Case No: C5/2008/2199

Neutral Citation Number: [2009] EWCA Civ 377
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/24861/2002]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 25th March 2009

Before:

LORD JUSTICE LAWS
LADY JUSTICE SMITH
and
LORD JUSTICE HOOPER

- -

Between:

AC (TURKEY)

Applicant

- and -

SECRETARY OF STATE
FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr R Smith (instructed by the Treasury Solicitor) appeared on behalf of the **Appellant**.
Mr R Scannell (instructed by Glazer Delmar) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Laws:

1. This is the Secretary of State's appeal, with permission granted by Hallett LJ on consideration of the papers on 19 November 2008, against a determination of the Asylum and Immigration Tribunal (the "AIT") (Senior Immigration Judges Latter and Lane) promulgated on 30 June 2008. By that determination, arrived at on a reconsideration in circumstances I will describe, the AIT allowed the respondent's appeal against the Secretary of State's refusal to revoke a deportation order which had been made against her, holding that the respondent's deportation would amount to a disproportionate interference with her rights protected by Article 8 of the European Convention on Human Rights, which of course enjoins respect for every person's private and family life.

2. The respondent is a Turkish national born on 1 December 1974. She arrived in the United Kingdom clandestinely on 19 August 1995 and made a claim for asylum three days later. In their determination of 30 June 2008 the AIT were to record at paragraph 2 that it was common ground that there was never any merit in the asylum claim. The respondent in fact came to the United Kingdom to join MA, who was also a Turkish national, and whom she married in this country on 8 October 1995.

3. MA subsequently acquired British citizenship. The respondent's asylum claim was rejected by the Secretary of State much later, on 6 November 2001, and her appeal against that decision was dismissed by an adjudicator on 13 June 2002. But much else had happened before that. On 7 November 1995 the respondent applied for leave to remain in the United Kingdom as a foreign spouse. On 3 August 1996 a daughter, S, was born to the respondent and MA. However, the marriage broke down. The respondent left MA, taking S with her in early 1997. On 29 July 1997 MA informed the Home Office that the marriage had broken down. In early 1998 the respondent, now living as a single parent on benefits in North London, met and was befriended by an elderly couple of Greek extraction, Mr and Mrs Efthymiou. Mrs Efthymiou was 79 years of age. They invited the respondent to their home. The husband, who was some years younger than his wife, "took something of a shine" to the respondent, as HHJ King was to put it, on 22 January 1999.

4. On 22 April 1998 the respondent met the husband on his own and she had, as I understand it, done so on some previous occasions. At length she left him waiting near a bus stop and went without him to the Efthymious' home, knowing that the wife would be there on her own. In the home the respondent perpetrated a very vicious attack on this elderly lady. She threw a curtain over her head, knocking her to the floor. Mrs Efthymiou fell down a flight of six stairs and the respondent beat her, attempted to strangle her, punched her and tried to gouge her eyes out. She grabbed her by the hair and repeatedly knocked her head against the skirting of the door frame. The old lady lost consciousness. The respondent left. HHJ King, passing sentence on her on 22 January 1999, thought that she had left Mrs Efthymiou for dead.

5. The respondent was tried at the Snaresbrook Crown Court on a charge of causing grievous bodily harm with intent. She protested her innocence throughout, denying her presence at the scene. But the jury convicted her on 30 November 1998. As I have said, HHJ King, who had presided over the trial, passed sentence on 22 January 1999. He considered that, in going to Mrs Efthymiou's home on 22 April 1998, the respondent had entertained "a premeditated intention at the very least to do her serious harm". He described the offence as horrific and so it was. The victim had been in intensive care for two days "on the very edge of life".

6. Judge King sentenced the respondent to ten years' imprisonment and recommended that she be deported when she had completed her sentence. She applied to the Court of Appeal, Criminal Division, for leave to appeal against conviction, first to the single judge and on renewal to the full court. That was refused on 8 November 1999. At the same hearing, however, the court granted leave to appeal against sentence, dealt with that appeal and reduced the sentence to eight years' imprisonment. After the respondent had been charged with the section 18 offence, the child, S, was taken into the care of foster parents. In December 1998 the respondent applied for contact with S. In February 2000 MA, the father, applied for a residence order which was made by District Judge Brasse on 26 May 2000. On 27 November 2000 Deputy District Judge Green made a contact order in favour of the respondent, though she was still in custody at the time. On 13 September 2001 the Secretary of State signed a deportation order in respect of the respondent. Her application to remain as a foreign spouse was refused the following month. On 6 November 2001 she was served with notice of refusal of her asylum claim, as I have said, and also notice of the Secretary of State's refusal to revoke the deportation order. She lodged an appeal against that decision on 15 November 2001.

7. On 13 June 2002, as I have indicated, the appeal against refusal of asylum was dismissed by the adjudicator, but by the same determination the adjudicator allowed the appeal against the refusal to revoke the deportation order. He did so on human rights grounds: that is to say, the effective severance of the tie between mother and daughter, which the adjudicator held would be entailed by the respondent's deportation. On 22 April 2002 the respondent was notionally released from her sentence but was detained under the Immigration Act. The Secretary of State lodged an appeal to the Immigration Appeal Tribunal on 20 June 2002 against the adjudicator's human rights decision. There followed something of a procedural tangle but at length, on 2 June 2004, the IAT allowed the Secretary of State's appeal and reversed the adjudicator's determination. I should note that the respondent had been released on bail on 2 April 2003. It appears -- see the IAT's determination, paragraphs 40 and 41 -- that at this stage the respondent was maintaining the fiction that she had struck Mrs Efthymiou in self-defence.

8. The IAT had material from three experts which included assessments as to the risk of the respondent re-offending. The IAT gave careful reasons for rejecting certain conclusions reached by the experts which were favourable to the respondent. They accepted (paragraph 71) that if the respondent were

deported "the interference with the mother's family life would be very severe indeed".

9. They held (paragraph 73) that no assessment could really be made of the risk of re-offending. They made it clear (paragraph 75) that they had not considered the position from the viewpoint of the child, S. Here is their conclusion:

> "76. We have come to the conclusion that the decision that the Claimant should be deported is not one which is outside the range of responses open to a reasonable Secretary of State. We attach the greater weight to the very serious offence of violence and to the repugnancy which we consider the public would rightly feel for someone who committed such an offence, showed no remorse of real significance and has so frequently lied about it. She has offered no credible explanation and what she says about self defence is untrue. So it is at best a motiveless but very violent offence. The low risk assessment cannot be sustained on the current material. To deport a mother who is not the primary carer and who does not live with the child, and who has not lived with her for most of the years of the child's life as a result of her own criminal acts, is not unreasonable in those circumstances, even though it will put in real jeopardy her continuing relationship with the child. She may be anxious for the well-being of the child but the report from CAFCASS does not provide a foundation for her concerns in that respect. She may be concerned about how the child will develop without her and in view of the attitude the father is likely to adopt. We do not regard the impact on her of those concerns, though not shown to be well-founded, as inconsiderable. Nonetheless, the deportation is in our judgment a not unreasonable balancing of the competing interests."

10. The respondent sought permission to appeal to the Court of Appeal. On 22 July 2005 the matter was remitted by consent for reconsideration by a freshly constituted tribunal so that the Article 8 rights of the child, S, could be taken into account in the decision-making process. After the respondent's release on bail in April 2003 she had increased contact with S. Staying contact was increased by District Judge White on 12 May 2005. A joint residence order, as I understand it, was made on 20 September 2005. However, in November 2007 MA took the child to live in Doncaster without notice to the respondent. Further residence provisions were made by District Judge Redgrave on 19 February 2008 on the basis of a promise by MA to bring S to London at appointed times. The father has remained the prime carer.

11. I may turn to the AIT's determination of 30 June 2008, the subject of the appeal. The respondent gave evidence. She had by this date contracted an Islamic marriage and had a son born on 8 January 2007. At the time of the hearing before the AIT she was again pregnant, expecting delivery on 22 July 2008. She described the substantial contact that she had with S. She expressed considerable concerns about the move to Doncaster and other matters. A psychotherapist who gave evidence, Renee Cohen, had some criticisms of the father: see paragraphs 21 and 26 of the determination. She also expressed concerns as to the wellbeing of S if the respondent were deported (paragraphs 23 to 25).

12. Before coming to the AIT's conclusions it is convenient to summarise the law which the AIT had to apply. First, the only issue was whether, in terms of Article 8 of the Convention, the respondent's deportation would be disproportionate to a legitimate aim pursued by the Secretary of State. The general approach to such a question is given by the decision of their Lordships' House in Huang at paragraph 20. That reads:

> "20. In an article 8 case where this question is reached, the ultimate question for the appellate 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 this opinion, need ask in addition whether the case meets a test of exceptionality."

13. In many immigration cases where the pressure of an Article 8 right has to be set against a legitimate aim served by the immigrant's removal, the legitimate aim will simply be the maintenance of firm but fair immigration control. Such an aim was certainly present here. At no material time, save obviously when she was in jail, did the respondent have any legal right to be in this country. But in this case there is another factor of great importance. The respondent had been convicted of a very serious crime. It is the Secretary of State's policy to deport persons so convicted who are not British nationals. The decision to deport the respondent and, more particularly, the decision not to revoke the deportation order was taken in pursuance of that policy. The question in this appeal is whether the AIT in allowing the respondent's appeal dealt with that policy as by law it was required to do. The leading case in this area is the decision of this court in N (Kenya) v SSHD [2004] EWCA Civ 1094. The appellant in that case had committed a number of very serious

crimes, for which he had been sentenced to a total of 11 years' imprisonment. He had a child born shortly before his incarceration and he married the mother when he was in jail. The Secretary of State decided he should be deported on completion of his sentence. An adjudicator allowed his appeal against that decision. The Secretary of State's appeal to the IAT was successful, but the appellant appealed further to this court. That appeal was dismissed by a majority of their Lordships. May LJ said this:

> "In a deportation appeal under section 63(1) of the 1999 Act, the adjudicator has an original statutory discretion as provided in paragraph 21(1) of Schedule 4 of the 1999 Act. The discretion is to balance the public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view."

Judge LJ, as he then was, stated:

> "The 'public good' and the 'public interest' are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a

> public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion "differently" to the Secretary of State, he must say so. Nevertheless, in every case, he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State "should have been exercised differently" without understanding and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good."

14. N (Kenya) has been applied and followed in later cases, notably OP (Jamaica) [2008] EWCA Civ 440. Clearly the Secretary of State has a particular responsibility to make judgments as to what Judge LJ called "broad issues of social cohesion and public confidence" within the system of immigration control. The Secretary of State's judgment on those matters must broadly be respected by the AIT, at least so far as the policy itself is concerned. As Wall LJ stated in OP (paragraph 24), the Secretary of State's assessment of those matters has "to be taken as a given unless it is palpably wrong". But then the AIT must exercise its own judgment as to whether, in view of that axiom or given the decision, to remove or deport is disproportionate in the terms of Article 8(2) of the Convention. That decision is to be arrived at on the merits and is entirely in the hands of the Tribunal. How then did the AIT proceed in this case given that legal background? Having noted (paragraph 29) that Mr Scannell did not suggest that the respondent's crime was other than extremely serious, the AIT proceeded as follows:

> "As a general matter, the respondent, representing the public interest, is entitled to take the view that foreign nationals who commit offences of this kind, even if apparently isolated and out of character, should not remain in the United Kingdom, regardless of future risk; and that society is entitled to express its revulsion by removing the perpetrators of such crimes (N (Kenya) [2004] EWCA Civ 1094). Those considerations plainly drove the decision of the IAT in July 2004. So too did the view, as expressed in the IAT's determination that, contrary to the report of Jackie Craissati, a forensic psychologist, whose report was before it, the mystery concerning the appellant's motivation meant that it was impossible to say that the appellant was at low risk of re-offending."

15. There followed various citations from the evidence showing that the respondent presents as well-adjusted, very regretful of her crime, having excellent "behavioural controls" and a "very marked capacity to identity with her daughter's needs and respond accordingly" (paragraph 33). It is also suggested that the respondent's risk of reoffending was low. Then this:

> "36. In considering what we might describe as the N (Kenya) issue, Mr Smith urged us to disregard the fact that some ten years have elapsed since the appellant's offence and conviction. We agree that the mere passage of time is in no sense to be regarded as automatically diminishing the extent to which society might wish to express its revulsion by removing a person such as the appellant from its midst. On the other hand, what has happened in the intervening period plainly can have a part to play, not only by providing material for the appellant to place on her side of the proportionality balance, but also in assessing the extent of the public policy factors in favour of removal. Although, as N Kenya makes plain, societal revulsion may require removal irrespective of the extent to which the person concerned has been punished in the host state by imprisonment or other means, on the particular facts of this case, it would in our view be wrong to ignore the obvious fact that, since her release from prison, the appellant has continuously had to live with the direct, significant effects of her offence, so far as concerns her relationship with S, and the difficulties stemming from the fact that S could no longer live with the appellant whilst the latter was in prison. Those effects will continue to beset the appellant for the foreseeable future; perhaps for the rest of her life.
>
> 37. On the evidence available to it, we can well just understand how the IAT in 2004 came to its conclusions regarding risk of re-offending. However, with the benefit of over four years' hindsight and the latest evidence of Ms Craissati, together with the appellant's own contrite view of her behaviour, we conclude that the appellant's risk of committing such an offence again must be low.
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> 38. Notwithstanding what we have just said, however, the fact remains that the respondent can still point to very significant public interest reasons for deporting the appellant. With that in mind, we turn to analyse the factors lying on the other side of the scale.

> 39. In making our assessment of the appellant, we are conscious of the fact that, at important points in her life, she has shown herself to be a liar. She lied to the immigration authorities about her reasons for wanting to come to the United Kingdom, making a false claim for asylum when her real motivation was to join MA. She lied to the jury, in claiming that she had not been the person who had so savagely attacked her victim. We have, accordingly, approached the appellant's evidence concerning her relationship with S and MA's alleged bad behaviour in this light.
>
> 40. Having said this, and having had the opportunity of seeing and hearing the appellant give evidence, and of hearing Ms Cohen and reading the various professional reports stretching over several years, we are fully persuaded that the appellant is telling the truth about her relationship with S, her desire to ensure that S's best interests are served (even when these do not coincide with what the appellant might wish for herself) and the appellant's description of the difficulties she has encountered with MA."

16. The AIT proceed to accept the psychologist's evidence as to the adverse consequences for S as well as the respondent if the respondent were deported (see the reasoning at paragraphs 42 and 43) and there is also taken into account the loss of S's relationship with her half-brother (paragraph 44). They conclude as follows:

> "45. In conclusion, balancing all relevant factors, we find that in the (plainly unusual) circumstances of this case, the removal of the appellant, pursuant to the unrevoked deportation order would be disproportionate and thus a violation of Article 8 of the ECHR."

17. The essence of the Secretary of State's argument on the appeal is that the AIT has downplayed or failed to acknowledge the importance of society's revulsion at crimes such as that committed by the respondent and has illegitimately second-guessed the significance of that factor in arriving at its conclusions on proportionality. More shortly, it is said that the Tribunal has failed to give sufficient or appropriate weight to the Secretary of State's policy. Particular attention is drawn to paragraph 36 of the determination. It is said that the personal factors referred to by the AIT are somehow taken to diminish the objective condemnation of or public revulsion at the respondent's crime and this, it is submitted, is in effect to disapply the Secretary of State's policy for no good reason. Against that, in Mr Scannell's skeleton argument for the respondent, it is said the AIT properly considered the points against the

respondent and so applied or took into account the policy: see in particular paragraphs 38 and 39, which I have read.

18. Although the background is long the point itself is a short one. In my judgment it is impossible to suppose that, given the multiple references to N (Kenya), the AIT was not fully aware of the Secretary of State's policy on the deportation of serious criminals and in my view they acknowledge, at paragraphs 30, 36 and 38, the pressure of that policy in terms of society's revulsion at such crimes. It is true there is no express statement of the weight to be given to the policy. But this is one of those cases where it would be wrong to read the determination as if it were a textbook. On a fair and reasonable reading the AIT has reasoned this case in a manner consistent with the jurisprudence of this court. If we were to allow the appeal on the grounds advanced by the Secretary of State, we would be requiring so scholastic an exercise by the Tribunal as really to depart from the ordinary requirements of legal discipline to which of course they must be subject.

19. In my judgment therefore the appeal falls to be dismissed for those reasons.

20. I should add that Mr Smith for the Secretary of State submits that on the facts the only reasonable result is to apply the Secretary of State's policy to deport the respondent and that we should in effect make an order to that effect. That is a hopeless contention given the history here; and I fear it tends to betray what I think is the reality of the case, which is that the Secretary of State finds the AIT's Article 8 conclusion unacceptable. But that of course is neither here nor there.

Lady Justice Smith:

21. I agree.

Lord Justice Hooper

22. I also agree.

Order: Application refused