Neutral Citation Number: [2010] EWCA Civ 583

Case No: C5/2009/2541

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM & IMMIGRATION TRIBUNAL
IMMIGRATION JUDGE NEUBERGER
IA/17851/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th. May 2010

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE RIMER
and
SIR SCOTT BAKER

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
HK (TURKEY)	**Respondent**

- -
- -

Vikram SACHDEVA (instructed by **Treasury Solicitors**) for the **Appellant**
Seema FARAZI (instructed by **Messrs Birnberg Peirce & Partners**) for the **Respondent**

Hearing date: 12 May 2010

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Judgment

SIR SCOTT BAKER:

1. The respondent is a 22 year old citizen of Turkey who was successful in his appeal to the Asylum and Immigration Tribunal against a deportation order. The Secretary of State appeals against that decision with the permission of the Asylum and Immigration Tribunal.

The Facts

2. In January 1994 the respondent arrived with his family in the United Kingdom from Turkey. Their applications for asylum were dismissed but he was granted exceptional leave to remain on 14 December 2001. This was converted into indefinite leave to remain on 14 December 2005.

3. On 11 December 2007 he was convicted of an offence under section 18 of the Offences Against the Person Act 1861 and sentenced to detention for 2 years.

4. On 14 October 2008 the Secretary of State made a deportation order and gave removal directions. The respondent appealed. On 12 January 2009 the appeal came on before Immigration Judge Lucas and Mr James. It was allowed on Article 8 grounds. The Secretary of State sought reconsideration. After an initial refusal, reconsideration was ordered by Sales J.

5. Senior Immigration Judge Nichols found on 23 June 2009 that the Tribunal had erred in law because the Article 8 analysis was flawed. She directed it to be re-heard. On 21 August 2009 it was re-heard by Immigration Judge Blackford, Immigration Judge Neuberger and Mr Jones JP. That is the decision now under appeal.

The Background

6. The respondent was born in Istanbul in September 1987. He remained in Turkey until he was 6 years old. Since 1994 he has lived with his parents and siblings in the same house in north London. After attending the Highbury Quadrant Primary School for a short time he went to the Duncombe Primary School in Islington where he remained until 1999. He then attended the Islington Arts and Media Secondary School until he was 16 and after finishing school he started working with his father as an assistant delivery man for a catering company. However, after a year, due to back problems he was experiencing, he left this work and did a brick laying course for 3 months. He then worked as a labourer, learning brick-laying and plumbing and also worked in a mini-cab office.

7. The circumstances of his criminal offence are these. Towards the end of June 2007 he was walking home one evening when he became aware of a gang of youths chasing another youth. He did not get involved but when the gang dispersed he realised somebody was lying on the ground. He went over to see what had happened and was shocked to see that the young man in question was a boy called Martin who was younger than himself and whose brothers were known to him from school. Martin was fighting for his breath but sadly died before the police and ambulance arrived.

Their attempts to resuscitate him were unsuccessful. Everyone in the area was shocked by the murder.

8. Some three days later the respondent had gone to visit a friend and together they had gone to baby-sit for the friend's sister. Thereafter the respondent decided to walk home and on the way smoked a cannabis joint. At about midnight he passed the spot where Martin had been killed and decided to pay his respects. As he was standing there a group of boys, who were already there when he arrived, suddenly gave chase to a boy who was passing by. One of the group shouted out that the boy in question was one of those who had killed Martin. Three boys gave chase and the respondent joined in. When he caught up with them the boy they were chasing was on the ground and the respondent joined in a concerted attack, kicking him.

9. Shortly thereafter the respondent was arrested and bailed until his criminal trial which began on 11 December 2007. He and his co-defendant, Robinson, were the only two who were caught and charged. He did not know the other assailants who were involved in the attack. He was charged with wounding with intent to cause grievous bodily harm. He offered a plea of guilty to the lesser offence of wounding without the specific intent but this was not accepted by the prosecution. He was tried over a period of 4 days and convicted. The victim suffered a fractured hand, a head injury requiring stitches and bruising.

10. The Recorder in passing sentence said:

> "The mob, of which you were both a part, hounded Mr Cormack down and trapped him in an alleyway where you set about him. He received a good kicking and beating, your words, Mr Robinson, when you gave evidence, including being attacked with a shovel by one of your number. Both of you had his blood on your trainers or your trousers consistent with a much greater involvement in your attack upon him than either of you were prepared to admit in this court or are still prepared to admit in the reports that I have read.
>
> Mr Cormack received serious injuries as a result of the attack, although not nearly as serious as often seen in incidents such as these."

He continued a little later:

> "…. this was an ugly horrific attack on an entirely innocent young man by a mob with whom you associated yourselves that night and you are fortunate, through no thanks of either of you, that Conrad Cormack's injuries were not more serious."

Analysis

11. The judge made no recommendation for deportation. It is not clear whether he was asked to do so. I regard this point as neutral: as far as the present appeal is concerned see *DA (Colombia) v Secretary of State for the Home Department* [2009] EWCA Civ 682.

12. Paragraph 364 of the Immigration Rules, as amended HC 395 provides:

> "Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol Relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority."

Paragraph 380 provides:

> "A deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the status of Refugees or the Human Rights Convention."

13. The ultimate question in this case was therefore whether deportation of the respondent would put the United Kingdom in breach of Article 8 of the ECHR.

14. The Tribunal rightly directed itself in paragraph 43:

> "There is absolutely no doubt in our minds, and it is indeed conceded by both representatives, that this [respondent] is indeed prima facie liable to deportation as he has been convicted of a serious crime for which he received a prison sentence of two years. The Secretary of State has a duty to deter and prevent serious crime generally and to uphold the public abhorrence to such offending. He has a duty to remove foreign nationals who commit serious criminal offences and accordingly we do accept that the (Secretary of State) was acting fully in accordance with the law in deciding to deport the [respondent especially as in the circumstances of the crime committed by the [respondent]. Rule 364 clearly states that there is a presumption of the public interest that requires deportation."

The Tribunal then went on to consider Article 8. It was first necessary to decide whether Article 8 was engaged. This involved consideration of the separate, but factually interlinked, questions of family life and private life.

15. Mr Sachdeva, who appeared before us for the appellant, submits that the Tribunal's finding that family life was engaged was flawed. The thrust of his argument was that for family life between an adult and his parents to engage Article 8 something more than emotional ties must exist. He relied on *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31. At paragraph 14 Sedley L.J. accepted the following as a proper approach:

> "Generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependant minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, 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."

We were also referred to Arden L.J. at paragraphs 24, 25:

> "There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.
>
> Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: See *S v United Kingdom* (1984) 40DR 196 and *Abdulaziz, Cabales and Balkandali v the United Kingdom* [1985] 7 EHRR 471. Such ties might exist if the appellant were dependant on his family or visa versa…"

16. In my judgment Mr Sachdeva is seeking to read more into these passages than is warranted. Normal emotional ties will exist between an adult child and his parent or other members of his family regardless of proximity and where they live. Scrutinising the relevant facts, as one is obliged to do, it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority.

17. Mr Sachdeva argued that the Tribunal accepted that no more than emotional ties existed until the offence was committed in June 2007 and that the family rallied round thereafter, thus triggering more than the normal emotional ties, a finding which he submitted could not be sustained as establishing family life. The relevant passage is to be found in paragraph 56 of the Determination:

> "The emotional dependence of the [respondent] on his immediate family has increased as a result of his offence and sentence and we do believe, contrary to the submission of Mr Whitewell, that this dependency does now go beyond the normal emotional ties between parents and siblings and accordingly, the [respondent's] family life is indeed engaged under Article 8."

Mr Sachdeva focuses firmly on the word "now" arguing that the implication is that the Tribunal had concluded there was previously nothing beyond the normal emotional ties and therefore no family life. In my judgment, however, paragraph 56 has to read in the context of paragraph 50 where the Tribunal recorded the submission of Mrs Farazi, for the respondent, that his offence and subsequent prison sentence had drawn the family even closer together than previously. The critical issue was whether family life existed at the date of the hearing. The Tribunal, rightly in my view, found that it did and I am unable to infer a conclusion that there was no family life such as to engage Article 8 immediately before the offence was committed.

18. The Tribunal went on to say in paragraph 56 that even if they were wrong in finding that the respondent had established a family life for the purposes of Article 8 nevertheless it was quite clear he had established a well-developed and strong private life, one aspect of which related to his relationship with his parents and siblings. Mr Sachdeva does not challenge the existence of private life but contends that the Tribunal's finding is tainted by their alleged erroneous conclusion on family life. I do not think their conclusion on family life was an error and I cannot accept this submission. What the Tribunal did not do was spell out the detail of the respondent's well developed and strong private life that they had found.

19. Having found that Article 8 was engaged in respect of both family and private life the Tribunal had to go back to paragraph 364 of HC 395 and decide whether the presumption that the respondent should be deported was rebutted by his Article 8 rights in that it would be disproportionate to remove him from this country. Article 8 rights are of course not absolute but qualified by the considerations in Article 8(2). The Tribunal was faced with a difficult balancing exercise and I have some reservations about the manner in which they conducted it. They thought the case was finally balanced. In my judgment they should have taken more care to set out the factors on each side of the scales and given some indication of the weight that they carried. Whilst it is true that reading the Determination as a whole the relevant matters all appear at some point or another, nowhere is it possible to find the manner in which the Tribunal weighed them.

20. Mr Sachdeva argues that the Tribunal impermissibly diminished the gravity of the offence. He agues that this was a matter for the Secretary of State and the Tribunal had no business to superimpose its own view. The Tribunal said at paragraph 43:

> "…. there is absolutely no doubt in our minds, and it is indeed conceded by both representatives, that this [respondent] is indeed prima facie liable to deportation as he has been convicted of a serious crime for which he received a prison sentence of 2 years. The (Secretary of State) has a duty to deter and prevent serious crime generally and to uphold the public

> abhorrence of such offending. He has a duty to remove foreign nationals who commit serious criminal offences and accordingly we do accept that the (Secretary of State) was acting fully in accordance with the law in deciding to deport the [respondent] especially as in the circumstances of the crime committed by the [respondent], Rule 364 clearly states that there is a presumption that the public interest requires deportation."

21. The Tribunal went on to say at paragraph 44 that both representatives agreed that the point to be determined was whether in the particular circumstances of the respondent, it would be disproportionate to remove him to Turkey when balancing those circumstance against the Secretary of State's duty.

22. In looking at the seriousness of the crime, the Tribunal referred at paragraph 48 to the recorder's sentencing remarks and the probation officer's references to the risk of re-offending and the possibility of the victim's life being altered forever. The passage in the decision that gives rise to difficulty, however, is at paragraph 53 where the Tribunal said:

> "On the other hand the offence was committed in very peculiar circumstances. [The respondent] was, with very good reason, angry at the fact that the innocent brother of a good friend of himself had been murdered only few days previously and this does go a long way to explain why he became involved in the hounding and attacking of a young person who he believed, as the result of wrong information, was the perpetrator of the murder. The [respondent] did not seek out his victim but just happened to be near a gang who believed that the victim had perpetrated the murder a few days earlier and even though he had tried to minimise his involvement, he did indeed take some responsibility for his actions, by offering to plead guilty to a lesser offence of wounding and assault occasioning actual bodily harm."

23. Those experienced in the criminal law might see this paragraph as unduly favourable to the respondent. It might also be said that the sentence of 2 years detention was very lenient in the context of the recorder's sentencing remarks. The Sentencing Guidelines Council's Guidance suggests a starting point of 5 years and a sentencing range of 4 – 6 years detention. The offence of which he was convicted carries a maximum penalty of life imprisonment and involves, as a constituent element, an intention to cause really serious injury. The background to the offence would have carried more weight had the respondent pleaded guilty and the fact that he offered to plead guilty to a lesser offence seems to me to be of marginal relevance. Of more relevance are the points made by the Tribunal in the following paragraph namely the respondent's subsequent remorse and the fact that he has no other convictions.

24. It is, I think, correct to say that nothing the Tribunal said is, however, inconsistent with either the recorder's sentencing remarks or, more particularly, the actual sentence imposed.

25. Mr Sachdeva referred us to *OP (Jamaica) v Secretary of State for the Home Department* [2008] EWCA Civ. 440. At paragraph 24 Wall L.J. said:

> "The point, I think, shortly stated, is this. *N (Kenya)* makes it clear that proper weight must be given to the Secretary of State's policy on deportation, and in particular to the fact that she has taken the view, in the public interest that crimes of violence such as that committed by the appellant are sufficiently serious to warrant deportation. In such circumstances, her assessment had to be taken as a given, unless it is palpably wrong. It was, accordingly, at best a questionable operation for the first determination to evaluate the seriousness of the offence."

26. In *OH (Serbia) v Secretary of State for the Home Department* Wilson L.J., having considered *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ. 1094 said at paragraph 15:

> "Primary responsibility for the public interest, whose view of it is likely to be wide and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than "to weigh" this feature."

27. Mr Sachdeva further argues that a low risk of re-offending (something which could be said to apply to the respondent) does not mean that the Secretary of State is not justified in deciding to deport; serious offences raise other considerations. As Laws L.J. said in *AC (Turkey) v Secretary of State for the Home Department* [2009] EWCA Civ. 327, paragraph 14:

> "Clearly the Secretary of State has a particular responsibility to make judgments as to what Judge L.J. called "broad issues of social cohesion and public confidence" within the system of immigration control. The Secretary of State's judgment on those matters must broadly be respected by the AIT, at least so far as the policy itself is concerned. As Wall L.J. stated in *OP* (paragraph 24), the Secretary of State's assessment of those matters has "to be taken as a given unless it is palpably wrong". But then the AIT must exercise its own judgment as to whether, in view of that axiom or given, the decision to remove or deport is disproportionate in the terms of Article 8 (2) of the Convention. That decision is to be arrived at on the merits and is entirely in the hands of the Tribunal."

28. Among serious offences, there are of course degrees of seriousness. The best indication of the gravity of the particular offence will ordinarily, it seems to me, be

found in the Judge's sentencing remarks and the sentence passed, the starting point of course being the actual offence itself, in this case one under section 18 of the Offences Against the Person Act 1861. In my judgment tribunals, and indeed the Secretary of State, should be careful not to make findings or draw inferences that are inconsistent with anything said by the judge who presided over the trial. In this case the Asylum and Immigration Tribunal rightly directed itself at paragraph 43 in the passage I have set out that the Secretary of State has a duty to deter and to remove foreign nationals who commit serious criminal offences. He was, in my view acting fully in accordance with the law in deciding to deport the respondent. But, it seems to me, when it comes to the proportionality exercise it is necessary to form a view where on the scale of seriousness the respondent's conduct comes so that the Article 8 considerations can properly be balanced against the Rule 364 presumption. In some cases the seriousness of the offence is so overwhelming as to trump all else. This, however, was not a case, serious as it was, where the gravity was such that deportation was virtually inevitable albeit there would have to be compelling reasons to allow the respondent to remain here.

29. Having decided in paragraph 43 that this was plainly a case where the respondent had been convicted of serious crime and that the presumption under Rule 364 applied, the tribunal went on to say at paragraph 45, that in reaching a decision whether it would be disproportionate to remove him to Turkey it had to take into account the nature and seriousness of the offence, the circumstances surrounding its committal and the personal circumstances of the respondent as they are in the United Kingdom and as they would be in Turkey. I do not have any difficulty with this approach. Mr Sachdeva's complaint, I think, is that by considering the circumstances surrounding the committal of the offence the Tribunal was impermissibly trespassing on the nature and seriousness of the offence which was a matter for the Secretary of State. But it seems to me that circumstances surrounding its committal were relevant in deciding whether it would be disproportionate to remove him. Apart from anything else they might throw some light on whether the respondent was likely to offend again. Admittedly Rix L.J. said in *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ. 544 paragraph 37 the public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question of the right to re-offend in this country; it extends to deterring and preventing serious crime generally and to upholding abhorrence of such offending. However, it may, depending on the circumstances become relevant in the balancing exercise when one comes to look at Article 8 considerations and consider whether it would be disproportionate to make a deportation order. As Richards L.J. pointed out in *JO (Uganda) & anr v Secretary of State for the Home Department* [2010] EWCA Civ. 10, paragraph 29 the actual weight to be placed on the criminal offending must depend on the seriousness of the offence (s) and the other circumstances of the case.

30. Turning therefore to the specific grounds of appeal, as to ground 1 I am unable to conclude that the tribunal erred in law in diminishing the seriousness of the offence. It had well in mind the Secretary of State's view, the seriousness of the offence and the presumption that the public interest required deportation. The tribunal was right to look at the surrounding circumstances and although it gave a more favourable interpretation than others might have done to some of the facts it was entitled to do so.

31. On ground 2 I can detect no error of law in the tribunal's analysis of family and private life. Mr Sachdeva's submissions seemed to me to come very close to attacking the conduct of the balancing exercise by the tribunal and whether there was a violation of Article 8 such that interference with family and/or private life made it disproportionate to deport the respondent. There is, however, no ground of appeal on this point. It is true that the tribunal gave little assistance as to how they weighed the various facts in the scales. But it cannot be said that any material consideration has been overlooked in the judgment as a whole. For my part the respondent's best point is the length of time he has been in this country. He has been here since the age of 6 save for some 2 months when he returned to Turkey on holiday in the summer of 2005. The Tribunal referred briefly to *Maslov v Austria* (2008) Application No. 1638/03, in particular the court's statement at paragraph 75:

> "In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion."

But they made this reference only in the context of Mrs Farazi's submissions and they made no reference to it in the context of the private and family life the respondent had built up; nor did they refer in any detail to the nature of the respondent's private life. If the Tribunal failed to give due weight to this aspect of the case it can only have been beneficial to the Secretary of State's case.

Conclusion

32. There has been no rationality challenge to the Tribunal's decision and had there been one it would not in my view have succeeded. In order to succeed and have this case remitted for yet further consideration the Secretary of State must establish a material error of law. In my view he has not done so. The offence of which the respondent was convicted was a serious offence, not in the most serious category but serious enough. The Tribunal was aware of this and entitled, indeed required, to look at all the circumstances when conducting the Article 8 exercise. Others might have concluded that it was not disproportionate to deport the respondent but that is not the point. In my view the Tribunal made no error of law in reaching its conclusion and I would dismiss the appeal.

Lord Justice Sedley :

33. I agree that this appeal should be dismissed for the reasons given by Sir Scott Baker.

34. I agree in particular that the primary measure of the offending behaviour is the sentence, viewed where appropriate in the context of the sentencing remarks. It is not for either the Home Secretary or the Tribunal to reappraise the offending behaviour so as to either inflate or diminish the judicial evaluation of it. That is a function of, if anyone, the Court of Appeal. This is not, of course, to say that matters which were relevant to sentence – the likelihood of reoffending, for example - may not also be relevant to deportation.

35. If there is a gap in the tribunal's reasoning, it is their apparent omission of the fact that the respondent had been here since the age of six. The number of years a potential deportee has been here is always likely to be relevant; but what is likely to be more relevant is the age at which those years began to run. Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. The difference between the two may amount to the difference between enforced return and exile. Both are permissible by way of deportation, but the necessary level of compulsion is likely to be very different.

36. To have weighed this factor in the balance in the present case would, however, as Sir Scott Baker points out, only have tipped the scales further towards the respondent.

Lord Justice Rimer: I agree with both judgments.