H-SS-V1

Heard at Field House

PN (Article 8 - Adults - Proportionality - Delay) Sri Lanka [2004] UKIAT 00069

On 22 March 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

16 April 2004

Before :

Mr A R Mackey - Chairman
Mr C Thursby
Mr N W Renton

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT (CLAIMANT)

REPRESENTATION

For the Appellant: Mr J McGirr, Home Office Presenting Officer
For the Respondent: Mr D O'Callaghan of Counsel representing Selva & Co Solicitors, London

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of an Adjudicator Mr M Cohen, promulgated 7 August 2003, wherein he dismissed an asylum appeal made against a decision of the Secretary of State but allowed a human rights appeal under Article 8 of the ECHR.

The Adjudicator's Determination

2. The Adjudicator largely accepted the truthfulness of the Claimant's case but did not consider he had a well-founded fear of persecution for a Refugee Convention reason on return to Sri Lanka. He noted that the Claimant was a 23 year old man, who had arrived in this country on 12 August 1998 and claimed asylum at that time. He had been 17 years of age when he arrived. He did not receive a notice of refusal from the Secretary of State until 12 April 2001 and a Home Office bundle was not submitted until April 2003. The matter then came for hearing before the Adjudicator on 4 July 2003.

3. We noted from the Reasons for Refusal Letter that there is no clear reference to an Article 8 ECHR claim set out. The refusal letter simply stated at paragraph 24 that consideration had been given to the obligations of the United Kingdom under the ECHR and the Secretary of State was not satisfied on the information available, that the claimant qualified under any of the Articles.

4. The Article 8 claim was however, argued before the Adjudicator and the claimant's evidence appears to have been largely accepted as credible. He stated that one of his brothers, who had arrived in this country in 1992, had received asylum and had become a British citizen. In addition to that his father had also moved to the United Kingdom, on the basis of the brother's sponsorship. It was also noted that the claimant's mother had been shot and killed when the army came to arrest one of his brothers. This apparently took place in 1996.

5. Since the claimant has been in the United Kingdom he has been living with his elder brother and, after completing high school, has gone on to start a civil engineering degree. The claimant has another brother in the United Kingdom, who apparently has been refused asylum, but has not yet returned to Sri Lanka.

6. It was claimed that the claimant's father was in poor health and that the claimant himself gave a considerable amount of support to his father, when he was not at university undertaking his studies. The claimant's brother, who has British citizenship, has paid £1,000 for the claimant's courses at university.

7. The findings, in relation to the Article 8 ECHR issue, are set out between paragraphs 41 and 43 of the determination.

8. The Adjudicator firstly noted the determination of the Tribunal in **Nhundu (01/TH/00613)** and acknowledged that the correct approach was one which involved a step-by-step analysis.

9. The Adjudicator accepted that private and family life had been established in the United Kingdom and that removal to Sri

Lanka would interfere with private and family life. He then went on to consider whether the interference with family life would be disproportionate when set against the requirements of maintaining effective immigration control. He set out factors relating to the family's financial and emotional support and stated that he considered that the claimant, while 21 years old, "is obviously very young for his age". He also noted that there was no evidence of the financial situation of relatives in Sri Lanka and whether he could be supported or accommodated on return. All of the immediate family were settled in the UK, save an older brother, who was an asylum seeker. In addition he noted that the claimant was obviously an important member of the family unit and assisted his 67 year old father who was in poor health and needed to attend medical appointments. He then went on to note the death of the mother and the additional stress and suffering that was placed on the family. He then reached a decision that it would be disproportionate to expect the claimant to return to Sri Lanka. In doing so he had particular regard to:

(a) The delay by the Secretary of State in deciding the claimant's application.

(b) Following the death of the claimant's mother, the family unit had become a particularly close one and the removal from the UK would cause the claimant and his family "an enormous amount of emotional and psychological distress".

10. He then said that the claimant's removal to Sri Lanka would breach Article 8 and that the claim had been substantiated.

The Appellant's Submissions

11. At the outset Mr McGirr agreed that there did not appear to be any proper engagement with the Article 8 issues by the Secretary of State in the Reasons for Refusal Letter and therefore his grounds relied solely on the Adjudicator's determination and his claim that the determination was substantively flawed to the extent that the Tribunal could substitute its own determination. He provided us with a copy of the relevant starred determination of the Tribunal in **[2004] UKIAT 00024 M (Croatia)*** and submitted that paragraph 28 of that determination should be followed by us.

12. In addition he submitted that the Adjudicator had made inadequate findings and did not fully consider the Respondent's situation. This was tantamount to an error of law by the Adjudicator. He submitted that the status of the claimant, as an adult rather than as part of a family group, had been overlooked by the Adjudicator. It was necessary to look at the reality of the situation as it now stood. The claimant was a 23 year old and a

statement by the Adjudicator that the claimant was "young for his age" appeared to have no substantive or objective grounds to support it, particularly given there was no medical or psychiatric report submitted.

13. He submitted that the requirement (as set out in the Strasbourg determination in **Advic v United Kingdom** -6 September 1995) had not been followed, in that the Adjudicator had not considered further elements of dependency that went beyond normal emotional ties. There was thus a substantive flaw in the determination and in that situation the Tribunal could assess whether removal of the Appellant was within a range of reasonable responses that could be made by the Secretary of State. He submitted that there was nothing before the Adjudicator to indicate anything beyond normal emotional ties between the claimant and his family, now based in United Kingdom, beyond the financial support for his study. This support, he suggested, could also be provided whether the claimant was in this country or in Sri Lanka. Thus, he considered we should allow the appeal.

The Claimant's Submissions

14. Mr O'Callaghan submitted to us that the conclusions reached by the Adjudicator in paragraph 43 were within a range reasonably open to the Adjudicator, particularly noting that the Secretary of State had not considered Article 8. The Adjudicator had correctly referred to the **Nhundu** determination, which included the requirement to take account of proportionality issues and required balancing against legitimate immigration control policies of the Secretary of State. He submitted that the Adjudicator did take into account the dependency issues and the family relationship that existed. He claimed that there was more than just a situation of the claimant being young for his age. The dependency of the father on the claimant, that had grown up over recent times, had to be taken into account, as well as the delay factor in the assessment and the obvious situation that had developed after the claimant's mother had been shot and a close family bond, between the remaining members, had developed.

15. He noted that the delay in the initial decision, between September 1998 and March 2001, involved a period of two and a half years. In this situation it was invalid for the Secretary of State now to claim that effective immigration control required the claimant's removal. This situation was further weakened by the additional two years of delay in proceeding with the appeal to the Adjudicator. During that time the father's health had been deteriorating and the dependency on the claimant had clearly grown. Mr O'Callaghan conceded that the claimant was not the Sponsor of the father but the reality of the situation was that because the claimant was a younger man, who was at

home for considerable periods, while not at university, did contribute to the dependency of the father on this claimant.

16. He submitted therefore that it was reasonably open to the Adjudicator to reach the conclusions he did and that the grounds now put forward by the Secretary of State were too narrow.

17. We asked the significance of the statement by the Adjudicator that removal would cause "an enormous amount of emotional and psychological distress", and whether there was any medical support to back this up. Mr O'Callaghan told us that there was not, but clearly as this was a family who had lost the mother in such a tragic fashion, then there would be a much higher degree of emotional support required between the remaining members.

18. We also asked whether there was information on the middle brother, who evidently was claiming asylum in this country. We were advised by both parties that they could not advise us further on that issue.

19. Finally, we were advised that it appeared that if the Secretary of State had processed the claimant's application at the time when he arrived, when he was 17, then exceptional leave to remain would possibly have been granted, if no reception facilities were available in Sri Lanka. That period of exceptional leave would have been until the Applicant was 18. Mr McGirr could point to no changes in that policy that may have been relevant.

20. In final reply Mr McGirr also submitted that the delay factor could not be seen as undermining the Secretary of State's valid application of immigration control policy. Indeed this claimant would be in a situation where, if the health of the father continued to deteriorate, visits could be made to this country from time to time by the claimant.

The Issues

21. We found the issues before us to be:

    (a) Given that the Secretary of State had failed to give consideration to the Article 8 issues himself, was the determination made by the Adjudicator one that was lawful and proportionate and when set against immigration control or would the decision to remove this claimant be so disproportionate that no reasonable Secretary of State could remove him in the circumstances that prevailed?

    (b) If the determination of the Adjudicator was unlawful, or did not take into account relevant jurisprudence, could we substitute our determination, particularly take into account

the guidelines set out in the starred determination **00024 M (Croatia)***?

Decision

22. At the outset we are satisfied that the Adjudicator has made an error of law in not placing the Applicant's claim under Article 8 in the correct perspective, particularly taking into account the Strasbourg jurisprudence and that these are relationships between adult siblings, and an adult child with one of his parents. The Adjudicator has referred to **Nhundu,** a decision of this Tribunal that covers the Article 8 relationship of family life between a married couple and their immediate children. Indeed that decision refers to the leading Court of Appeal determination in **Mahmood [2001] INLR 01** which set out a number of helpful guidelines in the assessment of such relationship cases at paragraph 55. This however is the situation of an adult child of 23 living with an adult brother who is a British citizen and a father, who has some dependency on the claimant and is legitimately (apparently) indefinitely in this country. The determination of the Tribunal in **Ali Salad [2002] UKIAT 06698** directly addresses a situation such as this and finds that it should be placed within the correct perspective and applicable Strasbourg jurisprudence. It notes that in *MacDonald's Immigration Law and Practice (5th Edition)* at paragraph 8.59 it is said:

> "Generally, relationships between adult siblings or adult children and their parents will not fall within the scope of Article 8, but in each case it is a question of fact whether there exists ties strong enough to constitute family life within the meaning of the Article."

The authority for this is taken from the Strasbourg decision in **Advic** which sets out that such a relationship will not necessarily require the protection of Article 8 without evidence of further elements of dependency, involving more than normal emotional ties.

23. The Adjudicator in this case did not start his assessment of proportionality under Article 8(2) from that premise. His approach therefore, we consider was fundamentally flawed. He has given some consideration to the emotional ties, but has not demonstrated dependency beyond normal emotional ties. Indeed he has stated, without medical or psychiatric evidence, that removal from the United Kingdom would cause the claimant and his family "an enormous amount of emotional and psychological distress". We see no basis for concluding that any distress would be "enormous". Particularly when in the totality of the evidence there would appear to be no reason why the Appellant's middle brother could not return with him to Sri Lanka and beyond that financial support, now provided by his

elder brother, could continue to be provided in Sri Lanka. In addition to that, while there has developed some dependency between the claimant and his father, it is the claimant's elder brother who has been the Sponsor and is clearly the person who the father has looked to obtain support and accommodation with, in his old age.

24. As we consider that the Adjudicator commences his assessment without consideration of the relevant family association and the relevant law relating to it, the determination must therefore be seen as wrong in law. We are thus in a position where we should make our own assessment.

25. In this regard we have noted particularly at paragraph 28 of the starred determination in **00024 M (Croatia)**. This states:

> "28. The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and Adjudicators should regard Shala, Edore and Djali as providing clear exemplification of the limits of what is lawful and proportionate. They should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, e.g. through a consistent decision-making pattern or through decisions in relation to members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality. We cannot think of one at present; it is simply that we cannot rule it out. This decision is starred for what we say about proportionality."

26. As we have set out above, following **Advic**, this is not a situation where there are further elements of dependency involving more than normal emotional ties. There are clearly *some* emotional ties which have arisen through the death of the mother and the recent support provided by the claimant to his father. These are however, nothing beyond what would normally be accepted between adult family members and an adult child and parent. We are also satisfied that the delay factors, while they have assisted in the establishment of a family and private life for the Applicant, would not impact on the proportionality determination to the extent that it would be

disproportionate for this claimant to be removed. We are satisfied therefore, taking into account all matters, and particularly noting the need to acknowledge that the Secretary of State is entitled to take into account his lawful immigration policy, that a decision to remove this Appellant would not be so disproportionate that no reasonable Secretary of State would remove him in these circumstances. In reaching this decision we also take into account the submission of Mr McGirr that on the factors mentioned above, the Applicant could, apply, on compassionate grounds, to visit his father in this country. Beyond that his brother or brothers could clearly visit him in Sri Lanka. All of these factors come within a legitimate immigration policy provided by the Secretary of State.

27. In this situation therefore, having found that the determination of the Adjudicator is a flawed one, we consider that the decision to remove the Appellant would not be disproportionate or outside a range of valid options open to the Secretary of State. The appeal is therefore allowed.

A R MACKEY
VICE PRESIDENT