Case No: C5/2007/1256

Neutral Citation Number: [2007] EWCA Civ 1554
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. TH/51569/2003]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 3rd December 2007

Before:

LORD JUSTICE MOSES,
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE WARD

- - - - - - - - - - - - - - - - - - - -

Between:

LK (SERBIA) & OTHERS — **Appellant**

- and -

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

- - - - - - - - - - - - - - - - - - - -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - - - -

Mr S Jegarajah (instructed by Messrs Pickup & Jarvis) appeared on behalf of the **Appellant**.

Ms L Busch (instructed by **the Treasury Solicitor**) appeared on behalf of the **Respondent**.

- - - - - - - - - - - - - - - - - - - -

Judgment

(As Approved by the Court)

Crown Copyright©

Lord Justice Moses:

1. This is an appeal in which I gave permission, which yet again raises the question as to whether, where an appellant relies on article 8, the Asylum and Immigration Tribunal erred in applying a test of true exceptionality. The appeal in question is from a determination dated 28 February 2007. It concerns a family from Serbia, the head of which family committed a serious criminal offence, and in respect of whom an order was made pursuant to paragraph 364 of the Immigration Rules House of Commons Paper 395, prior to the amendment in July 2006. The family consisted, at the time of the parents' arrival on 31 January 2000, of the appellant who is now aged 37, his wife and the two eldest children, R (with whom the appeal is particularly concerned) now aged 15, and Z who is nearly 13. A third child was born shortly after their arrival on 4 September 2001, and two further daughters, now aged four and two, have been born in this country. On 13 July 2001 the appellant, Mr K, pleaded guilty to criminal charges of cruelty to his daughter Z. She, as a result, was taken away and put into care with, at the time, two of the other daughters, and on 14 April 2003 she was adopted. The Secretary of State took the view that the appellant and his family, other than Z, should be deported on the grounds of that criminal offence, pursuant to paragraph 364, which reads:

> "Subject to paragraph 380 in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, 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 to another in all material respects. (In the cases detailed in paragraph 363(a) 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. Before a decision to deport is reached the Secretary of State will take into account the relevant factors known to him including:-
>
> (i) age
> (ii) length of residence in the United Kingdom
> (iii) strength of connections with the United Kingdom
> (iv) personal history, including character, conduct and employment record
> (iv) domestic circumstances

(v) previous criminal record and the nature of any offence of which the person has been convicted
(vi) compassionate circumstances
(vii) any representations received on the person's behalf."

2. Paragraph 380 provides that no deportation will be made if it is contrary to the United Kingdom's obligations under the European Convention on Human Rights. Since the decision to deport the family, a number of events have occurred which speak in favour of the family; particularly, two of the girls who had been in care are no longer in care and live with the family. In other words, both the appellant and his wife have successfully overcome what might otherwise have been the disastrous consequences of the serious offence of abuse. It is unnecessary, for the purposes of this appeal, to identify with any particularity the nature of the abuse, suffice it to say it was set out by the tribunal in paragraph 9 of its decision, and it discloses very serious violence indeed against the young, second-born daughter of this family. There were two particular factors which told in the appellant's favour and that of his family in relation to his application under article 8. But it is important to bear in mind that they were factors which the tribunal also took into account in considering the claim under the paragraph 364 of the Immigration Rules. That claim failed and there is no appeal in relation to that. The appeal is focused solely upon article 8.

3. The Tribunal concluded that, whilst it had been difficult for the appellant who was not allowed to work, to integrate in the community and earn his living, the children, and in particular the eldest, R, now aged 15, had done so with conspicuous success. She had done well in school, as the school itself says, and after initial difficulties has achieved a high standard of education, hopes to go on studying in higher education and wants to be a nurse. She has fully integrated into this country and, as one would expect, has friends here. Were she to be returned to Serbia, from where the family came -- a country of which she knows so very little -- she would lose all the advantages of the educational standard she has achieved and would, so it appears, have to return to an education at primary school level. There is a full statement, to which the tribunal referred, from a social worker employed by Oxfordshire County Council, Kay Oxlade, to that effect.

4. Quite apart from that feature of the case, there were also the facts in relation to the child who has been adopted, Z. Of course, now she is part of a different family, but to remove the rest of her blood relations will make it difficult for any relationship to be resumed should she wish there to be any such resumption. There has been only what is known as letterbox contact -- in other words, exchange of letters in the past; but it should be noted that the family has not seen her since 2005. She herself has not requested contact with the appellant's family in 2006 and there has been no exchange of any letters at all in 2007. The highest it can be put is that deportation will be an inhibition against any resumption of face to face contact. All of that the tribunal records and had well in mind when it reached its decision.

5. The first issue is whether the tribunal erred in law in reaching the conclusion it did -- that it would not be disproportionate for the family to be deported. At paragraph 25 the tribunal accurately set out the statutory questions which were posed by Lord Bingham in Regina (Razgar) v SSHD [2004] UKHL 27. It then went on as follows:

> "We have to decide, therefore, whether, on the evidence before us, the circumstances of this case will be described as truly exceptional. If the circumstances are not truly exceptional then this appeal cannot succeed under Article 8 where it has failed under the Immigration Rules. We have had regard to all the matters to which we were referred by the appellant's representative in putting forward her arguments under paragraph 364. In that exercise, we took account of the compassionate circumstances relating not only to the appellant but also to those around him who would be adversely affected by the deportation decision. Under Article 8, it is only the circumstances of the appellant which should be taken into account save where the adverse affects of others may impact directly upon the appellant. Therefore, the compassionate circumstances taken into account under paragraph 364 are at least as wide, if not wider, than those taken into account when assessing the appeal under Article 8. Taking that constraint into account, we have to say that we have not been able to find any circumstances which could be described as truly exceptional."

6. Had the decision ended there, it might well have been thought that the tribunal had assessed where the balance should lie between the demands of immigration control and the circumstances of this family, according to a standard of truly exceptional. But it is important to read on and look at the decision as a whole. The tribunal was at pains to set out the facts I have sought to outline before reaching its conclusionary paragraph at paragraph 31:

> "Looking to the evidence as presented, overall, and taking into account the detailed and careful submissions made by Ms Jegarajah, who referred us to a wealth of documentation in the bundle of documents, all of which we have read and taken into account, we remind ourselves that Article 8 is not an all embracing compassionate fallback. It is a difficult balancing act but is not to be treated as a vehicle for the exercise of a sympathetic or considerate judgment by reference to circumstances which are neither relevant nor weighty to the content of a claim on the grounds of private life, nor the

> degree of interference, nor the proportionality of the same. Although it is the circumstances of the appellant, which have to be taken into account, we cannot and have not ignored the adverse affect the decision to deport will have by its direct impact upon the family members of the appellant. We have also weighed in the balance the issue of delay; although not mentioned by either representative, delay is referred to in a previous skeleton argument; since we were not directed to any action taken by the appellant to advance his appeal, it appears to us that he has acquiesced in any delay such that it does not weigh sufficiently, with everything else, to tip the balancing scales in his favour. Having considered all the factors, including, in particular, the effect of the deportation upon the family members, especially [], the disruption to her education and the separation between her and [], the emotional impact upon the appellant's wife because of the severing, in reality, of any face to face contact between her and [] for the foreseeable future, we have not concluded these circumstances can be described a truly exceptional. Rather, we conclude any interference with the appellant's private and family life by his deportation is not a disproportionate exercise by the respondent of his discretion to make a deportation order. It is a proper exercise of that discretion in the maintenance of a fair and firm immigration policy in a democratic society. Accordingly, we dismiss this appeal on human rights grounds."

7. The first question, therefore, which then arises on Miss Jegarajah's excellent, clear and forceful submissions, is whether -- read as a whole -- the decision does disclose that the tribunal erred in law. That question has to be resolved according to the by now well-known passages within the judgment of the committee in Huang v SSHD [2007] 2 AC 167; [2007] UKHL at 11. That case made it clear that the tribunal should not ask in addition to the correct exercise of the balancing task posed by article 8(2) whether the case met a standard of exceptionality (see paragraph 20). All of this was explained by this court in the decision in AG (Eritrea) v the SSHD [2007] EWCA Civ 801. It would be a matter of unnecessary exegesis to attempt in my own words to say what has already been said by Sedley LJ between paragraphs 25 and 31 of the decision in that case.

8. Tribunals will not be helped by different judges, in different constitutions of this court, attempting to lay down what the decision of the House of Lords was in Huang, using words of their own. What I seek to emphasise is that, in carrying out the balancing exercise necessary in order to reach conclusion as to proportionality, the tribunal must bear in mind what has now been said over and over again: that, in normal circumstances, interference with family life

will be justified by the requirements of fair and consistent immigration control. That is to say no more than Lord Bingham said in Huang at paragraph 20; Carnwath LJ said in Mukarkar v the Home Secretary [2006] EWCA Civ 1045 at paragraph 23, and Sedley LJ said in AG (Eritrea) paragraph 31. I would therefore reject the suggestion advanced by Miss Jegarajah on behalf of the appellant, that the scales start at a point of even balance. The starting point is the need to maintain fair and consistent immigration control. It will therefore be difficult to outweigh the impact of that starting point for an appellant such as this, who has no claim to remain under the rules, to establish, nevertheless, that he and his family should be entitled to do so, by virtue of the rights enshrined in article 8. It is in that context that it is necessary to consider again what the tribunal said at paragraph 31, which follows their careful description of the particular family circumstances in the instant appeal.

9. It appears to me that they did carefully set out those factors which might weigh against the demands of immigration control and, by the end of paragraph 31, when they have carried out what they themselves describe as a difficult balancing act. They took the view that it was not disproportionate for the appellant and his family to be sent to Serbia. Looking at the decision as a whole, notwithstanding paragraph 26, I am far from satisfied that there was any error of law in applying an unlawful test of true exceptionality. But this court must -- even if there was an error of law in the approach of the tribunal -- consider whether there is any point in sending this case back, when it has already been reconsidered, to another tribunal to reach a fresh view. Miss Jegarajah says that there can always be cases where the compassionate circumstances touch the hearts of a fact-finding evaluative tribunal where there has been a decision to the contrary. That may be true, but that, in my view, discloses an erroneous approach to the task of this court. This court, where an error of law has occurred of the nature in the instant case -- namely, a balance according to too high a standard -- must always consider for itself whether there is any real prospect of persuading a fact-finding tribunal to reach the contrary conclusion. That requires this court to conduct its own evaluation, and it is not enough for an appellant merely to say that they may have the good fortune to appear before a tribunal with duly sympathetic members.

10. In the instant case, whilst I appreciate that the case is particularly hard in relation to the eldest child R, in my view the demands of keeping the immigration system fair and consistent far outweigh the sympathy due as a result of the educational success of the eldest daughter R. In my view, the conclusion as to where the balance lies, reached by the tribunal, was correct. One has to remember that the father has brought this upon all his family and upon himself. His treatment of the second-eldest daughter was truly grave and serious. Immigration control requires that, where such serious offences take place, this country should exercise the right to deport for the reasons identified by Lord Bingham in Huang, particular at paragraph 18. For those reasons, I conclude that this appeal ought to fail. Miss Jegarajah has not satisfied me that, reading the decision as a whole, there was any error of law, or that, had

there been any such error as she suggests, there is any reasonable prospect of an alternative, more favourable conclusion. I would dismiss this appeal.

Lord Justice Moore-Bick:

11. I agree. There is nothing I wish to add.

Lord Justice Ward:

12. I also agree.

Order: Appeal dismissed