Case No: C5/2009/1166

Neutral Citation Number: [2010] EWCA Civ 251
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRUBINAL
(SENIOR IMMIGRATION JUDGE TAYLOR)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 16th February 2010

Before:

LORD JUSTICE PITCHFORD
LADY JUSTICE ARDEN
and
LORD JUSTICE THORPE

- -

Between:

PT (SRI LANKA)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Miss S Jegarajah (instructed by Messrs K Ravi appeared on behalf of the **Appellant.**
Mr M Barnes (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Pitchford:

1. The appellant and his wife are Sri Lankan nationals. They arrived in the United Kingdom on 31 August 2007. The appellant is now aged 76 and his wife is aged 65. They have, since their arrival, been living as a family unit with their daughter, whom I shall call VJ, and her two children, now aged seven and five years.

2. The appellant and his wife were refused asylum on 15 November 2007, against which decision the appellant appealed to the Immigration Appeal Tribunal. In a determination of 27 May 2008 Immigration Judge Beg dismissed the appeal on both asylum and human rights grounds, including the appellant's claim under Article 8 of the ECHR. Following her determination the decision of the House of Lords in Beoku-Betts v SSHD [2008] UKHL 38, [2008] 3 WLR 166 was published. On 29 October 2008 Senior Immigration Judge Martin ordered reconsideration of the appellant's Article 8 appeal. That hearing took place before Designated Immigration Judge ("IJ") Shaerf, who dismissed the appeal in a determination dated 23 December 2008. The appellant now appeals with the permission of Sedley LJ given upon a renewed oral application by Miss Shivani Jegarajah, who continues to represent the appellant before the full court.

3. The issue raised by the appeal, as identified by Sedley LJ, is whether IJ Shaerf adopted the correct legal approach to the issue of proportionality, and if so whether he was right to discount the weight to be given to a family life formed only while the appellant's unsuccessful asylum claim was being processed.

4. Before considering the IJ's application of Article 8 principles it is necessary first to summarise the evidence and the judge's findings of fact. The appellant himself did not give evidence. He had, however, been interviewed. He suffered from diabetes, for which he took medication. It was represented by his advocate at the appeal hearing that he was prone to confusion, although the judge later observed that no medical evidence was relied on to support that assertion. Oral evidence in support of the appeal was given by the appellant's wife and daughter. It was common ground that the appellant and his wife had three children, two adult sons and their daughter VJ. The sons had also left Sri Lanka and were living at the time of the appeal in Europe. VJ herself came to the United Kingdom in 1997. She sought asylum, married in 1999 and had her two children. In 2005 she and her husband were given indefinite leave to remain. According to VJ, she and her husband separated in May 2006 and she moved with her children to a house close to their primary school. At the end of August or beginning of September 2007 her parents moved in with her following their arrival in the United Kingdom.

5. On 28 July 2008 Guildford County Court made an order upon the application of the children's father for supervised contact with the children on 5 and 18 August 2008 when they were to be accompanied by the

appellant's wife. We are told by Miss Jegarajah that although there was initial contact there was certainly no contact with the father during 2009. According to VJ's evidence there had been violence in the marriage which on one occasion had been witnessed by the appellant's wife, which she also confirmed in evidence. Remarkably, however, there was no allegation to that effect. In a copy divorce petition produced in evidence VJ said that her husband had deserted her. Her mother, on the contrary, gave evidence that they sometimes lived together and sometimes lived apart. VJ said that her divorce petition had been filed in January 2008. A copy produced to the hearing was unstamped but dated 23 October 2008. VJ was inconsistent when asked whether she had accompanied her mother and children to contact visits. VJ said that her father, the appellant, was the last living member of his family. Her mother said, on the contrary, that he had two brothers in Sri Lanka. In evidence VJ said both that her husband had left her and later, in contradiction, that she had left him taking the children with her.

6. In interview the appellant himself had said that his two sons were living respectively in Denmark and Italy but had no permit to remain there. His wife, on the other hand, gave evidence that she had no idea of her son's whereabouts. VJ told the judge that both of her brothers had been given refugee status. VJ said that she suffered from depression and was not currently working. She hoped to return to full time work if her mother could continue to look after the children. Among the documents produced were copies of statutory sick pay certificates dating from 11 September 2008 and some unspecified documentary evidence that she had been prescribed an antidepressant medicine. IJ Shaerf summarised his findings of fact as follow:

> "28. I accept that the Appellant, his wife and their daughter are related as claimed and that since the Appellant and his wife have arrived in the United Kingdom, the Appellant's wife has helped very considerably with the care of her grandchildren and that the Appellant and his wife are, after some fifteen months in the United Kingdom, integrated into their daughter's family.
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> 39. Looking at the evidence of the Appellant, his wife and his daughter in the round I find for reasons mentioned that I consider none of them to be reliable or credible witnesses. I accept that the Appellant and his wife live with their daughter and that the Appellant's wife runs the daughter's home and is effectively responsible for the care of her two grandchildren. I accept that it is no doubt a considerable benefit for the Appellant and his wife, their daughter and their grandchildren to live under the same roof. I accept that the Appellant is elderly and not in the best of health. I note his wife in her

> statement said that her husband is too ill to attend his solicitors to give a statement and that her husband is confused. At the hearing she said that his hearing was poor: see hearing reply 133. The Appellant was present at the hearing. There was no medical evidence to explain why he could not give oral testimony.
>
> 40. Given the numerous apparent inconsistencies relating to basic matters such as the whereabouts of their two sons and their relatives remaining in Sri Lanka, I find that I can place little reliance on the evidence of the Appellant's daughter to be an unreliable witness for the various reasons already identified.
>
> 41. The evidence is that the Appellant and especially his wife take an active part in their daughter's household and in caring for their grandchildren. I accept they are able to give each other mutual support and their lives are fraught in that the Appellant's daughter states she is separated from her husband and is a single parent, her father is not in the best of health and the immigration status of her parents is uncertain. Beyond that I can place little weight on their evidence."

7. The judge turned to address the questions posed by Lord Bingham in R (Razgar) v SSHD [2004] UKHL 27, [2004] 2 AC 368 at paragraph 17. These were, of course, the questions, the answers to which would determine whether the removal of the appellant and his wife would constitute a breach of the United Kingdom's obligations under Article 8(1) and (2). Upon the first two questions the IJ reasoned at paragraph 43 as follows:

> "The first was whether the proposed removal would be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life. I am satisfied that the Appellant has established a private and family life with his daughter and her children. There was no evidence before the Tribunal of family life with any other relatives in the United Kingdom or of any other aspect of the Appellant's private life. The second is whether the interference would have consequences of such gravity as potentially to engage the operation of Article 8. In AG (Eritrea) v SSHD [2007] EWCA Civ 801 at para 28 Sedley LJ said:

> ‘While an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement (the ‘minimum level’) is not an especially high one.’
>
> Accordingly there is a low threshold in the engagement of Article 8. Once Article 8 is engaged, the focus moves, as Lord Bingham’s remaining questions indicate, to the process of justification under Article 8(2).”

8. As to the third question the Designated Immigration Judge said:

> “Next must be considered whether the interference would be in accordance with the law. It would be in accordance with the Immigration Rules and the general law.”

He proceeded to pose questions four and five together as follows:

> “Then one must ask if the interference is necessary in a democratic society, whether it can be justified by reference to the legitimate objective of Article 8(2) or the maintenance of proper immigration control. The Respondent has stated that the removal of the appellant would be necessary in the interests of maintaining proper immigration control. The final question is whether such interference is proportionate to the public end sought to be achieved.”

9. This was as Lord Bingham observed at paragraph 7 of his speech in EB (Kosovo) v SSHD [2008] UKHL 41, [2009] 1 AC 1159, a legitimate approach. He said:

> “In practice the fourth and fifth questions are usually, and unobjectionably, taken together, but as expressed they reflect the approach of the Strasbourg court which is (see Boultif v Switzerland (2001) 33 EHRR 1179, para 46; Mokrani v France (2003) 40 EHRR 123, para 27; Sezen v Netherlands (2006) 43 EHRR 621, para 41) that
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> > ‘decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued’.”

10. The IJ directed himself as to the application of the proportionality test in accordance with the guidance given by Lord Bingham in Huang v SSHD [2007] UKHL, [2007] 2 AC 167 and in Razgar. In Razgar at paragraph 20 Lord Bingham said:

> "The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material, which may not have been before the Secretary of State. A reviewing court must assess the judgment, which would or might be made by an adjudicator on appeal. In Secretary of State for the Home Department v Kacaj [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that: 'although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate.' In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

11. In Huang at paragraph 20 Lord Bingham explained:

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the 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 the 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. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself

> along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

12. In Miao v SSHD [2006] EWCA Civ 75, 12, Sedley gave assistance upon the practical application of the Strasbourg approach, which I gratefully adopt. He said:

> "…the state must show not only that the proposed step is lawful but that its objective is sufficiently important to justify limiting a basic right; that it is sensibly directed to that objective; and that it does not impair the right more than is necessary. The last of these criteria commonly requires an appraisal of the relative importance of the state's objective and the impact of the measure on the individual. When you have answered such questions you have struck the balance."

13. The IJ went on to consider the issue of proportionality when, in the words used by Lord Bingham at paragraph 20 of Huang, there were "circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere".

14. In VW & MO v SSHD [2008] UKAIT 00021, at the appeal, the immigration judge had concluded: "I do not find it proved that there are insurmountable obstacles to the whole family living together in Uganda."

15. The issue for the president, Hodge J, sitting with Senior Immigration Judge Storey, was whether the use of those words was appropriate to express the reasonableness or the seriousness of the step of requiring removal. He concluded at paragraphs 31-44 that, whichever form of words was used, the underlying test is the same. What must be shown is:

> "…more than mere hardship or mere difficulty or mere obstacles. There is a seriousness test which requires the obstacles and difficulties to go beyond matters of choice or inconvenience."

16. In EB (Kosovo) at paragraph 12 Lord Bingham placed the question of reasonableness in its context, saying:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors, which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

17. In the appeal of VW (Uganda) v SSHD [2009] EWCA Civ, 5, Sedley LJ observed that Lord Bingham had put to rest the issue whether the existence or otherwise of insurmountable obstacles to removal was a substitute for, or an application of, the test of whether in the circumstances removal would be reasonable. At paragraph 19 he said:

> "…While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts."

18. Finally IJ Shaerf correctly directed himself according to Beoku-Betts v SSHD not just to the interaction between the appellant and his wife with individual members of the family but with the circumstances of the family as a composite whole. The judge's conclusions on the issue of proportionately are recorded in the following paragraphs of his determination as follows:

> "The Appellant's daughter stated her marriage effectively came to an end in late May 2006. She claimed her husband failed to provide for her or their children. I note it was not until the end of August 2007 that her parents arrived in the United Kingdom and on the evidence of her mother at hearing replies 137 and 138, her daughter did not know her parents

were coming to the United Kingdom until they had arrived. Her daughter confirmed this at hearing reply 67. Their only contact was by telephone according to the daughter once every two or three months and according to her mother once every two months: see hearing replies 69 and 179. This had been the frequency of their contact for almost ten years since the Appellant's daughter had come to the United Kingdom in 1997. Considering the evidence, I do not find it has been shown that the interference to the private and family lives of the Appellant, his wife, his daughter and his grandchildren established only during the time taken to process the Appellant's claim which would result from the removal of the Appellant together with his wife from the United Kingdom because of the legitimate objects referred to in Article 8(2) of the European Convention and the maintenance of proper immigration control would be disproportionate.

49. I have taken into account the age and apparent infirmity of the Appellant as well as the comparative age of his wife and their daughter's broken marriage and that she is now a single parent but also the limited time, since the end of August 2007, during which the Appellant and his wife have been in the United Kingdom.

50. For the claim to succeed, namely that the removal of the Appellant and his wife together would be unreasonable and would amount to a disproportionate interference which would breach the rights of the Appellant or of any members of his family under Article 8 what must be shown is more than a mere hardship or mere difficulty or mere obstacle or that the interference or its consequences would meet the criterion of the test for seriousness, in other words that the obstacles or difficulties must go beyond matters of choice or convenience: see VW and MO 08/21. I find the Appellant has failed to show this is the case.

51. Considering all the evidence in the round and looking at the position from the view point of each member of the Appellant's family I have come to the conclusion that the appeal of the Appellant under Article 8 of the European Convention fails and with it that of his wife as his dependant."

19. It is clear from the opening words at paragraph 50 of the determination that, in applying the proportionality test, IJ Shaerf did not contemplate that it would be reasonable to require VJ and her children to move to Sri Lanka to enjoy family life with the appellant and his wife. He saw his assessment, rightly in my view, as an examination of the question whether the impact of cessation of a recently acquired family life, by the return of the appellant and his wife in Sri Lanka, was a proportionate and therefore legitimate consequence of necessary immigration control.

20. It is to this issue that Miss Jegarajah's submissions have been principally directed. Her submissions, both in writing and orally to us, have been direct and to the point and for that I am grateful. She submits that central to the judge's assessment were the interests of the appellant's grandchildren. It was no fault of theirs that their parents were separated and their mother was unwell. During the period of 15 months or so, between the grandparent's arrival in August 2007 and a hearing in December 2008, relationships had inevitably been forged. Grandmother had become an indispensable carer and family housekeeper. In VJ's precarious state of health this was, it is submitted, a vulnerable family which required maintenance of the grandparents support. If that support was removed there was a real risk that the children would require the intervention of Social Services. The fact that both emotional ties and dependency had been acquired during the period when the appellant's immigration status was precarious did not undermine, it was submitted, the strength and depth of that family life. It should not, as a matter of principle, be discounted on account of the circumstances of its origin. The IJ's finding that the removal of the appellant and his wife would be a reasonable step involving no more than "mere hardship or mere difficulty or mere obstacle", and that it failed to meet the criteria of seriousness since those obstacles or difficulties did not "go beyond matters of choice or convenience", were irrational.

21. In my view, Miss Jegarajah is right to emphasise the importance of the appellant's grandchildren in the assessment of proportionality. Removal of the children's family support system would indeed be a serious step to take which, if taken, must be properly justifiable in the circumstances.

22. In a consideration of proportionality the IJ was involved first in a fact-finding examination of the circumstances of the family life asserted on the appellant's behalf. This he did and, in my view, his findings are properly and adequately expressed at paragraphs 28 and 39 to 41 of his determination.

23. Having found that immigration control was a legitimate aim which in fact would interfere with the appellant's Article 8 rights, the IJ's next task was to balance the impact of interference on this family with the need to maintain that control. In striking the balance, what were the considerations which were material? It seems to me that the Designated Immigration Judge was in this case entitled to take account of the following: 1) the nature and degree of family life enjoyed before August

2007; 2) the nature and degree of family life enjoyed after 2007; 3) the circumstances in which family ties were enabled to grow and deepen; 4) the likely impact upon the family if those ties were broken. It does not seem to me that any one of these considerations trumps the others, but they all together form the picture upon which the ultimate judgment was to be made.

24. Miss Jegarajah does not argue that the circumstances in which these family ties were recently made, during a time when the appellant's immigration status was precarious, was a factor of minimal or no importance. She recognised, I think, that both the European Court of Human Rights and domestic courts in England and Wales habitually examine the question of whether, and to what extent, family ties forged in breach of immigration control affect the balancing exercise to which I have referred. Cynical opportunism will often be a significant factor in favour of the maintenance of proper immigration control. On the other hand, and by way of example, prolonged delay by the Secretary of State in processing applications for leave to remain may create the circumstances in which close family ties are inevitably forged. In such circumstances the balance may be more likely to tilt in favour of the individual and against the necessity for enforcement.

25. Every case has to be judged on its own particular facts. I accept that there is here no question of exploitation of immigration control, cynical or otherwise. The IJ did not find that there had been. In the absence of the children's father, and in view of VJ's ill health, her mother's assistance with home and children was bound to result in a deepening of family ties and the emergence of a practical dependency between family members. Nevertheless, the IJ was in my view entitled to, and was right to, have regard to the comparatively short duration of the emergence of these ties and their circumstances as material considerations.

26. Miss Jegarajah's main criticism of the IJ's determination in paragraph 47 is that it failed to carry out an examination of the effects of separation on this family; in particular, the effects of separation upon the daughter and grandchildren who would be left behind. I accept that, in almost all cases where proportionality is the defining issue, the immigration judge will be bound to consider the evidence as to what is likely to be the effect on the family life established of the enforcement of immigration control. In some cases that will involve a consideration of the choices which confront family members, such as should they remain together and return together to their country of origin, or should they separate in the more compelling interests of one or more of them. As Sedley LJ pointed out in VW (Uganda) at paragraphs 40 to 43, it will not always be possible for the fact-finder to make a decision what choices will be made by those most intimately affected by the decision. In such circumstances it may be possible, when judging proportionality, only to give due weight to the existence of a hard if not impossible dilemma. That is not, in my judgment, the present case. Here there was no real question of choice. These children were British citizens. Their mother had indefinite leave to

remain. The father remained in the United Kingdom. The family had been in the United Kingdom since 1997. No-one questioned at the tribunal hearing that the appellant and his wife would either be permitted to stay or return alone to Sri Lanka. The issue for the judge was whether their return would be proportionate, having regard to the likely impact of that interference on the family life which had been established.

27. It is at this point that, it seems to me, Miss Jegarajah's argument flounders. Save for the IJ's findings to which I have already referred, the only evidence of the bond existing between family members and an interdependency between them came from VJ who told the IJ (paragraph 10 of the determination):

> "Her mother shouldered a considerable amount of the childcare and her father despite his poor physical condition had been a great emotional support for her. Although the Appellant's daughter was currently not at work because of depression, she would like to work on a full-time basis which would be practicable if her parents remained with her. Her children have a good relationship with her parents and so do not really notice the absence of their father."

28. I should observe that there was before the IJ no medical evidence upon VJ's current condition of mental health, let alone the effect upon her mental health of any separation of the family. He was therefore left to evaluate the evidence of infrequent telephone contact between the appellant and his wife and VJ and her children between 1997 and August 2007; evidence that for 15 months grandmother had been giving invaluable practical support to her single parent daughter who had suffered from depression; evidence that there was a "good" relationship between her children and their grandparents, and evidence that VJ had plainly coped with her single parent status during the period between May 2006 when she and her husband separated and August 2007 when her parents arrived.

29. There was nothing more which the IJ could put in the balance. Miss Jegarajah candidly assured us that she had examined the case papers and found nothing of assistance to the appellant which was not referred to by the IJ in the extracts from his determination to which I have referred. In my judgment paragraph 47 was, in the circumstances of the present case, read, as it was intended to be, together with the IJ's findings of fact, an adequate and proper analysis of the issue of proportionality. IJ Shaerf was not, as I read it, excluding from his consideration or, as Miss Jegarajah put it, marginalizing the acquisition of a family life, simply because it was short-lived or because it had been acquired while the appellant's immigration status was uncertain. Had that been his intention it would have been a momentous decision explicitly stated in the determination. The judge was saying no more than when taking all these considerations, including the family life acquired into account the balance fell in favour of

the Secretary of State's decision. The judge recognised that this would create difficulties or hardship for the family, but his assessment was that these were not of such a quality that removal should be regarded as unreasonable and disproportionate.

30. In my view, these findings were properly available to the IJ and he made no error of law. For these reasons I would dismiss the appeal.

Lady Justice Arden:

31. I agree. Like my Lord, I would like to express my appreciation of the advocacy on this appeal, particularly that of Miss Jegarajah, who was well prepared and argued the appeal with admirable economy and persuasiveness.

Lord Justice Thorpe:

32. I too agree that this appeal should be dismissed and I associate myself with the commendation that has come from my Lord and my Lady for the quality of Miss Jegarajah's advocacy.

Order: Appeal dismissed