CO/4101/2004

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 14th April 2005

B E F O R E:

MR JUSTICE WALKER

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THE QUEEN ON THE APPLICATION OF JEGATHEESWARAN
(CLAIMANT)

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(DEFENDANT)

- - - - - - -

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MISS S JEGARAJAH (instructed by K RAVI SOLICITORS) appeared on behalf of the CLAIMANT
MS L BUSCH (instructed by TREASURY SOLICITOR) appeared on behalf of the DEFENDANT

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J U D G M E N T
(As Approved by the Court)

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Thursday, 14th April 2005

1. MR JUSTICE WALKER: The claimant is the father of a boy who was born in Sri Lanka on 8th April 1992. I shall call him "K". He is now just 13 years of age. Under United Kingdom immigration legislation he has no right to stay in this country. It is asserted on his behalf that if, as the defendant proposes, he is returned to Germany his human rights will be infringed. The stance taken by the defendant is not merely that removing K to Germany is consistent with his human rights, but that any argument to the contrary is manifestly unfounded. The question which arises before me is whether the Secretary of State's, the defendant's, conclusion in that latter respect is invalid as a matter of public law.

The history

2. The defendant's skeleton argument prepared by Miss Bush, who has appeared on behalf of the defendant today with conspicuous ability, contains a helpful account of the history:

> "7. The Grounds for the Claim are set out in Section 5 (Detailed Statement of Grounds) of the Claim Form. It would appear that the Claimant no longer seeks to pursue Ground I for the Claim. Grounds II and III are as follows:
>
> 'The Secretary of State for the Home Department's decision [of 25th August 2004] is unlawful in that
>
> ...
>
> II. The point is not whether there is a specialist education service in Germany but rather [the] profoundly prejudicial effect of re-educating [K] at 12 in an alien language. And the disruption this will cause to his personal integrity.
>
> III. He has failed to attach sufficient weight to the rights of the children.'
>
> "8. Both of these grounds for the Claim, like the Claimant's original claim to the SoS as set out in his representative's letter of 23rd August 2004, appear to be relied upon on the basis (at least, in key part) that the removal of the Claimant and his family from the United Kingdom would result in a violation of Article 8 of the European Convention On Human Rights and Fundamental Freedoms ("the ECHR").
>
> "9. The SoS is content to treat the above grounds as grounds for a claim for judicial review of all of the decisions set out in DL1 - DL4.
>
> BACKGROUND
>
> "10. The Claimant is a Sri Lankan Tamil. He and his wife have three

sons [names and dates of birth stated]. [K] has special educational needs arising out of the fact that he is deaf and suffers from a Specific Language Impairment ("SLI").

"11. The Claimant, his wife, and [K] left Sri Lanka for Germany in 1994, where the Claimant claimed asylum. This claim was refused by the German authorities.

"12. On 19th December 2000, the Claimant, his wife and three sons arrived at Heathrow Airport on a flight from Spain, and immediately claimed asylum. On 8th February 2001 the German authorities agreed to accept responsibility for the Claimant's asylum claim under the terms of the Dublin Convention (see Acknowledgment of Service ("AS")). Accordingly, on 22nd March 2001 the asylum claim was certified on third country grounds.

"13. In April 2001, arrangements for the removal of the Claimant and his family to Germany were cancelled because the Claimant claimed that his removal would breach Articles 2, 3, 5, 6 and 14 of the ECHR. On 9th May 2001 the SoS certified the claim as manifestly unfounded pursuant to section 72(2)(a) of the 1999 Act. The Claimant applied for permission to claim judicial review of that decision, which application was refused on the papers on 6th July 2001. The Claimant did not renew the application to an oral hearing.

"14. On 9th August 2001, arrangements for the removal of the Claimant and his family were cancelled, because they failed to report for their flight, as they had been directed to do by the Immigration Service. The Claimant and his family were subsequently treated as immigration absconders.

"15. The family's whereabouts were discovered in May 2004, whereupon, on 22nd July 2004, arrangements were again made for their removal to Germany.

"16. On 23rd August 2004, however, the Claimant's representatives wrote to the SoS alleging that the family's removal would be in breach of Article 8. In support of this claim they relied, inter alia, upon a letter drafted by a Ruth Hamilton of Glasgow City Council Education Services dated 19th August 2004 ("the first Hamilton Report"). The SoS responded to this allegation on 24th August 2004 in DL1.

"17. Permission to claim judicial review having been refused by Richards J on 22nd September 2004, the Claimant renewed his application on 29th September 2004. He did so on the basis that he had "received further expert evidence" in support of his claim, in the form of a report dated 28th September 2004 from Ruth Wheeler, Senior Educational Psychologist with Glasgow City Council, concerning [K's] special

educational needs ("the first Wheeler Report").

"18. On 5th October 2004, the SoS wrote to the Claimant's representatives ("DL2"), explaining that he had considered the first Wheeler Report, but that the Immigration Service was not persuaded that it provided any grounds for altering the Decision.

"19. On 6th October 2004, the Claimant's representatives sent the SoS's representatives an educational report dated 29th September 2004, together with a speech & language therapy report dated September 2004 ("the SALT Report"). The Claimant also sought to rely, for the purposes of the renewed permission application, upon a further report concerning [K] from Ruth Wheeler dated 12th October 2004 ("the second Wheeler Report").

"20. On 12th November 2004, after permission to claim judicial review had been granted, the SoS wrote to the Claimant's solicitors referring to the above mentioned evidence submitted by them to the SoS in support of his claim. This letter ("DL3") stated

'... 2. You have asserted that removal of your client and his family to Germany would be an interference with their Article 8 ECHR rights, and in this you rely on the disruption such removal would cause to the special education being given to your client's son, [K]. On reviewing all the evidence before him, which you have submitted at various stages of his consideration of your client's claim, the Secretary of State is of the view that it contains a number of ambiguities. For example, in her report of 28 September Ms Wheeler stated that if [K] *'were required to restart his education in Germany there would be a major discontinuity in the support available to him with a significant risk that in the long-term [K] would not be able to communicate functionally in any spoken language'*. Ms Hamilton's report of 19 August clearly suggests that [K] *would* acquire an ability to communicate in German if he is provided with adequate specialist support. Although Ms Hamilton notes that [K's] only spoken language is English she states that *'he will have to begin all over again with specialised language teaching for SLI if he is to make any progress acquiring German. He will not learn German without this'*. In her later report of 28 September Ms Hamilton states that *'it is essential that if [K] is to have any communicative future that these [training] needs continue to be met in a highly specialised communicative setting'*.

'3. There is no suggestion in either of Ms Hamilton's reports, or indeed in any other of the reports submitted, that such a specialist training as is necessary for your client's son would

not be available in Germany. On the contrary, it is generally accepted that the training would indeed be available there. The clear implication of Ms Hamilton's reports is that [K] *would* have a communicative future if he is provided with the relevant kind of specialist education.

'4. There is a further ambiguity in Ms Wheeler's reports. Although in her report dated 12 October she stated that *'English is the only language in which [K] has any communicative competence*' she had earlier stated in her report of 28 September that *'English remains the language in which [K] has* ***most*** *communicative competence'* (emphasis added). The clear implication of this is that [K] does indeed have some communicative competence in another language, whether it be German, or Tamil, or both.

'5. In the light of the discrepancies highlighted above, the Secretary of State is not persuaded that the evidence provided shows that removal of your client and his family to Germany would present a significant, long-term risk that [K] would be unable to communicate functionally in any spoken language. The specialist educational support which he requires will be available to him in Germany and steps will be taken to advise the German authorities of his needs in advance of removal. In addition, [K] will undoubtedly continue to receive support from his parents throughout this period.

'6. In light of the above, the Secretary of State is satisfied that, even if an interference with your client's Article 8 rights were to be shown in the event of his and his family's removal to Germany, this would be proportionate under the provisions of the second paragraph of Article 8. The Secretary of State's decision to maintain his earlier certificate in respect of your client's human rights allegation therefore stands, for the reasons given above and for the reasons set out in his previous correspondence to you in response to those allegations (emphasis in original letter).'

"21. The Claim was listed for a substantive hearing before Sullivan J on 2nd March 2004. On 1st March 2004, after 17:00, the Claimant's representatives faxed yet further evidence in support of the Claimant's claim to the Treasury Solicitor. This evidence took the form of a further letter from Ruth Wheeler, dated 1st March 2005 ("the third Wheeler Report"), in which she explained, inter alia, that:

(1) 'It remains our current assessment, as it was when I wrote my letter on the 28th September 2004, that English is the only language in which [K] has any communicative competence'

(third Wheeler Report, paragraph (ii)); and

(2) '[K] has made such progress over this time, and has developed English language skills to such an extent, that he can begin to communicate effectively. Having to start this long term and intense progress again, however well developed the support network is in Germany, would, as I stated earlier lead to significant risk that [K] would not be able to communicate functionally in any spoken language' (third Wheeler Report, para (iv)).'"

3. There are some aspects of paragraphs 7 to 21 which are in dispute. However, for the purposes of today I proceed on the basis that paragraphs 7 to 21 set out the history so far as those paragraphs recite matters of a factual nature.

The orders sought by way of judicial review

4. K spent some time in this country as is evident from the facts set out above. The proposal to remove K and his family on 25th August 2004 led to emergency action being taken in the week prior to that date on K's behalf. A claim form was issued on 24th August. It identified the decision to be reviewed in this way:

> "The decision of the Secretary of State for the Home Department to prevent removal on the basis of the United Kingdom's international human rights obligations, by way of removal directions dated 25th August 2004."

5. The suggestion that this particular decision should be the subject of judicial review is puzzling. One would have expected that under section 65 of the Immigration and Asylum Act 1999 it would be open to the claimant as K's father, and on his behalf, to appeal to an adjudicator against that decision. That is because the essence of the claimant's case was, and is, that a decision to remove K from the United Kingdom to Germany is a decision which is in breach of his human rights. Thus the relevant authority, when deciding to remove him to Germany with the date fixed for 25th August, had, by that decision, acted in breach of his human rights. It is trite law that where there is a right of appeal it would not ordinarily be appropriate for the court to proceed by way of judicial review.

6. The answer, however, has emerged as the case proceeded. The stance taken by the Secretary of State is that on a number of occasions he has concluded that the allegation that actions by the authorities in relation to immigration in K's case contravenes his human rights, is manifestly unfounded. Accordingly, the Secretary of State says, under section 72(2)(a) of the 1999 Act, that K is not entitled to appeal while he is in the United Kingdom.

7. By way of shorthand, the expression that was used in argument was that he is not entitled to an "in-country" appeal. As the case has developed it has become apparent

that the real issue is his entitlement to an in-country appeal. That is what he seeks. That is what the Secretary of State, the defendant, says is not his entitlement.

The grounds for seeking judicial review

8. As set out in the claim form these were skeletal:

> "The Secretary of State for the Home Department's decision is unlawful in that
>
> I. The claimant and family were not required to report for three years, there was no requirement of temporary admission to do so,
>
> II. The point is not whether there is a specialist education service in Germany but rather profoundly prejudicial effect of re-educating [K] at 12 in an alien language. And the disruption this will cause to his personal integrity.
>
> III. He has failed to attach sufficient weight to the rights of the children."

9. As the matter has developed I is no longer relied upon. The matters raised at II and III have been considerably developed in skeleton arguments since the claim form was issued. The defendant, quite properly, draws attention to the fact that the arguments now advanced are rather different from those that were put forward in the original statement of grounds. However, it is not contested that today I need to look at the matter in the light of the submissions put forward in successive skeleton arguments and orally to me, again with conspicuous ability, by Miss Jegarajah on behalf of the claimant.

10. At the outset of her submissions I asked Miss Jegarajah whether she disagreed with certain propositions of law put forward on behalf of the defendant in the defendant's skeleton argument. One main disagreement was a suggestion by Miss Jegarajah that this is a case falling into a category described as a "domestic" case: see the speech of Baroness Hale in R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368. In terms of the way the matter is put by Baroness Hale at paragraph 61 of her speech, the submission for the claimant was that K's degree of social integration was so high as to make this both a domestic case and a foreign case.

11. I shall not need to describe this aspect of the argument further. For the purposes of today I proceed upon the footing that this case is to be treated as what is described as a "foreign" case. It is a "foreign" case in this sense: that the reason why the claimant's human rights, and in particular his rights under Article 8 of the European Convention, are said to be infringed, is because it is his removal to Germany which will put him in a position where he is not able to enjoy a private and family life in the way that he would be entitled to enjoy it had he remained in this country.

12. Also at the start of the claimant's submissions there was some discussion of certificates which had been issued in 2001. A certificate dated 22nd March 2001 had been issued

in relation to K's family's asylum claim. Nothing turns on this for the purposes of the present case.

13. On 10th April 2001 the claimant's family asserted that removal of them to Germany would contravene their human rights. On 9th May 2001 the defendant issued a certificate in relation to that claim. The allegation as to breach of human rights and the Secretary of State's conclusion upon it, were as follows:

> "You allege that removal to Germany would constitute a breach of your client's human rights under Articles 2, 3, 5, 6 and 14 ECHR because if he were returned to Germany he would be returned to Sri Lanka without further consideration of his asylum application and that his removal to Sri Lanka would breach his human rights as detailed above.
>
> "After full and careful consideration, the Secretary of State has concluded that this allegation is manifestly unfounded..."

There then followed reasons for reaching that conclusion.

14. I should add that this is a letter in relation to a representation by a firm of solicitors who appear to have been acting on behalf of the claimant.

15. It may be noted that the alleged breach of human rights did not involve an allegation of a breach of Article 8. It may be inferred from the history that the reason that no specific claim at that stage was made on behalf of K was that the full implications of his speech difficulties were not then apparent.

16. When I asked Miss Busch about the significance of the decision of 9th May 2001 it was her submission that once any certification is made under section 77(2)(a) there is no in-country right of appeal in relation, not merely to the allegation considered in the certificate, but also to any fresh allegation. As will appear, in this case it is not necessary for me to consider whether that submission is sound in law.

17. I asked Miss Busch what the position would be if it were certain that a move to Germany would mean that the claimant would not be able to communicate functionally in any spoken language. Miss Busch, having taken instructions, informed me that the defendant accepted that in such circumstances Article 8 of the Convention would arguably be engaged. Equally, if it were unequivocally the case that removal to Germany carried a significant risk that the claimant would not be able to communicate functionally in any spoken language, it was accepted that Article 8 would arguably be engaged.

18. I turn to the submissions on behalf of the claimant. In the light of the way in which the defendant had responded to my questions it was entirely appropriate for the claimant to concentrate very strongly on the reports that had been put forward on behalf the claimant and that were relied upon by the defendant.

19. The first report of Miss Hamilton (Hamilton 1), prepared on 19th August 2004, was submitted to be a very general report. While DL3 alleged discrepancies between Ruth

Wheeler's conclusions and Hamilton 1, the passages that were quoted in paragraph 2 of DL3 were not inconsistent with Miss Wheeler's conclusion. At this stage the claimant had only been very recently transferred to the specialist unit.

20. As to paragraph 4 of DL3, the interpretation that had been adopted by the defendant was wrong. What the material from Miss Wheeler was intending to show was not that the claimant had some or any communicative competence in languages other than English. Paragraph 5 gave reasons for concluding that removal was still appropriate and so did the first sentence of paragraph 6.

21. The remainder, however, of paragraph 6 of DL3, went on to a different question, the question whether the earlier certificate should be maintained. This involved consideration of not merely whether the defendant was right, but whether any other view was manifestly unfounded. No explanation is offered in DL3 for reaching the view that any argument to the contrary was manifestly unfounded other than this: the word "therefore" appears. In other words the one decision is said to follow from the other.

22. That cannot be right, says Miss Jegarajah. The argument for the claimant continued that a feature had been that the defendant had not looked at the matter in context, and, in particular, the time taken in Germany to acquire language skills.

23. The key points were those set out in Wheeler 2 at paragraphs 1 to 4. I quote them:

> "1. [K's] special educational needs are complex and pronounced and require a very particular form of intensive and structured teaching input.
>
> 2. Given his hearing impairment and language learning history it has taken some time to come to a robust conclusion about his special educational needs.
>
> 3. Although his current placement is proving effective in helping overcome his specific language difficulties, these difficulties are likely to require such support throughout his secondary schooling.
>
> 4. If [K] were required to restart his education in Germany there would be a major discontinuity in the support available to him with a significant risk that in the long-term [K] would not be able to communicate functionally in any spoken language."

24. That was then developed in the letter of 12th October which gave a description of the nature of the assessment process and of the support. Miss Jegarajah said that no adjudicator could say with certainty what would happen because the claimant had not yet been removed and we do not know what the relevant German professionals would say.

25. More generally on the merits, Miss Jegarajah drew attention to the length of the process, the fact that success had been founded on competence in English, the familiarity of the team in the UK with the claimant, and the fact that without this

support his educational progress would have been significantly limited. This material and the key points made on page 36 would, said Miss Jegarajah, enable an adjudicator to conclude that removal to Germany poses a real risk to the claimant's ability to communicate with the outside world.

26. Any doubts as to this, said Miss Jegarajah, were resolved by the further letter from Ruth Wheeler of 1st March. In particular Miss Jegarajah stressed sub-paragraphs (iv) and (v):

> "(iv) [K] has made such progress over this time, and has developed his English language skills to such an extent, that he can begin to communicate effectively. Having to start this long term and intense progress again, however well developed the support network is in Germany, would as I stated earlier lead to significant risk that [K] would not be able to communicate functionally in any spoken language.
>
> (v) The fact that there had been continuity of support since 2001 meant that we could reach an informed and robust conclusion in August 2004."

27. Miss Jegarajah submitted that the approach of the defendant was similar to that which had been taken by the defendant in the case of R (on the application of) Bardiqi v Secretary of State for the Home Department [2003] EWHC 1788 Admin, a decision of Sullivan J on 14th July 2003. As the claimant's evidence had become stronger and stronger, the defendant had nevertheless maintained a stance which was no longer appropriate.

28. At this point Miss Jegarajah indicated that she had prepared an amendment to the grounds in order to deal with the argument of law I mentioned earlier. That is the suggestion that certification once made covered any future human rights application. In the event I was able to indicate to Miss Jegarajah that it would be unnecessary for her to proceed with that proposed amendment.

29. Miss Busch, for the defendant, acknowledged that the present case could be described as a "health case" in the sense used by Baroness Hale at paragraph 51 of her speech in Razgar. Here, however, the focus had been on the disruption caused by removing K and this put the case squarely in the "foreign" class.

30. In reply to a question from me Miss Busch accepted that if the defendant had said in DL4, "I continue to think you should be removed but I no longer say your human rights arguments are manifestly unfounded" then there could be an in-country appeal. Despite what was said in the claim form, the defendant was prepared to treat the case as if the claimant sought an order that he was entitled to an in-country appeal from DL4. If DL4, insofar as it asserted that the human rights claim was manifestly unfounded, were invalid in public law, then the consequence would be that the claimant had an in-country right of appeal.

31. Addressing the merits, Miss Busch said that the claimant had relied selectively on the evidence as it had evolved, but that the defendant was entitled to look at the matter in

the round. As at 23rd August 2004 the human rights claim had been that so far as K was concerned he would have to learn German and start again. That was consistent with Hamilton 1. The plain inference was that he would be able to learn German. The defendant's response to that was reasonable.

32. At this point I indicated to Miss Busch that she was pushing at an open door as matters then stood. For the reasons explained in the judgment of Munby J, it seemed to me that as matters then stood there was no such clear case as could render a human rights claim arguable.

33. Miss Busch then went on to deal with the subsequent matters. She referred to the SALT report of September 2004. That showed a desire to keep up K's Tamil as well as his English. The defendant did not deny that K's communications skills in German were very limited.

34. As to the first Wheeler report, key conclusion number 4 indicated that the core of the alleged "significant risk" was the "major discontinuity." The defendant had dealt with this by undertaking to inform the German authorities about K's case. As to the suggestion that even though he may well have expert support in Germany, there is nonetheless a discontinuity which carries with it the significant risk that the first Wheeler report spoke of, Miss Busch said, first, that paragraph 4 of the first Wheeler report proceeded on the basis that the claimant would not get such support in Germany. Second, Miss Busch said that the claimant's difficulty on this aspect of the case was a lack of evidence. There was, she submitted, no implication in paragraph 4 of the first Wheeler report, that what Ruth Wheeler had in mind were the points made at paragraph (iv) of the third Wheeler report. I have quoted paragraph (iv) of the third Wheeler report above.

35. As to paragraph (v) of the third Wheeler report, the defendant accepted what was said there. However, the first Hamilton report and the August 2004 human rights claim had themselves been made on the basis of that "robust" conclusion.

36. Miss Busch submitted that the case on discontinuity had been fairly and squarely met by the defendant. The first time it had been taken further was in Wheeler 3, in March 2005. It was right for the Secretary of State to take account of all the evidence and to conclude that there was no significant risk to the claimant's education.

37. As to the burden of proof, Miss Busch stressed the high threshold that was needed to show that Article 8 was engaged, let alone breached, and that decisions taken pursuant to the lawful operation of immigration control must be treated as proportionate to the legitimate aim of maintaining an effective immigration control system in all save the small minority of cases.

38. As this was a foreign case, well established principles came into play. The Secretary of State was entitled to certify a claim as manifestly unfounded if, after reviewing the material upon which it is based, he is reasonably and conscientiously satisfied that the allegation must clearly fail.

39. The questions that are likely to arise are those set out by Lord Bingham in his speech in Razgar at paragraphs 17 to 20. When addressing those questions it is to be recalled that the court is exercising a supervisory jurisdiction, although one involving such careful scrutiny as is called for where an irrevocable step, potentially involving a breach of human rights, is in contemplation.

40. The case law showed that successful reliance upon the Convention as a ground for resisting extradition or expulsion demanded presentation of a very strong case. What was required was a very grave state of affairs amounting to a flagrant or fundamental breach of the Article, which in effect constitutes a complete denial of his rights.

41. Miss Busch submitted that this case was similar to Bensaid v UK [2001] 33 EHRR 205. She draw my attention to a passage in paragraph 48 of that judgment:

> "Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention. Even assuming that the dislocation caused to the applicant by removal from the United Kingdom where he has lived for the last eleven years was to be considered by itself as affecting his private life, in the context of the relationships and support framework which he enjoyed there, the Court considers that such interference may be regarded as complying with the requirements of the second paragraph of Article 8..."

42. The present case, said Miss Busch, fell well below Razgar in terms both of that which was at risk and the cogency of the evidence. The result was that Article 8 was not engaged.

43. Even if, however, her submissions thus far failed, Miss Busch contended that, on the assumption that there was an interference within Article 8, the Secretary of State had reasonably concluded that assertions of breach were unarguable. She submitted that it was unarguable that the interference with Article 8 was disproportionate to what was needed in order to reflect the very important countervailing factor of maintaining fair and firm immigration control. It was relevant in this regard that K had been here unlawfully for three years. This linked with the importance of maintaining firm immigration controls.

44. As to what had been said in Bardiqi, that had been decided before the House of Lords in Razgar. In any event, passages in that case reflected what had been said by Lord Bingham, namely that each case must turn on its own facts. The length of time spent in the United Kingdom in Bardiqi was greater than in this case and a child had been born. In the case of Bardiqi there had been no evidence to contradict the claimant.

45. That concluded the defendant's submissions.

46. I sought clarification from Miss Busch in relation to one aspect of the proposed amendment. The proposed amendment included, I believe as an additional head of relief, "It is hereby ordered that... [the defendant] issue a Notice of Appeal to the [claimant] so that he may appeal to an adjudicator." I asked Miss Busch whether, if I concluded that DL4, insofar as it said that the human rights claim was manifestly unfounded, was invalid, the claimant would need an order of the kind suggested. After taking instructions Miss Busch was able to give me the answer which I had expected; namely that in that event the defendant would not stand in the way of an in-country right of appeal.

47. In those circumstances I was, having given consideration to the matter throughout the course of argument, able to indicate that it was my conclusion that the claimant succeeded without the need for an amendment.

Analysis

48. It is important to note at the outset of my analysis of the position that Miss Busch had, in my view, rightly, accepted that if it were unequivocally the case that there was a significant risk that a move to Germany would lead to the claimant not being able to communicate functionally in any spoken language, then Article 8 was arguably engaged.

49. Miss Busch, also, if I may say so, very properly accepted that if my conclusion were that DL4, insofar as it determined that the human rights claim was manifestly unfounded, was invalid, then the claimant would be entitled to succeed on this judicial review application.

50. For that purpose I confine myself to what was described by Munby J as the "discontinuity" point. That point has now been elaborated by Ruth Wheeler in her report of 1st March. Is it strong enough, arguably, to engage Article 8, and if so, arguably, to lead to a conclusion that it outweighs the important need to maintain a firm and fair immigration policy?

51. With respect to the submissions on behalf of the defendant, I do not regard this as a case where there is a "lack of evidence."

52. Starting with the first mention of the discontinuity point, I turn to Ruth Wheeler's report of 28th September 2004. Paragraph 4 said that a requirement for K to restart his education in Germany would lead to "a major discontinuity in the support available to him with a significant risk that in the long-term [he] would not be able to communicate functionally in any spoken language."

53. I find it difficult to read this as predicating that there would not be, in Germany, the sort of support that is available to the claimant in this country. There would have been no need to refer to a "discontinuity." The concern would not be one of lack of continuity but of a complete cessation. The ordinary meaning of what was said in paragraph 4, is, to my mind, that having developed English language skills, if he goes to Germany, the claimant has to go through afresh the whole process he has been through in this country

if he is to be in a position where support can continue at the level and kind which in this country is now being offered.

54. The risk that I see identified in paragraph 4 is a risk that while that process is being successful so far in England, if he were in Germany it would not work because of the need to operate in a new language. That is the risk which I understand Ruth Wheeler to have described as "significant" in the report of 28th September 2004.

55. If there were any doubt about it the position has been made absolutely clear by Ruth Wheeler in her letter of 1st March 2005. I readily accept that the points made by the defendant suggesting various discrepancies between the position as it appeared in August 2004 and the position as described by Ruth Wheeler, might be deployed in cross-examination of Miss Wheeler. For my part I do not regard them as anything like so compelling as to cast significant doubt on her evidence for the purposes of the issues that arise before me today.

56. There is, in my view, at least an arguable case for the conclusion that removal to Germany will indeed entail the significant risk which the defendant has accepted would arguably engage Article 8. It is nevertheless said by the defendant that such an interference with rights under Article 8 could not arguably be such as to outweigh the importance of maintaining a firm and fair immigration policy.

57. One difficulty that faces the defendant is that in reaching his decisions he has not approached the matter in that way. He has, for reasons which seemed to him to be sound, concluded that there is not a significant risk. It is on that footing that, as it appears to me, he has concluded that any arguable interference with Article 8 cannot arguably be so great as to lead to a breach of that article. May it nevertheless be said, as Miss Busch has forcefully submitted, even if the article is engaged because there is a serious risk, that cannot be enough to give rise to an argument of breach?

58. Here, I bear in mind all that has been said about the question of proportionality that arises, not merely in Razgar and the other cases cited to me, but also in the case of Huang [2005] EWCA Civ 105, to which reference was made briefly in argument. I must look at the consequences which are feared if the significant risk should eventuate. Those consequences are very serious indeed. The ability to communicate functionally in any spoken language would be lost. I do not say by any means that the claimant is bound to succeed before an adjudicator, I simply say that those very severe consequences, combined with a significant risk that they may come about, in my view give rise to an arguable case for consideration by an adjudicator.

59. I bear in mind Miss Busch's submission that this case is similar to that of Bensaid. However that was a case about whether a breach had been demonstrated, not whether it was merely arguable. The court found in that case that it had not been established that Mr Bensaid's moral integrity would be substantially affected to a degree falling within the scope of Article 8. That is a finding on the basis of all the evidence and a conclusion. This case is in a very different position; we are simply concerned with whether there is an argument available to the claimant that there has been a breach.

60. I turn to examine the defendant's letter, DL4, dated 5th April 2005. The first point made by the defendant is that there is no suggestion that similar specialist facilities would not be available in Germany. As Miss Jegarajah has pointed out, the claimant is not asserting that there is a lack of similar specialist facilities in Germany.

61. It is then asserted that the first Hamilton report said that the claimant would indeed acquire an ability to communicate in German if provided with the proper specialist support. What the first Hamilton report actually said was that having diagnosed SLI as the main presenting difficulty, the claimant required "as a matter of urgency" an integrated and highly specialised education service if he is to build on the language that he has acquired. His only language is English and he will have to begin all over again with specialised teaching for SLI if he is to make any progress acquiring German. He will not learn German without this. That does not say that he would succeed in overcoming his SLI if he were to go to Germany and have the specialised teaching there.

62. It is said that when all the evidence was taken into account he indicated that "on balance" the claimant's chances of progress would probably not be completely hindered by removal to Germany. It is difficult to see the basis upon which that can be distilled from the material before the Secretary of State, the defendant.

63. The letter then continues, by reference to ambiguities and equivocal nature of the evidence, that such risk as existed could not be regarded as sufficiently great to outweigh the requirement that the Secretary of State should maintain a fair and effective immigration policy. This, of course, does not work by reference to the finding of "significant risk." It appears to me to be predicated upon the conclusion that the risk is less than significant. In any event, the conclusion that is reached is simply a conclusion that in the Secretary of State's view there is nothing to outweigh the requirement for maintaining a fair and effective immigration policy.

64. That does not address the question whether the arguments put forward on behalf of the claimant, and the views of Miss Wheeler, are so slim that the human rights claim is manifestly unfounded. I certainly recognise that there are real difficulties in the way of the claimant, but I cannot accept that those difficulties are so overwhelming that K's human rights claim is manifestly unarguable.

65. Thus far I have proceeded on the footing that this is indeed a "foreign" case. It will remain for argument before an adjudicator whether there is such a "domestic" element as to move the balance somewhat in the claimant's favour.

66. As I mentioned earlier, in the course of the claimant's counsel's submissions questions of law were identified as to whether a certificate under section 72(2)(a) of the 1999 Act was once and for all, or whether the decision letters in 2004 and 2005 involved, or had to involve, fresh "certificates". In the light of the helpful concessions made by the defendant, those questions of law do not arise in the present case.

Conclusion

67. My conclusion is that this is a case where it is arguable that Article 8 is engaged by the decision to remove the claimant to Germany, and that the significant risk of very serious consequences gives rise to an arguable case that such removal would breach Article 8. I consider that the defendant could not reasonably, if he had applied his mind to the matters before him, in the light of their true analysis, have reached the conclusion that the human rights claim was manifestly unarguable.

68. It follows that the decision letter of 5th April 2005 is invalid as a matter of public law. The defendant has given an undertaking that in those circumstances he will not stand in the way of an in-country appeal by the claimant to an adjudicator. In those circumstances the claimant will be able to proceed with such an appeal forthwith.

69. I stress that nothing in this judgment should be taken as in any way casting doubt on the importance of firm and fair immigration policy. The government very properly accepts that a significant risk that in the long-term the claimant would not be able to communicate functionally in any spoken language, would, if it were unequivocally established, arguably engage human rights considerations.

70. My conclusion is simply that there is an arguable case that there is such a risk and that the very serious consequences if the risk were to eventuate, coupled with the fact that the expert view is that the risk is a significant one, means that there is an arguable case to be considered by an adjudicator as to whether or not removal of the claimant to Germany would breach Article 8.

71. MS BUSCH: My Lord, can I just make two points? The first is important to us. The concession that I made, and I am very sorry if I made it unclear, but the concession was intended to be only that in the circumstances that you refer to, namely assertion or serious risk of no community of competence, there would be an arguable engagement. My concession was not that Article 8 would be engaged.

72. MR JUSTICE WALKER: Yes, I am so sorry. I may have, by slip of the tongue, have referred to it as a concession that it "would be", but it is "would arguably be". That will need to be corrected when the judgment is edited.

73. MS BUSCH: Yes, there are three references. And the second --

74. MISS JEGARAJAH: My Lord, can I just add that it is actually the claimant's son, not the claimant. K is the claimant's son.

75. MR JUSTICE WALKER: I see, yes. Well, again that will need to be corrected, but basically they stand in the same position.

76. MISS JEGARAJAH: There is no dispute, there is no issue.

77. MR JUSTICE WALKER: Yes, well, again I will need to correct that when I edit the transcript.

78. MISS JEGARAJAH: The second point is that the claimant turned 13 last Friday.

79. MR JUSTICE WALKER: He turned 13 last Friday. Yes, we are in 2005, yes.

80. MISS JEGARAJAH: The third point is that I keep my maiden name, my name is Miss not Mrs.

81. MR JUSTICE WALKER: I do apologise. Now the order: a declaration that the --

82. MISS JEGARAJAH: Decision dated 5th April 2005 is unlawful.

83. MR JUSTICE WALKER: Well, it is not the decision to carry out the removal, it is simply that insofar as it concludes that the human rights claim is manifestly unfounded is invalid.

84. MISS JEGARAJAH: Yes, but that is the essence of the decision.

85. MR JUSTICE WALKER: I am sorry?

86. MISS JEGARAJAH: I would have thought that was the essence of the decision.

87. MR JUSTICE WALKER: No, because the decision is: I am going to continue to remove you as well.

88. MS BUSCH: My Lord, the Secretary of State would not remove somebody in circumstances of -- where he would or could not be -- in circumstances where he had found an in-country appeal. So it would be sufficient simply to declare unlawful the decision to uphold the certification as set out in --

89. MR JUSTICE WALKER: I hope that the way I put it in my judgment which is -- how about this: "The defendant's decision, evidenced in the letter of 5th April 2005, that the claimant's human rights assertions are unfounded, is invalid."?

90. MS BUSCH: Yes, that is fine thank you.

91. MISS JEGARAJAH: That is fine.

92. MR JUSTICE WALKER: Are there any other consequential orders?

93. MISS JEGARAJAH: We are very lucky to be publicly funded in this case and we would ask for an LSC certificate.

94. MR JUSTICE WALKER: Do you seek your costs against the defendant?

95. MISS JEGARAJAH: We do have an application to make for costs although that has not been -- the Secretary of State is not on notice.

96. MR JUSTICE WALKER: So, you seek an order that the defendant pay the claimant's costs? All of them?

97. MISS JEGARAJAH: I believe it would be a reimbursement towards the LSC, for those costs, because we were acting on a pro bono basis previously.

98. MR JUSTICE WALKER: Miss Busch?

99. MS BUSCH: Yes, but I think we would have to oppose the application for all of the costs, certainly the costs of today's hearing, but then because there were so many -- well procedural to-ing and fro-ing that what we would --

100. MR JUSTICE WALKER: Yes, well, I have in mind an order that the defendant should pay the claimant's costs following the hearing before Munby J.

101. MS BUSCH: Well no, my Lord, we would oppose having to pay the costs of the hearing before Sullivan J because the sole reason that was adjourned was because evidence was provided to the defendant after 5 o'clock.

102. MISS JEGARAJAH: We accept that, we accept that we produced late evidence, so it would be after that.

103. MS BUSCH: So costs after the hearing of 2nd March we would accept on the standard basis.

104. MR JUSTICE WALKER: So defendant to pay claimant's costs from 3rd March onwards to be the subject of a detailed assessment if not agreed. Detailed assessment of the claimant's publicly funded costs.

105. MISS JEGARAJAH: My Lord, yes. I do not know if your clerk has a copy.

106. THE CLERK OF THE COURT: We need one, yes.

107. MR JUSTICE WALKER: Anything else that arises?

108. MISS JEGARAJAH: No, my Lord.

109. MR JUSTICE WALKER: Thank you both very much.

110. MS BUSCH: Thank you, my Lord.