ST (Article 8: Family Life - Proportionality) Iran [2003] UKIAT 00110

Heard at Field House on 4 July 2003

IMMIGRATION APPEAL TRIBUNAL

Date determination notified

29.10.03

Before:
Mr J Perkins
(Chairman)
Mrs M L Roe

Between

Appellant

and

ENTRY CLEARANCE OFFICER TEHRAN

Respondent

DETERMINATION AND REASONS

1. Before us Mr R Toal of counsel, instructed by Noden & Co, solicitors, appeared for the appellant and Mr A Sheikh , a Home Office Presenting Officer appeared for the respondent.

2. The appellant is a citizen of Iran. He was born on 5 July 1982 and so is now aged 21 years. He appeals a decision of an adjudicator, Mr J R L G Varcoe CMG, who dismissed his appeal against the respondent's decision that he was not entitled to entry clearance to settle in the United Kingdom. The appeal before us is limited to deciding if the decision was contrary to the appellant's rights under article 8 of the European Convention on Human Rights.

3. The appellant's parents and two younger brothers are settled in the United Kingdom. His younger brothers were minors when they were given permission to settle in the United Kingdom. The appellant had achieved his majority before he made the application that is the subject of this appeal. The appellant's father and sponsor is recognised as a refugee. It is accepted that the appellant's father cannot be expected to return to Iran so that the appellant can enjoy family life with him there.

4. Mr Toal drew to our attention the case of ECO Dhaka v Box [2002] UKIAT 02212 in which Dr Storey's tribunal considered the approach to be followed by a decision maker considering the impact of article 8 in a case involving an application for entry to (rather than removal from) the United Kingdom. The case is not "starred" but it is, if we may say so, a careful review of relevant jurisprudence and we intend to follow it.

5. The appellant must prove his case on the balance of probabilities. The "substantial grounds for believing" test does not apply to entry cases. Further the test is not "has there been an unjustified interference with the right to family life?" but "is the act in accordance with the positive obligation on the United Kingdom to show respect for family life?" The distinction is important because in entry cases it is arguable that it is the decision of a relative to go and live in the United Kingdom (rather than the decision of the United Kingdom to refuse entry clearance to the applicant) that has interfered with an applicant's family life. It may well be that it is the relative's decision that has interfered with family life but in entry cases European jurisprudence shows that "interference with family life" is not the test. Under the convention the state must actively show respect for family life. Nevertheless if a "lack of respect for family life" has been established then when conducting the balancing exercise to determine if it is proportionate to the proper purpose of enforcing immigration control the decision maker must remember that the United Kingdom does not have a general obligation to respect an immigrant's choice of country or residence and it is relevant to consider whether there are insurmountable obstacles to the family enjoying family life elsewhere.

6. At the hearing before us Mr Toal emphasised that the existence of "insurmountable obstacles" is relevant to the proportionality of the decision, and not to whether the decision shows respect for family life. Put like that the point seems trite but that is not fair to Mr Toal. It is arguable, but, in the light of Box, wrong to claim that there can be no lack of respect for family life if the family life can continue elsewhere. It was Mr Toal's concern that the adjudicator did not appear to consider "insurmountable obstacles" when considering the balancing exercise in his determination and the fact that there are insurmountable obstacles should, he said, count heavily in the appellant's favour when the balance is struck. He based this on the well known formulation of Lord Phillips in R (ota Mahmood) v SSHD [2001]INLR at 55(3) "exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Art 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded." Mr Toal submitted that where the proviso does not apply then there is a strong inference that article 8 is breached and that the lack of respect shown to family life is disproportionate.

7. Mr Toal further submitted that the adjudicator should have regard for the whole family, and not just the appellant. He relied for this on Sen v The Netherlands (Case No 31465/96), a decision of the European Convention of Human Rights. We do not find the proposition controversial but it must not be overstated. There is one appellant before us. It is his human rights that have to be considered but his exclusions will (or can be expected to) impinge on the rights of others and to that extent only their rights must be considered too. This is probably what the adjudicator has in mind at paragraph 19 where he said "It has been held in Kehinde that to succeed under article 8 an applicant must be subject of an immigration decision and that it was only his human rights that fell to be considered, even though it was possible to take into account the suffering of the other family members." Sen concerned the rights of an infant child and

members of her family who were parties to the appeal. It gives only limited guidance to us in this case.

8. Mr Toal then criticised the adjudicator for his approach to the evidence of how the appellant's exclusion affected other members of the family.

9. We have seen a medical report from Dr Judith Edwards who is a consultant psychiatrist with the Surrey Oaklands NHS Trust. She prepared a report dated 28 January 2002 concerning the appellant's parents. The appellant's mother in particular has been rather poorly. Dr Edwards concluded "It is clear that the ongoing separation from their sons is having a very detrimental effect upon them individually, and as a couple and as a family. It is clear that reunions with their sons would have a positive impact, although it is likely that there are other factors contributing to the couple's depression". She then went on to say how the appellant's mother felt "imprisoned and tortured by the separation from her culture of her two sons". We see no reason to go behind this conclusion although of course one of those two sons has now rejoined her in the United Kingdom.

10. Mr Toal then criticised the adjudicator for his approach to the evidence of the appellant's brother, Sina. He said, rightly, that the adjudicator ought not to have discouraged him to give evidence and then rejected some of his account. However this criticism is only relevant to the extent that the evidence was relevant. The issue before us is not "is the appellant safe in Iran" but rather "is excluding him from the United Kingdom contrary to the appellant's right to a family and private life" and we do not find the evidence of Sina very helpful about that. We accept that he is part of the appellant's family and that there is an important relationship between the brothers.

11. For similar reasons we reject any criticism of the adjudicator for not giving more attention to the evidence about the conditions that the claimant will face in Iran. They do not bear on the issue.

12. We find that the adjudicator's approach to the issue before him was wrong. He did not follow Box, which is scarcely surprising as no-one seems to have told him about it, although we do not accept that this has led the adjudicator into any material error.

13. We find that excluding the appellant from the United Kingdom does show a lack of respect for his family life and to that extent is contrary to his rights under article 8 of the European Convention on Human Rights.

14. We must now decide if excluding him is proportionate to the proper purpose of achieving immigration control.

15. Against this is the fact that he has close ties with his parents and brothers in the United Kingdom and they cannot be expected to live with him in Iran because his parents are refugees. That is an important but not decisive point. Further his absence is a significant contributory cause of his parents' ill health. We have to consider the appellant's rights and we find that it must be distressing for him to be upsetting his family in this way.

16. However we must not lose sight of the fact that the appellant has achieved his majority. He was born on 5 August 1981. He applied for entry clearance on 12 November 1981 when he was aged 20 years. In the absence of evidence of, for example, exceptional immaturity or dependency he must be expected to make his own way in the world. His absence is not causing so much distress to his parents that it is contrary to the appellant's right to a private and family life to keep them apart.

17. It follows that we agree with the adjudicator's conclusion and we dismiss this appeal.

Jonathan Perkins
Vice President

9 September 2003