**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**Lord Kingarth**
**Lord Carloway**
**Lord Marnoch**

**[2008] CSIH 59**
**XA133/07**

OPINION OF THE COURT

delivered by LORD KINGARTH

in

APPLICATION FOR PERMISSION TO APPEAL UNDER SECTION 103(B) OF THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

By

A

Applicant;

against

A determination of the Asylum and Immigration Tribunal dated 2 August 2007

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**Act: Bovey, Q.C., Devlin; Drummond Miller**
**Alt: Carmichael; Office of the Solicitor to the Advocate General**

18 November 2008

[1] This is an application for permission to appeal against a determination of the Asylum and Immigration Tribunal ("the Tribunal") dated 17 July 2007.

[2] In that determination - which followed a reconsideration of the applicant's appeal, on human rights grounds, against a decision of the Secretary of State to order his deportation to Jamaica - the Tribunal affirmed an earlier decision of the

Immigration Appeal Tribunal to refuse the applicant's appeal. Permission to appeal to this Court was refused by the Tribunal on 2 August 2007. It was agreed before us that if the Court was minded to grant permission it could also proceed to determine the appeal.

[3] In its determination the Tribunal, for a number of reasons expressed at length, rejected contentions that deportation of the applicant would be in breach of his rights under Articles 2 and 3 of the Human Rights Convention, and in breach of his rights under Article 8 relating to his family life with S, his wife. As to the latter, the Tribunal found that insofar as S indicated that she would not follow the applicant to Jamaica if he was deported, partly because of difficulties in keeping up with her own family and partly because of what she thought would be encountered there, this was her own choice. It is not sought to challenge the determination in these respects. It was, however, also determined that deportation would not be in breach of the rights of the applicant, and of his children T and U, in relation to his family life with them. It is this part of the determination which is challenged before this Court.

[4] So far as the relevant background is concerned the Tribunal proceeded on the basis that the applicant came to the United Kingdom in 1991, aged 25. He had a visitor's visa. His sponsor was F, whom he had met in his own country. A and F married in July 1991. H was born in July 1992. In the summer of 1993 A was granted indefinite leave to remain in the United Kingdom as F's husband. A couple of years later, A and F separated. In 1996 A was convicted of a number of offences of indecent assault and gross indecency. The victim of these assaults was G (F's daughter by a previous relationship), and the feature of the offences was that he was in a position of trust towards her, as he was looking after her. Although the judge was able to find some mitigation, A was sentenced to a term of imprisonment for 51/2 years. He was

released from custody in 1998, by which time he had also been divorced from F. Thereafter the Secretary of State made the decision to deport the applicant as someone whose presence in the United Kingdom was not conducive to the public good. A and S met in the spring or early summer of 1999. By early 2000, S was pregnant, and T was born in October 2000. U was born a little over 2 years later. S is white and T and U are of mixed race. A and S married in May 2000. For the most part thereafter they have lived together in family, latterly at a house in Dumbarton.

[5] On 10 January 2006 an incident occurred. The Tribunal in particular record:

> "39. .....On that day some young men who had been drinking with one of their (older) neighbours took it into their heads to damage the parties' car and the CCTV camera which was permanently trained on the outside of their house. S went out to record what happened on her cam-corder at which the vandals threw eggs and abuse, racialist and otherwise, at her and the appellant. The police were called, and eventually arrested five young men: one was kept in custody for some time, apparently because he had assaulted an officer. Criminal proceedings followed, which resulted in some of them being admonished.
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> 40. The most serious consequence of this incident for the parties was that S and the children were taken away to a refuge at Clydebank by an officer of the police sex offenders unit, who apparently indicated that the only alternative was for the children to be take into care. The police were concerned for the children's safety, on the basis that the house might be fire-bombed. In the course of the hearing, Mr Bovey produced the report of a local authority child protection conference on 9 February 2006, expressing a hope (whether on the part of the writer or the parties is not immediately clear; but we shall return to

this) that the family could be re-united. The appellant continued to see the others every day, either at Dumbarton or at Clydebank.

41. In April 2006 the social services department wanted to move S and the children back to Dumbarton; but the police would not agree that they would be safe there, and S did not want to risk being moved out again in a hurry, so they stayed at Clydebank. It was not clear from S's evidence whether the appellant went on seeing the children at that point; but another case conference on 7 May 2006 decided that he should have only supervised contact with them, and this went on till another incident in June, when he and she were attacked by persons unknown to them in a park in Dumbarton. Evidently they reported this to the police: while the social services department at first gave the parties to understand that the incident would make no difference to the contact arrangements, the next week even supervised contact was stopped for the time being".

[6] Thereafter, it was found that abortive attempts to resume supervised contact were made until the applicant was detained under immigration powers, following what, he said, was a misunderstanding by him of what a police officer had said to him about his reporting requirements. He was released from detention in May 2007. In the six weeks or so thereafter before the hearing of the Tribunal, supervised contact was acceptable to the social work department but only on the basis that it would take place within the departmental office in Clydebank, albeit the department was trying to arrange for this to take place elsewhere, for example, at a park, activity centre or zoo. As to why any contact was then to be supervised the Tribunal record (at paragraph 43) the evidence of S (who at all times has willingly maintained contact with the applicant) that contact had to start somewhere after the period during which there had

been no contact. They also record that the applicant's most recent statement "sheds no further light on this, other than to say that his solicitor ....is trying to get to the bottom of it".

[7] Two risk assessments relating to the applicant were before the Tribunal, dated in 2000 and 2001 respectively, the latter being one prepared by Mr James McCahon, social worker. The details of both and the conclusions of the authors are summarised by the Tribunal at paragraphs 52 to 55 of the determination. It is enough for present purposes to note that both assessments were to the effect that the applicant did not then present a significant risk of reoffending, although it was acknowledged in both that insofar as circumstances changed, so could the assessment of the risk he could be said to pose. Although it appears the appellant committed no further offences after 1996 and followed a sex offender's treatment programme from 1998 to 2000 when he moved to Scotland with S, he voluntarily registered himself with the authorities in Scotland as a sex offender when he moved. The children were placed on the "at risk" register, but it was S's evidence (as recorded at para.44) that this was simply as a result of the applicant's registration. At a child protection review case conference on 9 January 2002, it was agreed by all present that T's name should be removed from the child protection register, and that the appellant should be provided with a copy of Mr McCahon's recent risk assessment. T was not put back on the list until about January 2005, but the Tribunal, at paragraph 47, record S's evidence that the reason for that was that S had been ill and the appellant had gone to pick T up from school, which he was not authorised to do. Since then T had been on the register because of concerns that S had not been supervising her adequately.

[8] In paragraphs 56 to 62 the Tribunal set out their conclusions as to why only supervised access was allowed from May 2006 onwards as follows:

"56. The report of the child protection review conference on 9 February 2006 (by this time also dealing with U, a boy born 6 December 2002) was produced by Mr Bovey, as previously mentioned, in the course of the hearing. It refers to an initial conference on 7 April 2005: of course that means the children had been put on the 'at risk' register (back on it in T's case) before the attack on the house in Dumbarton in January 2006, which is referred to in the report as the reason for S and the children having left it.

57. The report goes on to say that the appellant and S 'remain upset at the manner and circumstances which led to the initial CP Conference and the children's registration on the at risk register'. It does not describe those circumstances, which were no doubt already on record; so there is nothing to contradict S's evidence about it being a question of the appellant picking the children up from school when she was ill. Finally the report says the risk assessment being prepared is (as of 9 February 2006) almost complete, having been delayed by the writer being off sick for some time. Neither this assessment, nor any explanation for it not being available by now, have been put before us, although Mr McCahon's assessment, which is before us, was to have been made available to the appellant.

58. While the appellant had been allowed free unsupervised contact with his children from the time they and S were taken to the refuge after the attack in January 2006, that came to an end, they say, after the case conference on 7 May 2006, which decided on supervised contact only. That decision can only have been based on the up-to-date risk assessment, which we have not got, having become available by then.

59. There were further problems after the attack on the appellant and S in the park at Dumbarton in June, which led to his not having even supervised contact to the children since then. From October 2006 when he was detained for what he says was a misunderstanding on his part about his immigration bail conditions being relaxed, and 21 May this year, he was detained and it proved impossible to arrange contact. Since then, it has not happened because of difficulties about the venue: see 42.

60. However, we accept that the position of the social services department ever since the case conference on 7 May 2006 has been that in principle the appellant should have supervised contact with T and U. As we have explained, however, that position cannot have been solely the result either of the appellant's fetching them from school in 2005, or of the attack in January 2006; and it was reached before the one in June that year. There must have been something in the 2006 risk assessment of serious enough concern to lead the local authority to forbid this appellant from having unsupervised contact with his own children ever since.

61. As to what that something was, the only evidence is in S's recent statement, where she says the police, who take part in regular case conferences about the children, are against the appellant having contact with them; '...but the weight of consensus is shifting towards the social workers' position'. While we can see why the police should have had security concerns about the children living with the appellant for some time immediately after the attack on the house in January 2006, we return to the question of why unsupervised contact was allowed from then until the case conference that May, but then forbidden.

62. Why that was, we cannot and will not speculate; but we have no doubt that the real explanation could have been put before us by the appellant or those representing him. The present situation, explained or not, inevitably forms a significant part of the background to the balancing exercise to which we now have to move.....".

[9] Having thereafter reached the conclusion on the evidence that deportation of the applicant would almost inevitably deprive the applicant of the opportunity for contact with his children until they are at least 16, the Tribunal concluded, in a short section headed "Conclusions", as follows:

"74. In the end, we have to balance the public interest in the enforcement of the appellant's deportation, under the order already made, against his probable loss of opportunity for family life with S and their children. So far as S is concerned, that is her choice: though no doubt her concerns about her parents are greater now than when she married, she could reasonably be expected to go with the appellant to Jamaica. The children have no such choice, and ten years separation from their father would be a serious loss for them and him.

75. On the other hand, the children are not having any contact with the appellant at the moment, and only supervised contact is currently on offer. The reason for this cannot, as we have seen, must be *(sic)* in the present concerns about the appellant expressed at the May 2006 case conference, whose conclusions could have been presented to us, but were not. Since unsupervised contact was allowed for months after the January 2006 attack, the concerns must relate to the appellant himself.

76. We do not know what the cause of those concerns about the appellant may be; but their existence does make it clear that the deportation order is not simply a matter of history, or of the public interest in orders resulting from convictions for serious offences being seen to be enforced (as in *Samaroo* [2001] EWCA Civ 1139) for the sake of deterrence and general respect for the law. While in 2001-02 the risk presented by the appellant was assessed as low, that is not by any means necessarily the case now: he is clearly considered by those responsible for his own children's safety to present some kind of risk to them significant enough to require supervised contact only, at least for the time being.

77. Since we have not been given the current risk assessment, or any explanation why it was not made available, that is the basis on which we have to proceed. Coupled with the appellant's convictions themselves, it shows a serious continuing public interest (not to be confused with the views or actions of the Dumbarton youths or the press) in removing the appellant from this country.

78. We have thought long and hard about the effect of that on the appellant's family life, particularly with T and U: if upholding the decision to dismiss the appeal meant depriving them of any real family life they were presently getting together, then we might possibly have found our way to a different decision. However, when the reason why that is not happening lies in the present views of those responsible for their safety from the appellant, we have no doubt where our duty to them and the public generally, especially to children, must lie. For these inevitably rather longer reasons the original determination of the appeal stands".

[10] Before this Court the essence of the submission on behalf of the applicant was that the Tribunal was not reasonably entitled to draw the inference that there must have been something in the 2006 risk assessment of serious enough concern, relating to a risk posed by the applicant to his children, to lead the local authority, from May 2006 onwards, to forbid the appellant from having unsupervised contact with his own children. Absent any knowledge of the details of the risk assessment in question or, in the absence of minutes or the like, of any detailed information as to what transpired at the case conference in May 2006, the Tribunal's conclusion can be said to have been mere conjecture. The possibility that security concerns for the children's welfare arising from potential actions of third parties, particularly as expressed by the police, could have been determinative could not reasonably have been excluded. Reference was made to *Jones* v *Great Western Railway Company* 1930 47 TLR 39 and, for reasons which remain obscure, to *Wilsher* v *East Essex Health Authority* 1988 AC 1074. It was plain that the inference in question had played a material part in the overall determination. Further, although the Tribunal had suggested that the applicant had deliberately withheld relevant information, they were not reasonably entitled so to do. His position was that he had been kept in the dark. Since the Tribunal efforts had been made on his behalf to obtain the relevant risk assessment, which he had never seen. It had not been put to him that he was withholding any information. Although it was true that in his most recent statement before the Tribunal it was said that he had never received any "decisions to explain why I am not allowed to see my children. West Dunbartonshire Council are of the view it is because I am a risk to my children", this passage was not referred to in the determination. It was uncertain, in any event, what could have been made of it, given that it was expressed in general terms, possibly open to more than one interpretation, and that it appeared to relate to a

situation which the Tribunal found did not exist (i.e. that the applicant was not being allowed to see his children). The appeal should be remitted to the Tribunal for reconsideration in relation to the applicant's claim in respect of the Article 8 rights of himself and his children in relation to his family life with them.

[11] On behalf of the respondent, although it was accepted that the inference drawn at paragraph 76 (that the applicant was clearly considered by those responsible for his own children's safety to present some kind of risk to them significant enough to require supervised contact only) was material to the decision, it could not be said that there was no evidence before the Tribunal from which that could be inferred. Reference was made, in particular, to the up-to-date statement of the applicant himself, as referred to by his counsel. In any event it was reasonably open to the Tribunal to infer, as they did, that the decision to restrict access to supervised access was based, in May 2006, on the up-to-date risk assessment (and on concerns therein as to risk posed by the applicant himself to his children) - particularly having regard to the analysis of the chronology of events carried out by the Tribunal between paragraphs 56 and 62. In the event that the appeal was allowed it was agreed that the appropriate disposal was that suggested on behalf of the applicant.

[12] In reaching our decision we proceed on the basis that (as was accepted before us) the finding that the applicant was clearly considered by those responsible for his children's safety to present some kind of risk to them significant enough to require supervised contact only was material to the Tribunal's determination. It seems clear that this finding proceeded on the basis of an inference which the Tribunal felt able to draw to the effect that the decision at the case conference in May 2006 (to restrict contact to supervised contact only) could only have been based on an up-to-date risk assessment having become available by then containing concerns relating to the

appellant himself. The short question is whether the Tribunal were reasonably entitled to draw that inference on the basis they did.

[13] Although reference was made in the course of argument to part of the statement by the applicant, we leave that out of account. It is not mentioned in the determination of the Tribunal as having any bearing. We are, moreover, inclined to agree with senior counsel for the applicant, for the reasons he suggested, that it is uncertain what could have been made of it. Indeed it appears (from paragraph 43) that the Tribunal took the view that it shed no light on matters.

[14] We have come to the view that the inference which the Tribunal sought to draw was not one reasonably open to them.

[15] It is certainly possible that an up-to-date risk assessment was completed prior to the conference in May 2006; that it was considered at that conference; that it contained concerns about risks posed by the applicant and that the decision to restrict contact to supervised contact was based upon it. The Tribunal, however, did not have any direct evidence bearing on any of these matters. They did not, in particular, have the risk assessment or any minutes of the relevant meeting. And in the circumstances disclosed we consider it is equally possible (as was canvassed before us) that the decision taken at the meeting was motivated by other considerations, in particular perhaps by security concerns relating to potential dangers to the children arising from the actions of third parties. At any rate such a possibility cannot in our view reasonably have been excluded. It was accepted before us that the police would be likely to have had an input at a case conference meeting such as the one which took place on 7 May 2006, and that the police could potentially have had security concerns after the January attack affecting their attitude to contact, in relation to whether it should be exercised at all, or only subject to some form of supervision. Indeed that

this could potentially have been the reaction of the police to the January attack was, it appears, accepted by the Tribunal itself (see in particular paragraph 61). Of course the position of the Tribunal was, it seems, that if there had been any such concerns they would have been reflected in changes made shortly after that attack. In our view, however, the possibility cannot reasonably be excluded that security concerns may have been greater in May than earlier, depending upon up-to-date intelligence, or simply that such concerns were, for whatever reason, then believed to carry greater weight; concerns which, it could be said, would soon have been shown to be well founded having regard to the June attack (when, so we were informed, the children were at least nearby). It appears the Tribunal concluded that it was following that attack, and as a result of it, that all contact ceased for a period (see paragraphs 41 and 59). S's apparent evidence to the effect that thereafter the police had greater concerns relating to contact than the local authority could perhaps be said to be consistent with this. Further at para.44 the Tribunal record her evidence as being that "....it is not the appellant himself, but the risk of attacks on him in which they might be hurt, which has caused the local authority to take the action they have". In addition, the Tribunal's finding was that in April 2006 (by which time it might have been expected that the risk assessment would have been completed), the social services department wanted to move S and the children back to Dumbarton, apparently to live in family with the applicant, but the police would not agree that they would be safe there.

[16] In these circumstances the relevant conclusion of the Tribunal can, in our opinion, properly be described as being the result of conjecture and not of reasonable inference. The evidence led may have been limited, but it was open to the Tribunal (and this was not, as we understood it, disputed before us) to call for primary

information on this a matter which plainly was regarded as critical to the determination.

[17] We would only add that although senior counsel for the applicant advanced submissions to the effect that, on the question in issue before the Tribunal, the legal onus lay on the respondent, he ultimately accepted that this did not directly bear on the thrust of his main submission. In the circumstances we did not hear from counsel for the respondent on this matter, and we do not express any opinion upon it.

[18] In all the circumstances we grant permission to the applicant to appeal; indeed we allow the appeal itself. We shall remit the applicant's appeal to the Tribunal for reconsideration, in relation to his claim in respect of the Article 8 rights of himself and his children in relation to his family life with them.