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Heard at Field House

AW (Rule 298 - Article 8 -
Proportionality - Delay -
Shala) Jamaica [2003] UKIAT
00126

Date: 22 July 2003
Dictated: 24 July 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
30th October 2003

Before

:

Mr J Barnes (Chairman)
Mr S L Batiste
Mr Richard Chalkley

Between

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Miss M Bhamra, of Counsel, instructed by Community & Immigration Rights Centre, appeared on behalf of the appellant and Mr L Parker, a Senior Home Office Presenting Officer, appeared on behalf of the respondent.

DETERMINATION AND REASONS

1. The appellant, a citizen of Jamaica, appeals against the determination of an Adjudicator, Mr B H Forster OBE, who, in a determination promulgated on 4 March 2003, following a hearing on 24 February 2003 at Newport County Court, dismissed her appeal against the decision of the respondent, taken on 1 February 2001, to refuse to vary leave to remain in the United Kingdom.

2. The appellant was born on 9 August 1990 and she arrived in the United Kingdom as a visitor on 11 June 1999, when she was granted leave to enter on that basis for a period of six months. She is now twelve years old.
3. On 11 November 1999, Community & Immigration Rights Centre applied on behalf of the appellant for indefinite leave to remain in the United Kingdom as a dependant relative of her great uncle, Arthur Campbell, ("the sponsor"), a British citizen present and settled in the United Kingdom. The relevant immigration rule is contained at paragraph 298 of HC 395.
4. On 1 February 2001, the respondent refused to vary the appellant's leave in accordance with paragraph 30 and with reference to paragraph 298(1)(d) of HC 395. The respondent noted that the appellant's close relatives in her own country included her mother and father, whom the appellant's representatives claimed were unable to maintain the appellant. The respondent was of the view that there was no reason why the sponsor could not continue to support the appellant, were she to be returned to Jamaica, having been responsible for her financial support, according to the application, prior to the appellant's arrival in the United Kingdom. The respondent was not satisfied on the basis of documentary evidence and information received, that both the appellant's parents were settled in the United Kingdom, or that the appellant's great uncle had previously had sole responsibility for the appellant's upbringing, or that there were serious and compelling family or other considerations which made the appellant's exclusion from the United Kingdom undesirable. He concluded that the appellant could not meet the requirements of the immigration rules relating to indefinite leave to remain as a child related to a person present and settled in the United Kingdom and he refused her application.
5. Following the respondent's decision, a notice of appeal was lodged on behalf of the appellant on 7 February 2001, when the application was reconsidered by the respondent, who maintained his refusal. The appellant had raised a claim under Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR"), but on the basis of the documentary evidence received, the Secretary of State was not satisfied that there were "any concerns sufficiently serious to engage Article 8 in the appellant's case as both parents were in Jamaica."
6. In his determination, the Adjudicator found that the circumstances of the appellant's family home in Jamaica, while being less desirable than those of the appellant's great uncle and his wife, were not so poor as to amount to conditions

which would make the return of the appellant undesirable. In considering the appellant's Article 8 claim he said:

"In the light of the fact that the appellant's mother and the bulk of her family is in Jamaica, then although her removal to Jamaica would amount to an interference with the family life she has established with her sponsor and his wife in the United Kingdom, that interference would be in pursuit of a legitimate aim, namely immigration control and taken in accordance with the law and I find that the interference with her Article 8 rights is proportionate to that aim for the same reasons that ground my view of her position under the Rules."

7. In the (quite unnecessarily long) grounds of application for leave to appeal, it was submitted that the Adjudicator had not considered in detail all the evidence given by the appellant's great uncle and evidence submitted on behalf of the appellant from her school and her church. Had he done so he would have found that there were serious and compelling family or other considerations, which make the appellant's exclusion undesirable. They also assert that the Adjudicator erred in law in his consideration of the appellant's Article 8 claim and the effect of removal on the physical and moral integrity of the appellant.
8. Addressing us on behalf of the appellant, Ms Bhamra pointed out that the Adjudicator heard a great deal of evidence that was not previously considered by the Secretary of State. Since arriving in the United Kingdom in 1999, the appellant has lived with her great uncle and his wife. Neither of the appellant's parents take any real role in the appellant's life. The appellant's mother is herself wholly reliant financially on her own father, the sponsor's brother. The appellant's own mother lives with her mother and father, four of her siblings and with the appellant's two younger siblings. They live in a three bedroom house in cramped and unsatisfactory conditions. Counsel submitted that there were serious and compelling family or other considerations making the appellant's exclusion from the United Kingdom undesirable. The appellant was entitled to succeed in her appeal against the refusal of the respondent to grant her indefinite leave to remain under paragraph 298 of HC 395. She submitted that the Adjudicator's decision was unsustainable.
9. Counsel drew the Tribunal's attention to paragraph 26 of the Adjudicator's determination. She reminded us that the Adjudicator accepted the evidence of the sponsor, in relation to the conditions in Jamaica to which the appellant would be returning. The appellant's family members in Jamaica are not able to feed themselves and the sponsor regularly sends them money. He last sent money in December 2002.

10. Turning to the appellant's Article 8 claim, the Adjudicator failed to consider in the balancing exercise the conditions under which the appellant lived in the United Kingdom. Within his consideration in paragraph 27 of his determination, the Adjudicator has failed to consider the impact which removal would have on such a young child. He does not demonstrate that he has considered the inevitable change to the appellant's emotionally stability, which would occur by removal.
11. The Tribunal asked Counsel to clarify whether, under the immigration rules, the Adjudicator should have concerned himself with the conditions in the appellant's own country rather than those which the appellant enjoyed in the United Kingdom. Counsel was not able to assist. She invited the Tribunal to either remit the appeal for hearing afresh or, in the alternative, to allow the appeal.
12. For the respondent, Mr Parker confirmed that the Adjudicator was only concerned, in his consideration of the appellant's claim under paragraph 298(d) of HC 395, with the circumstances in the appellant's own country. In relation to the appellant's claim under Article 8, both the appellant's situation prevailing in the United Kingdom and the conditions to which she will be required to return should be considered.
13. Mr Parker submitted that the question of whether or not, "*... there are serious and compelling family or other considerations which make exclusion of the [appellant] undesirable...*" had been properly considered by the Adjudicator, but this appellant had failed to demonstrate that there were any such considerations. There were many children living at, or close to the poverty line throughout the world and there is nothing in the evidence before the Adjudicator to suggest that conditions to which the appellant would return in Jamaica were serious and compelling. Her family in Jamaica were living just above the poverty line. Viewed cumulatively, the evidence of the conditions in which the appellant would live, do not meet the requirements set out in paragraph 298 of HC395. He suggested that were the sponsor not supporting the family as he had done, then it was possible that those conditions might be met. He submitted that the correct approach in respect of the appellant's Article 8 claim was to look at the balance between the conditions prevailing in Jamaica and those which the appellant enjoyed in the United Kingdom.
14. As to the appellant's Article 8 claim, Mr Parker submitted that it was necessary to bear in mind that the appellant was granted leave as a visitor, when in fact the intention of the sponsor was that the appellant should settle in the United Kingdom. That, he submitted, breaches paragraph 322(2), namely, "*the making of false representations or the failure to disclose*

any material fact for the purpose of obtaining leave to enter or a previous variation of leave." That, he urged us, must be a consideration. He suggested that culpability must attach to the appellant, because the sponsor was *in loco parenthesis*. After some discussion with the Tribunal, he conceded that this point could not be right, given that the appellant is now only aged twelve and was only eight years of age at the time she entered the United Kingdom.

15. Mr Parker accepted that there was a fifteen month delay on the part of the Secretary of State in considering the application and that there was a further unacceptable delay on the part of the respondent following the giving of the notice of appeal, in sending the appeal papers to the Immigration Appellate Authority.
16. He conceded that the Adjudicator's determination was not sustainable in relation to the appellant's claim under Article 8 since the Adjudicator had not demonstrated that he had considered properly the question of whether removal was proportionate. However, he suggested that the Adjudicator had made clear findings of fact and on that basis the Tribunal could correct the error. He invited the Tribunal to dismiss the appeal.
17. Responding, Counsel accepted that there was no evidence before the Adjudicator which he has not properly recorded in his determination. We reserved our determination.
18. We first considered the appellant's appeal in respect of her claim for indefinite leave to remain in the United Kingdom under the requirements of paragraph 298 of HC 395.
19. Paragraph 298 provides as follows:

"298. *The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:*

i) is seeking to remain with a parent, parents or a relative in one of the following circumstances:

a)

b)

c) or

d) one parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

- ii)*
- iii)*
- iv)*
- v)*"

20. We are grateful to Counsel for having accepted that there was no evidence before the Adjudicator, which he has not recorded in his determination. The evidence before the appellant in relation to the circumstances in Jamaica are set out in paragraphs 12 and 13 of the Adjudicator's determination. He said:

12. *[the sponsor] said that since 1961 when he came to the United Kingdom, he had been back to Jamaica five or six times - the last occasion in 1999 - to visit his brother and had been struck by the appalling conditions. There was overcrowding with nine people in the three bedroom house and the appellant and her mother and an adult and two sisters all shared two beds in the same room, sleeping "top to toe". The appellant was unable to go to school more than two to three times a week because the fares could not be afforded. She was thin and undernourished. He said that the farming which provided their livelihood was not really paying and everything had virtually come to a stop. It was only a smallholding and with the droughts some years and too much rain others, they often lost crops. When the crops did succeed, so did everybody else's and there was too much produce and no profit. When he was there, there was not a lot to eat and there was no meat or fish and the appellant ate yams, banana, breadfruit and whatever else she could find. She was very thin, but still lively. She did not cry at all. The sponsor's brother was the breadwinner in the house and the farm was the only source of income. The appellant's mother worked by way of washing and cooking in the house and could not maintain the appellant properly on her own, having no income. They had brought the appellant to this country because of the appalling conditions there and because they could give her such a better life here. They treated her as their own child and when she had any problems of the sort afflicting young women, she could turn to his wife or to his daughters aged 33 and 34, although the latter no longer lived with the sponsor. She called his wife "auntie".*

13. *The sponsor said that there was no one else to take care of the appellant and if she returned to Jamaica she would be devastated. School there was a poor proposition and the teaching here was much better. She would not be able to afford to go to school every day back in Jamaica and she would not get such good food and would lose weight. She would also lose the emotional support of the sponsor's wife and daughters."*

21. The Adjudicator noted that the appellant got on well with her mother and that the sponsor and his wife had chosen the

appellant to bring with them, because she was the oldest. The sponsor confirmed that the appellant telephoned her mother regularly, but nonetheless came to him and his wife with her problems. The appellant's father played no role in the proceedings and was not supporting them, or living with the appellant's mother, who was now in her early thirties.

22. The Adjudicator correctly identified that the sole matter requiring his decision was in relation to the decision taken by the Secretary of State, that there were no serious and compelling family or other considerations making exclusion of the appellant undesirable. In paragraph 24 of his determination he said:-

"It is abundantly clear that the appellant enjoys a far better standard of life in the United Kingdom with her great uncle than she would back home in Jamaica with her mother and other relatives. The accommodation is more spacious, there is more money and better food and the appellant is now able to attend her school five days a week. It is quite clear that she is a model pupil, well thought of by her tutors and that she is a conscientious student and also a member of her local church. In Jamaica the family position is much more precarious, standards of living are considerably lower and not only do I have considerable sympathy with the view taken by the appellant's sponsor, it clearly does him great credit that he is prepared to offer the appellant a supportive and loving home in this country in order, at the very least, that she might have a better standard of living and education."

23. The Adjudicator considered the position of the family in Jamaica and, while noting that they were patently less desirable than those of the sponsor and his wife and it was certainly true that the appellant would enjoy a much better standard of living, health and education were she to remain in the United Kingdom, he found that he was not satisfied that if returned to Jamaica the physical and social conditions in which she would find herself would be such as to amount to "serious and compelling family or other considerations making her exclusion undesirable." He found that the conditions in Jamaica were clearly not as good as they are in the United Kingdom, but that they were not so poor, in his opinion, and on the evidence which was placed before him, as to satisfy the requirements of paragraph 298.
24. Included within the bundle submitted on behalf of the appellant, was a statement signed by the sponsor in which he confirmed that he regularly sends money to his brother, the appellant's grandfather, to maintain him and his family and there was also included a "Victoria Link Money Transfer" form dated 20 September 2002 showing that the sponsor's wife had remitted the sum of £60 and a further "Victoria Link Money Transfer" form showing that on 18 December 2002 the sponsor had remitted a further £160.

25. We carefully considered the circumstances in which the appellant had been living in Jamaica, as set out in some detail by the Adjudicator at paragraph 12.
26. We find ourselves unable to agree with Counsel that there was sufficient evidence before the Adjudicator to establish that there are serious and compelling family and other considerations such as to make the exclusion of the appellant from the United Kingdom undesirable. We therefore **uphold** the decision of the Adjudicator in relation to this aspect of the appellant's appeal.
27. We now turn to the appellant's claim under Article 8. As the Tribunal have said on numerous occasions previously, the correct approach is to adopt that used by the European Court and to analyse the claim, using a logical step-by-step approach. First it must be asked whether there is an existent private or family life? Second it needs to be considered whether there will be an interference with that family or private life? Third, it must be decided whether that interference pursues a legitimate aim, and if it does, fourth, whether it is in accordance with the law? Finally it must be decided whether such interference is proportionate?
28. In answer to the first question, we find, as did the Adjudicator, that the appellant does enjoy a family life with the sponsor and his wife, with whom she has lived since her admission to the United Kingdom. It follows, therefore, that removal of the appellant will amount to an interference with it. Such interference does pursue a legitimate aim and it has not been argued before us that it would not be in accordance with the law. The question for us to decide is whether such interference is proportionate?
29. The Adjudicator had before him a statement from the sponsor and letters of support from the appellant's church and school. We have a letter from the Rev. Audrey Standhaft in which she confirms that the appellant is a regular attendee at Sunday Worship and at the Parkway Methodist Church mid-week youth club. She is described as being a reliable, trustworthy and helpful young lady. The appellant's tutor from St. Thomas Moore School describes the appellant as keen pupil of average ability who always works to the best of that ability. She is well behaved and polite, both in the classroom and around the school. She is friendly, caring and enthusiastic about everything she does. She punctually completes her homework and is described as being a "delightful member of the tutor group" and always willing to volunteer for tasks and be helpful in any way she can. She is popular with her peers and teachers and takes a keen interest in extra-curricular activities and sings with the choir. She is a keen athlete and competes on behalf of the school. Her tutor describes her as

being a very likeable mature girl who is an asset to the school. The appellant has been awarded an attendance award for perfect attendance during the academic year September 2000 to July 2001. She has been awarded nine commendations since December 2002 by her school, which, in the words of the Head Teacher, "reflect a positive attitude to school life". A charitable company providing arts and performance tuition for young people, Multi A Ltd., have presented the appellant with a Certificate of Achievement for outstanding contribution and performance. It is quite clear to the Tribunal that the appellant's sponsor and his wife are to be congratulated for the way in which they have been caring for the appellant.

30. Mr Parker asked us to bear in mind that it appears to have always been the sponsor's intention to bring the appellant to the United Kingdom for settlement. That is a matter that we believe we should have regard to; there was a deliberate attempt by the sponsor to circumvent immigration control. We reminded ourselves that, when the appellant entered the United Kingdom, she was eight years old and that the delay in processing her application for indefinite leave, coupled with the delay on the part of the respondent in forwarding her appeal to the Immigration Appellate Authorities, has resulted in her having spent some four years in the United Kingdom. During these four years she has made excellent progress in her education, assisted no doubt by the undoubted love and care lavished on her by the sponsor and his wife. We take into account the fact that this four year period has been a crucial time in her development and that the appellant has come to regard her great uncle and aunt as substitute parents. We do not underestimate the emotional trauma which she will undoubtedly suffer as a result of being required to leave the United Kingdom.
31. Nevertheless, this appeal does not in our view raise the considerations as to the effect of delay on the part of the Secretary of State which applied in **Shala v Secretary of State for the Home Department [2003] EWCA Civ 233**, where the claimant had a legitimate claim to enter. In the present appeal, although entry was lawful in the sense that entry clearance as a visitor had been obtained, that was not the real purpose of entry, as we have noted above. The delays on the part of the respondent have not altered the outcome of the appeal under the Immigration Rules, or caused the appellant to alter her position to her detriment. The Secretary of State has reached his decision on the human rights claim in the knowledge of the appellant's circumstances in this country and the passage of time has not changed their essential nature. We bear in mind the area of discretion which is, as held in **Blessings Edore v Secretary of State for the Home Department [2003] EWCA Civ 716**, to be accorded to the Secretary of State in making his decision, as to the

proportionality of removal. We cannot say that he is plainly wrong in the decision which he has reached.

32. We bear in mind that the sponsor and his wife have regularly supported the appellant's family in Jamaica financially and they continue to do so. There is no evidence before us to suggest that, were the appellant to be required to leave the United Kingdom, she would not continue to enjoy financial support from the sponsor and his wife.
33. Taking all these factors into account and looking at the matter in the round, we are of the view that the interference with the appellant's Article 8 rights is, in the particular circumstance of this case, proportionate. For all these reasons this appeal is **dismissed**.

Richard Chalkley
Vice President