H-AM-V1 BB (Article 8 - Application of Ekincin) India [2003] UKIAT 00144

Heard at Field House

On 22 September 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

13/11/03

Before:

Mr A R Mackey – Chairman
Mr C Thursby

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT (CLAIMANT)

DETERMINATION AND REASONS

Representation:

For the Appellant: Mr J Gulvin, Home Office Presenting Officer
For the Respondent: Mr Iraq Anisuddin, Legal Representative, Immigration Counselling Centre

1. The Secretary of State appeals with leave against the determination of an Adjudicator Dr S S Juss, promulgated 23 January 2003 wherein he allowed an appeal on human rights grounds against a decision of the

Secretary of State who had refused an application made under paragraph 284 of HC 395 for the Claimant to join a British spouse. The appeal was approved on Article 8 human rights grounds.

The Adjudicator determination

2. The Adjudicator heard evidence from the Appellant and his wife Mrs Kuldeep Kaur Kalsi. The Claimant was represented but the Secretary of State was not.

3. The Adjudicator established that the Claimant had arrived in the United Kingdom in December 1992 and had requested asylum. His application was considered and refused on 16 September 1993. An appeal was also dismissed. A new passport was obtained for the Appellant and arrangements made for his return to India on 19 May 1994. The Appellant failed to embark and was circulated as an absconder. Nothing further was heard of him until June 2000 when he made an application for leave to remain on the basis of his marriage to Mrs Kalsi. That marriage had taken place in May 2000 subsequent upon a relationship which commenced in 1996. The application on marriage grounds was refused on 29 March 2001 and an appeal was then made to the Adjudicator. It was not disputed that the marriage itself was a genuine one. It is also evident that the couple had a child in 2001.

4. The Adjudicator recognised that the onus was on the Claimant to show whether there were obstacles to establishing family life in India and that the obstacles did exist. The Adjudicator rightly noted the determination of the Court of Appeal in **Mahmood** [2001] Imm AR 229 and in particular paragraph 55 of that case. The Adjudicator went on to consider whether there were insurmountable obstacles to the family living together in India. It was noted that Mrs Kalsi was earning some £392 per month and the Claimant was not employed. However he was looking after the child while she was at work. It was submitted that she would have to lose her employment and take care of the child if the Claimant was removed and that the child, also a British citizen, would lose education and healthcare benefits. Mrs Kalsi noted that she had never visited India (although she is clearly of Indian ethnic background). The Adjudicator, having considered the obstacles were not insurmountable, went on to note that the Claimant had been in the United Kingdom for 10 years and thus was long-established in the United Kingdom. He then went on to state:-

> "Of course, the length of time per se is not conclusive as to merits. In this case I note also that the Appellant has not been married to Mrs Kalsi for the duration of the ten years. Nevertheless, it is a significant period of residence in this country. What has only just narrowly persuaded me to allow this appeal, however, is Mrs Kalsi's statement that if her husband is removed she has to stop working so she could look after the young child, she would not be able to meet the requirements of the Immigration Rules on maintenance in order to

Sponsor him or an entry clearance certificate to enable him to rejoin her as a spouse."

5. He then went on to consider that these were real and practical, or even legal obstacles, to the establishment of family life and therefore allowed the appeal.

The Adjudicator's Submissions

6. Mr Gulvin produced to us the determination of the Court of Appeal in **Ekinci [2002] EWCA Civ 765**. He submitted that this determination, which followed on from the **Mahmood** determination, should be given strong persuasive weight by the Tribunal and that when this was considered against the determination of the Adjudicator it indicated a substantive error by the Adjudicator. He referred us to the determination and the quote referred to above. He submitted that the consideration of the Adjudicator that the Claimant would not be able to meet the requirement of the Immigration Rules was speculative and made in respect of an application that had not been made and was not before the Adjudicator. In this situation any temporary interference with the Claimant's Article 8 rights would be seen as legitimate and proportionate. In this regard he referred us to paragraphs 16 and 17 of the determination in **Ekinci** and in particular:

> "16… Secondly, however and to my mind more fundamentally, the Secretary of State submits that whether or not the Appellant will qualify for entry clearance is presently material: it should be decided not now but when he comes to apply. Even if strictly he fails to qualify so the ECO would be prohibited from granting leave to enter given the obvious Article 8 dimension to the case the ECO would refer the application to an Immigration Officer who undoubtedly has discretion to admit someone outside the Rules. And if entry were to be refused at that stage, then indeed a section 59 right of appeal would certainly arise in which, by virtue of section 65(3), (4) and (5) the Adjudicator would have jurisdiction to consider the Appellant'

17. In my judgment this second argument is unanswerable. It would be a bizarre and unsatisfactory result, if the less able the Applicant is to satisfy the full requirements for entry clearance, the more readily he should be excused the need to apply…When granting permission to appeal, Sedley LJ said of this Appellant's immigration history that "few claimants come to court with a track record of such prolonged evasion and mendacity". True it is, as Sedley LJ also observed, that "The protection of human rights also observed, that "The protection of human rights is not a reward for virtue and withholding or dilution of them is not a penalty for vice" but that is not to say that a person's "immigration history is an irrelevant consideration when striking a balance between his Article 8 rights and the countervailing public interest in maintaining effective immigration control. To my mind it is

entirely understandable that the Secretary of State should he require the Appellant to return to Germany so as to discourage others from circumventing the entry clearance system. One authority which Mr Jacobs put before us was this Court's decision in ***Shala*** *[2003] EWCA Civ 233*. In giving the leading judgment there Keene LJ said at paragraph 10:

7. The determination in **Ekinci** went on to find that in ***Shala*** exceptional circumstances were established but that in **Ekinci** they were not.

8. Mr Gulvin also submitted that given the findings of the Adjudicator that they were not insurmountable obstacles, a term set out in paragraph 55 of **Mahmood** the Adjudicator's determination should be seen as perverse. The Adjudicator had misled himself as to the factors that should be taken into account in the balancing exercise. It was also submitted that this Claimant while he had been in the United Kingdom for some ten years had clearly not been married for all of that time and for a period from 1994 until 2000 had been an absconder. Accordingly the reference from **Mahmood** that the Claimant had been "long-established" in this country ha to be seen in the light of the reality of this Applicant's own immigration history and the Adjudicator appeared to have failed to give appropriate consideration to these factors. The narrow balancing exercise undertaken by the Adjudicator should therefore be seen as an error of law and we should adopt the rationale from **Ekinci**. He further submitted that while each case must be seen on its own facts it was clear there was an error of law in this case rendering the determination unsustainable. In that situation the Tribunal properly could look at the facts before it and conclude whether or not there would be a breach of Article 8(2) by assessing proportionality ourselves. The issue of whether Mrs Kalsi wanted to go with the Appellant was entirely up to her and as the Adjudicator had noted did not present an insurmountable obstacle. It was therefore submitted that the appeal should be allowed.

The Claimant's Submissions

9. Mr Anisuddin submitted that the Adjudicator had carried out a correct building assessment and had noted the hardships of removal for both the Appellant's wife and child and while he had found these were not insurmountable he had gone to take other factors into account. These included the facts that the Claimant had been in the United Kingdom for some ten years, whether lawful or otherwise, that the Claimant looks after his child in this country, that the Appellant's wife would lose her employment and thus there would be great difficulty in meeting the Immigration Rules in an application made in India by the Claimant. He referred to the quotation in **Ekinci** noted above and the reference to the determination of the Court of Appeal in ***Shala***. He submitted that in this case the Adjudicator had established that they were "exceptional circumstances" and therefore the determination was not a perverse one. Thus while he conceded that the Adjudicator had failed to follow the step-

by-step approach recommended in the leading Tribunal determination in **Nhundu (01/TH/0613)** it should not be seen as a fundamental flaw and that on its facts the determination was a sustainable one.

The Issue

10. We found the issue before us to be whether the determination of the Adjudicator was one that was clearly wrong or unsustainable? If so were we able to substitute our own determination of the proportionality issue?

Decision

11. We are satisfied that the determination of the Adjudicator is an irrational one on the evidence that was before him. The Adjudicator found that there were not insurmountable obstacles, a highly relevant factor in the guidance given in **Mahmood**. However he had gone on to be persuaded, primarily on the basis of the length of time the Claimant had been in the United Kingdom and because of the potential difficulties there would be in the Appellant and his wife establishing a valid claim for entry clearance as a spouse to allow the Article 8 claim. We have given careful consideration to the determination in **Ekinci** and find that it is strongly persuasive. We would agree that it is bizarre and unsatisfactory if the situation should arise that those least able to meet the full requirements of entry clearance (Immigration Rules) should more readily be excused under Article 8 the need to apply than those who are able to meet the core requirements for entry clearance. We also note that the determination in ***Shala*** was reached on a substantially different set of facts. In that case the Court of Appeal found that the Claimant had come to the United Kingdom as a putative refugee in 1998. There was a delay of some four years in the processing of his application by the Secretary of State and during that time the Claimant took steps to establish his private and family life in this country. There was therefore the strong argument that, nothing that refugee status is declaratory, Mr Shala had legitimately been in this country for more than four years and therefore it was disproportionate for him to be removed to Kosovo. The situation here is markedly different. This Appellant came to the United Kingdom and applied for refugee status in 1992/1993. That was refused. He was then illegally in this country as an absconder. In the year 2000 he then applied for entry clearance on the basis of his marriage to a British citizen. There has been no substantive delay by the Secretary of State in the processing of the applications. We are satisfied that this is not a case where there are exceptional circumstances and that the Adjudicator has carried out an improper assessment of the guidelines set out in **Mahmood**. Those guidelines have now been elucidated by the determination in **Ekinci**. In this situation therefore the appeal of the Secretary of State is allowed. We are satisfied that there would not be a real risk of a breach of Article 8 of the ECHR should this Applicant be returned to India. In reaching this conclusion we have noted that the Adjudicator did not consider there were insurmountable obstacles to the return, the Claimant's wife, while she may not have been to India is of Indian ethnic background and the child is of a very young age and would obviously be totally dependent on its parents at

this time and thus it is in the interest of the child to accompany them. We also agree that we should not place ourselves in a position where we speculate the results of a future application for entry clearance. Clearly this must be determined on the factors before the ECO and, as rightly noted in **Ekinci**, there will also be the right to apply to an Immigration Officer for consideration outside of the Rules.

12. This appeal is allowed.

A R MACKEY

VICE PRESIDENT