Case No: C5/2008/0390

Neutral Citation Number: [2008] EWCA Civ 1551
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/00249/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 10th December 2008

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE KEENE
and
LADY JUSTICE SMITH DBE

- -

Between:

CL (VIETNAM)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Ms J Bond (instructed by the Immigration Advisory Service) appeared on behalf of the **Appellant**.

Mr J Hyam (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Keene:

1. The appellant is a citizen of Vietnam who arrived in the United Kingdom in June 2002 and claimed asylum shortly thereafter. He was at that time aged 13, having been born on 28 October 1988. He was accompanied only by his brother who was then aged 14. The appellant was therefore an unaccompanied child seeking asylum, a person in respect of whom the Secretary of State had and has specific policies.

2. The Secretary of State refused the asylum application by letter dated 22 July 2002, which also said that it had been decided that the removal of the appellant would not breach his rights under the European Convention on Human Rights ("the ECHR"). The appellant appealed against those decisions on 31 July 2002. For some reason which has not been identified, the Immigration Appeal Tribunal now the Asylum and Immigration Tribunal ("the AIT") did not deal with the appeal until mid 2006.

3. By decision promulgated on 14 July 2006, almost four years after the Home Office decision, Immigration Judge Dineen dismissed the appeal in respect of asylum and Article 3 rights but allowed it in respect of Article 8. I shall have to look in more detail at that decision in due course. The Secretary of State applied to the AIT for reconsideration on the basis that the Immigration Judge had made an error of law. The AIT, Senior Immigration Judge Gleeson, found that that was indeed so and redetermined the appeal in the Secretary of State's favour.

4. The appellant now appeals to this court, permission to appeal having been granted on two grounds only by Sir Peter Gibson.

5. The facts about the appellant can be put briefly. His father had been killed in Vietnam in early 1997. About a year later, when the appellant was aged ten, his mother left him and his brother with their grandmother; she died in 2001. Their mother returned and made arrangements for the two boys to go to the United Kingdom. They were met at the airport in London by a friend of their mother's, with whom they then lived for a time before being placed in foster care by social services. In November 2005 they moved to semi-independent housing.

6. The letter of 22 July 2002 containing the Secretary of State's refusal on asylum and his human rights decision was followed by a notice that removal directions had been given, that being dated 12 August 2002. That seems to have reflected a decision within the Home Office that the appellant did not qualify for leave to enter under the Secretary of State's then policy in respect of unaccompanied children. There is a Home Office document headed "consideration" and dated 22 July 2002 which concludes by stating:

> "Despite the fact that Applicant is a minor it is considered that he can be returned to Vietnam as it has been established that there are adequate care

> provisions for children returned to Vietnam. See attached letter from the British Embassy in Hanoi."

7. The Secretary of State's policy at that time in respect of children, ie those under 18 years of age, who arrived in the United Kingdom unaccompanied and sought asylum unsuccessfully, was that they would not be removed unless adequate reception and care arrangements could be made for them in their country of origin. If such arrangements could not be made, then in the case of children under 14 exceptional leave to remain would be granted for four years on the expiry of which they would be able to apply for indefinite leave to remain.

8. The British Embassy letter was one dated 4 July 2001. It stated:

> "The Law on Care, Protection and Education of Children of Vietnam states that all children, including orphans, shall be given appropriate care and education by the state. All children homes are run by the Ministry of Labour, Invalids and Social Affairs. Some receive additional financial assistance from foreign NGOs.
>
> In principle, childcare ceases at the age of 18 but, in practice, continues until individuals have found a job. Vietnam is a secular society with no restriction on religious practices."

9. By the time of the appeal hearing before Immigration Judge Dineen in June 2006, things had moved on in several ways. First, the appellant was by then aged 17. Secondly, the Secretary of State's policy in such cases had been modified so that unaccompanied children would be granted discretionary leave to enter or remain for three years or until their eighteenth birthday, whichever was the shorter period, unless the Secretary of State was satisfied that adequate reception and care arrangements were available in the receiving country. Thirdly, there was some recognition by the Secretary of State's representative at the 2006 hearing that the situation in Vietnam for returned children might have changed since the letter of 4 July 2001.

10. The Immigration Judge rejected the asylum appeal and the claim under Article 3 of the ECHR. Nothing now turns on those parts of his decision. As for Article 8, the judge found that removal of the appellant to Vietnam would amount to an interference with his private life and he then referred to the issue of the adequacy of reception facilities for the appellant in Vietnam. The Secretary of State had stated that he would not return the appellant to Vietnam unless satisfied that there were at present adequate reception arrangements there, and indeed had through his representative given an undertaking to that effect. On his behalf reliance had been placed on the decision of the Immigration Appeal Tribunal in BV (Vietnam) [2004] UKIAT 00148 "in support of the proposition that the respondent should be left to assess the

question of adequacy of reception arrangements after the dismissal of the present appellant's appeal".

11. The Immigration Judge rejected that line of argument. He stated in his determination:

> "71. The respondent has, as is accepted, embarked upon the exercise of establishing whether there are sufficient reception facilities for the appellant in Vietnam. I am satisfied that it is not open to the respondent simply to say that no return would be made unless the respondent were satisfied that there would in the future be adequate reception facilities. The facilities which have been ascertained so far must be assessed, and a decision made accordingly.
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> 72. I am not satisfied that the letter from the Vice Consul in Hanoi, dated in 2001, establishes the existence of adequate reception facilities. Indeed, the respondent's skeleton argument goes quite a long way towards conceding as much.
>
> 73. In the absence of evidence as to specific arrangements for receiving the appellant, I am not satisfied that such a reception would be adequate. In reaching this conclusion, I have considered the objective evidence, and in particular that contained in the COI report at paragraphs 6.96-6.105. Paragraph 6.104 refers to the existence of over 21,000 street children in the country as at February 2003. These children were vulnerable to abuse and were sometimes abused or harassed by the police. Further particulars as the nature of the plight of these children are given in that paragraph. I note also from paragraph 6.100 that the orphan population of Vietnam, estimated at 124,000 in a report of June 2002, had recourse to only 214 centres, which have to provide shelter additionally to over 182,000 disabled children.
>
> 74. In all these circumstances, I am not satisfied that there are adequate reception facilities in Vietnam for the appellant. I am therefore not satisfied that the respondent can demonstrate compliance with its own policy of not returning children in the absence of such facilities. I am therefore not satisfied that the return of the appellant would be lawful.
>
> 75. In all these circumstances, I am satisfied that the return of the appellant to Vietnam would be a

> breach of his rights under Article 8 of the Human Rights Convention, because of its unlawfulness.
>
> 76. Additionally, bearing in mind the fact that the appellant is a minor, and taking account of the objective evidence I have referred to above linked with the unlawfulness of return, I am satisfied that the return of the appellant would not be proportionate to the maintenance of effective immigration control. In reaching this conclusion I take account of the fact, as I find, that at the time when the respondent made its decision in 2002, the letter from the Vice Consul of the previous year did not establish the existence of adequate reception faculties. The appellant should therefore have been granted exceptional leave to remain at that time which, as pointed out by his Counsel, would have afforded him the possibility of a further claim to indefinite leave to remain."

12. He in consequence dismissed the asylum appeal but allowed the appeal on human rights grounds. It will be observed that the consideration of the Secretary of State's policy on unaccompanied children was dealt with in the context of the Article 8 claim. The Secretary of State sought reconsideration by the AIT on the ground of a material error in law by the Immigration Judge in that he failed to follow the decision in BV (Vietnam) and failed to provide adequate reasons for not following it. The reconsideration decision by the Senior Immigration Judge, Judge Gleeson, cited a number of passages from BV (Vietnam) including the following:

> "23. Furthermore, by deciding that the claimant's family had abandoned him, the adjudicator was pre-empting the consideration that the Secretary of State was himself intending to give when he came to make his own enquiries in Vietnam. As appears from the Tribunal's decision in N (Vietnam), the Secretary of State will first consider whether there are family members in Vietnam who are likely to assume responsibility for the child. In our judgment, until those enquiries had been concluded, it was not for the adjudicator to decide whether the claimant had been abandoned.
>
> 24. The adjudicator then went on to deal with the Article 8 claim. In paragraph 73 of the determination, the adjudicator decided that the Secretary of State had not considered proportionality at all and that it was, therefore, open to him to carry out the balancing exercise himself,

> albeit paying deference to the Secretary of State's duty to maintain effective immigration control. For the reasons that we have set out above, once the adjudicator had embarked upon a simple comparison of conditions in the United Kingdom and the absence of any information as to conditions in Vietnam, the contest was bound to result in the claim succeeding. For reasons we have given, that is not the correct approach."

13. The Senior Immigration Judge held that the Immigration Judge had not explained why BV (Vietnam) was not determinative of the appeal and that this was a material error of law. She went on to reconsider the appeal and to dismiss it on the basis that the appellant had "kept track of" his mother through her friend in the United Kingdom and that he was "just one day short of 18 when the Immigration Judge signed the determination". (That does not seem to be accurate in that the Immigration Judge's determination was signed on 14 July 2006 whereas the appellant's eighteenth birthday was on 28 October 2006).

14. The two grounds of appeal to this court on which permission to appeal has been granted are that there was no material error of law by Immigration Judge Dineen, so that there was no jurisdiction to reconsider the appeal; and secondly, that if there was such jurisdiction then the AIT should have heard evidence as to the contact between the appellant and his mother and as to her whereabouts. The first of those two grounds raises the not unimportant issue of how far the adequacy of reception facilities for an unaccompanied child on return is solely a matter for the Secretary of State after the statutory appeal process has been completed and does not arise in the context of the decision on the child's Article 8 rights.

15. It is right that Immigration Judge Dineen did not in that part of his determination headed "findings" expressly refer to the BV (Vietnam) decision. However, he records only two pages earlier the reliance placed on it by the Secretary of State's representative for the proposition I have set out earlier in this judgment, and it seems to me that the Immigration Judge then purports to deal with that proposition by making the point at paragraph 71 that in the present case the Secretary of State had already embarked on that exercise of establishing whether sufficient reception facilities existed for the appellant in Vietnam. To that extent the Immigration Judge was giving reasons for distinguishing the decision in BV (Vietnam).

16. Of greater significance is whether the Immigration Judge was right as a matter of law to consider the adequacy of such reception facilities as part of the statutory appeal process, or whether he should have put that issue to one side for the Secretary of State to deal with after the statutory appeal process had been concluded. The AIT, following its earlier decision in N (Vietnam) [2003] UKIAT 00059 and in BV (Vietnam), has adopted the latter approach. Such an approach and the rationale for it are set out in clear

and indeed almost identical terms in those two decisions. It will suffice to cite the relevant passages from N (Vietnam) paragraph 8:

> "We accept that there is no reason to doubt that the Secretary of State will follow his own detailed published policy in this respect. He clearly cannot be expected to make these inquiries and put in hand such arrangements until the asylum appeal process has been exhausted, partly because this might breach matters of confidentiality which he has undertaken to preserve in dealing with the claimant's application, and partly because it is self-evident that it would not be practicable to make such arrangements until a point in the asylum process had been reached when it was known whether or not the claimant was likely to be returned. That point has only just been reached in the present case with the refusal of leave to appeal other than on Article 8 grounds, and even then the asylum process will not have been exhausted until this determination is formally promulgated. Insofar as Mr Richmond sought to rely on any failure to have made inquiries in advance, we are satisfied that that cannot provide any valid basis for challenging the proportionality of the intended removal under Article 8."

17. I can see the practical reasons for the Secretary of State not wishing to carry out the necessary inquiries into the reception facilities in the receiving country until the appeal process has concluded. Indeed, one can go further. Where a substantial time elapses between the conclusion of those proceedings and the process of deciding on removal, the Secretary of State may well be under a duty to keep the information she has up to date and, if an earlier decision on the adequacy of reception arrangements has been made, as in the present case, to keep that decision under review. Otherwise it may no longer reflect the realities in the receiving country.

18. But that is a different matter from the position of the Immigration Judge seized of a claim under Article 8 in respect of a child. It is well established that the Immigration Judge, when dealing with human rights issues and indeed asylum issues, is concerned with evidence about the situation as put before him at the time of the hearing. He may receive evidence not before the Secretary of State when the original Home Office decision was made, and he may receive evidence on "a matter arising after the date of the Home Office decision" (section 85(4) of the Nationality Immigration and Asylum Act 2002). That embodies a long standing approach adopted by the courts, an approach which recognises that this is indeed an appeal process, rather than one of judicial review concerned only with the propriety of the original decision in terms of the evidence as it was before the original decision maker: see Ravichandran v SSHD [1996] Immigration Appeal Reports 97.

19. Even where there is no foreseeable prospect of removal the AIT is still required to determine any human rights claim that may be raised before it relating to the impact that removal may have on the appellant (JM v SSHD [2006] EWCA Civ 1402 at paragraph 28). This may involve a degree of hypothetical reasoning, as the courts have several times emphasised, because one is looking at what would be the situation if the appellant were to be returned (Saad, Diriye and Osorio v SSHD [2002] INLR 34, paragraph 57). The fact that the removal of the appellant may only take place at some time in the future does not relieve the Immigration Judge of his burden of making a decision on the human rights claim.

20. When that claim involves Article 8 rights, the right to respect for private life may require a consideration of the effect of removal on the individual's physical and mental integrity. In R (Razgar) v SSHD [2004] 2 AC 368, Lord Bingham of Cornhill referred to the Strasbourg court's decision in Pretty v UK [2002] 35 EHRR 1, 35-36 paragraph 61, where that court held that "private life" covered "the physical and psychological integrity of a person". Lord Bingham's conclusion as a matter of principle was that:

> "…the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong."

21. In the case of a child applicant, it would seem to be difficult for a decision-maker to carry out a proper assessment of the effect of removal on the child's right to a private life without considering the circumstances which would await that child upon removal. Those circumstances must surely include in most cases the adequacy of reception and care arrangements for the child in the receiving country. If they were inadequate, there might be serious consequences for the child's physical and mental well being. It seems to me to be impossible for that aspect of the assessment to be taken away from the Immigration Judge and left to the Secretary of State, since the judge would then be having to decide the Article 8 claim on only some of the facts and with only part of the picture.

22. Mr Hyam, who appears today on behalf of the Secretary of State, accepts that when the Immigration Judge is considering an Article 8 appeal in the case of a child, one factor in the balancing exercise must be what lies in wait in the child's home country, including the adequacy of the reception facilities. But he contends that by giving such an undertaking as was given in the present case, the Secretary of State guarantees that there will not be a removal of the appellant unless the reception facilities are adequate. In effect, the argument is that, in carrying out the Article 8 assessment, the Immigration Judge must assume that there will not be a breach of this aspect of the appellant's Article 8 rights. Mr Hyam stresses the practical advantage of such a course, since conditions in the receiving country may change and he argues that it is

reasonable and proportionate to remove this part of the Article 8 issue from the Immigration Judge .

23. I cannot accept that argument. The Secretary of State is not giving a guarantee that the reception conditions in the home country will in fact be adequate if removal is decided upon, but only that the Secretary of State considers them to be so. The conclusion at which she arrives may be right or wrong but, as Mr Hyam concedes, it is a conclusion which could only be challenged by judicial review, albeit applying anxious scrutiny, and not by statutory appeal. Certainly that will be the case where, as here, removal directions have been given. That means the effect of the procedure being advocated is to remove the child's statutory right of appeal on that aspect of the Article 8 claim, and to leave him or her only with the more limited remedy of judicial review. The Immigration Judge, if adopting the BV (Vietnam) approach, would in effect be delegating to the Secretary of State the decision on this part of the Article 8 appeal, a very important part of it in the case of an unaccompanied child, and denying the appellant his or her statutory entitlement to a full appeal process. That cannot be right.

24. There is some parallel between a case like the present and that of MS (Ivory Coast) [2007] EWCA Civ 133, which involved an Article 8 claim based on the appellant's right to family and private life. She had not seen her children for four years but was attempting to renew family life through contact proceedings which had not been concluded. The Secretary of State gave an undertaking not to remove her pending the outcome of those proceedings, an undertaking which accorded with normal Home Office policy. The AIT identified the issue as being whether her rights were adequately protected by the Home Office undertaking, and decided that they were. The Court of Appeal recognised that there were some practical reasons for the Secretary of State's approach but emphasised that if the appellant's appeal were dismissed on the basis of the undertaking, she would not obtain leave to enter or remain as such and would suffer significant disadvantages as a result (paragraph 49).

25. Scott-Baker LJ, giving the judgment of the court, referred to a passage from a judgment of Laws LJ in JM (paragraph 28) where it was said that "once a human rights point is properly before the AIT, they are obliged to deal with it". The court went on to conclude that, if removal would be contrary to the United Kingdom's obligations under the ECHR, then the appellant was entitled to succeed in the appeal, even if the Secretary of State had no current intention to remove him or her (paragraph 62-63, relying on the Afghan Hijacking case [2002] INLR 116).

26. The same approach seems to me to apply in a case like the present. The AIT in the shape of Immigration Judge Dineen was required to determine the Article 8 appeal on the basis of the evidence put before him. The extent of suitable reception and care facilities in Vietnam was relevant to that determination. He was not entitled to put that aspect of the Article 8 claim on one side and to leave it for future consideration by the Secretary of State. In a sense, Senior Immigration Judge Gleeson conflated two matters which were in

reality distinct. The first was the Secretary of State's policy towards unaccompanied children, which involved the Secretary of State in keeping reception facilities in the receiving state under review pending removal, even after the statutory appeal process had been concluded; and secondly the AIT's own obligation to consider the Article 8 claim and to take into account all the relevant evidence on that issue as it was at the date of the hearing. Immigration Judge Dineen properly recognised the need to deal fully with the Article 8 position despite the Secretary of State's undertaking.

27. His approach is not one which imposes an inappropriate burden on the Secretary of State; nor does it lead to an appellant receiving any undue benefit. On the basis of a successful Article 8 claim, the appellant will be entitled to leave to enter and remain, but only until such time as he can safely be returned without violating his ECHR rights: see S v SSHD [2006] EWCA Civ 1157. In the present case the appellant is no longer a child and the Secretary of State will no doubt wish to consider afresh whether his return to Vietnam as an adult would breach any of his ECHR rights. But the short point is that the Senior Immigration Judge was wrong to conclude that there had been an error of law in Immigration Judge Dineen's decision. That being so, that latter's decision should have been allowed to stand.

28. I would, for the reasons I have given, allow the appeal.

Lady Justice Smith:

29. I agree

Lord Justice Sedley:

30. I also agree, but I would add three comments.

31. First, the Home Office policy to which Keene LJ has referred is of course designed in large part, as such policies have for many years been designed, to give effect to the United Kingdom's international obligations, here in particular the European Convention on Human Rights and the International Convention on the Rights of the Child. These are among the very things that the AIT had in turn to consider, for the reasons Keene LJ has given, once an appeal was brought before it.

32. Secondly, I find it disturbing that a document as bland and jejune as the letter which Keene LJ has quoted was relied on by the Home Office when deciding something as important as the safe return of a child to another country. The letter is plainly a recital of a formal answer obtained from the Vietnamese authorities. The Immigration Judge recorded evidence from the Home Office's own in-country information which shows that the reality for tens of thousands of Vietnamese children was very different.

33. Thirdly, I would in any event wish to enter a caveat as to whether a Home Office undertaking to the AIT, which is not a court of record, has any legal force. Unlike an undertaking to the High Court, it may well be

unenforceable. It has not been necessary to argue the point on this appeal, but I wish to put down a marker about it.

34. With those comments I too would allow the appeal.

Order: Appeal allowed