Case No: C5/2007/2152

Neutral Citation Number: [2008] EWCA Civ 325
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/06699/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 17th March 2008

Before:

LORD JUSTICE WARD,
LORD JUSTICE SEDLEY
and
LORD NEUBERGER

- -

Between:

LM (DRC)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr R Husain (instructed by TRP Solicitors) appeared on behalf of the **Appellant**.

Ms P Patel (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent.**

- -

Judgment

(As Approved by the Court)

Lord Justice Sedley:

1. The appellant, who is now 22, came to this country with her two younger siblings in May 2002 when all three of them were minors, one of them born on 13 October 1992, the other on 21 July 1988. They had fled from the Democratic Republic of Congo where their parents, who were Burundian, had been abducted and (as the immigration judge was in due course to find) probably killed by Congolese soldiers. The father was a doctor; the mother was a diamond trader. The children thereafter lived from hand to mouth until by selling one of the mother's diamonds they were able to reach the United Kingdom. Here they have been cared for and fostered by a couple, Mr and Mrs Hodgson. They have no other family and no remaining links with the Democratic Republic of Congo.

2. The Home Secretary declined to grant the appellant either a variation of her leave to remain here or further leave to remain. She appealed to the AIT on both asylum and human rights grounds. Before Immigration Judge Salmon in August 2005 the asylum claim failed but the human rights claim succeeded, both under Article 3 and under Article 8 of the Convention. A reconsideration of the human rights determination was ordered because of arguable errors of law. No attempt was or has since been made to revive the asylum claim.

3. In April 2006 Senior Immigration Judge Southern held not only that Immigration Judge Salmon had erred in law but that the human rights claim was unarguable because it was not justiciable. He therefore substituted a decision dismissing the appellant's human rights appeal without proceeding to a second-stage hearing.

4. It is now common ground that Senior Immigration Judge Southern himself erred in law in holding that in a variation appeal, as opposed to a removal appeal, human rights were not justiciable. That had been the view of the law prevailing at the time of his determination by virtue of the AIT's decision in JM v Liberia [2006] AIT 00009. That decision was overset by this court: [2006] EWCA Civ 1402. It follows that Senior Immigration Judge Southern's conclusion that Immigration Judge Salmon had determined the human rights issues without jurisdiction to do so has to be abandoned. The question which remains is whether the consequence should be, as Parish Patel for the Home Secretary submits, a remission to the AIT for reconsideration of the merits of the human rights claim or, as Raza Husain for the appellant submits, the restoration of Immigration Judge Salmon's determination that removal of the appellant would breach Article 8.

5. Mr Husain is able to limit his submission to Article 8 without seeking to defend the favourable decision of the Immigration Judge under Article 3, a more formidable task, since the appellant need succeed on only one limb of the ECHR in order to remain here.

6. Before I turn to this, however, I need briefly to record that the appellant's lawyers at the time of Senior Immigration Judge Southern's decision told the Home Office that if the case of JM (Liberia) was overset on appeal they would

seek to appeal the appellant's case out of time. Instead, however, they closed their file. It was not until her present solicitors were instructed in July 2007 that the Home Office was asked now to give effect to the Article 8 decision of Immigration Judge Salmon and it was when this was declined that permission to appeal out of time was sought. This was granted by Moses LJ.

7. Whether to remit or to restore depends on whether Immigration Judge Salmon's determination on Article 8 contains any appealable error of law. I put it in this way because it is common ground that one error in it is not appealable. The immigration judge, adopting what was the conventional approach at the time, decided the Article 8 issue by reference to whether the case was "truly exceptional". For reasons which it is unnecessary to explore but which are detailed in this court's decision in AG (Eritrea) [2007] EWCA Civ 801 it is now established, or rather re-established, that the test under Article 8(2) is proportionality, not exceptionality. Where, as here, the higher hurdle of exceptionality has been found to have been surmounted the error cannot be said to be material, and Mr Patel rightly does not attempt to say it is. What Mr Patel submits are material are two further matters, both amounting in his submission to errors of law. In his skeleton argument he puts them this way

> "32…Whilst it is true to say that Immigration Judge Salmon's assessment of proportionality by reference to the "truly exceptional" standard was an error of law which was not material to his conclusion there were two other errors in his determination which make it impossible to know whether he would have decided the appeal in the appellant's favour.
>
> (1) In IJ Salmon's assessment of proportionality he puts into the balance the fact that the appellant 'has no contacts whatsoever left in the DRC'. He relies upon that factor, along with the fact that there is a strong link between the appellant and her siblings, as making the appellant's removal to the DRC a disproportionate interference with her family life (as he concludes that her removal would 'split apart the family'). However the first factor has to be seen in the context of IJ Salmon's finding that her lack of contacts in the DRC (coupled with her ethnicity, sex and age) put her at risk of treatment contrary to Article 3 and that such finding was found by SIJ Southern to be erroneous as being contrary to the objective evidence. By reference to the observations of the Court of Appeal in AG {Eritrea) that introduces into a 'labile balance' a factor which was not properly made.

> (2) IJ Salmon concluded that the appellant's removal would cause an interference with her Article 8(1) right to a family life. In reaching that conclusion he stated 'it is unrealistic to expect [the appellant's siblings] to leave their foster home and return voluntarily to the DRC'. That is not the correct approach. The immigration judge should have considered the issue of interference by reference to whether 'there are insurmountable obstacles' to family life being enjoyed elsewhere so that unless there were there was no interference caused by the appellant's removal (see Mahmood…). That is clearly a higher hurdle to overcome from whether it is 'unrealistic'. In the circumstances had the immigration judge considered the appellant's circumstances by reference to the proper approach it is impossible to know whether he would have reached the same conclusion."

8. The material findings and conclusion of the immigration judge are found at paragraphs 31 and 33 of his determination, but in order to examine Mr Patel's first argument it is necessary to include paragraph 32:

> "31. I find that although the Appellant and her siblings are Congolese her parents originated in Burundi. They were seized by Congolese soldiers in 1998 or 1999 and have not been seen since. There is no evidence of their deaths but it must be at least very likely that they are dead. The Appellant and her siblings fled to Brazzaville where they lived in the forest and on the streets for a substantial time. The Appellant lived for approximately a year with a soldier who gave shelter to her and her siblings. He ill treated her and finally by the sale of a diamond she was able to arrange for the three of them to come to this country. Mr Hodgson describes how suspicious the Appellant and her siblings were when they first came here and how they have gradually relaxed and become a family with him and his wife. This is consistent with the hardships which they faced in Africa.
>
> 32. There is no evidence to suggest that the Appellant is personally known to the authorities in the DRC. Her Burundi ancestry is not sufficient in itself to cause her to be automatically at risk of persecution if returned. However, the UNHCR does refer to ethnicity in the case of returned asylum seekers. The Appellant is a young single

> woman with no known contacts in the DRC. I take account of the situation as a whole in the DRC. The level for Article 3 of the Human Rights Convention is that of asylum. The Appellant has to establish that there is a reasonable degree of likelihood that she will suffer inhumane or degrading treatment if returned to the DRC. I find that in this case the Article 3 claim does not stand or fall with the asylum claim. Taking account of her ethnicity, sex, age and lack of contact in the DRC I find that the Appellant is at risk of treatment contrary to Article 3 of the Human Rights Convention.
>
> 33. I have also considered Article 9. I have taken account of the many cases concerning Article 8 and in particular the case of Huang. The Appellant's family life is concentrated on her relationship with her two siblings and their home is with their foster parents. She has no other family life. Plainly her removal constitutes interference with it. The interference is in accordance with the law. The question therefore is whether it is proportionate to the legitimate aim to be achieved. I have taken account of the approach to be adopted as set out in Razgar and Huang. To succeed the Appellant has to show that her circumstances are truly exceptional. In this case the Appellant's only family life is in this country. She has no contacts whatsoever left in the DRC. There is no dispute that there is a strong link between her and her siblings. I appreciate that neither of them has been granted asylum status but they do have leave to remain until they reach the age of 18. In the case of Deo that is not until the year 2010. It is unrealistic to expect Chance and Deo to leave their foster home and return voluntarily to the DRC. The removal of the Appellant would split apart the family. I find that these are truly exceptional circumstances."

9. Adopting this court's reasoning in AG (Eritrea) [2007] EWCA Civ 1801 to the effect that an error of fact may make it impossible to know how the balance would have been struck in its absence, Mr Patel points to the Senior Immigration Judge's finding that Immigration Judge Salmon's description of the appellant in paragraph 32 as having no known contacts in the DRC was contrary to the objective evidence. This is not quite so. What the Senior Immigration Judge held to be contrary to the objective evidence was the finding that this would put her at risk there. This Mr Husain (as I understand it) is content to accept, although we have not had to call upon him today. What he does not accept and what the Senior Immigration Judge did not find, was that there was anything amiss with the finding that the appellant

had no known contacts in the DRC. The argument accordingly identifies no rogue factor in the immigration judge's proportionality balance, a balance which the immigration judge goes on explicitly to strike in paragraph 33 as we have seen. Mr Patel however submits that the exaggerated importance which the immigration judge must have attached to it in finding a potential breach of Article 3 may well have been carried into the Article 8 balance. For myself, I can see the force of this as an abstract argument but I see no evidence of it in the immigration judge's reasoning. He rightly treats the Article 8 case as a qualitatively different exercise from the Article 3 case and his judgment on it, it seems to me, is freestanding.

10. Mr Patel's second point, which is also concerned with the ingredients of a proportionality judgment, relates to the possibility of the two younger siblings going back voluntarily to the DRC with the appellant and thereby preserving the integrity of the family. One might be forgiven for thinking that the immigration judge's description of this as "unrealistic" is an understatement of a fairly high order; but Mr Patel is entitled to ask us to take it at face value. If we do so, he submits, it falls markedly short of the "insuperable obstacle standard" which he contends is set for this purpose by the decision of this court in R (Mahmood) v SSHD [2001] 1 WLR 840. The passage upon which he relies is taken from the third judgment in that case, given by the then Master of the Rolls, Lord Phillips of Worth Matravers. It reads as follows:

> "I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls:
>
> (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other

> were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned."

11. It seems to me that it is not correct to say of this passage (which is not reflected verbatim in the first judgment, given by Laws LJ in Mahmood) that it requires there to be some insuperable obstacle to the reunification of the immediate family in the country of origin before Article 8 is engaged or, if engaged, is violated. The phrase "insurmountable obstacle" comes from the illustrative checklist given by the Commission in the case of Poku v The United Kingdom [1996] 22 EHRR CD 94. It is not a term of art. Few obstacles are literally insuperable: for example, here there may well have been no insuperable obstacle to the foster parents going with the three children to live in the DRC; it would just have been so utterly unrealistic and unreasonable that nobody has dreamed of suggesting it. Moreover, one observes a very close affinity between points 3 and 4 in Lord Phillips' exegesis, and that in point 4 the phrase "not reasonable to expect" lies parallel to the "insurmountable obstacle" criterion in point 3.

12. Regard has to be had also in point 3 to the words "not necessarily". The Master of the Rolls is acknowledging, it seems to me, that even if there are no such obstacles removal could still infringe the Convention right. Both the phrase used in point 3 and the phrase used in point 4 seek to convey no more, it seems to me, than a sometimes difficult judgment which has to be made in deciding whether the lawful removal of a person who has their family here will engage Article 8 and, if so, will be a proportionate measure. Ordinarily no doubt it will, but not always. The point is reinforced by Lord Bingham's formulation in Huang v SSHD [2007] UKHL 11:

> "20. In an article 8 case where this question is reached, the ultimate question for the appellant immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in its opinion, need ask in addition whether the case meets the test of exceptionality."

13. Mr Patel in argument before us rightly and realistically accepts that the word "insurmountable" is not to be taken literally; it is a word which has a range of registers and its meaning here, insofar as it is a legal term of art, is in my judgment a meaning which requires the decision-maker to consider whether, realistically or reasonably, it is an obstacle which is able to be surmounted. In this light there is no error of law in the immigration judge's reliance in the present case on his finding that it was "unrealistic" to expect the two younger siblings, both of them still minors, to leave their foster home here in order to return with their older sister to what is now for all three of them a strange country. It is not necessary, in my judgment, to find in formulaic terms some insuperable obstacle before removal becomes disproportionate. Such an approach would reduce adjudication on serious and complex human rights issues to a choice of words. What matters is that in the context of his findings as a whole the immigration judge is plainly deciding that to expect the younger siblings to uproot themselves in this way in order to keep their relationship with the appellant intact, ignoring - as I have pointed out - the foster parents, who nobody suggests should go and live in the DRC, is not a realistic or reasonable answer to what would otherwise be the disproportionality of removing the appellant.

14. I can see nothing wrong with that approach. As Mr Husain points out in his written argument, it corresponds with the approach of the European Court of Human Rights itself. Indeed it would have been very surprising to my mind if, on these facts, a humane decision maker had not found in the proposed removal of the appellant a potential violation of Article 8. In other words, even if there were a discernible error in the immigration judge's Article 8 decision I would have hesitated to send the case back because I would have doubted whether a different decision on the particular facts of this case was really possible.

15. All of this makes it unnececssary to embark upon the more technical question which has been raised in these proceedings: whether the Article 8 issue is open to the Secretary of State at all. Although it featured in the AIT's grant of permission to the Home Office to apply for reconsideration it did not actually feature in the Home Office's own grounds. But it has seemed to me very much preferable to address the case on its merits, and since the answer on the merits is that which I have arrived at, the technical point falls away.

16. I would allow this appeal not by remitting it to the AIT but by restoring the decision of Immigration Judge Salmon.

Lord Justice Ward:

17. I agree.

Lord Neuberger:

18. I also agree.

Order: Appeal allowed