Neutral Citation Number: [2007] EWCA Civ 1384

Case No: C5/2007/0130

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Asylum and Immigration Tribunal
HX196792004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2007

Before :

SIR MARK POTTER, PRESIDENT, FAMILY DIVISION
LORD JUSTICE WILSON
and
LORD JUSTICE MOSES

- -

Between :

KD (Sri Lanka)	**Appellant**
- and -	
SSHD	**Respondent**

- -
- -

Mr Philip Nathan (instructed by **Messrs Nag & Co**) for the **Appellant**
Ms Philippa Whipple (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 29TH November 2007

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Judgment

Lord Justice Moses :

Introduction

1. This is an appeal against a determination of Immigration Judge Saffer dated 13 October 2006 on reconsideration of the appellant's appeal against refusal of asylum and of his claim under Article 8 of the European Convention on Human Rights. It is primarily concerned with the consequences of the judge's erroneous approach to the operation of Article 8.

2. The judge's determination was made before the decision of the House of Lords in *Huang v SSHD* [2007] UKHL 11, [2007] 2 AC 167 and of this court in *AG (Eritrea) v SSHD* [2007] EWCA Civ 407. There is no dispute but that the Immigration Judge erred in law in assessing whether the appellant's case was "truly exceptional". It is the consequence of that error which gives rise to the essential controversy in the appeal. The appellant contends that the appeal should be sent back to an Immigration Judge for further re-consideration of his claim that his rights enshrined in Article 8 have been infringed. The Secretary of State asserts that the correct application of the principles according to which a claim under Article 8 must be judged will inevitably lead to its rejection.

3. This issue gives rise to a further dispute. The appellant, prompted by observations of Sedley LJ on giving permission, contends that the undisputed error of law affords him the opportunity to resurrect his claim to refugee status, rejected by the judge on the grounds that his account of the basis of his fear of persecution was not to be believed.

Facts

4. The appellant comes from Sri Lanka. He left in October 2001 with his wife and two sons (born June 1992 and July 2000). His wife was, at the time, pregnant with their third boy. He came via India, Turkey and France. In Sri Lanka he ran his own business; he owned houses and transport lorries. He claims that in Sri Lanka a lorry which he had hired out was found by security forces to contain weapons. He was detained firstly between May 2000 and October 2000, during the course of which he was badly beaten and threatened with death. There was a threat to kidnap his son. He was released by virtue of a substantial bribe. On release he received further threatening telephone calls following a bombing outrage and his wife was detained and raped in December 2000. He was further detained for a period of about one month between 26 July 2001 and 21 August 2001. He finally fled, as I have said, in October 2001. He explained that he had not left when his wife was abused because he had no work to go to and was unaware of what he should do.

5. Once in the United Kingdom he and his family have built a new and successful life for themselves. His claim for asylum took three years to determine. He has now been in the United Kingdom for six years. He has a successful building maintenance company which provides employment for fifteen British and EU Nationals. His family are involved in activities for the church and his elder son plays for the Yorkshire County Cricket Club under-15 Team. He takes justifiable pride not only in his own success but that of his children.

The Asylum Claim

6. Although the rejection of this claim was not the primary focus of the appeal, it is convenient to deal with it first. The Immigration Judge disbelieved the appellant. He identified a number of discrepancies in the appellant's account during his screening interview on 31 October 2001 when he first arrived in the United Kingdom. At that screening interview he made no mention of his detention, he merely suggested that a member of an underground movement had threatened to kill him and extorted money from him. He made no reference to his two periods of detention and ill-treatment. The judge rejected his explanation that he did not mention the discovery of the weapons or his arrest because of his fear of the police.

7. This ground for disbelieving the appellant was criticised by his counsel, Mr Nathan, because it gave insufficient weight to the appellant's own explanation that he could not be expected to give full grounds of his claim on his first arrival, confused and tired as he was, accompanied by two young children and his pregnant wife.

8. No authority is needed for the proposition that one seeking refugee status is not expected, when first arriving, fully to set out his claim to asylum, although asylum seekers are expected to tell the truth and discrepancies can legitimately be deployed in the assessment of credibility (see *YL (China)* [2004] UKIAT 00145 at paragraph 19). But in the instant appeal the Immigration Judge was entitled to place weight upon the absence of any reference to detention and ill-treatment but one month before the appellant left Sri Lanka and the absence of any reference to the trigger for the series of events which were said to give rise to a well-founded fear of persecution in the future, namely, the discovery of weapons in a truck he had rented out.

9. The Immigration Judge relied not only on that glaring discrepancy but on other inconsistencies which, had I been assessing credibility, I would not have regarded as of any significance. He noted the appellant's failure to mention the fact that he had rented his lorries to others. He suggested that the appellant's account that the authorities had telephoned to check whether he was in the house was implausible and that his reference to a fear of attempted kidnap of one of his sons was untrue since at the time he had two. Nor does it seem to me that the threats which he first attributed to an underground movement, but later attributed to state authorities, is of significance in the light of the appellant's asserted belief that the underground movement was linked to the authorities. But the Immigration Judge was entitled to rely upon such factors as some support for the significance he attached to the initial omissions in the first account the appellant gave.

10. Further, the Immigration Judge was entitled to rely upon the failure of the appellant to take his family away from Sri Lanka at the earliest opportunity in the light of the alleged problems to which he was exposed in 2000.

11. Realistically, in his grounds of appeal, the appellant accepted that he could not challenge the Immigration Judge's factual findings; he accepted they were not perverse. He was right to do so. Although, as I have indicated, part of the basis on which the Immigration Judge reached his conclusion seems insubstantial, it discloses no error of law. In the light, in particular, of the significant discrepancy in the appellant's initial account, the judge was entitled to disbelieve the appellant.

Article 8

12. The Immigration Judge concluded that the appellant's case was:-

> "not exceptional, let alone truly exceptional".

This confusion, between the test to be applied in assessing claims under Article 8 and the consequences of its application, was identified in *Huang* and explained in decisions in this court which have followed. The analysis of *Huang* in *AG (Eritrea)* would only suffer by any further exegesis. The test to be applied in assessing proportionality is that set out in paragraph 20 of Lord Bingham's speech in *Huang*. In *AG* Sedley LJ commented that he did not expect Article 8 claims to be any more successful following the House of Lords identification of the correct test. (See paragraphs 29-31.)

13. The Immigration Judge's errors did not, however, stop at his adoption of the erroneous test of exceptionality. The relevant parts of his determination read:

> "102. I accept that the Appellant has established a family and private life here as he has brought all his family with him and embedded themselves within the community through legitimate hard work and the building up of a business. I accept that he is involved with the church and his children are doing well at school and will inevitably have a wide circle of friends. Removal would interfere with those established rights.
>
> 103. I still have to go through all the stages of *Razgar* referred to above to see whether having interfered with his rights the other aspects of that five stage test are met.
>
> 104. In my judgment the interference would not have consequences of such gravity as potentially to engage the operation of Article 8 and comes nowhere near the high thresholds referred to above. Even if I am wrong such interference is in accordance with the law and is 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 given the Appellant has simply come here for economic betterment.
>
> 105. I accept that the family have now been here altogether for some five years. I am aware that some two years worth of the time the Appellant has spent here has been going through appeal procedures. However it took the Respondent three years to determine the asylum application. That is well in excess of the 22 months

referred to in *Ajoh*. The only explanation that could possibly be given is the overwhelming problems faced by the Respondent around that time by being swamped with asylum applications and simply not having the resources to deal with them. It has recently been said by the current Secretary of State for the Home Department that the Department he took over was not fit for its purpose. As stated in *Ajoh* the Secretary of State was required to reach a decision within a reasonable time unless there was a good excuse for not doing so. In my judgment not having sufficient staff to deal with issues of providing international protection to people is not a good excuse. I also bear in mind *Shkembi* and the statements by the then Secretary of State for the Home Department that it would be disproportionate and wrong to remove families already embedded in our community and that he was granting an amnesty to families who had been here for over three years. This family was here for three years when a decision was taken on their case and whilst they came after the period referred to by the then Home Secretary I do not accept that the statement can refer to one group of people and not another. It is my judgment that what he said was a policy in relation to the issue of proportionality and not merely a concession.

106. The statement by the then Home Secretary on proportionality does not in my judgment affect this situation because in order to succeed under Article 8 all five of the *Razgar* tests have to be met and in this case only the first and fifth are. The other three are not.

107. On one final point I have noted the evidence of Mrs Joyce of seeing the family home. There is no indication of when that picture was taken. It is my judgment that all that had happened is the Appellant has found himself in financial difficulties from having had business success in the past and has come here for a better life. The business he has built up is laudable. The employees would be able to find alternative work because if he is not employing them then somebody will step in to fill the gap and inevitably they will simply go to the jobs and whoever pays them they will be happy to receive payment. The children will be able to reintegrate themselves into life in Sri Lanka where they have the prime and protective support of their parents and no doubt extended family in a culture into which they had been born. I note that both the Appellant and his wife gave evidence through an interpreter. I do not accept it is reasonably likely they would not speak their

> mother tongue with the children. They therefore will be fully conversant with the language and be able to reintegrate themselves within the school system."

14. This passage discloses a number of serious errors. Firstly, the Immigration Judge erred in his application of the five questions posed by Lord Bingham in *R (Razgar) v Home Secretary* [2004] 2 AC 368 at 389:-

> "(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 wellbeing 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?"

15. The Immigration Judge plainly erred in his conclusion that the *interference would not have consequences of such gravity as potentially to engage the operation of Article 8, and comes nowhere near the high thresholds referred to above*. As Sedley LJ explained (at paragraph 28 in *AG (Eritrea)*) the threshold for an engagement of Article 8(1):-

> "…is not an especially high one. Once the article is engaged, the focus moves, as Lord Bingham's remaining questions indicate, to the process of justification under Article 8(2). It is this which, in all cases which engage Article 8(1), will determine whether there has been a breach of the article."

16. Quite apart from the fact that the Immigration Judge's conclusion at paragraph 104 is not supported by any reasoning, it is apparent that he applied far too high a test. It was accepted by the Secretary of State that Article 8(1) was engaged.

17. The second error, as it seems to me, relates to the second part of the same paragraph 104. The Immigration Judge appears to have been under the impression that if the interference was in accordance with law and necessary in a democratic society the appellant is bound to fail (see his paragraph 106). But there never was and never could be any dispute about those requirements of Article 8(2). The fact that the interference was in accordance with immigration law and necessary for the control of

immigration was not in dispute. But those requirements could never be dispositive otherwise no claimant would ever be able to establish that interference with his Article 8(1) rights was disproportionate.

18. This error appears to be one of the reasons why the Immigration Judge refused the human rights appeal. I say that because it is apparent that the Immigration Judge found that the fifth test was satisfied, in other words that the claimant had succeeded in establishing that interference with Article 8(1) was not proportionate. Accordingly, he appears to have rejected the claim on the grounds that Article 8(1) was not engaged and because the interference was in accordance with law, and necessary in a democratic society, even though the decision to require the family to return to Sri Lanka was disproportionate.

19. The explanation for the judge's view that, as he put it, the fifth test was met, appears to lie in paragraph 105. He seems to have taken the view that the fact that it took the Secretary of State three years to determine the asylum application amounted to culpable delay during which the family had become embedded in the community. Paragraph 105 does not state any conclusion but the only way of making sense of it, reading 105 and 106 together, is that by reason of delay which the Immigration Judge regarded as blameworthy, the family had embedded itself into the community and thus it would be disproportionate to remove them.

20. Accordingly, in my view, the judge's conclusion was founded on three errors of law: Article 8(1) was not even potentially engaged, interference was in accordance with law and necessary in a democratic society was dispositive and, thirdly, that the case was not truly exceptional. All those errors of law infected his conclusion.

21. But not all the judge's errors of law were in favour of the Secretary of State. Paragraph 105, dealing with delay which the judge regarded as culpable, was written without the benefit of the decision of this court in *HB (Ethiopia) and Others v SSHD* [2006] EWCA Civ 1713. This appellant and his family had no potential rights under immigration law. Accordingly:-

> "(iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy…) and persons who have no such right.
>
> (v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under Article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under Article 8(2), but it must have very substantial effects if it is to influence the outcome." (paragraph 24)

22. As Miss Whipple, on behalf of the Secretary of the State, pointed out, although the appellant has been with his family in this country for six years, the delay was only for three. The delay afforded the opportunity for the appellant and his family to establish

themselves in this country but otherwise is, as a matter of law, of no further significance.

Disposal of the Appeal

23. The real controversy in this case turns on whether the appellant should be permitted to try, once again, to establish that removal would constitute a breach of his rights enshrined in Article 8. If this court takes the view that any such further application is bound to fail, then the appeal should be dismissed. There is no basis for a further hearing.

24. In deciding whether the appellant has any realistic chance of success at a further hearing, I would reject the approach advanced by Mr Nathan on behalf of the appellant to the effect that there is always the chance that a decision would fall to be determined by a benign Immigration Judge. It is inevitable and appropriate that there can be no certainty as to conclusions such as these which depend so much upon the value judgment of the particular fact finder. But it is incumbent upon this court to make its own judgment without regard to the fact that others might take a more or less favourable view.

25. We must recall that this court has repeatedly emphasised since *Huang* that the number of those who will be entitled to succeed under Article 8 will be "a very small minority". For that reason the second principle contained in paragraph 24 of Buxton LJ's judgment in *HB,* required the adaptation suggested by May LJ in *R (A) v SSHD* [2007] EWCA Civ 655 at paragraph 30. In that case May LJ said of the appellant's Article 8 family life claim:-

> "The balancing question for the court upon an intense scrutiny appropriate to the subject matter is whether Mrs A's case, which was hopeless at the time of her application, became one of that very small minority by reason of the passage of…the thirteen months between February 2004 and March 2005." (Paragraph 36)

There is always a danger that, if this court persists in emphasising that only a very small minority will succeed, that observation will be elevated into the very test rejected in *Huang*. The number of people who are likely to succeed is only relevant for the purpose of emphasising the stringency of the test explained by Lord Bingham in paragraph 20 of *Huang*.

26. To my mind, it is important to appreciate that whilst there will be interference with the *private* life of the appellant and his family in uprooting them from the United Kingdom, their *family* life will not be otherwise interfered with. The family can stay together. Moreover, there is no inhibition on their return to Sri Lanka since the judge concluded that the appellant and his wife spoke in their mother tongue to the children. He took the view that the children could reintegrate themselves into the life of the country.

27. This is, therefore, not a case where the family will be divided if some of them are forced to return. Further, the lies that the judge was entitled to find the appellant had told, are a factor in concluding whether it was disproportionate to force immigration

control. Quite apart from the need to ensure that the system is fair and consistent, such lies must have led an intelligent man, like the appellant, to appreciate that his time in the United Kingdom was precarious.

28. For the two crucial reasons I have sought to identify, namely that the appellant and his family could reintegrate themselves without difficulty in Sri Lanka and the false basis upon which the appellant sought to establish himself and his family in this country, I take the view that he has no realistic chance of success in establishing that it will be disproportionate to require the appellant and his family to leave. I would dismiss this appeal.

Lord Justice Wilson:

29. I agree.

Sir Mark Potter, P:

30. I also agree.