Case Nos: C5/2009/0177

Neutral Citation Number: [2009] EWCA Civ 1018
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: IA/14160/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 3rd September 2009

Before:

LORD JUSTICE KEENE

- -

MA (Turkey)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Mr C Yeo (instructed by Messrs MKM) appeared on behalf of the **Applicant**.
THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

Lord Justice Keene:

1. This is a renewed application for permission to appeal from the Asylum and Immigration Tribunal (AIT), permission having been refused on the papers by Sullivan LJ. The applicant is a citizen of Turkey. He appealed to the AIT against the decision of the Secretary of State to deport him on the ground that his presence was not conducive to the public good. He also relied in his appeal on his rights under Article 8 of the European Convention on Human Rights (ECHR).

2. The applicant entered the United Kingdom in June 1989 when he was aged nine, with other members of his family. Ultimately he and other members of his family were granted indefinite leave to remain in March 1997. However, since then he has been convicted of various criminal offences including in November 2005 handling stolen goods, for which he was sentenced to one year's imprisonment on a plea of guilty. His earlier offences included burglary and theft of a non-dwelling, robbery and possession of an article with a blade or point.

3. His appeal relied in part on the fact that he has a son aged five called T who is a British citizen. T's mother, Ms H, is not married to the applicant, nor do they live together. T lives with his mother. The AIT found that the family relationship between the applicant and T's mother "is barely subsisting" and that there was no prospect of their relationship resuming.

4. So far as the applicant's relationship with his son is concerned, the Tribunal found that the contact had been very limited. They seem to have accepted that he had his son at weekends and that he might deliver or collect his son from school from time to time. Since his son was only five, the Tribunal noted, this degree of contact had not been going on for long. The Tribunal in fact regarded the extent of contact as so minimal as not to constitute family life so as to engage Article 8. However, it went on to consider the position if they were wrong on that and the degree of family life was such as to engage that Article. They then applied the Razgar test, going through the various steps set out in that case. At paragraph 26 of their decision, they said this:

> "The evidence of any meaningful family life consists of [Ms H's] preparedness to continue as friends with the Appellant and to let him see their child from time-to-time. We do not accept that the Appellant's relationship with his child has such a degree of regularity or strength that it could not be continued in other ways should he be deported to Turkey. We accept that the Appellant's deportation may provide limited opportunities for him to see his son in person. However, we find that communication could be continued by telephone or on the internet together with occasional visits to Turkey made by [Ms H] and their son."

5. The Tribunal then weighed the interference with this limited relationship between the appellant and his son against the public interest and concluded that the decision to deport the applicant was proportionate. They expressly had regard to

the applicant's ties with other members of his own family in the United Kingdom but reached the same conclusion.

6. A number of criticisms are now advanced on behalf of the applicant by Mr Yeo. It is said first of all that the AIT erred in finding that there was no family life. That in itself of course does not get the applicant very far, because as Sullivan LJ pointed out when refusing permission on the papers, the AIT went on to deal with the case on the alternative footing that family life was such as to engage Article 8. Mr Yeo argues that the initial finding that there was insufficient family life to engage Article 8 shows the Tribunal did not understand the concept of Article 8 family life, and this he submits vitiates the conclusion reached in the alternative assessment carried out by the Tribunal.

7. For my part I cannot accept that. The AIT in carrying out that alternative assessment were clearly applying their minds to the facts as they had found them to be about the relationship between the applicant and his son, and indeed the applicant and the mother of his son, and on the basis of those facts, having now approached it on the footing that there was Article 8 family life and that there would be interference with that, weighed all of that against the public interest. That weighing exercise and the balance which is then struck is a matter of judgment for the AIT. I cannot see that any error of law in that assessment arises from the earlier conclusion that the family life was not such to engage Article 8.

8. Then it is contended that the AIT did not have proper regard to the Article 8 rights of the son, contrary to the House of Lords decision in Beoku-Betts [2008] UKHL 39. Mr Yeo submits that no separate consideration is given to the impact on the son's Article 8 rights as is required by that decision. I am not persuaded that that is a properly arguable point which merits permission to appeal. It is important that one should not be too impressed by the particular form of a decision. In this particular case the Tribunal expressly reminded themselves at paragraph 12 that they had to pay due regard to the interests of the applicant's five year-old son and to the impact on his rights of the deportation of the applicant. That being so, their subsequent consideration of the continuation of the limited contact between the two people, the son and the applicant, if the applicant were deported, has in my view to be seen as reflecting the impact on the child as well as the impact on the applicant. It was not incumbent upon the Tribunal to go through the exercise again spelling out specifically the effects on the child as well as on the applicant; the relationship was a two-way relationship.

9. Then it is contended that the Tribunal did not have regard to the seriousness of the offence which led to the decision to deport, or certain other considerations. From that is developed an argument that it was perverse of the Tribunal to conclude that deportation was proportionate. It seems to me to be clear from the Tribunal's decision that they had well in mind the nature of the 2005 offence and the 12 months' prison sentence, because they refer to it more than once. They note that the 12-month sentence was imposed after a guilty plea. They also set out the applicant's other previous convictions. Their conclusion is at paragraph 33. They expressly balance the prevention of crime against the Article 8 rights. For my part I do not see what more they could or should have done. There would have been little purpose served by them trying to express in some adjectival way the view

they took of the seriousness of the offence and previous convictions of the applicant.

10. Finally it is said in the written material that the AIT was wrong to apply the amended version of paragraph 364 of the Immigration Rules which came into effect on 20 July 2006. This is a not a point which has been emphasised orally this morning by Mr Yeo, but reliance is placed in the written submissions on the AIT decision in EO (Turkey) [2007] UKAIT 62. Whether that decision can stand in the light of the House of Lords' recent decision in MO (Nigeria), sometimes referred to as Odelola [2009] UKHL 25, must I think be open to some question. But it matters not in the present case. The notice of decision to deport and the reasons for the decision are set out in a Home Office letter dated 3 April 2007. That decision was made in terms of paragraph 364 as amended. This decision-making process clearly superseded any earlier deportation order, and I bear in mind of course that a deportation order can only be made after any appeal or expiry of appeal rights against such a decision. Ultimately it is quite clear that the amended form of paragraph 364 did apply here because the decision under appeal was made after 20 July 2006. There was no error of law therefore by the AIT in that respect.

11. Putting all these matters together, I cannot see that there is any real prospect of a successful appeal in this case and it must follow from that that this application must be refused.

Order: Application refused.