H-AF-V1

Heard at Field House
by video link with Leeds
On: 5 May 2004
Prepared On: 7 June 2004

AY (Article 8 – Family life – Proportionality) Ivory Coast [2004] UKIAT 00205

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

.....23rd July 2004.....

Before :

HH Judge N Huskinson (Vice President)
Dr A W Chaudhry
Mr G H Getlevog

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the Appellant: Mr D Giovannelli (Counsel – instructed by Johar & Co)
For the Respondent: Mr S Halliday (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Ivory Coast born on 29 December 1977. He appeals to the Tribunal, with permission, from the Determination of Miss Manjit Kaur Obhi, Adjudicator, promulgated on 14 May 2003 whereby she dismissed the Appellant's appeal on asylum grounds and human rights

grounds against the Respondent's decision to refuse asylum to the Appellant and against his decision to issue directions for the removal of the Appellant to the Ivory Coast.

2. The Appellant's account of events in the Ivory Coast, on the basis of which he claimed asylum, need not be set out for the purpose of this Determination. This is because the Adjudicator did not believe the Appellant. There is no appeal against the Adjudicator's adverse credibility findings. The only point upon which the Appellant has been granted permission to appeal, and the only point developed in argument before the Tribunal, relates to the Adjudicator's dismissal of the Appellant's appeal under Article 8 of the ECHR.

3. Before the Adjudicator there was evidence in relation to the Appellant's family life that the Appellant was a single man but had a partner to whom he was engaged to be married, namely Miss ( ) who is a citizen of Cameroon. The Adjudicator was informed that Miss Mongo was an asylum seeker. At the date of the hearing before the Adjudicator (24 April 2003) the Appellant and Miss ( ) were engaged to be married – the prospective date of the wedding being 31 May 2003. They were expecting their first child in August or September 2003. The Adjudicator dealt with the Article 8 claim in paragraph 42 of the Determination in brief form. She reminded herself of the decision in **Mahmood [2001] 1 WLR 840** and stated:

> "*I note that the Appellant is engaged to be married to another asylum seeker. The relationship and any family life arising therefore have been formed in the knowledge of the respective immigration situations of each party. In light of the information available to me in this appeal, I do not find the existence of a private or family life.*"

4. It may be noted at the outset that on behalf of the Respondent Mr Halliday accepted that the Adjudicator's analysis of the Article 8 case was flawed. Mr Halliday contended that the Adjudicator had reached the correct ultimate result, but he did not seek to support the Adjudicator's finding that there was no private or family life in existence. Mr Halliday's argument was to the effect that, although the Appellant enjoyed a family life with his fiancée, any interference would be proportionate.

5. It follows from the foregoing that this case before the Tribunal turns entirely upon matters arising under Article 8 of the ECHR.

6. Certain procedural matters should be noted at this stage. The case was heard by video link with Leeds. On the morning of the hearing this case was called on as the first case in the list. Mr Giovannelli informed the Tribunal that a bundle of documents on behalf of the Appellant was in the course of being faxed to

the Tribunal. It had not arrived when the case was called on. The bundle had not been served in accordance with the Rules. The bundle contained unsigned witness statements from the Appellant and from Miss ( ) (now Mrs ( )) and various other documents including a medical report (considered further below). No application had been made under Rule 21 of the 2003 Rules for permission to adduce this additional evidence. The Tribunal put the case back and took the second case in the list. Having concluded that case, the fax from Mr Giovannelli had arrived. There was then argument as to whether the Tribunal should receive this late bundle which had been submitted in contravention of the Rules. Mr Halliday argued that the Tribunal should not receive this late material and in particular should not receive the late medical report. This medical report is dated as long ago as 7 August 2003. It was also noted that the statements from the Appellant and his wife were unsigned.

7. No criticism is intended of Mr Giovannelli personally. However the procedure adopted on behalf of the Appellant by those instructing him is wholly unsatisfactory. It emerged that this medical report of August 2003 had been sent to the Respondent (apparently a different department of the Respondent) in about December 2003 in support of an application on behalf of the Appellant that his case should be reconsidered as engaging particularly compassionate circumstances and that as a matter of discretion he should be allowed to stay in the United Kingdom. The Tribunal reserved the question of whether it would admit in evidence and take into consideration the contents of the bundle, but looked at the contents de bene esse and full submissions were made in relation to the documents. The Tribunal has ultimately concluded that in order to avoid injustice to the Appellant (who is not personally at fault for the procedural irregularities) the Tribunal should admit the contents of the bundle in evidence and take them into consideration. The Tribunal in particular has in mind that the medical report was sent to the Respondent in December 2003 (albeit it seems to a different department rather than to the Home Office Presenting Officers Unit) – thus this is not a case where a medical report which has never previously been disclosed in any shape or form is produced on the morning of the hearing. The Tribunal also is prepared to take into consideration the witness statements of the Appellant and his wife – although we bear in mind that these are unsigned and this must affect the weight given to the documents insofar as there is anything controversial therein. As regards the other documents in the bundle these are uncontroversial documents being a marriage certificate and a birth certificate and letters regarding the second pregnancy of the Appellant's wife.

8. Leaving aside for the moment the medical report, the facts emerging from the statements and other documents in the Appellant's bundle can be summarised as follows:

(i) On 31 May 2003 the Appellant married ( ) who is a citizen of Cameroon.

(ii) Their son ( ) was born on 6 September 2003. The son is in good health. The Appellant's wife is also now in good health although suffered from postnatal depression after the birth, in respect of which the Appellant's support was important to her.

(iii) The Appellant met his wife in June 2002 and they started a relationship in August 2002 and started living together in November 2002 and have lived together ever since then.

(iv) The Appellant's wife is now again pregnant. The Tribunal was not informed of the expected date of birth, but the pregnancy was confirmed by a letter dated 25 February 2004.

(v) In paragraph 4 of his unsigned statement the Appellant states:

> "*I do not know what citizenship my son has. If I was to return to Ivory Coast now I could not return with my wife because she is a citizen of Cameroon and has no right to reside in the Ivory Coast. I would therefore be split up from my wife. I would probably have to leave my son with her because I have no accommodation in the Ivory Coast and nowhere to take and bring up a young child. I would also lose the chance of seeing our new baby. To split me up from my family would be devastating for me.*"

(vi) In her unsigned statement the Appellant's wife states that she cannot live without her husband. She says she cannot go back to the Ivory Coast because she would have no rights to live there. She says she cannot return to Cameroon as she has nowhere to go there and her home was burnt down. She says that her family (her mother, two brothers and three sisters) are in the United Kingdom and have also claimed asylum but she does not know the status of their claim. She has a difficult relationship with them because they disapprove of her marriage. She only sees one member of her family namely her younger sister – and she only sees her occasionally. She confirms she is pregnant again. She states that if her husband was taken away from her she is worried she would not be able to cope

with two small children after the birth of the baby. She states that they are a family and love and need each other.

9. The Appellant's wife's status regarding an asylum claim should be noted at this stage. In her statement she says she is an asylum seeker. However the Tribunal was informed by Mr Halliday (and this was accepted by Mr Giovannelli) that what had happened in relation to the wife's asylum claim was this. Her claim was refused by letter in May 2002 based upon a full asylum interview. An appeal was lodged to the Adjudicator and the case came before the Adjudicator in September 2002, when the Appellant's wife did not attend but her representatives did. It seems that her representatives were without instructions. The Adjudicator dealt with the case on the basis that the appeal had been abandoned. There has been no further attempt to appeal from this decision. It may be noted that in her unsigned witness statement the Appellant's wife does not say that she has some pending appeal. Mr Giovannelli, while accepting the foregoing as factually accurate and accepting that at present the position is that the wife's asylum case is over, indicated that the wife's advisors were seeking to raise again her case.

10. As regards the medical report this is dated 7 August 2003 and prepared by Miriam Ann Wohl MB, Ch.B., J.C.C.C., M.S.T.A.T. of Leicester Sports Medicine Clinic. The report sets out the Appellant's account of events in the Ivory Coast, being the events rejected as not credible by the Adjudicator. The report examines certain physical aspects of the Appellant's condition, including scarring. As regards mental health matters the report states that examination revealed that the Appellant clearly suffered from post traumatic stress disorder following his experiences in prison. The report sets out the core diagnostic criteria for PTSD and states that the Appellant exhibits the core diagnostic criteria which, if left untreated, can run a life-long remitting-relapsing course. The report continues:

> "*The fact that his symptoms are at present in abeyance, does not mean that he is fully recovered. It is well recognised that additional stress can precipitate recurrence of symptoms of PTSD and this would be extremely likely, were he forced to return to the Ivory Coast, as it is well recognised that acute distress is likely to reoccur on exposure to trauma located events and locations. His symptoms of PTSD are subsiding and it [is] my opinion that the reason why he has made such a good recovery is because he has had a stable environment and meaningful activities. It would be psychologically deleterious for him to be returned to his homeland, where he is certain his life would be in danger. There is no doubt that his mental health would suffer, whether or not his fears are justified.*"

At the end of the report there is set out a passage describing the current consensus of medical opinion about PTSD.

11. It has already been noted that there was no challenge before the Tribunal to the Adjudicator's adverse credibility findings or to the findings on asylum or Article 3 (risk on return). Further Mr Giovannelli did not seek to raise any self-standing Article 8 case based upon the Appellant's claimed mental health condition – thus there is no Article 8 case as contemplated in **Razgar [2003] EWCA Civ 840** (and see now **[2004] UKHL 27**) or in **Djali [2003] EWCA Civ 1371.** However the mental health matters as revealed in the report were relied upon by Mr Giovannelli as being relevant on the question of proportionality so far as concerns the Article 8 case based upon interference with family life.

12. Mr Giovannelli argued that if the Appellant were removed from the United Kingdom then there were three theoretically possible ways in which the Appellant might become reunited with his wife and children so that family life could continue. Mr Giovannelli argued that in respect of each of these separate possibilities there were apparently insuperable problems for the Appellant and his wife and children in becoming reunited. However it is first necessary to identify the three possibilities, which are that the Appellant is removed to the Ivory Coast and:

    (i) The Appellant makes an out-of-country application as a spouse from the Ivory Coast to join his wife in the United Kingdom.

    (ii) The Appellant's wife (and children) return to Cameroon and the Appellant makes an application in the Ivory Coast to join them in Cameroon.

    (iii) The Appellant's wife applies for permission for herself and the children to join the Appellant in the Ivory Coast.

13. As regards the prospect for the Appellant of making an out-of-country application to join his wife in the United Kingdom, Mr Giovannelli drew attention to the fact that his wife did not have sufficient status to support such an application under the Immigration Rules. It would be a long time before the Appellant's wife did have such a status (and indeed she may never have such a status bearing in mind what has happened to her own asylum application). Mr Giovannelli also queried whether there were any facilities for making such an application in the Ivory Coast.

14. Regarding the possibility of the Appellant joining his wife and children in Cameroon, Mr Giovannelli pointed out that there was no evidence as to the ability of the Appellant as a citizen of the Ivory Coast to obtain admission to Cameroon. He also drew

attention to the fact that the Appellant's wife was fearful of returning to the Cameroon (because she had sought asylum) and she had nowhere to go there and she says in her statement that her house was burnt down. Her family is in the United Kingdom.

15. As regards the possibility of the Appellant's wife (and children) returning to the Ivory Coast with the Appellant or soon thereafter, Mr Giovannelli pointed out that she is not a citizen of the Ivory Coast and she may be unable to obtain permission to enter the Ivory Coast. He argued she may have to return to Cameroon to make an application to enter the Ivory Coast. He stated it was unknown as to whether it was possible for the Appellant's wife to make any necessary application at the Cameroon Embassy in the United Kingdom.

16. In support of the foregoing arguments Mr Giovannelli added certain general points, namely that the Appellant's wife has one young child and is again pregnant. He also relied upon the mental health difficulties of the Appellant as disclosed in the medical report which indicates that the Appellant would have difficulty in supporting a family life in the Ivory Coast or in Cameroon – thus the Appellant may well be unable to provide for his wife and children. He drew attention to Dr Wohl's conclusion that the Appellant's mental health would suffer "whether or not his fears are justified" on return to the Ivory Coast. He also drew attention to the general comments regarding PTSD included at the end of Dr Wohl's report which shows that she was alive to the possibility of exaggeration of symptoms or the intentional production of symptoms. He argued that this lent weight to the diagnosis.

17. As regards the significance of there being no evidence whatsoever before the Tribunal as to what if any difficulties the Appellant would have in seeking entry into Cameroon or the Appellant's wife and children would have in seeking entry into the Ivory Coast, Mr Giovannelli argued that the absence of any such evidence was detrimental to the Respondent's case rather than to the Appellant's case. He argued that it was merely necessary for the Appellant to prove that his removal to the Ivory Coast would constitute an interference with his Article 8.1 rights (namely family life) and that the burden was then on the Respondent to prove that any such interference was proportionate. If there was an absence of information as to the ability of the Appellant or his wife to obtain entry into the other's country, then this uncertainty meant that the Respondent had failed to prove that the interference was proportionate – this was because the Respondent had failed to prove how extensive the interference would be. In the absence of any evidence regarding the ability of the one to obtain entry to the other's country the only proper basis on which to proceed was that there would be substantial problems (if not an

impossibility) of obtaining such right of entry. Mr Giovannelli argued that it would be a reversal of the normal burden of proof to say that the Appellant had failed to prove what difficulties he or his wife would have in obtaining entry into the other's country. He referred to **MacDonald** at paragraph 8.60.

18. The Tribunal is unable to accept Mr Giovannelli's arguments. Our reasons for so concluding are substantially those advanced in argument by Mr Halliday and are as follows.

19. Having regard to the matters in paragraph 9 above regarding the status in the United Kingdom of the Appellant's wife, the Tribunal concludes that it must proceed on the basis that the Appellant's wife has made an asylum appeal which has been treated as abandoned and which is at an end. The Tribunal cannot speculate as to the possibility of the Appellant's wife reactivating her claim. Accordingly the Appellant's wife is not a refugee and she has not established any well-founded fear of return to Cameroon. It also follows that she does not have status to support an out-of-country application by the Appellant to join her in the United Kingdom and there is no realistic prospect that she will ever obtain such status. Accordingly there is effectively no prospect that family life between the Appellant and his wife can be restored through the route described in possibility (i) in paragraph 12 above, namely by the Appellant making an out-of-country application to rejoin his wife in the United Kingdom.

20. So far as concerns the medical report from Dr Wohl the Tribunal is only able to give limited weight to this document. This is because PTSD is diagnosed on the basis of the Appellant's account of his experiences in the Ivory Coast being true – in particular his experiences in prison. However the Adjudicator rejected this account as not being credible and there is no appeal against this finding. Accordingly the Tribunal does not find persuasive Dr Wohl's conclusion that acute distress is likely to reoccur "on exposure to trauma located events and locations". However the Tribunal places some weight on the report and notes that Dr Wohl states there is no doubt the Appellant's mental health would suffer "whether or not his fears are justified". The Tribunal also notes that no treatment is proposed in Dr Wohl's report apart from the Appellant being allowed to stay in the United Kingdom. Nowhere in the report is it stated that the Appellant is at real risk of suicide nor that he would be unable to cope in his own country. The Tribunal notes that the Appellant has been able to cope in the United Kingdom. Mr Giovannelli quite rightly did not seek to advance any self-standing Article 8 (or Article 3) case upon the Appellant's mental health. Clearly such a claim could not succeed. The Tribunal takes into consideration the evidence regarding the Appellant's mental health in support of the arguments upon

proportionality, but we find that the report is of little assistance to the Appellant.

21. It is of significance that there is no evidence of any kind before the Tribunal as to what if any difficulties there would be for (a) the Appellant obtaining the right to enter Cameroon and live with his wife and children there, or (b) the Appellant's wife and children obtaining the right to enter the Ivory Coast and live with the Appellant there. The Tribunal is unable to accept Mr Giovannelli's argument that the burden is on the Respondent to adduce evidence about this and that, in the absence of such evidence, it should be assumed in effect that neither the Appellant nor his wife would be able to obtain entry into the other's country. There has been ample opportunity for the Appellant to investigate these rights of entry and to adduce evidence relating to the particular facts of his and his wife's case as to their respective abilities to obtain entry into the other's country. In the absence of any evidence whatever on this point the Tribunal concludes that the Appellant has failed to establish, even to the lower standard of proof, that the removal of the Appellant from the United Kingdom would constitute any interference with his family life with his wife and children. This is because the Appellant has failed to produce any evidence at all that there would be any difficulties of any kind in his wife and children returning with him to the Ivory Coast or in him, having been returned to the Ivory Coast, joining his wife and children in Cameroon. Accordingly the question of proportionality does not arise at all because the Appellant has failed to establish that his removal will interfere with his Article 8 rights.

22. If however the foregoing were wrong and the Appellant's removal would of itself constitute some interference with his Article 8.1 rights, then the question of proportionality arises. The Tribunal is guided by **[2004] UKIAT 00024 M (Croatia)*** especially at paragraph 28 and by **Razgar [2004] UKHL27**, especially at paragraph 20. In these circumstances also, however, the Tribunal concludes that the burden is on the Appellant to establish any particular difficulties for himself and his wife in each returning to the other's country. The Tribunal rejects the contention that, once it is established that there will be some interference with a Claimant's Article 8.1 rights, then it must be assumed that every potential course of action for that Claimant in re-establishing family life would necessarily meet with insuperable difficulties unless such difficulties are expressly disproved by the Respondent. The Respondent has a burden upon him to prove that the removal would be proportionate, but the Respondent provisionally discharges that burden of proof by relying upon the substantial weight to be accorded to a firm and fair immigration policy. If a Claimant wishes to contend that the facts of his particular case mean that his removal from the United Kingdom will cause for him particularly severe difficulties then it is for him to establish on

evidence the prospect that these difficulties may in fact emerge. It is not for the Respondent to disprove every possible difficulty. Accordingly upon this analysis (i.e. supposing that the question of proportionality falls to be considered, contrary to paragraph 21 above) the Tribunal concludes that the Respondent's decision to remove the Appellant to the Ivory Coast is a decision within the range of reasonable responses open to the Respondent. The Tribunal is not satisfied (and on the evidence before it it cannot be satisfied) that there would be any significant difficulties either for the Appellant to join his wife and children in the Cameroon and enjoy family life there or for the Appellant's wife and children to join the Appellant in the Ivory Coast and to enjoy family life there. The Tribunal has not overlooked the Appellant's mental condition but is not satisfied that, even taking this into account, the Appellant's removal would give rise to any disproportionate interference with his family life or indeed his private life. As regards a return to the Cameroon for the Appellant's wife, she has not established any well-founded fear of persecution or Article 3 infringing treatment there. The fact that the Appellant's wife has many (if not all) of her members of her family in the United Kingdom is not a matter of any significant weight bearing in mind her own evidence that she is substantially estranged from them. So far as concerns a return to the Ivory Coast, the Adjudicator has found the Appellant has no well-founded fear of ill-treatment there.

23. In the result therefore the Tribunal dismisses the Appellant's appeal.

HH JUDGE N HUSKINSON
Vice President