Case No: C5/2008/1586

Neutral Citation Number: [2009] EWCA Civ 57
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: IA/07489/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 16th January 2009

Before:

LORD JUSTICE LAWS

- -

MP (India)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Mr I McDonald QC (instructed by Messrs JM Wilson) 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)

Lord Justice Laws:

1. This is a renewed application for permission to appeal against a decision of the Asylum and Immigration Tribunal (the AIT) (Senior Immigration Judge Mather), promulgated on 13 February 2008, by which he dismissed the appellant's appeal against the Secretary of State's decision, notified on 8 May 2007, to deport him. The SIJ's determination was arrived at on a reconsideration ordered by SIJ Taylor on 31 July 2007. The appeal had first been dismissed by a panel of the AIT on 4 July 2007. Permission to appeal to this court was refused on consideration of the papers by Jackson LJ on 19 November 2008.

2. The appellant is a citizen of India. He arrived in this country on 26 June 1995 on a South African passport which did not belong to him and posing as a holidaymaker. He applied for asylum on 16 November 1995. The application was not dealt with promptly and was still outstanding on 27 July 1998 when the Secretary of State introduced a policy described in a White Paper entitled "Fairer, faster and firmer: a modern approach to immigration and asylum", which amongst other things dealt with the backlog of outstanding applications. Part of the policy applied to the appellant. It is not necessary to go into the details. The upshot was that on 27 July 2000 his asylum application was refused but he was granted four years' exceptional leave to remain, extended to indefinite leave to remain on 1 June 2005. Before that date he had married a lady who is also a citizen of India. A daughter was born to them on 28 January 2004. It is now accepted that the daughter is a British citizen.

3. At length the applicant was prosecuted and on 16 March 2007 at Leicester Crown Court convicted on his plea of guilty to charges of having a false instrument with intent, obtaining leave to remain in the United Kingdom by deception and the possession of an improperly obtained identity document. He was sentenced to 12 months' imprisonment. It is to be noted the judge did not make a recommendation for deportation. Thereafter however, as I have said, on 8 May 2007 the Secretary of State decided to deport the appellant; that was on the ground that his deportation would be conducive to the public good. Both the AIT panel making the first decision and SIJ Mather considered the appellant's family circumstances in the context of Article 8 of the European Convention on Human Rights, though Mr McDonald on the appellant's behalf submits that they were by no means adequately considered. I will return to that.

4. The panel held erroneously that the daughter was an Indian citizen; they held there was nothing to prevent the appellant, his wife and child going to or returning to India; they held that the wife must have known that the appellant's standing in this country was precarious (see paragraph 42); and they stated as follows:

> "48. The appellant's offences are exacerbated because he confidently installed his wife in the United Kingdom based upon his false claim and knowing that otherwise his marriage would be precarious. We do not know the basis upon which he was able to secure for their daughter a British passport.

49. We find that the appellant and his wife have established a family life with their daughter in the United Kingdom and therefore also to that same extent a private life. As is often the case, the appellant protests that he had been in gainful employment whilst here and had received benefits, at least in the past in relation to the contributions which he had made. He therefore founded his employment here.

50. Clearly the removal of the appellant, implying also the revocation of his wife and daughter's right to remain here, interferes with his family life but that interference would not be serious because it would be open to the appellant to leave the United Kingdom with his wife and daughter and return to their home country in India.

51. As noted above, and as generally accepted, the deportation of foreign prisoners may be justified by the entitlement of the United Kingdom to enforce immigration control and prevent serious crime. In this case, the two are intermingled.

52. The underlying question ids whether or not the appellant's removal would be a proportionate exercise of that right and we are mindful of the amended guidance given by the House of Lords in Huang. In practice, this may make little difference to the previous search for some exceptional factor. Mr Afzal sought to persuade us that this was in any event a truly exceptional case and in the light of the Trial Judge's decision on sentencing, this would be a further punishment of the appellant and his family.

…

53. The present case is one where the appellant arrived here illegally, had no genuine asylum claim, installed his wife here and started a family all knowing that the basis of his presence was founded upon a false statement as to his nationality and thus his background. His presence is based on deceit.

54. We find that this is not in any way the unusual or exceptional case. The appellant and his wife took their chance on going unnoticed, they were discovered and it is a right and proportionate exercise of the respondent's power to deport and thus remove

the appellant from the United Kingdom to his country of origin, where he could be joined by his wife and child who share the same nationality. The appellant has a family of some sort in India and had previously worked there. He is back where he started but this is not a breach of Article 8. It has not been suggested that he would be at risk of life or limb and thus entitled to reconsideration of any asylum claim."

5. SIJ Mather, after disposing of certain arguments advanced by Mr McDonald for the appellant, said this:

> "32. Mr Macdonald argued that by deporting the appellant, and if his wife is also deported under the provisions of section 3(5)(b) of the Immigration Act 1971, then that would be tantamount to deporting Fatemah, a British citizen.
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> 33. That, in my judgement, is not the correct approach. Fatemah is now just 4 years of age. At the time of the Tribunal panel's hearing she had not started any education. She speaks English and Gujarati. She has no independent existence away from her parents. Being a British citizen does not mean that she cannot live in India and it does mean that, provided her citizenship is not revoked, she will be able to return when she is able to do so independently. There is no reason to suppose that if her parents, both Indian citizens, were deported, that she would not go with them. It would be a matter for the respondent on removal rather than now for the Tribunal, but there is no reason to think that she would not be admitted to India and that she could not live there with her extended family and her parents.
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> 34. In relation to Article 8 it has not been shown that there is any insurmountable obstacle to her going back, to the contrary, it would be the sensible and desirable thing to do if her parents were to be deported.
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> 35. In my judgment, the fact that the appellant's daughter is a British national, aged 4, has not made any material difference to the outcome of the reconsideration. I know of no authority which suggests that where a deportee has an infant dependant who is a British citizen, that should be a bar to that person's deportation. The private and family lifer of the appellant and his two dependants will not be breached in such a way as to engage

> Article 8, and even if it were, it would be proportionate to remove them, given the appellant's deceitful entry into the United Kingdom and that it is on the basis of such deceit that the appellant's two dependants' status is built."

6. In his written statement made pursuant to Practice Direction 52, Mr McDonald submits that the lower tribunals have made far too much of "insurmountable obstacles" in dealing with the Article 8 claim, and have not considered the human rights of the family members, or not considered them properly, as the House of Lords' decision in B v SSHD [2008] 3 WLR 166; [2008] UKHL 39 requires. With respect to Mr McDonald, who could not have put it more clearly, I do not in the end agree. The SIJ and the AIT made a judgment in the round. I do not accept there is an overemphasis on insurmountable obstacles; I have cited the relevant passages of the tribunal decisions.

7. In any event it may fairly be said here that the nature of the case on the facts was such that the Tribunal would inevitably have to approach the Article 8 issue by considering whether there were pressing reasons to allow the claim. The starting point must have been that this man had cheated his way into the United Kingdom and by deception obtained indefinite leave to remain, and also on that basis effectively obtained his wife's right to stay in the country. Her original status had been as a visitor. I wholly accept Mr McDonald's submission that she was not complicit in his deception, but her indefinite leave to remain was part of the fruit of it.

8. As for B v SSHD, Mr McDonald submits in particular that the wife's circumstances have not been properly considered. It may be that she has spent all or most of her life before she came here in Zambia; although she is an Indian citizen, it would appear her parents emigrated or moved there at one stage, and Mr McDonald submits that really matters of that sort should have been gone into in the course of arriving at an Article 8 decision. There is less to be said about the little girl's case because she is now only four, perhaps nearly five. Her family life must be entirely adjectival to that of her parents.

9. If everything else were equal there might have been a point here, but I am afraid I think this was a very, very weak Article 8 case put at its best. I am unable to see that any different outcome would in the end have been realistically possible. Nothing is said, as far as I am aware, by way of evidence either here or more properly before the Tribunal below, to show that there would be any difficulty, never mind insurmountable obstacle, in the wife and child accompanying the husband to India. It is of course important that Article 8 be approached in the manner in which their Lordships' House has indicated, but in this case it does not seem to me that there is any real point to be taken that might affect the result of the case.

10. In those circumstances, notwithstanding Mr McDonald's as always elegant efforts, I will refuse permission.

Order: Application refused.