PG (Article 8 – child - contact) Serbia & Montenegro [2004] UKIAT 00255

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 28 July2004
Determination prepared: 1 August 2004
Date Determination notified: 15 September 2004

Before:

Mr Andrew Jordan (Vice President)
Mr A.E. Armitage

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

and

RESPONDENT

DETERMINATION AND REASONS

For the Appellant/Secretary of State: Mrs L. Prince, Home Office Presenting Officer
For the Respondent/Claimant: Mr P. Simm, Counsel, instructed by AS Law, Solicitors

1. The Secretary of State appeals against the determination of an Adjudicator, Dr O.T.C. Ransley, in which she allowed to the Claimant's human rights appeal against the decision of the Secretary of State to refuse both his asylum and human rights claims. The Adjudicator rejected the Claimant's asylum appeal. No challenge is made to that finding.

2. The Appellant is a citizen of Serbia and Montenegro and was born on 10 October 1960. He is 43 years old. He is an ethnic Albanian from Kosovo who claimed to have been persecuted by the Serbian army in 1998. He claims to have arrived in the United Kingdom in September 2000, avoiding immigration controls, at a time after the NATO-led forces had entered Kosovo.

3. Shortly after his arrival, he formed a relationship with a British citizen, [ ], known as [ ]. They started living

together in May 2001. They became engaged. Their daughter, [ ], was born on 19 February 2002. [ ] is now two years old. Unfortunately, the couple separated in June 2002. At the time, the conditions of the Claimant's stay prohibited his taking employment and he was unable to support either [ ] or [ ]. The Claimant was refused contact with his daughter. He approached solicitors. A contact order was made in November 2002. The current order was made in the Liverpool Family Proceedings Court on 5 August 2003. This permits the Claimant frequent contact with [ ]. [ ] is a student. During term-time, contact takes place three times a week. During the vacations, contact takes place each weekend both on Saturday and Sunday. In paragraph 20 of the determination, the Adjudicator expressly finds that the Claimant has maintained regular contact with his daughter, as well as contacting the nursery which [ ] attends to find out about her progress.

4. The Claimant gave evidence that his parents are no longer alive and that he has no other family in Kosovo. He submitted that his former partner has consistently adopted a hostile attitude towards contact, such that it would be difficult or impossible for contact to take place were the Claimant removed from the United Kingdom. The Adjudicator found that it was highly unlikely that [ ] would bring [ ] to see the Claimant in Kosovo. (See paragraph 22 of the determination.)

5. In paragraph 23 of the determination, the Adjudicator accepted that the Claimant had the right to apply under paragraph 246 of the Immigration Rules, HC 395, for leave to enter the United Kingdom in order to maintain contact with his daughter. The Adjudicator, however, considered this might not provide practical assistance for the Claimant because he has no assets to finance his journey to the United Kingdom and is not permitted to work in United Kingdom at present. The Adjudicator's approach appears to have overlooked the fact that the Claimant is capable of work in Kosovo. Indeed, there is no evidence (as far as we are aware) that he is in any different position from any other ethnic Albanian for these purposes. In addition, whilst as a failed asylum seeker, the Claimant may be subject to restrictions on his ability to work, no such restrictions would apply on his being granted leave to enter under paragraph 246.

6. Nevertheless, the Adjudicator found in paragraph 24 of the determination that the Claimant would have considerable difficulties meeting the requirements regarding maintenance and accommodation under paragraph 246 of HC 395 in the short or medium term. As a result, she decided that there would be a break in the regular contact which the Claimant now has with [ ] in United Kingdom. The Adjudicator was entitled to take into account the age of the child. She was entitled to accept as credible the evidence that the Claimant had formed a close and affectionate relationship with Lisa as a result of the regular

contact and his active involvement in the child's care and development. The Adjudicator regarded a two-year-old child as being in particular need of contact, although it is arguable that the same might apply to a child of almost any age.

7. As a result of the need to maintain contact with his daughter, the Adjudicator concluded that it would be a violation of the Claimant's Article 8 rights for him to be removed from the United Kingdom. Accordingly, she allowed the appeal on human rights grounds. In reaching this conclusion, it is apparent that the Adjudicator was not concerned to consider whether the Claimant could or should make an application for entry clearance on the basis of satisfying the requirements of the Immigration Rules. Instead, the Adjudicator appears to have accepted that the Claimant was unable to satisfy those requirements. Accordingly, the Adjudicator used Article 8 as a means of circumventing the Rules.

8. The Secretary of State appeals. He relies upon the decision of the Court of Appeal as expressed by the Master of the Rolls in **Mahmood [2001] Imm AR 229**. In paragraph 65 of the judgment, the Master of the Rolls says:

> "I do not consider the possibility that his application may not succeed is any reason for excusing him from the requirement to make an application from outside the country if he wishes permission to settle here with his wife and family."

It is suggested that, by parity of reasoning, the same consideration applies in the instant appeal. If the Claimant is unable to make out his case under the provisions of the Immigration Rules, there is every reason to reject his claim on human rights grounds. Rather than allowing it, as the Adjudicator did, it is argued that the fact that the Claimant is likely to fail under the Rules is reason enough to find that his removal is not disproportionate.

9. Part 7 of the Immigration Rules include provisions for persons to seek leave to enter or remain in United Kingdom in order to exercise rights of access to a child resident in United Kingdom. The requirements for leave to enter are set out in paragraph 246:

> 246. The requirements to be met by a person seeking leave to enter the United Kingdom to exercise access rights to a child resident in the United Kingdom are that:
>
> (i) the applicant is the parent of a child who is resident in the United Kingdom; and
> (ii) the parent or carer with whom the child permanently resides is resident in the United Kingdom; and
> (iii) the applicant produces evidence that he has access

rights to the child in the form of:

(a) a Residence Order or a Contact Order granted by a Court in the United Kingdom;... and

(iv) the applicant intends to take an active role in the child's upbringing; and

(v) the child is under the age of 18; and

(vi) 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; and

(vii) the applicant will be able to maintain himself and any dependants adequately without recourse to public funds; and

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

10. It is apparent from the foregoing that an application made under paragraph 246 should be made out-of-country. Where there is a viable option of making an application from abroad for entry clearance under the Immigration Rules, this is usually sufficient to render the removal proportionate and it will only be in exceptional circumstances that the decision will not be so. See **Baljit Singh [2002] UKIAT 00660**, (Dr H. H. Storey, Chairman). This accords with the decision of the Court of Appeal in **Mahmood [2001] Imm AR 229** in which Laws LJ said at paragraph 23 of the judgment that, if it were not so,

> "... it would be manifestly unfair to other would-the entrants who are content to take their place in the entry clearance queue in their country of origin."

11. There does not appear to be any doubt that the Claimant is likely to establish the requirements of sub-paragraphs 246 (i), (ii), (iii), (iv) and (v). It was only in relation to the maintenance and accommodation requirements set out in sub-paragraphs (vi) and (vii) that the Adjudicator considered the Claimant was at risk of failure. Her reason for reaching this conclusion appears to be because, under the terms of his present temporary admission, he is precluded from finding work. In our judgment, there is no reason to assume he will be prevented from working if he is granted admission under paragraph 246. Indeed, we would have thought that anybody seeking settlement under the Immigration Rules must, by implication, be entitled to work. Consequently, we consider the Adjudicator was in error in her finding that the Claimant was unlikely to establish the requirements of the rules because he is presently unable to work. We do not consider that the Adjudicator was entitled to rely upon the fact that the Claimant sold his land in order to finance his journey to the United Kingdom and is, therefore, without assets in Kosovo. We were not told of any credible evidence that the Claimant cannot find work sufficient to fund his journey to the United Kingdom.

Accordingly, we do not consider that the Adjudicator's conclusion that the Claimant is unlikely to establish the requirements of the rules is sustainable for the reasons given by her.

12. There is, however, in our judgment, another more important reason why the Adjudicator was in error in seeking to use Article 8 to circumvent the provisions of the Immigration Rules. Paragraph 246 as it now stands came into force on 2 October 2000, the same day as the European Human Rights Convention was made part of English domestic law. This strongly suggests that paragraph 246 was a recognition that persons wishing to exercise rights of access to their children resident in United Kingdom should be permitted to do so pursuant to their Article 8 rights to enjoy a family or private life. In our judgment, however, that does not mean those seeking leave to enter have an unfettered right to do so. It is a proportionate response on the part of the government of the United Kingdom to make the right of entry conditional upon establishing entry requirements. The right of a father to settle in the United Kingdom in order to maintain contact with his child is different in character to his right to visit a child. This enlarged right has to be balanced against the wider purpose of maintaining immigration control. The Adjudicator appears to have given no significant weight to this aspect of the appeal and to have concentrated exclusively on the position of the Claimant and his daughter.

13. It seems to us that the requirement in the Immigration Rules that a father in the position of the Claimant should be allowed to join daughter on condition that his entry into the United Kingdom should not be an added burden upon the United Kingdom taxpayer is proportionate and proper, in the sense that it does not violate either the child's or the father's human rights. It is to be noted, of course, that paragraph 2 of the Rules sets down the specific requirement that the Rules should be applied in such a way as to comply with the parties' human rights. That is a far cry, however, from saying that the Rules themselves should be rewritten or, in the context of the present appeal, that the maintenance requirement omitted altogether. We see it difficult to envisage the circumstances in which an applicant's human rights require he be given leave to enter or remain in circumstances that are contrary to the Immigration Rules which have, themselves, been drafted with the intention that a fair balance is struck between the rights of the parties and reasonable restrictions made upon entry clearance in order to protect, amongst other things, the State and the taxpayer from being overburdened.

14. In cases where there is a viable option of applying under the Immigration Rules, it is likely to be extremely rare that the Claimant will succeed under the European Convention on Human Rights, though likely to fail under the Rules. In our judgment, there is an additional reason why an applicant should seek to

make out a claim under the Rules, rather than under the ECHR. Where leave to enter or remain is sought, the primary decision-maker is either the Secretary of State or the Entry Clearance Officer. It is open to the Entry Clearance Officer to interview the applicant and require that he provides documentary evidence in support of his application. In cases where the application is made out-of-country, the Entry Clearance Officer will often have valuable local knowledge that an Adjudicator will not possess. In many cases, the assessment of the facts will often best be made by the primary decision maker. We do not consider that, where there is a viable application under the Rules, whether in- or out-of-country, the Adjudicator should seek to second-guess the decision in an entry clearance case under the umbrella of an Article 8 claim. It has to be remembered that if the Entry Clearance Officer or the Secretary of State is in error, the applicant has an in-built right of appeal as well as a right to require that any decision made complies with his human rights.

15. We accept in the circumstances of this appeal that it is important for the Claimant to maintain contact with his daughter. We are, of course, unable to reach any conclusion as to what is in the best interests of the child. All the more so since we have not heard from the mother, nor from those reporting to the Family Court as to the advisability of contact. For our purposes, it is quite sufficient that there is a Contact Order. The Immigration Rules provide a means by which this Claimant may seek to maintain contact with his daughter. In our judgment, there is no reason to think that the Rules, properly applied, will not result in a decision that adequately reflects the competing interests of the Claimant and his daughter on the one hand and the social and economic interests implicit in immigration control on the other. The Adjudicator, whilst considering the former did not properly assess the importance of the latter. We do not consider, as the Adjudicator did, that a period of separation between father and daughter was decisive in allowing the appeal in the Claimant's favour. It is, of course, preferable that decisions of this nature are best made sooner rather than later. That said, however, the Tribunal is in no position to know whether the urgency in this case is any greater than in other cases that Entry Clearance Officers have to decide, many of which will have similar calls made for a swift determination.

16. We are satisfied that the Adjudicator reached the wrong conclusion in allowing this appeal under Article 8. Accordingly, the appeal of the Secretary of State is allowed.

ANDREW JORDAN
VICE PRESIDENT
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