C5/2005/0960

Neutral Citation Number: [2005] EWCA Civ 1592
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT

Royal Courts of Justice
Strand
London, WC2

Thursday, 24th November 2005

B E F O R E:

LORD JUSTICE SEDLEY

LORD JUSTICE LATHAM

LORD JUSTICE WALL

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JOVAN SHKEMBI

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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(Computer-Aided Transcript of the Stenograph Notes of
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PHILIP NATHAN (instructed by Messrs Sutovic and Hartigan) appeared on behalf of the Appellant
ANGUS McCULLOUGH (instructed by the Treasury Solicitor) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Thursday, 24th November 2005

1. LORD JUSTICE LATHAM: This is an appeal from a decision of the Immigration Appeal Tribunal notified on 26th January 2005. The Tribunal dismissed an appeal by the appellant from a decision of an adjudicator promulgated on 25th February 2004, in which he had dismissed the appellant's appeal against the respondent's refusal to grant the appellant asylum or leave to remain by reason of the claim made by the appellant that to remove him would breach his human rights.

2. The appellant is a citizen of Albania who came to this country on 23rd November 2000, concealed in a lorry, together with his wife and son. He claimed asylum on 30th November 2000. It is not necessary for the purposes of this appeal to consider the facts of the asylum claim. The Secretary of State rejected that claim. The Adjudicator rejected that claim and there was no appeal against that rejection to the Tribunal.

3. The sole ground upon which the appellant appealed to the Tribunal was the rejection of his Article 8 claim that to remove him from this country would be a disproportionate interference with the Article 8 rights of this family. The main basis upon which that claim was made was the period over which this appellant and his family had been resident in this country, coupled, in particular, with the consequence which was that the son, who was then in the Sixth Form of his school, would clearly have his education significantly disrupted by a decision to remove him.

4. Counsel acting for the appellant before the Adjudicator, Mr Nathan, who appears for him today, relied in support of his argument that the removal would be a breach of the family's Article 8 rights on a concession made by the respondent to the effect that, as a matter of policy, he would not remove those families with children who had come to this country prior to October 2000. Mr Nathan's argument was that although the appellant and his family clearly fell outside the strict terms of that concession, nonetheless the rationale for the concession applied to the family and, accordingly, there was a proper basis for saying that there could and should be a departure from the normal rule which was that those refused asylum should be refused leave to enter this country.

5. The Adjudicator dealt with it in the following way at paragraph 42:

> "Mr Nathan also relied on the respondent's recent concession made on 24th October 2003 in which he announced the intention to grant ILR [indefinite leave to remain] to families arriving in the UK before October 2000. This concession is purely a matter for the respondent. Having announced the concession the respondent will decide in due course which families at present within the system qualify to benefit from the concession. The concession does not change the law or in any way affect the way in which Article 8 appeals require to be dealt with and I cannot regard the concession as having any significance in this appeal. I have to decide the Article 8 appeal solely on the evidence before me."

6. However, it is noteworthy that the conclusion of the Adjudicator was that he should, nonetheless, recommend that the family should not be removed until the son had completed his current year in education in this country.

7. On the application for permission to appeal, the Tribunal granted leave to appeal, the grounds of appeal essentially repeating the argument which Mr Nathan had made to the Adjudicator, but adding that the Secretary of State had indicated that the reason for the concession was that it would be disproportionate to remove those to whom the concession was to apply and that that view had been expressed personally by the Secretary of State in a radio broadcast on 27th October 2003. The reason for the grant of permission was as follows:

> "The grounds of appeal are arguable in that the Adjudicator did not take into account the effect of the Respondent's exercise of October 2003 relating to family those who arrived in the UK prior to October 2000. This requires a decision by the Respondent, which will hopefully be made by the time this matter comes to hearing. No other issue arises."

8. It is apparent that that grant of permission was worded in a way which suggested that the matter could and should be reconsidered by the Secretary of State in the light of the policy he had adopted in relation to others. Nonetheless, it was a grant of permission to appeal and the appellant was entitled to have the issue determined by the Tribunal. The appeal was, however, from a post-June 2003 decision of the Adjudicator and therefore on a point of law only; therefore Mr Nathan would have to persuade the Tribunal that, in truth, there had been an error of law in the Adjudicator's decision.

9. When the matter came before the Tribunal, the Tribunal was not prepared to accept mere say-so as to what Mr Blunkett was said to have said in the interview referred to in the grounds of appeal. In my judgment, the Tribunal was absolutely correct to take that view. The position was that in order to make any sensible decision on this issue, the factual matrix had to be properly established. That matrix was not merely what was said by Mr Blunkett in an interview, but was, and should have been, the terms of the concession and its contents. The Tribunal, however, refused to grant an adjournment to the appellant to allow that matter to be put in proper order. It is against that decision to refuse an adjournment, essentially, that this appeal relates.

10. Rule 40 of the Immigration and Asylum Appeals (Procedure) Rules 2003 govern the Tribunal's powers in relation to adjournments and is in the following form:

> "40 (1) Subject to any provision of these Rules or of any other enactment, an adjudicator or the Tribunal may adjourn the hearing of any appeal or application.
> (2) An adjudicator or the Tribunal must not adjourn a hearing on the application of a party, unless satisfied that the appeal or application cannot otherwise be justly determined."

11. In this case, the Tribunal concluded that an adjournment should not be granted because, in its view, the just disposal of the appeal meant, as it put it:

> "... more than one that is convenient to any one of the parties. An adjournment would have caused inconvenience to both parties and inconvenience to others. Space had to be made in the list to accommodate the hearing and it ought to have been heard now. The appellant had no proper basis for assuming that his understanding of the Secretary of State's policy had been accepted. We found the application for an adjournment to be without merit."

12. In my view, in coming to that conclusion, the Tribunal was wrong. The concession had been the subject matter of argument before the Adjudicator. The gloss, if that is what it can properly be described as, on the concession, which was said to have been expressed by Mr Blunkett in the interview, was a gloss which was expressly referred to in the grounds of appeal. There was no indication from the respondent that there was to be any challenge to that. There was no respondent's notice which raised that issue before the Tribunal. In those circumstances, it seems to me that fairness required the Tribunal to give the appellant an opportunity to put the flesh that was obviously required upon the mere assertion of the concession, coupled with the words used by the Secretary of State in his interview. Accordingly, insofar as this appeal is one which depends upon the appellant persuading this court that the Tribunal was wrong to refuse an adjournment, I have no hesitation in saying that this appeal should be allowed.

13. However, there is before us a respondent's notice which this court has given permission to the Secretary of State to rely upon, albeit it has been served well out of time. That decision was made by a Master earlier this month. There was no objection to the application on behalf of the appellant. It does not seem to me, in those circumstances, that we can properly interfere with the Master's decision. The respondent's notice, essentially, asserts that this is an appeal which is doomed to eventual failure.

14. Mr McCullough, on behalf of the respondent, relies on this court's decision in Huang [2005] 3 WLR page 488. In that case this court dealt in some detail with the basis upon which the appellate authorities should deal with cases where the would-be immigrant raises Article 8 issues. He submits that on a proper reading of that decision the Tribunal will essentially be required to consider whether the Adjudicator could properly have concluded as matter of law that there were exceptional circumstances which should override the policy of the Secretary of State in circumstances such as these. He has to accept that this court made it clear in paragraphs 52 to 54 of that decision that matters of policy are matters which are capable of being justiciable, but, as Mr McCullough has rightly submitted, the position will usually be that the Article 8 rights of would- be immigrants will have been properly considered in the formulation of policy. That does not, however, mean that merely because in a given case the claim by the would-be immigrant does not, within the terms of the policy, have any entitlement to remain here, that is of itself clearly an answer because, as the court explained, the Adjudicator, in accordance with the decision of House of Lords in Razgar, has an independent assessment of the situation to perform. The consequence is that the Tribunal in the present case would have been entitled to consider, and if the matter is returned to the Tribunal will have to consider, what the true policy in this situation is and decide whether it does or does not apply to the appellant the facts as we understand them, but that is simply a matter at the moment of argument before us.

15. The policy does not strictly apply to the appellant but, nonetheless, Mr Nathan is entitled, it seems to me, to argue that if and insofar as a rationale can be discerned for the policy the Tribunal can consider whether or not as a consequence the Adjudicator was wrong to conclude that this was merely a concession which the Secretary of State is entitled either to depart from or to require strict adherence to, but goes further than that and justifies the conclusion that his is an exceptional case.

16. I do not wish to hold out any hope to the appellant that that latter argument can succeed on the facts of this case. But he was given leave to appeal to the Tribunal on that basis and it seems to me that he is entitled to have that appeal properly resolved by the Tribunal which Parliament has provided for the determination of that appeal, rather than this court taking upon itself any other role than that which it seems to me we should take in this case, which is to say that the procedure that was adopted by the Tribunal was unfair and the decision that it made was one which cannot stand. It is on that basis, and that basis only, that I would allow this appeal.

17. LORD JUSTICE WALL: I agree.

18. LORD JUSTICE SEDLEY: I also agree.