CO/12450/2008

Neutral Citation Number: [2009] EWHC 2403 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 5th August 2009

B e f o r e:

MR JUSTICE OUSELEY

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Between:

THE QUEEN ON THE APPLICATION OF GORAN KADR AHMED

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Ms Rebecca Chapman (instructed by Messrs Elder Rahimi) appeared on behalf of the **Claimant**

Mr S Singh (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE OUSELEY: The claimant is an Iraqi citizen born in May 1988 who arrived in the United Kingdom in November 2005 and immediately applied for asylum. His application was refused. He appealed. His appeal was dismissed and in April 2006 his appeal rights were exhausted and he had no further rights to remain in this country and ought to have left. He remained in this country, however, and on 24th November 2008 he was investigated as a result of a driving incident and then detained under immigration detention and removal directions were set for Iraq.

2. These directions were set on 9th December 2008 for removal on 29th December 2008. On 15th December 2008, representatives for the claimant then made further submissions to the Secretary of State on his behalf, saying that they raised a fresh claim. However, this claim was rejected on 23rd December 2008 and, following further submissions, a further decision was issued by the Secretary of State, again, refusing to treat the further submissions as a fresh claim. In effect, the 23rd and 26th December 2008 letters became the subject matter of this judicial review claim issued on 29th December 2008.

3. The course of proceedings is perhaps unusual. On 22nd January 2009, Ms Geraldine Andrews QC, sitting as a Deputy Judge, rejected the claim on the papers and ordered that a renewal application should not be a bar to proceeding with removal. The claimant sought an injunction to prevent removal, which was refused by Mr Mark Ockelton, also sitting as a Deputy Judge of the High Court, on 13th February 2009 and, indeed, on 17th February 2009 the claimant was removed from the United Kingdom to Iraq.

4. The oral renewal application comes before me along with the substantive application, if permission is granted, in a rolled up hearing.

5. Although the bundle has grown somewhat since the initial representations were made, Ms Chapman for the claimant has helpfully confined her submissions to what she says are the errors of law in the decisions under challenge of 23rd and 26th December 2008.

6. The basis for the fresh claim is the relationship which the claimant developed in 2007 and through 2008 with Ms Jones, who was born in July 1991 and is a British citizen. The relationship led to the birth of a son on 14th July 2008 and it is said in the representations of 15th December 2008 put in by the IAS, who then represented the claimant, that it was soon after the birth of this son that the claimant moved in with Ms Jones, both living at her mother's house in Hastings. The submissions were supported by a statement from Ms Jones of 12th December 2008 and a copy of the birth certificate for the son naming Mr Ahmed as the father.

7. A further statement was provided by Ms Jones on 24th December 2008. The Secretary of State rejected the claim in first of all the letter of 23rd December in which he, having considered a number of authorities dealing with the issue of article 15(c) of the Qualifications Directive, turned to Article 8, which has been the focus of the submissions here. He accepted that the claimant was the named father of the boy but did not accept that evidence demonstrated that he was in a subsisting relationship with Ms Jones or had any contact with the son. He said that no evidence had been provided

apart from a statement purportedly from Ms Jones to confirm the relationship and that there had been no utility bills to demonstrate that he and she had lived together as claimed since the birth of the son. He said also that, if family life did exist in the United Kingdom, it was not disproportionate to remove Mr Ahmed. He said that they had only lived together since the birth of the child, the relationship had been entered into in the knowledge of the precariousness of the claimant's immigration status, the family life had not developed in such a way that it would be significantly interfered with if Mr Ahmed were to be removed to Iraq and from Iraq he could go to Jordan to seek entry clearance and meanwhile maintaining contact with Ms Jones and their son by telephone calls and letters until entry clearance might be granted.

8. The further representations by now from those currently representing Mr Ahmed pointed out that, although they had only lived together since the birth of the child, they had a child together and said that they were living as a family unit and the matter required further investigation. This was particularly urgent because it was over the Christmas period that these exchanges were taking place. Letters in relation to income support and child benefit were referred to, along with bank statements, but they did not advance matters. It was said by Mr Ahmed's solicitors that no application for entry clearance could be made until mid-2012, by which time Ms Jones would be aged 22 and of an age therefore which would permit her to sponsor Mr Ahmed under the immigration rules, and that family life would have been destroyed by that date and the father and son would have been separated for four important years of development.

9. In his letter of 26th December 2008, the Secretary of State said that the further documents that have been provided by Ms Jones provided no independent corroboratory evidence that she was enjoying a family life with either Mr Ahmed or his son and found that they added no weight to the claim. There was a debate about the impact on this case of the decision of the House of Lords in Chikwamba v Secretary of State [2008] UKHL 40 and the Secretary of State expressed his satisfaction that full consideration had been given to the Article 8 claim.

10. Ms Chapman, for Mr Ahmed, makes two essential submissions. The first is that the Secretary of State's conclusion that there was no realistic prospect that an immigration judge would find that family life existed was irrational and, from the point of view of a substantive application, contended that it was irrational to conclude that there was no realistic prospect of an immigration judge finding that family life existed. Her second submission was to the effect that the Secretary of State's alternative approach in relation to the proportionality of removal was also arguably irrational and there were realistic prospects that an immigration judge would find removal in these circumstances was disproportionate.

11. In relation to the former, that is the existence of family life, she, and Mr Singh for the Secretary of State accepts this, says that the evidence that was provided before the Secretary of State in the form of the two statements of Ms Jones have to be taken at face value and at their highest. The evidence on that basis shows that there was a relationship of sorts that developed in July 2007 and which developed over time in 2007 to what, even taking the evidence at its highest, appears to have been a casual sexual relationship whereby, towards the end of 2007, October/November 2007, Ms

Jones became pregnant, but was not aware for five months, perhaps because of her tender years, that she was in fact pregnant. The fact that she was pregnant did not lead to Mr Ahmed living with her. It was only after the birth of the child on 14th July 2008 that he started living with her. She makes some general comments about her fondness for him and the bond between father and son during the first four months or so of his life.

12. The absence of documents showing that they lived together was explained by the fact that she and Mr Ahmed had lived together at her mother's address from some point shortly after 14th July 2008. Mr Ahmed was not receiving NASS support, had nowhere to live and was staying with different friends and had no address to notify to the immigration service. Their intention was to try and sort out his immigration status when they were more settled and had been, as they had hoped, allocated a place of their own to live. It continued to make comments about the relationship between the three of them. It also continued to say that there was no realistic prospect of her and the child going to Iraq but she wanted her son and Mr Ahmed to know each other properly when the child was young.

13. The Secretary of State points out, in support of his contention that family life did not exist, that there is evidence of a casual relationship, that they only lived together after the child was born, they had only lived together for four months, there was no evidence from Mr Ahmed at all and there was no statement from Ms Jones' mother supporting the nature of the relationship. The Secretary of State accordingly took the view, and submits that this is how a reasonable immigration judge would be bound to regard it, that this was a relationship that lacked substance and stability and it should instead be regarded as essentially a casual one with cohabitation, if such it was, for convenience. In particular, he draws attention to the fact that there was no suggestion of any such relationship until after removal directions were set on 9th December 2008, that is some months after the child was born.

14. However, the problem with the Secretary of State's approach in relation to that matter is this. The evidence of Ms Jones for these purposes has to be assumed to be true, with all the limitations that there may exist as a result of its contents. It is not asserted by the Secretary of State that, by reason of internal contradiction or other evidence, it would be bound simply to be found to be incredible by an immigration judge. Whatever may be the way in which the relationship up to the birth of the son is characterised, the existence of the child and cohabiting from mid to late July 2008 until arrest in November 2008 is a different relationship. It is a relationship which has to be looked at as not just as that between Ms Jones and Mr Ahmed, which could, taken by itself, properly be regarded as wholly insufficient to establish family life, and it cannot be regarded simply either as a relationship between Mr Ahmed and his son, which has endured merely for four months.

15. In my judgment, there is a reasonable prospect that an immigration judge could hold that family life had been established as from July 2008, albeit that its essential genesis was the birth of the child, and it would be normal to regard the relationship between parents and child who were cohabiting as creating a family life, and that its shortness reflected the fact that the child had only been born for some four months.

16. The first ground therefore upon which Ms Chapman relies, which is that the Secretary of State's decision was arguably irrational in holding that there was no realistic prospect of an immigration judge concluding that there was family life, in my view succeeds. Ultimate success before an immigration judge may be improbable, but I for my part cannot accept that it is rational to say, when two parents cohabit with a child of four months, notwithstanding all the problems that there are in the way of this evidence, that there is no realistic prospect of an immigration judge holding that family life existed.

17. The second question concerns proportionality of removal in these circumstances. It is important to approach this on the right basis, that is to say that there is an element of family life which engages Article 8(1). The interference has to be considered carefully. There are two aspects to it. The first concerns whether, from Iraq, Mr Ahmed would in fact be able to go through the physical process of making an application for entry clearance. I am satisfied on the material, including the decision in SM (Entry clearance application in Jordan - Proportionality) Iraq CG [2007] UKAIT 00077, that it is not disproportionate to require an Iraqi to return to Iraq in order to make an entry clearance application on the grounds of the physical process that has to be gone through, going from Iraq to Jordan for that purpose or from northern Iraq to Syria and then on to Jordan. I do not find any assistance at all in a debate about the application of article 15C of the Qualifications Directive. What matters is the position on the ground which in my judgment is best dealt with in the decision which I have referred to.

18. Ms Chapman referred me to the passage in the operational guidance notes for Iraq of June 2009 at paragraph 6.6, dealing with the effect of Chikwamba, which referred to the difficulties involved for Iraqis in travelling to the designated entry clearing posts in neighbouring countries. There is no debate that there are difficulties. That note continues:

> "In most cases it is likely to be disproportionate to expect Iraqis who have established family ties in the UK ... to return to Iraq and to apply for entry clearance."

But the case that is being considered there is not quite this one. That is guidance dealing with the effect of Chikwamba. Chikwamba is a case in which the claimant had in effect an unassailable case for entry clearance who should not be returned to Zimbabwe in order to make an application there. The reasoning in the operational guidance note to which I have referred applies that same principle to Iraq. The difficulties there are perhaps parallel to the circumstances in Zimbabwe: if you have a clear basis for entry clearance, the difficulties mean you should not be required to go through the empty process of returning to Iraq to demonstrate the point.

19. The second aspect of proportionality is the question of whether Mr Ahmed is in effect being required to return to Iraq to make an application for entry clearance which is either bound to fail or bound to succeed. The first point made by Ms Chapman is that the Immigration Rules, and in particular paragraph 277, require the sponsor of somebody seeking to enter as a fiance or civil partner or spouse to be 21. Ms Jones' statements, I note, make no reference to engagement or intentions to marry but, be that as it may, entry clearance under these rules is only granted in that case where the

sponsor is 21. That is the reason why it is said that Mr Ahmed would be quite unable under the provisions for settlement with partners to apply until mid 2012, by which time the boy would be four years or so old.

20. Mr Singh for the Secretary of State submits by reference to paragraph 320 that the position is not quite so black and white and that there is scope within a proper interpretation of the rules for a discretion to be exercised by the entry clearance officer and for these purposes has referred to the June 2004 Immigration Directorate's instructions, chapter 9, section 2, which says that the particular passages concerning age are not to be regarded as mandatory but as a normal basis for refusal, leaving open the possibility of an earlier application succeeding.

21. I would not wish to express a concluded view on the aptness of that interpretation of the rules, bearing in mind what may be a misremembered but nonetheless strong memory of Secretaries of State being concerned that immigration judges should not discern within the rules a wide range of discretions to treat seemingly mandatory language as merely embodying a discretion. It may be that Mr Singh is right but it is, if he is right, perfectly clear that the normal rule would be, in relation to entry clearance as a spouse, fiance partner, that Mr Ahmed would have to wait until mid 2012. That has to be a significant factor in the proportionality judgment.

22. The second paragraph which is said may be relevant to an application for entry clearance is paragraph 246, which deals with rights of access to a child resident in the United Kingdom. There was a considerable debate about whether the application of the requirement to produce a contact order or a certificate issued by a district judge would amount to a significant hurdle. It is clear in my judgment, into which I factor the letter from Miles & Partners (who are family solicitors) dated 3rd August 2009, which shows that obtaining a contact order would be nothing like as difficult or fearsome a matter as the claim had suggested, and I also take account of the fact that, as the option of a certificate issued by the District Judge is apparently a legal impossibility and the Secretary of State's guidance has been that an affidavit sworn by the other parent than the applicant would suffice instead, that that particular part of paragraph 246 would provide no obvious hurdle. But it cannot be said, because the issue has not been before the ECO, that certain other requirements of paragraph 246 would be met. I refer in particular to accommodation for Mr Ahmed, which he owns or occupies exclusively, which might be difficult if he were to live with Ms Jones and her mother, and that he maintain himself without recourse to public funds, which is an unknown quantity.

23. Ms Chapman also makes the point that the purpose of paragraph 246 was to provide a means of appeal against refusals of entry clearance for parents who were divorced or separated and, indeed, the paragraph does seem structured in that way. She says that an ECO, considering an application from someone who was not merely seeking access to the child but was also intending to live with the mother, might regard the application as having been made for an ulterior motive, namely settlement, and might on that basis refuse it. All that I need find at this stage is that there is real uncertainty over whether that paragraph would assist immediately or at some stage in the future.

24. Therefore the Secretary of State's decision on proportionality cannot be sustained simply on the basis that entry clearance would be granted if that was the basis upon which he reached his decision. However, I do not see the Secretary of State's decision on proportionality under Article 8(2) as having been reached on the basis that there would be a very good prospect that entry clearance would be granted, thus taking comfort falsely from the position should Mr Ahmed be returned to Iraq. Although some of Mr Singh's submissions may have endeavoured to put a more optimistic tone on the position, I do not see the Secretary of State in his decision as having made errors in relation to the prospects of entry clearance being granted in such a way as to mean that his decision was flawed. What is said, in the letter of 23rd December, that it is open to Mr Ahmed to return and to seek entry clearance, maintaining contact until such time as he satisfies the criteria after entry clearance, does not contain any false view as to the prospects of that being done imminently or before 2012.

25. On the basis therefore that there would be an interference with family life through removal and that removal would not simply be a temporary affair while an unassailable claim for entry clearance was gone through, the question was whether the degree of interference means that the Secretary of State's decision that there was no realistic prospect of an immigration judge finding removal disproportionate is itself an irrational decision.

26. The position where there is thus far a short term relationship but one which may endure if not disrupted, and where there is a young child who on the face of it would have a relationship with his father which would be disrupted potentially for some very important years, would in my judgment give an immigration judge pause for thought. The question is: is it irrational for the Secretary of State to conclude that there is no realistic prospect that an immigration judge, pausing for thought about that, would come to the conclusion that removal was disproportionate. It seems to me that factors that would weigh heavily with the immigration judge would be the importance of the early years of a child's life, the starting point, as it has to be, that what is being said about the relationship between Ms Jones and Mr Ahmed after the birth of the son is true and that there would be cohabiting during the early years of the child's life. I have no doubt that an immigration judge would find the circumstances quite difficult, and in particular the timing of the claim, the probable instability of such youthful relationships, and might very well take the view that the right course of action would be that Mr Ahmed should return to Iraq, maintain contact by whatever means were available and then take his chances as any would be immigrant would have to with the immigration rules rather than relying upon his legal presence to force a decision that has no proper basis. But I, for my part, do not find it possible to say that there is no realistic prospect of an immigration judge taking the view that removal is disproportionate and in my judgment the Secretary of State's view that there was no such prospect is irrational, although he may very well be right as to an eventual outcome, but to say there is no prospect in my judgment simply goes too far.

27. That leaves the difficult question as to what relief is appropriate in these circumstances. As I have indicated, Mr Ahmed was removed. It is impossible to say that his removal was unlawful because permission had been refused, removal had been permitted in the event of oral renewal and an injunction to prevent removal was specifically sought.

Although from the judgment which I have given it is plain that I would not have reached the decision that was reached on those occasions, I have to say it has been a very marginal decision on my part to conclude adversely to the Secretary of State here and I have reached it with some difficulty, but I in the end have come to the conclusion I have.

28. Now, I would be willing to hear submissions as to what relief is appropriate beyond a grant of permission and a quashing of the decision.

29. MS CHAPMAN: My Lord, it seems we have two options: one is to engage with that now, the second is to adjourn that part and perhaps deal with it in written submissions. The reason I say that is because there are, it seems, some technical difficulties. The normal course of events, following a judgment such as this, would be that the Secretary of State would agree to consider the representations as a fresh claim. Now, if the Secretary of State decides that Article 8 is met, there is family life, then perhaps a grant of discretionary leave would be made, but that is on the basis that the person is here. What I do not know is what the position would be when someone is outside, whether an entry clearance officer would be instructed to issue discretionary leave to enter. So that is the first difficulty. The second would be if the Secretary of State treats the representations as a fresh claim but rejects them, the matter would go before an immigration judge. Again, normally, this is an in-country right of appeal, but the claimant is not here. Can the claimant have a right of appeal in the UK whilst remaining in Iraq? The normal course of events is the appeal is deemed lapsed if the claimant or appellant leaves, but of course he has already left because he is not here. So is the Secretary of State then obliged to facilitate his entry --

30. MR JUSTICE OUSELEY: I am not for my part aware that the Secretary of State is obliged to do anything. He has acted on perfectly lawful decisions and, if there is a right of appeal, there may be a facilities for evidence to be provided otherwise than by attendance. It may be that the right of appeal is illusory. This is not one of those cases where the Secretary of State has acted unlawfully --

31. MS CHAPMAN: We accept that.

32. MR JUSTICE OUSELEY: -- and it is certainly, although I have come to a different, and I appreciate, from the point of view of where do we go from here, awkward decision, I am by no means clear that it follows from that that everybody now has to do everything that can be done to turn the clock back to an earlier date. But I am quite happy for you to have some time to consider what to do.

33. MS CHAPMAN: And it does seem that the ball essentially is in the Secretary of State's court, if I can put it in that way.

34. MR JUSTICE OUSELEY: Yes, it is in its court.

35. MR SINGH: My Lord, the difficulty is, and I indicated this earlier on, because the claimant is not in the country it is very difficult to see how any decision given by the Secretary of State now could give right to an in-country right of appeal. So the

position, my Lord, would appear to be that, whilst you have made a decision which is favourable to the claimant, it actually has no practical effect for the claimant.

36. MR JUSTICE OUSELEY: Well, it may have no practical effect and it may be that it might affect the way things are looked at, but I have not, as I have emphasised, said that an immigration judge would, merely that you cannot say there is no chance.

37. MR SINGH: No. On the basis of your judgment, if the claimant were in the UK, the Secretary of State would refuse to accept that he had an Article 8 claim but give him a right of appeal, because he would also decide to remove him at the same time. Now, my learned friend's proposal, I think that could only work if the claimant was first brought back to the uncle, even though his removal itself was not unlawful, and then some kind of immigration decision made in the UK which would give rise to an in-country right of appeal. But there is no reason why the Secretary of State should be ordered to bring the claimant back, if the removal itself is not unlawful.

38. MR JUSTICE OUSELEY: Well, I think what I am going to do, I am going to adjourn this for further consideration as to what, if anything, should be done, you may wish to take instructions on this particular turn of events, which you may not have anticipated, and it may be helpful if we convene for a short session, but I would prefer written submissions first.

39. MR SINGH: My Lord, would it be possible for the claimant to serve written submissions first --

40. MR JUSTICE OUSELEY: Yes, I think that would be sensible: what relief you want and why. I cease being on duty at the end of next week and I would rather clear it up by then. So can I have submissions in a couple of days from you, or by -- what is today? Wednesday. Can I have your submissions by Friday?

41. MS CHAPMAN: 4 o'clock.

42. MR JUSTICE OUSELEY: Mr Singh, yours by Tuesday, and if I consider that I need an oral session we will have one, otherwise I will just make whatever order seems appropriate. If I do have an oral session, it will be quite early in the morning. Are you around next week?

43. MR SINGH: Next week, I am my Lord. Yes.

44. MS CHAPMAN: I am fairly solidly in court, but if it is fairly urgent --

45. MR JUSTICE OUSELEY: We will finish this off next week. Thank you both very much.