EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Mackay of Drumadoon
Lady Smith

[2010] CSIH 23
XA106/09

OPINION OF THE COURT

delivered by LORD REED

in application

by

R.A.A.P.)

for leave to appeal against a decision of the Asylum and Immigration Tribunal

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Bovey QC, Bryce; Drummond Miller

Alt: Lindsay; Solicitor to the Advocate General

25 February 2010

[1] The appellant is a national of Pakistan. He arrived in the United Kingdom on 15 May 2000 and applied for asylum on 19 September 2000. His application was refused on 10 February 2004. His appeal against that decision was refused on 24 May 2004. In the meantime he had married Shumalia Shezadi, who had arrived in the United

Kingdom with her mother on 10 January 2004. She too applied unsuccessfully for asylum. Their child, A.A., was born in Glasgow on 26 November 2004 and died four days later. In August 2008 the appellant and his wife applied for leave to remain on human rights grounds under Article 8 of ECHR. That application was refused. On 17 September 2008 the appellant was served with a notice informing him of the respondent's decision that directions should be given for his removal to Pakistan. He appealed against that decision under the Nationality Immigration and Asylum Act 2002. The appeal was heard in Glasgow on 27 October 2008 by Immigration Judge Quigley. She allowed the appeal. The respondent, who had not been represented at the hearing before Immigration Judge Quigley and had not submitted any written representations, then applied for the reconsideration of that decision. Reconsideration was ordered by Senior Immigration Judge Waumsley on 17 November 2008. The matter then came before Designated Immigration Judge Macleman, on a first stage reconsideration, on 13 February 2009. He held that Immigration Judge Quigley's determination was vitiated by three material errors of law. He decided that the case should proceed to a fresh hearing. The appeal was then reheard by Immigration Judge Corke on 2 April 2009 and was dismissed.

[2] The appellant has been granted leave to appeal to this court, on grounds which are to the following general effect. Immigration Judge Macleman is said to have erred in law in finding that there had been any material error of law committed by Immigration Judge Quigley. He therefore had no jurisdiction to order the rehearing of the appeal. Immigration Judge Quigley's decision should therefore have stood.

[3] The first alleged error of law we have to consider is set out in Immigration Judge Macleman's decision (under reference to the grounds on which the respondent applied for reconsideration) in the following terms:

> "(c)... the AIT... erred by finding that although no documentary evidence regarding the availability of similar medical treatment in Pakistan was before it, that it is unlikely that the appellant's wife would be able to obtain similar treatment in Pakistan. ...the conclusion reached is little more than an opinion as the AIT has not referred to any objective evidence...".

That ground referred to a passage in Immigration Judge Quigley's decision at paragraph 24, which was in the following terms:

> "Unfortunately, the appellant's wife has suffered two subsequent miscarriages, one in September 2007 and one very recently in September 2008. I accept their evidence [that is to say, the evidence of the appellant and his wife] that doctors are conducting tests on the appellant's wife to try and ascertain what the medical reason is for the miscarriages. I understand that she is presently awaiting notification of an appointment for a further consultation in hospital. Although no documentary evidence with regard to the availability of similar medical treatment in Pakistan was placed before me, I find that it is unlikely that the appellant's wife would be able to obtain similar medical treatment in Pakistan."

[4] That ground was not soundly based. Immigration Judge Quigley had before her evidence from the appellant and his wife that she "would certainly not receive any similar medical treatment in Pakistan" if they were removed from the United Kingdom. It was a matter for the Immigration Judge to consider that evidence and accept it or reject it. It did not require as a matter of law to be supported by documentary evidence or by "objective evidence": that is to say, evidence from an independent source. Immigration Judge Macleman however said in relation to this ground:

> "Ground (c) is soundly taken. The Immigration Judge had no basis for her conclusion regarding the medical evidence".

He accordingly upheld ground (c). In doing so, he was in error.

[5] The second alleged error in law is set out by Immigration Judge Macleman in the following terms:

> "(d) At paragraphs 25 and 30, the AIT refers to the death of the appellant's son and the fact that the appellant attends regularly at the graveside... the AIT has erred by failing to take into account the real possibility that the appellant could

> arrange for reinterment... in Pakistan and has failed to address the material fact that if the child had lived, his presence would not enhance the Article 8 entitlement of the family to remain in the United Kingdom as the family would be removed as a whole unit."

The matter with which that ground was concerned was dealt with by Immigration Judge Quigley primarily at paragraph 25 of her determination:

> "I also accept the documentary evidence of the appellant and his wife that they attend regularly at the graveside of their deceased son and that it is a source of great comfort to them that they are close to him. I accept completely that it would be greatly distressing to them if they were to be removed from the United Kingdom and, as a consequence, become unable to pay their respects to their deceased son. I have no hesitation in finding that such a situation would be unimaginably distressing and intolerable for most parents."

[6] In relation to ground (d), we note that the possibility of the exhumation of the remains of the appellant's child and their reinterment in Pakistan was not raised at the hearing before Immigration Judge Quigley. As we have mentioned, the respondent did not take part in the hearing. Immigration Judge Quigley could not have raised the matter herself to any useful purpose in the absence of any evidence as to the practicality of such measures. She did not therefore err by failing to take that possibility into account. Nor did she err by failing to address the "material fact", as it was described in ground (d), that if the child had lived his presence would not enhance the Article 8 entitlement of the family to remain in the United Kingdom, as the family would be removed as a whole unit. The situation where the child had died was not comparable with the hypothetical situation where a child was living, not least because, if the child was living, the family could indeed be removed as a whole unit, as it was put in ground (d). Immigration Judge Macleman however expressly upheld ground (d). His reasons for doing so are not entirely clear to us. He states:

> "As to ground (d), the Immigration Judge goes too far in respect of the death of the appellant's child, no matter how unfortunate that circumstance may be. She does not state the legal basis on which to evaluate the case for the appellant."

Ground (d) was however in our view ill-founded, and it follows that Immigration Judge Macleman erred in law in upholding it.

[7] The remaining alleged error of law is set out by Immigration Judge Macleman as follows:

> "(e) The AIT at paragraph 31 places considerable weight on the length of time...spent in the United Kingdom and the letters of support...at paragraph 34 the AIT refers to recent House of Lords case law...the AIT has erred in failing to refer specifically to the actual case citations but even if it can be assumed that the cases were *Beoku-Betts* v *SSHD* [2008] UKHL 39 and *Chikwamba* v *SSHD* [2008] UKHL 40...the AIT has failed to give adequate reasons...why the appellant's circumstances can be found to fall within the ambit of the two cases, and how the factual matrix of the appellant's claim in this context should succeed."

As presented in argument to Immigration Judge Macleman on behalf of the respondent, the point was narrower and was summarised by Judge Macleman as follows:

> "On ground (e), Mr Matthews submitted that the Immigration Judge failed to specify the authorities on which she relied, but it was clear on all authority including *Beoku-Betts* and *Chikwamba* that the third parties whose interests had to be taken into account were immediate family members, not extended family members or other friends or supporters."

That submission was accepted by Immigration Judge Macleman, who stated:

> "The Immigration Judge's passing reference to recent unidentified decisions of the House of Lords as to 'interests of third parties' shows that she misunderstood the law."

Ground (e) was accordingly upheld.

[8] The critical part of Immigration Judge Quigley's decision, so far as concerns this matter, followed her consideration of a number of other matters, including the medical treatment of the appellant's wife and the visits to their child's grave:

> "26. It is clear to me that the appellant and his wife have put down roots in this country. There are numerous letters of support in the Inventory of Productions from friends and colleagues and numerous people with whom they have made contact during their years in the United Kingdom.

> 27. I also place considerable weight on the appellant's evidence that he has family in the United Kingdom consisting of his cousin, aunts and uncles. I accept his evidence that he previously lived with his uncle in Glasgow but that he had to move to a friend's house when his uncle relocated to Manchester with his business. I also accept his oral evidence that he has lost contact with his family in Pakistan given the passage of time over 8 years. I also place considerable weight on the fact that the couple have had to rely on the kindness and financial help of friends because of their lack of immigration status in the United Kingdom."

Immigration Judge Quigley continued:

> "30. If the death of a newborn child, taken along with the other circumstances in the appellant's case, is not considered sufficiently compelling to merit a grant of leave, then it does seem to me that a careful study and assessment of the various circumstances has not been carried out.
> 31. I also place considerable weight on the fact that the appellant has spent almost one third of his life and his whole adult and married life in the United Kingdom. I have studied all the letters of support. I find that the fact that so many letters of support have been written does stress the importance and depth of the roots which the appellant and his wife have put down in Glasgow.
> 32. By way of example, the letter for Mrs A.I.states that she would not like to see them leave the United Kingdom as she would really feel their loss 'as if they are a member of my family'.
> 33. Many of the other letters are in similar terms.
> 34. It is clear that recent House of Lords case law has emphasised the point that the interests of third parties should also be considered in making an assessment under Article 8 of the ECHR.
> 35. In conclusion, I find that the appellant's human rights under Article 8 would be breached by the respondent's decision."

[9] In its context, Immigration Judge Quigley's reference in paragraph 34 to "the interests of third parties" was, as Immigration Judge Macleman described it, a "passing reference." We accept that Immigration Judge Quigley erred in treating the interests of third parties such as Mrs Ishtiaq as relevant to the assessment of the appellant's rights under Article 8 of the ECHR. In context, however, that error does not appear to have had any effect on the outcome of Immigration Judge Quigley's consideration of the case. It appears to us that her decision would have been the same

even if paragraph 34 had not been present in her determination. The error that she made was not therefore a material error.

[10] Finally, we note that counsel for the respondent conceded that Immigration Judge Macleman had no jurisdiction to consider whether Immigration Judge Quigley had made any other errors of law, not raised in the submissions made on behalf of the respondent, except to the extent that he was required to do so in accordance with *R* v *Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929. Immigration Judge Macleman did not however identify any such errors.

[11] In the circumstances we conclude that Immigration Judge Macleman had no proper basis for finding that there had been a material error of law committed by Immigration Judge Quigley or, therefore, for ordering a fresh hearing. Immigration Judge Macleman should have ordered that the original determination of the appeal should stand, in accordance with rule 31 (2)(b) of the Procedure Rules. It is open to this court, under section 103B (4)(b) of the 2002 Act, to make a decision in those terms. That appears to us to be the most appropriate way of disposing of this appeal.