Judgments

Neutral Citation Number: [2014] EWCA Civ 163

C5/2013/1648

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice

Strand

London, WC2

Wednesday, 5th February 2014

B E F O R E:

LORD JUSTICE MAURICE KAY

(VICE-PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION)

LORD JUSTICE ELIAS

LORD JUSTICE TOMLINSON

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MA (PAKISTAN)

Claimant/Applicant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Respondent

(Digital Audio Transcript of

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Official Shorthand Writers to the Court)

Mr A Pipe (instructed by Khan & Co Solicitors) appeared on behalf of the Applicant

Mr C Bourne (instructed by The Treasury Solicitor) appeared on behalf of the Respondent

J U D G M E N T

(**Approved**)

1. LORD JUSTICE ELIAS: This is an appeal against a deportation order made by the Secretary of State under the UK Borders Act 2003. There was an unsuccessful appeal to the First-tier Tribunal but that decision was set aside. There was an entirely fresh hearing before the Upper Tribunal (Upper Tribunal Judge Perkins and Deputy Upper Tribunal Judge Pickup). They also rejected the appeal. It is against that decision that the applicants now seeks permission.

2. The case was considered on paper by Sir Stephen Sedley, who sent it to the Full Court to consider, first, the question of permission and, if granted, to go on to hear the appeal.

3. The background is as follows. The appellants in this case are a family from Pakistan. The husband and father Muhammed Aziz was born on 3rd September 1965 and he is now 48. He worked as a medical doctor in Pakistan. He came to the United Kingdom in 2005, working as a highly skilled migrant. His wife is 37 and his children are now 14, 11 and 8 but they were about 6, 3 and 1 when they came into the United Kingdom. He was convicted after a trial on three counts of possessing criminal property. These are money laundering offences. They were part of a large scale operation of trafficking of Class A drugs. One of the leading figures in that operation was a man called Mr Chapni, who is a cousin of the appellant. He is said to be a man of some considerable political influence in Pakistan. He was on bail pending the trial in relation to this conspiracy to deal in drugs when he escaped to Pakistan. As a consequence he was not tried.

4. The judge in his sentencing remarks noted that about £1.5 million had passed through the hands of the applicant but he sentenced him only on the basis that he was involved in the sum of £450,000, that being the amount involved in the three particular counts for which he was convicted. He was sentenced to 3 years. The judge also made a recommendation that he should be considered for deportation. The judge said:

"I am satisfied that, for the reasons I have given, you constitute a genuine and sufficiently serious threat to the requirements of public policy..."

5. As a result of his recommendation the matter was considered by the Secretary of State. MA was allowed to make representations but the deportation order was made.

6. The basis of the original conclusion by the Secretary of State was that the case fell within section 3(5) of the Immigration Act 1971. That essentially provides that where the deportation of a person who is not a British citizen is considered to be conducive to the public good and then the Secretary of State may deport him. Section 32 of the UK Borders Act then provides that where a foreign national is sentenced to a sentence of imprisonment of at least 12 months, the Secretary of State must make a deportation order in respect of him. But there is an exception in section 33 which says that the removal of the foreign criminal in pursuance of the deportation order should not be made if it would breach a person's rights under the Refugee Convention or the Human Rights Convention. It is necessary that a court considering the exceptions must take into account not only the situation of the criminal himself but other members of his family who will be affected by the deportation order.

7. The case, as I said, came before the Upper Tribunal considering the matter de novo. There are essentially two grounds of appeal. First, it was said that there was a real risk of ill treatment under Article 3 of the Human Rights Convention. The basis of that submission was that there was evidence that this applicant had threats to his life made by his cousin, Mr Chapni, that these were realistic threats, and that in the circumstances he should not be sent back to Pakistan.

8. The second ground of appeal was an Article 8 claim. This was not with respect to his own situation, or indeed of his wife, but with respect to his four children. The basis of the claim was that they had developed their own rights to family life and private life in the UK and it would be disproportionate in all the circumstances, given that they had been here for 7 years and given their respective ages, to send them back to Pakistan.

9. The Upper Tribunal considered both these arguments and they rejected them. The relevant findings they made in relation to the Article 3 claim can be summarised as follows. First, they accepted that threats he had been made against the life of this applicant by Mr Chapni. There was a letter which had been sent in November 2008, in which Chapni had alleged that his business had closed down and he had suffered a loss of millions of pounds as a result of the fact that the applicant had given information to the police. He stated in that letter that he had "lots of access in the UK" and he said: "So far you have experienced my friendship, now you can experience my animosity".

10. The Upper Tribunal also accepted that there had been some evidence given to the police by the applicant although they commented that they were not sure how significant it was. There was no reference to it in the sentencing remarks. One would not of course expect any direct observation to the effect that assistance had been given to the police, but nor is there any hint in the sentencing remarks that sentence had been reduced because of co-operation or anything of that kind. Nor was there any independent evidence from the police that helpful information had been given. Nonetheless the Tribunal did accept that some information had been given. They also accepted that there had been some threatening telephone calls to the house of the applicant. They were not satisfied that there were threats made to his mobile phone, as he alleged. Nonetheless, notwithstanding these threats, the Upper Tribunal concluded that he did not face a real risk of serious harm on return to Pakistan essentially for two reasons. First, they concluded that Mr Chapni was not as powerful as the applicant had alleged. They noted that there was no public document or anything of that kind which demonstrated that he was a real man of influence and they thought there would have been some evidence if that had been the case.

11. Second, it was the applicant's own case that he was at risk even in the United Kingdom because of the influence of Mr Chapni and the Tribunal observed that he had come to no harm thus far. That was a relevant consideration in their conclusion that he would not be at risk on return to Pakistan. It was suggested that being a doctor he would have to register in Pakistan in order to practise. But the Tribunal concluded that in any event he did not have to register if he were going to engage in some other occupation. He was an intelligent man who could do other work if necessary. The Upper Tribunal also concluded, at paragraph 115, that although there would be some parts of the country where he

could not sensibly be expected to relocate because he did not speak the local language, nonetheless there would be many places where he could. So even if he were at any real risk from Mr Chapni, he would be able to avoid the potential adverse consequences by relocating out of his way

In my judgment there is nothing at all wrong with this analysis. The appellant has challenged it but in truth has identified no error of law in the analysis. I would therefore reject the appeal in relation to article 3.

12. In relation to the Article 8 claim the Tribunal carefully considered the position of the children. It was satisfied that they had established both private and family life in the UK. The Tribunal noted that they had been in the country for more than 7 years and they said this about that length of time:

"There is no inherent quality residence of 7 years. It is not to be found in residence for similar but slightly shorter or longer periods."

The Tribunal went on to say that in the circumstances and notwithstanding their settled and secure residence in the United Kingdom, it was not disproportionate under Article 8(2) to remove them from the country along with their father and mother. They recognised that it was in their best interest to remain in the United Kingdom because they were settled and because the future in Pakistan was somewhat precarious, but they also observed at paragraph 123 that their best interests were likely to be best served by remaining in close contact with their parents. They did not consider the Article 8 rights were sufficient in all the circumstances to override the imperative of removal of someone who had committed such serious crimes as had their father. The Tribunal also noted that their presence in the United Kingdom had always been precarious because neither they nor any other member of their family had indefinite leave to remain. Effectively, therefore, their rights were trumped because of the public interest in removing their father who had committed such a grave criminal offence.

13. There is a third finding which the Tribunal made, which is also challenged in the context of this application. It is the determination by the Tribunal that the applicant posed a real risk of committing offences in the future. The effect of that was that pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 he could not advance any claim that his removal would constitute a breach of the Refugee Convention. However, that conclusion did not impact on his right to allege that his removal would infringe Article 3. As I indicated, that was a matter that was considered by the Tribunal. I will come back to the significance of this third finding later in this judgment.

14. I turn to the principal grounds of appeal which concerned article 8. The submission in relation to the children was essentially this. It was said that the Tribunal ought to have given more significant weight than it did for the fact that the children had been here for more than 7 years. It was pointed out that historically in UK immigration law, 7 years' residence has been considered to be a real significance for children and indeed under rule 276 of the Immigration Rules it is provided that if an applicant:

"is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK..."

then in principle he should be allowed to remain.

I note that the provision only applies where "it would not be reasonable to expect the applicant to leave the UK". Of course the Tribunal in this case thought that it was.

15. In addition reference was made to certain decisions of Blake J, for example EM (Zimbabwe) [2011] UK AIT 98 where he said at paragraph 380:

"In the absence of any other policy guidance from the Secretary of State, it remains legitimate for Immigration Judges to give some regard to the previous policy that seven years residence by a child under 18 would afford a basis for regularising the position of the child and parent in the absence of conduct reasons to the contrary..."

16. It seems to me that all the judge is saying is that a Tribunal will not err if it recognises, as a general indication of the period which might be thought appropriate to establish a right to remain under Article 8, that 7 years has often been considered an appropriate period. But again, that is only a starting point and there may be reasons which justify removing the applicant and the child in any particular case. That was the position here. All the Tribunal was saying, in my view, when they referred to the 7 year rule not having any particular status, is that it did not in any sense alter the balancing exercise which the Tribunal had to carry out. There was no different balancing act if a child was just under 7 years than if a child was just over 7 years. It is the quality and the length of the period which has to be taken into consideration. The Tribunal did that here and they were satisfied that family rights were very well established but concluded in the circumstances that the children were entitled to be removed.

17. It seems to me that there is no error of law at all in that determination mentioned by the Tribunal which Tribunal itself said they found this the most problematic of the issues here to determine. But they reached a conclusion which, in my view, they were wholly entitled to reach.

18. It is in this context that the issue potentially arises as to whether the Tribunal was entitled to conclude that the applicant was at risk of committing offences in the future. Mr Pipe, in extremely able argument, contended that the Tribunal had erred in that analysis. He submitted that the consequence of that was that when carrying out the balancing exercise under Article 8(2) the Tribunal would have weighed against the interests of the children the fact that their father had not just committed a serious crime but also was a person who might commit offences in the future. He said that if the Tribunal's finding on that could be challenged, then it affects the Article 8 balance. The basis on which he said the Tribunal was not entitled to conclude that the applicant was a serious risk in the future was essentially that this was his first offence, that he had committed no offences since, and that the OASys analysis carried out by the probation officer had put him at a low risk of re-offending. It is to be noted however that the low risk was still a 17% chance of re-offending within 2 years.

19. The Tribunal considered all these matters but it concluded that there was a serious risk that he would commit offences in the future for two reasons, first the gravity of the offending but secondly, and in any event, they put weight on the fact that he had not faced up to his criminal offences. He was still in denial; his case was he was innocent and had been improperly convicted. They added that although he had kept out of trouble since his conviction, he had done so at a time when he knew he would be under extreme scrutiny and therefore not too much weight ought to be given to that fact. They concluded therefore that he was a danger to the community. The particular point advanced by Mr Pipe in relation to this finding is that they ought not to have departed from the OASys analysis without giving careful and cogent reasons why they were so doing. He referred the court to the decision of Pitchford LJ in AN v Secretary of State Home Department, where Pitchford LJ commented at paragraph 34 that in general a Tribunal ought not to depart from the determination made by a probation officer in an OASys assessment without a proper and adequate explanation. Mr Pipe submits that there was no adequate assessment by the Tribunal in this case of the OASys report and no proper

justification for departing from it.

I do not accept that. It seems to me that the Tribunal has made it plain that it simply puts more weight than the probation officer would have done on the fact that that the applicant has never accepted his guilt. Perhaps more importantly, what may be an assessment of low risk for the purposes of criminal sentencing is not necessarily to be considered a low risk when looking at the future behaviour of this applicant. A risk of 17% re-offending over a 2-year period is not, in my judgment, in the context of a deportation case a matter which can be treated as insignificant. It is a good reason for supporting a decision to deport.

20. Furthermore, it is plain that when considering Article 8 cases and looking at the public interest the court has to focus not simply on the risk of re-offending and indeed not principally on the risk of re-offending but it must also consider the wider public interest and in particular what Judge LJ described N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1094 as:

"... broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged."

Judge LJ emphasised the importance of deterrence to non-British citizens who are here, and also public revulsion at the crimes committed. When the Tribunal made their Article 8 assessment they concluded that "the children's interest were not of a sufficient weight to override ..the imperative of removal of someone who had committed such serious crimes." That imperative of removal is not simply linked to future risk of re-offending, it is also linked to the wider public interest which I have outlined. Accordingly, in my judgment, even if, contrary to my view, the Upper Tribunal erred in the assessment of future risk, nonetheless it seems to me it would not have had any real bearing on the balancing exercise that the Upper Tribunal had to carry out when considering the Article 8 interest of the children.

21. It follows that, in my judgment, there is no proper basis on which either the Article 3 conclusion, or the Article 8 conclusion of the Upper Tribunal could successfully be challenged as demonstrating any error of law. I have left account the additional point that this is a second appeal. For myself, if I felt there was real force in the submissions made by Mr Pipe and in particular, if I felt that there was a real prospect of an Article 3 claim succeeding on behalf of the father, then given that the First-tier Tribunal decision was set aside entirely, I would not have refused permission to appeal on the grounds that this was a second appeal. It seems to me it is a kind of case, if sufficiently meritorious, which would have justified being considered by the Full Court. But I would refuse the application for permission.

22. LORD JUSTICE MAURICE KAY: I agree.

23. LORD JUSTICE TOMLINSON: I also agree.