Neutral Citation Number: [2005] EWCA Civ 828

Case No: C4/2003/2634 & 2634(A)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2005

Before :

LORD JUSTICE BROOKE
VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE LATHAM
and
LORD JUSTICE LLOYD

- -

Between :

ERNEST FESTUS BEOKU BETTS	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Miss Sonali Naik (instructed by **Messrs Irving & Co**) for the **Appellant**
Miss Elisabeth Laing) (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 22nd June 2005

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Judgment

Lord Justice Latham :

1. The appellant is a citizen of Sierra Leone, born in November 1978, who has been in this country since 1997, when he entered as a student after the military coup in that country. He is a member of a prominent and comparatively wealthy Creole family from Freetown, which had for a number of generations been involved in government and politics. His father was a friend of President Kabbah, whose government was overthrown by the military coup. Although no member of the family suffered any physical harm either during or after the coup, soldiers entered the compound of the family home in Freetown at one stage, and subjected the appellant and his elder brother Seth to a terrifying mock execution. Thereafter the family took refuge with the appellant's grandmother. They then left Sierra Leone in stages. Seth went eventually to the United States. The appellant came to this country on his student visa from Senegal, and was later joined here by his mother, father and Candace who had also taken refuge in Senegal. There is in fact one other member of the family, a sister older than the appellant, Josepha, who was born in the United Kingdom in 1973, and has British citizenship but returned to Sierra Leone with the family in 1973. She came to this country to study in 1993 and has remained in this country ever since.

2. The appellant, having come to this country, completed his A Levels and obtained a place at the University of Hertfordshire to study law in September 1998. He obtained an extension to his student visa in December 1998. He ultimately made an application for asylum on the 1st June 2001 by which time he was an overstayer, having failed to appreciate that his visa had expired. By that time, his father had died. He died in December 1998, having registered as a British Citizen on the 28th May 1998. His application for registration was first made as long ago as 1972. The family lived together in London, and were joined by the appellant at weekends and at vacations. By the time he made his application for asylum, the appellant's mother and his younger sister Candace had been granted indefinite leave to remain in accordance with the then policy of the respondent. That policy was withdrawn in September 2001. The appellant's application had not by then been determined. He was interviewed in December 2001 and January 2002. His application for asylum was refused by letter dated the 27th February 2002 in which the respondent also rejected his claim to remain on the basis that to return him to Sierra Leone would expose him to treatment contrary to articles 2 and 3 of the European Convention on Human Rights, and would be a breach of Article 8 of that Convention. His appeal to an adjudicator was successful on the 4th February 2003 on the basis that to return him would breach his article 8 rights. The respondent's appeal to the Immigration Appeal Tribunal was successful on the 5th September 2003. The appellant appeals to this court with limited permission from the tribunal restricted to the extent to which the position of the appellant's family members was to be taken into account in assessing his article 8 claim. The appeal has however been overtaken by the decision of this Court in *Huang –v- SSHD* [2005] EWCA Civ 105; and we have permitted Ms Naik to argue that the effect of that decision is that the tribunal wrongly directed itself as to its approach to the determination of the appeal.

3. The adjudicator directed himself in relation to the issue with which we are accordingly concerned in the following terms:

> "Under Article 8 I have to determine the following separate questions:
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> 1) Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
>
> 2) Is that interference in accordance with the law.
>
> 3) Does that interference have legitimate aims?
>
> 4) Is the interference proportionate in a democratic society to the legitimate aim to be achieved?"

4. He concluded that the appellant had established both a family life and a private life in the United Kingdom which would be interfered with in the event of his being removed to Sierra Leone. He accepted that the interference was in accordance with law and had legitimate aims so that the question was whether the interference was proportionate. He considered with care the relationship between the appellant and his mother and sisters. He noted that a number of other family members were in the United Kingdom although there were others in the United States and some still in Sierra Leone. He noted that the appellant was intending to qualify as a solicitor in this country. He concluded that whilst there was nothing prohibiting the family from returning to Sierra Leone he was satisfied that they would not return and as a result the effect of the appellant's removal would be that he was separated from his family. He concluded that this was a significant degree of hardship for all members of the family.

5. He then went on to consider the extraordinary history of the appellant's father's application to be registered as a British Citizen in 1972. At that time his father was in this country. He was a graduate of Oxford University and had qualified as a Barrister. According to a letter written by his solicitors to the respondent in March 1998, he had received no response to this application. For whatever reason, it therefore appears that the appellant's father did not follow up his application in 1972 or pursue it in any way, until he arrived back in this country after the coup. The result of the solicitors' letter was, in the circumstances, both startling and remarkably prompt. He obtained registration on the 28th May 1998. It was said that had the application been dealt with in 1972 then the appellant would have been a British citizen as of right. The adjudicator concluded in paragraph 79 of his decision:

> "I consider in the above circumstances that the return of the appellant to Sierra Leone would be disproportionate. I have taken into account the large volume of documentary supporting evidence supplied, the oral evidence of the appellant and his witnesses, and the submissions both are (sic) both representatives. I consider that there are exceptional circumstances applying in the light of the appellant's father's application, over thirty years ago, for citizenship, which application was not at the time acknowledged or dealt with. To summarise, having considered all of the available evidence, I

> am of the firm view that the appellant's return to Sierra Leone will be disproportionate and would breach Article 8."

6. The tribunal, in dealing with the appeal before it in so far as it related to article 8, firstly considered what it described as the two "but for" arguments put forward by Ms Naik on the appellant's behalf. The first was that but for the failure to register the appellant's father as a British citizen in 1972 or 1973 the appellant would himself have been a British citizen. The second was that but for the failure to deal with the appellant's own asylum application before September 2001, he would have been entitled to the benefit of the policy which had resulted in his sister Candace receiving indefinite leave to remain in April 2001.

7. As to the first, the tribunal considered that the material was insufficient to justify the conclusion that the appellant's father's application should have been dealt with before he returned to Sierra Leone in 1973, shortly after the birth of Josepha. It was not therefore appropriate to approach the case on the basis that the application should have been processed nor that, in consequence, the appellant would have become a British citizen. There was simply insufficient material to justify that conclusion. As to the second, the tribunal concluded that there was no undue delay on the part of the respondent in dealing with the appellant's asylum application which could justify the conclusion that the pre-September 2001 policy should have been applied to the appellant. Accordingly the tribunal concluded that the appellant could not rely on either of these arguments to justify the conclusion that in some way his case was exceptional.

8. Turning to the position of the appellant and his family, the tribunal concluded that the adjudicator had placed too much emphasis on the position of the appellant's mother and his siblings. It noted that there was no dispute that this was a close family with a not inconsiderable amount of interdependence. It concluded that the approach of the adjudicator had been flawed in that he had placed greater importance on the position of other members of the appellant's family than he should have done. Nonetheless it accepted that to return the appellant to Sierra Leone would be an interference with that close knit family life which had been created in this country since 1998. It concluded:

> "16. In considering whether it would be proportionate, therefore, we weigh on one side the fact that the respondent is 24 years of age, well educated and perfectly self-sufficient. We do not consider that there is any likelihood of an adverse psychological or psychiatric result following his return to Sierra Leone, for the reasons which we have indicated earlier in relation to the Article 3 claim. We have also taken into account the fact that the respondent comes from Freetown and that the family owned a property there. The evidence before the Adjudicator is that the property was vandalised during the coup but there is no evidence that the family has been deprived of the property. Furthermore it would appear that the respondent has fairly close family connections in Sierra Leone. He has two uncles there, the mother's brother and half brother (paragraph 74) and his late father was obviously a fairly substantial business man, and political ally, if not friend, of President

Kabbah. In such circumstances we do not consider that the respondent would have too much difficulty in establishing himself in Sierra Leone. We accept that circumstances in the country are not as favourable as they were to this family prior to the coup but nonetheless we do not consider that in the circumstances of this case the respondent would come within the special circumstances applicable to unsuccessful Sierra Leonean citizen referred to by the UNHCR in their letter of the 12th June of this year.

17. On the other side, there is the fact that this is a close knit family, that there is a dependence by the mother upon the respondent, but in this connection we would point out that there are three other siblings in this country, two of them older than the respondent and one of 15. These siblings are equally able to provide support for the mother. What is perhaps even more important from the respondent's point of view is the interruption to his legal training, he having now reached what would appear to be almost the last stage in his journey to enrolment as a solicitor. This difficulty could be overcome by the respondent making an application from Sierra Leone to return to this country to complete his legal studies if he were minded so to so. He now has behind him the benefit of an English law degree, which, if he decided not to apply to complete his training here (or, in the alternative, was refused consent) would nevertheless be of assistance to him in a career in Sierra Leone.

18. In the case of *Mahmood* their Lordships emphasised the right of the Secretary of State to decide matters under Article 8 on the basis of the merits of each case. Laws LJ states at paragraph 53:

"Much of the challenge presented by the enactment of the Human Rights Act 1998 consists in the search for a principle to measure scrutiny which would be loyal unto the convention rights, but loyal also to the legitimate aims of democratic power. In this case Miss Webber's submission comes close to the proposition of the court not withstanding refusing the Secretary of State and retaking the decision of the case on its merits. In fairness, when testing, she disavows such a proposition. But in that case her submission is without principle: the courts are in as good a position as the Secretary of State to decide; but they must not decide as if they were his surrogate. This antithesis at the same time commends but deprecates the imposition of a courts of their own views of the merits of the case in hand. It is of no practical assistance and lacks respect for its adherence. The Human Rights Act 1998 does not authorise the judges to stand in the shoes and refuse Parliament's delegates, who are decision makers, given their

> responsibility by the democratic arm of the state. The arrogation of such power to the judges would usurp those functions of government which are controlled and distributed by powers with authority derived from the ballot box. It follows that there must be in principle distance between the court's adjudication in case such as this and the Secretary of States decision, based on his perception of the cases merits". (Syntax unamended)
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> 19. The Secretary of State in paragraph 23 to 26 of the letter of refusal has dealt with any claim arising under the Human Rights Act, in particular Articles 2, 3, 6 and 8. The Master of the Rolls in paragraph 38 of his judgment states:
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> "The court does not substitute its own decision for that of the executive. It reviews the decision of the executive to see whether it was permitted by law – in this instance the Human Rights Act 1998. In performing this exercise the court has to bear in mind that just as individual states enjoy a marginal of appreciation which permits them to respond within the law, in a manner which is not uniform, so there will often be an area of discretion permitted to the executive for a country before a respondent to be demonstrated to infringe the European Convention." (Syntax again unamended)
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> 20. In our view, for the reasons we have indicated above, the Secretary of State was perfectly entitled to come to the conclusions to which he has come, both in relation to Article 3 and Article 8."

9. Miss Naik submits that the decision of the adjudicator discloses no error of law, and, accepting that this was a pre-June 2003 decision, so that the tribunal was entitled to consider the merits, was an unimpeachable assessment of the facts and a proper exercise in balancing the interests of effective immigration control on the one hand and the particular circumstances of the appellant on the other. Accordingly, she submits that the tribunal could not, and should not have interfered with his decision. In any event, she submits, the tribunal's decision is itself flawed. She submits that it was not entitled to dismiss her "but for" arguments in the way that it did. But more fundamentally, it failed to exercise the jurisdiction it was required to exercise when considering an appeal raising an issue under article 8 of the European Convention in the light of the decision of the House of Lords in *R (Razgar) –v- SSHD* [2004] UKHL 27, [2004] 2AC 368 and of this court in *Huang*. The consequence of these two decisions, she submits, is that the tribunal was itself obliged to carry out the exercise required by article 8 of determining whether or not the decision to remove the appellant was a proportionate response by the State, and in doing so was required to carry out a much more careful analysis of the facts than in fact it did. In particular she refers to the apparently uncritical recitation of the damage to the family compound, without considering whether that might be an adequate description of the problems which would be faced on the appellant's return and the mistake that the tribunal made when it would appear that it considered that the appellant's brother Seth would be available in this country to provide for the appellant's mother as well as Josepha.

Paragraphs 18 and 19, she submits, make it quite plain that the tribunal adopted the wrong test.

10. Before considering the validity of these submissions, it is necessary to consider the effect of the two decisions upon which Miss Naik relies. They now provide essential guidance for the way in which appellate authorities are to consider appeals raising issues under the Human Rights Act 1998, at least in this context. In *Huang* this court considered that the passages in the speech of Lord Bingham in paragraphs 17 to 20 in *Razgar* are the critical passages in determining the scope of the review to be carried out by an appellate authority. For the purpose of this judgment it is only necessary to cite paragraphs 17 and 20:

> "17. 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:
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> (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?
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> (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?
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> (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?
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> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?
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> ….
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> 20. The answering of question (5) where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for

> careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department –v- Kacaj* in [2002] Imm AR 213 para 25, the Immigration Appeal Tribunal (Collins J, Mr CMJ Ockelton and Mr J Freeman) observed that:
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> 'Although the [Convention] rights might be engaged, legitimate immigration control would almost certainly mean that derogation of the rights must be proper and will not be disproportionate.'
>
> In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this over stated the position. I respectfully consider the element of over statement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

11. In *Huang*, this court concluded that the result was that the approach which had been adopted in a line of cases including *Mahmood*, which was the case cited by the tribunal, was wrong. The appellate authority has to exercise its own independent judgment, as Lord Bingham indicated. However, where a decision has been taken in the exercise of legitimate immigration policy, it can only be in a truly exceptional case that a departure from the policy can be permitted. It follows that in any appeal very clear and compelling reasons related to article 8 will have to be established for it to be appropriate to interfere with the decision of the respondent.

12. Turning then to the present case, it seems to us that the tribunal was clearly entitled to conclude that the adjudicator's decision was flawed. Under Section 65 of the Immigration and Asylum Act 1999, the right of appeal on human rights grounds requires consideration of the alleged breach of the appellant's human rights. In the present case this required the adjudicator to concentrate on the effects of removal on the appellant. True it is, as Jack J said in *R (AC) -v Immigration Appeal Tribunal* [2003] EWHC 389 (Admin) [2003] INLR 507, the effect on others might have an effect on an appellant, nonetheless it is the consequence to the appellant which is the relevant consequence. In the context of a merits appeal, which this was, the tribunal was entitled to conclude that the adjudicator had allowed his judgment to be affected unduly by the effect of removal on the remainder of the family in particular his mother. Further, the adjudicator does not suggest that the effect on the family, let alone the appellant, amounted to an exceptional circumstance. The only factor which he expressly identifies as such was the failure to register the appellant's father as a British citizen until 1998. Implicit in this conclusion is a recognition that the effects of removal on the appellant would not in themselves amount to an exceptional circumstance.

13. The tribunal, in my view correctly, considered that the history of the father's registration application could not amount to an exceptional circumstance, for the reasons that it gave. There was nothing in the material available to the tribunal, or to us, to suggest that the application for registration made in 1972 was being pursued, at least after the appellant's father returned to Sierra Leone. For all we know, the last thing he may have wanted thereafter was British citizenship until forced to leave Sierra Leone as a result of the coup. The adjudicator was certainly not entitled to speculate in a way which could justify the conclusion that some sort of wrong was done him at the time which he should remedy by giving the appellant the benefit that he sought.

14. In those circumstances, the tribunal was entitled, and indeed required, to come to its own conclusion on the article 8 issue. Had it had the benefit of the decisions in *Razgar* and *Huang* it would accordingly have been looking for some exceptional circumstance to justify departure from the normal consequence of a failed asylum application, namely that the asylum seeker should be removed to his country of origin. The fact that it misdirected itself as to its task by following the guidance in *Mahmood* does not, however, require us to allow this appeal and remit the matter for further consideration. If it is obvious from the conclusions of the tribunal that on its findings and conclusions there were no exceptional circumstances, it must follow that to quash the decision would be of no ultimate value to the appellant. In my judgment, having rightly concluded for the reason that it gave that neither the way the appellant's father's application was dealt with nor the way the appellant's own application for asylum was dealt with could amount to exceptional circumstances, there was no basis upon which the Tribunal could have properly have upheld the adjudicator's decision. In my judgment paragraphs 16 and 17 of the decision, save in so far as a mistake was made in relation to Seth, adequately and fairly set out the considerations relevant to the question of proportionality. They make it plain that there is nothing exceptional in this case which could justify departure from the normal consequences of the application of immigration policy. The mistake in relation to Seth is wholly insufficient to undermine that conclusion particularly bearing in mind that, as I have said, it is the effects of removal on the appellant's article 8 rights which are in question.

15. In my judgment the appeal should be dismissed.

Lord Justice Lloyd: I agree.

Lord Justice Brooke: I also agree.