AO (unreported determinations are not precedents) Japan [2008] UKAIT 00056

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 29 April 2008

Before:

Mr Justice Hodge, President
Senior Immigration Judge Waumsley

Between

AO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr P Costello, of UK Visa Services
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

No judge must treat as a precedent an unreported decision of the Tribunal without paying proper regard to para 17 of the AIT Practice Directions.

DETERMINATION AND REASONS

1. The appellant is a citizen of Japan, born on 13 September 1969. On 1 November 2006 she applied for indefinite leave to remain in the United Kingdom as a spouse of a person present and settled in the UK (paragraph 287 Immigration Rules HC 395 as amended).

2. The application was refused on 24 September 2007. The appellant's appeal was heard by Immigration Judge Majid. He allowed the appeal on human rights grounds in a determination promulgated on 12 November 2007. The respondent's application for reconsideration was granted by a senior immigration judge on 2 December 2007.

The Immigration History

3. The appellant came to the United Kingdom on 6 September 2000 as a student. Her leave was extended on various occasions until 31 October 2004. On 1 June 2004 the appellant married WH a British citizen. She thereafter applied for and on 3 November 2004 was granted an extension of her leave to remain as a spouse. This was further extended until 2 November 2006. Her application for indefinite leave to remain as a spouse was made in time on 1 November 2006.

4. On 20 August 2007 the appellant was asked to resubmit her husband's current passport which had been withdrawn from the Public Enquiry Office in 2006 and to provide a letter from her husband confirming that he supports the application. Neither the passport nor the letter were provided. On 24 September 2007 a Notice of Immigration Decision was issued as a refusal to vary leave. In the section "Decision and Reasons" it was stated:

> *"You applied for indefinite leave to remain in the United Kingdom as the spouse of W...H.., but your application has been refused.*
>
> *In view of the fact that you failed to respond to our letter dated 5 August requesting your husband's passport and a letter from him confirming that he still supports your application, the Secretary of State is not satisfied that you have not failed to produce within a reasonable time documents or other evidence required by the Secretary of State to establish your claim to remain under the Immigration Rules."*

5. In her appeal the appellant said:

> *"At the time of my application in October 2006 I submitted my husband's passport, completed application form, our child's birth certificate, marriage certificate, evidence of our cohabitation in the past two years, my payslips, P60 and bank statements.*
>
> *It is submitted that I have provided enough evidence for Secretary of State to approve my application as I satisfied all the requirements of Immigration Rules concerning spouses applying for indefinite stay.*

6. The appellant went on to state that after the application was submitted her husband had committed adultery and had abandoned her and her child for another woman. She said *"We are still married but do not keep in contact. My child is British national and I established my life in the UK with him."*

Immigration Rules

7. The requirements for indefinite leave to remain for a spouse or civil partner of a person present and settled in the United Kingdom are set out in paragraph 287 Immigration Rules. That provides, so far as is relevant as follows:

> *"287(i)(a) The applicant was admitted to the United Kingdom or given an extension of stay for a period of two years in accordance with paragraphs 281 – 286 of these Rules and has completed a period of two years as the spouse or civil partner of a person present and settled in the United Kingdom ….*
>
> *(ii) The applicant is still the spouse or civil partner of the person he or she was admitted or granted an extension to stay to join and the marriage or civil partnership is subsisting, and*
>
> *(iii) Each of the parties intends to live permanently with the other as his or her spouse or civil partner."*

8. Here the appellant having married on 1 June 2004 was granted a two year extension of her leave to remain as a spouse for a period from 3 November 2004. At the time of the application she had completed two years as the spouse of a person present and settled in the UK and satisfied paragraph 287(i)(a).

9. Paragraph 322 of the Immigration Rules provides so far as appropriate:

> *"322. Grounds of which an application to vary leave to enter or remain in the United Kingdom should normally be refused.*
>
> *(9) Failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules."*

10. The appellant had been written to on 20 August 2007 by the Border & Immigration Agency requiring the appellant under paragraph 222 of the Rules to *"re-submit (her) husband's current passport – he withdrew this from the Public Enquiry Office last year"* and *"We also require a letter from your husband confirming that he still supports your application"*. The passport was never returned to the relevant authorities. No letter was then or has been subsequently submitted confirming that the appellant's husband still supports her application.

11. The grounds for refusal have been set out in paragraph 4 above. They are badly worded. The application to remain as the spouse of the appellant's husband was clearly refused. The reasons given were the failure to supply information. The information required was that needed to satisfy paragraph 287(a)(ii) and (iii) confirming that the marriage is *"is subsisting"* and that *"each of the parties intends to live permanently with the other as his or her spouse"*. The marriage has clearly broken down. It was and remains the case that the parties to the marriage do not intend to live permanently with each other. The requirements of paragraph 287 Immigration Rules are not satisfied in this case and the appeal on that ground necessarily fails.

Error of Law

12. This was an appeal under the Immigration Rules. The immigration judge entirely failed to address the issue. It is however clear and remains unchallenged by the

appellant that she could not satisfy the relevant Immigration Rule. She had failed to supply the information required under Rule 322. She was not and is not living permanently with her spouse and the marriage cannot properly be described as *"subsisting"*.

13. The immigration judge however allowed the appeal but addressed only issues under Article 8 of the European Convention on Human Rights.

14. In the respondent's challenge to this decision in the application for reconsideration she said of the basis of the findings under Article 8:

> *"his (the immigration judge's) … findings are fundamentally flawed. At paragraph 21 of the determination he makes a clear finding that the Appellant's husband has abandoned the child and mother since Jan 2007. He then finds the child cannot be removed and that the child will be left in Social Service' care if the mother is removed from the UK. There is no analysis of why the child cannot return to Japan with his natural mother. There is no reason why the child will need to be separated from his mother in this case. As to the reference to Social Services there was no evidence the Child was subject to a care order or Court proceedings which regulated contact with the father who had been found to have severed his family life with both the Appellant and his son.*
>
> *The IJ has failed to follow the case of Konstatinov v the Netherlands ECHR (26/04/07) which reiterated the principles of "whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them".(para 48)*
>
> *It is noted the child was born in 2004 and could easily adapt to life in Japan where the appellant has family.*
>
> *If the IJ had properly applied the law he would have found there was no breach of Article (8) following Huang".*

15. A further ground for reconsideration was that the immigration judge relied on an unreported case of this Tribunal AS/18287/2004 promulgated in 2007 describing it as a precedent and so ignoring the requirements of the AIT Practice Directions. These provide at paragraph 17(6) as follows:

> *"17. Reporting and citation of determinations*
>
> *17.6 A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless:-*
>
> *(a) the appellant in the present proceedings, or a member of the appellant's family, was a party of the proceedings in which the previous determination was issued; or*
>
> *(b) the Tribunal gives permission.*

17.7 An application for permission to cite a determination which has not been reported must:

*(a) include a **full** transcript of the determination;*

(b) identify the proposition for which the determination is to be cited;

(c) certify that the proposition is not found in any reported determination of the Tribunal or of the IAT and has not been superseded by a decision of a higher authority; and

(d) be accompanied by a summary analysis of all other decisions of the Tribunal and all available decisions of higher authority, relating to the same issue, promulgated in the period beginning six months before the date of the decision proposed to be cited and ending two weeks before the date of the hearing. (This analysis is intended to show the trend of Tribunal decisions on the issue)."

16. The respondent relies in part on the claim that the immigration judge erred in law in his approach to Article 8 ECHR by relying as a precedent on the unreported determination AS/18287/2004. In effect the implication is that it is wrong in law for an immigration judge to rely on an unreported determination without going through the process required by paragraph 17.7 of the Practice Directions.

17. We deprecate use by any immigration judge of an unreported determination of the Tribunal without paying proper regard to requirements of paragraph 17 of the Practice Directions. The unreported case cited by this immigration judge says in the clearest of terms at paragraph 28: *"The case turns very much on its own facts"*. An advocate attempting to rely on AS/18287/2004 could not in our judgement satisfy the requirements of paragraph 17 of the Practice Directions in relation to the determination published as it was in March 2007. The judge in this case should not have purported to rely on the decision nor should he have described it as a "precedent". He was in error in so doing. However the material error of law in this case occurs in the manner in which the immigration judge analysed and decided upon the Article 8 claim. We deal with that below.

The Article 8 Claim

18. The factual background to this Article 8 claim is in brief as follows. The appellant and her spouse had a son who was born on 8 May 2004. She married her spouse on 1 June 2004, her husband's fourth marriage and their son is his fourth child. The husband is said to have a serious alcohol problem. The couple went to Japan on holiday for two weeks in March 2006 paid for by the appellant's parents who live in Japan. She said of her husband:

"He hardly came back home after the holiday … He confessed several adulteries … He said he would help my visa application when I asked him in October 2006, but I gathered all the documents by myself because he was not helpful. They were sent off on 1 November 2006. (The spouse) went to the Home Office on 3 November and said that "our marriage was unsustainable" to get his passport back, but he did not. He was due to travel to South Africa to see someone who was in a relationship. He reported it as stolen and applied for a new one. He left home in January 2007 to live with her. I do not know where he is now."

19. The basis on which the immigration judge appears to have acted is set out in paragraph 20 of his determination where he said:

The essence of this Determination (with a full advertence to the particular facts of the case) [a reference to the unreported determination AS/18287/2007] may be stated that if a British national child is likely to encounter undue hardship if he is returned with a non-British parent then the parent may exceptionally be allowed to remain in this country, in line with the spirit of Article 8 of the ECHR 1950".

20. The judge went on to say:

"The rights of a British child are of course very significant in light of the precedent mentioned … In this case the father is not interested in the welfare of the child to the extent that he has made himself disappear from the scene and has not been in any physical contact with the child or the mother since January 2007. Hence, since being a British child he cannot be removed, if the mother is forced to leave the UK I can understand Mr Costello's submission that the British infant would be taken into care by the local authorities and be deprived of the mother's care. Say, I must that the mother came over as a caring person and she would not leave the infant behind but to depend on her love for the child in this way would not be fair on her. Thus I am willing to allow this appeal to let this willing mother look after the child and having the satisfaction that the father may have contact with the child."

21. This approach to the appellant's Article 8 rights is fundamentally misconceived. The proper approach is to apply the analysis set out by the House of Lords in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27. Lord Bingham in that case was dealing with the issues that arise where removal of an appellant is resisted in reliance upon Article 8. The questions he poses are however entirely appropriate for a case, such as this, where an Article 8 claim is relied on in resisting a decision to refuse to vary the applicant's leave to remain the consequence of which will be that the applicant has no right to remain in the United Kingdom and is therefore subject to removal if he or she does not depart voluntarily. The questions are as follows:

"17.

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) *If so, will such interference have consequences of such gravity as potentially to engage the operation of Art 8?*
(3) *If so, is such interference in accordance with the law?*
(4) *If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of other?*
(5) *If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

22. Mr Costello's core submission was that because the appellant's child aged 4 is a British citizen it is wrong on the facts of this case to take a decision that means the mother has no leave to remain in the UK. He relied on the decision of Jack J in R (AC) v Immigration Appeal Tribunal [2003] INLR 507. The decision in this case is best summarised in Betts v Secretary of State for the Home Department [2005] EWCA Civ 828 at paragraph 12 where Latham LJ said:

> *"The right of appeal on human rights grounds requires consideration of the alleged breach of the appellant's human rights. In the present case this required the adjudicator to concentrate on the effects of removal on the appellant. True it is, as Jack J said in R (AC) …. the effect on others might have an effect on an appellant, nonetheless it is the consequence to the appellant which is the relevant consequence. In the context of a merits appeal, which this was, the tribunal was entitled to conclude that the adjudicator had allowed his judgement to be affected unduly by the effect of removal on the remainder of the family in particular his mother."*

23. The appellant is a Japanese citizen. Japan is a safe country. She has parents who live in Japan who she visited in 2006. It is nowhere suggested in the evidence that Japan is in any sense unsafe for the appellant or her child. The appellant can safely return there. The effect on her 4 year old son is minimal as he will, on the evidence, go there with her. The immigration judge ought to have applied the Razgar step-by-step approach which we now do. He erred in law by failing to do so.

24. The appellant clearly has a private life in the United Kingdom. She has been here since 2001. There is no family life with her spouse. He has left her. There is clearly family life with her child. There was no evidence before the immigration judge or before us that were the appellant to leave the United Kingdom she would do anything other than take the child with her. Indeed the immigration judge found at paragraph 21 that she would not leave the infant behind. There was no evidence before the immigration judge that the child would therefore be left behind or that the child would be taken into care or that a local authority was in any sense involved in oversight of the child's welfare. We cannot see that there would be any interference with the appellant's family life with her child were she to leave the UK in consequence of an adverse decision. She will on the evidence take the child with her. We accept there would be some interference with her private life given the length of time she has stayed in the UK. We turn then to the second of the Razgar questions. On our analysis the appellant has to show that such interference with

her private life as will result in her no longer having any right to remain in the country will *"have consequences of such gravity as potentially to engage the operation of Article 8"*. For this Japanese citizen to return with her child to her home country where her parents live cannot on the evidence have grave consequences.

25. We conclude that the appellant's Article 8 rights are not engaged. Her only family life is with her child. He will leave the UK with her if she does so. It is clear that her family life with her child can reasonably be expected to be enjoyed in Japan. There is nothing to suggest to the contrary. Equally the appellant's private life can be conducted in Japan. There will be minimal adverse effect on the appellant's child as he will be with his mother and go to Japan with her. Such breach as might arise of the appellant's Article 8 rights cannot using the words of Huang v SSHD [2007] UKHL 11 be of *"a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8"*. The consequences to the appellant of her having no right to remain in the UK does not prejudice her family life with her child to such an extent as to engage the United Kingdom's obligations under the European Convention.

26. It has not been necessary for us to address the third, fourth and fifth Razgar questions. But for the avoidance of doubt we acknowledge that were we to be wrong in our conclusion on the 2nd question, questions 3 and 4 would be answered in the affirmative. Any removal would be entirely proportionate. There are no serious difficulties (or insurmountable obstacles) preventing the appellant mother and her young child returning to Japan.

Decision

26. For the reasons given above we conclude the immigration judge erred in law in his approach to the appellant's rights under Article 8 of the ECHR. The immigration appeal should itself have been decided against the appellant which the immigration judge failed to do. Accordingly,

    (a) The appeal under the Immigration Rules is dismissed.
    (b) The appeal under Article 8 ECHR is dismissed.

MR JUSTICE HODGE
PRESIDENT

Date: 13 May 2008