Case No: C5/2008/1231

Neutral Citation Number: [2008] EWCA Civ 1020
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: 0A/27753/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 2 September 2008

Before:

LORD JUSTICE LONGMORE
and
LORD JUSTICE WILSON

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Between:

TC (ZIMBABWE)	**Appellant**
- and -	
ENTRY CLEARANCE OFFICER, HARARE	**Respondent**

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(DAR Transcript of
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Mr P Lewis (instructed by Fisher Meredith) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

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Lord Justice Longmore:

1. In February 2001 the mother of this applicant, to whom I shall refer as TC, came to the United Kingdom from Zimbabwe. It was not until June 2005 that she sought asylum, which was refused in August 2005. On 26 November 2005 the applicant, who had remained in Zimbabwe in full-time education became 18. He lived there with his father and sister.

2. On 29 November 2005 the mother's appeal against the refusal of asylum was allowed and she was thereafter treated as a refugee. The applicant then applied to an entry clearance officer for entry clearance from Zimbabwe in order that he could live in the United Kingdom and be reunited with his mother.

3. On 29 June 2006 that application was refused because the applicant was over 18 at the time of the application and did not therefore fall within Rule 352D of the Immigration Rules. The Entry Clearance Officer refused to exercise his discretion because, as he put it, there were no "compelling compassionate circumstances" to allow him to use that discretion. That is a reference to the Family Reunion Policy, issued by the Secretary of State, which records that a spouse, civil partner or minor child, viz a child under 18, are the only persons eligible but then adds:

> "Other members of the family (e.g. elderly parents) may be allowed to come to the United Kingdom if there are compelling, compassionate circumstances (see below)."

And when one goes below, one sees these words:

> "Dependent children over the age of 18 and other dependent relatives (e.g. mother, father, brother, sister, etc) do not qualify for Family Reunion under this section of the Rules. However, if there are compelling compassionate circumstances, which warrant consideration of the application "outside" the Rules, ECOs have discretion to refer applications to the Home Office for a decision on compassionate grounds. However, ECOs must be satisfied that the applicant was genuinely dependent on the sponsor before his flight to seek asylum."

4. The applicant then appealed on the grounds that the decision of the Entry Clearance Officer should have been different and that there was interference with his private and family life pursuant to Article 8. On 1 March 2007 Immigration Judge Reynolds dismissed that appeal, holding that he could not interfere with the Entry Clearance Officer's decision and, secondly, without going through the five steps required by the speech of Lord Bingham of Cornhill in Razgar, said that any interference with private or

family life was proportionate and the case was not exceptional in the sense which had been given to that word by the Court of Appeal in Huang.

5. On 20 August 2007 Senior Immigration Judge McGeachy ordered reconsideration because he considered it was arguable that the Refugee Family Reunion Policy had not been mentioned and had therefore not been considered by the Immigration Judge. That reconsideration took place before Senior Immigration Judges Lane and McKee, and in the decision as promulgated the AIT said that Immigration Judge Reynolds had failed to consider the policy exception to the Immigration Rules and had misapplied the law in Article 8, and in paragraph 7 of the decision they said this:

> "We were satisfied that the inadequacy of the judge's treatment of the policy and Article 8 issues amounted to a material error of law, and proceeded to the 'second stage' of the reconsideration, which was by way of submissions only from the two representatives."

   They concluded by saying in paragraph 9 that:

> "although the immigration judge's determination contains errors of law, we have come to the same conclusion, namely that the respondent's decision is in accordance with the law and the Immigration Rules, and the decision does not breach any of the appellant's rights under Article 8 of the ECHR."

6. In a statement of 2 March 2008, Miss Piya Muqit, who represented the applicant before the AIT, said that what happened during the hearing was that after submissions of law had been made the representatives were asked to retire; and, when recalled, Senior Immigration Judge Lane said that there was no error of law and the reasons would be given in writing. So, according to Miss Muqit, no indication in accordance with paragraph 7 was in fact given at all. Unfortunately that was never incorporated into the Grounds of Appeal which had been filed on 15 February 2008, and merely recited paragraph 7 of the decision. She added that the representative was not informed that there was to be a second-stage reconsideration, so she did not make submissions on the basis of any error of law.

7. There was an application for permission to appeal which that notice of appeal supported, and Senior Immigration Judge McKee refused that application but did appear to accept that there had been a misunderstanding because he says:

> "There appears to have been a misunderstanding as to whether the panel had found that, whatever errors the immigration judge might have made at first instance, they were not material errors, or whether the panel had found that, albeit there was a

> material error in the original determination, the facts of the case were such that neither the Refugee Family Reunion Policy nor Article 8 was engaged."

8. In those circumstances we indicated to Mr Lewis, who has appeared for the applicant this morning, that what the court was most interested in, in the light of the procedural history, was what submissions or what evidence could have been relied on if Miss Muqit had had the opportunity to make such submissions or refer to such evidence.

9. Mr Lewis submits that this was a case where the AIT were wrong to say that there was no family life at all. He says that Immigration Judge Reynolds accepted that there was family life but said that the interference with it was not disproportionate, and therefore, Mr Lewis says, the AIT has reversed the Immigration Judge without giving any notice of the possibility that they might do so, and that that was so unfair that the matter ought to be revisited. However, as Senior Immigration Judge McKee said in refusing the application for permission to appeal:

> "It is possible, as acknowledged by the Court of Appeal in *Kugathas*, for family life to continue, in Article 8 terms, between an adult and his parent, if there is an unusual degree of dependency. But the situation envisaged in *Kugathas*, where the adult child has been living for several years with his parent in this country, is very different from the present case, where the child had been living apart from his mother, in a different country with his father, for several years. Remittances from the mother would not suffice to establish the requisite degree of dependency, which has to be more than financial. No evidence was before the respondent or before the judge at first instance to suggest that, at the date of decision, the *Kugathas* test could be met".

10. Mr Lewis has endeavoured to say that that test could be met, and he has taken us to evidence (that was in fact before both the Immigration Judge and the AIT) showing that the mother had sent remittances to her son in Zimbabwe to help his father in supporting the applicant in full-time education. He points out the telephone calls that were made. For my part I would accept that it might be going too far to say that there was no family life shown by the evidence that was before both the Immigration Judge and the AIT, although one can well understand the conclusion that there was not. But, on any view, it was so tenuous that, in the light of the fact the mother has been in the United Kingdom without any visits from her son for the past seven years, it is impossible to say that any interference with that family life would be disproportionate.

11. So while the procedural errors, as I think it is fair to call them, on the part of the AIT do give rise to some concern, I do think that, in the end, it is so unrealistic to think that any appeal would have any prospect of success on the merits that it would not be right to grant permission to appeal in this matter.

Lord Justice Wilson:

12. I agree.

Order: Application refused