ASYLUM AND IMMIGRATION TRIBUNAL

LH (Truly exceptional – Ekinci applied) Jamaica [2006] UKAIT 00019

THE IMMIGRATION ACTS

Heard at	Field House	Determination
Promulgated On	10th January 2006	24 January 2006

Before

Mr Justice Hodge OBE, President
Mr L V Waumsley, Senior Immigration Judge
Prof A Grubb, Senior Immigration Judge

Between

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr A Alexander (Counsel)
For the Respondent: Mr S Ouseley (Home Office Presenting Officer)

(1) In determining whether an appellant's removal is disproportionate under Article 8(2) it is wrong to assume that an ECO will ignore or breach his human rights when deciding whether to grant entry clearance to return to the UK; (2) following Ekinci, removal is not disproportionate merely because any such application would be unsuccessful; (3) to succeed, the appellant's circumstances must be "truly exceptional".

DETERMINATION AND REASONS

1. The appellant is a national of Jamaica, born on 28th July 1979. He came to the United Kingdom on 14th April 2001 and was

granted one month's leave to enter. He thereafter applied to remain as a student. This application was refused in July 2001. The appellant remained in the United Kingdom. He was arrested on 8th July 2004. He then claimed asylum and that application was refused on 29th July 2004. He appealed.

2. The appeal came on for hearing before an adjudicator (Mr M B Hussain) on 4th October 2004. The appellant abandoned his asylum appeal at the hearing. However, he claimed that his removal from the United Kingdom would breach his right to a family and private life under Article 8 of the European Convention on Human Rights (ECHR). His Article 8 claim was and is based on his relationship with his then partner, Michelle Grant, and their two children. He married Ms Grant on 21st October 2004, after the adjudicator hearing, but before the promulgation of the decision.

3. The adjudicator allowed the appeal. He regarded it as disproportionate that the appellant should be removed from the UK and that such removal would breach his Article 8 rights. The respondent applied for permission to appeal, claiming the adjudicator had erred in law in reaching the decision he did on the appeal. The application was granted and a reconsideration was ordered by a Senior Immigration Judge on 13th April 2005.

4. By Article 5 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005 (SI 2005/565) any appeal which immediately before the commencement of the 2004 Act was pending before the Immigration Appeal Tribunal shall after commencement of that Act be dealt with by the Asylum and Immigration Tribunal as if it had originally decided the appeal and it was re-considering its decision.

Error of Law

5. The appellant and his wife have two daughters. The elder child, Rene, born on 28th February 2002 has cerebral palsy. She requires a good deal of care. The evidence shows that the appellant lives with his now wife and their two children, and he provides important care and help, particularly for Rene.

6. It is uncontroversial that the appellant has no right under the Immigration Rules (HC395) to be or remain in this country. Indeed he had no such right since his leave to enter elapsed in May 2001, over three years before he eventually made the asylum claim in July 2004 which he abandoned in

October 2004. He has throughout this period been in the United Kingdom unlawfully. He has no current entry clearance. He is liable therefore to be removed under the general provisions of the Immigration Rules.

7. Article 8 of the ECHR states:

> *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right, except such as 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.*

8. A person who is in this country in breach of the Immigration Rules is liable to removal. The relationship between Article 8 rights and the Immigration Rules was analysed in *Huang and others v Secretary of State for the Home Department* [2005] EWCA Civ 105. As Laws LJ said at para 60

> *"The balance struck by the Rules will generally dispose of proportionality issues arising under Article 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances."*

States are entitled under European jurisprudence confirmed in many UK cases to exercise immigration control even though there may be an interference with the private or family life of an individual subject to those controls.

9. In this appeal, the adjudicator said at para 19:

> *"Whilst the removal of a person unlawfully in the United Kingdom is in the interests of immigration control, that interest of the community has to be balanced against the impact on the individual concerned. In this case, I find that if this appellant is removed from this country, then although it is open to him to apply to return as the fiancé of Michelle Grant, the prospect of that application succeeding is almost negligible and the impact on the appellant's spouse and their children disproportionate. I come to this view, because one does not know how long it will be before the appellant will be able to obtain a visa (if at all) and in the meanwhile Michelle Grant*

would be left to look after two young children. Given her vulnerability as a person on medication for depressive illness and given the severe condition of the appellant's first child, in my judgment she is unlikely to cope with either looking after herself or her children. As a result they would all suffer".

10. This is plainly wrong in law. In *R (Ekinci) v Secretary of State for the Home Department* [2003] EWCA Civ 765, the Court of Appeal dealt with a very similar case to this appeal. There a Turkish citizen was unlawfully in the UK. Whilst here he had married a British citizen. A son had been born to them. That son had an illness which required an operation. Mrs Ekinci was caring for her 82 year old mother, who was semi mobile and dependent upon her. His wife and child could not join Mr Ekinci in Germany to where he was to be removed.

11. It was argued on behalf of the appellant in *Ekinci* that it would be wrong to return him to Germany and require him to apply for entry clearance there, because he would on any such application fail to qualify. The Secretary of State replied that it was immaterial whether or not the appellant will qualify for entry clearance in the future. That should be decided when the time comes for the appellant to apply for such entry clearance. Simon Brown LJ regarded that argument as unanswerable. He said at para 17:

"*it would be a bizarre and unsatisfactory result if, the less able the applicant is to satisfy the full requirements of entry clearance, the more readily he should be excused the need to apply…….it is entirely understandable that the Secretary of State should require the appellant to return to Germany so as to discourage others from circumventing the entry clearance system".*

12. The court also quoted Keane LJ at para 10 in *Shala v SSHD* [2003] EWCA Civ 233.

"it is important that those without leave to enter or remain, should not be able to exploit the procedures so as to be able to prolong their stay in the United Kingdom by making in country applications for such leave. As Mahmood [R v SSHD [2001] 1 WLR 840] shows, even with a subsisting marriage, a person only here on temporary admission will be required to return home to seek entry clearance, unless there are exceptional circumstances."

13. The reasons given by the adjudicator for his decision are wrong in law, as they fail to have regard to the clear guidance from the Court of Appeal in *Ekinci*. It is wrong to decide that any appellant must be allowed to stay, not primarily because he cannot be expected to go abroad to obtain entry clearance, but because he would or might be refused entry clearance if he did. Such arguments are periodically advanced in appeals before the Asylum & Immigration Tribunal. They purport to pre-judge both an application and a decision by an entry clearance officer that has not yet been made. They may, in many instances, ask a judge to assume that an entry clearance officer would ignore and/or breach any applicable human rights issues which the applicant would be able to assert at that stage. There is no justification for such assumptions.

14. The adjudicator in this appeal has assumed that, if the appellant were returned to Jamaica, he would not succeed in any application he might make to return to this country. That is not an assumption which can or should be made and even if it were the case, following *Ekinci*, it would be wrong to conclude that the removal decision was not proportionate on that basis alone. This approach was the basis for his decision that the appellant's Article 8 rights would be breached if he was removed, and is legally wrong.

Reconsideration

15. We concluded, for the reasons set out above, that there was a material error of law in this case. We considered we had adequate evidence to complete a full reconsideration of the case and accordingly heard submissions. We had regard to those and to the evidence that had been before the adjudicator. This consisted of two short statements by the appellant and his wife; a medical report by a consultant community paediatrician on Rene and the speech and language therapy report on her, both dated 8th May 2003; the appellant's marriage certificate; supportive letters from family members; a report from a consultant paediatrician at a child care development centre dated 5th February 2004; a letter about Rene's condition from a Professor of Paediatric Neuro-surgery dated 19th August 2005; an undated, but recent letter from the family's general practitioner; a letter from a Sure Start visitor for Haringey Council dated 23rd August 2005. The adjudicator found that the appellant's wife has not been in employment for many years. She is primarily responsible for caring for the child, Rene, but he found that "she cannot cope on her own". He said "without

the practical support of the appellant, Michelle Grant would not be able to cope on her own in looking after the two children"

16. It is clear that Rene has cerebral palsy and she requires a considerable amount of care. She has for periods been in a special school. She has a shunt which can become blocked. We proceeded on the basis that, as with the appellant's wife in *Ekinci*, this appellant's wife and children could not return with the appellant to Jamaica. In particular, we were told the travelling involved might be dangerous for Rene and this is clearly supported by the report of the Professor of Paediatric Neuro-surgery to which we were referred. We accordingly went on to consider whether this case might be described as "truly exceptional" in the sense referred to in *Huang* and one where this appellant's appeal should be allowed on the basis that his Article 8 rights would be breached were he alone to be removed to Jamaica.

17. Here, any ultimate removal of this appellant would be in pursuance of a lawful immigration policy. As Lord Bingham pointed out in *R (Razgar) v SSHD* [2004] INLR 349 at para 19 *"the implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state."* He said *"where removal is proposed in pursuance of a lawful immigration policy"* the question whether such removal is necessary in a democratic society *"will almost always fall to be answered affirmatively"*.

18. On one side of the scales in this case therefore, is the undeniable fact that the appellant is in the UK in breach of the Immigration Rules. On the other side of the scales are the circumstances which, it is said, engage Article 8 and go to the question whether they can be regarded as "truly exceptional" on the specific facts of his case. The appellant has known he has no entitlement to be here for a number of years, but took no steps to regularise his position. His wife, on the evidence, was clearly aware that he had come only as a visitor for a short period. But he has a disabled child. We do not regard the evidence as showing that his presence in the family is essential at all times. The child herself has been in a special school for a period. One or other of her parents takes her to various hospital appointments. Social services are involved. The appellant was in detention for approximately one month in 2004. It is, we accept, clearly significantly easier for the mother to manage if the appellant is available in the household.

19. On the other hand, were the appellant to stay, he would have jumped the queue of those wishing to apply for leave to enter this country as the spouse of the British citizen. This is the same position as the appellant was in, in *Ekinci*. In our judgment, the maintenance of immigration control must weigh heavily in the scales when the necessary balancing act is conducted between the maintenance of those controls and consideration of whether particular individual facts can be regarded as "truly exceptional". The need for immigration control is itself one of the factors which must be considered, together with and alongside the individual personal circumstances of any particular appellant.

20. In conducting this balancing act, we considered it right to have some regard to what the position might be if the appellant were removed and applied to return to the United Kingdom. He would have to satisfy paragraph 281 of the Immigration Rules.

> *281. The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:*
>
> *(i) (a) the applicant is married to a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; or*
> *(b) the applicant is married to a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom for the purposes of settlement and the parties were married at least four years ago, since which time they have been living together outside the United Kingdom; and*
>
> *(ii) the parties to the marriage have met; and*
>
> *(iii) each of the parties intends to live permanently with the other as his or her spouse and the marriage is subsisting; and*
>
> *(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and*

(v) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

21. The appellant's wife is in receipt of social security benefits. She has not worked for many years. However, the appellant has done some work in the UK. The promise of a job could be obtained for him either before he leaves the United Kingdom or whilst he is away. There is a family network in the UK who might help. It does not, in our judgment, automatically follow that this appellant will be unable to satisfy paragraph 281 of the Immigration Rules. If in work, he will be able to provide some relief with child care for his wife. Such family patterns are no doubt replicated among those bringing up children with disabilities.

22. In any event even if he does not satisfy paragraph 281, this appellant will also have available to him, the argument that his wife's need for support and the children's needs mean that the appellant's right to a family life with them should properly be considered as truly exceptional outside the Immigration Rules in the *Huang* sense. In the circumstances of such an application, the appellant will have returned to Jamaica. He will not have the very significant burden which weighs in the scales against him presently, of currently being in the United Kingdom unlawfully in breach of the Immigration Rules. The Article 8 claim will not be tainted by that illegality. It can be considered in the round, with such fresh evidence as may be available.

23. In our judgment, the individual facts of this case must be considered together with the fact that the appellant has been in the United Kingdom in breach of the Immigration Rules for a number of years. Those two factors taken together lead us to conclude that this is not a "truly exceptional" case in the *Huang* sense. Once the background unlawfulness of the appellant's current position is changed by his leaving the United Kingdom, any fresh application made by him based solely on his right to a family life with his wife and daughters might, with appropriate supporting evidence, meet the "truly exceptional" test, if he is unable otherwise to satisfy the Immigration Rules.

Decision

24. For the reasons given, we substitute a fresh decision dismissing this appeal.

Mr Justice Hodge
President
13.01.06