Case No: C5/2009/1596

Neutral Citation Number: [2009] EWCA Civ 1420
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
(IMMIGRATION JUDGE WARNER AND MR GRIFFITHS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 27th November 2009

Before:

LORD JUSTICE RICHARDS

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Between:

MM (Democratic Republic of Congo)

Appellant

- and -

Secretary of State for the Home Department

Respondent

- -

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Ms Sonah Naik (instructed by **Elder Rahimi Solicitors**) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

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Judgment

Lord Justice Richards:

1. This is an application for permission to appeal from a decision of the AIT promulgated on 3 June 2009 on a deportation appeal. The facts are of some complexity: they are set out in detail in the tribunal's decision, which I do not propose to repeat at length. The salient features are these.

2. First, the applicant is a citizen of the Democratic Republic of Congo ("the DRC") who was born in December 1964 and came to this country in 1990. A claim to asylum was not accepted, but in 1999 he was granted indefinite leave to remain outside the Immigration Rules as part of the special measures introduced to clear the backlog of such claims.

3. While in this country he has been convicted of a series of criminal offences. In 1996 he was convicted and sentenced to three months' imprisonment for using a fake passport. In May 2001 he was convicted and sentenced to two years' imprisonment for conspiracy to defraud the Benefits Agency. In November 2002 he was convicted and sentenced to a total of two years' imprisonment for a further offence of conspiracy to defraud arising out of the cashing of stolen benefit books at a time when he had been released on licence from the previous sentence. In April 2005 he pleaded guilty to an offence of attempting to obtain property by deception, for which he was again sentenced to two years' imprisonment. The judge on that last occasion recommended that a deportation order be made against him, but the Secretary of State had in fact already decided in July 2003 to make such an order on the basis of the criminal offences already committed by the applicant at that time.

4. The applicant's appeal against the decision to make a deportation order was first heard in April 2006, but it was subsequently held that that decision was affected by a material error of law, and the deportation appeal was the subject of a second-stage reconsideration giving rise to the decision now under challenge. The essential issue on the reconsideration was whether the applicant's deportation would be in breach of Article 8 ECHR.

5. That brings me to the applicant's family life, in relation to which I shall again give only a brief summary. In addition to the applicant himself, the relevant individuals are, first, PT, who has been his partner since 2004. She is a citizen of the DRC and a failed asylum seeker. She is HIV positive and has been so since before she arrived in this country. In July 2006 she gave birth to a daughter, H. The applicant is H's father.

6. The applicant also has a number of other children by other partners. There are two twins, K and K, born in July 1991 and therefore now eighteen years' old. There is a daughter called D, born in March 1999 and therefore now ten years' old. The mother of all three of those children was a woman who left the United Kingdom in late 2001, leaving the children behind. PT took over their care after forming her relationship with the applicant, and since December 2005, when he was last released from prison,

they have all lived together. It is unnecessary to consider his two other children by different partners, with whom he does not have an established family life.

7. The tribunal was satisfied that PT, the twins, D and H had established family life in the United Kingdom and that the deportation of the applicant to the DRC would constitute an interference with that family life of sufficient gravity to engage Article 8. Much of the tribunal's determination was concerned with an assessment of whether deportation would be proportionate. That involved first a detailed examination of the circumstances of the applicant's offending. In addition to the offences of fraud and dishonesty already mentioned, the tribunal referred to further evidence of dishonesty by way of the creation or obtaining of false birth certificates in respect of the twins. At paragraph 72 the tribunal expressed themselves satisfied that there was a continuing substantial risk that the applicant would commit further offences similar to those of which he was convicted in 2001, 2002 and 2005. There was, in the tribunal's view, no evidence that he could not adapt to life in Kinshasa where he was born and grew up.

8. The tribunal considered the issue of private life and were not satisfied that he had established private life in this country of a nature and quality to engage Article 8.

9. As regards family life, the tribunal looked first at the position of PT, concluding that her involuntary return to the DRC would not be in breach of her rights under Article 3 or Article 8 by reason of her HIV positive condition. As to H, the tribunal noted that she had acquired the status of a British citizen by virtue of the applicant's indefinite leave to remain. The tribunal were not satisfied that H's health would be adversely affected if she went to live with her parents in the DRC, or that if she did suffer from ill health appropriate treatment would not be available there. Further, she would be able to adapt to living in Kinshasa. The twins would be eighteen years' old in July, a date now passed, and would then be young adults capable of establishing and leading independent lives. The tribunal could see no reason why they should not be able to continue their studies or find employment in this country, whether or not the applicant was deported. If the applicant, PT, and the other children went to live in the DRC the twins could maintain contact with them and visit them. As to D, the tribunal was satisfied that she was young enough to adapt to life in the DRC where she would be living with her father and PT.

10. The tribunal concluded their discussion of family life as follows, at paragraph 107:

> "Having considered all the evidence, for the reasons we have set out, we are satisfied that, although they might suffer hardship and difficulty, there are no factors which constitute insurmountable obstacles in the way of [PT], [D] and [H] going to live with the appellant in the DRC and, in particular, in Kinshasa. We are also satisfied that it would not be unreasonable to require them to do so."

The tribunal's overall conclusion was set out in paragraphs 110 to 112 as follows:

> "We are satisfied that the offences committed by the appellant, particularly when considered together, are sufficiently serious to justify his deportation as a deterrent, to deter other foreign nationals from committing similar serious crimes. We also attach weight to the view of the respondent that it is appropriate to deport the appellant for the reasons given by the respondent.
>
> Having considered all the evidence, we are satisfied that the appellant's criminal history and bad character justify deportation and outweigh his rights, and the rights of [PT], the twins, [D] and [H], to have their established family life respected by allowing the appellant to remain in the United Kingdom. We are satisfied that the deportation of the appellant to the DRC would be a necessary and proportionate act of lawful immigration control. We are satisfied that his deportation would not be in breach of the United Kingdom's obligations under Article 8.
>
> We have considered whether, if contrary to our findings, the circumstances of [PT], [D] and [H] in the United Kingdom, and conditions in the DRC, are such as to make it unreasonable to require [PT] and the children to join the appellant there, the deportation of the appellant would be justified and proportionate. We are satisfied that because of his bad record of committing serious offences of dishonesty, the risk of his committing similar offences and the need to deter other foreign nationals from committing such offences, his deportation would be justified even if it separated him from his family for a period of at least three years, and probably for a considerably longer period."

11. On the face of it, the tribunal's decision provides a detailed and well-reasoned basis for dismissing the applicant's appeal. Ms Naik contends, however, that it was based on material errors of law. She has renewed an application for permission to appeal, notwithstanding the reasons given by Sedley LJ for refusing permission on the papers.

12. The first point taken is that the tribunal misdirected themselves in considering whether there were any insurmountable obstacles in the way of PT and the two younger children going to live with the appellant in the DRC. It is right, as Sedley LJ recognised, that the tribunal should not have been asking themselves that question (see BW (Uganda) [2009] EWCA Civ 5, paragraphs 17-24). Ms Naik submits that this was a material error, and she refers to various authorities on what amounts to a material error.

13. The fact is, however, that the tribunal went on to state in terms that they were also satisfied that it would not be unreasonable to require the relevant family members to go to live with the appellant in the DRC. That was to apply in substance the correct legal test; and, if the tribunal were entitled to reach the view they did on unreasonableness, nothing turns on the reference to insurmountable obstacles. Ms Naik has criticised the finding of unreasonableness, but in my view it is clearly sustainable. I do not accept that it was affected in some way by the view expressed about insurmountable obstacles. In reaching the finding the tribunal had proper regard to the rights of the other family members in accordance with what was said in the House of Lords in Beoku-Betts v SSHD [2008] UKHL 39, and the tribunal's assessment included detailed consideration of the implications of PT's HIV condition as well as the individual position of the various children. There is, as it seems to me, nothing to show that the tribunal failed to take account of any aspect of the evidence or submissions placed before them in respect of PT or the children. The conclusion that it would not be unreasonable for family members to go to live with the applicant in the DRC was itself a reasonable conclusion on the evidence.

14. Ms Naik has raised an argument as to the tribunal's failure to deal with the implications of the Secretary of State's policy DP 5/96, the effect of which is said to be that only in exceptional circumstances should a child who has been living in the United Kingdom continuously for more than seven years be required to leave. Ms Naik has referred me to AF (Jamaica) v SSHD [2009] EWCA Civ 240, in which the implications of the policy were considered in a deportation context. In this case the policy is relied on in relation to the one child, D, who was born in this country and is ten years' old. It is relied on in this court but it was not relied on before the tribunal. Notwithstanding Ms Naik's submissions that it was the duty of the Secretary of State to bring the policy to the attention of the tribunal, I do not think that the tribunal could be said to have erred in law in this case in failing to deal with it, and I have to say in addition that I do not think that, in the circumstances of the case, consideration of the policy would realistically have been capable of altering the balance struck by the tribunal.

15. But it does not stop there. That is because the tribunal were satisfied in any event that the applicant's deportation would be justified even if the family members did not go with him and he was separated from them "for a period of at least three years and probably for a considerably longer period". If the tribunal were entitled to reach their conclusion that deportation was proportionate and justified even if the family members stayed in the United Kingdom, all the arguments addressed to the finding as to the reasonableness of family members being expected to go to the DRC fall away. Ms Naik submits that the tribunal was wrong to refer to a period of at least three years, since, pursuant to paragraph 320(7B) of the Immigration Rules, the minimum period would in fact be one of ten years. This again is not a point that seems to have been canvassed below, but in any event the tribunal's reasoning was not limited to a three-year absence but was expressly premised on the possibility of a considerably longer period than that. I do not accept that a greater minimum period of absence would be capable of giving rise to a wholesale difference of approach in this case. I can see no material error of law in what the tribunal said on the matter. Ms Naik's

skeleton argument withdrew this ground of appeal; she now seeks to reinstate it. I think that even if it is reinstated it gets her nowhere.

16. She raises a further point about the balancing exercise. She says that the tribunal did not factor in the Secretary of State's delay between deciding to make a deportation order and enforcing that order, delay being a relevant factor in accordance with the decision in EB (Kosovo) v SSHD [2008] 3 WLR 178. Again, this point does not seem to have been advanced before the tribunal; it was not included in the grounds of appeal, but Ms Naik seeks to introduce it by amendment. In my judgment, it is too late to take the point, since any argument on delay is far from obvious and would require closer examination of the reasons for the delay which, on the face of it, arose through a delay in the appellate process once notice of appeal against the Secretary of State's decision had been lodged in July 2003. Even if there was some fault on the part of the Secretary of State, whether between notice and the first decision in 2006 or between the first decision and the reconsideration, I do not think that this shone out as a point required to be taken by the tribunal when it had not been raised in argument before the tribunal.

17. The fact is that the tribunal were certainly aware of the date of the Secretary of State's decision and of the subsequent timings and, having regard to the evidence and submissions actually placed before them, I can see no arguable error of law in their omission to deal expressly with delay as a separate factor in the balance. Insofar as the delay may have reinforced the applicant's case on private life, which is a further point raised by Ms Naik though I did not detect it in the grounds of appeal, I am satisfied that the tribunal's finding that the applicant's private life did not itself engage Article 8 was sustainable.

18. For all those reasons, I share the view expressed by Sedley LJ on the papers that, in the light of the history and analysis set out in the tribunal's determination, this was a legally unassailable decision. Despite Ms Naik's clear and cogent submissions, I am satisfied that an appeal would have no real prospect of success and that the application for permission must be refused.

Order: Application refused