Neutral Citation Number: [2008] EWCA Civ 1238

Case No: C5/2008/0560

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Asylum and Immigration Tribunal (AIT) promulgated on 20 September 2007 (Senior Immigration Judge Warr)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2008

Before:

LORD JUSTICE WARD
LORD JUSTICE WALL
and
LORD JUSTICE HOOPER

- -

Between:

JS (Colombia)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Declan O'Callaghan (instructed by Messrs Hayat & Co) for the Appellant
Oliver Sanders (instructed by the Treasury Solicitor) for the Respondent

Hearing date: 27th October 2008

- -

Judgment
As Approved by the Court

Lord Justice Wall:

Introduction

1. With limited permission granted by Moses LJ at an oral hearing on 19 June 2008, the appellant, JS, appeals from a decision of the Asylum and Immigration Tribunal (AIT) promulgated on 20 September 2007 (Senior Immigration Judge Warr) which dismissed his application for the reconsideration of an earlier decision of Immigration Judge E B Grant promulgated on 12 October 2005. On 5 November 2007, SIJ Warr refused permission to appeal.

2. Reconsideration of IJ Grant's decision had been ordered by SIJ Freeman on 30 October 2006. The outcome of the litigation to date, therefore, is that the Secretary of State's decision to make a deportation order against the appellant on 29 May 2006 has been upheld. JS now challenges that conclusion in this court.

The relevant statutory provisions

3. It is common ground; (1) that this is a case to which the version of rule 364 of the Immigration Rules (HC 395) in force prior to its re-amendment on 20 July 2006 (IR 364) applies; (2) that the rule in its unamended form contains no presumption in favour of deportation; and (3) that the function of the Immigration Judge and the AIT was to balance the factors contained in the Rule and to reach a conclusion based on that balance. The IJ and the AIT were also bound to consider JS's ECHR rights, and in particular his rights under ECHR Article 8.

4. The applicable version of IR 364 is in the following terms:-

> Subject to paragraph 380 in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. … Before a decision to deport is reached the Secretary of State will take into account all relevant factors known to him including:
>
> i. age;
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> ii. length of residence in the United Kingdom;
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> iii. strength of connections with the United Kingdom;
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> iv. personal history, including character, conduct and employment record;
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> v. domestic circumstances;
>
> vi. previous criminal record and the nature of any offence of which the person has been convicted;

vii. compassionate circumstances;

viii. any representations received on the person's behalf.

The facts

5. JS is a citizen of Colombia, where he was born on 9 April 1986. He came to this country in late March 1994 at the age of 7, with his parents and his two younger brothers. His mother made an unsuccessful application for asylum in 1994. A subsequent application for indefinite leave to remain was made by the whole family, including JS, on 6 July 2005, and subsequently refused.

6. On 9 October 2004, at the age of 18, JS was convicted at Portsmouth Crown Court for possessing crack cocaine with intent to supply. On a plea of guilty, he was sentenced to two years imprisonment on 5 November 2004. It is common ground that this was his first offence.

7. On 28 May 2005, JS was tagged and released from prison on Home Detention Curfew (HDC). His licence expired on 9 April 2006, and it is not suggested that he has re-offended since being released on HDC. On 6 July 2005, he applied for indefinite leave to remain in the United Kingdom. However, the application was refused and by letters dated 29 May 2006, the Secretary of State refused the application and gave notice of his intention to deport JS on the ground that his deportation would be conducive to the public good.

8. JS has a partner, who, whilst of Colombian origin, has the right of abode in the United Kingdom, and they have a son born in July 2006.

The grant of permission

9. In giving judgment on 19 June 2008, Moses LJ said the following: -

> 1. there is one aspect that causes me particular concern and that is consideration of the damage to the public interest by allowing this applicant to remain - before one ever comes on to consider the compassionate circumstances which tell against his deportation. This was a young man of no previous convictions caught distributing a proportion of crack cocaine. The offence is, as both immigration judges rightly said, very serious. But the seriousness of the offence has to be considered in the context of, considering the damage to the public interest were he allowed to remain, the risk that there would be any repetition of such behaviour. After all, the right to deport in such circumstances depends upon a view that there will be damage in the future by someone who has been convicted if he is allowed to remain. The power to deport is not merely an aspect of punishment.
>
> 2. In this case I find no reference by either of the immigration judges, either first time round or on reconsideration, to the terms of the pre-sentence report in which an assessment is made by one who is an expert in making such an assessment, namely the probation officer, that the offence appears to be isolated and the defendant is considered

to be at low risk of reconviction and low risk of serious harm. That is the very stuff of assessments probation officers have to make daily. She may be right. She may be wrong. It may be that a view can be taken that so serious is the offence that, despite that minimal risk, there remains a risk and he ought to be deported and the compassionate circumstances do not outweigh that consideration. But at least one would have expected some recognition of that assessment and use of it in the assessment of quite how damaged the public interest might be in the future, were he allowed to remain.

3. Since I find none, I take the view that it is arguable that there is an error of law. Added to that is the absence of any reference to the fact that this applicant for 12 months after he had been released from prison (it being a surprisingly short sentence, no doubt because the judge himself recognised that this was an unusual offence of dealing in crack cocaine) has stayed out of trouble ever since.

4. In those circumstances, whilst the family and their associates must remain cautious, there does seem to me a real prospect of success in having yet further reconsideration of this matter and I grant permission.

10. As a consequence of Moses LJ's grant of permission, the single ground of appeal advanced by Mr O'Callaghan on JS's behalf is that the AIT adopted an unreasonable approach to the balancing exercise under IR 364.

The determination by IJ Grant

11. Although, of course, JS's appeal strictly lies against SIJ Warr's dismissal of his application for reconsideration of IJ Grant's determination, it is self evident that if there was no error of law in IJ Grant's determination, SIJ Warr was right to dismiss JS's appeal against it. I propose, therefore, to concentrate on IJ Grant's decision.

12. In paragraphs 1 to 3, IJ Grant sets out in short form JS's details, and the background to the Deportation Proceedings and Appeal. In paragraph 4 she deals with the burden of proof. Nothing turn on this. In paragraph 5, she sets out what is on any view the bulk of the Pre-Sentence Report (PSR) on JS prepared by Matt Harvey of the Portsmouth Probation Scheme and dated 29 October 2004. We have the complete PSR in our papers. IJ Grant sets out paragraphs 2-5, 8, 10-11 and 16-18. Of those paragraphs which she omits, paragraph 1 is formal, and simply indicates the sources available to Mr Harvey, paragraphs 6-7 deal briefly with JS's history, his schooling, his wish to obtain employment on his release from custody and the fact that on release he would live with his parents; paragraph 9 deals with an absence of mental health issues and is irrelevant; paragraphs 12-15 set out Mr Harvey's views on sentence; and the final three paragraphs of the report simply add details to what would be involved in a CPRO.

13. Paragraphs 10 and 11 of the PSR in particular deal with the risk of JS re-offending, and are in the following terms:-

> 10 In preparation of this report I have used the National Probation Service risk assessment tool which predicts risk of reconviction and risk of serious harm. Having completed this assessment (JS) is considered to be of low risk of reconviction and low risk of serious harm.
>
> 11. (JS)'s current offence does not involve violence and is his first conviction. The offence appears to be an isolated one based on a bad decision, poor problem solving skills and a lack of consideration for the consequences of his actions.

14. IJ Grant then cites a passage from the case summary relating to the criminal proceedings prepared by the Hampshire Constabulary. This reveals that when he was arrested JS had on him nine cellophane wraps of crack, and that he had sold one. He was also carrying £200.

15. In paragraphs 7 and 8, IJ Grant gives herself the following directions:

> 7. I am required to decide whether the proposed deportation strikes the right balance i.e. a fair balance between the appellant and the public interest. Prevention of crime is a legitimate public interest which must be taken into account in assessing the degree of the disruption to the appellant's family life established in the United Kingdom since the age of 7.
>
> 8. In deciding whether the correct balance has been struck by the respondent, I am required to take into account the factors set out in paragraph 364 of the Immigration Rules.

No criticism was made by Mr. O'Callaghan of these two paragraphs.

16. IJ Grant then sets out the whole of IR 364. Having done so, she states:-

> 10. Whilst not every conviction could legitimately result in the deportation decision being taken, cases do arise, exceptionally, when the personal conduct of a proposed deportee has been such that whilst not necessarily evincing any clear propensity to re-offend it causes such deep public revulsion that public policy requires deportation. Convictions for importing or supply (sic) dangerous drugs for example have been held in themselves as a sufficient threat to public order as to give rise to the exercise of the power although compassionate or other relevant circumstances may outweigh the public good.

17. IJ Grant then refers to JS's statement (which is in our papers) and the written and oral evidence she had taken from JS, his partner and members of his family. She then records:-

> 12. The appellant and his family claim he cannot return to Colombia. Colombia is a dangerous country. There is no-one there for the appellant to return to. He is

> culturally and socially integrated into the English way of life, having been in the United Kingdom since he was 7 years of age where has (sic) undergone primary and secondary education. His partner has had a son in July 2006.

18. IJ Grant then goes through IR 364 heading by heading. Under sub-heading (iv) she refers back to the pre-sentence report. Under (v) we learn that it was JS's partner's brother who was his accomplice when he was convicted in 2004.

19. I propose to set out the entirety of IJ Grant's response to item (vii) of IR 364:

> It is said on behalf of the appellant that he has spent the bulk of his life in the United Kingdom, that he has integrated into the British way of life and that he cannot now return to Colombia where in any event there is no-one there to help take care of him. This is not strictly true. Questioning of the appellant's aunt elicited the information that there is a great aunt and a cousin aged 30 in Miranda, which is 20 minutes drive from Cali where the family are from. Neither of the appellant's parents nor his siblings have any leave to remain in the United Kingdom. The appellant's mother was refused asylum and although she had exceptional leave to remain for four years and has subsequently made an application for leave to remain on the basis of long residency, the initial application made by the family was refused in 2005. Apparently a fresh application has been made for which the family is awaiting a decision from the respondent. The appellant's family sought to maintain that the appellant speaks English and that he would have difficulty adapting to life in Colombia where the spoken language is Spanish. This is not true. The appellant's first language is Spanish and he achieved an A* grade in his Spanish GCSE (he did exceedingly badly in all other examinations taken by him). The appellant's girlfriend is also of Colombian origin and speaks heavily accented English. The appellant's father confirmed that Spanish is spoken in the family home. The appellant's father has sought to explain away the appellant's conduct by claiming that his (sic) was led astray by two Jamaicans who he had met at school who the family no longer have any contact with. That was not true. The appellant was caught supplying crack cocaine with his girlfriend's brother … who was supplying heroin. They may well have received the drugs from a Jamaican as claimed by the appellant to his probation officer but any suggestion that the offences were commissioned by people entirely unconnected with the family is simply untrue.

20. IJ Grant proceeded to undertake the balancing exercise. She sought assistance from counsel in relation to the case of ***N (Kenya) v SSHD*** [2004] EWCA Civ 1094. Her conclusions are expressed in paragraph 19 and 20 of her decision:-

19. I have concluded following ***N(Kenya)*** that in carrying out the balancing exercise required of me I must also take into account the nature of the offence for which the appellant was convicted and the circumstances of that offence. I have concluded that the public good requires the appellant is deported from the United Kingdom. This will not only prevent any reoccurrence of this offence by the appellant but will act as a deterrent to non British citizens already here. I have concluded that the compassionate circumstances are not such that the balance should be exercised in favour of the appellant. His immediate family have no right to remain in the United Kingdom and can return to Colombia with the appellant if they do not wish him to go alone. He has a cousin aged 30 who resides 20 minutes from Cali so he will not be alone on return as falsely claimed by his parents. His girlfriend, who is from Colombia has shown no good reason why she cannot return to Colombia with the appellant if she wishes to family unit to remain intact (sic). Alternatively she can support the appellant in an application for entry clearance in due course once the period of exclusion required by the Deportation order has expired.

20. For all these reasons I find that the appellant's right to family life (sic) under Article 8 of the 1950 Convention will not be breached by the appellant's return to Colombia. Following the Court of Appeal decision in ***Huang and Others v SSHD*** [2005] EWCA Civ 105 I find the appellant's circumstances are not so exceptional as to warrant the imperative of proportionality being exercised in the appellant's favour.

The attack on the judgment

21. Mr. O'Callaghan was, of course, to some extent constrained by the limited grant of permission. However, in submitting that IJ Grant had adopted an unreasonable approach to the balancing exercise under IR 364, he laid considerable weight of what he submitted was the limited risk of further offences being committed by the appellant. This fact, he argued, was evidenced by JS committing no further offences in the year following his release from prison and prior to the Secretary of State giving notice of his intention to deport.

22. This, Mr. O'Callaghan argued was a factor to which IJ Grant had not given any, or any adequate weight. The crime itself, whilst undoubtedly serious, was not so serious as, by itself, to justify deportation in the light of the Article 8 factors which the appellant advanced. These included, of course, his age and his family history.

23. Both Mr. O'Callaghan and counsel for the Secretary of State relied on the decision of this court in ***N (Kenya)***. Mr. O'Callaghan relied upon it for the uncontentious proposition that the compassionate circumstances of a case will embrace such rights as an appellant has under Article 8 ECHR, and that this requires an adequate and appropriate consideration of Article 8 issues when carrying out the balancing exercise.

24. Mr O'Callaghan took us to the judgment of Judge LJ (as he then was) at paragraph 83:

> The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion "differently" to the Secretary of State, he must say so. Nevertheless, in every case, he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State "should have been exercised differently" without understanding and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good. (Emphasis supplied by counsel.

25. Mr. O'Callaghan also cited ***Yousuf (Somalia) v SSHD*** [2008] EWCA Civ 394 and a decision of the ECtHR, ***Moustaquim v. Belgium*** (18 February 1991: application number 12313/86) for the proposition that consideration had to be given to post release activity and a lack of offending.

26. Although Mr O'Callaghan's argument ranged widely, it seemed to me that it regularly returned to and focused upon the alleged failure of IJ Grant to give weight to the length of time JS had spent in the country, his family circumstances and, in particular, his low risk of re-offending.

27. For the Secretary of State, Mr Oliver Sanders submitted firstly that, whilst the risk of JS re-offending is a factor, it is not a critical or overriding factor in the IR 364 balancing exercise. He took us to paragraphs 45 and 65 in the judgment of May LJ, and paragraph 87 (Judge LJ) in ***N (Kenya)*** where the following was said:-

> 45. The Tribunal noted that paragraph 364 [of the IR] made no specific reference to propensity to re-offend. There is a reference there to "previous criminal record". They saw the deportation decision as primarily reaction to past facts or present circumstances, rather than to future risk. In my view, there is some general force in this, but the risk of re-offending must be capable of featuring among "all relevant factors".
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> 65. The risk of re-offending is a factor in the balance, but, for very serious crimes, a low risk of re-offending is not the most important public interest factor.
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> 87. Although not expressly mentioned as a factor in rule 364, I agree with the adjudicator that the risk of further offending or potential danger was relevant to the deportation decision. In simple terms, the greater the risk represented by the offender, the greater the public interest in his deportation. However, just as the express provisions in rule 364 do not specify that conviction of a specific crime or crimes will automatically lead to an order for deportation, so consideration of the "nature of the offence" or offences of which he was convicted

> continues to be relevant, even if the risk posed by the appellant has significantly diminished. Indeed as it seems to me, even if the risk were extinguished altogether, given the need to attend to the public good and the public interest, the nature of the relevant offence or offences continues to require close attention.

28. Mr Sanders also submitted that IJ Grant had been entitled to make clear to JS, and through him to other non-nationals that, as a matter of policy, they cannot come to this country and commit ***any*** serious offence and then expect to stay. The approach urged by the appellant, Mr. Sanders submitted, would undermine this policy enormously and run counter to each of the legitimate aims identified by the House of Lords in ***Huang v SSHD*** [2007] UKHL 11, [2007] 2 AC 167, per the Appellate Committee at paragraph 16 (also quoted in ***EB (Kosovo) v SSHD*** [2008] UKHL 41, [2008] 3 WLR 178, per Lord Bingham at para.10).

Discussion

29. I have come to the clear view that the decision of IJ Grant cannot be impugned, and that JS's appeal must be dismissed. I reach that conclusion for the reasons which I will try to set out in the following paragraphs.

30. First and foremost, it seems to me that IJ Grant has properly carried out the balancing exercise. She has gone through all the factors listed in IR 364 and given each appropriate weight.

31. Secondly, it seems to me that IJ Grant was entitled to give substantial weight to the nature of JS's offence and the policy of the Secretary of State in relation to offences of this nature. I remind myself that in paragraph 64 of his judgment in ***N (Kenya)*** May LJ said:-

> In a deportation appeal under section 63(1) of the 1999 Act, the adjudicator has an original statutory discretion as provided in paragraph 21(1) of Schedule 4 of the 1999 Act. The discretion is to balance the public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view.

It seems to me that this was the approach taken by the IJ.

32. Thirdly, I agree with Mr. Sanders that the risk of re-offending, whilst a factor to be weighed in the balance, is not a critical factor in this case. I am unimpressed by the argument that substantial weight should be given to the absence of any further offences during the period in which JS was released on HDC and was tagged.

33. In any event, it seems to me that IJ Grant did make reference to the question of the low risk of JS re-offending. She sets out the paragraphs of the PSR which deal with it: she also makes a specific reference to JS's statement which also contains references to his contrition and his determination not to re-offend. At the highest, it can perhaps be said that the IJ did not deal with the point as explicitly as she might have done. But there are, I think, two clear answers to Mr. O'Callaghan's submissions on the point: (1) it cannot be said that she overlooked it or excluded it; and (2) if her decision had contained a sentence sating in terms that she had taken account of the low risk of JS re-offending, my view is that it would not have altered or affected her decision.

34. The other factors in what I may call the IR 364 equation all seem to me properly identified and taken into account by IJ Grant, and irrespective of the limited grant of permission do not seem to me to be capable of challenge.

Conclusion

35. SIJ Freeman granted reconsideration "solely so that the Tribunal can consider the effect that should be given to the appellant's age and long residence here, in the light of accurate information from both sides as to his family's and his baby-mother's status". In my judgment, SIJ Warr was plainly right to express himself not satisfied that the decision of IJ Grant was materially flawed.

36. I would, accordingly, dismiss this appeal.

Lord Justice Hooper:

37. I agree.

Lord Justice Ward:

38. I also agree.