Neutral Citation no. [2007] NIQB 117 | *Ref:* **WEAH4817**

Judgment: approved by the Court for handing down | *Delivered:* **19/12/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY CELAL SURGULA
FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of a decision of the Secretary of State of 21 June 2007 certifying the applicant's human rights claim under Article 8 of the European Convention as clearly unfounded. Ms Keegan QC and Mr Stockman appeared on behalf of the applicant and Mr Maguire QC and Mr Coll appeared on behalf of the respondent.

[2] The applicant is a Turkish national born on 13 November 1978. He first arrived in the United Kingdom from Germany on 12 August 1998. He applied for asylum and the United Kingdom immigration authorities refused his asylum claim and requested Germany to take responsibility for the applicant's claim under the Dublin Convention. Germany accepted that request and removal directions were issued in March 1999 for the purpose of the applicant's removal to Germany. The applicant absconded. The applicant then moved to Northern Ireland and at some point began a relationship with a Pamela Hull, a British national. A child, Ali William Robert Hull, was born on 12 October 2002. The applicant's relationship with Ms Hull ended in 2005. However the applicant maintains regular contact with his son, seeing him twice per week, and he contributes financially to the child's upbringing.

[3] On 9 September 2006 the applicant was detected in the course of an immigration enforcement visit to the Turkish Kebab House on the Cregagh Road, Belfast. The applicant advised immigration officials that he had a son in Northern Ireland and he made a claim that to remove him from the United Kingdom would violate his right to respect for family life under Article 8 of the Convention. The immigration authorities refused the applicant's human rights claim on 21 June 2007 and the Secretary of State issued the certificate that his claim was clearly unfounded.

[4] The Nationality, Immigration and Asylum Act 2002 provides at Article 82 for general rights of appeal to the Asylum and Immigration Tribunal where an immigration decision is made. Section 92 makes general provision for article 82 appeals from within the United Kingdom and by section 92(4)(a) this applies to an appeal against an immigration decision on an asylum claim or a human rights claim made while the applicant is in the United Kingdom. However the Asylum and Immigration (Treatment of Claimants) Act 2004 at Schedule 3 provides for the removal of asylum seekers to a safe country and paragraph 5 applies to the applicant. Paragraph 5(4) provides that -

> "The person may not bring an immigration appeal by virtue of section 92(4)(a) of [the 2002 Act] in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies unless satisfied that the claim is not clearly unfounded."

[5] A number of propositions might be stated in relation to consideration of certificates that a human rights claim in relation to the right to respect for private and family life under Article 8 of the Convention is "clearly unfounded" (or, as was formerly the case, "manifestly unfounded").

[6] First of all, the immigration authorities and the Secretary of State, in carrying out this exercise, are conducting what has been called a screening process. In Yogathas v The Secretary of State for the Home Department [2002] 4 All ER 800, Lord Bingham at paragraph 14 stated that the Secretary of State's consideration of the issue of whether to issue a certificate does not involve a full-blown merits review, but rather -

> "It is a screening process to decide whether the deportee should be sent to another country for a full review to be carried out there or whether there appear to be human rights arguments which merit full consideration in this country before any removal order is implemented."

[7] Secondly, the Secretary of State should decide if the claim that is made must "clearly fail". Lord Bingham in Yogathas at paragraph 14 concluded by asking whether or not the Secretary of State is "reasonably and conscientiously satisfied that the allegation must clearly fail". In the same judgment at paragraph 34 Lord Hope stated that the question to which the Secretary of State had to address his mind under the legislation was "whether the allegation is so clearly without substance that the appeal would be bound to fail".

[8] Thirdly, the Court must subject the decision made by the Secretary of State to the most anxious scrutiny. At paragraph 58 of Yogathas Lord Hope stated that "the basis of the decision must surely call for the most anxious scrutiny". Lord Hutton in the same judgment, at paragraph 74, stated that "the Court must subject the decision of the Secretary of State to a rigorous examination".

[9] Fourthly, the Court must consider how the appeal would be likely to fare before the Tribunal and ask essentially the questions that would have to be answered by the Tribunal. In Razgar v The Secretary of State for the Home Department [2004] UKHL 27 at paragraph 17 Lord Bingham stated that in a case which relied on the right to respect for private and family life under Article 8, the questions which the Tribunal was likely to ask were as follows -

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the 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 freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

[10] Fifthly, in relation to Lord Bingham's question (2) above, the threshold of engagement of Article 8 is not specially high. In Razgar at paragraph 18 Lord Bingham stated that -

> "Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 1 FCR 65."

This comment has given rise to some debate, most recently in Eritrea v The Secretary of State [2007] EWCA Civ 801. Sedley LJ, at paragraphs 27 and 28, having set out Lord Bingham's questions, turned to the second question, referred to the Costello-Roberts decision and stated -

> "The decision, while clearly illustrating the principle for which Lord Bingham cites it, does not say or imply the minimum level of severity required to bring a case within the article is a special or a high one."
>
> "It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement ('the minimum level') is not a specially high one."

[11] Sixthly, in relation to Lord Bingham's question (5) above, there is no test of exceptionality in considering proportionality. In Razgar at paragraph 20 Lord Bingham stated -

> "The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal….
>
> Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

[12] This reference to exceptional cases gave rise to some misunderstanding and was revisited by Lord Bingham in Huang v The Secretary of State [2007] UKHL 11 where at paragraph 20 he stated -

> "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar's case*

> (at [20]). He was there expressing an expectation, shared with the Immigration Appeal Tribunal, 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. That is still his expectation. But he was not purporting to lay down a legal test."

[13] Lord Bingham's question (5) was also considered by Sedley LJ in Eritrea at paragraphs 25 and 31 –

> "The effect of their Lordships' decision (and, if we may say so, the intended effect of this court's decision) in *Huang* has thus not been to introduce a new interpretation of art. 8 but to clarify and reiterate a well understood one. While its practical effect is likely to be that removal is only exceptionally found to be disproportionate, it sets no formal test of exceptionality and raises no hurdles beyond those contained in the article itself."

> "The fact that in the great majority of cases the demands of immigration control are likely to make removal proportionate and so compatible with art. 8 is a consequence, not a precondition, of the statutory exercise. No doubt in this sense successful art. 8 claims will be the exception rather than the rule; but to treat exceptionality as the yardstick of success is to confuse effect with cause."

[14] Seventhly, it is necessary to address the interaction of the right to respect for family life under Article 8 and the controls which the immigration authorities are entitled to impose. Consideration of this balance was undertaken by Lord Phillips in Mahmood v The Secretary of State [2001] 1 WLR 840 where at paragraph 55, having reviewed the European jurisprudence on the issue, it was stated -

> "… I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls.

> (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
>
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
>
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
>
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
>
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned."

[15] Eighthly, it is the Article 8 rights of the applicant rather than the effect on other family members that is relevant. The applicant referred to AC v The Immigration Appeal Tribunal [2003] EWHC 389 Admin at paragraph 33 where Jack J stated –

> "…. it is right to consider and take into account the effect of the interference on all of those sharing the family life in question and not simply the effect upon the individual who is subject to possible deportation….
>
> So I consider that it is the effect of the proposed interference on the family as a whole which should be taken into account."

On the other hand the respondent referred to Betts v Secretary of State [2005] EWCA Civ 828 a decision of the Court of Appeal in England. At paragraph 12 Latham LJ stated -

> "…. the right of appeal on human rights grounds requires consideration of the alleged breach to the appellant's human rights. In the present case this required the adjudicator to concentrate on the effect of removal on the appellant. True it is, as Jack J said in AC v IAT, the effect on others might have an effect on the appellant, nonetheless it is the consequence to the appellant which is the relevant consequence."

I prefer the approach that it is the effect on the applicant that is relevant, although one is entitled to take into account that the impact on the family members may impact on the applicant.

[16] Against the background of the above propositions I turn to the circumstances of family life in the present case. The applicant's relevant family life is that he is a separated parent with direct contact with his son and he is making financial provision for that son. The mother of the child has a new partner and the child has residence within a new family unit. The removal of the applicant to Germany will obviously result in direct contact between the applicant and the son being, in reality, a rare prospect so that in essence there will be only indirect contact with the son.

[17] In the immigration setting the applicant was refused asylum in the United Kingdom and he absconded in 1999. He was probably working illegally in Belfast when he was discovered in 2006. His relationship with the mother of his son developed in 2002 after he had absconded and remained illegally in the United Kingdom. The relationship with the child's mother ended in 2005 and the contact with the child has continued.

[18] Counsel referred to certain authorities where consideration had been given to the balance of interests in a case such as this. Ahmadi v Secretary of State [2005] EWCA Civ 1721 concerned two brothers, the older being an illegal entrant and the younger, having been granted asylum in the United Kingdom, suffered from schizophrenia and had to be admitted from time to time to hospital under the Mental Health Act. The Court of Appeal concluded that removal of the older brother would involve a breach of his Article 8 rights. The Court of Appeal concluded that the trial judge had failed to pay sufficient heed to the declared intention of the brothers to provide care and support for each other, in particular because one was dealing with a seriously ill younger sibling.

[19] In Berrehab v The Netherlands (decided on 21 June 1988) there was an attempt to expel a Moroccan from the Netherlands and it was found that this was a breach of his Article 8 rights. The ECtHR at paragraph 29 considered the "necessity" of the interference. As to the legitimate aim pursued by the State the ECtHR was influenced by the applicant's lawful presence in the country for several years, that he had a home and a job in the State, that the State had not had any complaint against

the applicant, that he had married a Dutch woman and had a child. As to the extent of interference, the close family ties with the child were noted, in particular the youth of the child. The ECtHR found that a proper balance was not achieved.

[20] In Mahmood v Secretary of State Lord Phillips reviewed the European cases. In Abdulaziz & Ors v United Kingdom 7 EHRR 471 three United Kingdom women had married partners from Portugal, Philippines and Turkey and the husbands were to be returned to those countries. The ECtHR attached significance to the fact that at the time of each marriage the wife had been aware that the husband had uncertain immigrant status and was unlikely to be granted leave to remain in the United Kingdom. In each case the ECtHR held that there was no lack of respect for family life and no breach of Article 8.

[21] Lord Phillips also referred to Poku v United Kingdom [1996] 22 EHRR 94 where the ECommHR referred to Abdulaaziz to the effect that Article 8 does not impose a general obligation on a State to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in the State. The ECommHR stated that the same applied to situations where members of a family, other than spouses, were non-nationals. Ms Poku was a citizen of Ghana who had over-stayed her leave to remain in the United Kingdom. She had a rather complex extended family, all resident in the United Kingdom. She had a second husband, three children, one of whom was by her previous marriage and a stepdaughter who was the daughter of her second husband by a previous marriage. All of these members of the extended family were taken into account in considering the case. The ECommHR referred to her husband and their two children and noted that there were no obstacles effectively preventing those members of the family from accompanying Ms Poku back to Ghana and they had regard to the fact that the two children were aged four and one.

[22] As to the husband's relationship with his own daughter, who would be left behind with her mother if the husband accompanied his wife to Ghana, the ECommHR noted that this would obviously interrupt the frequent and regular contact which the husband enjoyed with his daughter, who lived with her mother in the United Kingdom. The ECommHR recalled that the parties had married at a time when the applicant had already been subject to immigration proceedings and a deportation order had been served. Of course, the husband's daughter could not be taken to have become engaged in the family relationship in the knowledge that there was precarious immigration status. However the ECommHR considered that the daughter's situation flowed from the choice exercised by her father rather than any direct interference by the State with her family relationships. So it was found that there were no elements concerning respect for family or private life which outweighed the valid considerations relating to the proper enforcement of immigration controls.

[23] The decision of the Secretary of State of 21 June 2007 referred to the balance between any potential infringement of the applicant's Article 8 rights and the

operation of a credible and effective immigration policy and concluded that any interference was proportionate and justified.

[24] In considering the five questions that the Tribunal hearing the applicant's appeal would ask itself, as set out by Lord Bingham in Razgar, I proceed on the basis that the proposed removal of the applicant to Germany would be an interference with the applicants right to respect for his family life; that the minimum standard of interference has been attained so as to engage Article 8; that the interference is in accordance with law; that the interference pursues a legitimate aim, as it is recognised that the State is entitled to regulate the entry and expulsion of non nationals; that the issue is whether the interference is proportionate.

[25] The applicant was a failed asylum seeker, who had absconded to avoid removal and thereafter formed the relationship that established the family unit. Had the present applicant's family unit remained together the applicant could nevertheless have expected to be removed from the United Kingdom to Germany, as the Court would have been expected to conclude that, in all the circumstances of the present case, his partner and child would move with the applicant. With the separation of the applicant from his partner and child it would appear, further to the approach in Poku, that were the applicant to be removed from this country and thus leave behind the child with the mother, this consequence would flow from choices exercised by the applicant and his partner rather than from direct interference by the State with family relationships. A proper balance has been struck between the competing interests.

[26] In the circumstances of the present case, where the applicant, illegally present in the State, formed a relationship and had a child and then separated from the mother of the child, is to be removed from the jurisdiction to a safe third country in accordance with the Dublin Convention, there is no lack of respect for family life and there is no breach of Article 8 of the Convention and such a claim must clearly fail. Accordingly the Secretary of State was correct to so certify and the application for judicial review is dismissed.