Case No: C5/2007/2233
C5/2007/2233(A)

**Neutral Citation Number: [2008] EWCA Civ 853**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**
**[AIT No. IA/08096/2006]**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 9th June 2008

**Before:**

**LORD JUSTICE TUCKEY,**
**LORD JUSTICE CARNWATH CVO**
and
**LORD JUSTICE JACOB**

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**Between:**

**SK (SIERRA LEONE)** **Appellant**

**- and -**

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

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**Mr M O'Connor** (instructed by Messrs Howe & Co) appeared on behalf of the **Appellant**.

**Miss S Broadfoot** (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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# Judgment

**(As Approved by the Court)**

**Lord Justice Tuckey:**

1. This is an appeal by SK from a decision of the AIT which on a reconsideration affirmed its earlier decision dismissing his appeal from the Secretary of State's decision to deport him to Sierra Leone.

2. The appellant is a 28 year old citizen of Sierra Leone, although he was born in Gambia. He apparently entered the United Kingdom in October 2002 using a forged French passport. In January 2005 he married a British citizen by whom he has a son, born in October 2004, and a second child born in April 2007. His wife has older children now aged nine and 14 from earlier relationships. The wife's parents and brothers live in Coventry in the United Kingdom where the appellant presently lives.

3. In May 2005 the appellant was arrested on suspicion of immigration offences. He claimed asylum three months later but this claim was rejected by the Secretary of State and his subsequent appeal against this decision was dismissed. On 4 November 2005 the appellant pleaded guilty at the Coventry Crown Court to offences of obtaining by deception and using a false passport to obtain a pecuniary advantage for which he was sentenced to 12 months imprisonment.

4. The Secretary of State's decision to make a deportation order was made under section 3(5)(a) of the 1971 Act -- that is to say, deportation was conducive to the public good. The appellant's appeal against this decision was based primarily on paragraph 364 of HC395 before it was amended on 20 July 2006, but he also relied on article 8.

5. The appellant and his wife gave evidence at the first AIT hearing. The tribunal set out this evidence at length in paragraphs 33-85 of its reasons. In essence, this evidence was that they and their children (which included, of course, the appellant's step-children) were a close family. They depended very much upon the emotional support which the appellant gave them. The wife had only been out of this country once to the United States when she was 14 and the children had never been abroad. There was no prospect of her taking the children to Sierra Leone because they would not be able to adapt to life there. She could not rely on her parents, who were elderly, to look after them here.

6. The first ground of appeal is that the first tribunal confused the issues arising under article 8 with those arising under paragraph 364. The structure of the tribunal's decision certainly lends support to this argument.

7. At paragraph 114 the tribunal start by considering paragraph 364, which they set out in full. It is well known, and I do not need to cite it in this judgment. In paragraphs 115-130 the tribunal deal with the first six factors which have to be taken into account for the purposes of paragraph 364. At paragraph 131 it turns to deal with compassionate circumstances: factor 7. This, it says, necessitated detailed consideration. In the following five paragraphs the

tribunal consider what are obviously compassionate circumstances, although there are references in these paragraphs to family life and to proportionality, which suggests that it may at this stage have started to stray into article 8 territory as well. I shall have to come back to paragraphs 135 and 136 later, but what is clear is that in this part of its reasons the tribunal does not express any conclusion on the paragraph 364 issues which it had embarked on.

8. Instead, paragraph 137 starts straightaway with a finding that deportation would not be a breach of the appellant's article 8 rights. The reasons for this conclusion -- and the conclusion that to return the appellant to Sierra Leone would not be a breach of article 3 despite the fact that he had mental health problems -- are then given between paragraphs 137 and paragraph 179.

9. Paragraphs 180-184 are as follows:

> "180. In respect of his private life we find that the appellant has not proved that there is anything truly exceptional so as to make the decision to remove him disproportionate.
>
> 181. We therefore conclude that there is nothing of a compassionate nature about the appellant's case that tips the balance in his favour.
>
> 182. As stated above there is a large overlap between the human rights situation and the matters considered under paragraph 364.
>
> 183. Having considered all the aspects of the case we make a finding of fact that the public interest argument advanced by the Secretary of State based upon the nature of the offences committed by the appellant are not outweighed by his own personal circumstances and we find for the respondent in this aspect.
>
> 184. With regard to human rights claim we have set out above the issues we have considered regarding his family and private life and his medical situation and make a finding of fact that he has failed to prove that his removal would breach any of his rights under Article 3 or 8 for the reasons stated above."

10. Now the second tribunal, in upholding this decision, concluded that the first tribunal had in the course of its long decision examined thoroughly all the relevant issues in the round and had not made any material error of law.

11. Miss Samantha Broadfoot, counsel for the Secretary of State, made submissions to similar effect to us this morning, although she conceded that the first tribunal's decision could have been more clearly expressed. Although Miss Broadfoot relied on what Lady Hale said in AH (Sudan) v SSHD [2007] UKHL 49 about the need for appellate courts to respect the decisions of a specialist tribunal unless it was quite clear that it had misdirected itself in law, she accepted in the course of argument this morning that this statement had not imposed any different test from the one laid down by this court in R (Iran) & Ors v SSHD [2005] EWCA 982 at paragraphs 13-15 of its judgment. Whilst noting, as Moses LJ did, that the first tribunal's decision in this case is not easily digestible, I do not think it is necessary to consider this ground of appeal further because of the view I have formed about the way in which the first tribunal dealt with the impact on the appellant's family of the decision to deport him.

12. This is to be found in paragraph 135 and 136 of the tribunal's decision where it says:

> "135. Notwithstanding the arguments that have been put forward it is clear that neither the appellant nor his wife have established the existence of any legal insurmountable obstacle to the appellant's wife and children returning to Sierra Leone with him should he be deported. The objection to destination as put forward relates solely to the disruption and practical difficulties that may or may not be encountered which are not unique to the parties in this appeal but apply to any family removed as a result of deportation decisions.
> 136. In making the above statement we have considered the situation in Sierra Leone and although difficulties may be encountered they are not such as to make the decision to remove disproportionate."

13. These paragraphs appear in that part of the reasons where, as I have said, it is not clear whether the tribunal are considering compassionate circumstances under paragraph 364 or proportionality under article 8. The use of the words "insurmountable obstacle" and "disproportionate" suggests the latter. As the tribunal were applying a pre-Huang House of Lords exceptionality test, one can perhaps understand the harshness of the judgment on this part of the case. But such a test was inappropriate to consideration of the compassionate factor under rule 364.

14. Furthermore, the conclusion is based on the fact that there were no legal obstacles to the appellant's wife and children relocating to Sierra Leone. For that reason the appellant could only rely on "disruption and practical difficulties", and any family would suffer in this way as a result of a deportation decision. But the appellant was not relying on legal obstacles; he

was relying on the serious disruption and practical difficulty which his -- not any, but *his* -- family would suffer as a result of the decision. It was incumbent upon the tribunal to deal with this in the context of the appellant's reliance on compassionate circumstances. It was not enough, as Miss Broadfoot submitted, for the tribunal simply to have recited the appellant and his wife's evidence about this in the earlier part of their reasons. As Moses LJ said of the reasons in paragraph 135:

> "…that hardly begins to deal with the difficulties she [that is the wife] would have to face were she to have to take herself and her children to Sierra Leone when she has only left the country once and has other connections here in the country of which she is a citizen."

15. For these reasons I think the first tribunal made a material error of law in its approach to the question of how the decision to deport impacted upon the appellant's family. This is an error of law which should have been recognised by the second tribunal which should have then gone on to conduct a reconsideration. I would therefore allow this appeal and remit this case for reconsideration by the AIT.

**Lord Justice Carnwath:**

16. I agree. I add two points. First, the decision of the first tribunal illustrates the adage that it takes longer to write a short decision. The case was heard on 9 January and the decision was apparently prepared on 15 January. The timetable set on a tribunal in this kind of decision is very tight, but it was certainly a remarkable achievement to produce a detailed decision running to 186 paragraphs in that short timescale. Unfortunately, in doing that, the need to highlight very clearly the particular issues arising in respect of the Human Rights Act and the Rules and to deal with them distinctly seems to have been lost sight of. The other point concerns the reliance placed in her skeleton by Miss Broadfoot on the approach of Baroness Hale in AH (Sudan) which was recently adopted without argument by this court in AS and DD (Libya) v SSHD [2008] EWCA Civ 289. The judgment of the Master of the Rolls there says this:

> "The correct approach is to consider the judgment of the court below as a whole and only to hold that has erred in law if it is quite clear that it has done so." (Paragraph 19)

17. Miss Broadfoot did not have before her at that stage my own comments on this passage in AA (Uganda) v SSHD 2008 EWCA Civ 579. I there expressed concern that the formulation adopted by the Master of the Rolls might be seen as in some way intended to alter the law as comprehensively restated by Brooke LJ in a judgment of the court in R (Iran) v SSHD [2005] EWCA Civ 982. As my Lord has indicated, Miss Broadfoot accepted that there was in fact no material difference between the approach outlined by Baroness Hale

and the guidance on the question of reasons given by Brooke LJ in that case. In particular, it is apparent from the passages dealing with the reasons that Brooke LJ, while emphasising that a court will not interfere with a lower decision unless clearly persuaded that it is erroneous in law, treated the approach in immigration cases as no different to that applying to the review of any judgment of a lower court. In my judgment I also noted that that view had also been expressed by Sedley LJ with the agreement of the other members of the court in ECO (Mumbai) v NH (India) [2007] EWCA Civ 1330, where he said of the decision in AH (Sudan):

> "Their Lordships do not say, and cannot be taken as meaning, that the standard of decision making, or the principles of judicial scrutiny which govern immigration and asylum adjudication, differ from those governing other judicial tribunals, especially when for some asylum seekers adjudication may literally be a matter of life and death."

**Lord Justice Jacob:**

18. I agree with both judgments.

**Order:** Appeal allowed