Case No: C5/2007/2383

Neutral Citation Number: [2008] EWCA Civ 230
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT Nos: 1st Appellant IA/07363/2006; 2nd Appellant IA/07365/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 22nd February 2008

Before:

LORD JUSTICE PILL
LORD JUSTICE MAY
and
SIR PETER GIBSON

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Between:

ES (TOGO) & ANR	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Miss C Record (instructed by HS Kang & Co Solicitors) appeared on behalf of the **Appellant**.

Mr D Barr (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment
As Approved by the Court

Lord Justice Pill:

1. This is an appeal against a decision of the Asylum and Immigration Tribunal ("AIT") dated 6 July 2007, whereby it upheld the decision of the Secretary of State for the Home Department ("Secretary of State") refusing applications by ES and AS for indefinite leave (ILR) to remain in the United Kingdom.

2. The first appellant is a citizen of Togo, born on 5 December 1947, and the second appellant, her daughter, was born in the United Kingdom on 6 July 1989. The first appellant arrived in the United Kingdom in 1985 on a two-month visa. She overstayed. She was joined in the United Kingdom by her then husband in December 1985. She was questioned by immigration officers in 1989 and served with a notice of intention to deport on 27 August 1989. By letter dated 25 September 1989 the Secretary of State stated that he proposed to give directions for the first appellant's removal to Togo. An appeal was instituted but was withdrawn on 5 February 1990. Applications for leave to remain to train as a midwife were also refused. The first appellant's husband was removed to Ghana and was accompanied by the second appellant. On 15 April 1991 a deportation order was made against the first appellant under section 5(1) of the Immigration Act 1971 ("the 1971 Act"). The order required the first appellant to leave and prohibited her from entering the United Kingdom so long as the order was in force. Authority to detain her until removal was also granted.

3. In November 1995 the first appellant travelled voluntarily first to Togo and then to New Zealand. For four years she worked in New Zealand where she had several other children. The second appellant joined her in New Zealand and attended school there. The first appellant attempted to enter the United Kingdom in May 1999. She first attempted by using a New Zealand passport she had acquired but entry was refused. She returned two weeks later on 16 May using a false passport and gained entry illegally. Sometime after her entry she made an application for political asylum but this was withdrawn in March 2000. Meanwhile the second appellant, then about ten years old, had also entered the United Kingdom illegally, it is believed with her father.

4. The first appellant, with the leave of prospective employers, an NHS trust, sought a work permit under the 1971 Act. That was granted by letter of 12 September 1999 and it was pointed out that an exceptional course was being taken. In a letter dated 23 October 1999 it was made clear that the permission did not in any way guarantee that leave to remain would be granted. The first appellant is a midwife and the permit was granted "in light of current recruiting difficulties". On 31 March 2000 indefinite leave to remain was sought. On 11 August 2000 the first appellant was given temporary admission to the United Kingdom but it was stated that she was "a person who is liable to be detained." Residential and reporting conditions were also imposed. It was also stated that the first appellant had not been given leave to enter the United Kingdom within the meaning of the 1971 Act.

5. There then followed an appalling delay by the Secretary of State, in considering the application for ILR. Requests for an early decision were made in writing by

a lawyer, David Grant, acting on the first appellant's behalf on 11 April 2000, 11 January 2001, 22 March 2001 and 13 June 2002. The last of those letters requested the Home Office "to treat this letter as a formal complaint". Further letters were sent on 12 August 2002, 23 January 2003, 15 September 2003 and 26 April 2004. The letter of 12 August 2002 asked: "Please, please, please may I hear from you."

6. The first reply from the Home Office was on 11 May 2004 and stated that the writer was "sorry that you felt cause to complain". It was said that a response would follow as soon as possible. Further letters were sent on the appellant's behalf on 15 March 2005 and 12 April 2005. The first appellant continued to comply with the requirement to report monthly. In March 2005, five years after the application had been made, the appellant received a bare apology: "I am sorry that you have not yet received a reply to your previous correspondence". But there was still no action.

7. In June 2005 the first appellant's lawyer sought the help of the first appellant's Member of Parliament. The Member of Parliament wrote promptly to the Home Office, making representations on her behalf. Six months later the Member received a letter stating that the application for ILR had been refused. On 22 June 2006 notice was given of a decision to remove. The appellants appealed against that refusal but the appeal was dismissed by the AIT on 31 July 2006. Permission was granted for a reconsideration and the appeal was again considered in June 2007.

8. It was conceded that the appellants had the right to reside in New Zealand, where the first appellant has three other children and two adopted children. Both appellants have New Zealand passports. On behalf of the appellants it was argued, as it has been before this court, that the deportation order had impliedly been revoked or waived because temporary leave to enter had been granted since the order was made. The appeal was also based on a policy dealing with children with long residence, the long residence policy, and an alleged violation of Article 8 rights. The first appellant gave evidence to the Tribunal . The Tribunal held that the deportation order had not been revoked or waived. They stated:

> "We know of no authority for saying that a deportation order is impliedly revoked or varied. There is specific provision for an application to be made for revocation which, as is conceded, was not pursued."

9. The Tribunal considered in detail the long residence policy and accepted there was no evidence that the first appellant had "gone to ground". They found that the first appellant did not have leave to remain when the second appellant was born and that there would be no detriment to health if the appellants were to travel to New Zealand, where other family members live. The facts did not "come anywhere near establishing extreme hardship". The Tribunal found that the first appellant had "a poor history of deception". She had lied about her daughter continuing to reside in the United Kingdom in the late 1990s and she admitted that the truth that she was in New Zealand emerged only when a photograph was put to her. She had lied by pretending that she had

misunderstood the Home Office interviewer and had persisted in that lie until presented with evidence as to the true circumstances. She had lied about her reason for returning to the United Kingdom. She had made an asylum application when she had no fear of persecution. She did use subterfuge to gain entry in 1999, by using a false passport, with the intention of deceiving the authorities. The Tribunal stated:

> "…we are in no doubt at all that the reason she resorted to that method of entry was because she knew of the deportation order against her."

The Tribunal found that the Secretary of State had:

> "Given very good reasons why he has not applied the policy [that is, the long residence policy] in this case."

They saw little in favour of the appellants in policy terms.

10. The Tribunal also dealt in detail with the application of Article 8. They stated:

> "35 There will be an interference with the appellants' private lives as currently enjoyed because it will bring to an end their respective employments and prevent the second appellant from continuing her education in the UK. It will separate them from their friends and acquaintances."

However, the Tribunal went on to find that such a clear interference would not have consequences of such gravity as potentially to engage the operation of Article 8 The appellants had the option of relocating to New Zealand, where other family members reside. Employment and education would be available in New Zealand, as would a potential for friendships and links with the Roman Catholic community there. The Tribunal stated that, on their findings, consideration of Article 8(2) did not arise, but they nevertheless considered proportionality. They correctly applied the decision of the House of Lords in Huang v SSHD [2007] 2 AC 167. They considered the "highly regrettable" delay by the Home Office and the contribution the first appellant had made to the economic well being of the United Kingdom. They stated that they should not attach, "very much weight" to that aspect. The Tribunal again referred to the first appellant's "persistent disregard for UK immigration control".

11. The same issues are raised before this court. Permission to appeal was limited in that it did not permit reliance on Article 8. That limitation is now removed. For the appellants, Miss Record submits that there has been an implied revocation of the deportation order as a result of the long delay in attempting to enforce it, the admission of the first appellant in 1999, notwithstanding its existence, and the long delay which has occurred since admission.

12. It is an abuse of process, it is submitted, for the Secretary of State now to rely on the deportation order in refusing ILR, in the light of temporary admission with the right to work and the delay, when the Secretary of State has,

throughout, known of the existence of the deportation order. It is also submitted that a failure to grant ILR on the basis of the long residence policy was in the circumstances irrational and unlawful. On the facts, the decision on Article 8 was unlawful, it is submitted; first, in the decision that the article was not engaged and secondly, in the decision on proportionality. The case of the second appellant had, in any event, been insufficiently considered by the Tribunal Contribution made by the first appellant to the economic well being of the United Kingdom was, in the circumstances, a weighty factor in the equation. The United Kingdom had been the second appellant's home for most of her young life. Her friends were here and she was still in the course of education here.

13. It needs to be stated that the delay of over five years in determining the application for ILR was indeed deplorable. The application was properly pursued by many letters written on behalf of the appellants during those years. The letters were written by a lawyer in polite but forceful terms. There were no replies. The first reply after four years, stating that the Home Office were "sorry that you felt cause to complain" was, to put it no higher, offhand, with its suggestion that others would not be so sensitive.

14. No action followed for another year and then only after the appellant's Member of Parliament had made representations to the Home Office. No explanation for the lack of response or the delay has been forthcoming save that Mr Barr, who appears for the Secretary of State, put it down to "sheer bureaucratic inefficiency". He was not in a position to give further particulars. He had no instructions to apologise or to explain when the court asked questions it inevitably would ask following the extent of delay and the lack of response. That degree of casualness is itself deplorable and an attitude towards the appellants and to the court itself which falls far below the standard to be expected of a public authority. The implications of the delay upon the case itself must, of course, be considered but it has to be said at the outset that delay, however inordinate and inexcusable it may be, does not necessarily lead to a reversal of the Secretary of State's decision on an issue such as the present one.

15. I am unable to uphold the submission that the deportation order is for any reason ineffective. Section 5(1) of the 1971 Act provides, so far as is material:

> "…a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

Section 5(2) as amended provides:

> "A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes [a British citizen]."

Sections 5(3) and 5(4) provide further circumstances, which do not cover the present facts, in which a deportation order shall cease to have effect.

16. I cannot accept the submission of Miss Record that the wording of section 5 opens the door to an implied revocation. It expressly provides for a situation in which a deportation order shall cease to have effect. In Watson v Immigration Officer, Gatwick [1986] Imm AR 75 the Tribunal stated, at page 79:

> "In our opinion it is not possible for a deportation order to be revoked by implication, and such revocation can only be effected by an unequivocal decision by or on behalf of the Secretary of State resulting in an order -- not necessarily in any particular form, but an order nevertheless. This being so, the deportation order against the appellant was in force when he arrived at Gatwick airport and it was mandatory for the immigration officer to refuse him permission."

17. Miss Record submits that the present case is distinguishable. Because the first appellant did actually obtain admission the principle stated by the Tribunal does not apply. I agree with the statement of principle by the Tribunal. The Tribunal were dealing with a case where admission had been refused but the principle holds good even when admission has been obtained.

18. The Immigration Rules (HC 395) provide no support for Miss Record's submission. Paragraph 320(2) provides that entry clearance or leave to enter is to be refused if a person seeking entry is currently the subject of a deportation order. A specific provision is made for an application for revocation of a deportation order in paragraph 390 of the Rules, and paragraph 395 gives a right of appeal against refusal to revoke a deportation order. The effect of a deportation order is stated in paragraph 362 in a way consistent with the provisions of the statute.

19. The appellant remains liable for deportation under the Rules. The wording of section 5 is clear. The deportation order invalidates the subsequent grant of temporary permission to enter. The first appellant remains liable for deportation under the rules. Paragraph 363A provides that the order remains in force, notwithstanding provisions subsequently providing for administrative removal.

20. The long residence policy is set out in document DP5/96. It is a discretionary policy, outside the Rules. As set out in Fouzia Baig v SSHD [2005] EWCA Civ 1246 it provides:

> "DEPORTATION IN CASES WHERE THERE ARE CHILDREN WITH LONG RESIDENCE.
>
> *Introduction*
>
> The purpose of this instruction is to define more clearly the criteria to be applied when considering whether enforcement action should proceed or be initiated against parents who have children who were either born here and are aged [a figure appears to which the court returned] or over or where, having come to the

> United Kingdom at an early age, they have accumulated [again the same figure] years or more continuous residence."
>
> *Policy.*
> Whilst it is importance that each individual case must be considered on its merits, the following are factors which may be of particular relevance:
> a. the length of the parents' residence without leave;
> b. whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;
> c. the age of the children;
> d. whether the children were conceived at a time when either of the parents had a leave to remain;
> e. whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk;
> f. whether either of the parents have a history of criminal behaviour or deception."

21. I referred at paragraph 9 of this judgment to the Tribunal 's consideration of each of those factors. The court in Baig went on to cite a statement by a Minister at the Home Office in 1999 in a written answer to a parliamentary question. It included the statement:

> "For a number of years, it has been the practice of the Immigration and Nationality Directorate not to pursue enforcement action against people who have children under [the age of] 18 living with them who have spent ten years or more in this country, save in very exceptional circumstances. We have concluded that 10 years is too long a period. Children who have been in this country for several years will be reasonably settled here and may, therefore, find it difficult to adjust to a life abroad. In future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children in the family who have been living in the United Kingdom continuously for 7 or more years. In most cases, the ties established over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here. However, each case will continue to be considered on its individual merits."

22. The court in Baig also cited a commentary on the policy set out in Butterworth's Immigration Handbook, paragraph 1121. That states, "a general presumption" that there will be no enforcement action and adds:

> "However, there may be circumstances in which it is considered that enforcement action is still appropriate

> despite the lengthy residence of the child, for example in cases where the parents have a particularly poor immigration history and have deliberately seriously delayed consideration of their case. In all cases the following factors… [then the factors which are stated in the policy itself are set out]."

23. Referring compendiously to the documents before the court in Baig, Buxton LJ stated:

> "That, then, if this matter were to be remitted would be the policy that the adjudicator would have to apply."

24. Miss Record seeks to rely on the general terms of the policy and, in particular, on the presence of the word "and" in the sentence cited from the commentary. It has not been established in this case, she correctly asserts, that the appellants have deliberately delayed consideration of the case. Enforcement action is therefore not appropriate. I cannot accept that submission. First, I do not consider that the court in Baig was approving the commentary word for word. Secondly, the commentary was only giving an example or examples of situations in which an application may be refused. Thirdly, I do not consider that the word "and" in the sentence in the commentary was being used conjunctively. The words "in cases where" can appropriately be read in after the word "and" so that at least two possible situations are contemplated.

25. In applying the policy, the factors of particular relevance are those stated in the policy itself. I bear in mind the terms of the policy and the ministerial statement, including, of course, the statement that "each case will continue to be considered on its individual merits". I do not consider that the Tribunal can be said to have erred in law in reaching the conclusion it did on this issue. The Tribunal considered each of the factors said in DP5/96 to be of particular relevance. They were entitled to rely on the first appellant's deceptions, which included overstaying in 1985, returning to the United Kingdom in 1999 on a false passport, making a false asylum application, though it was not proceeded with, and telling lies to Home Office representatives and to the Tribunal.

26. The Tribunal were entitled to have regard to the opportunity both appellants had to return to New Zealand and to the opportunities available to them there. This is far from a case where there would be "extreme hardship" for the second appellant or, for that matter, for the first. It is not suggested that the second appellant has at any stage been personally culpable but the lawfulness of a policy which entitles the Secretary of State to take into account the first appellant's conduct is not challenged on the hearing of this appeal. I am quite unable to conclude that the Tribunal have erred in law in reaching the conclusion they did. They were entitled to hold that the Secretary of State had very good reasons why he did not apply the policy in this case.

27. Miss Record submits that article 8(1) is engaged and that, in considering whether the interference is proportionate to the legitimate public end sought to be achieved, the Tribunal have erred in failing to give sufficient weight to the first appellant's contribution to the health service and in failing to consider

sufficiently the separate position of the second appellant. Insufficient regard has been paid to the very long delay in dealing with the application for ILR, it is submitted, and the consequent building-up by both appellants of lives in the United Kingdom.

28. On the first issue the Tribunal accepted that there will be an interference with the appellants' private lives, including preventing the second appellant from continuing her education in the United Kingdom, and separating both appellants from their current friends. The Tribunal held that the consequences were not "of such gravity as potentially to engage the operation of Article 8". The Tribunal referred to the option of relocating to New Zealand, where other family members reside. In AG (Eritrea) v SSHD [2007] EWCA Civ 801 Sedley LJ, giving the judgment of this court, stated at paragraph 28:

> "It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one."

29. Deportation would involve a considerable interference with the current lives of the appellants. Whether that amounts to interference with "private life", as defined in Article 8, has not been fully argued at this hearing by reference to Convention authorities and I do not propose to give a ruling upon it. However, I am prepared, for the purposes of this case, to assume that Article 8 is engaged.

30. I am far from persuaded that the decision of the Secretary of State involved a breach of Article 8, having regard to the provisions of Article 8(2). The decision of the Tribunal is carefully reasoned and demonstrates a clear understanding of Huang and the authorities on delay. The law on delay was considered in HB (Ethiopia) [2006] EWCA Civ 1713. Buxton LJ, with whom Latham and Longmore LJJ agreed, set out propositions which apply when there has been delay in considering an application or in making a decision. I refer to those propositions (at paragraph 24) insofar as they are material to the circumstances of this case:

> "i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within article 8(1). That however is a question of fact, and to be treated as such.
>
> …
>
> v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with the previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome."

31. Reference was made to the case of Strbac v SSHD [2005] EWCA Civ 828.

Laws LJ stated:

> "It is of course right that administrative delay in the determination of an application may, at least if it proves to be substantial and to have brought consequences in its wake beyond the bare passage of time, be a factor which a decision-maker is obliged to consider. But as a proposition that does no more, with respect, than identify an actual or potential relevant factor. (And it is a factor which, I apprehend, must have very substantial effects if it is to drive a decision in an applicant's favour: see Anufrijeva v SSHD [2004]QB 1124])"

32. The Tribunal gave little weight on this issue to the first appellant's contribution to the health service. They considered the primary consideration to be the deceptive conduct of the first appellant. They were entitled to hold that in an Article 8 context the delay had "no very substantial effects". They sufficiently considered the position of the second appellant, aware as they were of the disruption of her education and social life. They had regard to and applied the principles in HB, to which I have referred, and were entitled to hold, in my judgment, that the very substantial effects which Laws LJ had in mind in Strbac, and the court had in mind in HB, were not present in this case. Overall, they were entitled to hold that the decision to refuse ILR was proportionate to the aim to be achieved.

33. The entire decision of the Tribunal was carefully reasoned and, with respect, well drafted. No error of law is demonstrated on any of the issues, either in the conclusions reached or in the way in which they were reached. I am conscious of the substantial effect of the Secretary of State's decision on the lives of the appellants and particularly on that of the second appellant, who has not been personally culpable. I am conscious of the extent of delay. However, on a correct interpretation of immigration laws and policies the Tribunal were entitled to uphold the decision of the Secretary of State and to refuse leave to remain.

34. I would dismiss the appeal.

Lord Justice May:

35. I agree that the appeal should be dismissed, for the reasons which Pill LJ has given. I only add that I entirely agree with what he has said about the apparent attitude of the Secretary of State to the admittedly appalling delay.

36. Pill LJ has given details of the delay between March 2000, when the first appellant applied for indefinite leave to remain, and June 2006, when the application was eventually determined but only after an intervention by a Member of Parliament. The time between the application and its determination was significantly in excess of six years, and entirely reasonable and measured requests on behalf of the appellants over these years received, in substance, no response. It became apparent that counsel appearing for the Secretary of State in this appeal had no instructions to apologise for this appalling delay, nor any

real instructions to explain to the court why it had occurred. This is not the first time, in my experience in this court, that extreme delay has occurred in an immigration case, when counsel's instructions have not apparently extended to any real apology or explanation. It is no criticism of the Secretary of State that the appeal is resisted, at it turns out successfully, notwithstanding the delay; but the manner in which counsel is apparently instructed to advance that resistance is, in my judgment, most unfortunate. My impression is that it goes further than just inadvertent bad manners. The impression is that the Secretary of State has consciously decided to instruct counsel not to embark on any real explanation for the delay. The fact that delays of this kind in immigration cases are publicly notorious does not mitigate the bad manners in an individual case nor obviate the obvious need to give an explanation to the court. It should not be necessary to say that the two individual appellants in this case are people, not statistics, and they personally deserve better treatment in this respect than these appellants have received at the hands of a public authority.

Sir Peter Gibson:

37. I agree with both judgments.

Order: Appeal dismissed