Case Nos: C5/2008/1984

Neutral Citation Number: [2009] EWCA Civ 215
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/13350/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 17th February 2009

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
SIR JOHN CHADWICK

- -

WB (PAKISTAN) **Appellant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Ms A Jones (instructed by Messrs Bhogal Partners) appeared on behalf of the **Appellant**.

Ms L Busch (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Longmore:

1. The appellant, WB, was born on 8 October 1976 in Pakistan. He arrived in the United Kingdom and claimed asylum in 1998. His application was not refused until 26 November 2007. He then appealed to the AIT, but Immigration Judge Kanagartnam dismissed his appeal on 29 January 2008 because there was no well-founded fear of persecution in Pakistan. Immigration Judge Kanagartnam recorded that the appellant was employed and had set up his own business, but the judge did not consider that either of those facts, or the delay that had occurred in considering his case, was such as to make his removal disproportionate.

2. On 21 February 2008 Senior Immigration Judge Spencer ordered reconsideration on the basis that a nine-year delay might be thought to indicate a lack of interest on the part of the Secretary of State in maintaining effective immigration control. When the reconsideration by Immigration Judge Turquet occurred, the law on delay was as set out in the nine propositions of Buxton LJ in (HB) Ethiopia v SSHD [2006] EWCA Civ 1713. Proposition 2 said that cases where the demands of immigration policy would not suffice to meet the requirement of Article 8(2) would be truly exceptional. That was a reference to the exposition of Razgar [2004] 2 AC 368 by the Court of Appeal in Huang v SSHD [2004] EWCA Civ 105. In due course, the House of Lords reversed that part of the decision in Huang on the grounds that the requirement of exceptionality was too prescriptive, although the House recognised that it would only be in a minority of cases that the right to private or family life contained in Article 8 of the European Convention would prevail over the normal requirements of immigration control.

3. HB (Ethiopia) was itself appealed to the House of Lords under the name of EB (Kosovo) v SSHD [2008] UKHL 41; 3 WLR 178. The actual decision in the case of EB was reversed by the House of Lords, partly because the Court of Appeal had decided the case before the House of Lords had decided Huang, and the second of Buxton LJ's propositions could not therefore stand. It was also said that, rather than being constricted by the nine propositions of law as set out by Buxton LJ, tribunals should make a close examination of the facts to determine whether in such cases removal was proportionate. In that consideration delay could be a factor, especially if it was prolonged. Immigration Judge Turquet did not have the benefit of EB (Kosovo) in the House of Lords; and, not unnaturally, Moses LJ thought it right on the papers to give permission to appeal in the light of the House of Lords' change of emphasis in relation to delay on the part of the Secretary of State in considering applications.

4. On the reconsideration before Immigration Judge Turquet the appellant had for the first time raised the possibility that he might be able to take advantage of paragraph 201 of the Immigration Rules, which entitles a person to be given an entry clearance if he intends to establish himself in business and satisfies a number of conditions, such as, in particular: (1) that he has £200,000 capital to his name which he will invest in the business; and (2) that, until his business provides him with an income, he will have sufficient additional funds to maintain and accommodate himself without recourse to any employment other than his work for the business. WB contended that during the eight-year period while he was in the United Kingdom, he had established and maintained a company called

Middlesex College Ltd, which conducted a profitable business by laying on post-A Level courses, which were recognised by the Home Office for student visa purposes, and the final year of which was accredited for university purposes. Immigration Judge Turquet heard evidence from WB and so was able to take into account the position under paragraph 201 of the Immigration Rules and the argument that it would be disproportionate to remove the appellant if he was to be entitled to obtain entry clearance in any event. In due course, Immigration Judge Turquet dismissed the appeal and made certain findings relevant to any application that might be made pursuant to Rule 201.

5. When this appeal was called on, I began the hearing by thinking that Ms Jones for the appellant was intending to maintain the argument that the appellant would be entitled to gain entry clearance under Rule 201. That would have been difficult for her, because Immigration Judge Turquet had made findings of fact which do not support the suggestion that WB was entitled entry pursuant to 201. In paragraph 42 she said that there was no evidence that WB had had £200,000 at his disposal to invest, so Rule 201(ii) was not satisfied. In paragraph 43 she said that WB had been working with BMW while setting up his business, and she concluded that neither 201(iii) nor 201(ix) of paragraph 201 of the Rules was satisfied. In paragraph 44 she concluded that the submission that the appellant satisfies the requirements of Rule 201, apart from the fact that he did not have entry clearance, was not supported by the evidence.

6. In the event, Ms Jones made a much more modest submission to the effect that, through no fault of Immigration Judge Turquet, she had simply not applied the law as set out by the House of Lords in EB (Kosovo) but had relied on the law as laid down by the Court of Appeal in HB (Ethiopia), and that the immigration judge's final conclusion that removal after eight years would not be a disproportionate interference with the appellant's private life would have had to have been differently reasoned and differently expressed if she was applying the law as we now know it to be. There should therefore, she submitted, be a remission to the Asylum and Immigration Tribunal to consider the matter again.

7. Ms Busch, for the Secretary of State, resisted the appeal on the basis that the appellant came nowhere near satisfying the requirements of paragraph 201 of the Immigration Rules and that, even having regard to the delay of eight years, which she maintained was not all attributable to the Home Office in any event, all that had occurred was that the appellant had set up a successful business. To the extent that he had a private life, his removal could not on any view be regarded as a disproportionate interference with that private life. So a remission to consider the facts in the light of EB (Kosovo) would, she said, be a pointless exercise. She pointed out that Immigration Judge Turquet had, in coming to her conclusion on proportionality, expressly taken into account: (1) the long delay that had occurred; (2) the absence of any prejudice to the appellant arising from that long delay (see paragraph 39); (3) the fact that there had never been any application to enter the United Kingdom lawfully (see paragraph 39 again); and (4) the appellant's acquiescence in the delay, since it was said he had only written two letters prompting the Home Office to take action (see paragraph 40). As to that matter, Ms Jones said there had in fact been three letters.

8. Although the immigration judge's conclusion on proportionality was shortly expressed in paragraph 48 of her determination she must, said Ms Busch, be understood to have had all those matters in mind, and that should be conclusive. Powerfully as this submission was made, I cannot bring myself to accept it. This court has always to remember that it is not itself the primary decision maker. If the applicable law in any particular case has been wrongly applied by the Tribunal, the court has to be sure, before upholding the decision of the Tribunal, that no other decision is possible.

9. The law about delay had become quite complicated at the level of the Court of Appeal, and that is why Buxton LJ had found it necessary to set it out in nine propositions. The House of Lords decision swept all that learning away, and emphasised that:

> "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" (see paragraph 12 of the speech of Lord Bingham of Cornhill)

Lord Bingham then explained that delay could be relevant in any one of three ways, which he set out in paragraph 14 to 16 of his speech. That was a different approach from that adopted by the Court of Appeal in HB (Ethiopia), and I for my part cannot be sure that the result would have been the same if the judge had considered the three possible ways in which Lord Bingham considered delay might be relevant. The fact that Buxton LJ's second proposition was couched in terms of exceptionality only serves to make a double ground of error on the part of the judge, once again through no fault whatever of her own.

10. One appreciates that the job of an immigration judge must be almost impossible, with the law in this area changing almost from month to month; but in my view, justice to the appellant requires that there should be a fresh consideration of this appeal, applying the principles now laid down by EB (Kosovo).

11. I would therefore allow the appeal, and remit the matter to the Asylum and Immigration Tribunal for their reconsideration to take place.

Sir John Chadwick:

12. I agree with the order proposed by my Lord, Lord Justice Longmore. I, too, should emphasise that in allowing the appeal I intend no criticism of Immigration Judge Turquet. She was entitled to take the view that the law in this field -- that is to say, in cases where there has been undue delay in determining an asylum or immigration claim -- was set out by this court in HB (Ethiopia). She did not have the benefit of the exposition of the law by the House of Lords in EB (Kosovo); and, with some misgivings, I am persuaded that had she done so it is possible that she might have reached a different answer.

Lord Justice Sedley:

13. I too agree that this appeal should be allowed so that the second-stage reconsideration can be undertaken afresh in the light of the House of Lords' decision in EB (Kosovo). Given their Lordships' recent amplification of the potential relevance of delay to Article 8 claims, it would have been necessary for Ms Busch to show either that Immigration Judge Turquet had substantially anticipated the House's reasoning or that, despite her not having done so, any redetermination of the claim in the light of EB would ineluctably come to the same conclusion as she did.

14. For the reasons given by my Lord, Lord Justice Longmore, I do not think either answer is satisfactorily made out. But I do wish to add a footnote to what he has said. In KR (Iraq) [2007] EWCA Civ 514, Auld LJ and I, with the assent of Smith LJ, sought to restate the law governing Article 8(2) in the light of the House of Lords' decision in Huang [2007] UKHL 11. The material passages are set out again in our subsequent decision in AG (Eritrea) v SSHD [2007] EWCA Civ 801, paragraph 32, as part of what was intended to be -- and I believe still is -- a comprehensive restatement of the law on Article 8(2). One thing that AG (Eritrea) I hope laid definitively to rest is the idea that something amounting to "truly exceptional circumstances" has to be demonstrated before a finding can be made and that it is disproportionate to interfere with family or private life by deportation or removal.

15. So one is alarmed to find in the first immigration judge's determination in the present case that AG (Eritrea) is cited for precisely the opposite proposition. More immediately one finds that the second immigration judge has accurately cited what I said in KR (Iraq) but appears to have derived from it an erroneous conclusion. The passage is as follows:

> "…I agree nevertheless with Auld LJ that the essential change in our approach following Huang will be that rather than take the threshold of entry into Article 8(1) to be some exceptionally grave interference with private or family life, tribunals and courts will take the language of the article at face value and wherever an interference of the kind the article envisages is established, consider whether it is justified under Article 8(2). In the great majority of cases it will be, because immigration controls are established by law and their operation ordinarily meets the criteria of proportionality which, in the Strasbourg jurisprudence, measure what is necessary in a democratic society for such prescribed purposes as the economic wellbeing of the country. While therefore there is no need to apply a formal test of exceptionality, it will be only rarely in practice that an otherwise lawful removal which disrupts family or private life cannot be shown to be compliant with art. 8.

Having cited this passage, Immigration Judge Turquet said:

> "I do not find that the appellant's is one of those rare cases."

16. This form of inverted reasoning, which continues to crop up in AIT determinations, has caused me on occasion to come close to regretting that I said what I did in KR (Iraq). But, properly read, the passage does not need rewriting. What needs to be said clearly is that neither KR (Iraq) nor any other decision of this court or of the House of Lords gives any warrant for reintroducing in any verbal guise a test of exceptionality or rarity. All that was being said in KR (Iraq) was, predictively, that the even-handed application of the proportionality tests was likely in most cases to result in the finding that removal was proportionate. To take this as a fresh licence to consider whether a case is exceptional or of a rare kind is, with respect, to stand the jurisprudence on its head by substituting effect for cause.

17. Immigration judges will do well to bear in mind in this context too what my Lord has already quoted from Lord Bingham's speech in EB (Kosovo) at paragraph 12:

> "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."

This court in KR (Iraq), paragraphs 34 to 36, sought not for the first time to indicate how a structured decision should be made in carrying out that exercise intelligibly and transparently. The time is past when it was acceptable to see opaque or dismissive one-line decisions on proportionality.

18. One further word on delay. Lord Bingham's taxonomy of the possible effects of delay in EB (Kosovo), paragraphs 12 to 14, requires no initial allocation of fault. Delay is simply a fact of which the effects need to be gauged. It is only at the extremes that fault may matter. One extreme is where the delay has been engineered by the claimant, so that it is inequitable to let him rely on it. The other is where it has been culpably brought about by the respondent: here Lord Bingham's third dimension of delay may begin to matter. Each of these extremes requires either evidence or at least a powerful inference.

19. So the appeal will be allowed to the extent of remission for redetermination of the second-stage issue.

Order: Appeal allowed.