EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Mackay of Drumadoon

[2010] CSIH 89

OPINION OF THE COURT

Delivered by LORD CARLOWAY

in the application for leave to appeal

by

CB

Applicant;

against

A decision of the Asylum and Immigration Tribunal

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Act: Bovey QC, Komorowski; Drummond Miller LLP
Alt: Lindsay; Solicitor to the Advocate General

12 November 2010

The applicant arrived in the United Kingdom as a visitor on 30 December 1991. On 4 August 1993 he was granted indefinite leave to remain as the spouse of a United Kingdom national. His wife already had a female child of her own. She had a male child with the applicant. The applicant was convicted of one act of gross indecency and two of indecent assault over a three week period with his step-daughter, then aged 9. There had been an element of grooming and breach of trust in the offences and he was sentenced to four years in prison. When he was in prison, he was divorced. On 10 August 1998, as a consequence of the conviction, he was served with a notice of intention to deport on the grounds that his presence in the UK was not

conducive to the public good. He appealed against that decision, but that appeal was dismissed on 22 May 2001. Exactly one year later, the deportation order was signed.

On 31 May 2002, the applicant's claim that the deportation order should not be enforced upon human rights grounds (Articles 3 and 8 of the European Convention on Human Rights) was refused by the Secretary of State for the Home Department (the respondent). An appeal against that decision was dismissed by an adjudicator on 20 March 2003. The Immigration Appeal Tribunal rejected an appeal from the adjudicator on 19 August 2004. However, on 5 April 2007, the court, of consent, remitted the case to the Asylum and Immigration Tribunal for a rehearing. The subsequent decision of the AIT, dated 17 July 2007, again rejecting the appeal was successfully appealed on 18 November 2008, but only in respect of the applicant's Article 8 rights and those of his two children by his present wife, born in October 2000 and December 2002. The present application is the latest episode in a prolonged legal process commenced on 31 May 2002, when the respondent refused the applicant's human rights claims.

At what was a complete rehearing of the Article 8 issue before the AIT, it was conceded that it would be unreasonable to expect the applicant's two children to relocate to his country of origin or to expect his wife to do so, leaving the children in the UK. Therefore, in answering the first four of Lord Bingham's five questions in *R (on the application of Razgar)* v *Secretary of State for the Home Department* [2004] 2 AC 368 (at para 17), the AIT held that:

1. the applicant's removal would be an interference with the applicant's exercise of his right to respect for his family life;
2. the consequences of that interference would be of such gravity as potentially to engage the operation of article 8;
3. the interference was in accordance with the law;
4. the interference was necessary in a democratic society in the interests of the prevention of crime.

Accordingly, the issue became a narrow one, in terms of the fifth question, of whether the interference was proportionate to the legitimate public end sought to be achieved.

Before the AIT, the applicant had attempted to introduce Article 6 unfairness in connection with whether the order had been in accordance with the law. The argument was that the respondent had not taken account of policy DP5/96 (Deportation in cases where there are Children with Long Residence), which dealt with cases where potential deportees had children "born here [and] are aged 7 or over". A statement from the respondent dated 24 February 1999 had created a general presumption against deportation in such circumstances, although it also stressed that each individual case would be considered on its merits. The policy did not apply to the applicant at the time of the deportation order in 2002, but it might have been applied by the respondent when the applicant's daughter reached the age of seven on 8 October 2007, before the concession was withdrawn on 9 December 2008.

The AIT rejected the argument, since it had not previously been raised by the applicant in any of the deportation proceedings. However, the AIT nevertheless accepted (para 12) that the factors referred to in the policy were relevant to the assessment of proportionality as were the criteria in the European Court of Human Rights cases of *Boultiff* v *Switzerland* (2001) 33 EHRR 50, *Uner* v *Netherlands* (2007) 45 EHRR 14 and *Maslov* v *Austria* [2009] INLR 47. Thus they specifically addressed proportionality in detail under various headings, viz:

> "The nature and seriousness of the offences;
> The duration of the appellant's stay in the United Kingdom
> The time which has elapsed since... the offences and the appellant's conduct during that period
> The nationalities of the various persons concerned
> The appellant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life
> Whether the spouse knew about the offences at the time when she entered into a family relationship
> Whether there are children of the marriage and if so their ages

> The seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled
> The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the appellant are likely to encounter in the country to which the appellant is to be deported
> The solidity of social, cultural and family ties with the host country and with the country of destination
> The duration of the exclusion order".

The AIT took note of a number of particular facts under these headings. These included that the offences had been serious ones, although by no means the most serious, resulting in a total sentence of four years. On the other hand, the applicant had been in the UK for more than 18 years, albeit that his permission to do so ended in May 2002. He had not re-offended since his conviction and had completed a sex offender's programme. He had gained employment, re-married a UK national in 2000 and now had his two children, a daughter, aged 10, and a son, aged almost 8; the children being on the Child Protection Register because of his conviction. His wife had been aware of the applicant's conviction and the likelihood of deportation prior to marriage. Following an attack on his home in 2006, the applicant had become separated from his wife and children. Following a Child Protection Review Conference on 12 May 2006, he had been allowed supervised contact only with the children. This was partly because the family had been forced to flee from violence in the community and also because of allegations, made by the daughter, relating to the applicant's chastisement of her and the removal of her clothes after a period of contact. However, the AIT disregarded the possibility of the allegation being true. A further incident in a park, when the applicant was attacked by youths and the supervising social worker had to shield the children, resulted in a cessation of contact. This continued for three years until almost the date of the AIT hearing because of the applicant's failure to co-operate with the Social Work Department. He refused to be

interviewed with a view to facilitating contact and, because of his lack of co-operation especially in connection with a risk assessment, he was deemed to be at high risk of re-offending.

The AIT accepted that the applicant's wife intended to resume cohabitation with him as soon as practicable. Although the applicant was seeing his wife several times a week, contact with the children had been by telephone only until two supervised contacts took place shortly before the AIT hearing. The AIT accepted a submission that they were bound to look at the position as at the time of the appeal hearing, and not when the order for deportation had been made (*Mokrani* v *France* (2005) 40 EHRR 5). In relation to the children, they repeated (para 52) the need to take into account the factors specified in policy DP5/96 and considered that, in terms of Lord Bingham's *dicta* in *EB (Kosovo)* v *Secretary of State for the Home Department* [2008] UKHL 41, it would rarely be proportionate to remove a person who had a close and genuine bond of affection with a family, the members of which could not be expected to follow him to the country of removal. The best interests of the children required to be considered and it was in their best interests to have contact with the applicant (para 60). However, these interests could not be considered independent of the risk of the applicant re-offending and the expert evidence was that he presented as at medium risk of engaging in sexually motivated violence (paras 62 - 67).

The AIT held that:

> "[65] We take the view that in the assessment of risk we can do no better than rely upon the report of Dr [C] which the appellant himself placed before us. What is evident from the report is that the appellant may become at a high risk of re-offending in the absence of protective factors. The most significant protective factor identified in the evidence before us it is (sic) the attitude of his wife. There is a suggestion, however, that there are occasions upon which she ceases to be as effective as she might otherwise be, due to stress. It is also the case, as we have seen, that there have been occasions when the appellant has been less than cooperative, which must have a bearing upon risk".

The AIT reasoned (para 74) that the ultimate issue was whether "the public interest requires that the applicant be deported, notwithstanding that the appellant is unlikely as a result to have physical contact with his children for many years". In that regard the AIT were satisfied that, in the event of deportation, the applicant would be able to maintain the amount of contact which he had had with the children in the years 2006 to 2009; that is by telephone (eg Skype) and correspondence. He might also be visited by his wife, and the children, from time to time (para 79).

The AIT concluded:

> "80. We have taken into account all of the evidence before us, whether specifically mentioned or not, as well as the submissions made by and the authorities to which we have been referred by both representatives. We have not found it useful to undertake a close analysis of the facts of the authorities to which we have been referred since ultimately each case depends upon its own facts. The fact that the offences are so old can be given little weight given that the appellant is at medium risk of re-offending. In this appeal having regard to all the relevant circumstances, particularly the seriousness of the offences and the current risk of re-offending, we are satisfied that the public interest in the prevention of crime justifies the deportation of the appellant notwithstanding the undoubted interference with his private and family life and that of his wife and children. We are satisfied that the appellant's deportation would be a proportionate interference with these rights in the interests of the prevention of crime. Accordingly we dismiss the appeal on human rights grounds under article 8 of the ECHR".

The applicant sought to persuade the court that there were grounds of appeal with a real prospect of success upon three principal bases. The first was that the AIT had erred in not holding that the respondent had erred in failing to take into account the terms of policy DP5/96 (*IA ('applying principles') Mauritius* v *Secretary of State for the Home Department* [2006] UKAIT 82). However, it was accepted that this policy did not apply when the order for deportation had been made. For the reasons explained by the court in *TP* v *Secretary of State for the Home Department* [2009] CSIH 80 (at para 28), the respondent could not have applied the policy when he made the decision to deport the applicant since the policy did not then apply to the

applicant's situation (cf *R (on the application of Dabrowski)* v *Secretary of State for the Home Department* [2003] EWCA Civ 580). There was no obligation on the respondent to consider the policy subsequently, in the narrow window of opportunity between the seventh birthday of the applicant's daughter and the revocation of the policy, at least in the absence of an application to the respondent to reconsider the case in light of that policy upon the change of circumstances when the daughter reached her seventh birthday. In any event, given the ultimate decision of the AIT, which took into account the factors identified in the policy prior to reaching a decision on the merits, it is not possible to assert that express consideration of the policy by the respondent could, or indeed would, have resulted in a different decision from that reached.

The applicant's second submission was that the AIT had erred in their consideration of how the supervised contact between the applicant and the children might develop. The essential point was that, in terms of *Ciliz* v *Netherlands* [2000] 2 ELR 469 and *MS (Ivory Coast)* v *Secretary of State for the Home Department* [2007] EWCA Civ 133, the AIT ought not to have dismissed the appeal pending a decision on how successful the supervised contact had been. Rather than speculating, the AIT should have awaited developments (see also *Birmingham City Council* v *Secretary of State for the Home Department* [2010] EWCA Civ 460, Dyson LJ at para 68; *S* v *Adoption Board* [2009] IEHC 429, O'Neill J at para 8.12).

There is little difficulty with the proposition that, in certain situations, it may be disproportionate to deport a parent in advance of the resolution of contact proceedings. This is not such a case. There were no contested proceedings concerning contact. There was no dispute that the applicant had a family life with his wife and children and *vice versa*. It was accepted by the AIT that it was in the best interests of

the children that they should have continuing contact with the applicant. The AIT thus took into account the existence of a family life and that it would be in the best interests of the children that contact be maintained. There was therefore no need for the AIT to wait to see whether contact would be successfully re-established. They proceeded on the basis that it had.

The third proposition was that the AIT had failed properly to take account of the Strasboug jurisprudence in stating that they had not found it useful to analyse the facts of the European Court of Human Rights cases (cf *Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167). The decision was out of keeping with ECHR cases (*Sezen* v *the Netherlands*, 31 January 2006, application 50252/99; *Omojudi* v *United Kingdom*, 24 November 2009, application 1820/08; and *AW Khan* v *United Kingdom*, 12 January 2010, application 47486/06; cf *Grant* v *United Kingdom*, 8 January 2009, application 10606/07 and *Onur* v *United Kingdom*, 17 February 2009, application 27319/07).

The AIT did not ignore the Strasbourg jurisprudence. All that they said was that each case depended upon its own facts and circumstances. Each case, as those cited demonstrate, is generally different from the next.

The AIT appear to have balanced all the various factors in accordance with the Strasbourg guidance (notably *Boultif* (*supra*)) and reached the view that it was proportionate to deport the applicant, despite that being an interference with his and his family's Article 8 rights, because of the continuing risk of his re-offending, which the evidence demonstrated he still posed. It is correct to submit that, primarily because of the legal process, the applicant had been in the United Kingdom for many years before the AIT's decision. He had, after his conviction, established a family life and had not re-offended, despite being involved in at least two violent incidents. He was

employed, saw his wife regularly and was in contact with his two children. His wife and children are UK nationals and, as the AIT recognised, it is rarely proportionate to remove a person who has close and genuine bonds of affection with family members who cannot be expected to leave the UK. However, it is important to note in terms of the Strasbourg cases (eg *Grant* (*supra*) para 40, *Onur* (*supra*) para 58) that at the time of the AIT decision, the applicant was not living with the family. The AIT were entitled to take that into account when balancing the many factors in favour of the applicant with the seriousness of the offences and the current risk of re-offending.

Essentially, although phrased in terms of errors of law, the present application is in reality an attempt to review the AIT's assessment of the weight to be attached to the various factors for and against deportation. But it cannot be said that the AIT took into account an irrelevant consideration or failed to have regard to a relevant one. It can also not be asserted with any substance that the AIT made a decision which no reasonable tribunal could have reached. The applicant's attempt, although persuasively advanced, is not one which points to the existence of any error of law, which is the only basis upon which the court could grant leave.

This application must therefore be refused.