Case No: C5/2008/0726 & 0726(A)

Neutral Citation Number: [2008] EWCA Civ 1534
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: OA/42917/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 5th November 2008

Before:

LORD JUSTICE LAWS
LORD JUSTICE SEDLEY
and
LORD JUSTICE LAWRENCE COLLINS

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SS (Somalia) & ORS	**Appellants**
- and -	
ENTRY CLEARANCE OFFICER	**Respondent**

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Mrs R Chapman (instructed by Wilson & Co) appeared on behalf of the **Appellants.**

Ms K Steyn (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent.**

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Judgment

(As Approved by the Court)

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Lord Justice Laws:

1. This is an appeal with permission granted by Dyson LJ after a hearing on 21 July 2008 against a determination of the Asylum and Immigration Tribunal ("the AIT") (Senior Immigration Judge Lane and Senior Immigration Judge McKee) on 1 February 2008, by which the AIT upheld the decision of Immigration Judge Cary promulgated on 17 July 2007. Immigration Judge Cary had dismissed the appellants' appeals against the refusal of the Entry Clearance Officer at Nairobi to grant entry clearance to join the first appellant's son in the United Kingdom pursuant to paragraph 320(1) of the Immigration Rules contained in House of Commons Paper 395.

2. The case has a somewhat complex history. The appellants are nationals of Somalia but resident in Kenya. The first appellant, born on 1 January 1973, is the mother of the second, third, fourth and sixth appellants. The fifth and seventh appellants are said to be adoptive children of the first appellant. The first appellant is also the mother of MH who was born on 1 July 1993 and has indefinite leave to remain in the United Kingdom as a refugee. He is the appellants' sponsor for the purposes of the Immigration Rules. The second, third, fourth and sixth appellants are his full siblings.

3. The sponsor arrived in the United Kingdom on 15 May 2001 when he was only eight years old. It appears that the first appellant, his mother, had arranged for his travel to the United Kingdom with the assistance of an agent, as it is put. The sponsor lives with an aunt here. He was granted asylum on 14 August 2001. Two brothers of the sponsor, who are not among the appellants, were also sent by their mother, the first appellant, to join the sponsor here and they too have indefinite leave to remain, we understand, also as refugees.

4. The appellants, led as it were by their mother, the first appellant, first applied for entry clearance to join the sponsor in the United Kingdom in April 2002. Those applications were refused on 14 October 2002 under paragraph 317 of the Rules. The appellants' appeals were dismissed by an adjudicator on 1 April 2004 and their further appeals rejected by the Immigration Appeal Tribunal on 31 January 2005. There followed proceedings in this court leading to an order by consent that the matter be remitted for consideration by the Secretary of State with particular reference to what is called the Refugee Family Reunion Policy. At length the applications for entry clearance were reconsidered by the Entry Clearance Officer in December 2005, both under the Family Reunion Policy and Article 8 of the European Convention on Human Rights, and were again refused on 30 December 2005 and 4 January 2006.

5. Those refusals were appealed and as I have indicated the appeals were dismissed by Immigration Judge Cary on 17 July 2007. On 14 August 2007 a reconsideration of that decision was ordered pursuant to section 103A of the Nationality, Immigration and Asylum Act 2002.

6. And so the matter went to the AIT which on 1 February 2008 found (paragraph 17) that there had been no error of law, as adumbrated in the order for reconsideration, concerning a particular report of an expert; to that, I will return. They proceeded to hold (paragraph 22 and following) that it was open to the siblings in the United Kingdom to return to Kenya, and (paragraph 26 and following) there was no case to be made under Article 8 of the European Convention on Human Rights.

7. In this court a major theme of the appellants' case as formulated has been to assault the finding of the Immigration Judge and the AIT that the siblings settled here could relocate in Kenya and the family life of all parties could thus be maintained and upheld. This overall contention has more than one strand. I need not however deal with it at length because it is to my mind entirely clear that the decisions below were not in fact dependent on the premise that the United Kingdom siblings might return to Kenya.

8. However there are one or two points which ought to be addressed. First, at paragraph 20 of their determination of 1 February 2008 the AIT stated that Kenya is one of the States party to the Refugee Convention of 1951. It has been contended for the appellants that that is wrong, and there was some evidence that Kenya was not a signatory, or at least that there is no procedure for the appellants to apply for refugee status in Kenya. It is enough to say that it seems to be clear that Kenya is in fact a signatory to the Convention because it is included in the UNHCR's list of States party to the 1951 Convention and the 1967 Protocol of 15 August 2008.

9. There have been other issues on this part of the case concerned with any difficulties which the UK siblings might face if they in fact sought to return to Kenya. But the principal point made in relation to return to Kenya is that it was unfair of the Immigration Judge and the AIT to raise and adjudicate upon this issue at all. The reason was that no such contention had been raised in the respondent's decision letter of 4 January 2006; nor was it raised on behalf of the Entry Clearance Officer before Immigration Judge Cary; nor indeed by Immigration Judge Cary himself in the course of the hearing. Accordingly it should not have surfaced in Immigration Judge Cary's decision; nor should the AIT have upheld his view that the UK siblings might indeed return to Kenya.

10. The AIT considered that argument of unfairness and rejected it at paragraph 24. We have not heard Ms Chapman's full submissions on the question because she was at once faced by the court with the issue whether -- and I have already referred to it -- it is in fact clear that the decisions below did not depend on any question of the United Kingdom siblings' return to Kenya. Accordingly I propose to say no more about it. The case depends on whether or not the decisions upholding the Entry Clearance Officer, irrespective of any question of the siblings' return to Kenya, are legally faulty.

11. The Immigration Judge addressed the Family Reunion Policy, which was in these terms:

> "**Eligibility of applicants for family reunion**
> Only pre-existing families are eligible for family reunion i.e. the spouse, civil partner and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum. Other members of the family (e.g. elderly parents) may be allowed to come to the UK if there are compelling, compassionate circumstances...
>
> The parents and siblings of a minor who has been recognised as a refugee are not entitled to family reunion. Such applications are considered under the criteria above, i.e. there must be compelling, compassionate circumstances in order for the family to be granted entry to the UK."

Having set out the policy, Immigration Judge Cary proceeded to consider whether it applied. At paragraphs 38 to 42 he rehearsed the facts in very considerable detail. It is not, I think, necessary to read out the whole of that passage. Then at paragraph 43 he said this:

> "Of course, the three children living in the United Kingdom could return to Kenya. It is not and has never been suggested that the children fled Kenya due to the threat of persecution or treatment amounting to a breach of Article 3 of the European Convention in that country. Although it would undoubtedly be disruptive particularly to the children's education to return to Kenya they could, if the circumstances warranted it return to be reunited with mother and brothers and sisters. However, even if that were not the case I do not consider that the circumstances of the family and, in particular, the Appellants, as at the date of the decisions enable the Appellants to fall within the criteria of the Family Reunion Policy. The Appellants have not made out their case as they were required to do on the balance of probabilities."

12. Immigration Judge Cary then proceeded to consider Article 8. His conclusions are from paragraph 46 to paragraph 52 inclusive. At paragraph 46 he says:

> "It is clear to me that the refusal to allow the Appellants to join [M] [HO] and [HU] amounts to an interference with the Appellants' family life. The decision was taken in pursuance of the legitimate aim of the Respondent to maintain effective immigration control. I therefore have to decide whether the decision reached by him was proportionate."

The Immigration Judge proceeded to refer to and cite the decision of their Lordships' House in Huang [2007] UKHL 11, which as is well known is the leading case on proportionality where that arises as an issue under Article 8(2) in an immigration case. After referring to Huang, the Immigration Judge continued:

> "51. I cannot see that the Appellants are entitled to succeed under Article 8. In my view it would not be unreasonable to expect [Ms SN's] three children to join her in Kenya. It is well-established that [Ms SN] and her three children cannot chose in what country they practice family or private life and I do not consider that there are any insurmountable obstacles preventing the return of [M], [HO] and [HU] to Kenya. Although I accept that none of the children are Kenyan nationals there is no evidence before me to suggest that they would be prevented by the Kenyan authorities from returning to Kenya.
>
> 52. Even if it would not be reasonable to expect the children to return to Kenya I cannot see that the decision of the Entry Clearance Officer prejudices the family life of the Appellants in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. There is nothing to suggest that the children cannot return to Kenya to at least visit their mother and siblings and it appears to have been a voluntary decision on the part of [Ms SN] to send the children to the United Kingdom. Although reference is made to medical problems suffered by possibly two of the children there is nothing in the evidence to suggest that these problems were sufficiently serious to warrant the children being sent to this country. Presumably medical treatment could have been obtained in Kenya albeit at a price. Any problems faced by the children in the United Kingdom are not so serious as to engage Article 8 particularly as they have the support of various aunts and uncles here."

13. There is as it seems to me a degree of confusion here. At paragraph 46 the Immigration Judge has apparently made it clear that he accepts that refusal of entry clearance would interfere with the appellants' family life, so that the issue of proportionality arose. At paragraph 51 he appears to decide that refusal is not disproportionate, but that is because of the possibility that the UK siblings might return to Kenya. And I am considering the case presently on the basis that the question is whether the ECO decision is lawful, irrespective of that possibility. In paragraph 52, the final substantive paragraph, the Immigration Judge appears to hold that Article 8(1) was not engaged at all, because any interference with family life would not be sufficiently grave to have that effect. And it is clear that

the reasoning in paragraph 52 is applied irrespective of any question of return to Kenya of the United Kingdom siblings. So while the Immigration Judge appears at paragraph 46 to 50 to proceed on the premise that there is, on the face of it, a violation of Article 8(1) and the true question is whether it is saved as being proportionate under Article 8(2), yet in paragraph 52 he appears to revert to a position in which his conclusion is actually to the effect that Article 8(1) is not engaged at all. That would ordinarily give rise to considerable cause for concern.

14. However the difficulty facing Ms Chapman is as it seems to me twofold. First, the conclusion of the Immigration Judge in paragraph 52 that Article 8(1) is not engaged because any interference with family life is insufficiently grave is as it seems to me plainly justified in law. But if, on the basis of want of clarity because of what has gone before, there is some question as to whether that in truth is what is being stated, then I have to say that it seems to me that, given the factual points that are taken in paragraph 52, and not least the facts described in paragraph 38 to 40 by the Immigration Judge, the only available conclusion here was that if there were an interference with family life, refusal of the entry clearance was on the facts proportionate. In those circumstances there is no room for a finding here of a material error of law by the Immigration Judge.

15. As for the AIT, their conclusions are set out at paragraph 25 to 27 on pages 32 to 34.

> "We do not find that, upon analysis, there is any merit in the second ground upon which reconsideration was ordered in this case. In any event, however, it is important to bear in mind that the issue was one of whether the appellant were entitled to succeed by reference to the Secretary of State's policy regarding the family members of refugees. As the Tribunal has found in AG and Others (Policy; executive discretion; Tribunals powers) Kosovo [2007] UKAIT 00082, if a policy has been taken into account by the relevant decision-maker, then the claimant will be able to succeed only if he or she can show that the terms of the policy and the facts of the case are such that there was no option to the decision-maker other than to grant the remedy sought. Otherwise, where within the terms of the policy the benefit to the claimant depends upon the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker. On the facts of the present case, it could not possibly be said that the respondent had no option but to find that there were compassionate circumstances of such a nature as to compel him to apply the policy in favour of the appellants. That is true on the holistic basis of looking at the position

of both the appellants and the United Kingdom children.

26. The third ground relates to article 8 of the ECHR. It is submitted that the Immigration Judge "failed to consider the policy through the lens of Article 8 as argued in the appellant's skeleton". We do not consider that this submission has merit. It seems to us plain that, when dealing with article 8, the Immigration Judge was very much aware of the existence of the policy regarding compassionate circumstances. At paragraphs 52 and 53, the Immigration Judge drew on his findings, made in the course of analysing that policy, in order to ascertain whether the appellants' article 8 case was such that their exclusion from the United Kingdom would be an unjustifiable interference with their right to respect for a family life with the United Kingdom sponsor and his siblings. Indeed, at paragraph 51, the Immigration Judge specifically identified an important point in the relevant Strasbourg jurisprudence; namely that a person cannot properly use article 8 in order to give effect to what is no more than his or her choice of the country of residence of the family in question….

27. As the Immigration Judge pointed out more than once, it was the choice of the first appellant to send the sponsor and his siblings to the United Kingdom. Although they were recognised here as refugees, it is highly significant that none of them arrived here, fleeing persecution in Somalia. On the contrary, they had long been resident in Kenya, in circumstances where, on a proper reading of the evidence, it could not be said that they had a well-founded fear of being *refouled* to Somalia. Whilst the first appellant no doubt hoped and expected that the children sent to the United Kingdom would enjoy a better material standard of living in the country, it was her decision to send them. If, as the evidence of Ms Cohen suggests, the lives of the sponsor and his siblings in this country are effectively being blighted by their separation from the first appellant and their other siblings, the best interests of the United Kingdom children would appear to require that serious consideration be given to reuniting the family in Kenya. Instead, however, the Tribunal has been asked to disregard that course of action, without any evidence to show that it would violate the underlying reasons for the

> respondent's policy or that there are insurmountable obstacles in the way of the family living together in Kenya."

This seems to me to require no further analysis beyond what I have said in relation to the Immigration Judge's reasoning in the earlier decision.

16. In the result, the Immigration Judge's decision on the family policy and Article 8 are well justified in law on the footing that there is not here a live question whether the UK siblings might return to Kenya. I cannot see that that conclusion is at odds with their Lordships' reasoning in Chikwamba v SSHD [2008] UKHL 40, or Beoku-Betts v SSHD [2008] UKHL 39, both decisions of their Lordships' House referred to in Ms Chapman's skeleton argument.

17. There is a freestanding point concerning a report dated 12 May 2007 from Ms Renee Cohen, a psychotherapist and social worker. The purpose of that report was to provide an assessment on the sponsor of the two other UK-based children. It was intended to update two previous reports by the same author made in October 2003 and December 2005. In particular the assessment was to focus on the effect on the three children of continued separation from their other family members and whether there was a "exceptional and compelling case" for family reunion. Ms Cohen concluded that the children were:

> "… more depressed and more anxious than in December 2005, their development was being damaged and they were in desperate need of their mother."

The circumstances, she opined, were exceptional and compelling.

18. This report post-dated the decision of the Entry Clearance Officer. It was not expressly referred to by the Immigration Judge, and the complaint made by Ms Chapman in her written argument, not I think separately advanced today but it is right we should deal with it, is that the report in fact was relevant and should have been considered. The AIT, dealing with this, said this:

> "17. Mr Fripp, who did not draft the grounds (and did not represent the appellants before the Immigration Judge) was in considerable difficulty in purs[u]ing the assertion in those grounds that the Immigration Judge materially erred in law in failing to deal with the report of Ms Renee Cohen of 12 May 2007. Insofar as that report continues to point to signs of anxiety and depression in the sponsor and his siblings in the United Kingdom, the report does no more than reiterate matters set out in Miss Cohen's 2005 report, which was expressly considered by the Immigration Judge (paragraph 40 of the determination). To the extent, however, that

> the grounds assert that the 2007 report discloses a material change in the condition of the United Kingdom children, such evidence falls foul of section 85(5)(b) of the 2002 Act. Mr Fripp submitted that the subsequent deterioration in the states of mind of the children was "predictable", as at the date of decision and, accordingly, fell to be considered. We disagree. In our view, the situation falls within the type of cases described by Ouseley J in paragraphs 27 and 27 of DR (ECO: post-decision evidence) Morocco [2005] UKIAT 00038 and effectively summarised by the Immigration Judge at paragraph 31 of the determination (see paragraph 4 above)."

19. It is convenient also to refer to paragraph 4 of the AIT's decision, to which cross-reference was made at the end of paragraph 17. Paragraph 4 says this:

> "At paragraph 31 of the determination, the Immigration Judge reminded himself that, these being appeals against refusal of entry clearance, he was restricted by section 85(5)(b) of the Nationality, Immigration and Asylum Act 2002 to considering "only the circumstances appertaining at the time of the decision to refuse". Although that empowered him to consider post-decision evidence, so far as it concerned a matter arising at the date of the decision, the Immigration Judge observed that he was not entitled to take into account evidence showing that something which was unlikely to happen at the date in the decision had, in the event, actually occurred."

20. The effect of the report of May 2007 is to suggest that there had been a deterioration in the situation of the three UK-based siblings since December 2005. That is plainly a later event post-dating the ECO's decision. In my judgment the AIT dealt with the argument as to whether this report should have been considered correctly at paragraph 17. The Immigration Judge had dealt with the situation as disclosed in Ms Cohen's earlier reports (see paragraph 40). He did not find that separation from the appellants was compromising the mental health or education of the UK siblings, nor had Ms Cohen in the earlier reports predicted that that would happen. The appellants need to rely on the May 2007 report to show distinctly that the situation had changed for the worse. Whatever one's sympathies, that is not permissible by reason of section 85(5)(b). At one stage in the argument, Ms Chapman suggested that section 85(5)(b) has no application where Article 8 is in issue albeit the context is an entry clearance case. That is to my mind entirely unsustainable.

21. Lastly I should mention that Ms Chapman put in a further skeleton argument yesterday, relying on the decision of the United Kingdom government on

22 September 2008 to withdraw its reservation in respect of Article 22 of the United Nations Convention on the Rights of the Child. At the beginning of the hearing however we refused leave to amend her grounds so as to incorporate an argument based on this circumstance, since it seemed to us as we said at that stage that this was an event that could have no bearing on the legality of the decisions under challenge.

22. For all the reasons I have given, I for my part would dismiss the appeal.

Lord Justice Sedley

23. I agree, but reluctantly, because for reasons which are now apparent from Laws LJ's judgment, neither of the determinations below deals properly with the Article 8 issues. This court has repeatedly said that Article 8 requires a structured approach, deciding first whether the impugned decision involves the denial of respect for the rights, here the right to family life, protected by Article 8(1). If, and only if, it does, the Tribunal must then go on to decide whether, putting it shortly, the interference is lawful and proportionate.

24. The Immigration Judge here, at paragraph 46, began by finding that the ECO's decision amounted to an interference with the sponsor's family life. He proceeded through what purported to be the proportionality exercise, incorrectly trying on the way to reintroduce an exceptionality test, and then at paragraph 52 concluding:

> "Even if it would not be reasonable to expect the children to return to Kenya, I cannot see that the decision of the Entry Clearance Officer prejudices the family life of the Appellants in a [manner] sufficiently serious to amount to a breach of the fundamental right protected by Article 8."

-- in other words, a 180-degree turn from where he had started at paragraph 46.

25. The AIT, in finding that there was nevertheless no error of law in this determination, appears to have entirely overlooked this *volte face*. Asked by us to explain the Home Office's position in this regard, Ms Steyn accepted that Article 8(1) was indeed engaged. But what, in my judgment, is crucial is that the interference by which it was engaged manifestly lay towards the lower end of the scale of interference, for a reason to which the Immigration Judge and the AIT were alive. This was essentially that, although the sponsor and his siblings had been accepted as refugees, since any return would have been to Somalia where because of their membership of an oppressed minority clan they would have a well-founded fear of persecution, the decision to send them to live with members of their family in the United Kingdom had been made in the relative safety of Kenya for the children's own benefit.

26. In this situation, and notwithstanding their understandable distress at being separated from their mother, it seems to me to have been inevitable that the Entry Clearance Officer would find it not to be disproportionate to preserve that chosen situation by refusing to allow the mother and other siblings to join the

sponsor, and settle in the United Kingdom in order to do so. The sponsor has here a home, a family, education and financial security. The understandable desire to have his mother and siblings join him does not make it proportionate to allow them to do so. In my judgment, to hold it to be a disproportionate use of lawful immigration controls was simply not possible on these facts, even if the issue had been properly addressed by the tribunals below. Unfortunately it was not.

Lord Justice Lawrence Collins:

27. I have considerable sympathy for M and HO and HU, but I agree that the appeal should be dismissed.

Order: 1) Appeal dismissed.
2) No decision made.
3) Oral Application to amend grounds refused.