OUTER HOUSE, COURT OF SESSION

[2009] CSOH 124

P331/09

OPINION OF LADY CLARK OF CALTON

in the Petition

of

HS (AP)

Petitioner;

For Judicial Review of decision by the Secretary of State for the Home Department dated 16 February 2009

Petitioner: J. Komorowski; McGill & Co
Respondents: K Campbell; Office of the Solicitor to the Advocate General for Scotland
4 September 2009

Summary

[1] Substantial amendments were made by the petitioner to the petition and these are reflected in the amended petition 12 of process. Averments are made about the factual circumstances in paragraph 4. The petitioner left Algeria with her husband and arrived in the UK on 12 August 2005. They had a son, born 23 January 2006 and a daughter born 10 April 2008. The petitioner was unsuccessful in her various attempts under statutory procedures to claim asylum. Thereafter on 5 November 2008 the petitioner's

solicitors submitted to the respondent that any attempt to remove the petitioner from the UK would amount to contravention of her rights and the respondent's duties under Article 8 of the European Convention on Human Rights (hereinafter referred to as Article 8 ECHR) and that the respondent had not properly considered the petitioner's claim in terms of the "legacy review" exercise. This is a reference to an announcement made by the respondent in July 2006 that there would be a review of asylum claims then outstanding. This is commonly known as the Case Resolution Programme. In support of the petitioner's case, various documents now lodged with the petition were sent to the respondent. The decision making was carried out by an official acting on behalf of the respondent. On 16 February 2009 the respondent rejected the submissions in the decision letter, 6/1 of process.

[2] The case came before me for First Hearing which was held over two days following a continuation. At my request, parties provided a written outline of submissions. These are contained in 14 and 15 of process. The wide issues covered in the petition were narrowed during submissions because counsel for the respondent conceded, as a matter of law, that the respondent in reaching a decision in this case required to take into account "as a primary consideration the best interests of the children". I refer to that as the "the principle". Counsel for the petitioner and counsel for the respondent disagreed about the source from which "the principle" flowed and the implications thereof. The submissions focussed on paragraphs 13 and 14 of the amended petition.

Submissions on behalf of the petitioner

[3] Counsel for the petitioner submitted that there was ratification by the United Kingdom on 16 December 1991 to the United Nations Convention on the Rights of

the Child (hereafter referred to as the UN Convention). Article 3(1) provides *inter alia*:

> "1. 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"

At the time of ratification there was a reservation by the UK regarding the control of immigration. That reservation ceased to have effect on 18 November 2008 prior to the decision of the respondent in this case. Counsel submitted that in these circumstances the principle that the best interests of the child should be a primary consideration required to be applied by the respondent. Counsel submitted that the source of "the principle" was Article 3(1) of the UN Convention. He developed his submission on the basis that counsel on behalf of the respondent, having conceded as a matter of law that "the principle" applied, was wrong in contending that "the principle" was inherent in Article 8 ECHR and wrong in his submission that "the principle" was given effect when Article 8 ECHR was considered by the respondent in this case. Counsel for the petitioner also submitted that, in any event, in the present case the decision letter, properly understood, demonstrated that "the principle" had not been applied in the assessment which had been carried out by the respondent.

[4] Counsel for the petitioner then considered the terms of the decision letter 6/1 of process. He submitted that it was plain from the letter that no express reference had been made to "the principle" by the respondent in expressing the reasons for the decision. At best for the respondent, there was a tentative indication in the decision letter of what might be best for the children. There was some discussion in the decision letter about the children and potential quality of life. Counsel was critical of

the approach adopted in the decision letter for a number of reasons. Firstly, he submitted that there was no concluded assessment about the best interests of the children. Secondly, the respondent in expressing the view that there was no sufficient compelling factor appeared to proceed on the basis that immigration control is such an important factor that there requires to be compelling reasons to alter the balance. It was submitted that was to give immigration control a higher or pre eminent status which did not recognise the best interests of the children as a primary consideration.

[5] Counsel for the petitioner referred to *Minister of State for Immigration and Ethnic Affairs* v *Teoh* 183 (1995) 183 CLR 273 at pages 289, 292, 303 and 305. He referred in particular to the passage at page 292 which states:

> " The question which then arises is whether the delegate made her decision without treating the best interests of the child as a primary consideration. There is nothing to indicate that the Panel or the Minister's delegate had regard to the terms of the Convention. That would not matter if it appears from the delegate's acceptance of the Panel's recommendation that the principle enshrined in Art 3.1 was applied. If that were the case, the legitimate expectation was fulfilled and no case of procedural unfairness could arise. It can be said that the delegate carried out a balancing exercise in which she considered the plight of Mrs Teoh and the children and recognised that they would face a 'very difficult and bleak future' if the respondent were deported. On the other hand, she considered that the respondent had been convicted of very serious offences and this factor outweighed the "compassionate claims". However it does not seem to us that the Panel or the delegate regarded the best interests of the children as a primary consideration. The last sentence in the recommendation of the Panel reveals that, in conformity with the departmental instructions, it was treating the good character requirement as *the* primary consideration."

Counsel urged me to adopt the approach of the Court in that case and to consider that "a decision maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration such as immigration control outweighed the best interests of the children." He submitted that the respondent in the present case had not carried out that exercise. The respondent had not had regard to the principle, had not

formed a view about the best interests of the children as a primary consideration and then considered whether the force of any other consideration outweighed it. The respondent appeared to elevate immigration control as "the" primary consideration which required to be outweighed by other compelling reasons.

[6] Counsel for the petitioner then referred to *R* v *SSHD ex parte Gangadeen* [1998] INLR 206 at 207 and 218-219. It was submitted that the Commission approached Article 8 ECHR as a straight forward balancing exercise in which the scale starts evenly balanced. The weight to be given to the considerations on each side of the balance is to be assessed according to the individual circumstances of the case. Counsel submitted that this approach to Article 8 is correct and indicates that Article 8 does not imply the application of "the principle". He submitted that, albeit in some circumstances, Article 8 may involve consideration of the best interests of the child, that does not mean that in every Article 8 case, where a child is involved, that there will be such consideration taking into account the best interests of the child as a primary consideration. That is what is required by Article 3 of the UN Convention. It is not sufficient therefore for the respondent to claim that for the purposes of the present action consideration of Article 8(2) issues necessarily involves a consideration of the best interests of the children as a primary consideration. Counsel referred to Thomas L.J. at pages 227-229 and in particular the passage at 229D where he states:

> "In the field of immigration, particularly decisions relating to deportation, the interests of the child are not, and cannot, be paramount or primary..."

[7] It was submitted by counsel that whatever "primary" means, whether it means first consideration or a pre-eminent consideration or something similar, it does not mean a balance "where the scales start as even." In Article 8 ECHR cases, the balance does start even and it follows that whatever principles are being used to determine Article 8

questions, that does not impliedly and necessarily cover an approach where the best interests of the child is required by law to be a primary consideration. Reference was made to *Ahmed* v *Secretary of State for the Home Department* 2002 SLT 1347 and in particular paragraphs 9-11. In paragraph 11, Lord Nimmo Smith stated:

> "The extent to which the petitioner can rely on Article 8 of the Convention in support of his argument that the respondent's decision was *Wednesbury* unreasonable is set out in decisions of this court in *Abdadou & Saini*. The weight to be given to the interests of children, in considering the application of Article 8, is as set out in *Gangadeen*. The interests of children require to be weighed against the other considerations...."

[8] Counsel then invited me to compare Article 3 of the UN Convention and Article 8 ECHR under reference to *Tavita* v *Minister of Immigration* [1994] 2NZLR 257 at 265. Cooke P stated:

> "It would appear therefore that under the European Convention a balancing exercise is called for at times. A broadly similar exercise may be required under the two international instruments relevant in the present case but the basic rights of the family and the child are a starting point. It is accepted by the Crown that the case has never been considered from that point of view. Consideration from that point of view could produce a different result..."

Submissions on behalf of the respondent

[9] Counsel for the respondent submitted firstly, that the respondent accepted that "the principle" must be applied, but "the principle" is not a separate and stand alone consideration. Counsel submitted that the issue of the best interests of the child as a primary consideration is one which arises because the respondent requires to address

Article 8 ECHR. Article 8 ECHR makes the following provision in respect of the right to respect for private and family life.

> "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 prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Counsel submitted that the respondent is entitled to address "the principle" not directly by considering Article 3 of the UN Convention but as part of the balancing process which the respondent requires to undertake in terms of Article 8(2) ECHR. Secondly, it should be noted that "the principle" is defined in terms of "a primary consideration" but it is not the over-riding consideration. Thirdly, "the principle" may be outweighed by other important competing considerations. Counsel explained that the respondent does not accept that the UN Convention, in particular Article 3, is justiciable but the issue does not arise in the present case as the respondent accepts that "the principle" applies. The reason the respondent accepts this is because the principle is implicit in Article 8(2) ECHR.

[10] In developing his submission, counsel for the respondent referred to *Glaser* v *UK* [2001] 33 EHRR 1. Counsel recognised that the case was not concerned with immigration matters but related to relations amongst family members. He accepted that the discussion by the Court about the best interests of children requires to be seen in that context.

[11] Counsel submitted that his approach was supported by the approach adopted by the European Court of Human Rights in *Üner* v *Netherlands* [2006] 45 EHRR 14, paragraphs 54, 57, 58 and 64. The Court in paragraph 58 makes explicit that Article 8 includes criteria, namely the best interests and well-being of the child, and in

particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled. The Court noted that this is already reflected in existing case law which is referred to in paragraph 58. Counsel submitted that the Court while recognising the importance of the best interests of the children also recognised that these interests might be outweighed by other considerations.

[12] Turning to domestic law in an immigration context, counsel made passing reference to *AG and ors* v *SSHD* [2007] UKAIT 00082. He conceded however that does not give much assistance with the issues in the present case. Counsel placed reliance on *VW & MO (Uganda)* [2008] UKAIT 00021. That case considered a number of issues, some of which were reversed on appeal reported at [2009] EWCA Civ 5). The Tribunal in reviewing the decision of the Immigration Judge considered in paragraphs 47-49 the best interests of a minor child. It was submitted that the Immigration Judge had failed to accord due weight to the evidence from a social worker that removal of the minor child would not be in her best interests. The Tribunal supported the approach of the Immigration Judge in paragraph 48. In paragraph 49 the Tribunal reiterated that mere disagreement about the weight attached by an Immigration Judge to a factor cannot give rise (without more) to an error of law. Counsel submitted that the Tribunal and the Immigration Judge gave consideration to the best interests of the child involved as part of the consideration of Article 8(2) ECHR in the course of the consideration of proportionality which the decision maker requires to undertake. Counsel referred also to *DS (India)* [2009] EWCA Civ 544. Paragraph 18 summarises the grounds of appeal considered by the Court of Appeal. Paragraphs 19-22 is a summary of the submissions presented. One of the issues in the case was whether the Tribunal had placed insufficient weight and/or had failed

adequately to consider the impact of the removal of the appellant on a child accepted and treated as a child of the marriage. It was also contended that the Tribunal had failed to make findings concerning the best interests of the child. These issues are considered in paragraphs 29 -31 and specifically in paragraphs 32-36. The Court accepted that the Tribunal had considered and reflected on the best interests of the child. The Court also accepted that the Tribunal had made an evaluation of the many factors in the case. On that basis the Court did not accept that the Tribunal had erred. The Court appeared to accept the approach in *Üner*. The Court specifically rejected a submission to the effect that the best interests of the child amounted to the primary consideration. Lord Justice Ricks concluded in paragraph 35

> "...I do not accept the submission that the Tribunal paid other than the closest and most anxious consideration to the best interests of the boy, who is presently about five and a half years old. The Tribunal made express reference to *Üner* (at paragraph 138), described the consequences of the appellant's conduct leading to his deportation as causing 'enormous distress to the boy and referred specifically to the loss of the opportunity of a British education and to greatly reduced contact with the appellant"

[13] Turning to the decision letter 6/1 of process, counsel for the respondent submitted that the use of the words "... is not considered a sufficiently compelling factor" does not bear the interpretation contended for by the petitioner. It is plain from the decision letter that the respondent did give consideration to the best interests of the children in the context of the factors and considerations which were placed before the respondent. The petitioner did not submit that any particular information presented to the respondent was not taken into consideration when it ought to have been or that a relevant consideration was not taken into account. The respondent is plainly

approaching the best interests of the children as a primary consideration in considering the facts and circumstances in relation to Article 8(2) ECHR. That approach is consistent with the case law prayed in aid on behalf of the respondent. The approach necessarily involves balancing relevant consideration, some of which may be considered of greater weight depending upon the circumstances. The respondent is not tasked with looking at the best interests of the children first and separately and then considering any other relevant considerations. That would be to elevate the best interests of the children to "the" primary consideration and not "a" primary consideration. Counsel for the respondent submitted that on a fair reading of the decision letter, the respondent did consider the best interests of the children as a primary consideration.

[14] Counsel submitted that the use of the words "a primary consideration" has a clear meaning. It is not particularly helpful to substitute other similar words such as "special weight", "important consideration" or "first rank importance". It is not disputed in this case that "a primary consideration" does not mean "the primary consideration" and does not mean that the best interests of the child are to be regarded as "paramount."

[15] Counsel for the respondent conceded that if on a consideration and proper interpretation of the decision letter, the Court was not satisfied that the respondent had applied "the principle", the decision could not stand. I was invited however to conclude that looked at broadly, the respondent had applied "the principle" and to refuse the petition.

[16] There was some discussion, raised by the Court, about the remedy if the Court found that the grounds on which the decision were made were flawed but nevertheless

the result reached was correct when the proper test was applied. Reference was made to *Andrew* v *City of Glasgow District Council* 1996 SLT 814 at 818 I-L.

Response on behalf of the petitioner

[17] Counsel for the petitioner made the following comments in relation to the case law cited in support on behalf of the respondent. He submitted that *Glaser* was not of assistance. That case was not dealing with immigration issues and was dealing with relations amongst family members in a different context. In relation to *Üner* he emphasised that the interests of the child in family life was affected by the removal of the father. But in the present case, the problem is not interference with the petitioner's right to family life because the family are being removed as a whole. Article 8 is concerned with family life, it is not focussed on the best interests of the child which may be a separate issue. Referring to *AG & ors*, counsel submitted that the case was not determined on the basis of best interests of the child but other reasons. He submitted that *VW and MO (Uganda)* was similar to *Üner* in that it was dealing with potential separation of parent and child and in such cases there was an interference with the family life of the children. It was submitted that the essence of Article 8(2) is that it is concerned with family life and does not require that the best interests of the child are given any consideration (primary or otherwise) where there is no interference with family life.

Discussion

[18] The issues in this case were well focussed by counsel and I am grateful for their assistance. The case raise an interesting point of principle as well as requiring a decision in the particular context of this case.

[19] It is not in my opinion helpful to try to substitute other words to help explain the meaning of Article 3 of the UN Convention when it refers to the best interests of the child as a primary consideration. In domestic law proceedings in Scotland the Courts have for long been used to interpreting and applying a principle relating to the welfare of the child as the paramount consideration. The words "the paramount consideration" were originally reflected in the working text of the UN Convention (1980 E/CN.4/1349) to which I was referred but the words were not adopted into the official text quoted in paragraph 3 hereof. "The principle" in Article 3 of the UN Convention is not phrased in terms of "the paramount consideration" nor in terms of "the primary consideration". In my opinion, both these formulations would give an importance and affect the application of "the principle" in a way not demanded by a principle which is phrased in terms as "a primary consideration".

[20] In my opinion the 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. I also consider that when one or more such considerations are taken into account, it follows that in a particular case, one or more of these considerations may outweigh the best interests of the child.

[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 in my opinion 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 best interests of the child would not in my opinion 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. In my opinion 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 in my opinion amount to a failure to give effect to "the principle".

[22] I consider that the submission on behalf of the petitioner to the effect that Article 8 is concerned with family life and is not focussed on the best interests of the child which may be a separate issue is misconceived. Article 8 is plainly not confined to respect for family life and issues may arise about a child's private life, even in circumstances where there is no question of any separation of the child from family members. I do not consider that there is any difficulty in applying Article 8 with "the principle" in mind. I do not consider that there is any inconsistency in applying "the principle" merely because Article 8(2) ECHR involves a balancing exercise. What is being considered in immigration cases, such as the present case, are issues relating to the applicant who is now the petitioner in these proceedings. It is recognised that an applicant may have Article 8 ECHR protection. In circumstances where an applicant

has a dependent child or children, they may also have Article 8 ECHR protection as dependents albeit they may not have an independent claim in the immigration process. The issue in dispute is whether the balancing exercise involved in Article 8 ECHR consideration does or does not imply the application of "the principle". As is apparent from the case law cited by counsel for the respondent, both the Court of Human Rights and domestic courts have in some circumstances embarked upon a consideration of the best interests of the children in considering certain issues in relation to Article 8 ECHR. If it is accepted that it is necessary and appropriate in an immigration context, where Article 8 is being considered, to consider also whether a child also may have the protection of Article 8, I am of the opinion that consideration requires to be by reference to some standard. The obvious standard in my opinion appears to be the best interests of the child. That would be consistent with the international obligation in Article 3 of the UN Convention and with the approach adopted in the ECHR and domestic case law.

[23] I do not consider that the authorities relied on by the petitioner support the position which he adopts. The decision making in the tribunal in *Minister of State for Immigration and Ethnic Affairs* was taken in circumstances where the decision maker required to treat "the good character requirement" as "the" primary consideration. The decision must be seen in that context. That is not the situation in immigration cases like the present case. As I have stated there may be other considerations which in a particular case may be a primary consideration but I do not accept that any of such considerations amount to a consideration which would have the status of "the primary consideration". The weight to be given to a consideration will depend upon the facts and circumstances and will require to be decided by the decision maker. In *R* v *SSHD ex parte Gangadeen*, there were submissions that the best interests of the child was

paramount. That is a different situation. There is nothing in my opinion inconsistent in a balancing exercise in which the scales start evenly balanced with "the principle". What is important for judicial review purposes and for Article 8 ECHR assessment purposes is that the decision maker would not be entitled to omit a consideration of the best interests of the children if that has the status of a primary consideration. If the decision maker failed to consider "the principle", that might have consequences in relation to judicial review. I consider that *Tavita* is of little assistance. That case was considered in a foreign jurisdiction in circumstances where parties did not appear to have the opportunity to address the Court on the matters prayed in aid by counsel for the petitioner.

[24] I consider that the case law prayed in aid by counsel for the respondent which I have summarised in paragraph 11 and 12 does lend support to his submission and includes matters wider than family life. I note for example that *Üner* is not limited to a consideration of best interests in relation to family. Reference is also made to "the validity of social, cultural and family ties with the host country and with the country of destination" (paragraph 58). In *VW & MO (Uganda)* consideration was obviously being given to issues wider than family life looking to practical or cultural links (paragraphs 47-48). Similarly in *DS (India)* consideration of the circumstances of the boy who was aged about five years extended beyond family considerations to include, for example, educational opportunities (paragraph 35).

[25] In this case the respondent has set out the reasons she considered relevant to a decision in relation to the very young children. These are narrated in the decision letter in pages 4 and 5 and also as part of the consideration of a number of factors in pages 5 and 6. It is not submitted that the respondent took into account some irrelevant factor or failed to take account of some relevant factor in relation to the

children. I accept that reference is not made in terms to "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 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 consider that it is not essential to make explicit reference to "the principle" albeit that would assist in making the approach of the respondent more transparent.

[26] As the issue referred to paragraph 16 was not fully argued before me and is not essential to my decision, I do not deal with that.

[27] For the reasons given I refuse the Petition.