Neutral Citation Number: [2008] EWCA Civ 149

Case No: C5/2007/1045

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
IM/11521/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/02/2008

Before :

LORD JUSTICE WALLER
LORD JUSTICE SEDLEY
and
LORD JUSTICE MOORE-BICK

- - - - - - - - - - - - - - - - - - - -

Between :

AS (SOMALIA) AND ANOTHER	**Appellant**
- and -	
(1) ENTRY CLEARANCE OFFICER, ADDIS ABABA	**Respondents**
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT	

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

Mr M Gill QC and Mr D O'Callaghan (instructed by Messrs Hersi & Co) for the **Appellant**
Ms E Laing (instructed by The Treasury Solicitors) for the **Respondent**

Hearing date: Monday 18 February 2008

- - - - - - - - - - - - - - - - - - - -

Judgment
As Approved by the Court

Lord Justice Sedley :

The issues

1. The appellants are brother and sister, born in 1991 and 1995 and therefore still minors. Their litigation friend in these proceedings is Fawsiya Sharif Omar, who is their cousin and, for entry clearance purposes, their sponsor. She has indefinite leave to remain in this country as a refugee, having fled here in 2002 from the carnage being perpetrated in Somalia by militias in the civil war. She is dependent on public funds for her accommodation and subsistence, but out of it manages to send modest but regular sums to maintain the two appellants. Their wish and hers, however, is to be reunited here.

2. In July 2003 the appellants applied for entry clearance for this purpose. The entry clearance officer in Addis Ababa, having referred the application to the Home Office, refused it by a decision dated 24 August 2004. The delay in taking a decision of this importance to those involved seems inordinate. On 25 October 2004 an appeal was lodged against the refusal. For reasons which again are completely unaccounted for, and which it has to be inferred amount to no more than inertia in the Home Office, the papers did not reach the AIT until 9 March 2006.

3. In the intervening period the appellants' situation had changed very much for the worse. When the appeal came on before IJ Oliver on 6 April 2006, the appellants' counsel conceded that, because of the need to rely on public funds, he could not pursue the appeal within the Immigration Rules. Instead he based his case on the Home Secretary's family reunion policy, which allowed for admission of family members outside the rules in "compelling, compassionate circumstances". The immigration judge accepted that he was entitled to take into account the serious neglect into which the appellants had fallen since the refusal of entry clearance in 2004, and went on to find that the combination of compassionate circumstances with the appellants' article 8 rights entitled them to succeed.

4. On reconsideration, SIJ Spencer, by a determination promulgated on 9 March 2007, held that IJ Oliver in 2006 had not been entitled to take into account events postdating the refusal of entry clearance in 2004. He went on to hold that the evidence of the appellants' situation at the earlier date passed neither the compassionate circumstances test of the policy nor what he took to be the exceptionality test for art. 8 protection. He accordingly substituted decisions dismissing both appeals.

5. Manjit Gill QC, for the appellants, does not abandon the submission that even in 2004 the appellants qualified for admission outside the Rules; but his real case, which Carnwath LJ considered to merit this court's attention, is that the legislation, correctly construed, does not limit the AIT on appeal to the situation obtaining at the time of the refusal of entry clearance. Elisabeth Laing, for the Home Secretary, concedes that even if Mr Gill is wrong about that – as she contends he is - SIJ Spencer has made a separate error of law by determining the art. 8 issue, albeit correctly as at 2004, by an incorrect test of exceptionality. The Treasury Solicitor has proposed remission on this ground, but Mr Gill has justifiably pressed on with his contention that what still matters is the date as at which the test is to be applied. If he succeeds on that issue, he

has a finding of the immigration judge in his favour on compassionate circumstances which the senior immigration judge has not purported to disturb. If he fails on it, Miss Laing accepts that the appeal has to be remitted for the purpose of determining the application of art.8 to the facts as they stood in 2004 in accordance with what is now known to be the law.

6. Additionally Mr Gill contends that there was before SIJ Spencer a claim, which he failed to address, under paragraph 352D of the Immigration Rules. He asks us either to allow the appeal on that discrete issue or to include it in the remitted case.

The background

7. The appellants are war orphans. In 1998 both their parents were killed. They were adopted by the present sponsor's parents as members of the family. In 2000 the sponsor's parents were both killed, and the sponsor, who was their cousin, undertook to care for them. The following year, not long after she had remarried, the sponsor herself was put in a detention camp and her new mother-in-law took over the care of the two children. The following year, 2002, the mother-in-law had to flee with the children to Ethiopia. The sponsor herself managed to reach the United Kingdom, where she was accorded refugee status. Once settled here, and although reliant on public funds, she was able to send modest sums of money to her mother-in-law for the appellants' maintenance and to maintain telephone contact with them. This, broadly, was the situation when entry clearance for the two children was applied for and refused.

8. But in 2005 the sponsor's husband left her and her mother-in-law, blaming her for the separation, left the children in the care of a friend of the sponsor, named Shamis. By the time of the hearing of the appeal, in April 2006, their situation was found by the immigration judge to be that, although the sponsor had continued to maintain parental control,

> "the conditions in which the appellants have been living since January 2005 appear to be below the standard in which they were living with the mother-in-law and they are not being well clothed and sometimes money has to be begged for from neighbours. Shamis is not giving the care that would be adequate for children of the appellants' ages."

The immigration judge accepted that the sponsor was greatly concerned about the children's welfare and that her accommodation, while small, was sufficient to enable her to have them with her and her own small child. He found that the money she would no longer be having to send to Somalia would go towards their maintenance.

The issue of law

9. Was the immigration judge right or wrong to base his decision on events which had changed the picture seriously for the worse since the refusal of entry clearance? It is worth observing that the Home Office has nothing to gain overall by establishing that he was wrong. To do so will mean that a situation which has changed to the applicant's benefit, thereby diminishing or negativing the case for entry, has to be ignored on appeal. If statute were silent about it, common sense might well dictate an up-to-date appraisal of an applicant's situation, and never more so than when through the Home Office's own inactivity the lapse of time has enhanced the case for admission.

10. But the Nationality, Immigration and Asylum Act 2002 is not silent on the subject. Section 82(1) affords an appeal against any immigration decision, an expression which by s. 82(2) includes both refusal of entry clearance and refusal of leave to enter. Section 85(4) and (5) as amended then provide:

> (4) On an appeal under section 82(1) … against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.
>
> (5) But in relation to an appeal under section 82(1) against a refusal of entry clearance …
>
> (a) subsection (4) shall not apply, and
> (b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse.

11. The prohibition could hardly be clearer. But Mr Gill submits that it can and should be read down pursuant to s.3 of the Human Rights Act 1998 in order to make it conform to the Convention right contained in art. 8. This means making good not one but two propositions: first, that by its presence in the Act s.85(5) fails to accord adequate respect to private and family life as required by art.8; second, that without assuming the role of legislator the court can modify the operation of the provision to conform with the Convention.

12. In my judgment this is an impossible enterprise. One begins with s.3(1) of the Human Rights Act:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

13. One then goes to s.6:

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently….

14. Assuming for the present that a common effect of s.85(5) is to blunt the effect of art.8 by shutting out evidence which supports applications for family reunion, Mr Gill's proposal is that the court should qualify s.85(5) by reading it as not applying to refusals of entry clearance which would breach the applicant's Convention rights. He suggests that this is a limited and discrete category of cases. I doubt whether it is either. The grounds for seeking entry clearance typically engage art. 8 issues, both freestanding and interpenetrating with the Rules, many of which are written with the UK's Convention obligations in mind. But more importantly, to write in such a qualification would be radically to amend the legislation.

15. The limits of the courts' s.3 function were authoritatively explored and explained by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30. They are variously expressed, but the thrust of their Lordships' reasoning can be found in Lord Rodger's speech at §109-110:

> "If a provision requires the public authority to take a particular step which is, of its very nature, incompatible with Convention rights, then no process of interpretation can remove the obligation or change the nature of the step that has to be taken….. The only cure is to change the provision and that is a matter for Parliament and not for the courts … [H]owever powerful the obligation in s.3(1) may be, it does not allow the courts to change the substance of a provision completely, to change a provision where Parliament says that x is to happen into one saying that x is not to happen."

Their Lordships contrasted the Human Rights Act process, potent though it is, with Privy Council's constitutional jurisdictions which do permit the striking down of laws for non-conformity with a superior law that renders them a nullity. But that is not how the Human Rights Act works: s.3(1) recognises that there may come a point at which Convention-compliant interpretation is not possible, and it is at that point that the only available recourse becomes a declaration of incompatibility under s.4.

16. In my judgment, still assuming incompatibility, the prescription contained in s.85(4) and (5) is unequivocal and unyielding. To modify it in the way proposed by Mr Gill would be to legislate. This is none the less so for the fact that neither he nor Ms Laing has been able to give the court an explanation for the distinction created by the two subsections. The fact that those seeking entry clearance from abroad do not have the same toehold as those seeking leave to enter on UK soil is not a very convincing reason: those seeking leave to enter here may be doing so speculatively or even fraudulently, while those seeking entry clearance abroad are patiently awaiting their turn.

17. This is enough to answer the appeal. But what in any case is the interference created by s.85(5) with Convention rights? Mr Gill is in some difficulty here, because if his proposed modification is to apply across the board, as he was initially inclined to accept it must, the immigration judge must be as ready to entertain post-decision evidence which shuts out Convention rights as evidence which enhances them. The

alternative is to introduce a one-sided modification, a step which Mr Gill was rightly diffident about taking.

18. In any event, I am not satisfied that the differential provision in s.85(5), unexplained though it is, does involve any necessary interference with Convention rights. The reason is the simple one founded upon by Ms Laing, that in s.85(5) cases any post-decision events which generate or enhance a human rights-based claim for entry clearance can be the subject of a fresh claim and, if necessary, a fresh appeal. While it may prolong matters (though the extent of prolongation in the present case is inexcusable), the procedure denies no access to Convention rights by comparison with s.85(4).

19. I think one can stop there. Other questions, not canvassed before us, for example questions of territoriality, might arise if Mr Gill were able to surmount these obstacles.

The Rule 352D claim

20. It is submitted that, although not canvassed before IJ Oliver, a case was sought to be made on reconsideration before SIJ Spencer under rule 352D, which provides:

> The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who has been granted asylum in the United Kingdom are that the applicant:
>
> (i) is the child of a parent who had been granted asylum in the United Kingdom; and
>
> (ii) is under the age of 18, and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and
>
> (v) would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

21. Mr Gill's reasoning is as follows. First, it is common ground that entry clearance under sub-paragraph (vi) will be granted if the remaining conditions are fulfilled. Secondly, "child" and "parent" have the meanings given to them by rule 6, which includes children by adoption, including de facto adoption (such as was the case here), so long as it conforms with rule 309A. Rule 309A, however, includes a requirement that adoptive parent and child must have lived together for at least 18 months. The appellants cannot meet this requirement because the war parted them from the sponsor within that time. This, Mr Gill submits, is so unjust and discriminatory that it should be overridden or read down.

22. I am in sympathy with all of Mr Gill's arguments under this head except the last. The Home Secretary has already recognised that there will be cases which require for humanitarian reasons to be addressed outside the rules. They are provided for in the policy which featured in the present case, and which IJ Oliver found the appellants met. Headed "FAMILY REUNION", it provides:

> 2. ELIGIBILTY OF APPLICANTS FOR FAMILY REUNION
> Only pre-existing families are eligible for family reunion i.e. the spouse and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum.
>
> We may exceptionally allow other members of the family (e.g. elderly parents) to come to the UK if there are compelling, compassionate circumstances.
>
> Family reunion may be refused if family members fall within the terms of one of the exclusion clauses in the 1951 UN Convention.
>
> 3. ELIGIBILITY OF SPONSORING FAMILY MEMBERS
> 3.1 Where the sponsor has refugee status
> If a person has been recognised as a refugee in the UK we will normally recognise family members in line with them. If the family are abroad we will normally agree to their admission as refugees.
>
> It may not always be possible to recognise the family abroad as refugees – e.g. they may have a different nationality to the sponsor or they may not wish to be recognised as refugees. However, if they meet the criteria set out in paragraph 2, they should still be admitted to join the sponsor. The sponsor is not expected to meet the maintenance and accommodation requirements of the Immigration Rules.

23. Mr Gill is not content with this in principle because it sets the high (and grammatically odd) hurdle of "compelling, compassionate circumstances"; but he has no reason to be discontented with it in practice because the immigration judge has found in the appellants' favour on this test as at the date of the hearing in 2006 and the finding (as opposed to its legal relevance) has not been questioned on appeal. I will come to its consequences at the end of this judgment.

Conclusions

24. On the central issue of law this appeal therefore, in my judgment, fails. It is conceded, however, that the case must go back to the AIT for a decision on the art.8 issue as at August 2004, to be decided in terms not of exceptionality but of proportionality (see *AG (Eritrea)* [2007] EWCA Civ 801). This will permit the recanvassing of all the factual merits, but without reference to post-decision events. It will not, however, include the rule 352D issue because this, in my judgment, is unarguable.

25. Meanwhile there is no reason why the appellants and the sponsor cannot reapply for entry clearance, basing the application on the situation described to and by IJ Oliver together with any further developments in the interim. It is a corollary of the Home Secretary's case, as Ms Laing readily accepts, that a refusal of entry clearance is not final and that new circumstances may produce a different result.

26. In the present case this means not only that the appellants are entitled to reapply forthwith for entry clearance, and indeed could have done so while this appeal was pending. It means that the entry clearance officer must pay full attention to the decision of IJ Oliver as to the compassionate circumstances of the situation which by then had arisen. This is an element of his determination which has not been criticised on reconsideration and which, while made inappropriately in law because of the time element, was not made without jurisdiction (see *Watt v Ahsan* [2007] UKHL 51 §28-34). Ms Laing accepts that the ECO who considers any fresh application must have full regard to it. We have not heard Mr Gill as to whether this means that it must not be departed from without good reason. It is to be hoped that the problem will not arise and that these children will receive the protection which the family reunion policy is there to provide.

27. Given its serious dilatoriness in these proceedings, which has resulted in the passage of almost 5 years since the application was first made, the Home Office has in my view a moral obligation (and if there is further delay, arguably a legal one) to deal speedily with any fresh application made on behalf of these two children for entry clearance. It also, for the reasons I have given, has a legal obligation to give full weight in so doing to the view reached by an immigration judge as to the merits of their case as it stood in 2006 under the family reunion policy.

28. I would allow the present appeal to the extent of remitting the article 8 issue for redetermination according to law.

Lord Justice Moore-Bick:

29. I agree.

Lord Justice Waller:

30. I also agree.