PK (EEA regs: Jia) Sri Lanka [2008] UKAIT 00043

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 15 January 2008

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Drabu

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr. V. P. Lingajothy of Linga & Co. Solicitors
For the Respondent: Mr. S. Ouseley, Home Office Presenting Officer

There is nothing in Jia v Migrationswerket to cast doubt on the legality of reg 8(2) of the Immigration (EEA) Regulations 2006.

DETERMINATION AND REASONS

1. The appellant is a citizen of Sri Lanka. He appealed to the Tribunal against the decision of the respondent on 2 March 2007 refusing him a residence card as confirmation of a right of residence under European Community Law. An Immigration Judge dismissed his appeal. He sought an order for reconsideration. The Tribunal made no order but on renewal to the High Court, in circumstances to which we make more detailed reference below, Silber J. ordered reconsideration. Thus the matter comes before us.

2. The appellant came to the United Kingdom, entering illegally, apparently in the summer of 1998. He applied for asylum, which he was refused, and his appeal was dismissed in November 1999. He did not leave the United Kingdom. He then sought to remain on human rights grounds. That claim was refused, and his appeal was dismissed in January 2002. He did not leave the United Kingdom. In May 2006, when the appellant was still in the United Kingdom, a relative of his described as a 'cousin-brother', who had been granted asylum in France following his arrival there in 1989, and has subsequently become a French citizen, came to the United Kingdom in the exercise of Treaty rights. The evidence before the Immigration Judge was that the appellant and the relative had lived together in the United Kingdom since May 2006 and that, before that, the relative had provided a great deal of support to the appellant so that the appellant was not merely a relative but a dependant of his. The Immigration Judge found the evidence offered on the appellant's behalf to be lacking in credibility and declined therefore to find that he had established the factual basis upon which his legal claim depended. He went on nevertheless to consider the prospects of that claim in the event that he should be wrong about the facts. He considered an argument put before him that reg 8(2) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) was incompatible with the Citizens Directive 2004/38/EC and that that had been decided by the European Court of Justice in Jia v Migrationsverket (C-1/105). The Immigration Judge referred also to the decisions of the Tribunal in PB [2005] UKIAT 00082 and RG [2007] UKAIT 00034. He took the view that he was bound to apply the Regulations despite any view about their incompatibility with European Law but in any event said that the circumstances were quite different from those of Jia, particularly because of the lack of credibility of the evidence and the appellant's failure to establish the facts in his favour. He went on to deal with the arguments raised by the appellant under the European Convention on Human Rights and, after giving reasons for his conclusions on all issues, dismissed the appeal on all grounds.

3. The application for reconsideration challenges the Immigration Judge's conclusions on credibility and on Art 8. Reference is made in the grounds to Horvath [2000] Imm AR 205, Huang v SSHD [2007] UKHL 11 and LS [2005] UKAIT 00132; but that case is cited only as part of an argument on Art 8. The grounds for reconsideration make no reference to any argument challenging reg 8(2) of the EEA Regulations, or to Jia. The Senior Immigration Judge dealing with the application declined to order reconsideration. He pointed out that, following RG the appellant is not entitled to consideration as an 'extended family member' under the EEA Regulations. He said that the Immigration Judge was entitled to make the findings that he did on credibility and on proportionality on Art 8 and that, as he put it, "the grounds disclose no error of law in the determination".

4. The appellant (who, we should say, has had the same representatives throughout) then renewed the application to the High Court as he was entitled to do. The provisions for doing so are in part 54 of the Civil Procedure Rules at 54.31. The Rules there provide that if the Tribunal, having received an application, indicates

that it does not propose to make an order for reconsideration, the applicant may, by service of a notice on the Administrative Court Office, invite the High Court to consider 'the application'. We have put that last phrase in inverted commas because it appears to us quite clear that the applicant is not entitled to make to the High Court an application different from that which he made to the Tribunal. What the applicant is entitled to do, under CPR 54.31(5), is to 'respond to the reasons given by the Tribunal for its decision' by making submissions 'setting out the grounds upon which the applicant disputes any of the reasons given by the Tribunal'.

5. The form used by the appellant's representative to make such submissions is headed as follows:

> "Part C – the grounds which the court will consider are those that you submitted to the AIT in your application for reconsideration (Form AIT/103 A).
>
> *If you wish to respond to the reasons given by the Tribunal for it's [sic] decision that it does not propose to make an order for reconsideration you should set out in this part the grounds upon which you dispute any of the reasons given by the Tribunal and give reasons in support of those grounds."*

The appellant's representative's response to that invitation is in our view rather remarkable. The new submission is approximately twice the length of the original grounds. It refers in almost every paragraph to Jia, which did not feature in the original grounds. It refers to an argument that the decision of the European Court of Justice in Jia overrode reg 8(2) of the EEA Regulations, another matter not mentioned in the original grounds. It refers to what is alleged to be a definition of "lawful residence" to be found in the Immigration Rules, also not mentioned in the original grounds. Horvath is not cited, nor is Huang, nor is LS, but it is said that the Immigration Judge erred in failing to find that RG was inconsistent with Jia. There is a reference to a case called Chiver, which is cited as an authority on the assessment of credibility. It does not appear that these extensive complaints were accompanied by any application to amend the grounds as originally submitted. We have the gravest of doubts whether the High Court had jurisdiction to consider them in the context of CPR 54.31(5), which allows an applicant merely to argue that the Tribunal's response to the grounds as originally submitted was wrong.

6. In any event, the new submissions put to the High Court contain at least three misstatements of law, each of which should readily have been apparent to the person making the submissions.

7. The first relates to the treatment of Jia. The submissions in response to the Tribunal's decision begin as follows:

> "The Immigration Judge's decision of 15 of June 2007, contains the following error of law. First, it has now been decided in the case of Yunging Jia v Migrationsverket (Grand Chamber, European Court), a copy of the decision is enclosed with the

relevant paragraph (33) highlighted, which clearly states that for the purpose of reg 8.2(a) and (c), it no longer is a requirement that the appellant and the sponsor must have resided in any state other than the United Kingdom. Based on this ground, residents in the sponsor's household and current support is only relevant. A copy of the tenancy agreement exemplifying their joint residence is adduced.

Since Jia established that the applicant needs not to have lived in another EEA state where the sponsor resided, therefore overriding reg 8(2)(a) of the 2006 regulations, but that only lawful residence of the UK has to be satisfied, the IJ has failed in his reasoning of his determination and findings why he thinks the applicant is not a lawful resident and does not consequently fall within the ambit of Jia".

8. The use of the word "now" at the beginning of that passage might be taken to suggest that the decision in Jia postdated the Immigration Judge's determination and perhaps even the grounds for reconsideration. The fact is, however, that the decision was published on 9 January 2007, well before the Immigration Judge heard the case on 17 May 2007. As we have indicated, he considered it in his determination. If it was regarded as important to the appellant's case, it is difficult to understand why it did not feature in the grounds for reconsideration submitted to the Tribunal. Much more important, however, is that Jia does not "decide" or "establish" what it is alleged in the submissions to do. In Jia the European Court of Justice was asked a question about persons such as the appellant, who are not themselves citizens of the Union but who are relatives of a national of a member state who has exercised his right of free movement. The question was whether the members were *required by European Law* to make the grant of a residence permit to such a person subject to the condition that he had previously been lawfully resident in another member state. Such a requirement had been formulated in Akrich v SSHD (C-109/01) [2003] ECR I-9607. After reviewing the facts of Akrich, the Court ruled as follows:

> "[32] It follows that the condition of previous lawful residence in another Member State, as formulated in the judgement in Akrich, cannot be transposed to the present case and thus cannot apply to such a situation.
>
> [33] The answer to Question 1(a) to (d) must therefore be that, having regard to the judgement in Akrich, Community law does not require member States to make the grant of a residence permit to nationals of a non-Member State, who are members of a family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another member state."

9. Subject to the ordinary difficulties of reading long sentences, nothing could be clearer. The decision in Jia is that Community law imposes no general requirement of the nature suggested. There is nothing at all in the judgement in Jia remotely equivalent to what is alleged in the submissions made to the High Court. Those submissions are to the effect that, so far from there being no rule in European law of the sort suggested, there is a rule to the contrary effect. Nothing

could be further from the truth. No such rule is "established" in Jia (which, incidentally, contrary to what is suggested in the submissions, makes no reference to the United Kingdom's regulations), and the High Court should not have been given submissions in the form we have set out.

10. In submissions to us, Mr. Lingajothy said that the comparison of Jia and Akrich was a difficult matter, which required detailed interpretation. It does not appear that his submissions to the High Court gave any hint of that. The truth is that it is not difficult at all. The judgement in Jia is clear. It does not cast any doubt on the legality of reg 8(2) of the EEA Regulations.

11. The second misstatement of law in the submissions put to the High Court is as follows. Raising an issue which, in so far as we are aware, is entirely new in these proceedings, the submissions state as follows:

> "The criteria for lawful residence is laid down at paragraph 276(A)(b) of the Immigration Rules and read as follows:-"

An extract from that paragraph of the Statement of Changes in Immigration Rules, HC395 is then set out and there are submissions based on it. What those submissions fail to indicate is that para 276A begins with the words "for the purposes of paragraphs 276B to 276D". Those paragraphs relate to applications made by persons who have lived in the United Kingdom lawfully for more than ten years or have been in the United Kingdom lawfully or unlawfully for more than fourteen years. The appellant has made no application for consideration under those paragraphs and indeed, given his own account of his arrival in 1998 it is difficult to see how he could have expected success had he done so. There is no suggestion that this definition in paragraph 276A of the Immigration Rules has any general applicability and it was quite wrong of the appellant's representatives, by selective citation, to suggest that it did, or that the definition had any general relevance to the present case. Made, as it was, in the context of an assertion that the Senior Immigration Judge erred in his decision, the suggestion that the Senior Immigration Judge should have misread the rule as the appellant's representatives had done is improper.

12. The third misstatement of law is as follows. In the penultimate paragraph of the submissions the appellant's representatives assert as follows:

> "The Senior Immigration Judge, McGeachy, instead of having recourse to the proper construction of paragraph 276 of the Immigration Rules and in line with the case of Jia, has only rubber stamped the decision of the previous Immigration Judge. Had he scrutinized the documentary evidence that were on file, he would have observed that credibility issues, if any, can only be made in light of the backdrop of the situation in the applicants home country at the present time. Reliance is placed here on Chiver (10758), where it was mentioned

> "Credibility should be made with regard to the centre piece of Appellant's account". "

13. SSHD v Chiver is a decision of a Vice President and two lay members of the Immigration Appeal Tribunal, made in March 1994 and reported at [1997] INLR 212. The decision does not contain the passage here alleged to be cited from it. It is in that context very difficult indeed to understand why the phrase is cited as though it were a quotation from the judgement. Although there may have been problems between 1994 and 1997 in ascertaining the text of the determination of the Tribunal in Chiver, there can since the end of 1997 have been no excuse at all for what has happened here.

14. It is perhaps worth saying again what Chiver decides, as it is so often misstated in general, although we are glad to say seldom with the mendacious particularity adopted here. Chiver was an appeal by the Secretary of State against the determination of an adjudicator who had allowed an appeal despite having concerns about particular aspects of the credibility of the appellant's story. The Secretary of State argued essentially that, given the concerns that he had, some of which were unresolved, the adjudicator was wrong in law, on the evidence before him as he assessed it, to allow the appeal. On that issue the decision of the Tribunal was that:

> "It is perfectly possible for an adjudicator to believe that a witness is not telling the truth about matters, has exaggerated his story to make his case better, or is simply uncertain about matters, and still to be persuaded that the centre piece of the story stands".

The Tribunal did not decide that an adjudicator was obliged to believe a story if uncertainties, exaggerations, lack of memory or lies went only to details. What it did decide was that the existence of such difficulties is not in law a bar to an adjudicator (or, now, an Immigration Judge) believing other parts of what is said if, having taken everything into account, he decides it right to do so.

15. Despite the failings of the extra submissions as we have set them out, they were sufficient to persuade Silber J. to make an order for reconsideration, which he did giving his reasons as follows:

> "It would be helpful to have a definitive decision of the Tribunal (if possible presided over by its President) clarifying the position of failed asylum seekers and the J.A Case. Similar cases should also be listed with this case."

16. We must assume that "J.A." is intended to be a reference to Jia. We do not know what is meant by the reference "similar cases", although the Tribunal has identified one other case in which reconsideration has been ordered in identical terms.

17. Before us, Mr. Lingajothy volunteered a submission that is obviously right, that is, that, in the light of the order for reconsideration, we are concerned only with matters relating to Jia. Even if the assertions made about Jia in the submissions to the High Court had been accurate, this case could not succeed, for two reasons which for some reason were not brought to the attention of the High Court Judge. The first is, as we have already said, that the Immigration Judge disbelieved the evidence adduced on behalf of the appellant. Although the Immigration Judge's assessment of credibility was challenged in general terms in the grounds submitted to the Tribunal, and, if we may say so, in even more general terms in the additional submissions to the High Court, it is not now suggested that the Immigration Judge's assessment of credibility was flawed. Any suggestion would, in our view, be doomed to failure. As the adjudicator sets out in Paragraphs 28 to 34 of his determination, he found the appellant was a person whose word was not entitled to credit, for a substantial number of reasons. In that context there is no reason at all why the Immigration Judge should be required to believe the appellant's story in general or any particular aspect of it, including that part of it relating to his alleged historic and present dependence on his relative.

18. That would be sufficient by itself to dispose of this appeal, whether by reconsideration or otherwise. There is, however, an additional point, which again was not brought to the attention of the High Court. The appellant has a particular problem in the light of the wording of the Directive upon which he seeks to rely as explained in RG [2007] UKAIT 00034. At this point, and rather belatedly it may be thought, we may set out the relevant parts of reg 8 of the EEA Regulations, under which the appellant claims to be an 'extended family member'.

> **"Extended family member"**
> 8.—(1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) [which the appellant is not] and who satisfies the conditions in paragraph (2), (3), (4) or (5). [there is no suggestion that the appellant could qualify under paragraph (3), (4), or (5)].
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and ---
>
> (a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
>
> (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
>
> (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

'EEA State' is defined in reg 2 as meaning in essence a Member State of the European Economic Area other than the United Kingdom. Thus residence in the United Kingdom does not qualify under reg 8(2)(a). In RG this Tribunal attempted to provide interpretive guidance on a number of issues relating to reg 8(2). We have no reason to suppose the guidance there provided was wrong. The first point is that sub-paras (a), (b) and (c) are genuine alternatives. The second point is that the tenses are important. A person may therefore qualify by currently meeting the requirements of sub-para (a), or by having met them in the past and by currently meeting the requirements of either sub-para (b) or sub-para (c). As the definition of 'extended family member' is relevant both to those who intend to come to the United Kingdom and to those already here, a definition which includes current residence outside the United Kingdom is not inappropriate.

19. As we have said, residence in the United Kingdom does not count for the purposes of sub-para (a). And in the present case, as in RG, the appellant and his family member have not lived together in an EEA country other than the United Kingdom. It follows that the appellant cannot meet the requirement of reg 8(2)(a). That is the burden of the argument based on Jia, which, as we have indicated is misconceived. Even if the appellant were to be regarded in the past to have met the requirements of sub-para (a), however, he would still not be entitled, because he does not currently meet the requirements of either sub-para (b) or sub-para (c). Sub-para (b) is clearly on its terms relevant to a person travelling to the United Kingdom to join a relative who is already here; and sub-para (c) relates to a person who 'has joined' his EEA national relative here. For the reasons given in RG at paragraphs 12 to 16, there is no reason to give the wording of reg 8(2)(b) and (c) any meaning other than its ordinary meaning; and there is nothing in the Directive 2004/38/EC requiring any other meaning to be given to them. The appellant is not a person who has joined his relative in the United Kingdom: he is a person whom his relative joined. He cannot meet the requirements of reg 8(2), even if sub-para (a) is ignored.

20. The Immigration Judge made no material error law. We order that his determination shall stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: