Asylum and Immigration Tribunal

SA (Article 8 –burden of proof) Algeria [2008] UKAIT 00054

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2008

Before

Senior Immigration Judge Storey

Between

SA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L Appiah, Counsel, instructed by Charles Annon & Co
For the Respondent: Mr S Walker, Home Office Presenting Officer

1. Neither Boultif v Switzerland [2001] 33 EHRR 50 nor Amrollahi v Denmark (11 July 2002) is authority for the proposition that the burden of proof lies on the respondent to show that it is reasonable to expect an applicant's family to accompany him to his own country of origin (where he has a right of residence and where it is probable his country makes provision in its immigration law for family reunion).

2. The European Court of Human Rights has not seen a period of delay of limited duration (before an applicant can be considered for re-admission to the country where he had established family ties) as in itself giving rise to disproportionality: see e.g. Kaya v Germany Appn. No. 31753/02 28 June 2007), [2007] Imm AR 802, para 68.

DETERMINATION AND REASONS

1. The appellant is a national of Algeria. In a determination notified on 6 March 2008 a Tribunal panel (Immigration Judge Freestone and Mrs M Padfield JP) dismissed his appeal against a decision dated 21 December 2007 to make a deportation order under s.5(1) of the Immigration Act 1971. The appellant was successful in obtaining an order for reconsideration in respect of his Article 8 claim only.

2. The first two grounds for reconsideration take issue with the panel's finding that it was reasonable to expect the appellant's family to accompany him to Algeria. It is said that this finding evinced a failure to take into account judgements of the European Court on Human Rights (ECtHR), in particular that of Boultif v Switzerland [2001] 33 EHRR 50 and Amrollahi v Denmark (11 July 2002) which indicated that in assessing this issue the burden of proof lay on the respondent, not (as the Immigration Judge stated at paragraph 33) on the appellant. It is next said that this finding also involved a failure to give adequate reasons or take accurate account of the true position of the appellant's family members. Once again reference was made to judgments of the ECtHR, Boultif, and Sezen v Netherlands (31 January 2006), as well as two UK cases, Huang [2007] UKHL 11, [2007] 2 WLR 581 and AB (Jamaica) [2007] EWCA Civ 1302. The third ground for reconsideration contends that in reaching its alternative finding (that the appellant's deportation was proportionate, even if it is unreasonable to expect his family to accompany him to Algeria) the panel erred in law in failing to take into account the appellant's side of the scales and thereby failed to conduct any kind of meaningful balancing exercise at all.

3. I have some difficulty with the submission dealing with the question of upon whom the burden of proof lies to show that the appellant's partner and children could not accompany him to live in Algeria. The two ECtHR cases cited in support, Boultif and Amrollahi, only refer to it "not been established" by the respondent government that the couple and family could live "elsewhere" *other than in the applicant's country of origin*. In Boultif v Switzerland the applicant was Algerian and the issue was raised by the respondent as to whether the couple could live in Italy; in Amrollahi v Denmark the applicant was Iranian and one of the issues raised by the respondent was that the couple and family could live in Turkey or Greece. Neither case is authority for the proposition that the burden of proof lies on the respondent to show that it is reasonable to expect an applicant's family to accompany him *to his own country of origin* (where he has a right of residence and where it was probable his country makes provision in its immigration law for family reunion). And indeed in the appellant's case Miss Appiah conceded that there was no reason to think that Algeria lacked such laws.

4. Nevertheless I am prepared to accept that the panel's treatment of the issue of the partner and her family accompanying him to live in Algeria was legally flawed, since they failed to address adequately the issue of the additional difficulties the family

would encounter in Algeria in living there together as a family, notwithstanding the fact they were not married. The panel appeared to consider that they did not need to address this issue, since there was no independent evidence to show that the appellant's partner could not gain entry to Algeria "as the unmarried partner of an Algerian national" (paragraph 33) or that he was estranged from his family in Algeria due his relationship with his partner (paragraph 44). However, the relevant criterion set out in Boultif and other ECtHR cases for evaluating the reasonableness of expecting a partner to accompany an applicant back to his own country is the "seriousness of the difficulties" or the existence or otherwise of "insurmountable obstacles". Given the known fact that Algeria is an Islamic country which has experienced in recent years conflicts between the government and fundamentalists, the panel was not entitled, simply by virtue of the lack of "independent evidence" to assume that the lack of either a civil or religious (Muslim) marriage tie would not cause the couple difficulties, possibly serious ones. It must also be borne in mind here that their child is, in law, illegitimate.

5. It may also be that the appellant is entitled to say that the panel's approach to this issue betrays a failure to apply the guidance given by the Court of Appeal in AB (Jamaica). Whilst I maintain doubts that this case lays down any legal rule about the burden of proof (see VW and MO (Article 8 – insurmountable obstacles) Uganda [2008] UKAIT 00021), it is difficult to see that the panel weighed properly in the balance here the fact that the appellant's partner (like the spouse in AB (Jamaica)) was a British citizen.

6. However, I do not consider that the above failing resulted in any material errors of law on the panel's part. That is because they went on, in the alternative, to find that even if they had found it unreasonable to expect the appellant's partner and children to accompany him to Algeria, the decision would still be proportionate. This alternative finding was based on their assessment that the appellant had a viable option of entry clearance. Despite the appellant's representative's (Mr Jorro's) submissions to the contrary (see paragraph 20), the panel counted against the appellant that he had failed to leave the UK when his leave expired and make an application in Algeria for entry clearance as a fiancé (para 35). The panel took into account that deportation meant that the appellant would not be able to make an application to return (for a "number of years"), but concluded nevertheless that "this factor is outweighed by the nature and seriousness of the offending".

7. I am not persuaded that this alternative finding was legally flawed. In arguing to the contrary, the grounds (ground 3) contend that the panel "failed to take any account of A's side of the balance and thereby fail[ed] to conduct any kind of meaningful balancing exercise at all". That argument is totally wrong. From paragraph 34 onwards the panel conducted a careful balancing exercise taking into account, not only factors counting against the appellant, but also those in his favour.

8. At panel 20 the panel had noted the factors which Mr Jorro said weighed in his favour:

> "The lack of any previous convictions; the acknowledgement by the sentencing judge that he had had an 'industrious life'; his entry to the UK on a valid issue; his immediate admission of guilt on arrest; the lack of violence, arson, sex or drugs in his offending; the relatively low sentence; his inability to apply for entry clearance for a number of years after deportation and his relationship which is akin to marriage and fulfils the criterion laid out by the respondent in DP3/06."

9. In other paragraphs the panel showed that it took into account that the couple lived as a family unit (consisting of the two of them, their own child, and his partner's two children from her previous marriage), that they had made an attempt to marry in a civil ceremony in October 2004 and had also sought to undergo a religious marriage ceremony (unsuccessfully due to the mosque's concerns about her previous marriage being still extant), and that the appellant had some health problems.

10. The panel made clear in their decision that whilst they weighed all these factors in the appellant's favour, they had qualifications about several or them, in particular they noted: that both partners must have known when they first sought to marry that the appellant's immigration status was precarious; that the appellant's stepchildren were not in contact with their father; that despite the sentencing judge describing him as "industrious" and working hard to support this family, in fact (on his own evidence to the panel) he had no permission to work and had only worked for a short period; that the evidence about the behavioural difficulties of one of his partner's children (M) did not show that these were caused by the appellant's previous absence; and that the medical evidence he had submitted provided no analysis assisting the panel as to the nature and severity of his health difficulties.

11. For the most part the grounds for reconsideration do not seek to challenge the panel's above qualification of certain factors. In para 13 of the grounds there is a suggestion that the panel should have attached more weight to the appellant's stepchildren's ties with their natural father, but the panel were fully justified in pointing out that there was no real evidence of such ties.

12. It is true that some of the above factors were identified and/or evaluated in the context of examining the issue of the reasonableness of the appellant's partner and children accompanying him to Algeria, but is quite clear that the panel sought to decide the separate issue of the viability of the entry clearance option by reference to the same balancing of factors in favour and against the appellant. The panel was entirely correct to consider that both issues had to be decided by reference to the overall balancing of factors. Indeed if it had sought to decide such matters by reference to a different balancing exercise, it would have fallen into legal error.

13. The grounds also suggest that the panel disregarded completely the interests of the two stepchildren, H, in particular (ground 22). But the panel clearly understood and took account of the fact that the family unit consisted of three children (see paragraph 27).

14. The principal thrust of ground 3 was that the panel had failed to take any account of a number of factors relating to the nature of the appellant's criminal offence and conviction: seven factors are mentioned. However, these were all factors which the appellant's representative had raised in written and oral submissions. The panel clearly understood that the appellant's conviction was for two offences of possessing false documents with the intention of using them (see para 44); that he had admitted his offence on being challenged; that he was sentenced to the minimum punishment for this offence; that his offence did not involve violence, arson, sex or drugs; that he was not a re-offending risk; and that his twelve months prison sentence put him at the very bottom of the level at which the respondent will generally consider deporting non-EEA nationals. There is nothing to indicate that they considered he had used a false ID to enter, or attempt to enter the UK. Clearly the panel considered that the appellant's offences were "serious" (para 44), but it cannot seriously be suggested that they were not. We note also that the panel did not describe the offences (as the grounds suggest) as "particularly serious".

15. It must be borne in mind that even if the appellant had not been convicted of a criminal offence, he was still an overstayer and, as such, the interests of the state in the maintenance of effective immigration control had to be considered as counting heavily against the appellant.

16. Miss Appiah submitted that the panel had failed to take adequate account of the serious disruptions in the appellant's and his family's relationships that deportation would cause, bearing in mind that (as someone subject to a decision to deport) he would not be considered for entry clearance for three years. However, leaving aside the fact that the three year rule is only stated in the Immigration Rules to apply in cases concerned with revocation of a deportation order (para 390, HC 395), whereas this appellant will only be made subject to a deportation order if, following exhaustion of his appeal rights, he refuses to leave voluntarily, the panel plainly did take into account the understanding that he would not be able to be considered for entry clearance "for a number of years" (paragraph 39). In the light of the panel's assessment of the evidence about the appellant and the different family members, they were quite entitled to find that there were no exceptional circumstances excluding the appellant from being required to return to Algeria and make an application from there for entry clearance even though that would not be possible for "several years". I note that the appellant had the option in October 2004 of returning to Algeria and applying for entry clearance to join his partner then, but chose to remain unlawfully. I note also that the European Court of Human Rights has not seen a period of delay of limited duration (before an applicant can be considered for re-admission to the country where he had established family ties) as in itself giving rise to disproportionality: see e.g. Kaya v Germany Appn. No. 31753/02 28 June 2007), [2007] Imm AR 802, para 68 (and the cases referred to therein, Benhebba v France and Jankov v Germany).

17. As Mr Walker pointed out, if the panel failed to take into account any relevant factor here, it was a further factor counting against the appellant, namely that there would

be nothing to prevent the appellant's partner and children visiting the appellant whilst he was in Algeria. Whatever difficulties they might face in efforts to reside there as a family, they would be most unlikely to apply in the context of a relatively short visit.

18. For the above reasons I consider that the panel's decision that the appellant had a viable option of entry clearance was well-reasoned and unaffected by actual (and possible) legal errors. Error infected only their treatment of the separate issue of whether the appellant's partner and children could accompany him to Algeria to resume their family life there.

19. For the above reasons the panel's decision to dismiss the appellant's appeal must stand.

Signed

Senior Immigration Judge Storey

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 28 January – 1 February 2008

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

SA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant:
For the Respondent:

FUNDING DETERMINATION

1. The Tribunal is satisfied that, at the time the Appellant made the Section 103A application and for the reasons indicated in the SIJ's order for reconsideration, there was a significant prospect that the appeal would be allowed upon reconsideration. Accordingly it orders that the Appellant's costs in respect of the application for reconsideration and in respect of the reconsideration are to be paid out of the relevant fund, as defined in Rule 33 of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Signed

Dr H H Storey
Senior Immigration Judge