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CO/12242/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 26 June 2009

B e f o r e:

MR JUSTICE MITTING

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

Between:
THE QUEEN ON THE APPLICATION OF JAV
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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MISS A JONES (instructed by BHOGAL PARTNERS) appeared on behalf of the **Claimant**
MR J-P WAITE (instructed by TREASURY SOLICITORS) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE MITTING: This is the hearing of the claimant's judicial review claim, pursuant to the grant of permission on the papers by Mr Rabinder Singh QC sitting as a deputy judge, of the defendant's decision to remove the claimant and her three children from the United Kingdom made on 15 December 2008. In fact, as I shall explain the true point in issue is whether or not the defendant's rejection of the claimant's claim to benefit from policy DP5/96 as modified was Wednesbury reasonable.

2. The immigration history is lengthy and complex. The claimant arrived in the United Kingdom with her husband some time in the year 2000. Both are Mongolian nationals; at that date they had two children, UB, born on 2 December 1987, now 21, and TB, born on 4 March 1992, now 17. Whilst in England they had another child, EB, born on 2 February 2002, now seven.

3. On 3 January 2001, the claimant's husband claimed asylum. The claimant and her then two children were cited as dependants upon that claim. The application was refused on 12 February 2001. The claimant's husband appealed against refusal, and the appeal was dismissed by an adjudicator in a determination and reasons promulgated on 4 October 2001. The adjudicator's conclusion was bluntly stated in the last paragraph of his determination:

> "It is always difficult to know exactly where fact parts from fiction, but I find overwhelmingly clear that the family history had been embroidered and exaggerated for the purposes of taking up residence in the United Kingdom for reasons primarily of economic and social advantage."

4. On 21st November 2001 the claimants then representatives requested that removal directions be delayed until the claimant had given birth to her third child, her daughter. That seems to have been acceded to, because the next event was the service upon 11 July 2004 of a notice of liability to detention and removal. The claimant and her husband were granted temporary release from detention on condition that they reported weekly to a Home Office centre, and resided at a specific address in Nottingham. The claimant and her husband did not comply with either of those conditions; they moved to a different address in Nottingham unknown to the immigration authorities. They were not encountered again until 10 April 2006, when immigration officers discovered where they were living during an enforcement visit to a house in Nottingham. The family was detained and removal directions were set for 14 April 2006. Two days before removal the claimant submitted an asylum claim in her own right, citing her two eldest children as dependants. That claim was refused on the following day, 13 April 2006.

5. On 20 April 2006, the claimant made an application under the one-off family exercise, a concession under which this family did not qualify. The application was refused on the same day. She challenged that decision by way of a claim for judicial review, and she and her children were released in accordance with the practice that then obtained. Strict reporting restrictions were imposed. Her application for judicial review was refused on 21 June 2006 and removal directions were set again for the removal of the whole family on 23 July 2006.

6. On 20 July 2006 immigration officials made an express agreement with the claimant that she and her three children would attend at Heathrow Airport to board the same flight as that upon which her husband was going to be removed on 23 July 2006. He was in detention, and accordingly there was no bar to his removal. It was agreed that travel facilities from her home in Nottingham to the airport would be provided and she was given tickets for the flight. The agreement demonstrated a degree of compassion on the part of the immigration officers for which they are not often given credit, and it was designed to avoid detaining the claimant and her children until removal. When, however, the time came for the transport to arrive at the family home, the claimant and her family were not there; they had absconded once again. Her husband was removed and has not, as far as is known to the defendant, returned to the United Kingdom since.

7. The claimant did not appear again until 22 January 2008 when she attended Refugee Action in Liverpool requesting she and her children be provided with accommodation and financial support. According to her they had up to that time lived with friends in Liverpool, but that accommodation was no longer available to them.

8. She was asked where she had been living she said she did not know. When she was asked where her oldest child (who was not with her) lived, she said he was studying at college; she said she did not know the address of the college. On this occasion, and in the light of the previous history, the immigration officers decided to detain the family. On being detained the claimant produced a letter from her then representatives AS Law, dated nine days before, on 14 January 2008. In it they asked for the family to be granted leave under the seven-year concession, DP5/96. That letter had been received by the defendant on 21 January 2008, the day before the claimant requested accommodation and financial support. It was established that the missing child was not the oldest child, but her second child TB. He had been studying with considerable success, as I will relate, at St Francis of Assisi College in Liverpool.

9. On 28 January 2008 the defendant refused the application for indefinite leave to remain under the seven-year concession. That was not an immigration decision and did not give rise to a right of appeal to the Asylum and Immigration Tribunal under section 82 of the Nationality and Immigration Act 2002.

10. Removal directions were set for 31 January 2008. The claimant filed a second claim for judicial review. Removal directions were cancelled and the family were released from detention. The letter of refusal set out in considerable detail and with perfect accuracy the immigration history which I have recited. Accompanying the claim for judicial review was a set of printed letters from TB's school to which members of staff had appended their own handwritten comments. Both the printed letters and the handwritten comments were highly complementary about TB's attendance at the school, his character, and success as a pupil. The second printed paragraph gives a flavour of the tone of the letters:

> "TB has played a significant part in our lives over the past two years since he has joined our school. His attendance, conduct and work have been exemplary; his behaviour and manners and have been a model to his classmates and his life here has reflected the best characteristics we hope

for in a young man. He was in the top stream of his year group as was expected to leave with excellent GCSE results."

11. The letter went on to ask that consideration be given to permitting TB to finish his GCSEs.

12. On 10 March 2008, in the light of those representations, the defendant issued a further decision letter which reiterated the refusal to grant indefinite leave under the seven-year concession. In the light of subsequent legal developments, it is worth quoting from one paragraph of that letter:

> "The SSHD acknowledges that the starting point for considering whether to grant ILR under the seven year child concession is that there is a presumption against removal. Consideration of the factors set out above will identify whether there are grounds for rebutting this presumption in any particular case. The consideration below shows that in the particular circumstances in your client's case there are strong grounds for rebutting the presumption and refusing the application under DP5/96."

13. The factors referred to in that paragraph were those set out in the policy as amended in 1999 to which I will refer later in this judgment.

14. On 20 May 2008 the claimant's application for judicial review was withdrawn by consent. The claimant's representatives signed a form of withdrawal to that effect. The agreement was reached on the premise that the claimant and her children would leave the United Kingdom voluntarily. They did not do so. Instead, further representations were made along the same lines as those that had already been made. On 20 November 2008 the defendant replied to the representations, again refusing to grant indefinite leave under the seven-year concession. That letter, unlike earlier and subsequent correspondence, did not recite the immigration history, but summarised it in trenchant words:

> "5. Since her arrival in 2001, your client and her family have persistently abused the immigration system. They failed to report in the years leading up until the family's detention in April 2006 making their removal impossible. In total, out of the 94 months your client has been in the UK, she has refused to comply with immigration rules for 42 of those months. In fact, aside from January 2008 when she presented herself as destitute, the only compliance we have had from your client was during her initial asylum claim and when she was detained in 2006. She has made repeated attempts to avoid removal, even though she had been informed she had no right of stay in the United Kingdom and that her removal was imminent. She evaded Immigration officials in July 2006 and absconded in order to avoid are her removal from the UK, despite the fact she knew her husband was to be removed on the same day, allowing them to build a family life in Mongolia.
>
> 6. Whilst it is accepted your client may have built up ties in the UK and

that her children are in full time education, it is considered that such ties are a direct result of her own actions in abusing the immigration system. She had as been blatant in her actions to avoid removal from the UK and for this reason has allowed bonds to be formed/the Home Office has made every effort to ensure that the life your client and her family was subjected to minimal disruption an example of this was attempting to remove them as a family unit. Your client, in avoiding her inevitable removal, made this an impossibility."

15. On 15 December 2008 the claimant and her children were detained pending their removal from the United Kingdom. A third judicial review claim was made on 18 December 2008; removal was deferred and the family was released from detention.

16. The concession applied by the defendant, the benefit of which is claimed by the claimant on her own behalf and on behalf of her children, is set out in paragraph 29 of the decision of the Court of Appeal in NF(Ghana) v Secretary of State for the Home Department EWCA Civ 906:

"**Deportation in the cases were there are children with long residence: Policy Modification announced by the Under-Secretary for the Home Department Mr O'Brien on 24 February 1999**.

Whilst it is important that each individual case much must be considered on the merits, there are specific factors that are likely to be of considerable relevance when considering whether enforcement action should proceed or be initiated against parents who have lengthy residence in the United Kingdom.

For the purpose of proceeding with enforcement action in a case involving a child, the general presumption is that we would not normally proceed with enforcement action in cases where a child was born here and has lived continually from the age of 7 or over, or where, having come to the UK from a early age, they have accumulated 7 years or more of continuous residence.

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 delayed the consideration of their case. In all cases the following factors are relevant in reaching a judgment on whether enforcement action should proceed:

- the length of the parents residence without leave: whether removal has been delayed through protracted (and often repetitive) representations or by the parents going to ground;

- the age of the children

- whether the children were conceived at a time when either of the parents

> had leave to remain
>
> - whether return to the parents' country of origin would cause extreme hardship for the children or put their health seriously at risk
>
> - whether either of the parents' have a history of criminal behaviour or deception.
>
> It is important that full reasons are given making clear that each case is considered on its individual merits."

17. The Court of Appeal, having reviewed the totality of the written and spoken material gave clear directions as to the law to be applied by the Secretary of State and by the courts in judging the Wednesbury reasonableness of any decision by the Secretary of State under it in paragraph 39:

> "For the future it seems us inevitable that tribunals considering the impact of Secretary of State's policy in relation to passing of seven years residence on the part of a child of the family should:
>
> (1) start from the position (presumption) that it is only in exceptional cases that indefinite leave to remain will not be given, but.
>
> (2) go on to consider the extent to which any of or a balancing of all of the factors mention in 1999 policy modification statement makes the case an exceptional one.
>
> It is only in such a way that the various documents can be reconciled into a single policy."

18. As a belt and braces exercise in the light of **NF(Ghana)** the defendant issued a further decision letter of 17 March 2009 in which the immigration history was again summarised and brought up to date. The defendant set out expressly the need for anxious scrutiny to be given to the decision; accurately set out the terms of concession under which the decision was being taken, and the observations of the Court of Appeal in respect of it. The letter noted that TB had been at a crucial point of his education when the 2008 decision had made, but had in fact been able to complete his GCSE study. The letter stated that a balancing exercise had been conducted under Article 8 in addition to consideration being given to any grant of indefinite leave under the concession; the defendant's position was maintained.

19. Miss Jones, who has represented the claimant today, has advanced her case and that of her children with commendable brevity and realism. She accepts that the challenge can only succeed if the decision making which I have set out is Wednesbury unreasonable, if anxious scrutiny is applied to it. There is no Article 8 challenge.

20. At the heart of the her submission is that the Secretary of State has not truly applied the "exceptional" test identified by the Court of Appeal in **NF(Ghana)**. She supports that submission by referring to the facts in **NF(Ghana)**, which she says, perfectly plausibly,

demonstrate a worse immigration history than that of this claimant. That part of her submission I am unable to accept; each of these cases must be judged on its own facts; it is the defendant's decision making in relation to those particular facts that is under scrutiny, and not an endless comparison with other circumstances of other families.

21. What the defendant had to ask herself was whether or not the circumstances here were, in the light of the considerations identified in the policy, such as to give rise to an exception to the presumption that indefinite leave should be granted. At all times, in the decision making process and since 2008, that is exactly what the defendant has done.

22. The immigration history of this claimant is exceptionally bad. As the history I have recited shows, she has not only absconded and gone to ground, but deliberately breached agreements made in good faith by immigration officers intended to alleviate the hardship which would be caused to her children by detaining her further. She has in this claim for judicial review done nothing more than repeat the claim which she abandoned in 2008, again indicating her willingness to depart voluntarily.

23. On the facts which I have recited the defendant's decision to treat the circumstances of this family as an exception to the presumption was fully justified. It was reached in the knowledge that it would sever the genuine and strong ties which the defendant's children, in particular TB, had established the United Kingdom. It is inevitable that when exceptions to the presumption are being considered they will give rise to hard cases in relation to the children, but if the true answer is that however badly the parents may have behaved, considerations of the welfare of the children trumps immigration control, then there is little room for the exercise of judgement by the defendant about whether or not a particular set of circumstances is exceptional.

24. Mr Waite makes the same point with only modest exaggeration, when he says that if that conclusion is reached then in this area, there will be an end to immigration control conducted on a rational basis.

25. This is a hard case. The defendant has always faced up to that. Her decision, whether made in 2008 or in 2009 was in my judgment unchallengeable. This claim for judicial review therefore fails.

26. I add by way of postscript something which may be relevant for the future. The third child has now been in the United Kingdom for more than 7 years. Given the history of this claimant's conduct and the three judicial review claims she has made, it would come as no surprise to me if she were to make a fourth, based upon her third child's 7-year residence. If such a claim is made under any policy which has replaced the now withdrawn concession made by the DP5/96, then in my view such a claim would be as much an abuse of process as in my view this claim has been, unless truly there are exceptional circumstances relating to that child which have not hitherto surfaced.

27. It is unusual for a judge to certify as clearly without merit a judicial review claim was which has been heard fully following the grant of leave by a judge, but I am satisfied on the history which I have recited that this claim is and always was totally without merit

not only because of the immigration history, but also because it is a simple repetition of a claim which has already been abandoned. Are there any other matters?

28. MR WAITE: Yes, I have an application for the Secretary of State's costs against the claimant.

29. MR JUSTICE MITTING: Miss Jones?

30. MISS JONES: I have not had a schedule and I don't know what the claim sums are.

31. MR WAITE: I would ask it to be assessed not agreed.

32. MR JUSTICE MITTING: Subject to detailed assessment?

33. MISS JONES: Yes.

34. MR JUSTICE MITTING: The claimant will pay the defendant's costs subject to a detailed assessment to be agreed.