Case No. CO/3630/2010

Neutral Citation Number: [2011] EWHC 157 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Monday, 24 January 2011

B e f o r e:

GERALDINE ANDREWS QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:
THE QUEEN ON THE APPLICATION OF MAMANIAT
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

- -

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MISS S GIBBONS appeared on behalf of the **Claimant**
DR C STAKER appeared on behalf of the **Defendant**

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J U D G M E N T

GERALDINE ANDREWS QC:

1. This is an application for judicial review which has been brought with the permission of HHJ Anthony Thornton QC. The decision under review is a decision made by the Secretary of State under Section 94 of the Nationality Immigration and Asylum Act 2002 to certify as clearly unfounded the claimant's claim that his removal from the UK would be a disproportionate interference with his right to a family and private life under Article 8 of the European Convention on Human Rights. The effect of such certification of course is that the claimant has no in country right of appeal to the Asylum and Immigration Tribunal, though he may still bring an appeal against the decision to remove him from outside the jurisdiction.

2. There was no real dispute before me as to the correct legal approach to be taken in a case such as this. The legal test is as set out by the House of Lords in ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6 at paragraphs 22 and 23, and as applied in more recent cases such as the decision of Sales J in R (Princely) v Secretary of State for the Home Department [2009] EWHC 3095 (Admin).

3. The test of whether a claim is clearly unfounded is a black and white test. A case which is clearly unfounded is one which has no real prospect of success or, to put it another way, is so wholly lacking in substance that it is bound to fail. This is a high threshold to cross. In applying that test the decision maker, in this case the Secretary of State, has to take into account the possibility that if an appeal is made to the Asylum and Immigration Tribunal a different conclusion might be reached upon the merits. Both the Secretary of State and this court must give the claim anxious scrutiny. In determining whether the test is met the decision maker will consider, amongst other matters, the factual substance and detail of the claim; how it stands with the known background data; whether in the round it is capable of belief; if not, whether some part of it is capable of belief; and whether if eventually believed, in whole or in part, it is capable of coming within the Convention. Whenever removal from the jurisdiction is resisted in reliance on Article 8 the Secretary of State and the appellate tribunal and the reviewing court will approach the matter by addressing the questions set out by Lord Bingham in paragraph 17 of R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368, as further explained by the House of Lords in the later case of R (Huang) v Secretary of State for the Home Department [2007] UKHL 11, namely:

> (a) will the proposed removal be an interference by a public authority with the exercise of the applicant's rights to respect for his private or, as the case may be, family life?
>
> (b) if so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (c) if so, is such interference in accordance with law?
>
> (d) if so, is such interference necessary in a democratic society in a number of legitimate interests [I paraphrase] including, on the established case law, the maintenance of effective immigration control?

(e) if so, is such interference proportionate to the legitimate public ends sought to be achieved?

4. It is well established that the maintenance of effective immigration controls may justify interference with an individual's right to respect for his private and family life. Cases where there is a tension between the two will usually be determined by reference to the proportionality of the interference in question. Therefore, they will be heavily dependent on the facts and circumstances of the particular case.

5. As to proportionality, the House of Lords in Huang stated at paragraph 20 that the ultimate question for the appellate authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner that is sufficiently serious to amount to a breach of the fundamental right protected by Article 8. Although there is no legal requirement of an applicant who has overstayed his visa to show exceptional circumstances, in practice it is rarely found in such cases that the interference with such right to a private of family life as that person has established in the UK is disproportionate.

6. Both Miss Gibbons, who appears for the claimant, and Dr Staker, who appears for the Secretary of State, were in agreement that, in determining this application for judicial review, the court must have regard only to the material that is currently before it and it must not speculate as to what further or additional evidence might be put before a appellate tribunal on any future occasion by way of further evidence either from or on behalf of the claimant himself. That is the approach therefore that I will take.

7. The claimant is a young man who is a national of Malawi. He is now 22 years old. He was born in Malawi and that is where he spent most of his childhood. In 1992, when he was only 5 years old, his mother sadly died. Shortly afterwards his father was diagnosed with a terminal illness. Both the claimant and his older sister were cared for, together with their father, by their paternal grandmother, Mrs Fatma Sheikhali. She is a British citizen and she now lives in this country. His father died in 2001, when the claimant was 14, but his grandmother continued to take care of him until 2005 when Mrs Sheikhali, who is diabetic, found herself in difficulties and unable to take care of him any longer. The evidence is that she came to live in the UK herself in 2006, not that long after the claimant came over here.

8. In 2005 the claimant was invited by one of his aunts, Mrs Haleem Francis, to go and live with her and her family in Huddersfield. Mrs Francis, like the rest of Mrs Sheikhali's surviving children, is a British citizen and entitled to live here as of right. For reasons that I need not adumbrate, he was not required to obtain an entry visa in advance.

9. He was still a minor, albeit that he was 17 years old when he arrived in March 2005. His passport was stamped with a 6 month visitor's visa but he stayed on in the UK when that period expired. His case is that it was always intended that he should

live permanently in the United Kingdom and that it was his aunt, Mrs Francis, who failed to take the requisite steps to apply for the appropriate permissions from the immigration authorities. According to the evidence before me, the rest of his family were under the impression that she had sorted matters out and it was only after he was detained by the authorities and served with a deportation notice that it came to light that he was in fact an over stayer. Whether or not that is right or wrong is a question that might be tested in due course were the application to quash the certification successful.

10. In any event, the claimant went to live with Mrs Francis in Huddersfield and he stayed there with her and her family from March 2005 until September 2007. Unfortunately at that point there was a falling out between them and he moved to stay with another aunt in London, Mrs Farida Bhayani, from September 2007 to November or December 2008. After that his cousin Mrs Kusum Kaltenberger, the daughter of Mrs Bhayani, assumed responsibility for looking after him until around May 2009. At that point the claimant indicated that he wished to return to Huddersfield to be with his friends and to rejoin a football team that he used to play for. However, instead of doing this he went to Blackburn, which is at the other side of the country and a fair distance from London, where he lived with a friend. He was paying rent at that point of £40 a week but neither working nor claiming benefits. Mrs Francis and Mrs Kaltenberger contributed an unspecified amount of money towards his rent and his general living expenses.

11. According to the evidence of Mrs Kaltenberger, the claimant has had no formal education and he seems to be very slow in his learning. She says he is not capable of looking after himself as an adult, although that bald statement is not elaborated upon in any way. Miss Gibbons told me upon instructions that he is now back living at home with his aunt in London.

12. There is also some evidence from Mrs Kaltenberger and from Mrs Bhayani that the claimant has suffered from time to time with depression and that he mentioned on several occasions that he was thinking of committing suicide because he was very lonely and, in particular, because he missed his father. I will come back to the quality and nature of that evidence in due course.

13. The starting point is that there is no presumption that a person has a family life, even with the members of his immediate family. It is not normally sufficient to establish a family life between a young adult and even his parents or siblings for Article 8 purposes unless something exists other than the normal emotional ties. The case law establishes that financial or other dependency might establish such ties, but it is important to look at all the overall factors. That includes the nature of the links between the claimant and his surviving relatives; his age; where and with whom he has lived in the past; and the nature and form of the contact that he has maintained with the other members of the family with whom he claims to have family life. As Dr Staker submitted, if in fact a person's only living relatives are settled in the UK, it is not sufficient, for Article 8 purposes, to give him the right to remain here. Nor is it sufficient that his sole carer at the time when he was still a child has come to the UK to live as of right. There must be something more than that.

14. Dr Staker submitted that the claimant has had ample opportunity to adduce any evidence he wishes in support of his Article 8 claim and that the evidence he has chosen to put forward is thin. He submits it is extraordinary that there is no evidence from the claimant himself and that the court cannot speculate as to what that evidence might be. The evidence from the remaining family members, so Dr Staker submits, is vague; it is lacking in any detail and there is no independent evidence in support of it. If, for example, a person seeking to remain here put in a witness statement that said that he was suffering from a debilitating illness and needed constant care and attention from other family members, Dr Staker submitted that the Secretary of State would be entitled to certify under section 94 if that statement was not supported by any medical evidence, *a fortiori* if the witness statement was not made by the person claiming to be suffering from the illness but simply by a member of his family. Dr Staker made strong criticisms of the quality of the evidence in the present case. He submitted that it was not of such quality that it could be taken at face value as establishing even a *prima facie* claim to a right to family life before one even gets into the question of the proportionality of the interference with it. However, if the court were not to accept that, then he submitted, even if the evidence were all to be taken at face value (which he submitted it should not be) it fell far short of establishing an arguable case of disproportionate interference with established private or family life.

15. In my judgment, there is a great deal of force in the criticisms that are put forward by Dr Staker of the nature and quality of the evidence in this case, and I do regard it as being close to the border line. However, having weighed into consideration all of the evidence, and having given it anxious scrutiny, I do not feel that it is possible fairly to conclude that this is a case which is bound to fail on appeal. It suffers from a number of serious difficulties but I cannot conclude that the quality and nature of the evidence is such that it is so hopeless that it is deserving of certification as clearly unfounded. I will briefly indicate my reasons for that conclusion.

16. First of all there is the question of whether or not the claimant has established a family life here. In my view, there is sufficient evidence for the Secretary of State, or indeed a tribunal on appeal, to conclude that he has. Admittedly, he was not brought to the UK as a very young child, nevertheless he was a minor when he came here and he has been here for some 5 years. The evidence, such as it is, indicates that during most, if not all, of that period he was staying with and dependent upon close family members, and of course I take into account the fact that he has neither parents nor siblings alive to support him. His sister died in 2008, so his closest family members are indeed his aunts and his cousin (leaving aside his grandmother who, on the evidence, is not able to look after him). They are all in the UK, and he has had a continuous period of staying with his family except for the period when he went to live in Blackburn, where he was apparently staying with friends. Even at that point, he was getting some financial support from his immediate family. This evidence indicates to me that there was still contact and arguable dependency. He has now gone back to live with his aunt in London and so there is at least a prima facie case that he has established a private/family life within the UK.

17. The next question is whether or not the removal directions are arguably capable of amounting to a disproportionate interference with that established family

life. Well, one of the considerations that the Secretary of State or any tribunal has to take into account are the circumstances in which he came here. I accept, as Dr Staker says, that there is something of a difficulty for the claimant in relation to that, because either he or (more likely) somebody in his immediate family at least ought to have known that he did not have indefinite permission to remain or permission to remain beyond 6 months. If what the claimant says is true, then it was always the intention of those who were responsible for bringing him here that he should remain here longer than 6 months and therefore there is a strong possibility that the immigration authorities were deceived. However, on the claimant's account, given on instructions through his counsel, when he arrived here he simply told the Immigration Officer he was coming to stay with his aunt and his visa was stamped. That is all something that will have to be sorted out in due course. I do not feel that there is, at the moment, sufficient evidence to conclude that the evidence so clearly weighs in favour of this being a deliberate attempt to hoodwink the immigration authorities that one can say that the balance is bound to come down firmly in favour of the removal of the claimant. There is no evidence at all that he has got himself into any trouble with the law or committed any criminal offences, so it is not one of those cases.

18. On the other hand, there is some evidence of dependency that is capable of being accepted by a tribunal. On the cases, as I say, mere emotional ties are not good enough, there has to be something more than that. I have to look at this case in the round. This is somebody who has had a very unfortunate background; who has been orphaned at an early age; who entered the UK as a minor and who has been dependent upon his family with whom he has been living for most of the time since; and I bear in mind the fact that, on the evidence before me, he has not had any form of formal education, which may make him more prone to dependency.

19. One then comes to the evidence in relation to his depression. It is not as good as it might be, and I think Miss Gibbons would be the first to acknowledge that it could be better. There is no medical evidence to support any finding of clinical depression, but equally there is no reason why I should assume that a tribunal (or the Secretary of State) should disbelieve Mrs Kaltenberger or her mother when they say that on a number of, admittedly unspecified, occasions the claimant had threatened suicide and had been very depressed and lonely, and felt that without his parents and his sister there was nothing for him to live for. I am paraphrasing but that is the thrust and gist of the evidence I have to consider. Dr Staker says, well look at the evidence of the people in the Detention Centre. They did not identify him as a suicide risk, he was not referred to any doctor there; they are experienced at picking out vulnerable people in that sort of scenario and even if you take at face value the evidence of his family members that from time to time he has threatened suicide, there is no real indication that if he is deported to Malawi he is going to be any more likely to commit suicide there than he is if he stays over here. That, it seems to me, is to ignore the common sense approach, which is that if you are dealing with a depressed young man who is suffering from the loss of all of his immediate family members and who has been brought up in a family environment, and continued to be brought up in a family environment and supported by his family when he reaches young adulthood, if you suddenly divorce him from all ties with his family it is more likely than not to contribute to his state of alienation and depression than if he is actually close to them in this country. Now, that is not to say

that the tribunal, having looked at all the evidence in the round, might not come to the conclusion that actually he is a grown adult and there can be sufficient ties maintained at distance, given the swiftness and ease of modern communications and the ability to send money to him if he is sent back to Malawi. But that is all a matter for future determination.

20. I cannot safely or reasonably conclude, on the basis of all the evidence that is before me, that he does not stand at least a reasonable chance of persuading an appeal tribunal that to send him back would be a disproportionate interference with the family life that he has established. I say this although this is a case that comes perilously close to the borderline. One can well see why it was that, on the evidence that was before the official acting on behalf of the Secretary of State at the time when the decision was originally made the decision was taken to certify the claim as clearly unfounded. However, looking at matters today, and on the basis of the evidence before me, I am not convinced that it is sufficiently black and white for me to shut him out.

21. For that reason, I am going to quash the order that was made and give him the opportunity to air the matter in front of the tribunal.

MISS GIBBONS: Thank you, my Lady.

GERALDINE ANDREWS QC: Are there any consequential matters that I need to deal with?

DR STAKER: The consequential matter I would raise is that the defendant would request permission to appeal. I acknowledge that every case is case specific but it did emerge in the course of the proceedings that the issue of whether the claim is clearly unfounded or not is, in effect, a legal test; it either is or it is not. And there does appear to be a point of principle here which is this issue of determining that question on the basis of the material that is before the decision maker at the time.

GERALDINE ANDREWS QC: Well, the question of whether it is a black and white test has actually been determined by the courts before and there is authority on it, which I think I quoted.

DR STAKER: Yes. The point of principle that perhaps has not been looked at before is where the evidence is of this kind of unsubstantiated general nature, unsupported by other evidence.

GERALDINE ANDREWS QC: Well, is that not a question of fact and degree? I mean, I can well understand you might say there is a point of law for further determination if I had been against you on the question of whether or not I could speculate, but I decided that I had to decide it on the basis of the material before me. Then it is a question of the nature and degree of the evidence that is before me and I came to the conclusion that it was on the claimant's side of the line rather than on the side of the line that you submitted it fell. So where is the point of principle to go to the Court of Appeal on that? You would simply be re-hashing the argument before me would you not?

DR STAKER: Well, potentially. Other than to say that it would be, in effect, a legal point to say that evidence of this nature would not satisfy or --

GERALDINE ANDREWS QC: Would never satisfy.

DR STAKER: Yes. Would not give rise to a reasonable prospect.

GERALDINE ANDREWS QC: Well, good try, Dr Staker. I think if you want to run that argument you are going to have to ask the Court of Appeal for leave.

DR STAKER: I am obliged.

GERALDINE ANDREWS QC: I will fill in the form and let your representative have it in a few minutes. You can either wait here for me to fill it in, it will probably take me about 5 minutes, or you can go, as you wish. I am told by the associate that he will send it across with the order, so I can type it up in pristine fashion and you will not have to decipher my handwriting.

I am indebted to both counsel for their assistance in this case.