Case No: C4/2008/1978

Neutral Citation Number: [2008] EWCA Civ 1519
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION, ADMIN COURT
(JUDGE DAVID HOLGATE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 2nd December 2008

Before:

LORD JUSTICE PILL
and
LORD JUSTICE MOSES

- -

Between:

THE QUEEN ON THE APPLICATION OF EMMANUEL **Appellant**

- and -

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

- -

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Miss S Jegarajah (instructed by Messrs Patricks) appeared on behalf of the **Appellant**.

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

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Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is a renewed application for permission to apply for judicial review. Permission was refused following an oral hearing by Mr David Holgate QC, sitting as a deputy High Court judge on 8 August 2008. Mr BS Emmanuel has exercised his right to renew the application in this court and is represented by Miss Jegarajah of counsel, who also appeared for him before the judge.

2. The application is based on the Secretary of State's refusal to treat as a fresh claim, within the meaning of the rules, material placed before her in late July of 2008.

3. The applicant is a Sri Lankan ethnic Tamil born on 19 June 1980. He arrived in the United Kingdom in March 1998; that is when he was 17 years old and has since resided here. He claimed asylum on arrival. The present proceedings arose when he was detained on 28 July 2008. Directions for removal were given, removal being set for 1 August 2008. A stay was granted to permit the application to be heard by Mr Holgate and stays have been extended to permit the application to this court.

4. A decision adverse to the applicant was made by the Secretary of State on 14 November 1998. That was not received by the applicant. A new decision was made on 23 November 2000. The decision was then subject to appeal and we have been referred to paragraph 17 of the decision of Immigration Judge Majid of 6 September 2005 in which he noted (paragraph 17): date of appeal lodged, 28 December 2000; date of appeal received, 8 August 2005. Thus there was a very long delay, which cannot be attributed initially to the applicant, of over 4½ years before the appeal was heard.

5. I have referred to the hearing before Dr Majid. Dr Majid allowed the appeal on human rights grounds, referring to Article 8 of the European Convention on Human Rights. The Secretary of State requested a reconsideration. That was granted and, on 16 November 2007, it was found that the earlier decision had been made in error because insufficient regard had been given to the decision of this court in HB (Ethiopia) v SSHD [2006] EWCA Civ 1713. That would have not have been available to Dr Majid.

6. The tribunal, relying on HB, reversed the previous decision and upheld the decision of the Secretary of State. I have referred to the event to which gave rise to the present application. By letter of 31 July 2008 the Secretary of State refused to treat the fresh representations as a fresh claim within the meaning of the Immigration Rules. The Secretary of State also declined to reverse the earlier order of the tribunal. Rule 353 at HC 395 was cited by the Secretary of State in a letter of 31 July.

7. All that is pursued by Miss Jegarajah in her most helpful submissions is the Article 8 claim. The Secretary of State also considered the asylum claim and found that a decision could not be made in the applicant's favour. In relation to Article 8 the Secretary of State set out the circumstances, including at page 2:

> "Whilst it is acknowledged that your client may have established a family / private life in the United Kingdom with his parents and siblings, it is not considered that your client's removal from the United Kingdom will amount to a breach of Article 8. Therefore, from the outset of their relationship they all should have been aware of the possibility that they might not be able to continue their relationship in the United Kingdom."

8. The Secretary of State referred to the "exceptional qualities" of the applicant and the possibility that they could be put to good use in Sri Lanka. Discretionary leave to remain was also refused. The deputy judge upheld the decision of the Secretary of State; reference was properly made to the House of Lords decision in EB (Kosovo) v SSHD [2008] UKHL 41. At that stage the asylum claim was also pursued.

9. On behalf of the applicant, Miss Jegarajah relies on the length of time during which the applicant has been within the jurisdiction, and this has included his formative years which would, it is submitted, make it more difficult for him to establish himself in the land of his birth. She refers to the tsunami and the serious effect that has had on prospects of people such as the applicant in Sri Lanka.

10. Against that background, counsel's submission is that there was an error of law in the earlier decision of the tribunal, in that reliance was placed on the decision of this court which has been superseded, it is submitted, by the decision of the House of Lords to which I have referred. Her submission is succinct: there is a fresh claim as a result of a change in the law. Miss Jegarajah submits that, if the Article 8 claim were now to go before the immigration judge, there is a real prospect that the judge would -- notably because of the long delay which occurred and having regard to the circumstances of the applicant -- grant relief on Article 8 grounds. There is no doubt that the applicant has parents and a sister in the United Kingdom. We are told that the sister now has indefinite leave to remain and the applicant's father is unlikely to be removed because of brain damage he has suffered and the consequent state of his health.

11. In her admirable skeleton argument, Miss Jegarajah has referred to the speech of Lord Bingham in EB at paragraphs 14, 15, 16 and 27. She has referred to the speech of Lord Hope at paragraph 27 and that of Baroness Hale at paragraph 32. In paragraph 14 Lord Bingham stated:

> "First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8

> will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it."

12. Paragraph 16:

> "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

13. The summary of Lord Bingham's approach is set out at paragraph 21, having first considered the decision of the Court of Appeal in which a series of propositions had been set out by Buxton LJ. Lord Bingham said that with some of the propositions he could readily agree:

> "I do not, however, think it necessary to recite or comment on all these propositions because, as I have endeavoured to show, the consideration of an appeal under article 8 calls for a broad and informed judgment which is not to be constrained by a series of prescriptive rules."

14. Counsel did refer to the Court of Appeal decision as a way of demonstrating how, in her submission, the approach had changed since the earlier decision of the Court of Appeal. Miss Jegarajah has referred to the judgment of Laws LJ in Strbac v SSHD [2005] EWCA Civ 828, cited by Buxton LJ when setting out his propositions.

15. Counsel has also referred to the earlier case of Senthuran v SSHD [2004] EWCA Civ 950, in which weight was attached to the relationship with siblings such as exists in this case. The test to be applied is that stated by Lord Bingham: take the broad approach he has indicated. This court should attach respect, to a degree, to the decision of the Secretary of State, but it is open to the court, and it is required of the court, to consider what impact the material (claimed to be fresh material) would have upon an immigration judge, and we do that. I do not propose to set out and consider further the legal question, which in some circumstances is a difficult one, as to whether a change in the law does amount to a change of circumstances. I am prepared to assume that it does, and the question therefore the court has to consider is whether the Secretary of State was entitled to make the decision, in the light of the change of the law and in the light of the earlier tribunal's

reliance on the Court of Appeal decision, to find that a fresh review could be declined.

16. In my judgment, in spite of the persuasive way in which the case has been put, there is not a real prospect that an immigration judge would grant Article 8 relief in this case. The delay was long and is unexplained. However, this is not a case where relationships have been established which provide an Article 8 case that might qualify under the broader approach now to be adopted to delay than the approach which was adopted earlier.

17. It is a factor that during the period of delay the applicant himself was inactive, as we must assume from the absence of evidence of any activity by him or on his behalf. That is certainly not the only factor to be considered. The cause of duty undoubtedly was that of the proposed respondent, but the court is entitled to take into account the inactivity of the applicant himself. The court must take into account the nature of the relationships established in this country, and the position established in this country, in considering whether it is disproportionate to require the applicant to leave. This was an aspect of the case carefully considered by the Secretary of State and in my judgment the Secretary of State was entitled to conclude that the applicant was not entitled to a fresh review.

18. That is the decision we have to consider: that of the Secretary of State. I share the concerns which my Lord, Moses LJ, expressed in the course of submissions as to what the judge had in mind in paragraph 5 of his judgment. The grant of leave cannot depend upon that, however. This court has to consider the Secretary of State's decision and whether there is a real prospect that upon a full judicial review it would be overturned -- that involves consideration of whether, in the end, there is a real prospect that Article 8 relief would be granted.

19. I am unable to hold that there is such a real prospect and for the reasons I have given I would refuse this application.

Lord Justice Moses:

20. I agree.

Order: Application refused