Neutral Citation Number: [2009] EWCA Civ 846

Case No: C5/2009/0651

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
IJ promulgated on 5 January 2009.
Permission to appeal to this court was initially refused by SIJ Batiste on 5 March 2009, and on 30 April 2009, the application for permission to appeal was refused on paper by Sullivan LJ.

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2009

Before :

LORD JUSTICE WALL

- -

Between :

NA (Afghanistan)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

The Appellant attended and acted in person

Hearing date: 15th July 2009

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Judgment

Lord Justice Wall :

1. Throughout this judgment, the initials IJ will be used for the designation "Immigration Judge" and the initials "SIJ" for Senior Immigration Judge. I shall refer to NA as "the applicant" or "the appellant" as the context requires. I shall also refer to IJ Watters as "the IJ".

2. This is a renewed application by the applicant for permission to appeal against the decision of the IJ promulgated on 5 January 2009. Permission to appeal to this court was initially refused by SIJ Batiste on 5 March 2009, and on 30 April 2009, the application for permission to appeal was refused on paper by Sullivan LJ. I ignore the question of the applicant being out of time, an issue which I am prepared to resolve in his favour. That apart, Sullivan LJ's opinion was expressed in the following terms: -

> an appeal against (the IJ's) conclusion that the interference with the applicant's private live would not be disproportionate has no real prospect of success. The final sentence of the determination is plucked out of context. When the Determination is read fairly as a whole it is plain that (the IJ) accepted that there would be an interference with the applicant's private life and the crucial question was whether the interference was proportionate (paragraph 13). There is no substance in the complaint that the Tribunal "compartmentalised" the applicant's private life. The Tribunal carefully considered every aspect of the applicant's private life. The submission that the Tribunal did not identify the countervailing factors is unrealistic. While the maintenance of effective control is not a "trump card", it is, in practice, the interest against which the particular factors in an appellant's favour will be weighed, hence the detailed consideration in any Determination of those factors. In the present case, the applicant had been in the UK since April 2004, but he had always known that he may have to return to Afghanistan once he became an adult. This was the policy background against which the IJ had to consider the proportionality of requiring him to return to Afghanistan.

3. I heard oral submissions from the applicant in person on 15 July 2009. Both because the matter is plainly one of considerable importance to the applicant and because he produced fresh material which I had not had the opportunity to read, I reserved judgment.

4. The IJ had been hearing the second stage reconsideration on ECHR Article 8 grounds of the dismissal by IJ Miss R Eban on 20 June 2008 of the applicant's appeal against the decision by the Secretary of State not to grant the applicant further leave to remain in the United Kingdom and her refusal to vary his leave to remain. The Secretary of State's refusal letter is dated 30 April 2008, and is in my papers.

The facts

5. There is some doubt about the applicant's date of birth. He arrived in the United Kingdom on 18 April 2004, giving his date of birth as 1 January 1990. This would have made him then 14. He claimed asylum. In the refusal letter his date of birth is given as 1 January 1987, which would have made him 17 when he arrived and 21 at the date of the letter.

6. IJ Eban recorded the applicant's case as follows:-

> The appellant is of Hazara ethnicity and is from Parwan Province. The appellant's father was a general in the Hizb-i-Whadat party. One night some men came to the house where the appellant lived with his family. They beat the appellant and asked him the whereabouts of his father. The appellant ran away and they killed the appellant's father, his wife and the appellant's brother. When the appellant arrived in the United Kingdom he know no more than that these men were his father's enemies. Since then the appellant's cousin, Mr. Ahmadi has told the appellant some family background. The appellant's father was in Commander Shafie's faction of Hizb-i-Whadat. Commander Shafie was thought to have been killed in about 1995 by a faction led by Abdul Karim Khalili. Abdul Karim Khalili and Mohammed Muhaqqeq both vied for power to be recognised as leader of the Hazara in about 2003 and went to the villages to seek support. The appellant's father sided with Mohammed Muhaqqeq rather than Abdul Karim Khalili because Abdul Karim Khalili was responsible for killing Commander Shafie. The appellant's father was the local leader and Abdul Karim Khalili saw him as a threat and had him killed. The appellant fears his father's enemies if he returns to Afghanistan now.

7. IJ Eban then made the following findings: -

1. The appellant is from Afghanistan;

2. the appellant's father had a position of some responsibility in Hizb-i-Whadat. This is both the appellant's and Mr. Ahmadi's evidence and there are documents and a video referring to his membership;

3. the appellant's family was killed by armed gunmen some time in early 2004. The appellant's evidence was consistent on this point. The appellant does not know by whom. This was the case when the appellant arrived in the United Kingdom straight after the incident. The only reasons that the appellant has suspicions about his father's murderers is based on what he has been told subsequently by his cousin Mr. Ahmadi;

4. the appellant's cousin Mr. Ahmadi believes that Abdul Karim Khalili was responsible for the murder because prior to the presidential elections in 2004, the appellant's father sided with Mohaqqeq for president against Abdul Karim Khalili who was standing as vice president on the same ticket as Kerzai who was standing for president. This might have been because a relative of the appellant's father, Commander Shafie, was thought to have been killed at the behest of Abdul Karim Khalili. Mr. Ahmadi's belief is based on conversations he had had with friends who were in Afghanistan at the time. He was not there himself. These friends have not been identified and the basis for their knowledge or assumptions have not been given;

5. the appellant fled his home following the murder and went to a maternal uncle. He left Afghanistan shortly thereafter in or about April 2004;

6. the appellant fears that those who killed his father might kill him;

7. the appellant has made a life in the United Kingdom and wishes to remain;

8. the appellant has lost contact with his maternal uncle, Zia;

9. the appellant has no other close relatives or friends in Afghanistan;

10. the appellant has no home in Afghanistan;

11. the appellant speaks English;

12. there was no evidence become me that the appellant was not in good health.

8. IJ Eban dismissed the appeal on all three grounds raised. However, on 15 September 2008, HH Judge Pelling QC, sitting in the Administrative Court of the Queen's Bench Division ordered reconsideration of the ECHR Article 8 ground of appeal, commenting that IJ Eban's reasoning did not follow the step by step approach required by the authorities, and that he could not find the evidence which supported the conclusion that the aspects of the applicant's private life which she found proved (in particular, work and study) could continue in Afghanistan.. On 2 November 2008, SIJ Spencer adjourned the hearing for a second stage reconsideration of the ECHR Article 8 ground only. He did so, however, on the basis that IJ Eban's finding that the applicant had no relations in Afghanistan was to be preserved.

The reconsideration by the SIJ

9. Having set out the background, and having cited extensively from SIJ Spencer's ruling, the SIJ records that he had taken evidence from the applicant and from Mrs. Jane Champion, a friend of the appellant, who also accompanied him to the hearing before me. The SIB correctly directed himself that the burden of establishing a breach of ECHR Article 8 was on the applicant and that he had to show that there were substantial grounds for believing that the decision of the Secretary of State had or would result in such a breach.

10. The SIJ then dealt with the up to date position of the applicant. This he sets out under nine separate headings, which I need not repeat. He then records the applicant's oral evidence and that of Mrs. Champion, He describes the evidence of both witnesses as having been given "in a straightforward and sincere manner".

11. The SIJ then considered the submissions made by the applicant's advocate, and directed himself according to the questions set out in paragraph 17 of the speech of Lord Bingham of Cornhill in ***Razgar v Secretary of State for the Home Department*** [2004] UKHL 27, namely: -

> In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

12. The SIJ found that ECHR Article 8 was, indeed, engaged. Questions (1) and (2) above had to be answered "yes". However, the interference by the State would be in accordance with the law and necessary (questions 3 and 4) - the law being the legitimate aim of immigration control. The "crucial question" identified by the SIJ was whether the interference was proportionate – question 5.

13. After further careful analysis, the SIJ answered this last question against the applicant. In paragraph 17 of his determination and reasons, this is what he says:

> 17. The appellant's private life consists of his cousin in the United Kingdom, the friends (including his girlfriend) he has acquired during his time here, his employment both paid and voluntary and his hopes for the future by way of obtaining a university degree. The appellant has not converted to Christianity. The appellant would be returning to Afghanistan with a good education including computer and language skills. Objective evidence indicates that the appellant would be able to put to good use the education he had obtained and computer and other skills he has acquired whilst in this country. He should be able to obtain employment and various educational opportunities would be available to him including a degree course in his chosen field. The Respondent has claimed that he needs to maintain orderly and fair immigration control. The appellant is an impressive person who has worked hard to improve his position whilst in the United Kingdom as well as to help others. It will be unattractive for him to return to Afghanistan but, when I come to consider all the factors in this case, I do not consider that they make the decision under appeal one which constitutes a disproportionate interference with the appellant's right to respect for his private or family life. The appellant's employment and education path may be different in Afghanistan and his friendships and other acquaintances are likely to be different too, however, his private life will continue in most of its essential particulars. The appellant's Article 8 claim cannot succeed.

The proposed ground of appeal to this court

14. The grounds of appeal, which were professionally drafted, seek to suggest that the SIJ did not adopt a structured approach to ECHR Article 8. That seems to me a hopeless submission. The SIJ carefully followed the ***Razgar*** steps, and was plainly right to identify proportionality as the substantive issue.

15. The grounds then assert that the SIJ failed to assess the applicant's rights in a "holistic manner" and adopted an approach which was "merely to synthesise the component parts and establish whether there was any possibility of those parts being replicated, without considering the overall issue of whether removal would constitute a breach of Article 8".

16. In so far as I understand this submission, I reject it. In my judgment, it is plain that the SIJ looked at the matter in the round, and carefully balanced his full findings in relation to the appellant's private life against the ECHR Article 8.2 factors relied upon by the Secretary of State.

17. In his oral argument before me, the applicant very largely repeated the matters he had placed before the SIJ. He placed particular emphasis on the fact that he had no family in Afghanistan, and pointed to the findings made by IJ Eban and accepted by the IJ. He also produced a letter from Canterbury Christ Church University dated 9 July 2009 confirming his course and his successful completion of the first level of his studies. He produced a further letter from Mrs. Champion dated 12 July 2009. He also produced a copy of Dr. Giustozzi's report. There was also a letter dated 30 June 2009 from Mr. James Witham, a letter from Lauren Hill and a further statement from the applicant. I have, of course, read all these documents.

18. I have considerable sympathy for the applicant, and no reasons to doubt either his sincerity, or the assessment of him and his witnesses made by the IJ. He must, however, understand my function and the limit of my powers. My function is to decide whether or not an appeal by him against the decision of the SIJ would stand a real prospect of success (Civil Procedure Rules 1998, rule 52.3(6)(a) or whether there is some other compelling reason why the appeal should be heard (ibid rule 52,3(6)(b). This, in turn, requires me to ask a very simple question: Is there, arguably, any error of law in the IJ's determination?

19. That is, plainly, a question which I have considered very carefully, but, from whatever angle I approach the case. I can detect no such error. Had I been deciding the case, I may or may not have reached a different conclusion, but that, of course, is not the test. The test is whether or not it is arguable that the SIJ make an error of law. I cannot see that he did, and the inevitable consequence is that this application must be refused.

20. I notice, of course, that Sullivan LJ was on the same view. I am not bound by his conclusions, but have to say that I agree with them. In my view, were I to allow this appeal to go to the full court I would be setting the applicant up to fail, and would be raising false hope which would be bound to be disappointed.

21. In saying this I wish to make clear that I have taken into account all the arguments raised by the applicant. This is a court of law. The judges do not exercise the

discretion which, under the legislation, is vested in the Secretary of State. We have to apply the law as it is.

22. The decision whether or not to grant exceptional leave to remain is, of course, that of the Secretary of State. The appellant has now exhausted his legal remedies, and however, sympathetic I may feel towards his position, the decision about the appellant's future is now a matter for the Secretary of State, not for the courts.