Neutral Citation Number: [2008] EWCA Civ 232

Case No: C5/2007/1242

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM & IMMIGRATION TRIBUNAL
IMMIGRATION JUDGE HOLMES
OA/13205/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2008

Before :

LORD JUSTICE RIX
LORD JUSTICE LONGMORE
and
LORD JUSTICE WILSON

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Between :

VN (UGANDA)	**Appellant**
- and -	
ENTRY CLEARANCE OFFICER	**Respondent**

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- -

Mr Glenn Hodgetts (instructed by **Blavo & Co**) for the **Appellant**
Ms Susan Chan (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 26th February 2008

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Judgment

Lord Justice Longmore:

1. VN was born in Uganda on 25th February 1987. Her brother Michael was also born in Uganda on 12th February 1990. In the course of 1990 their father fled from Uganda to the United Kingdom. He claimed asylum here. VN and Michael were looked after by a friend of the family called Florence Kasule because their mother was unwell.

2. In July 1990 the father was granted ELR and ILR was granted in 2000. In 2003 the mother sadly died as a result, we were told, of an AIDS related disease. Both VN and Michael applied to an Entry Clearance Officer to come to the United Kingdom but were refused entry clearance by a decision of 23rd March 2006. On appeal from that refusal, Immigration Judge Coker decided on 24th October 2006 that Michael should have received entry clearance, pursuant to paragraph 297 of the Immigration Rules since he was not yet 18 and would be maintained and accommodated without recourse to public funds; but the judge confirmed the decision in relation to VN who was by then over 18 and whose case fell to be considered pursuant to paragraph 317 of the Rules with its requirement that the applicant be living alone outside the United Kingdom in the most exceptional compassionate circumstances. With regard to Article 8 of the Convention of Human Rights she held that VN did not pass the exceptionality test then thought to be a relevant hurdle as set out in Razgar [2004] 2 A.C. 368 and applied by the Court of Appeal in Huang [2006] Q.B.1. On 12th December 2006 the AIT made an order for reconsideration. In 2007 the House of Lords [2007] 2.A.C. 167 held that there was no test of exceptionality. To that extent Immigration Judge Coker, though no fault of her own, had made an error of law. On reconsideration, the AIT on 13th April 2007 decided that that error of law was not material and, since there was no other error of law, the AIT confirmed Immigration Judge Coker's decision to refuse VN leave to enter the UK. On 2nd July 2007 Sir Henry Brooke gave permission to appeal from that decision of the AIT given by Immigration Judge Holmes.

3. The revision of the correct approach so as to exclude the test of exceptionality in Article 8 cases has meant that many decisions of immigration judges and of AIT tribunals have had to be re-visited. But in the light of Lord Bingham's statement in Huang that he, in common with immigration appellate tribunals in previous cases, expected

> "that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under Article 8 would be a very small minority," (para. 20)

it must often be the case that, despite an error of law having been made by an immigration judge in following Razgar and the Court of Appeal in Huang, the end result of an appeal will be the same. Since Sir Henry Brooke gave permission to appeal, this court has considered the position and said

> "… there will be many cases in which it can properly be said by an appellate tribunal that on no view of the facts could removal be disproportionate" AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 para 22.

4. That is what the AIT has purported to do in the present case. The crucial paragraphs of its reasoning are paras. 27-30 as follows:

> "27. The Immigration Judge's review of the relevant caselaw in # 28-35 of the Determination was thorough. She directed herself in reliance upon Miao [2006] EWCA Civ 75 that when a claimant has established the existence of a protected right the burden shifts to the state to establish the justification for the violation. She correctly reminded herself that Article 8 does not impose on a state a general obligation to respect immigrant's choice as to their country of residence. She correctly directed herself that similar principles applied to a refusal of leave to enter to a decision to remove. She correctly reminded herself that in the case of an adult applicant there should be evidence of additional ties of dependency beyond the normal ties beyond related adults.
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> 28. The Immigration Judge correctly concluded that Article 8 was potentially engaged both by the relationship between the claimant and her father, and the claimant and her brother. The refusal of entry clearance clearly interfered in the positive obligation to facilitate family reunion. The real question was whether that interference was proportionate to the need of the state to maintain immigration controls. To the extent that the Immigration Judge directed herself that the facts of the case needed to meet a test of "exceptionality" she did in the light of the House of Lords approach in Huang, thereby unwittingly fall into an error of law. I am not however satisfied that this amounted to a material error because in my judgment even had she directed herself in the light of their Lordships' unanimous opinion she would have reached the same ultimate conclusion.
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> 29. In Begum [2001] INLR 115 at 119 #12 the Court of Appeal held that #317 had been drafted in the light of the ECHR decision in Abdulaziz, and that the state was entitled to confine in that way the numbers of those dependent relatives of persons settled in the United Kingdom who would be permitted entry for settlement. Those limits are applied to reflect the respondent's view of the limits needed to secure the economic well being of the country.
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> 30. I am satisfied that the balancing exercise set out by the House of Lords in Razgar, as reiterated in Huang, must result in the refusal of the claimant's appeal."

5. Before considering the grounds of appeal it is necessary to remind oneself of the relevant Immigration Rules. Paragraph 297 applies to children of parents present and settled in the United Kingdom who are (inter alia) under the age of 18 and will be both accommodated and maintained without recourse to public funds. Michael fell into this category but VN did not because she was over 18. She had to make her claim as a dependant relative pursuant to Rule 317 (i)(f) namely a daughter over 18

who lived "alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependant financially on a relative, settled in the United Kingdom". She did not qualify because she did not live alone and because there were no exceptionally compassionate circumstances. It is for this reason that her only avenue to entry is pursuant to Article 8 of the ECHR Convention. What, therefore, VN has to show is that even though she cannot be said to qualify under the words "most exceptional compassionate circumstances", refusal of entry clearance is interference with her family life which is unnecessary for the economic well-being of the country or, whilst necessary, is disproportionate to the legitimate aim to be achieved. As the AIT pointed out in paragraph 29 of its decision the European Court of Human Rights has held that member states are entitled to confine numbers of dependant relatives who are to be permitted entry for settlement, see Abdul-Aziz v UK (1985) 7 EHRR 471, and this court has subsequently held that paragraph 317 is designed to achieve compliance with Article 8, see Husna Begum v Entry Clearance Officer, Dhaka [2001] INLR 115, para 8. Paragraph 317 thus represents United Kingdom policy in this respect and it is a policy which the United Kingdom is entitled to implement.

6. Although a number of points were originally canvassed in VN's skeleton argument, the issues become more refined by the time oral submissions were made. The question had by then become whether on any view of the facts VN's Article 8 claim must fail. The AIT had held in terms that even if Immigration Judge Coker had directed herself in accordance with Huang in the House of Lords she would have reached the same ultimate conclusion. Mr Hodgetts for VN submitted that this conclusion was itself an error of law because

   i) neither Immigration Judge Coker (nor, if relevant, the AIT itself) had identified the national interest served by the policy behind the immigration restrictions relied on or properly weighed against that policy the competing interest of VN not to have her entitlement to family life infringed;

   ii) nor had Immigration Judge Coker (or the AIT) taken into account in VN's favour that her father could not sensibly re-locate to Uganda;

   iii) most importantly, Immigration Judge Coker had not taken into account Michael's own independent right not to have his family life infringed; the refusal of entry clearance to VN infringed that night and the infringement was a particularly serious infringement since (so it is said) he treated VN as much like a mother as a sister.

   Mr Hodgetts acknowledged that, but for this last matter, his appeal was unlikely to succeed but he submitted that this factor alone (but especially when accompanied by the other two factors) meant that neither the AIT nor this court could be certain that Immigration Judge Coker, if she had conducted the right balancing exercise, would have come to the same conclusion if she had applied the correct Huang test. Ms Chan for the Secretary of State submitted that this was a clear case on the facts and no immigration judge correctly directing herself could come to any conclusion other than that VN's appeal must fail.

7. It is therefore important to see what facts were found by Immigration Judge Coker. The relevant facts for the Article 8 claim are mainly set out in paras. 36 and 37 of the decision as follows:-

> "36. VN is financially dependant on her father; she is still at school and, when her brother travels to the United Kingdom she will not have any family members in Uganda to whom she can turn to for either emotional or financial support. Her relationship with her brother Michael is particularly close both because they were not in physical contact with their father but their contact with their mother was restricted to school holidays and she then died in tragic circumstances. I am satisfied that family life such as to possibly engage Article 8 exists between VN and her father and VN and her brother Michael. The failure to grant her entry clearance is of sufficient gravity as to engage article 8 and interfere with the positive obligation on the part of the state to facilitate family reunion……..
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> 37. VN's father is married and has two children in the United Kingdom who are in full time education and are British citizens. He is a British Citizen. It is not possible for him to go and live in Uganda with VN; to do so would result in the breakdown of his family life here in the United Kingdom. VN and her brother are very close. Although I am satisfied that she has played an important role in his life, I am not satisfied that the death of their mother caused a qualitative change in that relationship – they only lived with their mother during school holidays (the exact amount of time was rather unclear from the evidence before me), they had been brought up by Florence Kasule since they were very young and their mother died three years ago. VN is still at school. There was no evidence before me how long it was anticipated she would remain at school or what her future educational or employment plans were. She is now aged 19 and although this is still young and she will still require the guidance and support of her father or other responsible adult, there was no evidence before me why this could not be achieved through the same means as it has been provided in the past – regular telephone calls and occasional visits."

8. From these and other passages in the decisions it appears that

   i) VN was in full time education at boarding school in Kampala funded by her father;

   ii) temporary accommodation was provided in the holidays by Mrs Kasule;

   iii) there was no evidence that accommodation would not continue to be provided either with Mrs Kasule or somewhere else once boarding school education came to an end;

iv) contact with Mrs Kasule could continue;

v) VN would be able to earn her living after leaving school;

vi) VN's father had visited VN at least twice since he had left Uganda; VN was able to visit both her father and her brother in the United Kingdom;

vii) VN could maintain the same contact with her father by post, e-mail and telephone as she always had;

viii) Michael had always played an important role in VN's life, but the death of her mother had not caused a qualitative change in the relationship; the relationship with Michael could continue albeit by post, e-mail, telephone and regular visits rather than a continued presence;

ix) There was no evidence of any isolation or social stigma that would attach to VN if she remained in Uganda.

The policy contained in the immigration restrictions

9. There was in my judgment no need for Immigration Judge Coker or Immigration Judge Holmes to set out in terms the policy enshrined in the immigration rules, before they considered VN's Article 8 claim. That policy is contained in the Rules themselves and particularly in the distinctions observed between applicants who are under 18 and those over 18, as set out in paragraph 5 above. That was well understood by Immigration Judge Coker who herself applied it to Michael to whom she gave entry clearance and to VN to whom she denied it. As the AIT observed the policy had been framed so as to take account of Convention rights.

10. Mr Hodgetts' main complaint on behalf of VN under this head was that, when it came to weigh that policy against VN's Article 8 rights, neither Immigration Judge Coker nor Immigration Judge Holmes had sufficient regard to ECHR jurisprudence on the subject. He relied for this purpose, on the cases of Sen v Netherlands 31465/96 (2003) 36 EHRR 7 and Tuquabo-Tekle v Netherlands 60665/00 of 1st December 2005. In assessing these authorities it is necessary to be aware of the restrictive nature of the relevant Dutch law on immigration set out at paragraph 14 of Sen and paragraph 21 of Tuquabo-Tekle namely that aliens were only eligible for admission on the basis of

i) obligations arising from international agreements;

ii) if their presence served an essential national interest; and

iii) if there were "compelling reasons of a humanitarian nature".

There was thus no comparably careful distinction between children under 18 and children over 18 such as is to be found in the United Kingdom Immigration Rules. It is perhaps not surprising therefore that the European Court on Human Rights held in respect of each of the applicants (who were each under 18 at the time) that their non-admission to the Netherlands when their parents could not be expected to re-locate to their country of origin constituted a disproportionate infringement of the child's right to family life. In paragraph 37 of Sen the court said it took into consideration

> "the age of the children concerned, their situation in the country of origin [Turkey] and their degree of dependence on their parents. It cannot in effect consider the matter from the sole point of view of immigration, by comparing this situation with that of persons who have only established family bonds after becoming settled in the host country."

It then proceeded to hold (paragraph 41) that a fair balance had not been struck in relation to a nine year old girl who had been left behind in Turkey when her parents came to the Netherlands.

11. The same result occurred in Tuquabo-Tekle in relation to a daughter of 15 whose grandmother in Eritrea had decided that she had reached marriageable age and for that reason should stop going to school (a notable contrast with VN who remains at school at the age of 19 and in relation to whom there is no threat of marriage without her consent). The court drew a distinction in paragraph 49 with cases in which children had reached an age when they were not as much in need of care as young children and were increasingly able to fend for themselves but decided (para. 50) that in the particular circumstance of the case the age of the child should not lead the court to assess the case differently from Sen.

12. Not only are those cases a long way from the facts of the present case but they were, as I have said, decided against a background of much more restrictive immigration rules than those applicable in the United Kingdom. The court expressly recognised (paragraph 50 of Tuquabo-Tekle) that there is no positive obligation to allow a child to reside in a member state. It all depends on the facts of the case. On the different facts of the present case and, subject to Mr Hodgetts' other arguments, it is impossible to say that the interference with VN's family life is disproportionate.

Inability to re-locate

13. This was always clear since VN's father is now settled in the United Kingdom with two children in full time education. Immigration Judge Coker expressly said that it was not possible for him to live in Uganda. That fact cannot, on its own, be remotely decisive and could have made no difference to the outcome of the case, even if Immigration Judge Coker had applied the Huang criteria as decided by the House of Lords rather than the test of exceptionality as held by the Court of Appeal.

Michael's human rights to family life under Article 8

14. Mr Hodgetts submitted that Immigration Judge Coker should have made a separate assessment of Michael's right to a family life with VN and the extent to which it would be infringed by separation from VN, if Michael (as he was likely to) decided to take advantage of his entry clearance and come to the United Kingdom to live with his father.

15. It is fair to say that Immigration Judge Coker did not make any assessment of the extent to which Michael's own right to family life would be infringed from his own point of view once he separated from VN. But she certainly did assess the impact that separation from Michael would have on VN. That in my judgment is the critical thing and it was fully weighed. Immigration Judge Coker said in terms (para.36) that VN's

relationship with Michael was particularly close since they had no physical contact with their father and they only saw their mother on the school holiday; their mother then died in tragic circumstances. This led to the conclusion that Article 8 was (possibly) engaged not only between VN and her father but also between VN and Michael in such a way that a failure to grant entry clearance was sufficiently grave to engage Article 8. She accepted (para. 37) that VN played an important role in Michael's life but expressed herself not to be satisfied that the death of their mother caused a qualitative change in the relationship between VN and her brother – in other words VN did not become a mother figure but she remained as an older sister to whom he was greatly attached.

16. This last finding shows that Immigration Judge Coker was indeed taking Michael's view of his relationship with his sister into account albeit in the context of assessing potential breach of her human rights rather than his. It does, however, show not only that she was considering the family unit as a whole but also that if she had been considering his human rights as a separate issue, she would not have come to a different conclusion.

17. In these circumstances it is evident that even if, as a matter of law, she was obliged to assess the extent of the infringement of Michael's (separate) human rights as it affected him, it would not have made any difference to the ultimate result. This third submission must therefore fail. In my view, this case is not an appropriate case to make any determinative resolution of the academic question whether, in considering an applicant's Article 8 rights, it may be right to consider the Article 8 rights of a third person.

18. This question is settled at tribunal level against the applicant by the starred decision of SS (Malaysia) v SSHD [2004] UKIAK 00091which Mr Hodgetts submitted was wrongly decided. That submission was said to be supported by the judgment of Sedley LJ in AB (Jamaica) v SSHD [2007] EWCA Civ 1302 especially at paragraph 20. As against the submission it might be thought to be difficult to take into account the rights of, at any rate, any third parties not before the tribunal. To the extent, however, that it may be right for an immigration judge to take into account the family unit as a whole, that is, in any event, what Judge Coker did.

Conclusion

19. In the event all the applicant's submissions fail and this appeal should, in my view, be dismissed.

Lord Justice Wilson:

20. I agree.

Lord Justice Rix:

21. I also agree.