Neutral Citation Number: [2011] EWCA Civ 274

Case No: C5/2010/1166

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
SENIOR IMMIGRATION JUDGE JORDAN
IA/25206/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2011

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE THOMAS
and
LORD JUSTICE HOOPER

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Between :

PE (PERU)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Ms Margaret Phelan (instructed by **Messrs Wimbledon Solicitors**) for the **Appellant.**
Mr Jonathan Swift QC (instructed by **Treasury Solicitors**) for the **Respondent.**

Hearing date: 8th March 2011

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Judgment

Lord Justice Hooper :

1. On 9 November 2009 the Asylum and Immigration Tribunal ("the Tribunal") (Immigration Judge Dawson and Mr AP Richardson) dismissed the appellant's appeal against the respondent's decision of 24 August 2009. The respondent had made a deportation order against the appellant on the basis of section 32 of the United Kingdom Borders Act 2007. The order arose out of the appellant's conviction on 5 December 2008 for possessing a controlled drug of class A (cocaine) with intent to supply contrary to section 5(3) of the Misuse of Drugs Act 1971, an offence for which he received a sentence of two and a half years' imprisonment.

2. Senior Immigration Judge Jordan, on an application for reconsideration, found no material error of law.

3. In paragraph 41 of the decision Immigration Judge Dawson wrote:

> We have found this a difficult case. We are bound to have regard to the entitlement of the Secretary of State to deter others by deporting someone such as the appellant for having committed a serious crime involving Class A drugs. Weighing all the matters in this case we are unable to find that removal would be disproportionate. Our conclusion is that removal would not be an unjustified breach of the Human Rights of the Appellant and of those close to him. We are not satisfied that the Appellant comes within the exception in Section 33 to automatic deportation on the basis that his removal would be in breach of his rights under the Human Rights Convention.

4. It is to be noted that the Tribunal found the case a difficult one. Mr Swift QC for the respondent, rightly in my view, accepts that if, in the third sentence, the Tribunal had said "proportionate" rather than "disproportionate" (with the consequential changes to the balance of the paragraph) and had allowed the appellant's appeal, then the respondent would not have been able to point to any error of law.

5. That demonstrates how closely balanced was the choice between the deportation being proportionate and being disproportionate. Others, including myself, might well have reached a different conclusion. Indeed, as Mr Swift accepts, if the European Court of Human Rights ("ECHR") assessed whether the appellant's deportation would be lawful in the light of Article 8, it might reach the conclusion that it was disproportionate. However Mr Swift submits, rightly in my view, that having regard particularly to *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2009] 2 WLR 512, Parliament by limiting any appeal from what is now the First Tier Tribunal to errors of law has accepted that possibility.

6. Provided, so Mr Swift submits, that what is now the First Tier Tribunal reaches a conclusion that was properly open to it then (absent other errors of law) neither the Upper Tribunal nor an appellate court can interfere. He cited to us *Piggott Brothers v Jackson* [1992] ICR 85 in which Lord Donaldson said, at page 92, reversing a decision of the Employment Appeal Tribunal:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option."

7. In the third sentence of paragraph 41 Immigration Judge Dawson wrote that "we are unable to find that removal would be disproportionate". Mr Swift for the respondent agrees that the correct way of expressing this conclusion would be to say something like: "The Secretary of State has satisfied us that the appellant's removal would be proportionate". Likewise in the last paragraph rather than saying "We are not satisfied that the Appellant comes within the exception ...", the Tribunal should have said that the Secretary of State has satisfied us that he does not come within the exception.

8. However, Ms Phelan does not submit that the manner in which the AIT expressed itself in this respect constitutes a material error of law.

9. There is no dispute in this case that the Tribunal reached conclusions of fact that it was entitled to reach. I shall summarise what appear to me to be the relevant ones shortly. Having reached those conclusions the only remaining live issue was proportionality. Ms Phelan sought to persuade us that whether *any* person's deportation was, on the facts as properly found by a Tribunal, proportionate or disproportionate for the purposes of Article 8 was a question to which there will only be one correct answer. In my view this submission is unsupported by authority. In the words of Lord Bingham of Cornhill in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] 1 AC 1159:

> 12. 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.

10. There will, of course, be cases where the "only permissible option" would be a finding that deportation would be proportionate or disproportionate but there will be cases where there are two permissible options. If that is the case then (absent other errors of law) the losing party will not be able successfully to appeal the finding.

11. We also discussed during the course of argument whether a finding, on the facts as found by the Tribunal, that deportation would be proportionate or disproportionate was a question of fact or a question of mixed law and fact or a question of judgment. It is of no practical significance but I prefer the view that it is a question of judgment (not discretion) and the Tribunal is carrying out what Lord Bingham described in the passage cited above from *EB (Kosovo)* as an evaluative exercise. As I have said, Mr Swift accepts that it is for the Secretary of State to satisfy the Tribunal that the deportation is proportionate for the purposes of Article 8.

12. Ms Phelan submitted that, in the light of the facts found by the Tribunal, the AIT erred in failing to take account of decisions of the ECHR, particularly *Űner v The Netherlands* 46410/99 [2006] ECHR 873, 18 October 2006. In that case the Court said:

> 57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland*, cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). In the case of *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:
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> - the nature and seriousness of the offence committed by the applicant;
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> - the length of the applicant's stay in the country from which he or she is to be expelled;
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> - the time elapsed since the offence was committed and the applicant's conduct during that period;
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> - the nationalities of the various persons concerned;
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> - the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
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> - whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> - whether there are children of the marriage, and if so, their age; and

> - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
>
> 58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:
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> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination.
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> As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).
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> As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the Court has held the "*Boultif* criteria" to apply all the more so (*à plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v. France*, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there.

13. Counsel for the appellant before the Tribunal (not Ms Phelan) had cited these two paragraphs in her skeleton argument prepared for the Tribunal hearing. Although the Tribunal did not cite this case, it is clear, in my view, that each one of these important criteria was considered by it, in so far as relevant to the appeal.

14. In the alternative Ms Phelan submitted that the decision of the Tribunal was manifestly wrong or, to put it another way, the decision was one that no reasonable tribunal could reach on the facts as found by the Tribunal.

15. A consideration of this argument requires me to set out the relevant background material and any conclusions thereon reached by the Tribunal.

16. The circumstances of the offence, the basis of the plea, which was found to have been entered at the earliest opportunity, and the mitigating features are to be found in the sentencing remarks:

> On 1 October 2008 you were seen by police officers receiving a package in a Costa coffee shop. You then took a number 91 bus to make your way home. The officers suspected, or having information contained drugs, and stopped you [sic]. You were asked whether you had anything on your person that you should not have had, and you told them that you did have something of that nature, and the package was found.
>
> That package contained just short of a quarter of a kilogram of powder, of which 60% was cocaine, a class A controlled drug. When you were interviewed about your possession of that class A drug you refused to answer any questions. You have subsequently given an explanation to the court in the basis of plea, which is accepted by the prosecution. You repeated that explanation to the probation officer who prepared your pre-sentence report and it has been put before me again in litigation today.
>
> The basis of your guilty plea is that you had been given the package of drugs by a man you did not wish to name, in exchange for a small financial reward for a small amount of drugs for your personal use. You had been persuaded to become involved in the production of saleable cocaine at street level, because you and your family were in debt and this was a way to earn additional money to pay those debts.
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> When your home was searched there was a large amount of white powder found. That turned out to be a drug named phenacetin, a pain killer which used to be prescribed as a similar form of drug to paracetemol. It was withdrawn from sale as apparently it is highly carcinogenic, therefore a dangerous substance in its own right.
>
> You accept that you had been given that cutting agent before the time of your arrest in order to bulk up or to use the drug dealers' term "cut" the powder that you had been given, to increase its quantity in order that it could be sold on a retail basis. I sentence you on the basis that this was, as you have set out in your pre-sentence report to the officer and in your basis of plea, a one-off offence. You have not done it before.

17. Senior Immigration Judge Jordan summarised the sentencing remarks in this way:

> 5. ... the sentencing judge had given the appellant the maximum credit for his guilty plea emphasised by his immediate admission to the officers that he was in possession of the drug when arrested on the bus, was content to treat the appellant as a man of good character who is leading a perfectly respectable life. The judge, when sentencing the appellant, imposed a period of imprisonment he said was the least he was permitted.

18. Although the appellant had previous convictions, as Senior Immigration Judge Jordan wrote in his decision:

> 4. The Tribunal did not take into account his previous convictions which had become spent under the Rehabilitation of Offenders Act.

19. In seven paragraphs the Tribunal summarised the pre sentence report. It is sufficient for my purposes to say that the Tribunal reached the conclusion that the probation officer's reference to the risk of re-offending being medium was possibly an error in the light of the officer's recommendation that the appellant should receive a suspended sentence. The Tribunal also looked at the progress made by the appellant in prison and concluded that the appellant's risk of re-offending "lies somewhere between very low and medium" and that this was evidenced by his conduct whilst in custody.

20. The Tribunal set out in some detail the appellant's personal circumstances:

> 28. It is the appellant's case that he has been in a relationship with his partner since 2001 and she is now (formally) his fiancée. As to the appellant's private life, he has lived in the United Kingdom since 1994 when he was 13. He has obtained various educational qualifications here and prior to his conviction he had been in employment. There is no dispute as to the facts relied on by the appellant in support of these assertions, Mr Little correcting the position in this regard taken by the respondent in the refusal letter.
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> 29. We have no doubt about the strength of the relationship between the appellant and his partner. We accept the evidence in the appellant's statement that they met every day and we accept they intend to marry if the appellant is released and will live together in a flat obtained by his partner. We accept the consistent evidence we heard that during the week the appellant has been staying with his partner in her parents' house and at the weekend they would stay together at his parents' house. Evidence of their commitment to one another is demonstrated by the frequency of telephone contact as recorded in a calls report from HMPS PIN phone system and the bundle of letters between the parties. In addition to the oral testimony of the witnesses, we take account of the number of photographs of the

appellant, his partner and various family members. Ms De La Cruz's parents were at court in support of the appellant's appeal.

30. We found Ms Da Silva [the fiancée] to be a compelling witness. As with all witnesses, she adopted a statement which reveals aspects of their life together prior to the appellant's conviction. She explains that they officially engaged on 13 February 2008, several months before that conviction. She explains that the appellant forms an integral part of her life which involves around him. They would meet up for lunch at work and go to the gym together. She explains that not to have the appellant in her life would be very traumatic and adversely affect her. She refers to their plans to have children. She was born and raised in the United Kingdom and has a job and accommodation here. She does not consider it would be feasible for her and the appellant to try and live in a country alien to them. She explained to Mr Little in cross-examination that if the appellant is deported to Peru, she would not accompany him. She confirmed that she did not speak Spanish, her second language being Portuguese.

31. We found the appellant's mother to be a similarly compelling witness. She appeared anxious and to an extent distraught about the prospect of her son's removal. Acknowledging the appellant to be an adult, she nevertheless states that he is an integral part of her family.

32. Mrs De La Cruz explained in cross-examination the extent of her family in Peru, her married sister and their children. She has been back to Peru twice since coming to the United Kingdom in 1991. The first was in 2002 when her father died. She also went in 2009 in May in connection with her church. Her brother lives in Argentina. She explained that her sister has had breast cancer when Mr Little enquired whether she would be in a position to help the appellant. Her husband would need to look after the couple's children who are aged 15 and 18. She explained to our question that she spoke Spanish to the appellant although he did not understand some of the words because of the time that he has spent in the United Kingdom.

33. The appellant's brother Leoncio explained that he is currently looking for a job and appeared positive about the prospects of an interview. He only spoke Spanish rarely to the appellant and from time to time has to translate for their mother. His younger brother Cesar cannot understand Spanish. He has been back to Peru since 1994 having travelled on a separate occasion when his mother and Cesar went in 2002. He explained that he is single. He further explained that his uncle and aunt live in a very small house in Lima in an unpopular

area. He also explained the purpose behind his visit to Peru which was to try and locate his father. He had been unsuccessful.

34. We consider generally that the protection of family life under Article 8 involves cohabiting dependants such as parents and their dependent minor children, whether it extends to other relationships depends on the circumstances of a particular case. Given the amount of time the appellant and Ms Da Silva spend together, we are satisfied that although they have not yet set up a household together, the length of their relationship, the fact of their engagement and the amount of time they physically spend together in their respective families' houses leads us to conclude that they do have family life within the meaning of Article 8.

35. The appellant, his mother, step-father and two brothers have continued to live together in the same household even though the appellant and Leoncio were adults. We are not satisfied that there are more than the usual emotional ties between adults and a parent on the facts of this particular case. The family have together found themselves in financial difficulties which was one of the reasons advanced by the appellant for his involvement in the crime. We take account that immigrant families are likely to have a stronger bond even when members become adults. But in this particular case having regard to the appellant's plans to live with his partner and his age, the relationship he has with his family does not constitute family life within the narrower meaning in Article 8. We remind ourselves that the ability of the family to live together despite their ages is an undoubted expression of their private lives.

…

38. We give weight to the amount of time that the appellant has spent in the United Kingdom including the passage of time that has passed without offence since his conviction in 1998 and the fact that these convictions have now become spent. We accept that the appellant probably has sufficient Spanish to function in Lima, employing Spanish for affectionate remarks to several of his letters to his partner. But he has not been back since arriving in the United Kingdom in 1994 and would be returning to a world he has not known since his early teenage years. He would be without the connections he has built up and as well as the family he has in the United Kingdom including his partner. Although he has relatives there, we do not consider that he will find things easy in the light of the account we received of their circumstances. Our conclusion is that the appellant would find after all this time removal to be difficult and would bring about hardship.

> 39. We turn to the impact on others if the appellant were removed. We are satisfied that his partner Ms Da Silva would find it a real blow. Such is the commitment between the parties and their evident affection, we do not rule out the possibility of her giving further thought to whether she should accompany him but having regard to the family she has in the United Kingdom, the place of her birth, her lack of knowledge of Spanish it would be unreasonable for her to be expected to join the appellant. We further find that the removal of the appellant would be hurtful to his mother. The family's circumstances are modest and it is unlikely that contact could be made regularly by visits. We must take account of the fact that if removed, the appellant could not even contemplate returning to the United Kingdom for 10 years. The close family relationship the appellant has not only with his partner but also his family would be ruptured. We have no doubt about the testing nature of such a separation coupled with the prospect of many years before contact could be made again other than by electronic or telephone means."

21. Of particular importance from the point of view of the appellant is the finding that the appellant would find the removal difficult and that it would bring about hardship given that he had left Peru in 1994 at the age of 13 and the finding that the appellant's fiancée would not accompany the appellant to Peru and that it would be unreasonable to expect her to do so.

22. There then followed in the decision a paragraph in which the Tribunal summarised the presenting officer's arguments and ended with this sentence:

> He reminded us that there were no children of the relationship between the appellant and [his fiancée] otherwise he observed that was about as far as he could go.

23. There then followed paragraph 41 which I have set out above in paragraph 3.

24. The Tribunal carefully set out all the facts and factors relevant to the exercise of its judgment whether the respondent had satisfied it that the deportation would be proportionate. Like Senior Immigration Judge Jordan I take the view that the Tribunal was entitled to reach the conclusion which it did.

25. Whilst feeling considerable sympathy for the appellant because the Tribunal decision could just as well have gone in his favour and that of his fiancée and family, the appeal, in my view, has to fail.

LORD JUSTICE THOMAS

26. I agree.

LORD JUSTICE SEDLEY

27. I agree, with the same reluctance as Hooper LJ, that this appeal has to be dismissed. The decision of the tribunal is properly structured, is balanced in its appraisal of the facts, omits nothing relevant, adopts a legally correct approach, and comes to a conclusion which, while others equally well qualified might well not have come to it, is tenable.

28. I gave Ms Phelan permission to appeal, nevertheless, so that she could develop the argument that Strasbourg jurisprudence had rendered the ascertainment of proportionality, if not a question of law, then a question of judgment which a reviewing or appellate court was as well placed as the initial tribunal to take. I do not think she has been able in the event to make this argument good. The reason why the Court of Human Rights, in cases such as *Űner* and *Maslov* 1638/03 [2007] ECHR 224 (22 March 2007), makes its own appraisal of proportionality is that it possesses the unique status of a court both of first instance and of last resort. It may be anomalous that, despite the underlying legislative policy of patriating the Convention rights, the superior courts of the United Kingdom lack the same power of reappraising merits as the Strasbourg court, but without doubt they do lack it.

29. A near relation of merits review, close scrutiny, has been considered in this appeal; but while close scrutiny may permit intervention in, for instance, the fact-finding process, its bearing on the ultimate judgment of proportionality is hard to discern. To use it as a licence for too-ready findings of perversity, which is generally all that is left at that stage, would be subversive of legal certainty.