Case No: C5/2008/2516

Neutral Citation Number: [2009] EWCA Civ 1229
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. TH/00700/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 23rd April 2009

Before:

LORD JUSTICE WARD
LORD JUSTICE RIX
and
LORD JUSTICE MOORE-BICK

- -

Between:

MA (NIGERIA)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr J Adler (instructed by Messrs Ikie LLP) appeared on behalf of the **Appellant**.

Mr P Patel (instructed by Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Ward:

1. This is an appeal against the determination of designated Immigration Judge Barton, promulgated on 1 September 2008, dismissing the appellant's appeal on human rights grounds against the decision of the Secretary of State for the Home Department to remove the appellant to Nigeria as an illegal immigrant.

2. The history fills me with such despair at the manner in which the system operates that the preservation of my equanimity probably demands that I should ignore it, but I steel myself to give a summary at least.

3. The appellant is a single man born in Nigeria on 31 August 1982. More of his background in a moment. He left Nigeria on 9 April 2000 bound for Dublin, where he visited his sister who lived there. From Dublin he slipped across the channel into the United Kingdom on 20 April 2000 in order to join his mother, his stepfather and three other siblings. He had no valid visa for this visit. He was then still a child, then aged 17 years and 8 months. On 23 August 2000, whilst still a minor, he applied for leave to remain in the United Kingdom under the regularisation of overstayers' scheme, but of course he was not an overstayer, he was an illegal entrant. And so it is no surprise that his application was refused.

4. Perhaps it is also no surprise, but it is still deeply depressing, that it took the Secretary of State nearly four years until 29 April 2004 to reach that momentous decision. What, one wonders, do they do with their time? The appellant had a right of appeal and he exercised it, claiming that his removal would breach his human rights guarantee under Article 3 and Article 8 of the European Convention on Human Rights. That appeal was heard a year later and on her determination promulgated on 18 May 2005. Mrs Malins, the immigration judge, dismissed the appeal under Article 3 but allowed it under Article 8, finding that:

> "…despite the appellant's illegal entry into the UK, his case can fairly be judged as being 'truly exceptional' so as to render his removal to Nigeria for the temporary purpose of lodging a student application for leave to enter; disproportionate"

   And so she found the case to be exceptional and allowed his appeal on Article 8 grounds.

5. The Secretary of State was not best pleased with that decision, and she or he (whoever it was at the time) sought reconsideration; and so another year went by until, on 8 September 2006, an immigration appeal panel presided over by Senior Immigration Judge Storey concluded that Immigration Judge Malins had made a material error of law, and they concluded that the appellant's case was not truly exceptional.

6. That led the appellant to seek permission from the Court of Appeal, which was granted, and the appeal was compromised and by consent the case was remitted. But, as those of you who are listening carefully could probably predict, I have to tell you that another year went by before that was finally decided on 11 June by Senior Immigration Judge Gill, who ruled that a second-stage reconsideration was necessary. It was that secondary consideration that was conducted by Immigration Judge Barton in August 2008.

7. So you can see why I am somewhat despairing. A simple application made over eight years ago is still not resolved. If we allow the appeal I suppose nine years will pass before we get that decision, subject to any further appeals to this court; and I ask, rhetorically, is this the way to run a whelk store?

8. But now for some more of the background. I have got all of that off my chest; let me deal with the appellant's position.

9. The family story is this. The appellant's mother came to the United Kingdom in 1968 to join her late husband and she stayed here irregularly until 1977. During that time she and her husband had four children. All of them are therefore British citizens because they took the nationality of their father in the country of their birth. In 1977 the family moved back to Nigeria. Unfortunately father died and the appellant's mother was in a powerless position, being the breadwinner for this family but with limited ability to earn a living for herself in that country.

10. The appellant was born, as I have said, in Nigeria in 1982, in somewhat exceptional circumstances. His father is the mother's father-in-law and that has been an embarrassment for this young man to cope with. In time, when the appellant was seven years' old, his mother came back to the United Kingdom to work here and better be able to support the family. In the result, his big sisters took their turns to look after him and, in effect, to act as surrogate mother for him. One by one the girls, when grown up, left and came back to England to establish lives for themselves, here passing on the quasi-maternal responsibilities to the next sister; and so sister number one left in 1992; number two left in 1994, and number three left in 1996 to live in Ireland.

11. At the age of 14 this unfortunate young man was placed with a family friend in an expectation, no doubt, that it would be temporary stay and that he could join the rest of the family in the United Kingdom, but life is not as simple as that; certainly not for this family. Mother's immigration position was at that stage wholly uncertain. She had come in as a visitor but she, in time, remarried; and, on her presence here with her husband in court, I hope, and assume, happily married to a gentleman who has British citizenship. In time therefore she was given indefinite leave to remain and has since been granted citizenship of the United Kingdom.

12. The curious position, therefore, is that this family -- and I have not mentioned the brother who is also in the country -- are now all British citizens, all with a

right to live here; all living here apart from the child, Ivie, who lives in Dublin, and he is the exception.

13. It is hardly a surprise that he wanted to join the family, and thus, at the age of just under 18, arrived in Dublin, and then, as I have described, became an illegal entrant by entering the country from Dublin. Since then he has applied himself industriously by taking a degree in business study courses at Lewisham College. He did another course at Southwark College and was given an unconditional place at the Kingston Upon Thames University for a three-year degree course in Computing with Business Management. He deferred the start of that course because of his unsettled immigration status, but entered the course after HHJ Malins had found in his favour in 2005. And so the current position is that he has, apparently successfully, completed the first two years of that three-year course, and, according to the judgment under consideration, is likely to graduate in June 2009. Speaking for myself, I hope he is successful in that endeavour; it may be the least he deserves.

14. On the reconsideration Immigration Judge Barton directed himself, after a review of the Senior Immigration Judge's determination, that the scope of his second reconsideration was limited to carrying out afresh the Article 8 balancing exercise. As he said in paragraph 6 of his judgment "(1) From a starting point of the foregoing facts as found;" and they were 1) that the appellant was an illegal entrant; 2) that he had established family life in the United Kingdom; and 3) that he is a fit, healthy young man. And those findings made by Immigration Judge Malins were preserved. So that was the starting point. The second stage was:

> "after making additional findings of fact regarding:
>
> (a) whether the Appellant could pursue his studies in Nigeria, and enjoy his **private life** there in all its essential respects;
>
> (b) whether the Appellant could enjoy a **family life** with his mother and siblings in Nigeria, either by returning there permanently, or by way of visits by them to him or he to them; and
>
> (c) after assessing the degree of dependency of the Appellant on his mother"

15. The immigration judge went on to make a series of findings. Firstly, with regard to progressing his education in Nigeria, the judge felt that, although the quality of education there has slipped in recent times and is certainly not as good as it is here, and although there was a problem with "cults", because I do not really understand what is meant by the word, but they seem to operate potentially disadvantageously to a student like this appellant. Notwithstanding those problems, the finding was set out in paragraph 40 of the judgment as follows:

> "The Appellant has not established that on a balance of probabilities he could not study in Nigeria, although it is accepted that standards may not be as high as in the UK and it may well take longer to graduate. It is purely speculative that he may fall foul of one or other of the student cults. The Appellant's UK relatives have sufficient resources to maintain the Appellant in the far more expensive environment of the UK and I find that on a balance of probabilities they would be able to do so in Nigeria and to make reasonable provision for completion of his education there. In regard to his private life generally, it has not been shown that he would be unable to make out there; he could anticipate financial support from the UK, just as was the case up until 2000."

16. So the judge addressed the second question: Could he enjoy family life with his mother and siblings in Nigeria either by all of them returning there permanently or by way of visits by them to him or he to them? His conclusion on that was that clearly it would not be practicable for all the family to return to Nigeria to return to enjoy a full association there with the appellant, because everybody is settled and led their lives elsewhere.

17. He then went on to say at the end of paragraph 41:

> "Although the family is said to be a close unit that feels the need to be together, it appears that [A] and [I] [the two older sisters] have established independent lives. Even more poignantly, Ivie has moved to live in the Republic of Ireland. It has not been explained why the Appellant's position is different, making it necessary for him to live in his mother's household at the age of 25 and continuing there. Furthermore, this is a family that has known a good deal of separation, starting with [K] [that is the mother] moving to the UK in 1989. As is evidently the case for Ivie, it would be possible for the Appellant to live in another country and to maintain family life despite the distance, just as she must do. Visits between family members and telephone contact could maintain family ties, albeit obviously not so closely."

18. Then the judge asked the third question: What is the degree of dependency of the appellant on his mother? And his conclusion was that the evidence was he had not worked at all and so he has been fully financially supported by his mother and his siblings whilst pursuing his education in this country. As for emotional dependents:

> "there is an assertion that the family are more than usually interdependent, though this has not been fleshed-out or explained, beyond saying that [mother] has feelings of guilt about having left her son in Nigeria at a young age and needs to make it up to him now. For his part [the judge continued], the Appellant must have become (by reason of events) an independent person from young. He has proven to be sufficiently well-adjusted to have adapted first to circumstances in Nigeria and now in the UK has completed his school education and since then has followed successfully several years of higher education. He has now had the benefit of living for more than 8 adult years with his mother in the UK and he is 25. There is no good reason to suppose that (any more than his siblings) he is going to continue for ever to remain part of the mother's household"

19. Having made various findings to answer the three questions that he posed, he turned to the question of proportionality. He did not underrate the importance of the public interest in the regulation of immigration policy by the respondent, the Secretary of State, but he pointed out that the fact that he was an illegal entrant detracted substantially from the strength of his position, and pointed out that all of his private life and the family life that has been furthered here by strengthening the family ties has been in the full knowledge of everybody that he had entered illegally and that he would be required to leave again if he could not gain legitimate status.

20. He held that he clearly has a private as well as a family life in the United Kingdom. A central plank of the form of private life is the education he has been receiving here, but the immigration judge could not and did not accept the argument on his behalf, that he had somehow gained an eligibility to study in higher education; and so he could not have applied for leave to enter as a student; he could not have succeeded to enter under paragraph 298 of the Immigration Rules because he was an illegal immigrant and because his mother had not settled status at the time of his arrival; he could not have succeeded under paragraph 317(1)F, which deals with dependents on siblings, because he would have needed to establish he was living alone in the most exceptional financial circumstances, wholly and mainly dependent on the sibling sponsoring him.

21. He dealt with delay, which at one stage Mr Adler, who appears for him today, was seeking permission to appeal, but the effect of the judgment on delay was, as I have read it, that, far be it from him being disadvantaged by the delay, he has made full use of the opportunity in which to enjoy a closer family relationship and to enjoy the benefit of his free education in this country and he has not shown that the delay has caused him any detriment.

22. So to his conclusion expressed in paragraph 48:

> "And so I ask myself, taking all of the foregoing in the round, is this a case in which the interference with private and family life '…is…necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?' and 'if so, is such interference proportionate to the legitimate public ends sought to be achieved?' I conclude that these questions should both be properly answered in the affirmative. The Appellant's family and private interests cannot, on the full facts, displace the public interest. Private life has been developed and pursued entirely in the knowledge of this precarious immigration position. Further education in the UK has been a key element of this, but he can legitimately only expect to benefit from this if he can meet the immigration rules governing study by overseas students, otherwise he will need to continue his study in Nigeria, or elsewhere. It is far from the case that his family life would be abrogated by the decision, rather it would be reduced back to a similar level to that which he had when he lived in Nigeria. He is now a mature man of 25, an age at which most men have, or are moving to, an independent life from their parents and adult siblings -- as indeed the Appellant's siblings appear to have done, with their own households and commitments and with Ivie living away from the others in the Republic of Ireland. His mother has not been shown to be significantly dependent upon the Appellant and she can avail herself of the help of her other children, since none of the household chores are uniquely the preserve of the Appellant and [A] (a nurse) would clearly be the best placed to help her with her medication needs. This is not a deportation case with the resulting restriction on future movement, but rather simple removal is in prospect. Family life can continue through telephone calls, correspondence, e-mails and personal visits, just as has been said to have been the case in the past."

As a result, as I have indicated, the appeal was dismissed.

23. Hooper LJ granted permission to appeal on one ground only. It centres upon the penultimate sentence of the conclusion I have just read. This is not a

deportation case with resulting restriction on future movement, but rather simple removal is in prospect. Reading back, one would imagine that there was therefore no handicap to his applying to come back to this country for one purpose or reason or at some time or another. But it has been pointed out that that wholly fails to take into account immigration rule 320, which is to this effect:

> "Grounds on which entry clearance or leave to enter the United Kingdom is to be refused"

I omit 1 to 7A and I quote 7B:

> "subject to paragraph 320(7C), where the applicant has previously breached the UK's immigration laws by:
>
> (c) being an Illegal Entrant […]
>
> unless the applicant:
>
> (iii) left the UK voluntarily, not at the expense (directly or indirectly) of the Secretary of State, more than 12 months ago;
>
> (iv) left the UK voluntarily, at the expense (directly or indirectly) of the Secretary of State, more than 5 years ago, or
>
> (v) was removed or deported from the UK more than 10 years ago."

24. Although there was some uncertainty expressed about the effect of that rule, Mr Adler I think now does accept that its effect is no more than this. If he goes voluntarily -- and that is not at the expense of the Secretary of State -- then 12 months will have to pass before he can apply for permission to get back here. If he leaves voluntarily -- but the Secretary of State has to pay for it -- then he has to wait five years before he can apply. If he is removed or deported, then he will not be allowed back for ten years. It is agreed that if he applies and is refused he can raise human rights arguments to contest that refusal.

25. The Secretary of State does not challenge that it was a misdirection on the part of Immigration Judge Barton to have failed to direct attention to Rule 320 of the Immigration Rules. I should have pointed out that Rule 320(7C) disapplies the rule I have been describing, where the applicant is an individual under the age of 18 at the time of his most recent breach of the immigration laws, but it is common ground that his entry here is a continuing breach and so that escape clause does not avail him.

26. The issue that has been argued before us is whether or not the failure to apply that rule amounts to a material or immaterial misdirection, and Mr Patel for the Secretary of State has submitted that it is immaterial because no self-respecting immigration judge properly directing himself on a remittal of the case for further consideration could come to any other conclusion but that he should be sent back. That would be the inevitable result, submits Mr Patel, because there is a finding which I have read that the family can pay for his air fare back to Nigeria. Whether he goes voluntarily or not is a matter for him, and if he does not he can hardly complain, so there is no obstacle to his going voluntarily and at his own expense. He can then apply at the end of 12 months for permission to get back, albeit on a restricted visitor's visa limited to six months, and that, submits Mr Patel, amounts to no effective hardship.

27. Mr Adler says that the matter of expense is not that clear cut, and the effect is not quite as simple as that. Mr Adler submits that, given his track record, there is at least a risk that the immigration authorities will refuse permission to enter because they simply would not believe that at the end of a six-month stay he would be willing to go home. His record speaks to the contrary. He would thus be required to apply again, appeal again, reliant on Article 8 grounds; but with his position, if not similar to how it is now, it is immeasurably weaker, because, being in Nigeria for the past period of time, the ties would obviously be immeasurably less strong than they are at present.

28. In my judgment this was a material misdirection. I am not myself in a position to be able confidently to decide that this rule would not have a material impact on the eventual decision. There are many matters that seem to me need to be taken into account. The immigration judge was not directing his mind to the costs of a return to Nigeria or the cost of flying back to this country; those matters would need to be looked at. The whole financial position of the family needs to be explored to see whether this is a twelve-month case or a five-year case. It may not be a difficult conclusion to reach, but it is still why I would rather the immigration judge took than that I should have to rule upon it.

29. Then there is the position of the appellant in Nigeria. It largely depends upon when he has to go; whether before or after the completion of his Kingston degree; whether he goes back to resume studies in Nigeria; or, with the advantage of his degree, to take up employment; and then, as an employed man, does he come back here for six months every year? How does that impact upon his employment, or does he come back only for the period of his leave? What job will he have? How will he be able to afford it? How will the family be able to afford it? What is the reality, in other words, of a real enjoyment of family life by face-to-face contact with his mother and his siblings?

30. Then there is for me the completely speculative position of the success of his application. Will he be rejected because of his track record? If so, what will be the prospects of his Article 8 appeal, assuming that that appeal is to be launched at some time 12 months or more -- at least 12 months but probably much longer -- after his removal voluntarily from this country? I am not in a

position to judge those matters. They are matters for the expert tribunal and they are material to the ultimate enquiry whether or not it would be proportionate to send him back today, and they are important matters that, in my judgment, need consideration. So I would allow the appeal and remit the matter back for reconsideration of the position, having regard to Rule 320 of the Immigration Rules.

31. There was debate as to the terms upon which the matter should be remitted. Mr Adler valiantly sought to submit that it should be remitted on the basis of HHJ Malins' findings, especially those with regard to his relationship with his mother and the siblings, who were in the view of HHJ Malins clearly unusually close to him.

32. In my view, the matter must be remitted for reconsideration on the basis of Immigration Judge Barton's decision. If he wrongly misapplied facts found by HHJ Malins, the time to complain about that has long passed. It is not possible for us to extend the ambit of this appeal by allowing, in effect, an appeal against the ruling of Immigration Judge Gill or of Immigration Judge Barton on different grounds from those permitted by Hooper LJ, who limited the appeal to this single ground and a single ground only. So the matter must go back for reconsideration of the decision of HHJ Barton having regard to his failure to address Rule 320.

Lord Justice Rix:

33. I agree.

Lord Justice Moore-Bick:

34. I also agree.

Order: Appeal allowed