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Heard at Field House

GS (Article 8 - Private life -  
Edore and Razgar) Ecuador  
[2003] UKIAT 00137

On 5 September 2003  
Prepared on:  
5 September 2003

## **IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

11 November 2003

**Before:**

**MR H J E LATTER (CHAIRMAN)  
MR A A LLOYD JP**

**Between**

**APPELLANT**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

### Representation

For the Appellant: Ms N Braganza, of counsel instructed by Ole  
Hanson & Partners Solicitors  
For the Respondent: Ms J Sigley, Home Office Presenting Officer

### **DETERMINATION AND REASONS**

1. The Appellant, a citizen of Ecuador appeals against the determination of an Adjudicator (Ms S Pitt) who dismissed his appeal against the decision made on 9 January 2002 refusing him leave to enter on human rights grounds.
2. The Appellant first arrived in the United Kingdom on 14 January 1997 accompanied by his wife and daughter, Joselyn born on 17 August 1993. Another daughter Justine, was born on 29 November 2000. The Appellant's sister in law, Vallejo Salcedo Eliana Belen, born November 1984, arrived in the United Kingdom on 12 November 1999. She has been granted exceptional leave to remain until 2005. She has lived with the Appellant and his family since arriving in the United Kingdom.
3. The Appellant claimed asylum on arrival. His application was refused by the Secretary of State on 16 April 1998 and leave to enter was

formally refused on 29 May 1999. The appeal against this decision was dismissed by a special Adjudicator on 20 January 1999. As neither the Appellant nor his representatives attended the hearing, the appeal was treated as abandoned. The Appellant and his family did not leave the United Kingdom but on 25 April 2001, an application was made for leave to remain under the Human Rights Act. This application was refused for the reasons the Secretary of State has set out in his decision letter on 9 January 2002.

4. The Appellant asserted that he would be at risk of treatment contrary to Article 3 from a criminal gang in Ecuador. The Adjudicator did not find the Appellant to be a credible witness in this respect. She did not accept his account of being threatened or attacked by a criminal gang, nor that his parents or other family members continued to be mistreated after he had left. Further, even taking his claim at the highest, she was not satisfied that there would be an insufficiency of protection.
5. The Adjudicator also had evidence before her relating to Joselyn's educational difficulties and to the fact that removal would lead to the Appellant and his family being separated from his sister-in-law who had been granted exceptional leave until 2005. The Adjudicator came to the view that there were no obstacles to the family enjoying a private life in Ecuador. She did not accept that Joselyn's educational difficulties would lead to treatment contrary to Article 3. She went on to consider the position under Article 8. She was not satisfied that the Appellant and his family had established a family life with his sister-in-law and in any event there was nothing to show that she could not return to Ecuador with them. Any interference with private life established in the United Kingdom would not be disproportionate. In these circumstances the appeal was dismissed.
6. The Grounds of Appeal argue that the Adjudicator failed to consider or to properly consider the evidence relating to Joselyn's special needs and failed to appreciate the extent to which Eliana was like a daughter to the family and the disproportionate interference separation would cause.
7. At the hearing before the Adjudicator Ms Braganza took the Tribunal through the evidence relating to Joselyn's condition. The Tribunal have reports and letters from Gill Stephenson, Speech and Language Therapist from the Community Health South London NHS Trust; Barbara Ward, a Special Educational Needs Coordinator; Robert Pattullo, a Senior Educational Psychologist; Marsha Greene, a child Mental Health Specialist; Magdalene Moorey, a Speech and Language Therapist; Marsha Lattey, a Team Administrator at Health in Action Zone and finally from Irene Sclare, a Consultant Clinical Psychologist/Project Coordinator with Health in Action Zone.
8. The reports start with the report from Gill Stephenson on 17 March 2001. Her assessment suggests that Joselyn has severe difficulty with all language skills. She will require individual support to enable her to access the curriculum and will require intervention from a Speech and

Language Therapist. A letter dated 17 July 2001 from Barbara Ward confirms that Joselyn has made very slow progress since starting school in April 1998. She rarely spoke at school and was functioning like a much younger child. It was her view that Joselyn was a child who had been very deeply affected by the experiences she shared with her parents and the events she had witnessed. In the report from Robert Patullo it is confirmed that Joselyn's language, literacy and numeracy skills all lie below the bottom of the normal range. She needs individual instruction and thorough checking that she understands what is required. She would benefit from help in managing her emotional reactions to past events. It was his view that Joselyn could best be helped by feeling assured that her family were settled and that there would be no return to the anxieties of the past. It was his view that Joselyn and her family would benefit from some form of psychotherapeutic counselling because of previous traumatic circumstances. Joselyn would benefit from additional help in school.

9. A letter from Barbara Ward, dated 20 January 2003 refers to the fact that Joselyn has made slow but steady progress and was responding well to the additional support which she had received. If she were uprooted from her present environment where she feels secure all this work would be lost and the outlook for her would be bleak indeed. In a further psychological report from Robert Patullo, dated 3 April 2003, he refers to the severe degree of delayed language and literacy skills which he had measured when he assessed Joselyn in 2001. As she was older, her difficulties were correspondingly more severe, and it seemed likely that they were due to the emotional trauma that Joselyn had experienced when there was significant family disruption and formerly as the family were persecuted for political reasons and had to move frequently. It was extremely important that Joselyn continued her stable environment until such time as she transfers to her Secondary School.
10. The letter of Marsha Greene dated 9 April 2003 indicates that only an initial assessment has been made of the family circumstances. It is recorded that Joselyn came to England from Ecuador along with her family in 1997 seeking asylum, and as part of this Joselyn has witnessed a lot of violence and aggression particularly inflicted on her father by gangs of men. It was her opinion that Joselyn was in need of substantial and appropriate educational support within school if she was to meet her full potential. In the report from Magdalene Morray it is confirmed that Joselyn has a severe expressive language difficulty. It can not properly be described as a severe language disorder. Joselyn would not be able to access the National Curriculum without significant differentiation and individualised support identified in this report.
11. The final report from Irene Sclare confirms Joselyn's learning difficulties and the fact that she is making little educational progress. Joselyn seemed very aware that her parents feared being sent back to Ecuador and that Ecuador was perceived by them as an unsafe place for the family. Given Joselyn's gentle and anxious nature it was highly likely that she would be distressed about having to leave a supported and supportive school which was sensitive to her needs. Joselyn is

vulnerable to change, lost and uncertain because of her young age and her delayed learning, her fear of outsiders, her perception of the world as dangerous and her lack of confidence. She needed stability, consistency, and security in order to develop and learn and maximise her potential.

12. Ms Braganza submitted that on the basis of this evidence it was clear that a removal to Ecuador would involve an interference with the private life of both the Appellant and the members of his family and in particular Joselyn. Any interference would be disproportionate to a legitimate aim within Article 8 (2).
13. Ms Sigley submitted that all the reports were prefaced on an acceptance of events in Ecuador. This was particularly apparent from the letters written by Barbara Ward. However, the Adjudicator had not accepted the account given by the Appellant. It was clear that Joselyn did have special needs but the issue was whether there would be a breach of the United Kingdom's obligations under the human rights convention. Even assuming that there was a breach of the Appellant's right to private life, removal would be proportionate to a legitimate aim. There was educational provision in Ecuador: see paragraph 4.43 of the CIPU report. The Secretary of State could not accept that any one with special educational needs could bring themselves within Article 8 and thereby engage the obligations of the United Kingdom Government.
14. There is no challenge in the grounds of appeal to the Adjudicator's findings on the claim based on a fear of violence from criminal gangs in Ecuador. The Adjudicator rejected this evidence. This was an issue of fact for her to determine. Her findings were open to her and are properly sustainable on the evidence.
15. It is conceded before the Tribunal that the Appellant can not bring himself within Article 3. The high threshold required for a breach of this article is not even arguably reached.
16. However, Ms Braganza argues that there would be a breach of Article 8 if the family were to be returned. Her submission is based on two grounds; the first relates to Joselyn's educational needs and the second to the prospect of separation from Eliana.
17. When considering Article 8, it is important to keep in mind that its objective is essentially to protect the individual against arbitrary interference by public authorities with the rights identified in Article 8 including private and family life. However, this must be balanced against the legitimate objectives identified in Article 8(2). There is a balance to be struck between the enjoyment of rights protected by Article 8(1) against the legitimate aims of society within Article 8(2). Any interference must be proportionate to the legitimate aim, and no greater than necessary to achieve the legitimate objective. The Tribunal understand and sympathise with Joselyn's parents: their aim is to do what is the best interests of their children and in particular Joselyn. That is not the question the Tribunal has to determine. We are concerned with whether the proposed removal engages the obligations

of the United Kingdom government under the Human Rights Convention.

18. The first issue for the Tribunal to assess is whether the removal would interfere with the private life of the Appellant and his family. Private life has a broad meaning and it includes the right to develop one's own personality and the right to physical and moral integrity. The right to develop full potential through good education arguably does come within the right to private life. It is clear from the evidence that Joselyn does have special educational needs. The Tribunal accept that she has a severe language disorder and that she needs considerable help and support to overcome or at least ameliorate that disorder. On this basis the Tribunal are satisfied that there would be an interference with her right to private life if she is removed to Ecuador and a consequential interference with the right to private life of her parents. There is no dispute that the interference would be lawful: there is power in law for the Secretary of State to direct the removal of the Appellant and his family. It would be in accordance with a legitimate aim, the prevention of disorder or crime. The need to have an effective immigration policy is part of maintaining order within society in the United Kingdom.
19. Two issues arise. The first is whether the Appellants are able to show an interference with private life within the United Kingdom as opposed to breach of the Appellant's right to physical and moral integrity in Ecuador. In Ullah and Do [2002] EWCA Civ 1856 the Court of Appeal had held that in so far as an applicant seeks to rely on the consequences of removal arising from the situation in Ecuador, a claim cannot succeed unless it is shown that the situation is of such severity that there would be a breach of Article 3. This is because the Human Rights Convention imposes territorial not extra-territorial obligations on contracting countries. The extra-territorial effect of Article 3 arises only because of the fact that Article 3 enshrines an absolute prohibition against torture, inhuman or degrading treatment.
20. Ms Braganza argues that it is the fact of removal from the United Kingdom and the deprivation of access to the facilities available in the United Kingdom that amounts to the interference. On balance and with some hesitation the Tribunal accept that in the light of the length of time that Joselyn has been in this country receiving educational help and support, to remove her would amount to an interference with her private life.
21. The second issue the Tribunal have to consider is whether this interference would be disproportionate to a legitimate aim. The Tribunal are bound by the Court of Appeal judgements in Blessing Edore [2003] EWCA Civ 716 and Razgar [2003] EWCA Civ 840. In Blessing Edore the Court held that the proper approach to the assessment of proportionality was to consider whether the decision of the Secretary of State was outside the range of reasonable responses on the facts before him. In Razgar this approach was qualified to the extent that where the essential facts found by the Adjudicator were so fundamentally different from those determined by the Secretary of State that they substantially undermined the factual basis of the

balancing exercise performed by him it would be for the Adjudicator to carry out the balancing exercise himself.

22. The Tribunal are satisfied that the Secretary of State did consider the educational needs of Joselyn. These are dealt with at paragraph 7 of the decision letter dated 9 January 2002. Before making that decision the Secretary of State had before him the strong representations made on behalf of the Appellants by Barbara Ward enclosing a copy of the report from Gill Stephenson. Further evidence was put in front of the Adjudicator and updated evidence before the Tribunal but it is impossible to say that the facts before either the Adjudicator or the Tribunal are so fundamentally different from those determined by the Secretary of State that the proper course would be for the Tribunal to exercise its own discretion on the issue of proportionality. The issue for us is whether the Secretary of State's decision was within the range of reasonable responses.
23. In our judgment it was. The Secretary of State had taken the view that the Appellant was not entitled to asylum nor to protection under Article 3. Both decisions were upheld by Adjudicators. It follows that the Appellant and his family have had no lawful right to be in the United Kingdom since 1997. This must be set against the compassionate circumstances relating to Joselyn. This is not an easy balance, but the Tribunal are unable to say that the Secretary of State's decision was outside the range of decisions properly open to him.
24. It is also argued that there would be a breach of the Appellant's rights to family life because Eliana has been living with the family since she arrived in the United Kingdom. She was born in November 1984, the Tribunal are satisfied that the Adjudicator was entitled to conclude that there is nothing to show that Eliana could not return to Ecuador. There is no indication of the basis on which she was granted exceptional leave. If she chose to remain in the United Kingdom, and even assuming a breach of the right to family life, the Tribunal are satisfied that a decision to remove the Appellant would fall within the range of reasonable responses open to the Secretary of State.
25. The Tribunal are therefore satisfied that this appeal cannot succeed. In AE v FE [2003] EWCA Civ 1032 the Master of the Rolls, although in a different context, commented that the consideration of appeals should distinguish clearly between (1) the right to refugee status under the Refugee Convention (2) the right to remain by reasons of rights under the Human Rights Convention and (3) considerations which may be relevant to a grant of leave to remain for humanitarian reasons. The Tribunal are not satisfied that there is a breach of the United Kingdom's obligations under the Human Rights Convention for the reasons which we have attempted to set out. Matters are raised which may be relevant to a grant of leave for humanitarian reasons but that is a matter for the Secretary of State and not for this Tribunal.
26. Accordingly, this appeal is dismissed.

**H J E Latter  
Vice President**