EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Clarke
Lord Emslie

[2010] CSIH 98
P148/09

OPINION OF LORD CARLOWAY

in the reclaiming motion of

AK,

Petitioner and Reclaimer;

against

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent:

____

Act: Bryce; McGill & Co.
Alt: K Campbell; C. Mullin, Solicitor to the Advocate General

16 December 2010

[1] This Opinion requires to be read in conjunction with that issued in *HS* v *The Secretary of State for the Home Department*, the reclaiming motion in which was heard at the same time as that in this petition.

1. The Application for Leave to Remain

[2] The petitioner is an Israeli citizen of Russian origin who arrived in the United Kingdom, with his wife and two daughters, on 18 August 2005. His daughters, namely E and A, were born respectively in 2001 and 2004. The petitioner had a

six month visitor visa. He claimed asylum, but this was refused on 6 October 2005 and his appeal rights became exhausted on 20 January 2006. As part of that process, there had been a determination by an Immigration Judge dated 12 December 2005 upon the petitioner's claim for not only asylum but also that his removal would be contrary to his rights under Articles 2, 3, 6 and 8 of the European Convention on Human Rights. This determination considered the position regarding his older child as follows:

> "22. The Appellant makes reference to his eldest daughter having problems in the kindergarten where other children would often beat her and throw stones. There is no evidence to show that the Appellant and or his wife took this mater (*sic*) up with the kindergarten authorities. The Appellant described an incident where after two months in the kindergarten the child's teacher beat her up. I am not given any information as to why a teacher would do such a thing or what the circumstances were. The Appellant took his daughter out of kindergarten and spoke to the person responsible for kindergartens. There is no evidence to show that the Appellant tried to bring charges against this teacher for her actions. According to the US Report the Israeli Government has legislated against abuse of children and has mandated comprehensive reporting requirements. There is no evidence to show that the Appellant and or his wife did anything to bring this teacher's actions to account. The Appellant states that if he did not send his child to state kindergarten from the age of four he and his wife would lose their parental rights. There is no objective evidence to support this contention other than the US Report stating that education is compulsory until the child reaches the 10th grade.
> ...
> 27. Article 8 has not been breached. The Appellant can return with every member of his family to Israel and continue his private life there. There is nothing in this case that is singularly exceptional to come to a different view. It is proportionate for them to return".

[3] On 13 March 2007 the petitioner's wife give birth to their third child. On 14 June 2007 the petitioner presented what purported to be a fresh application for asylum and ECHR protection. This repeated allegations that the petitioner's daughter E had experienced discrimination within the Israeli educational system. It stated that this daughter was attending primary school in Glasgow and was settled there. It said that "...she would not have this if she is returned to Israel". The application founded upon what was said to be article 20(5) of the Refugee or Person

in Need of International Protection (Qualification) Regulations 2006 which, it was maintained:

> "clearly makes it incumbent upon the United Kingdom in (*sic*) the best interests of the child shall be a primary consideration for the United Kingdom and furthermore Article 23 where the United Kingdom shall ensure that the family unit can be maintained. As you are aware the applicant's child is progressing well at school".

It should be noticed that these Regulations (SI 2006 No 2525) do not seem to contain any such provisions. However, the letter continued with a plea that the petitioner relied on ECHR Articles 3 and 8 and maintained that removal of the family would breach Article 8 as disproportionate.

[4] By letter dated 28 December 2007, the petitioner applied for consideration under the respondent's "legacy programme", and repeated the claim under Article 8 on the basis that the petitioner and her (*sic*) children were entitled to have their case "considered/reconsidered" in light of a particular policy. The letter stated:

> "...[the respondent] in interpreting Article 8 of the Convention must approach our client's situation as a straightforward balancing exercise and equally, he must give consideration to the individual circumstances of the case. The decision... must pass the test of proportionality
> There is a UK born child...and the family have settled into life in Scotland progressing well in education and studies".

[5] The application was, in large measure, duplicated in a letter dated 4 June 2008. The respondent rejected these applications because neither amounted to a "fresh claim". The petitioner raised a petition for judicial review, but this was dismissed on the understanding that the respondent would consider further representations. These were presented in the form of a new application dated 21 November 2008. By this time a "Lead Professional Report" had been obtained. This, along with other documents, was said to:

> "...show that the clients have integrated substantially into the community in which they live. The two youngest children are at nursery and the oldest child

> is now at school. The academic records seem to indicate that the children are doing particularly well...
>
> The family's domestic circumstances show that they are in settled housing, that there (*sic*) children are in education and that they have made friends in the UK".

[6] The Lead Professional Report did confirm that E attended modern dance classes. She was described by her teacher as a "good pupil who does not miss a session, a good dancer who always tries hard". She had good grades in her subjects.

[7] By letter dated 16 January 2009, the new application, which was dealt with in conjunction with the earlier applications, was rejected by the respondent. The letter concluded that there was no evidence of Article 3 mistreatment by reason of discrimination against children in education. It continued:

> "Next consideration has been given to whether there would be a realistic prospect of an Immigration Judge concluding that the removal of your client and his family would breach their Article 8 rights. It is considered, for the following reasons, that there would not be.
>
> It is accepted that your client and his family have established a family life in the United Kingdom. An Immigration Judge would no doubt come to the same conclusion. It is not however accepted that an Immigration Judge would conclude that the removal of your client and his family together to Israel would interfere with that family life. This would be because your client and his family would be removed together.
>
> It is also not accepted that the removal of your client and his family would interfere with the private life of your client and his family in a manner sufficient to engage Article 8. Whilst it is clear that... his children attend nursery or school their overall residence has been for a little over three years. At no point have any member of the family had leave to remain in the United Kingdom. Further, there appears to be no reason why such activities would not be capable of being pursued in Israel in a meaningful manner. It is not considered that there is a realistic prospect of an Immigration Judge coming to a different conclusion on this issue.
>
> ...
>
> Finally, consideration has been given to your client's children. It is noted that one of his children is presently at Primary School and is apparently doing well there. It is also noted that she attends a dance class. There is no reason to suppose that [E] would not be able to assimilate back into life in Israel. It is plain that educational opportunities exist for her there as well. Even taking into account the claimed difficulties which she experienced in Israel previously it is not considered that there is a realistic prospect of an Immigration Judge concluding that her return to Israel would disproportionately interfere with her right to respect for her private life. Further, the difficulties which it is claimed

> that she experienced at kindergarten were matters before the previous Immigration Judge and was not something which she considered engaged Article 8. There is no realistic prospect of another Immigration Judge concluding otherwise. It is not considered that the other two young children will have developed a private life, due to their ages, to such an extent that there removal would be disproportionately interfered with".

[8] Specific consideration was given to the petitioner's domestic circumstances in terms of Immigration Rule 395C. It was considered that:

> "The age of none of your client's family is considered to be a matter pointing against removal. None are of an age where they could not re adapt to life in Israel...
> Whilst it is acknowledged that [E] is at Primary School and [A] and [M] are at nursery none have been present in the United Kingdom for so long and in education for such a period that it would be wrong to interfere with this by removing them. Further, they plainly would be able to avail themselves of education at various levels in Israel. There is nothing else in the domestic circumstance of your client's family which would make removal inappropriate".

2. The Judicial Review

[9] The petitioner sought a judicial review of the respondent's decision. It was agreed that the respondent's decision was taken within the context of the "fresh claim" provision in Rule 353 of the Immigration Rules, whereby further submissions would only be considered if they were significantly different from the ones previously considered and created a realistic prospect of success. The petition contained a large number of challenges to the respondent's decision but these were all rejected and only one area is the subject of this reclaiming motion. The petitioner claimed that the respondent had failed to take into account the United Nations Convention on the Rights of the Child which provides, in Article 3, that:

> "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".

The contention was that, in making her decision under Rule 353, regard ought to have been had to the best interests of the children as a primary consideration. This required greater focus on these interests than would be necessary in the balancing exercise envisaged in gauging proportionality under ECHR Article 8. The respondent conceded that the best interests of the children were a primary consideration in the decision making process under Article 8, but not that UNCRC Article 3 gave the petitioner any free standing rights.

[10] The Lord Ordinary, in rejecting the petitioner's contentions, reached the same view as she did in *HS* v *The Secretary of State for the Home Department*. She appeared to accept (see para [44] of her Opinion in the petitioner's case) that, if best interests were taken into account ("a mandatory consideration"), that satisfied the requirements of UNCRC Article 3. In particular she stated that, within the context of the ECHR Article 8 exercise:

> "...[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".

In that regard, the Lord Ordinary held that (para [46]):

> "...[I]t is plain from the decision letter that in considering both family and private life, as it relates to the children, the respondent is addressing the best interests of the children current and future in the light of the information given. ...[T]he letter must be interpreted fairly and in its context. These are children who will remain in family. In view of their ages and limited opportunities to form a separate private life at the date of the decision letter, it is not clear what further information should have been referred to and considered by the respondent as bearing upon the interests of the children. None was put forward on behalf of the petitioner. I do not consider that it is essential that the respondent make specific reference to the phrase 'the best interests of the children as a primary consideration'. I am satisfied from the terms of the letter that the respondent did have in mind 'the principle' in her consideration and effectively applied 'the principle'".

3. Submissions and Decision

[11] The petitioner and respondent both lodged written submissions, which have been

considered. The petitioner did not maintain, as the petitioner in *HS* had done, that the petitioner's rights under UNCRC Article 3 ought to have been considered separately from those under ECHR Article 8. It was a matter of concession that the best interests of the child required to be taken into account as a primary consideration in context of the Article 8 exercise as set out in *R (Razgar)* v *Secretary of State for the Home Department* [2004] 2 AC 369 (Lord Bingham at para 17); (*LD (Article 8 - best interests of the child) Zimbabwe* v *Secretary of State for the Home Department* [2010] UKUT 278 (IAC) at para 28). The focus of the submission, as amplified in oral argument, was that the Lord Ordinary had erred in not recognising the failure of the respondent to consider best interests at all. The respondent had framed the question to be answered in terms of that described in *Huang* v *Home Secretary* [2007] 2 AC 167 (Lord Bingham at para 20), but that case had not involved dependent children. The Lord Ordinary had erred in holding that the respondent had taken into account the best interests of the child and, in any event, that she had done so as a primary consideration.

[12] For the reasons given in *HS*, upon the assumption that the respondent has, in terms of the concession, had regard to the best interests of any children as a primary consideration in determining an ECHR Article 8 claim, the respondent should state that expressly. That was not done here. As was also stated in the Opinion in *HS*, the court does not agree with the Lord Ordinary that the requirement is met merely by regarding best interests as a relevant consideration. It must be afforded a prominent or important status in the decision making process, even if it is not determinative. The issue, however, remains one of not only whether, were the matter to be analysed in the correct manner, the respondent did err in not treating the best interests as a primary

consideration but also of whether, had she done so, there is a realistic prospect that a different decision would have been reached (i.e. whether any error was material).

[13] The court agrees with the Lord Ordinary that, notwithstanding the absence of any express reference by the respondent to the general principle of best interests, it is plain from the decision letter that the respondent did address these interests, current and future, in the light of the information presented to her. The latter phrase is important. It is true that in the petitioner's application letters, as distinct from that in *HS*, there was specific, if wrongly attributed and vague, reference to best interests as a primary consideration. However, there was virtually no material put before the respondent to support a contention that it would be in the best interests of the children to remain in the United Kingdom as distinct from returning to Israel. The issue of any ill treatment at an Israeli kindergarten had effectively been dismissed by the Immigration Judge. All that remained was a contention that the older child had settled well in school and at dance classes. There was no basis for concluding that she would not settle equally well at a primary school and dance classes in Israel.

[14] Given the prominence which the respondent did give to the children's situation in the decision letter, it is difficult to conclude that their interests were not being looked at as a primary consideration. But, even if there were an error in not affording them the correct hierarchical status, the fact remains that there was no substantial information placed before the respondent upon which she could form a view that it was in the best interests of the children to remain in the United Kingdom. As the Lord Ordinary states,

> "In view of their ages and limited opportunities to form a separate private life at the date of the decision letter, it is not clear what further information should have been referred to and considered by the respondent as bearing upon the interests of the children. None was put forward on behalf of the petitioner".

[15] For similar reasons to those given in the Opinion of the court in *HS*, it cannot be demonstrated that, if any error were made, the information provided could have resulted in a different decision being made. The prayer of the petition, and the reclaiming motion, must be refused.