



16 June 2010

PRESS SUMMARY

Secretary of State for the Home Department (Respondent) v AP (Appellant) [2010] UKSC 24

On an appeal from [2009] EWCA Civ 731

JUSTICES: Lord Phillips (President), Lord Saville, Lord Rodger, Lord Walker, Lord Brown, Lord Clarke, Sir John Dyson SCJ

BACKGROUND TO THE APPEAL

The Appellant is an Ethiopian national who was the subject of a control order. This confined him to a flat for 16 hours a day in a Midlands town away from his family in London.

AP came to this country with other members of his family in 1992 at the age of 14. On 6 October 1999, he, his siblings and their mother were granted indefinite leave to remain. In May 2005 he travelled to Somalia and then Ethiopia. On 22 December 2006, upon his detention by the authorities in Ethiopia, the Secretary of State decided to exclude him from the UK. He was then suspected of involvement in terrorism.

On AP's return to the UK on 28 December 2006 he was duly refused leave to enter and, pending removal, detained under immigration powers until July 2007. He was then released on bail under stringent conditions. The Secretary of State, however, withdrew her decision to exclude AP from the UK when, on 10 January 2008, she was granted permission to make a control order against him.

The control order subjected AP to a 16-hour curfew and electronic tagging, together with a number of other restrictions on association and communication such as are usually imposed in these cases. This control order at first required AP to live at an address in North London. AP's family, friends and associates had always lived in the London area.

On 21 April 2008 the Secretary of State modified the terms of the control order, requiring AP to move to an address in a Midlands town some 150 miles away. It was this modification that led to AP's appeal.

On 12 August 2008 the High Court allowed AP's appeal against the modification, quashing the obligation to live in the Midlands. It rejected AP's case under article 8 of the European Convention on Human Rights ("ECHR") on the ground that the interference with his family life was justified and proportionate in the interests of national security but decided that the overall effect of a 16-hour curfew and AP's social isolation (particularly through his being separated from his family) constituted an article 5 deprivation of liberty.

When the matter was before the Court of Appeal there was again no dispute about the need for a control order, only about its terms. The Court of Appeal by a majority reversed the decision of the High Court. AP appealed.

The outcome of this appeal is no longer currently relevant to AP himself. AP's control order was revoked on 2 July 2009. The Secretary of State has again decided that AP should be deported on

national security grounds and since 20 July 2009 he has been on bail pending deportation on conditions, including residence in the Midlands, similar to those of the control order save that the curfew period is now 18 hours. However the points of law raised by AP's appeal were said to be of some general importance with regard to control orders.

The three issues the Supreme Court had to reach a decision on in this appeal were as follows:

- Whether conditions which are proportionate restrictions upon article 8 rights to respect for private and family life can 'tip the balance' in relation to article 5 (which guarantees the right to liberty and security), ie whether they can be taken into account in holding that a control order is a deprivation of liberty when, absent those restrictions, it would not have been held to be such.
- Whether the judge can take into account subjective and/or person-specific factors, such as the particular difficulties of the subject's family in visiting him in a particular location, when considering whether or not a control order amounts to a deprivation of liberty.
- Whether it was permissible for the Court of Appeal to interfere with the first instance judgment on the ground that the judge had relied on findings of fact in respect of article 5 which were inconsistent with his findings of fact in respect of article 8.

JUDGMENT

The Supreme Court unanimously allowed the appeal, set aside the decision of the Court of Appeal and restored the High Court's order. Lord Brown gave the leading judgment. Lord Rodger and Sir John Dyson SCJ delivered concurring judgments.

REASONS FOR THE JUDGMENT

- By way of introduction, Lord Brown noted that the majority in the House of Lords in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385 held that deprivation of liberty might take a variety of forms other than classic detention in prison or strict arrest. The court's task was to consider the concrete situation of the particular individual and, taking account of a whole range of criteria including the type, duration, effects and manner of implementation of the measures in question, to assess their impact on him in the context of the life he might otherwise have been living. **(para [1])**
- In relation to the first issue, Lord Brown considered that the answer was surely an obvious "yes". If an article 8 restriction is a relevant consideration in determining whether a control order breaches article 5, then by definition it is capable of being a decisive factor – capable of tipping the balance. The weight to be given to a relevant consideration is, of course, always a question of fact and entirely a matter for the decision maker – subject only to a challenge for irrationality which neither has nor could have been advanced in this case. **(para [12])**
- Lord Brown was of the view that the Secretary of State was wrong to contend that, in assessing the weight to be given to the restrictive effects of a condition such as that imposed on AP here to reside in the Midlands, the judge should ignore everything that depends on the individual circumstances of the family – for example, on the facts of this case, that AP's mother has never left London alone and that during term time, because of the children, Sunday is the only day the family can travel. By the same token that it is relevant that, whilst AP must live in the Midlands, his family are in London, so too it is relevant whether their circumstances are such that their distance away so disrupts contact between them as to cause or substantially contribute to AP's social isolation. Plainly the family could not be allowed to thwart what would otherwise be an appropriate residential requirement by unreasonably failing to take opportunities open to them to visit AP and save him from social isolation. The correct analysis, however, is that in those circumstances it would be the family's unreasonable conduct and not the residence condition which was the operative cause of the AP's isolation. It is not

suggested by the Secretary of State that AP's family behaved unreasonably in failing to overcome more effectively the practical difficulties they faced in visiting AP on a more regular basis, only that their particular difficulties should have been ignored. That submission cannot be accepted. (para [15])

- In relation to the third issue, having considered the relevant parts of the High Court's judgment, Lord Brown held that there was no contradiction between them. (paras [16–18])

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html