HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 39

on appeal from: [2005]EWCA Civ 828

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellant:
Richard Drabble QC
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(Instructed by Irving & Co)

Respondent:
Monica Carss-Frisk QC
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(Instructed by Treasury Solicitor)

Hearing date:
9 APRIL 2008

ON
WEDNESDAY 25 JUNE 2008

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it and would, for the reasons he gives, make the order he proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree with it, and for the reason he gives I would allow the appeal and make the order he proposes.

LORD SCOTT OF FOSCOTE

My Lords,

3. I, too, have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood. The reasons given by my noble and learned friend for allowing the appeal are, in my opinion, wholly persuasive and I am in full agreement with them. I would make the order that he proposes.

BARONESS HALE OF RICHMOND

My Lords,

4. I am in full agreement with the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood and for the reasons he gives I too would allow this appeal and reinstate the adjudicator's decision in the appellant's favour. To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

The issue

5. In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?

6. That is the central question for your Lordships' determination on this appeal.

The background

7. The appellant is a citizen of Sierra Leone, now aged 29, who on 9 November 1997, just short of his 19th birthday, arrived in the United Kingdom from Senegal following a military coup in Sierra Leone. Initially he was granted 12 months' leave to enter as a student. Having completed his A-levels he began to study law at university, obtaining the necessary extensions of leave until 31 December 2000 when his final leave expired; he had mistakenly thought it continued until the end of his course.

8. The appellant is a member of a prominent and comparatively wealthy Creole family from Freetown which for generations had been involved in political life in Sierra Leone. His father was a friend of President Kabbah whose government was overthrown by the coup and, although in the coup no member of the family suffered physical harm, he and his elder brother Seth were subject to a terrifying mock execution and understandably the family sought refuge.

9. The appellant's elder sister, Josepha, is a British citizen (born here in 1973) and has lived here continuously since 1993. The rest of the family left Sierra Leone in stages, Seth going to the USA and the appellant being followed to the UK by his mother, father and a younger sister, Candace. His father registered as a British citizen in May 1998 (having originally applied as long ago as 1972) but died of cancer in December that year. Under the immigration policy then in force, the

appellant's mother and Candace, as dependants, were both granted indefinite leave to remain in October 1998; the appellant was unable to benefit from the policy.

10. On 1 June 2001 (shortly after discovering that his leave had expired) the appellant claimed asylum and also the right to remain under articles 3 and 8 of ECHR. On 27 February 2002 the Secretary of State refused both claims. The appellant appealed.

The three successive appeal hearings below

11. On 30 January 2003 the adjudicator dismissed the appellant's asylum appeal but allowed his human rights appeal on the article 8 ground. As for the asylum appeal he accepted that "the appellant's situation in Sierra Leone at the time of his departure was life-threatening due to his family's political connections" but found that the situation in Sierra Leone had improved significantly not least because of President Kabbah's return to power, although conditions there remained "comparatively harsh".

12. On the article 8 appeal the evidence included a number of statements from members of the appellant's family. The adjudicator expressed himself satisfied that "the appellant's family is close-knit and interacts on a very regular basis", that "the appellant has a strong relationship with his sisters" and "currently resides with his mother and younger sister", travelling home most weekends during university term time. The appellant also has "a range of cousins and uncles in the United Kingdom". As for the suggestion that the "appellant's mother relied upon him for emotional support", this he found "entirely natural in the circumstances of the family's departure from Sierra Leone and the death of [her husband] in 1998". He noted that Josepha was employed in a local law firm, that Candace (then 13) was clearly doing very well at school, and that her mother worked full-time as a study supervisor at that school. He expressed himself satisfied that the family "would not return to Sierra Leone even if the appellant was returned. Consequently, if the appellant's article 8 claim were to fail, . . . he would be separated from his family". Having directed himself to "consider whether the interference with the appellant's family rights, which would obviously interfere with the family as a whole, is justified in the interest of controlling immigration", he concluded that the appellant's return to Sierra Leone would indeed be disproportionate so as to breach article 8.

13. On 5 September 2003 the Immigration Appeal Tribunal allowed the Secretary of State's appeal. For present purposes the critical paragraph in the Tribunal's determination is this:

> "14. So far as the article 8 claim is concerned, we take the view that the adjudicator has placed too much emphasis on the position of the respondent's mother and siblings. It is not disputed that this is a close family with a not inconsiderable amount of inter-dependence, but it has to be borne in mind that it is the position of the respondent with regard to article 8 that is being considered and not that of his mother and siblings. In our view, the approach of the adjudicator . . . is flawed to the extent that it places considerable importance on the position of other members of the respondent's family."

14. On 4 November 2003 the Immigration Appeal Tribunal gave leave to appeal to the Court of Appeal on one ground only, namely "as to the extent to which the position of the claimant's family members was to be taken into account. There are apparently conflicting decisions by the tribunal in *Kehinde*… and at first instance on judicial review by Jack J in *AC* [2003] EWHC 389 (Admin) which it is desirable the Court of Appeal should resolve".

15. On 6 June 2005 the Court of Appeal (Brooke, Latham and Lloyd LJJ) dismissed the appellant's appeal. Latham LJ gave the single reasoned judgment. Para 12 is central:

> "Under section 65 of [the 1999 Act], the right of appeal on human rights grounds requires consideration of the alleged breach of the appellant's human rights. In the present case this required the adjudicator to concentrate on the effects of removal on the appellant. True it is, as Jack J said in *R (AC) v Immigration Appeal Tribunal* [2003] EWHC 389 (Admin) [2003] INLR 507, the effect on others might have an effect on an appellant, nonetheless it is the consequence to the appellant which is the relevant consequence. In the context of a merits appeal, which this was, the tribunal was entitled to conclude that the adjudicator had allowed his judgment to be affected unduly by the effect of removal on the remainder of the family in particular his

> mother. Further, the adjudicator does not suggest that the effect on the family, let alone the appellant, amounted to an exceptional circumstance."

16. Although by no means central to this appeal I should at this point briefly note two matters. First, that both the adjudicator and the IAT had directed themselves in accordance with *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 to ask whether the Secretary of State as the decision-maker could reasonably have concluded that the interference with the appellant's article 8 rights were proportionate in the interests of immigration control—an approach subsequently corrected by the Court of Appeal's later decision in *Huang v Secretary of State for the Home Department* [2006] QB 1, holding that the question is one for the appellate authority itself rather than by way of review of the Secretary of State's decision. Secondly, that the Court of Appeal below directed itself in accordance with *Huang* (decided just four months previously) that only in a "truly exceptional case" could the Secretary of State's decision be interfered with on appeal (a direction reflected in the final sentence of the passage cited above from Latham LJ's judgment)—itself held to be erroneous by this House on the appeal in *Huang* ([2007] 2 AC 167) which decided that no additional test of exceptionality has to be met.

17. Whether these errors (each in turn obviously unhelpful to the appellant) may have affected the outcome of these appeals I for my part think it unnecessary to explore. I have already indicated the single issue of law raised for your Lordships' determination and it seems to me that if this is resolved in the appellant's favour then the adjudicator's determination ought simply to be reinstated.

The legislation

18. *The 1999 Act*

> "65(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision . . .

(2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, acted in breach of the appellant's human rights.

(4) The adjudicator, or the Tribunal, has jurisdiction to consider the question.

(5) If the adjudicator, or the Tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground."

19. *The 2002 Act (which superseded the 1999 Act)*

"82(1) Where an immigration decision is made in respect of a person he may appeal to an adjudicator."

"84(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds . . . (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 . . . as being incompatible with the appellant's Convention rights; . . . (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision . . . would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

The rival arguments

20. (a) The appellant's case

The appellant submits that the legislation allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.

21. In making her initial decision on removal the Secretary of State must necessarily have regard to the article 8 rights of each and all of the family members. So too the European Court of Human Rights on a complaint by the family of an article 8 violation by the United Kingdom's removal of a family member would look at the overall impact on family life. So too, therefore, should the immigration appeal authorities consider the matter on appeal. Otherwise, other family members would have no alternative but to bring separate proceedings under section 7 of the Human Rights Act 1998, parallel or sequential to the section 65 appeal.

22. (b) The Secretary of State's case

The Secretary of State submits that the wording of the legislation is clear and restrictive. Both section 65 of the 1999 Act and section 84 of the 2002 Act refer repeatedly to *the appellant's* human rights and to no one else's. The appellate authorities must decide whether *his* human rights would be breached, whether removal would be compatible with *his* Convention rights. (It is not contended that there is any material difference between the two Acts.)

23. Ms Carss-Frisk QC acknowledges that, on this approach, the appellate authorities are indeed required to answer a different and narrower question than that initially to be decided by the Secretary of State (from which the section 65 appeal lies) and that which would be addressed by Strasbourg on any subsequent complaint by the family under the Convention. She accepts, therefore, that on occasion, if the section 65 appeal fails, other family members (whether or not in combination with the unsuccessful section 65 appellant) will have to bring proceedings under the 1998 Act so that effect can be given to the rights of the family as a whole. She submits, however, that Parliament has left no alternative and suggests that in practice, in the great majority of cases, the difference between the two approaches will be unlikely to produce any different result.

The domestic case law

24. The issue before the House was first addressed in the Immigration Appeal Tribunal's starred decision in *Kehinde v Secretary of State for the Home Department* [2001] UKIAT 00010 which laid stress on the narrow wording of section 65 and continued:

> "In an appeal under section 65, therefore, there is no obligation to take into account claims made about the human rights of individuals other than the appellant or individuals who have not themselves been the subject of a decision which is under appeal. Such matters (save in so far as they relate to the human rights of the appellant himself) are irrelevant to the matter under consideration.
>
> . . .[A]nybody else who claims that, in making or proposing to carry out the decision a public authority will breach his or her human rights, may bring proceedings under section 7(1)(a) of the 1998 Act."

25. As noted in para 14 above it was the apparent difference between that approach and Jack J's approach in *R (AC) v Immigration Appeal Tribunal* [2003] EWHC 389 (Admin) (hereinafter "AC") which prompted the Immigration Appeal Tribunal to grant leave to appeal to the Court of Appeal in the present case.

26. *AC* both on its facts and by reference to the course of proceedings there seems to me a most instructive case. AC was a Turkish woman who came here clandestinely in 1995 and claimed asylum. The next month she married her Turkish fiancée and the following year had a daughter, S. The marriage broke down and two years later AC committed a violent assault for which she was sentenced to ten years imprisonment (reduced on appeal to eight) and recommended for deportation. If deported it was recognised that direct face to face contact between AC and S (then aged about seven) would in all likelihood be lost for some ten years.

27. The adjudicator allowed AC's appeal against the Secretary of State's deportation order. In 2002 the Immigration Appeal Tribunal on

the Secretary of State's appeal gave a preliminary ruling that the section 65 appeal "was to be determined by looking at the rights of AC to her family life under article 8 and not by looking at S's human right to a family life. S's human rights did not require to be taken into account. This did not exclude evidence as to the mother/daughter relationship but that evidence would be examined in the light of AC's rights."

28. That ruling was the subject of a judicial review challenge before Jack J who gave judgment in March 2003. Regrettably his decision was not altogether clear: in parts it appeared to support the narrower approach, in parts the wider approach. (The Immigration Appeal Tribunal in the present case plainly thought it in conflict with *Kehinde* whereas the Court of Appeal appears to have regarded it as supporting the narrower approach—and never even mentioned *Kehinde*).

29. In June 2004, following Jack J's judgment, AC's case returned to the Immigration Appeal Tribunal (before Ouseley J as President and two Vice-Presidents) who allowed the Secretary of State's appeal: [2004] Imm AR 573. The judgment includes the following passages:

> "There was some debate before us as to what [Jack J's] judgment decided and, in any event, as to what the true position in law is" (para 16).
>
> "We regard it as clear that the effect of section 65 is to require the adjudicator and tribunal to decide whether or not the decision breaches the appellant's human rights and not whether it breaches the rights of others who are not appellants. . . . that other person has the ability, if a victim, to bring proceedings in the Administrative Court under section 7 of the 1988 Act. It may be cumbersome, but it avoids an appellant making claims relating to someone else who may be unaware of what is being said, or who may disagree with it. A child of divorced or separated parents may be in a particularly difficult position in this regard" (para 17).
>
> "We also accept . . . that although the right to family life and the effective interference [in] it is examined, under section 65, from the viewpoint of the appellant, the impact of separation on another may cause distress or anxiety to the appellant and that indirect impact on the appellant

> should be taken into account. It is right to recognise that although some family relationships may involve complete reciprocity, others, and parent-child relationships are the obvious example, may be very different depending upon the person from whose viewpoint the matter is examined" (para 18).
>
> "We make it clear that we have not considered the position from the viewpoint of S. We recognise that the decision in this case affects her rights and interests, but for the reasons which we have given we do not bring those into the balance in this decision" (para 76).

That judgment had in fact been foreshadowed just two months previously by the Immigration Appeal Tribunal's decision (again presided over by Ouseley J) in *SS (ECO - article 8) Malaysia v Secretary of State for the Home Department* [2004] Imm AR 1-153. In that case too, having expressed doubts as to the effect of Jack J's judgment in *AC* and said that the tribunal was bound by the starred decision in *Kehinde,* Ouseley J said that section 65 required the narrow approach to be adopted even though that might result in other family members having to challenge removal decisions under section 7 of the 1998 Act.

30. The next decision was that of the Court of Appeal in the present case. As has been seen, only Jack J's judgment in *AC* was referred to and that as if it constrained the narrower approach.

31. It is perhaps worth noting that in September 2005 (after the Court of Appeal's decision in the present case) a consent order was made in the Court of Appeal in AC's case allowing her further appeal and recording:

> "The parties are in agreement that the appellant's article 8 appeal requires re-examination by a freshly constituted tribunal. There was only one appellant before the IAT and there is only one family life. A proper assessment of the proportionality of the interference with the family life requires an assessment of the impact on the child of loss of contact with her parent. Although a 'third party', the child's right to respect for family life is thereby a relevant factor in the assessment of proportionality."

Your Lordships were not told the final outcome of AC's case.

32. The present issue has arisen in the Court of Appeal in a number of cases since the decision in the present case. *R (Ahmadi) v Secretary of State for the Home Department* [2005] EWCA Civ 1721 concerned two brothers, one seeking to remain here to protect the other (a refugee settled here) from the consequences of his florid schizophrenia. The appeal succeeded without the court finding it necessary to resolve the issue. It was noted that the brother settled here had brought contingent separate proceedings in case they proved necessary. (The only other instances drawn to our attention of separate proceedings being brought by other family members were two Scottish cases involving petitions by other family members for judicial review following the failure of appeals against deportation orders.)

33. *Miao v Secretary of State for the Home Department* [2006] INLR 473 concerned a husband and wife seeking to remain here to care for the husband's father (settled as a refugee) who suffered chronic depression and presented a high suicide risk. The appeal succeeded. Although in argument the Crown relied on the Court of Appeal's decision in the present case, the issue was not mentioned in the judgment.

34. *NG (Pakistan) v Secretary of State for the Home Department* [2007] EWCA Civ 1543 concerned a Pakistani mother, with two young children, who was to be deported after separating from her husband, a British citizen of Pakistani origin. Contact between father and children would thereby be broken. Although it may well not have been decisive the Court of Appeal stated at para 9:

> "There was no prospect of the father actually caring for the children. The children would travel with their mother if she were removed. It was the mother's article 8 rights that were under scrutiny, not the father's or even the children's (see the decision of the IAT in *Kehinde*)."

35. *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302 concerned a Jamaican woman who overstayed here, was thereafter joined by her two daughters, then met and married a British citizen who had lived here all his life. Allowing the appeal against mother's deportation the Court of Appeal said at para 20:

> "In substance, albeit not in form, [the husband] was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received . . . It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact." (Sedley LJ)

Again no mention was made of the present issue.

36. Most recently the issue was raised in *VN (Uganda) v Entry Clearance Officer* [2008] EWCA Civ 232 when again it was found unnecessary to resolve it. The Court of Appeal dismissed the appeal on the basis that even if the immigration judge had taken full account of the appellant's brother's separate article 8 rights it could not have affected the outcome.

The Strasbourg case law

37. Plainly the present issue could not arise on a Strasbourg application: as Sedley LJ pointed out in *AB (Jamaica),* from Strasbourg's point of view the husband's Convention rights were as fully engaged as the wife's. Time and again the Strasbourg case law emphasises the crucial importance of family life.

38. *Sezen v Netherlands* (2006) 43 EHRR 621 is a case in point. Noting that the case concerned "a functioning family unit where the parents and children are living together", para 49 of the judgment continued:

> "The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the Convention and that to split up a family is

> an interference of a very serious order. Having regard to its finding . . . that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same [as when a 10 year exclusion order remained in force] as long as the first applicant continues to be denied the right to reside in the Netherlands."

39. True, unlike *Sezen*, the present case is not concerned with young children. But the dependency between the appellant and his mother here clearly engages article 8. As the Court stated in *Mokrani v France* (2003) 40 EHRR 123, para 33:

> "[R]elationships between adults do not necessarily benefit from protection under article 8 of the Convention unless the existence of additional elements of dependence, other than normal emotional ties, can be proven."

On the adjudicator's findings of fact, such additional elements of dependence can properly be said to exist in the present case.

40. All of this, moreover, is entirely consistent with the approach taken by the House in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 186:

> "[T]he main importance of the [Strasbourg] case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

Conclusions

41. Whilst it is no doubt true that only infrequently will the present issue affect the outcome of an appeal, clearly on occasion it will and in any event that could provide no reason for maintaining the present narrow approach if it is wrong—indeed, quite the contrary.

42. Ouseley J in *AC's* case (para 29 above) envisaged as a disadvantage of the wider construction that the appellant might make claims relating to other family members which they might not agree with. To my mind the risk of this is small: generally the appellant would be advised to adduce signed statements from other affected family members if not indeed to call them. The greater risk surely arises upon the narrower construction: if the impact of removal on other family members is relevant only in so far as it causes the appellant distress and anxiety, that puts a premium on the appellant exaggerating his feelings.

43. The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 appeal), other family members' rights in another (a separate claim under section 7 of the Human Rights Act)? Is it not somewhat unlikely that the very legislation which introduced "One-stop" appeals—the shoulder note to section 77 of the 1999 Act—should have intended the narrow approach to section 65? Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg Court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, as recorded in the eventual consent order in *AC's* case (para 31 above), "there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction.

44. I would accordingly adopt the wider construction to section 65 contended for by the appellant, and, in the result allow the appeal, set aside the decisions of the Court of Appeal and the Immigration Appeal Tribunal, and reinstate the adjudicator's determination in the appellant's favour. Written submissions on costs are invited within 14 days.