Case No: C5/2009/1171

Neutral Citation Number: [2010] EWCA Civ 11

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2010

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE RICHARDS
and
LORD JUSTICE TOULSON

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Between :

KB (Trinidad and Tobago)	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**

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- -

Matthew Slater (instructed by **The Treasury Solicitor**) for the **Appellant**
Christopher Williams (instructed by **Messrs Wilson & Co**) for the **Respondent**

Hearing date : 16 December 2009

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Judgment

Lord Justice Richards :

1. The Secretary of State appeals against a determination of the Asylum and Immigration Tribunal promulgated on 11 March 2009 by which the tribunal allowed, on Article 8 ECHR grounds, an appeal by KB against the Secretary of State's decision to make a deportation order in respect of him. We heard the case the week after hearing appeals in *JO (Uganda) and JT (Ivory Coast) v Secretary of State for the Home Department*, in which judgment had been reserved. Because the issues in those appeals overlapped with the main issue in the present case, we reserved judgment in this case too. Judgments in the various appeals are being handed down together. Reference should be made to my judgment in *JO (Uganda) and JT (Ivory Coast)* [2010] EWCA Civ 10 for the relevant Strasbourg case-law and a general discussion of it.

2. KB is a citizen of Trinidad and Tobago who resided there for over twenty two years of his life before entering the United Kingdom in March 1992. He was granted six months' leave to remain but thereafter remained in this country illegally for several years. Between 1993 and mid 1995 he was in a relationship with a Ms Bell-Ford. Their son, Kyle Bethelmy-Ford, was born on 15 January 1995 and is a British citizen. In May 1997, however, KB married a different woman, a British citizen whom he had met in 1994. He applied for and was granted an extension of stay as the spouse of a person resident and settled in the United Kingdom. He subsequently applied for, and in November 2000 was granted, indefinite leave to remain on the same basis. In November 2002 his wife separated from him as a result of an affair he had had, but they were reconciled in late 2004 or early 2005. In August 2005 KB was convicted of four counts of possession of controlled drugs and one count of possession of a class A drug with intent to supply, offences which were committed in September 2004. He was sentenced to six years' imprisonment.

3. On 28 April 2008 he was served with a decision by the Secretary of State to make a deportation order against him under section 3(5)(a) of the Immigration Act 1971. His appeal to the tribunal was dismissed but reconsideration was ordered by the Administrative Court. At the first stage of reconsideration a senior immigration judge found a material error of law in the original tribunal's determination and directed a fresh hearing at which all issues were to be at large. The matter was then heard by a tribunal consisting of Designated Immigration Judge JM Lewis and Ms JA Endersby. In their determination promulgated on 11 March 2009 they allowed KB's appeal on Article 8 grounds.

4. On the reconsideration the tribunal heard evidence from KB himself, his wife and his employer, as well as receiving letters and statements from others, including a statement from KB's son, Kyle. It also received an expert psychological report on the effect that KB's deportation would have on KB and his son. In its findings of fact, it said that it accepted the evidence of KB and his witnesses, and went on:

> "46. Specifically, we find that, at the date of the hearing, and at all times since their reconciliation in late 2004/early 2005, and including his period in prison, the Appellant is and has been exercising family life with his wife and that throughout his son Kyle's life, and including again his period in prison, the Appellant has been doing so with Kyle. We find also that at the

> date of the hearing and for periods before and after his imprisonment, the Appellant has been exercising private life, comprising his employment, his care work for his friend and his fostering, with his wife, of children with special needs."

5. The tribunal then referred to a number of domestic cases on the application of Article 8. The relevance of some of the citations may be questionable, but nothing turns on that because, at the end of para 56, the tribunal directed itself as follows:

> "Criteria for determining whether deportation is proportionate in cases following criminal convictions are set out in *Boultif v Switzerland* … and *Üner v Netherlands* …. We consider, in paragraphs 57 to 67, the appeal by reference to those criteria."

And that is just what it proceeded to do, taking in turn each of the criteria set out in paras 57 and 58 of the judgment in *Üner v The Netherlands* (2007) 45 EHRR 14.

6. Thus, at paras 57-58 of its determination the tribunal considered "the nature and seriousness of the offence committed by the applicant". It noted that the offence was regarded by the trial judge as very serious and also that KB had an earlier conviction in March 1999 for possession of drugs. It stated that proper weight must be given to the offence itself, as distinct from the probability of its being repeated; that the risk of reoffending was only one aspect of the public interest to be weighed against compassionate personal circumstances; and that other factors were deterrence and the view of the Secretary of State, who had special expertise in the administration of criminal justice and whose assessment of the public interest must be taken properly into account and given due weight. The tribunal referred to the decision of the Strasbourg court in *Grant v United Kingdom* (Application no. 10606/07, judgment of 8 January 2009), which in its view counsel for KB had successfully distinguished.

7. The next criterion considered, at para 59, was "the length of the applicant's stay in the country from which he or she is to be expelled". The tribunal noted that KB had spent his first twenty two and a half years in Trinidad and Tobago and had then been in the United Kingdom for approaching seventeen years, for the first six without leave and for three years in prison.

8. At para 60 the tribunal considered "the time elapsed since the offence was committed and the applicant's conduct during that period". It stated that the offence was committed in September 2004. After that KB had addressed the issues which led to his wife's separation from him and had attained a reconciliation with her. During his imprisonment his conduct was impeccable. Since his release he had made every effort to rehabilitate himself. In prison and subsequently he remained entirely free of drugs.

9. At paras 61-64, the tribunal considered in turn "the nationalities of the various persons concerned" (KB was a citizen of Trinidad and Tobago; his wife, her family and his son were all British citizens), "the applicant's family situation, such as the length of the marriage and other factors expressing the effectiveness of a couple's life" (the marriage had subsisted, with a period of separation of some two years, for approaching twelve years), and "whether the spouse knew about the offence at the

time when he or she entered into a family relationship" (the offence was committed some seven years after the marriage).

10. The tribunal turned next, at para 65, to "the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled". It concluded that for the reasons given in the wife's evidence, which was accepted, "on a balanced judgment in the light of all the material facts … she cannot reasonably be expected to follow her husband to Trinidad and Tobago".

11. Turning at para 66 to "the best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled", the tribunal gave careful consideration to the position of Kyle. It found, particularly in the light of the expert evidence, that the effect upon him of KB's deportation would be devastating. Kyle himself had no connection with Trinidad and Tobago and "living as he does with his mother, a British citizen, and himself a British citizen, cannot reasonably be expected to go with his father to Trinidad and Tobago, even were his mother to allow this, which is very much to be doubted".

12. Finally, at para 66, the tribunal considered "the solidity of social, cultural and family ties with the host country and with the country of destination". In relation to KB, whilst it accepted that he would have difficulties in returning to Trinidad and Tobago, it did not accept that those difficulties would be as serious as claimed.

13. Having considered each of the relevant criteria in turn, the tribunal expressed its overall conclusions as follows:

> "68. We summarise. The factors weighing against the Appellant are his conviction for possession of drugs with, on one of the counts, intent to supply, which the trial judge regarded as very serious, and to which significant weight is to be given; his earlier conviction; and the fact that he overstayed in the UK for more than six years. The trial judge did not recommend deportation; but in the context of the criminal justice system this fact is neutral.
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> 69. There are weighty factors in the Appellant's favour. He has repaired his marriage, and has a meaningful family life with his wife, who cannot reasonably be expected to go to live in Trinidad and Tobago, and which would therefore end were he to be deported. He also has a meaningful family life also with his son, with whom he is consolidating his relationship after his period in prison and who, at the age of fourteen, now stands on the threshold of adolescence. This relationship, too, could not be meaningfully maintained if the Appellant were deported. The Appellant's wife and son are both effectively parties to the appeal, and their interests are to be considered. Mrs Bethelmy herself regards Kyle as an integral member of the family. Charged and awaiting trial, the Appellant went lawfully to Trinidad and Tobago for his father's funeral, taking Kyle. He had the opportunity to stay there, and perhaps to keep Kyle

> there, but returned voluntarily to what proved to be his conviction and sentence of six years imprisonment. He made sustained efforts in prison and afterwards to rehabilitate himself, and throughout that period remained free of drugs. His employer has re-employed him, now as a trainee electrician, for which he hopes to be financially able to train him. Everybody stood by him during his period in prison – his wife, his son, his employer and even, in a sense, his ex-partner. All could conveniently have abandoned him. This fact attests to his character.
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> 70. The Appellant has succumbed to the temptation of an affair and of recourse to drugs, and has sorely tested the love of his wife. Yet he remains blessed with the love of a woman who, whilst she would be the first to repudiate any such description, is of that nobility of character which keeps goodness alive in the world. The Appellant is determined not to re-offend, and his wife is confident that he will not. To separate him permanently from his wife and son would be a disproportionate interference with his right to respect for his family as well as his private life. We are therefore required to allow his appeal on Article 8 grounds, which we do."

14. Sir Richard Buxton gave permission to appeal in order to enable the court to consider whether, as was submitted in the skeleton argument for the Secretary of State, deportation cases require a different approach from non-criminal removal cases. In developing the Secretary of State's case before us, Mr Slater sought to draw the contrast in this way. First, he referred to what Lord Bingham of Cornhill said in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, at [12], about the approach in ordinary removal cases:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

15. Mr Slater then submitted that deportation cases are different because, the prevention of disorder or crime being in play, greater weight is to be given to the Secretary of

State's legitimate interest in making suitable deportation orders for the public good, and greater weight must also be given to the criminality which leads to such deportation orders being made. He cited *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094, at [64], *AF (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 240, at [41], and *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544, at [30], for expressions of the potentially decisive effect of serious criminality in determining the proportionality of interference with an applicant's rights under article 8 in a deportation case. He also cited the Strasbourg deportation cases, in particular *Onur v United Kingdom* (2009) 49 EHRR 38, as providing further support for a different approach in deportation cases from that in ordinary removal cases.

16. In my judgment, Mr Slater's submissions confuse the question of *approach* with the question of *weight* to be given to relevant factors. Deportation cases do not call for a materially different approach from that required in ordinary removal cases. The issues arise under the same legal framework and involve the same essential question as to whether, if expulsion would interfere with rights protected by article 8(1), such interference is proportionate to the legitimate aim pursued. What Lord Bingham said in *EB (Kosovo)* about the judgment that needs to be made, about the need to take note of the factors which have or have not weighed with the Strasbourg court, and about there being in general no alternative to making a careful and informed evaluation of the facts of the particular case, is equally applicable in the context of deportation as in the context of removal.

17. The two types of case do, however, generally involve a different legitimate aim: in deportation it is the prevention of disorder or crime, in removal it is the maintenance of effective immigration control. That difference in aim and therefore of relevant considerations has to be factored into the analysis. It does not call for a different approach, but the presence of additional factors and the weight to be given to them will affect the balancing exercise. Thus, in the context of deportation in pursuit of the aim of prevention of disorder or crime, a person's criminal offending will be a factor in favour of removal and may in a particular case be given great or even decisive weight, though the actual degree of weight to be attached to it, and whether it is sufficient to render deportation proportionate, will depend both on the seriousness of the offending and on all the other circumstances of the case (see, further my judgment in *JO (Uganda) and JT (Ivory Coast)* at [28]). Lord Bingham's observation in *EB (Kosovo)* that "it will rarely be proportionate" to uphold an order for removal where it severs a genuine relationship with a spouse or child was directed specifically at removal and may need to be qualified in relation to deportation, but that is because of the effect that serious criminal offending can have on the overall balance rather than because of any difference of approach.

18. As to the present case, in my view there was no error whatsoever in the tribunal's approach to KB's appeal. The tribunal directed itself correctly by reference to *Üner v The Netherlands* (2007) 45 EHRR 14, where the relevant criteria in a deportation case are set out, and gave careful consideration to each of those criteria. Its assessment of the facts is not and could not be challenged. There is no error of law in its consideration of any of the criteria. Matters of weight were for the tribunal. It is not and could not sensibly be contended that the conclusion reached was not reasonably open to the tribunal in the light of its findings.

19. I should deal specifically with three further points raised in Mr Slater's submissions. First, he stressed that in considering the seriousness of the offending on which the decision to deport is based the tribunal must take into account, and give appropriate weight to, the Secretary of State's own assessment of the public interest: see, for example, *OP (Jamaica) v Secretary of State for the Home Department* [2008] EWCA Civ 440 at [24], and *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694. The proposition is well supported by authority but gets the Secretary of State nowhere in this case, since it is clear from para 58 of its determination that the tribunal had the point well in mind and did give proper weight to the Secretary of State's view that the offences were sufficiently serious to warrant deportation. There is nothing to support Mr Slater's suggestion that the tribunal was engaged here in a tick-box approach rather than giving genuine consideration to the Secretary of State's assessment or to other relevant matters. It is also apparent from the determination as a whole that the tribunal, far from minimising the seriousness of KB's offending, took the view that significant weight had to be given to it.

20. Secondly, Mr Slater submitted that, in considering the seriousness of the difficulties which KB's wife and son were likely to encounter in going with KB to Trinidad and Tobago, the tribunal ought to have asked itself whether it was "impossible or exceptionally difficult" for the wife and son to go with him (an expression used in *Onur*), rather than whether the wife and son "could not reasonably be expected" to go with him. He submitted that anything short of impossibility or exceptional difficulty is not to be taken into account as a factor telling against deportation and that the question whether family members could reasonably be expected to relocate is appropriate in the context of removal but not of deportation. I would reject that line of argument. As I have explained in my judgment in *JO (Uganda) and JT (Ivory Coast)*, at [14]-[15] and [22]-[26], the Strasbourg court has not laid down any test of impossibility or exceptional difficulty. The seriousness of the difficulties that the family would have in relocating must be properly assessed as a whole and taken duly into account. In asking itself whether KB's wife and child could reasonably be expected to go with him to Trinidad and Tobago, the tribunal not only followed the required approach in substance but formulated the question in terms that have been expressly approved by the Court of Appeal in the context of deportation as well as removal.

21. Thirdly, there were points in Mr Slater's submissions when he appeared to suggest that, although the tribunal covered all relevant factors, it fell into error by dealing with some factors more fully than others. If that was the suggestion, it was misconceived. There is plainly no requirement to cover all factors at equal length. On the contrary, the tribunal should deal with each factor at no greater length than is needed in order to make clear the essential reasoning. The tribunal approached the matter in that way in this case and is to be commended rather than criticised for so doing.

22. Accordingly, I am of the clear view that the Secretary of State's appeal should be dismissed.

Lord Justice Toulson :

23. I agree.

Lord Justice Mummery :

24. I also agree.