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AM (Extra statutory recommendations generally undesirable) Angola [2004] UKIAT 00146

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 23 March 2004

Date Determination notified:

8 June 2004

Before:

Dr H H Storey (Vice President)
Mr A A Lloyd, JP

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
For the appellant : Ms D. Gibbons, Counsel, instructed by Perera & Co.
For the respondent : Mr G. Phillips, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Angola. He appeals against the Adjudicator, Mr D. Taylor's determination dismissing his appeal against the decision giving directions for removal following refusal to grant asylum.

2. The issue in this case is a narrow one. Permission to appeal was confined to the issue of whether the Adjudicator was right to dismiss the appeal on Article 8 grounds.

3. The nub of the appellant's argument was that by the terms in which the Adjudicator made an extra-statutory recommendation he had effectively accepted that the decision was disproportionate. At paragraph 49 he had stated:

> ‘Although I have been obliged to dismiss the appellant's appeal on asylum and human rights grounds, it is clear from the objective evidence that Angola is a terrible place to be living and one cannot have anything but sympathy for anyone who seeks to leave that country to better themselves. The appellant's wife and child and the wife’s sister have all received exceptional leave to remain until 19 October 2006. Although I have no power to direct the Secretary of State in this matter, having seen the parties give evidence, I would recommend that the appellant be given humanitarian leave to remain until at least the same date that his wife has such leave to remain. she is about to give birth to their second child and it would be entirely lacking in humanity if the Secretary of State were to enforce the separation of husband and wife at this time.’

4. It was submitted that the Adjudicator's findings relating to the objective situation in Angola, his wife’s current status and pregnancy, read together with his use of the phrase “entirely lacking in humanity” equated to a breach of Article 8.

5. We are not persuaded that the Adjudicator made any findings that would have justified a conclusion that the decision was contrary to Article 8.

6. In the first place the Adjudicator quite clearly confined his reasons cited earlier to the context of an extra-statutory recommendation.

7. Secondly, he had earlier set out clear and cogent reasons for concluding that the decision was not contrary to Article 8. He wrote:

> ‘On the question of Article 8, the appellant has only just established a family life here with his wife and child. She came to the UK, on her own account, believing that she would have to make a life for herself and her child without her husband whom, she said, she had not seen him since June 2001. I find that it would not be disproportionate in all the circumstances of this case for the respondent to interfere with such family life as there is in accordance with Article 8(2). In so deciding I

> bear in mind the decision of the Court of Appeal in Blessing Edore [2003] EWCA Civ 716 and accordingly I must dismiss the Article 8 appeal.'

8. It is true that the Adjudicator's assessment of the nature of the tie between the appellant and her husband was somewhat at odds with his estimation at paragraph 44 that "It is most likely they planned to come to the UK and meet together here". However, it remains that he was entirely correct to identify that the appellant had only recently established a family life in the UK. Furthermore, the appellant's wife did not have settled status in the UK. Albeit she did have exceptional leave to remain until 19 October 2006, there was nothing to indicate that at the time she arrived in the UK she had a legitimate claim to enter (by virtue, for example, of coming within a policy protecting persons who arrive in the UK fleeing the dangers of civil war). On the evidence before the Adjudicator, that is to say, both knew that their immigration status was precarious.

9. Thirdly, even within the context of an extra-statutory recommendation it was otiose of the Adjudicator to have assumed that the Secretary of State would seek to enforce removal of the wife whilst she was in late pregnancy. It was otiose because she had limited leave to remain until 2006 and hence was not subject to removal anyway. It was also otiose because even in respect of a person who is subject to removal it cannot and must not be assumed that the Secretary of State would seek to act contrary to his obligations under the Human Rights Act. It is not the policy of the Secretary of State to enforce removals in situations where that would jeopardise health and safety.

10. As regards the Adjudicator's reliance in the context of making an extra-statutory recommendation on Angola "being a terrible place to live in", it is clear that whatever he meant by this phrase, he did not mean to assert that nationals of Angola per se face a real risk of serious harm, since he had dismissed the asylum and Article 3 grounds. Furthermore, the objective country materials relating to Angola which were before the Adjudicator, whilst highlighting serious human rights areas of concern, fell well short of indicating that conditions in Angola were so dire as to place everyone living there at risk of serious harm.

11. In our view, the Adjudicator's remarks about living in Angola being "terrible" illustrate a further reason why the Tribunal has sought to discourage Adjudicators from making extra-statutory recommendations. The principal difficulty the

Tribunal has identified is that Adjudicators are rarely in a position to know all the facts that would be relevant to an exercise by the Secretary of State of his discretion to allow a person to stay: therefore it is wrong to seek to bind the Secretary of State to act on findings based on incomplete evidence. But another difficulty illustrated here is that such recommendations can be seen as a vehicle for applying their own subjective standards as to what is or is not a compassionate circumstance. There is often no clear set of objective legal principles, such as those which govern assessment under the Refugee Convention and the Human Rights Act, which an Adjudicator can be seen to be drawing upon.

12. This brings us to Ms Gibbon's submission which dwelt on the Adjudicator's reference to enforcement of removal being "entirely lacking in humanity". If that was the effect of removal, she argued, then it would be plainly contrary to the Human Rights Act. The difficulty with this submission is that plainly the Adjudicator had earlier given specific and express consideration to the issue of whether the decision to remove contravened the Human Rights Act and decided it would not. Moreover, his expression of concern about "humanity" was only made in respect of the threat as he saw it of removal of the appellant's wife whilst she was in late pregnancy. For reasons already given that was an unfounded source of concern.

13. Ms Gibbons sought to argue that the Adjudicator's findings on Article 8 were flawed for other reasons. However, in our view that submission went beyond the scope of the grounds of appeal which relied on the purport of the extra-statutory recommendation. In any event, the Secretary of State considered the position of the family in his Reasons for Refusal letter, correctly noting in our view that his wife and children all hold Angolan nationality and have been in the UK only a short while. Bearing in mind that in respect of neither the appellant nor his wife has it been accepted there is an asylum basis for their claims, we do not consider there exist insurmountable obstacles to the family returning to Angola to resume their family life there. Even if it were considered unjustified to require the appellant's wife and child to accompany him back to Angola, the appellant would be able to apply from abroad for entry clearance.

14. Against this Ms Gibbons submitted that the appellant would not in fact have a viable option of applying for entry clearance since he could not qualify under the Immigration Rules. His wife, she pointed out, was not settled. Leaving to one side the real prospect that in 2006 the appellant's wife

will in fact be able to obtain ILR at the end of her four year period of limited leave, we do not accept the appellant would have no viable basis of application. Paragraph 2 of HC 395 requires an Entry Clearance Officer to ensure that any decision he makes is not contrary to a person's human rights. If the appellant sought entry clearance on Article 8 grounds, not only was this a legally viable basis for an application, but if it met with refusal, that refusal would attract a right of appeal under s.65 of the Immigration and Asylum Act 1999 (now s.84 of the Immigration and Asylum Act 2002).

15. For the above reasons this appeal is dismissed.

H.H. STOREY
VICE PRESIDENT