CO/6990/2000

Neutral Citation Number: [2008] EWHC 2737 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 10th September 2008

B e f o r e:

MR JUSTICE CRANSTON

Between:
THE QUEEN ON THE APPLICATION OF KRISHNAPILLAI
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr S Cox (instructed by Fisher Meredith) appeared on behalf of the **Claimant**
Mr P Patel and Mr R Dunlop (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(Approved by the court)

1. MR JUSTICE CRANSTON: The claimant in this case is a 38−year−old unmarried Sri Lankan Tamil. She came to the United Kingdom in 1992 when she was 23 years old. On her arrival, she lived first with her brother, then with her cousin. From October 1997 she lived with her sister, her sister's husband and their children. She was removed from this country to Sri Lanka on 18th February 2008. She challenges that decision on both human rights and public law grounds. The crucial legal issue is the extent to which reliance might be placed on Article 8 to resist removal of a claimant who says it will have adverse consequences for her mental health. A secondary issue is the extent to which delay can strengthen such a claim against the backdrop of the claimant's relationship with her family.

Background

2. The claimant entered the United Kingdom unlawfully, using a false British passport. She claimed asylum in 1992. She was interviewed in 1994, asylum was refused in 1995 and the matter then went to an adjudicator in 1996.

3. Mr John Boyd QC, the adjudicator, said that he was not satisfied that she was a credible witness. She had claimed that the Tamil Tigers ("the LTTE") had attempted to conscript young Tamil boys and girls to their movement and her account had been that consequently she had had to move twice. Mr Boyd QC said there was no evidence which satisfied him that she had had to move from place to place to avoid conscription by the Tamil Tigers. He also said that her experiences in Sri Lanka did not indicate that the authorities had any significant interest in her. She had been arrested twice, once in a sweep of young Tamils, but had been released after a few hours. On the second occasion, she was again released after a short detention, without charge. Mr Boyd noted that she was able to get a Sri Lankan passport in her own name and to leave the country without difficulty. He also took into account the situation for Tamils in Sri Lanka, which has oscillated over the years. He refused her claim.

4. The claimant appealed but permission to appeal was refused. She then made further submissions to the defendant Secretary of State about asylum in 1997, on the basis of the general security situation in Sri Lanka. Meanwhile, she was working and by 2001 she had also obtained a bachelor's degree in Business and IT from the University of Westminster. In 2002 further submissions were made on her behalf. Some of those submissions were made through her local Member of Parliament, the Right Honourable Margaret Hodge MP. In April 2002 the Home Office rejected her further submissions. In May 2002 she made human rights submissions based on the general security situation in Sri Lanka with a relatively short mention of her Article 8 rights. It is fair to note that human rights claims could only be advanced post−October 2000, when the Human Rights Act 1988 became effective. In 2003 the claimant submitted additional grounds to the defendant.

5. In late 2003 the matter of her human rights claim came before an adjudicator, Mr Boardman. She was represented by counsel at that hearing. In his ruling, dated 23rd December 2003, Mr Boardman said that he could not find that the claimant had established a family life in the United Kingdom, despite living initially with her

brother, living subsequently with her sister and associating very frequently with her other family members in the United Kingdom. At paragraph 28 he said:

> "I find that those amount at most to the normal emotional ties of members of a family, but, in the light of the fact that the [claimant] was 23 when she arrived in the UK, I also find that there is no evidence of dependency before me to suggest that those ties amount to a sufficient link to give rise to family life for the purposes of the protection of Article 8."

Mr Boardman went on to find that she did have a private life in the United Kingdom but that removal to Sri Lanka would not interfere with that right. At paragraph 30 he said that the Secretary of State's decision was pursuant to the lawful aims of immigration control, in accordance with law, and that the Secretary of State's decision was proportionate.

6. In his reasons Mr Boardman balanced a number of factors: that the claimant had been in the United Kingdom for nearly 11 years; that that represented about a third of her life; that she had integrated into society with jobs, worship and friends; that she lived with her sister; that she had no close relatives in Sri Lanka; and that she would be returning to Sri Lanka as a single woman with no immediate male support. He also took into account the fact that there were some 4 years between her first application for asylum and the refusal in 1996, and a further 5 years between her second asylum application and the refusal in 2002. However, he said that she had established a private life in the United Kingdom in full knowledge of her precarious immigration status. He also said that any delay in the defendant dealing with her second application was in the context of an appeal from her previous application. The fact was that she had parents and other siblings who had moved to several different countries. Thus her brother, with whom she had lived, had moved to Canada in 1999. Mr Boardman said:

> "... the fact, as I find, [is] that the public interest in maintaining an effective immigration control outweighs respect for the [claimant]'s private life in this case."

7. The claimant applied for permission to appeal Mr Boardman's decision to the Immigration Appeal Tribunal. She also wrote again to her Member of Parliament and included submissions to be sent on to the Home Secretary. Those representations were couched in terms of the case being reconsidered on a compassionate basis outside the Immigration Rules. Her legal representative wrote:

> "The threat of her removal from the United Kingdom after eleven years of well−settled peaceful life, to Sri Lanka where the political situation is still unsettled has very much affected our client physically, mentally and psychologically. We, therefore, kindly appeal to the Rt. Hon. Minister to take a humanitarian and compassionate view of her circumstances and grant her humanitarian discretionary leave. We are of opinion that such a situation would definitely revitalise her confidence and courage. It would also help her to look for a future with confidence."

8. Meanwhile, the claimant's application for permission to appeal Mr Boardman's decision was refused. In refusing permission, Miss Mensch, a vice president on the Immigration Appeal Tribunal, said that the adjudicator had given clear and sustainable reasons why he did not consider that family life had been established.

9. In 2005, a year later, the claimant applied for indefinite leave to remain under a long residence policy. There was a hitch in the way that this claim was submitted, but ultimately the proper form was sent to the Home Office. In the application, the claimant herself wrote that she had no one in Sri Lanka, that since arrival she had been living with her sister, and that she had established a well−settled private and family life. She said that she had been living in the United Kingdom for more than 12 years and during that time had studied English and had obtained a degree. She had been working for more than 10 years, 4 years in the technical department of PC World. She said that IT personnel were well needed in the United Kingdom and there was still a shortage, and she pointed out the possibilities of her obtaining a senior position.

10. In November 2005 the claimant's legal representative again wrote to the Home Office to put her case. The legal representative said that during what was now her 13−year stay in the country she had obtained a degree and she was leading a peaceful life, she had her sister and other relatives, she was well settled as a family with them, she had no one in Sri Lanka and, since she had been out of Sri Lanka for a long time, she had no knowledge of anyone back in Sri Lanka.

11. Over 12 months later, in December 2006, different legal representatives sent a letter to the Home Office relating to the application to remain in the United Kingdom on the basis of long residence. That letter included a letter from Dr Nicholas−Pillai, a general practitioner at the Bush Hill Medical Practice. Dr Nicholas−Pillai's letter was dated 11th November 2004. In that letter Dr Nicholas−Pillai said that the claimant had been suffering from post−traumatic stress syndrome. He set out a number of other aspects of her condition: a loss of appetite, a loss of weight and a loss of memory of the past. There were also flashbacks. In an important passage he said:

> "Her depression sometimes gets worse and she feels suicidal and feels that she should not live."

12. It is convenient to record at this stage that there is also a letter from another medical practitioner, dated June 2006. It is shorter than Mr Nicholas−Pillai's letter. It expresses the medical condition of the claimant, the depressive features. That letter was only produced to the Secretary of State on the day of the claimant's removal from this country and Mr Cox has conceded that he could not put a great deal of weight on it. In the papers there is also a letter from the claimant's sister, dated 14th March 2005. Like the second doctor's letter, it is a letter addressed "to whom it may concern". It says this:

> "The above named is my sister, I confirm that I have been supporting her by providing accommodation which, includes meals and pay her a weekly allowances for her miscellaneous expenditure."

In July 2007 and September 2007 the claimant made further submissions. The second

of these were acknowledged by the Secretary of State later in September.

13. We then come to the day of the claimant's removal from this country. That was 18th February 2008. On that day the claimant had reported, as she had been obliged to do for some time, and she was detained. In anticipation of removal, there was a decision letter from the Secretary of State dated that day. That letter set out the Secretary of State's decision in relation to the application of the Immigration Rules in relation to her long residence. No question has been raised about its lawfulness. The letter went on to consider whether it was appropriate to allow the claimant to remain in the United Kingdom exceptionally, outside those rules. The letter said that, having considered all the circumstances of the claimant's case, the Secretary of State had concluded that there were insufficient compassionate circumstances to justify a concession on the grounds of any of the factors raised. In reaching that conclusion, the letter said:

> "... we have taken into account your claim that your client suffers from post traumatic stress syndrome, and have noted Dr Nicholas−Pillai's medical report dated 11 November 2004. The Secretary of State notes that you have not provided an up to date medical report, and is of the opinion that the mere suggestion of a breach would not, in itself, postpone the removal of your client."

14. The letter went on to address the issue of the claimant's established private life in the United Kingdom. The letter recited the right of the United Kingdom to control entry of non−nationals into this country and continued that, although the claimant had a private life, it was a private life which had been established unlawfully in the knowledge that she had no right to be here and could be removed at any time. For those reasons, the letter said:

> "... it is our view that any interference with your client's family and/or private life, is necessary and proportionate to the wider interest of the maintenance of an effective immigration policy."

The letter went on to say that the Secretary of State had weighed up the extent of the possible interference with the claimant's private and family life, with particular regard to her length of residence, against the legitimate need to maintain an effective immigration policy.

15. The background to that decision letter goes back many years, as is evident from the history I have recounted. The immediate background, however, was a minute prepared in January 2008 by an Immigration Service official. That minute sought authority from a more senior official for the same−day removal of the claimant. The minute set out the immigration history of the claimant and then summarised in detail the letter from Dr Nicholas−Pillai. The depression suffered by the claimant and her suicidal feelings were mentioned, as was the fact that she suffered from post−traumatic stress syndrome and that she needed continual treatment and social support. Under the heading of "Mitigating circumstances and medical evidence", the minute again recounted the letter from the general practitioner of November 2004 and identified the claimant's post−traumatic stress syndrome and her need for continual treatment and social

support. That minute was forwarded to a more senior official, who replied in an e−mail:

> "In view of the medical circumstances I am content to authorise same day removal. Any prolonged detention would only add to her fear and anxiety."

16. The official immigration record from the day itself includes an account of a mitigating circumstances interview. In that interview, it is recorded that the claimant stated that she was single, had no dependents in the United Kingdom, but that she had a sister. She stated that her sister had entered the United Kingdom 2 years after she had arrived and had then married a United Kingdom citizen. The document records that the claimant stated that her sister had remained in the United Kingdom since that time and that she, the claimant, had been residing with her since 1997. The claimant said that her parents were in Canada, one of her brothers was in Australia and another was in Switzerland. She produced the second GP's letter to which I have referred and there is a summary in the immigration records. The official document also records that the claimant was suffering from suicidal thoughts and attempted to take her life nearly 2 months previously, when she overdosed on painkillers. She said that she was unemployed, had no access to public funds and she was being supported by her sister. The document also records that during the mitigating circumstances interview the claimant informed the official that she was dependent on her sister. The document then records that the claimant's position was referred up the line to an inspector, who made a decision for the removal to proceed. The claimant was removed that day.

17. These proceedings began with a pre−protocol letter in March. The judicial review was lodged later that month. There is no need to recount the variations in the way the claimant has put her case since the proceedings were instituted, although it is fair to say that initially the judicial review focused on what could be described as the mechanisms of her removal. In late March Griffith Williams J refused permission following an oral permission hearing, Sedley LJ refused permission for judicial review on the papers and in July Buxton LJ refused permission following an oral hearing.

18. On further consideration in July, however, Buxton LJ granted permission for judicial review. He said that the grounds were plainly arguable. He emphasised, in particular, that no tribunal had considered, and the Secretary of State had given no attention to, the element of delay. He referred to the case **EB (Kosovo) v Secretary of State for the Home Department** [2008] 3 WLR 178. He also said that there had not been consideration of the life of the family as a whole, as required by the recent decision of the House of Lords in **Beoku−Betts v Secretary of State for the Home Department** [2008] 3 WLR 166.

19. To complete the background, the Secretary of State prepared a lengthy letter in August this year which attempted to fill the gaps in any previous reasoning. Since the focus of my consideration must be the decision letter of 18th February 2008, I do not take that letter into account. So the vigorous criticisms levelled against it by Mr Cox for the claimant were in a sense wrongly aimed. There is also a recent statement from the claimant's sister dated August 2008. In that statement the claimant's sister says that the

claimant was increasingly dependent on her, not just emotionally but also physically. The sister describes the claimant as not eating properly, withdrawing into herself and that on the whole the claimant depended on her. The sister also says that the removal of the claimant has had an adverse impact on her. Finally, there is a statement from the claimant's solicitor. There is no need to set out the details, except to say that the solicitor reports that the claimant's present life in Sri Lanka is, to put it shortly, miserable. She has told the solicitor on the telephone that she misses her sister and her sister's children, that there is no one in Sri Lanka to care for her and that she has no life there. She lives with fear every day. She feels desperate and helpless and talks about harming herself.

The legal framework

20. Two streams of law bear on the decision in this case. The first is the jurisprudence surrounding Article 8 of the European Convention on Human Rights: whether it is engaged, where family life is based on a relationship between siblings, and its application where there are consequences for mental health in the removal of a person from the United Kingdom. The second stream concerns the Immigration Rules, Rule 353 of which governs the handling of what are described as "fresh claims", where all existing claims have been rejected and appeal rights exhausted. I consider these in turn, although I accept Mr Cox's submission that the various streams are not separate and at various points join.

(1) Family life between siblings

21. In **S v United Kingdom** [1984] 40 DR 196 the European Commission on Human Rights said:

> "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults... would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

That statement was approved by the Court of Appeal in **Kugathas v Secretary of State for the Home Department** [2003] EWCA Civ 31. There Sedley LJ said, in response to an argument that there was no actual requirement of dependency:

> "That is clearly right in the economic sense. But if dependency is read down as meaning 'support', in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support', then it represents in my view the irreducible minimum of what family life implies. (Paragraph 17)."

That case involved an adult Sri Lankan asylum seeker who had lived in the United Kingdom since 1999. The issue was whether he enjoyed family life with his widowed mother and siblings in Germany, with whom he had lived as an asylum seeker between

1985 and 1999. Since coming to Britain he had had only telephone contact with them and made one visit. The court accepted that it was possible that he had enjoyed family life but held that he no longer did so.

22. In **Senthuran v Secretary of State for the Home Department** [2004] EWCA Civ 950 the Court of Appeal considered another Sri Lankan man, this time aged 24, who had been living with his adult siblings in the United Kingdom. He had arrived in the United Kingdom aged 17 and had lived with them up to the date of the Immigration Appeal Tribunal's decision under appeal, some five and a half years later. In the course of his decision, Wall LJ said that the first task was to consider whether a sufficient link existed between the relatives to give rise to the protection of Article 8. It was not the case, said Wall LJ, that Article 8 could never be engaged when the family life which was sought to be established was that between adult siblings living together. Each case was fact sensitive and placed an obligation on adjudicators to identify the nature of the family life asserted.

23. As a matter of law, then, Article 8 can be engaged in a relationship between siblings. That demands an inquiry into the facts of the relationship. To adopt Sedley LJ's analysis in **Kugathas**, there has to be real, committed or effective personal support at the very least. It is as well to recall the core value which Article 8 exists to protect, as encapsulated by Lord Bingham in his speech in **Huang v Secretary of State for the Home Department** [2007] UKHL 11, [2007] 2 AC 167, paragraph 18:

> "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."

(2) Mental health and Article 8

24. The starting point for this is a passage in Lord Bingham's judgment in **R (Razgar) v Secretary of State for the Home Department** [2004] UKHL 27, [2004] 2 AC 368. At paragraph 9 of that judgment Lord Bingham says:

> "... reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country."

There are passages in the speech of Baroness Hale to the same effect at paragraphs 47, 51 and 57−58. **Razgar** was a case where the House of Lords held that, having regard to Article 8, the right to a private life protected those features of a person's private life

integral to his or her identity or ability to function socially, and that preservation of mental stability was recognised to be an indispensable precondition to the effective enjoyment of that right. I continue from the headnote:

> "... that such rights could exceptionally be engaged by the foreseeable consequences for health of removal pursuant to an immigration decision, where a claimant could demonstrate grave interference such as would amount to a flagrant denial of the right..."

25. In my view, the link between mental health and Article 8 can also arise as a result of the effluxion of time, what in some cases has been described as delay. In the case which Buxton LJ mentioned in granting permission for judicial review in this case, **EB (Kosovo)**, the House of Lords identified a number of ways in which delay could bear on a human rights claim. One aspect is that the delay in the decision−making process means that the applicant, as a result, develops closer personal and social ties, or establishes deeper roots in the community, than could have been demonstrated earlier. Importantly, in my view, it is no great extrapolation to see how a deterioration of mental condition over time could accentuate the dependency of, say, one adult sibling on another. Since care ideally derives from altruism and engenders gratitude, the bonds are strengthened in both directions, altruism and care on one side, dependency and gratitude on the other.

26. In these and possibly other ways, the jurisprudence supports, as a general proposition, the relevance of mental health to a consideration of family and private life in the context of Article 8. Should Article 8 be engaged in this way because of mental health, the key issue becomes proportionality. In **Huang** Lord Bingham reminds us there is a general right of states to control entry into their jurisdiction. At paragraph 20, Lord Bingham says that the ultimate question for the immigration appellate authority in relation to proportionality is whether a refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.

(3) Fresh claim

27. The fresh claim rule, Rule 353 of the Immigration Rules, is well known:

> "353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas."

28. The rule does not define further submissions, nor does it define human rights claims. The Asylum Process Guide, a manual for officials making day−to−day decisions, contains some 10 pages entitled "Further submissions", addressed to the fresh claim rule, Rule 353. In one passage the guide says that if a person is not alleging that removal will breach either the Refugee Convention or the European Convention on Human Rights, but is instead making some other kind of human rights argument, it is not appropriate to apply the rule. But the Guide goes on to say that it is not necessary for the applicant to make explicit reference to the European Convention on Human Rights for further submissions to have been raised under the rule.

29. Well known in this court is the decision of **WM (DRC) v Secretary of State for the Home Department** [2006] EWCA Civ 1495, [2007] Imm AR 337, where the Court of Appeal described the Secretary of State's task in deciding whether there is a fresh claim: she must consider the new material, together with the old, and make two judgments. First, she has to decide whether the new material is significantly different from that already submitted on the basis on which a previous claim failed. If the new material is not significantly different, that is the end of the matter. Where the material is significantly different the Secretary of State must consider, secondly, whether it, with the material previously considered, creates a realistic prospect of success in a further claim. The Court of Appeal held that this imposes a somewhat modest test before a fresh claim arises. It then went on to hold that on a challenge by judicial review to a decision of the Secretary of State under Rule 353, a claimant must show that the decision was irrational.

30. Before the refined analysis of **WM** arises, however, there have to be "further submissions". It seems to me that whether there are further submissions must be decided in the light of the circumstances of the particular case. "Further" simply means additional. There needs to be additional information before Rule 353 is engaged. Use of the word "submission" indicates that something more is required than an insubstantial and unsubstantiated assertion. There must be some substance to the additional material for it to constitute a further submission. That does not mean that the additional information has to be in any way elaborate. In the light of new country information, for example, Rule 353 might be easily triggered by a simple assertion. It is a question of fact whether additional material constitutes a further submission. But further submission, in the terms I have indicated, there must be. Not to require this approach would mean that the process could be frustrated by the need to engage in the refined analysis required by **WM**, notwithstanding the most elaborate previous consideration of a person's case, by an insubstantial and unsubstantiated assertion on the eve of removal.

The claimant's submissions

31. The claimant contends that her removal was unlawful. First, it is said that when considering whether her removal would be a proportionate interference with her rights

under Article 8, and whether her submissions amounted to a fresh human rights claim, the Secretary of State acted unlawfully in failing to take into account the evidence relating to her mental condition, which was given in the interview on the day of her removal, 18th February 2008. Secondly, it is said that the Secretary of State acted irrationally or perversely in failing to determine that the claims of dependency and about her mental condition amounted to a fresh human rights claim. For sake of completeness, I should record that Mr Cox abandoned earlier grounds revolving around leave to remain as part of the legacy programme.

32. In relation to the Article 8 aspect of the case, Mr Cox began with the submission, which I accept, that under Article 8 the proportionality of an expulsion has to be determined by reference to all the facts of the case. In contravention of that requirement, he said, the Secretary of State had separated the claimant's mental health from her family life. Instead of evaluating the whole of the claimant's private and family life, the Secretary of State sought to squeeze the case into a pigeon hole labelled "foreign health care" or "suicide case". The correct approach, in his submission, would have been for the Secretary of State to recognise that a deterioration in mental health could change the quality of a relationship between a person and close family members. That could mean that expulsion of a long−term resident with close family ties was no longer proportionate. In Mr Cox's submission, in February 2008 the claimant was in a different position from that of 4 years earlier, the date of Mr Boardman's decision. Taking into account matters such as mental health problems and suicide risks, and other factors, Mr Cox submitted that the question was whether it was proportionate to separate a person from their family. As in **Huang**, he said, such cases do not depend upon surmounting some high hurdle.

33. Turning to the Secretary of State's consideration of the evidence about the claimant's mental condition, Mr Cox pointed out that the decision letter of 18th February 2008 referred expressly to Article 8. The Secretary of State's case was that the letter set out her consideration, including, under Article 8, of whether removal was appropriate in the light of her mental health. In Mr Cox's submission that letter was manifestly inadequate in its consideration of her mental health. The Secretary of State had accepted that the claimant attempted suicide 2 months previously and that she suffered from post−traumatic stress disorder. The claimant had told the Secretary of State expressly that she was dependent on her sister in the interview on 18th February 2008. However, the decision letter dated 18th February 2008 did not mention either the attempted suicide or the dependency. That, no doubt, was because it had been prepared some time earlier.

34. As to the fresh claim aspect of the case, Mr Cox said, and I accept, that there is no requirement for the assertion "I am making a human rights claim" to be made. That follows, in principle, and as a matter of construction of paragraph 353. It is confirmed by the Asylum Process Guide. Mr Cox submitted that it was irrational for the Secretary of State not to treat the statement by the claimant on 18th February 2008 in relation to dependency and her mental condition as matters falling within Rule 353.

Failure to have regard to the claimant's mental condition and dependency: Article 8

35. It will be recalled that the claimant's contention was that the Secretary of State failed to have regard to her dependency and mental condition, in particular the suicide attempt 2 months prior to removal, in deciding whether removal would be a proportionate interference with her Article 8 rights. At the outset of my consideration of this issue, let me briefly recapitulate the background to any Article 8 claim. There was the decision by the adjudicator in late December 2003, just over 4 years prior to the claimant's removal, where he made an explicit finding that, despite living with the sister and associating frequently with other family members, there was no family life in the United Kingdom as defined by the jurisprudence. In his view these were normal emotional ties. In the light of the fact that she was 23 when she arrived in the United Kingdom, he had held that there was no evidence of dependency. Following the dismissal of her human rights appeal, the claimant sought leave to remain on compassionate grounds through representations made by her solicitor and also on her behalf by her Member of Parliament. Her submissions concentrated on her long residence in the United Kingdom and various compassionate circumstances. There was no reference to human rights. In 2005 she briefly raised the issue of a well settled family and private life. When the decision was taken in February 2008, there was also the letter from her sister, but that simply said that the sister supported her with accommodation, meals and allowance. So there was nothing, in terms of the evidence, approaching Sedley LJ's irreducible minimum for the engagement of family life under Article 8.

36. On the day she was removed, the claimant said in the mitigation interview that she was dependent on her sister and she also said that she had attempted to commit suicide 2 months previously. As far as the dependency claim was concerned, she was asked about her relationship with her sister. The official must have been sufficiently concerned that he referred the matter up the line to an inspector. Albeit that no reasons were given for rejecting any dependency aspect to her claim, the fact was that it was considered. Subsequently, there is the statement from her sister dated August 2008. As I have already indicated in relation to the Secretary of State's August letter, it is fundamental, in my view, that the legality of the decision has to be judged in terms of the material available to the decision−maker at the time of the decision.

37. Mr Cox raises the relationship between the claimant's mental health and her family and private life. That way of putting her claim overcomes, as he successfully contended, the high threshold set by **N v United Kingdom** [2008] Case no 26565/05, a decision of the European Court of Human Rights, where removal is resisted under Article 3. It is well known that only in exceptional circumstances will an individual be able to do that on the basis of ill−health. That includes suicide and self−harm cases. I my view, however, a deterioration of mental health can bear on the integrity of a person and also on the relationship between family members. So not only can Article 8 be engaged, but it may become disproportionate to remove the person from the United Kingdom. The deteriorating mental health of a person could lead to the real, committed or effective support which Sedley LJ spoke about in **Kugathas**.

38. But that is not this case. When the Secretary of State took the decision on 18th February 2008 all she had were the submissions and the two letters from general practitioners, one dating from 2004, 4 years previously, and one presented on the day,

dated 2006. The 2004 letter said that the claimant's depression sometimes was worse and she felt suicidal. There was no evidence that the claimant ever had a referral to a psychiatrist. The claimant mentioned the suicide attempt, but there was no evidence about what, if any, medical treatment followed. All we have is some subsequent evidence that she told a doctor about it. On that basis it does not appear to be serious attempt at suicide. I accept the submission of the Secretary of State that there was no up−to−date medical evidence, no evidence from a psychiatrist, and only these two relatively brief letters from general practitioners, the most recent of which was 2 years old. There was no evidence that this suicide attempt, which she reported on the day, was serious or had been assessed by any relevant medical expert to be serious. In summary, while I hold that mental health problems can engage Article 8 and render it disproportionate to separate a person from the support of their family, that is not the situation here.

Should consideration have been given to any further submissions?

39. It is clear from the Asylum Process Guide on further submissions that the Secretary of State must consider what are called "implied human rights claims". As I have said, I accept Mr Cox's submission, and the Guide implicitly reflects this, that submissions do not have to come labelled as a "fresh claim". Nor is it necessary, as the Guide rightly says, for the applicant to have made explicit reference to the European Convention on Human Rights for further submissions to be raised on these grounds. The Secretary of State must be alive to potential fresh claims.

40. However, the first pre−requisite to a fresh claim is that there be further submissions. On the facts of this case, I can find no further submissions. There is no need to recount the details of the claimant's case up to 18th February 2008, the day of her removal. It is sufficient to recall that the focus of her case was long residence and connections in the United Kingdom. She had not, at any stage prior to this date, advanced further representations on dependency which could have engaged paragraph 353. On the day itself, she mentioned her dependency. The immigration official took that seriously enough to refer it up the line to an inspector. In my judgment, however, it was not enough for the claimant to make that assertion at so late a stage without anything to support it. There had been ample opportunity since December 2003 to engage Rule 353. As far as the suicide attempt was concerned, I have already said that there was no suggestion that it was serious. In any event, the claimant's suicidal tendencies were already known to the Secretary of State. These were mentioned at several points in the background minute of the Immigration Service official, when he asked for approval of a decision to remove from his superior. From his e−mail, the superior was very conscious of health, including mental health, in giving approval. In my judgment, mention of the attempted suicide on the day of removal, against this factual background was not a further submission.

Conclusion

41. In my judgment, therefore, this claim for judicial review must be dismissed. In my view, the Secretary of State did not err either in considering the human rights aspects of the claimant's position or in addressing paragraph 353 of the Immigration Rules.

Reliance might be placed on Article 8 to resist removal where there are consequences for the claimant's mental health. The preservation of mental stability is a pre−condition to effective enjoyment of Article 8 rights. However, this is not such a case. Nor, in the circumstances, can the Secretary of State be said to have acted unlawfully in its application of paragraph 353. There were no further submissions for it be engaged.

42. For sake of completeness, another aspect of delay was advanced by Mr Cox. He referred to a second sense in which delay was used in the **EB (Kosovo)** case. That was the delay mentioned by Lord Bingham in paragraph 16 of his judgment, where reference is made to delay which could be shown to be the result of a dysfunctional system yielding unpredictable, inconsistent and unfair outcomes. That delay might well found a claim. In my judgment the dysfunctional system referred to by Lord Bingham has no application in this case. There was no arbitrary, unpredictable, inconsistent or unfair treatment. Indeed, when difficult points arose, the officials in this case addressed them and referred them to more senior officials for a final determination. I also express the view that if I had granted relief, I would not have ordered the return of the claimant to this country for the purposes of consideration of her claim. The claimant has mental health problems and, in exercising my discretion, I would have been very concerned about exacerbating that condition, were she to return to this country and then find that at the end of the day her claim was refused.

43. MR DUNLOP: My Lord, standing−in, as you will recognise, I am very grateful for my instructing solicitor's assistance. She is just going to check one factual point, which is the date of the suicide attempt: whether it was 2 weeks before or 2 months.

44. MR JUSTICE CRANSTON: Yes, it was 2 months. I will correct that.

45. MR COX: My Lord, I have an application for permission to appeal, which I address you on shortly. I should say that at the conclusion of the argument yesterday, my learned friend indicated that the Secretary of State might want time to deal with any application for leave to appeal. I do not know whether or not that is something that needs to be raised again today, or whether that was essentially in case the judgment went against the Secretary of State. Perhaps if I make the application, then my learned friend can hear what I say and the provisional view your Lordship takes of it, and whether or not any further time is necessary.

46. My Lord, in my submission there are two issues of law. They have, I accept, a significant factual content, but I do say nevertheless that they are issues of law. The first is the Secretary of State's failure to give any reasons addressed to her finding that the claimant had attempted suicide, or that the applicant asserted that she was now dependent on her sister, shows that the Secretary of State did in fact, contrary to your Lordship's finding, fail to consider properly all of the evidence, and in particular the evidence that was given to her on the day.

47. The second issue is whether or not the Secretary of State's treatment of Article 8 in the decision letter can stand with your Lordship's conclusion that she was not entitled to find that a fresh claim had been made. In my submission, while I accept that those issues are arising on the specific facts of the case, they are very significant, indeed determinative, it seems to me, of your Lordship's conclusion. Therefore, they are

particularly important to the claimant. For those reasons, I would ask your Lordship to grant permission to appeal.

48. MR DUNLOP: My Lord, if you think you need assistance from us in relation to those, then I would ask for −−

49. MR JUSTICE CRANSTON: No, I am not going to give permission. I have accepted a number of submissions by Mr Cox in terms of the law. I think he is absolutely right in a number of respects, but the decision was very much based on the facts of this case. This is a matter which, if the Court of Appeal wants to consider the issue, it will need to give permission itself.

50. MR COX: So be it, my Lord. Thank you for starting your Lordship's day so early to accommodate me. I am very grateful.

51. MR JUSTICE CRANSTON: Do not worry.

52. MR COX: I would appreciate an order for legal aid taxation.

53. MR JUSTICE CRANSTON: I order that. Mr Cox, thank you very much for your help yesterday. Mr Dunlop, you were not here, but thank you for coming along this morning.