Case No: C5/2018/2046

Neutral Citation Number: [2019] EWCA Civ 417
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 12 February 2019

Before:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(THE LORD BURNETT OF MALDON)
and
LORD JUSTICE HICKINBOTTOM

Between:
AS

Applicant

- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr B Bedford (instructed by **Freedom Solicitors**, Great Hampton Street, BIRMINGHAM B18 6EW) appeared on behalf of the **Applicant**

Ms K Apps and **Ms R Bergh** (instructed by **the Government Legal Department,** LONDON WC2B 4TS) appeared on behalf of the **Respondent**

Judgment
(Approved)

THE LORD CHIEF JUSTICE:

1. The applicant, who is an Afghan national, was convicted, on his guilty plea, of a serious offence of money-laundering and on 19 December 2012 was sentenced to five years' imprisonment. A deportation order was made on 4 July 2016. The applicant sought to resist deportation on two bases: first, he argued that he was a refugee; and, secondly, he relied upon Article 8 of the European Convention on Human Rights. He rested his argument on the impact of his deportation upon his daughter, Y, who was born on 18 February 2012. Immigration Judge Andonian allowed his appeal on Article 8 grounds in a decision promulgated on 18 January 2018. Upper Tribunal Gill reversed that decision on 16 April 2018.

2. This is the applicant's application for permission to appeal against the order of Upper Tribunal Judge Gill. The primary ground of appeal is that, in determining the Article 8 appeal, Judge Gill failed to take the balance sheet approach advocated by Lord Thomas of Cwmgiedd CJ in *Hesham Ali v SSHD* [2016] UKSC 60, [2016] 1 WLR 4799 between paragraphs 83 and 84. Mr Bedford, who appears this morning on behalf of the applicant, submits that the oversight was material because it resulted in Judge Gill failing to give sufficient attention and weight to various factors in this case. He submits that had she done so, the outcome would have been different. In short, Upper Tribunal Judge Gill concluded that the argument advanced by the appellant resting upon Article 8 was unsustainable given the factual findings made by Judge Andonian. Mr Bedford's argument, distilled to its bare essentials, is that there was a proper range of outcomes available on those facts and it was open to the First-tier Tribunal Judge to conclude as he did.

<u>The Facts</u>

3. The applicant arrived in the United Kingdom without leave on 7 October 2008. He was then 18 years old. He has been in the United Kingdom ever since without leave. The applicant developed a relationship with a British woman, who is the mother of Y. The applicant was in prison for the early years of Y's life but, although no longer in a relationship with her mother, developed a relationship with Y after his release. Y and

her mother lived in London, close to Y's grandmother. In early 2016 the applicant moved from the Midlands, where he was then living, to London. He moved in with Y's grandmother and saw Y on what was described by the First-tier Tribunal judge as almost a daily basis. To enable Y's mother to pursue her work, arrangements within the family had Y staying for two or three nights a week with her father and grandmother. The effect was that the father developed a close bond with his daughter. He would often take her to school and pick her up from school and take her to and from her grandmother's. He looked after her, cooked for her, bathed her and so on. Thus, subject to the underlying reality that the parents were not living together, this applicant developed a normal, loving relationship with his daughter. It was not in dispute before the First-tier Tribunal that the applicant had such a relationship. Were he to be deported, there would be no question of Y following him to Afghanistan. It was recognised by the First-tier Tribunal judge that visits would be impracticable for all sorts of reasons. Contact could, no doubt, be maintained by phone, Skype, WhatsApp and the like, but the relationship would be fractured, to the undoubted detriment of Y, quite apart from the impact on the applicant himself. As the First-tier Tribunal judge put it:

> "I understand and believe if the appellant was deported this may well bring an end to the relationship and a bond he has now established with his daughter and she may well suffer psychologically, emotionally and mentally as a result of the report of the independent social worker."

4. The distinctive feature of this case was recorded by the First-tier Tribunal judge in paragraph 28 of his determination.

> "The appellant said that his daughter is of mixed ethnicity and mixed religious background. He said he was an Afghan Muslim whilst Y's mother and all the mother's family are British and are not Muslims. He said that he was sure that he and Y's mother would encourage their daughter to explore her Afghani culture and heritage, but that the mother cannot teach Y about the Afghan background in the way that the appellant said that he could."

Similar evidence was given by both the mother and grandmother, recognising that they would do their best to support Y in an understanding of her mixed heritage. The

position was that Y was not being brought up in any particular religion, and the expectation appears to be that at some stage she might be in a position to make up her own mind about that. Thus, in addition to the reality of disruption in the relationship between father and daughter, at the heart of the factual position relied upon in support of the Article 8 claim was that Y would be less likely to learn about and understand her Afghan and Muslim heritage.

5. On the 19 June 2012 the applicant pleaded guilty on the first day of his trial. The offence was described by the judge as "intricate, highly sophisticated and involved numerous layers of personnel", with £120 million (most of which was, as it happens, derived from drug trafficking) being sent abroad. The applicant worked in a money exchange, set up for the purpose of the money-laundering enterprise. He worked there for ten months from its opening and created false records in respect of about £17 million to disguise the criminal source of the funds.

The Statutory Provision

6. Section 32 of the UK Borders Act 2007 provides for the automatic deportation of foreign criminals sentenced to at least 12 months' imprisonment. Section 33 of that Act provides an exemption from deportation if it would breach a person's rights under the Convention. In respect of the human rights ground, where a court is required to determine a person's right under Article 8 in this context, sections 117A-D of the Nationality, Immigration and Asylum Act 2002, as amended, apply. Where any court is considering the question of whether an interference with a person's right to respect for private and family life is justified under Article 8, it must take into consideration that "the maintenance of effective immigration controls is in the public interest." That is provided by section 117B((1). Where, the relevant person is a foreign criminal, the factors set out in section 117C must be taken into consideration, namely, so far as relevant:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where
>
> > (a) C has been lawfully resident in the United Kingdom for most of C's life,
> >
> > (b) C is socially and culturally integrated in the United Kingdom, and
> >
> > (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

This application is not concerned with Exception 1, which is set out in subsection (4). These statutory provisions are reflected in the Rules between Rule 390 and 390A and 396 and 399, but it is unnecessary to set them out separately.

7. The terms of subsections (5) and (6) make clear that, to avoid deportation on Article 8 grounds, a foreign prisoner sentenced to more than four years' imprisonment must show that the impact on the child or partner (as the case may be) must be more than unduly harsh. See the discussion in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662, [2017] 1 WLR 207 in the judgment of Jackson LJ between paragraphs 29 and 34.

8. The determination of the First-tier Tribunal Judge was very detailed, but most of it was concerned with the asylum claim, which he rejected. There was no appeal to the Upper Tribunal in respect of that aspect of the case. The Article 8 claim was considered between paragraphs 95 and 100. The First-tier Tribunal Judge noted the statutory provisions and that the test was one of very compelling circumstances. He accepted that the applicant saw his daughter almost daily and that there was a strong bond between the two. He concluded:

> "…the best interests of the child are not the only or paramount consideration and must be balanced against other relevant factors including the public interest in deporting foreign criminals and to determine whether the appellant's determination is proportionate… taking all matters in the round, I also note that the appellant is remorseful and that he knows what he has done was wrong and that is why he pleaded guilty on the first day of the trial. I believe for the reasons already stated as regards this Article 8 claim that in this case it is considered sufficient enough to outweigh the public interest in his deportation. I understand and believe if the appellant was deported, this may well bring an end to the relationship and the bond he has now established with his daughter."

The Appeal to the Upper Tribunal

9. The Secretary of State appealed. As I have indicated, the essence of the appeal was that the factual position underpinning this family relationship and the consequences for the applicant's deportation could not provide a sufficient foundation to surmount the statutory requirement in section 117C(6). It is important to observe that Judge Gill accepted the primary findings of fact of the judge below. Indeed, she quoted in full that part of the underlying determination which dealt with the judge's conclusions on those facts, underlining the most material parts. She concluded that, whilst the First-tier Tribunal Judge had identified the correct principles, it was clear that he had not applied them in practice. Her conclusion was that the circumstances would not have surmounted the hurdle in section 117C(5), let alone provided the very compelling circumstances over and above those factors required for section 117(6). Judge Gill found that the only way in which the judge below could have reached his conclusion that the public interest was outweighed was by impermissibly placing little or no weight on the state's interest in deportation or by treating Y's interests as the paramount consideration despite indicating to the contrary. Accordingly Judge Gill set aside the decision of the First-tier Tribunal and allowed the appeal on Article 8 grounds. She remade the decision on the basis that the case could not reasonably constitute very compelling circumstances. In the result, she dismissed the applicant's appeal.

This Appeal

10. Mr Bedford advanced a number of submissions in his Grounds of Appeal and skeleton argument, which he refined in the course of the argument before us. First, he submits that Judge Gill failed to place sufficient weight on the risk that Y would be deprived of an opportunity fully to appreciate her Afghan and Muslim heritage. He submits that Judge Gill appears to have decided that this factor could not amount to very compelling circumstances, in particular the religious aspects of the matter. I do not read Judge Gill's determination as making such a finding. It is clear to us that she took the circumstances arising from Y's mixed heritage fully into account. Mr Bedford prayed in aid the United Nations Convention on the Rights of the Child as supporting the proposition that a child's right to understand its heritage is an important part of its identity. I have no difficulty at all in accepting that such a factor is one that falls to be weighed in an Article 8 case. But it is abundantly clear, in my judgment, that both the First-tier Tribunal Judge and thus Judge Gill, who accepted his findings of fact, took that factor fully into account.

11. Mr Bedford submits that Judge Gill had effectively decided that the underlying appeal was unarguable and he makes the point that such a finding is incompatible with the absence of a certificate from the Secretary of State. In the course of argument this was discussed in the context of dancing on the head of pins. The basic ground of appeal was that the factual findings could not support the conclusion reached by the First-tier Tribunal Judge. It was that ground of appeal which Judge Gill accepted.

12. Next, it was submitted that Judge Gill failed to take fully into account the harm that deportation would cause to Y. But I repeat that she proceeded entirely on the basis of accepting the factual findings of the First-tier Tribunal judge, which set out those adverse consequences.

13. Mr Bedford submits that the judge failed to take into account various details of the case advanced by the applicant below and as a result erred in her conclusion. With respect to that argument, It founders on the fact that Judge Gill rested upon the factual findings

of the First-tier Tribunal judge, and in those circumstances it seems to me impossible to argue that she failed to take those matters into account.

14. That brings me to the argument that Judge Gill failed to follow the balance sheet approach to the question of justification of an adverse impact on Article 8 rights as advocated in the case of *Hesham Ali*. The nature of the appeal before the Upper Tribunal was straightforward. As I have indicated, it was that the circumstances, as found by the First-tier Tribunal judge, could not on any view amount to "very compelling circumstances" for the purposes of section 117C(6). In my judgment, Upper Tribunal Judge Gill's conclusion on that issue was undoubtedly correct. She took trouble in her determination to quote both the statutory provisions and extensively from *NA (Pakistan)* to make clear that she was applying the correct test. The findings of the First-tier Tribunal judge, which were set out in full, identified comprehensively the factors that went into the balance for Article 8 purposes. Failure to include a balance sheet in a determination does not give rise to an independent right of appeal if otherwise the assessment of the issues is satisfactory and appropriate.

15. This was not an ordinary Article 8 case, but even in cases which call for an assessment by reference to the test whether deportation would be "unduly harsh" or whether there are "very compelling circumstances" which trump the public interest in deportation, a balance sheet approach by any judge making the assessment is desirable. In *Hesham Ali*, Lord Thomas of Cwmgiedd said at paragraphs 83 and 84:

> "83. One way of structuring such a judgment would be to follow what has become known as the 'balance sheet' approach. After the judge has found the facts, the judge would set out each of the 'pros' and 'cons' in what has been described as a 'balance sheet' and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.
>
> "84. The use of a 'balance sheet' approach has its origins in Family Division cases (see paras 36 and 74 of the decision of the Court of Appeal In re B-S (Children) (Adoption Order: Leave to Oppose) [2014] 1 WLR 563). It was applied by the Divisional Court in Polish Judicial Authority v Celinski [2016] 1 WLR 551 to extradition cases where a similar balancing exercise has to be undertaken when article 8 is engaged - see paras 15-17. Experience in extradition cases has

> since shown that the use of the balance sheet approach has greatly assisted in the clarity of the decisions at first instance and the work of appellate courts."

16. The value of this approach continues to be demonstrated on a daily basis in the extradition field. It is becoming more common in immigration cases as a result of Lord Thomas's observations in the *Hesham Ali* case. As Lord Thomas explained, decisions at first instance are clothed in greater clarity when such an approach is adopted. That assists not only an appellate court but also the parties. It is a truism that the parties want to know why they have won or lost and are less interested in expansive reasoning, unnecessary citation from authority or lengthy disquisitions on the law. Where an appellate body is remaking a decision, such a balance sheet approach would also have value.

17. This approach should be coupled with a further desirable feature of first-instance decision-making of a relatively straightforward legal nature, namely a statement of the applicable principles drawn from as few governing authorities as possible. The result is likely to be shorter and clearer first-instance decisions. That, for obvious reasons, would be beneficial to all concerned.

18. We pay tribute to the thorough arguments that Mr Bedford advanced, both in writing and orally before us this morning, but in my judgment, there is no legal merit in the grounds advanced and this application for permission must be refused.

19. I would direct that this judgment, although a decision on an application for leave to appeal, may be cited as authority.

LORD JUSTICE HICKINBOTTOM:

20. I agree. I would particularly align myself with the Lord Chief Justice's observations on the approach to claims engaging Article 8 including those subject to sections 117C and 117D of the 2002 Act.

Order: Application refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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