EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Clarke
Lord Emslie

[2010] CSIH 97
P331/09

OPINION OF LORD CARLOWAY

in the reclaiming motion of

HS

Petitioner and Reclaimer;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents:

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Act: Komoroski; McGill & Co.
Alt: K Campbell; C. Mullin, Solicitor to the Advocate General

16 December 2010

1. Background

[1] The applicant is an Algerian citizen, who entered the United Kingdom with her husband on 12 August 2005. On 23 January 2006 she gave birth to a son. On 17 February 2006 she made a claim for asylum, but that claim was rejected and her rights of appeal became exhausted on 7 December 2006. On 1 March 2007 she tendered further representations and, on 19 September 2007, asked that her case be considered under the "legacy review" of asylum claims. On 10 April 2008, she gave birth to a daughter. On 1 August 2008 her representations and review request were rejected.

[2] On 5 November 2008 the petitioner applied for discretionary leave to remain in the United Kingdom, partly on the basis that any attempt to remove her would amount to a contravention of her rights, and those of her family, under Article 8 of the European Convention on Human Rights. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the preservation of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The petitioner's letter making the application stated that:

> "In considering this application we clearly refer you to Article 8... and submit consideration be given to our client's present circumstances in terms of Article 8... Article 8... imposes a duty on the State, not only to refrain from interfering with an individual's private and family life, but also a duty to act positively to protect that family. Any derogation from Article 8(1) must be sustained in accordance with the above. In accordance with Article 8(2) it must be shown that any removal is in accordance with the Law is for a legitimate aim specified, and is necessary in a democratic society.
> We would submit that [the respondent]...in interpreting Article 8... must approach our client's situation as a straightforward balancing exercise and, equally, be must give consideration to the individual circumstances of the case. The decision... must pass the test of proportionality with the consequence that if [the respondent] fails to test the proportionality, then [the respondent] would thus make a decision which is incompatible with Article 8...".

The letter complained in general terms of a prospective disproportionate decision, but did not set out any facts specific to the petitioner and her family illustrating that complaint.

[3] By letter dated 16 February 2009 the petitioner's application was rejected. The respondent explained that she had first considered whether the petitioner's submission amounted to a "fresh" claim. Ultimately, she decided that it did not. However, she dealt with the article 8 claim separately, under reference to which the petitioner had

founded upon *Beoku-Betts* v *Secretary of State for the Home Department* [2009] 1 AC 115. The respondent wrote:

> "An Immigration Judge would be able to distinguish your client's case in fact from the above caselaw (*sic*). This is because your client and her immediate family would be removed together as a family unit...
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> ...
>
> An Immigration Judge in examining your client's rights under Article 8 of ECHR would do so in accordance with Paragraph 17 of Lord Bingham's speech in *R (Razgar) v Secretary of State for the Home Department* ([2004] 2 AC 369). The first point to be considered by an Immigration Judge is would any proposed removal be an interference to your client's right to respect for private and family life? An Immigration Judge would accept that your client and her family will have established a family life in the United Kingdom and that removal will constitute an interference to that family and private life. An Immigration Judge would consider, however, that such interference would not be enough to engage the operation of Article 8. This is because an Immigration Judge would have to take recognance (*sic*, recognisance) of the fact that your client and her family would be removed together in order for them to continue their life overseas. Article 8 does not mean an individual can, in all circumstances choose where they wish to enjoy their private life when on balance there are no obstacles to them establishing a private life elsewhere. Furthermore, an Immigration Judge would consider that your client's private and family life has been established whilst she has been in the country unlawfully, in the knowledge that she had no right to be here and could be removed at any time.
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> An Immigration Judge would also have to consider proportionality. Any proposed removal would plainly be in accordance with the law and would pursue the legitimate aim of maintaining effective immigration control. Such interference is necessary in a democratic society and in reaching this decision an Immigration Judge would balance your client's rights against the wider rights and freedom of others and the general public interest.
>
> Your client has a child aged 2 years and another who is aged 10 months, both of whom would be considered young enough to adapt to a life abroad with their parents. Whilst an Immigration Judge would appreciate that their material quality of life may not be to the same standard as it would be in the United Kingdom, this is the case with many children brought up in other countries and is not considered a sufficiently compelling factor.
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> In conclusion, it is not accepted that given the particular facts of your client's case there is a realistic prospect of an Immigration Judge concluding that the removal of your client would constitute a disproportionate interference with your client's private and family life or that the Article 8 rights of your client would be breached".

The decision letter, which consists of eight closely typed pages of facts and reasons, goes on to consider a large number of specific factors in terms of the Immigration Rules (395C and 365 to 368 for family members).

2. Judicial Review

[4] The petitioner lodged a petition for judicial review of the respondent's decision reflected in the letter of 16 February 2009. The basis for the petition was the terms of Article 3.1 of the United Nations Convention on the Rights of the Child which are that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Although, upon ratification on 16 December 1991, the Government had made a reservation about immigration control, on 22 September 2008 the respondent announced that the reservation was withdrawn and, as from 8 November 2008, it ceased to have effect. It was contended that, in taking the decision of 16 February 2009, the respondent had failed to have regard to the principle contained in Article 3.1. Either the respondent had violated the United Kingdom's responsibilities under the treaty or, if the article did not form part of domestic law, she had acted contrary to the petitioner's legitimate expectation that regard would be had to the terms of the article standing the respondent's announcement. The petition advanced the proposition that, whereas a claim under ECHR Article 8 required a balancing exercise which did not afford the interests of children any preference, a claim made with reference to UNCRC Article 3 required the best interests of the children to be regarded as a primary consideration.

[5] When the matter came before the Lord Ordinary, the respondent made an important concession of law that, when determining an ECHR Article 8 claim, the best interests of the child required to be taken into account as a primary consideration, as stipulated in UNCRC Article 3.1. However, in oral argument, the petitioner

maintained that this was so, not because of anything inherent in Article 8, but because of the terms of Article 3.1. The petitioner proceeded to point to the absence of any reference to Article 3 in the decision letter. There had been no assessment on where the best interests of the children lay and the respondent appeared to have proceeded upon the basis that immigration control was a more compelling factor than the best interests of the children. The respondent's position in answer was that best interests only had to be considered as part of the Article 8 balancing exercise as a primary, but not the over-riding, consideration. That had been done by the respondent.

[6] The Lord Ordinary accepted the respondent's contentions. She noted that the words "the paramount consideration" had appeared in an earlier draft of UNCRC Article 3 but the words "a primary consideration" had ultimately been adopted (see para [19] of her Opinion). She then reasoned:

> "[20] ...[T]he principle of the best interests as "a primary consideration" carries with it the implication that, depending on the facts and circumstances of a particular case, there may be other relevant considerations which also may be regarded as primary in importance and which may properly be taken into account. ...[W]hen one or more such considerations are taken into account, it follows that in a particular case, one or more considerations may outweigh the best interests of the child.
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> [21] It appears also to be implicit in the submission on behalf of the petitioner that Article 3 of the UN Convention lays down some higher standard protecting the interests of the child so that even a mandatory consideration of the best interests of the child as part of the consideration of Article 8 could not meet that standard and therefore give effect to the principle. I do not accept that. Article 3 of the UN Convention does not elevate the principle to a higher status which would be implied by the words "the paramount consideration" or "the primary consideration". It is also... not intended to be a reference to the best interests of the child in the very general sense which might be appropriate in care proceedings. What is in issue, in the immigration context, is whether or not the decision affects the Article 8 rights of the child. A failure to give consideration to the bests interests of the child would not... satisfy "the principle". The mere fact that a balancing exercise of circumstances and factors is necessarily involved in Article 8 consideration, does not mean that "the principle" is not given effect. ...[A] a recognition that the best interests of the child must be considered in the balancing exercise is sufficient to give effect to the principle that it is a primary consideration. Other factors or circumstances may be omitted or discounted because they have not been given that status. But a failure to address the best interests of the child in a case

> where a child is involved, and the decision maker is required to consider Article 8 ECHR would... amount to a failure to give effect to 'the principle'".

[7] The Lord Ordinary stressed, therefore, that the respondent, in making her Article 8 decision, required to consider the best interests of the children. However, she concluded that:

"[25] ...[T]he respondent has set out the reasons she considered relevant to a decision in relation to the very young children. ...I accept that reference is not made to the "the principle" but I consider as a fair interpretation of the decision letter that the respondent did have regard to the best interests of the children both present and future, The family are to be removed together when the very young children have spent only a short time in the UK. The interests of the children are considered under various heads and there is a recognition that, for example, the children might have a higher material quality of life in the UK. As I read the decision letter, the respondent is carrying out a balancing exercise which includes reference to the best interests of the children impliedly though the term is not used explicitly. ...[I]t is not essential to make explicit reference to "the principle" albeit that would assist in making the approach of the respondent more transparent".

3. Submissions

[8] The petitioner produced a detailed written submission, which has been considered. In oral submission, it was emphasised, as a preliminary point, that the petitioner maintained, as she had done in the petition, that, notwithstanding the concession made by the respondent before the Lord Ordinary, the best interests of the child in terms of UNCRC Article 3 were broader than the interests protected in ECHR Article 8. The weight to be applied to the interests, as a primary consideration, was different from that to be given under Article 8. Independent regard had to be made to Article 3. The Lord Ordinary had not dealt with this argument and this was a weakness in her decision. She required to determine the status of the UNCRC and to apply Article 3 as an obvious matter to be noticed.

[9] The Lord Ordinary had erred in reasoning, as she did at paragraph [21] of her Opinion, that it was sufficient for best interests to have been considered. It was not

sufficient that they were regarded as a "relevant" or, as the Lord Ordinary had put it, "mandatory" consideration. They required to be looked at as a "primary" consideration, which was something more. The respondent had been bound to take into account material of a general nature relating to conditions in the UK and Algeria and to have regard to the fact that the children were born in the UK.

[10] The Lord Ordinary had also erred in holding in the same paragraph [21] that the reference to best interests in the UNCRC Article 3 was not intended to be a reference in the general sense which might be appropriate in care proceedings. The other articles of the UNCRC, where there was a reference to the term (arts. 9, 18 and 21), made it clear that it was used in the same sense as in care proceedings

[11] The respondent produced a written submission, which has been considered. In essence, the respondent again conceded that, notwithstanding it not being mentioned in ECHR Article 8, the respondent required to take into account the best interests of the child as a primary consideration when considering a claim under that article. That is what she had done and that is what the Lord Ordinary had correctly held. It was accepted that, even if there were no specific mention of best interests in the application, the respondent would still need to consider them. Applications made to the respondent were generally decided by solicitors experienced in immigration law. The best interests of a child were those arising in the particular circumstances of the case and required to be considered upon the basis of the material made available by the applicant. Generic material could not be decisive unless it revealed unacceptable treatment of children in the country of origin. There was nothing of that sort in this case. A "lead professional report" had been obtained, but this had not added anything to the issue.

4. Decision

[12] The application of the petitioner to the respondent was for exceptional leave to remain because otherwise her rights under ECHR Article 8 would be infringed. That was the context of the decision which the respondent had to make. The application was not based upon a contention that it would be unlawful for the respondent to remove the petitioner because she, or the children, had rights under UNCRC Article 3 and which, as a matter of domestic law, would thereby be infringed. In these circumstances, the respondent cannot be criticised for making the decision which she was invited to make. In that context, therefore, the question of whether UNCRC Article 3 provides a person with a "stand alone" legal remedy, or gives rise to a legitimate expectation, does not arise for a decision in this process.

[13] It is not disputed that, in considering an application under ECHR Article 8, the respondent must take into account the best interests of the children as a primary consideration. That arises because, in interpreting the scope of any rights which may arise in terms of the enforceable articles of the European Convention, the court is entitled to presume that these rights will be compatible with the United Kingdom's international treaty obligations. The concession made by the respondent is accordingly a good one.

[14] The Lord Ordinary began her analysis of the manner in which the best interests of children should be taken into account in an EHCR Article 8 application by emphasising that it was as "a primary" and not "the paramount" consideration (para [19]). This is, of course, correct. As the Lord Ordinary continued, there may be other relevant considerations which can be regarded as "primary in importance" in a particular case (para [20]). Thus, the fact that it may be in the best interests of the children to leave or to remain in the United Kingdom will not necessarily be decisive

in an immigration case. These interests may be outweighed by other considerations (para [20]). In this context, there is substance in the Lord Ordinary's reasoning that the assessment of best interests is a somewhat different exercise from that involved in welfare cases where the decision is not normally about which country best meets these interests but precisely where and with whom a child should reside. However, little seems to turn on this point.

[15] The Lord Ordinary went on to express the view that "mandatory" consideration of the best interests will give effect to the principle in UNCRC Article 3 and that mere consideration in the balancing exercise "is sufficient to give effect to the principle that it is a primary consideration" (para [21]). If that were correct, there would be no content to the words "a primary" before "consideration". It is not sufficient, if regard is had to Article 3, for best interests to have been taken into account in the equation merely as a relevant consideration. They must be regarded as "a primary consideration"; that is to say that they must be at least one of those matters at the forefront of the decision maker's thinking. Best interests are not merely relevant. They are given a hierarchical importance. The decision maker is being told by Article 3 that they are not just something to be taken into account but something to be afforded a grander status. They are to be regarded as a matter of importance. That having been said, the measure of that importance in the final balance will depend upon the facts and circumstances of the particular case.

[16] The Lord Ordinary's approach was that, since the respondent had clearly taken best interests into account, the respondent could not have erred in law. That matter has to be revisited in light of the different view taken by the court that the children's best interests required not only to be taken into account but also that they had to be treated as a primary consideration. There is, of course, force in the petitioner's criticism that

the respondent did not expressly state that she had taken those interests into account at all. That might be explained by the timing of the decision relative to the ministerial announcement and by an adherence to the judicial guidance set out in *R* (*Razgar)* (*supra*). Nevertheless, to avoid unnecessary criticism, the court would expect that, where the respondent has taken into account the best interests of children as a primary consideration in terms of the respondent's concession, she should take care to state that expressly.

[17] But, the issue remains whether, on the material provided to her, there has been a material error of law by reason of the respondent's failure to take into account the best interests of the children as a primary consideration. Given the terms of the respondent's decision letter, the court is not persuaded that such a failure has been demonstrated. Although sequence is not critical, it is of some note that, before going on to consider the detailed material which the respondent required to consider in terms of the Immigration Rules, she had already addressed herself to the issue of the children's welfare. She stated that, given the young ages of the children, they would adapt to life abroad with their parents before stating that the removal of the petitioner would not be disproportionate. In any event, for an error of this type to be regarded as material, the petitioner would have to demonstrate not only that the respondent erred in her approach but also that, had she considered the matter properly, there was a realistic prospect of a different decision being reached.

[18] The reality here was that the petitioner did not provide the respondent with any material upon which the respondent could have decided that it was in the best interests of the children that they should remain in the United Kingdom, the country of their birth, as distinct from being brought up in Algeria, the country of their cultural origin. The court was not pointed towards any evidence to suggest that it would be in the best

interests of these two children to remain in the United Kingdom. The respondent did make a general finding that the material quality of the children's lives "may not be to the same standard as it would be" in the United Kingdom. But this is a very tentative view and its foundation is not immediately apparent. Whether it is in the best interests of these particular two children to remain in the United Kingdom must depend upon their particular circumstances, which were not explored.

[19] The absence of any material pointing one way or the other is not surprising, given that the petitioner did not advance a case that it was in the best interests of the children to remain in the United Kingdom. In that situation, the court is unable to conclude that the respondent might have had a basis upon which to form a view that the best interests of the children lay in their remaining in the United Kingdom. In that state of affairs, no material error of law has been demonstrated and the prayer of the petition, and with it the reclaiming motion, falls to be refused.