KJ ("Own or occupy exclusively") Jamaica [2008] UKAIT 00006

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House
16 October 2007

Date of Hearing:

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Waumsley

Between

KJ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr P Richmond, instructed by Alexander & Partners
For the Respondent: Mr G Saunders, Home Office Presenting Officer

The requirement in the Immigration Rules that a person "own or occupy exclusively" property does not carry any technical legal meaning of exclusive occupation. It is sufficient if there is a defined place where the person lives and which he has as his home, with the implication of stability that that implies.

DETERMINATION AND REASONS

1. The appellant, a citizen of Jamaica, appealed to the Tribunal against the decision of the respondent on 8 June 2007 refusing to vary his leave in order to allow him to remain in the United Kingdom as a person exercising rights of access to a child who is resident here. The Immigration Judge dismissed the appeal. The appellant sought and obtained an order for reconsideration.

2. The Immigration Rules relevant to this appeal are in paragraph 248A of the Statement of Changes in Immigration Rules, HC 395. We are concerned only with sub-paragraph (ix), which requires that:

> "There will be adequate accommodation for the applicant and any dependants without recourse to public funds in accommodation which the applicant owns or occupies exclusively."

The ground for refusal, as set out in the notice of decision, was that:

> "The Secretary of State is not satisfied that your son can and will be accommodated adequately without recourse to public funds in accommodation which you own or occupy exclusively."

3. The appellant lives with his girlfriend and her son in a flat of which she is the tenant. There are two bedrooms: they share one, and the appellant's girlfriend's son has the other. The appellant's son (the child to whom he has rights of access) has never yet needed accommodation overnight with the appellant. If he did stay with the appellant, however, he could share the second bedroom with the appellant's girlfriend's son without causing statutory overcrowding. There is no doubt that the appellant's girlfriend's flat provides adequate accommodation for herself and her son and the appellant; and would also accommodate the appellant's son adequately. The question is whether it is properly described as accommodation "which the applicant [that is to say the appellant] owns or occupies exclusively". Mr Richmond submits that the Immigration Judge failed to make it clear whether he regarded the appellant as occupying the flat in which he lives with his girlfriend. It is, however, clear that he decided that he did not occupy it exclusively. Mr Richmond's grounds for review set out a dictionary definition of "occupy" but not of "exclusively". He does neither himself nor his client any favour by setting out extracts from a few unreported Tribunal decisions, with no regard to the Practice Direction and little regard to the fact that at least one of them has reference to a different formulation of the Immigration Rules. In the circumstances we have not been able to find very much assistance in previous authority and must do our best to decide what the requirements in the Immigration Rules are intended to mean, assisted only slightly by Mr Saunders who told us that he did not oppose the appellant's appeal with any great vigour.

4. The characterisation of accommodation as accommodation which the applicant or applicants own or occupy exclusively is very far from peculiar to paragraph 248A. It is a feature of many of the rules that have an accommodation requirement, including most or all of the provisions relating to the entry, remaining or settlement of persons as family members of other persons. The requirement is not typically found in the rules relating to admission for short or definite periods, nor in those relating to indefinite leave to remain unrelated to family membership. The question of the meaning of the phrase is therefore of considerable importance. In ordinary or indeed in legal language there would be little

difficulty about it. The phrase "ownership or exclusive occupation" of property typically simply contrasts the owner or tenant with a licensee. Exclusive occupation is precisely what a tenant normally has. If the rules were read in that way, they would require an applicant either to own the property in question or to be the tenant of it. But, as is not uncommon, the Secretary of State, having chosen to express the rules relatively clearly, adds considerable confusion by providing a commentary on them in the form of Immigration Directorates Instructions. The relevant passage of the IDIs (at Chapter 8, section 1, annex F, paragraph 6) is as follows:

> "Accommodation
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> The word 'exclusively' was added to HC 395 in reference to the accommodation requirement in order to make the Rules consistent with Tribunal determinations. [There is no indication of what these determinations were.] Accommodation can be shared with other members of a family provided that at least part of the accommodation is for the exclusive use of the sponsor and his dependants. The unit of accommodation may be as small as a separate bedroom but:
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> - Must be owned or legally occupied by the sponsor;
> - Its occupation must not contravene public health regulations;
> - Its occupation must not cause overcrowding as defined in the Housing Act 1985."

5. This provision makes it very difficult indeed to understand what is meant by "exclusively". Not the least difficulty is the requirement of "exclusive use" by the *sponsor* (not the applicant or appellant) and his dependants. Further, the provision that "the unit of accommodation may be as small as a separate bedroom" appears to mean that that unit need not be the subject of any separate formal legal agreement. That, further, means that the phrase "legally occupied" in the first bullet point must mean not "as a matter of law, occupied" but "occupied not unlawfully".

6. If "occupied exclusively" is not to be given its ordinary meaning as a phrase, one might have nevertheless have thought the word "exclusively" itself, apparently added deliberately to the Immigration Rules, might be taken to have some determinative value. But it is difficult to see that any of the ordinary meanings of the word "exclusively" can be intended to apply. "Exclusively" clearly implies either a power to exclude others or the actual exclusion of others, or both. A person can be described as occupying property exclusively in three situations. The first is where he is being described as living in one property to the exclusion of other properties: "he owns a cottage in Cornwall but lives exclusively in London". We do not think this meaning of "exclusively" has any relevance to the Immigration Rules. The second meaning is that of the actual exclusion of others. In this sense "exclusively" means "alone". A person who occupies property

exclusively would then be occupying it alone. The third sense is akin to the legal meaning and means "with the power to exclude anybody else". In this sense, a person occupies property exclusively if he has the right to prevent anybody else from occupying it. A person who takes a hotel room for the night by himself may be said to occupy the room exclusively in the second sense but not in the third. A person who is owner or tenant of a property may occupy it exclusively in the third sense, even if (because somebody else lives with him) he does not occupy it exclusively in the second sense. But two people who live together may together occupy the property exclusively in the second sense; and co-owners or co-tenants may together occupy the property exclusively in the third sense.

7. The problem is, however, that notions of actual exclusion or of the power to exclude do not sit well either with the IDIs as set out above or with the general purposes and approach of the Immigration Rules. Once it is accepted that what is technically in law "exclusive occupation" is not required, it is very difficult to see what notion of exclusivity is being applied. If a young married couple have their own bedroom in a sufficiently large house belonging to and also occupied by the parents of one of them, it appears from the IDIs that they can meet the requirement (here in, for example, paragraph 281(iv)) of accommodation which they own or occupy exclusively. So far as it goes, that could be a reference to the second meaning of "exclusively": they occupy that bedroom, but nobody else does. After that simple example, however, things become more difficult. For any children of theirs, there would also have to be accommodation in which the parents own or occupy exclusively (see, for example, paragraph 297(iv)). At this point the possibility of using the second meaning of "exclusively" vanishes, because the parents cannot be the only ones occupying the premises if the child is envisaged as living there as well. And the difficulty of applying the second meaning of "exclusively" becomes acute in the rule with which we are particularly concerned: because if the applicant occupies the property exclusively in the sense of living there alone, it follows that, quite apart from any difficulty relating to the addition of his dependants, he cannot be in a co-habitational relationship with anybody else. That would mean that the rules permit leave to enter or remain in the United Kingdom in order to exercise access rights to a child would be limited to applicants who remain single. We cannot imagine that that was intended. It follows that "exclusively" cannot mean "alone".

8. But it also cannot mean "with a right to exclude others". The young couple who together are the only people who use their bedroom cannot claim to exclude the owner of the house from that room in the way that a tenant can exclude his landlord. In the present case the appellant, who lives in his girlfriend's flat, has no right to exclude her from any part of it and probably has no rights against the landlord.

9. Nevertheless, “occupies exclusively” in the Immigration Rules must be given some meaning. From what we have said it is clear that it cannot mean either “alone” nor “with a legal right to exclude all others”. As we have said, however, the phrase occurs in those parts of the rules relating to admission for some family purposes and we hope it is right to draw from that context some indication of what this otherwise clear phrase, rendered obscure by the IDIs, is intended to mean. Where the rules permit immigration for family purposes, they may be presumed to do so with the intention of the continuation of family life, and it would be alien to such a notion to suggest that the immigrants, sponsors and their dependants should be living apart or in accommodation that is entirely precarious. Thus it ought not to be enough for an applicant to say that he will be accommodated by a series of friends allowing him to sleep on sofas, or that he has enough money to put up his dependants in hotels from time to time, or that he or they will find space in hostels. What appears to be required is that there is somewhere that the person or people in question can properly, albeit without any legal accuracy, describe as their own home. They may not own it; and they may share it; but it is adequate for them, it is in a defined place, and it is properly regarded as where they live, with the implications of stability that that phrase implies.

10. Applying that definition to the appeal before us, there is, as Mr Saunders acknowledged, little doubt that the appellant meets the requirements of the rules. He has lived with his girlfriend in her flat for some time (as a matter of fact, they have moved since the commencement of these proceedings, but still live together). Her flat is his home. Within the arcane meaning of the phrase as deployed in the Immigration Rules, he occupies that flat exclusively.

11. For the foregoing reasons we find that the Immigration Judge materially erred in law in his interpretation of the phrase “occupies exclusively”. We substitute a determination allowing the appellant’s appeal.

C M G OCKELTON
DEPUTY PRESIDENT