MK (Article 8 - Proportionality)
Pakistan [2003] UKIAT 00037

IMMIGRATION APPEAL TRIBUNAL

Date of Decision: 7 May 2003
Date of Promulgation: 05/08/03

Before
Mr K Drabu (Chairman)
Mrs R Faux JP

Between
SECRETARY OF STATE FOR THE HOME DEPARTMENT
(Appellant)
and

(Respondent)

Representatives:
Mrs L Singh, Presenting Officer for the appellant.
Mr F Mohammed of Counsel instructed by International Immigration Advisory Service for the respondent.

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State against the decision of an Adjudicator, Mr Steven P Alis, who, sitting at Salford Magistrates Court allowed the appeal of Mohammed Asif Khilgi, hereinafter called the respondent. The Adjudicator concluded that his removal from the United Kingdom would infringe his rights under Article 8.

2. The respondent is a citizen of Pakistan and his date of birth is 16 March 1966. The respondent came to the United Kingdom on 31 October 1997 when he was granted leave to enter and remain on the basis of his marriage as a foreign spouse. That marriage broke down and on 13 October 1998 he applied for asylum. That claim was refused on 18 May 2000 and the decision was upheld by an Adjudicator on 17 January 2001. Leave to appeal to the tribunal was not sought but on 2 October 2000, the respondent sought leave to remain as the husband of one Samina Ali, a British citizen. The application was refused on 8 April 2002. He claimed breach of his rights under ECHR on 21 May 2001. On 20 August 2001 the Secretary of State decided to refuse to grant the respondent leaver to remain under the Human Rights Act 1998. This is the decision that the Adjudicator refused to uphold and it is the Adjudicator's decision that is before us on appeal with permission to appeal having been granted by Mr P R Moulden, Vice President on 7 March 2003.

3. The Adjudicator heard oral evidence from the respondent and his wife Samina. He made the following findings:

    a) The respondent had not been viewed as a credible witness by the Adjudicator who dismissed his asylum appeal.
    b) The respondent had taken legal advice (albeit incorrect advice) which confirmed to him that him and his wife that if they married then his application would be successful. This clearly provided the respondent with a motive for entering into his current marriage – namely to obtain leave to enter or remain in this country.

c) Their son has not spent his formative years in the UK being only eight months old.
d) The parties are in a genuine and subsisting marriage.
e) At the time of the decision the parties were married and had a young child.
f) The parties have committed themselves financially to a life in the UK having purchased their present property and both parties are in gainful employment.
g) If the respondent was refused leave to remain then the spouse would have to give up work to look after her son and therefore would be unable to comply with requirements of the immigration rules on maintenance. Similarly if she went to Pakistan pending her husband's fresh immigration application she again would fail to comply with the rules.
h) The respondent spends all day looking after his son whilst his wife is at work and there is a strong bond between them.
i) The respondent' wife is a British citizen and has lived in the UK all her life and only visits Pakistan for holidays and family occasions.
j) The respondent's wife suffers from a skin disorder which gets worse in hot climates.

Based upon these findings the Adjudicator concluded that although the interference in family life of the respondent is in accordance with the law as he has lived in the United Kingdom without authority since October 1998, and the removal was proposed for the legitimate aim of immigration control, the interference was nevertheless disproportionate.

4. The Secretary of State contends in his written grounds of appeal inter alia that the Adjudicator's decision is perverse and that he has failed to apply the guidelines given by the Court of Appeal in *[2001] 1WLR 840*. It is contended that the Adjudicator failed to indicate what, if any insurmountable obstacles there are to the respondent's wife and baby relocating to Pakistan with him and why the removal is not proportionate to the need to maintain effective immigration control and also why it is unduly harsh to expect the respondent to return to Pakistan to make an application for Entry Clearance.

5. Before us Mr Mohammad raised a preliminary issue. He argued that the Secretary of State had filed the application for permission to appeal beyond the permitted time. We informed him that this issue had been ruled upon by one of our colleagues Mr D Parkes, Vice President and he had held that the application had been lodged in time. We told Mr Mohammad that we would respectfully follow that ruling and that in any event the Tribunal has the jurisdiction to extend time limits for lodging applications for permission to appeal. We invited him to make any further submissions on this issue. He said he wished to say no more. We then asked him to address us on the merits of the Home Office appeal. He said that the Adjudicator had looked at all the relevant matters and had properly allowed the appeal. When asked if in his view the Adjudicator's conclusions could be regarded as being consistent with the principles set out in *Mahmood, Baljit Singh [2002] UKIAT00660 and Xhezo (01/TH/0625),* Mr Mohammad said that decision in each case must depend on facts. In this case, he pointed out, the respondent did not have a bad history as the appellant had in Baljit Singh. Unlike the appellant in Mahmood, the respondent had entered the UK as a spouse having waited for five years to obtain an entry clearance. In Mahmood, the appellant's wife was born in Pakistan whereas in this case the wife was born in the United Kingdom and is therefore subject to visa requirements in Pakistan. He pointed out that she also has a medical condition and more importantly is a key

worker as a Teacher. He submitted that at a time when the country is importing such workers, it would be against the public interest to force her to leave the UK to maintain her family life with the respondent.

6. Mrs Singh argued that the respondent's immigration history may be different to that of Mahmood or Baljit Singh but he was subject to the same considerations in law as the others. The fact that he had come to the UK as a spouse was of no relevance. What was of relevance was whether there were insurmountable obstacles in the continuation of family life in the country of origin. In this context, she said, the medical condition of the respondent's wife is of no weight as there is no evidence of its real nature, its prognosis and the availability of required medical facilities in Pakistan. She said the burden of proof was upon the respondent and he had produced no evidence on any of the matters. She said that the respondent can return to Pakistan y himself and his wife did not need to go. She had known his immigration status when she married him and she could not now complain that his removal is unfair. Mrs Singh reminded us that it was not the respondent's wife who was being removed but the respondent alone. She conceded that on present evidence the respondent meets all the requirements of the rules for foreign spouses and that he would succeed in getting an entry clearance if he were to apply for one. She was not able to tell the Tribunal as to how long he would have to wait in Pakistan before he would be interviewed. She said that he receive the same treatment as other applicants in that category.

7. Mr Mohammed reminded us that in determining proportionality a balancing act had to be carried out and in the context of that balancing act it was important to have regard to the time scale for processing of entry clearance applications. If delay were shown to be significant, he said, that would be an important factor in the consideration of proportionality. We agree with that submission but what we do not have is evidence on processing times for spouses seeking entry currently from Pakistan. The respondent should have produced that evidence as he is asking us to rely on delay in the process. We can hardly be expected to rely on it when we have no evidence that upon removal the respondent may have to wait years and not months before his application for entry clearance is considered.

8. We have given anxious consideration to all the facts and the arguments that we heard from Mr Mohammed and Mrs Singh. With regard to Mrs Singh's argument that the Adjudicator's failure to indicate what insurmountable obstacles there were in the respondent continuing his family life in Pakistan had rendered his decision as erroneous in law, is not an argument that finds favour with us. In our humble view, the phrase "insurmountable obstacles" used by the Master of the Rolls in *Mahmood* has become grossly overused and somewhat abused and in many situations misconstrued. It is not, if we may say so, with great respect, a magical mantra which must be recited in every case. We draw inspiration and comfort from what the Tribunal chaired by Mr Justice A Collins said in the case of *Bakir [2002] UKIAT01176*. He said in paragraph 9 of the decision "The adjudicator's reference to the need for there to be 'no insurmountable obstacle to the family living together in the country of origin if the family members excluded' comes from the judgment of the Master of the Rolls in Mahmood. At Paragraph 55 he sets out his conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration control. The adjudicator has quoted number 3. It is to be noted that, helpful though they are, these conclusions are not specifically adopted by the other two members of the court (Laws and May LJJ). The test to be applied is whether in all the circumstances it is reasonable to require the family members to leave the country, that is to say, whether the interference is proportional." With respect we adopt and follow that

test. We should like to add that if proof of insurmountable obstacles were the only yardstick for success on an Article 8 claim, it would be a very high threshold to cross. We note that under our immigration rules a spouse of a person present and settled in the United Kingdom has the right to enter subject to the requirements of the rules none of which require proof of insurmountable obstacle to carrying on family life in the country of origin. As Mr Justice Collins pointed out in paragraph 11 of his decision in *Bakir* "It is the particular nature of family life in the case which leads to the view that the conclusions set out by the Master of the Rolls in *Mahmood*, itself involving a marriage to a British citizen settled in the United Kingdom, are not all embracing. Furthermore, it is to be noted that in conclusion (6) Lord Phillips says: 'Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned.' "

9. Fascinating and even impressive though it was, the comparison drawn by Mr Mohammed about the facts of the appeal before us with those of *Mahmood* and Singh, is misconceived since the end result in those cases is of no consequence but the legal principles, whatever these be, are. The question of course is what those legal principles are. For the Secretary of State we have often seen the Tribunal decision in *Baljit Singh* cited as authority for the "legal proposition" that an applicant's possible failure to qualify for entry clearance is no reason to allow the claim under Article 8. Having read the decision with care, it says nothing of the kind. If it had we would have regarded it as case specific and not a legal principle. It appears to us that the Home Office position is based upon a misconstruction of Paragraph 21 of the decision. It is perhaps being read out of context since paragraph 20 in the decision makes points, with which we respectfully agree, to the contrary. The same applies to the contents of paragraphs 24 and 25 of the decision.

10 Once family life is found to have been established, the determinative issue in most cases is likely to be whether the interference caused by removal is proportional to the legitimate aim of immigration control. This requires the decision maker to carry out a balancing exercise and he is required to weigh all the relevant facts in balance. The decision in each case will therefore very much depend on facts. In some cases certain facts may carry much weight and in others the same facts may carry less weight. It is therefore not very helpful to use cases decided purely on facts as precedents and sadly the pressures on representatives in immigration appeals is such that many often give in to such temptations, knowing full well that they should not.

11. Addressing the facts of this case, we have concluded that the Adjudicator's conclusion was plainly wrong. His balancing exercise was fatally flawed in that he did not remind himself that the law required the respondent to obtain an entry clearance to live in the United Kingdom as a husband and that there was nothing exceptional in his circumstances that should exempt him from compliance with that requirement. The requirement may well have no more than an administrative significance but until it is shown to be an unlawful hindrance to the right to family life, it has to be applied. The strongest factor in mitigation (if one can use such term in this context!) in this case is the profession of the respondent's wife. She is a key worker as a teacher and her husband's removal to Pakistan is bound to have an adverse impact on her. She might have to give up her job as a teacher while her husband seeks entry clearance. However, there is no evidence before us and nor was there any before the Adjudicator that the respondent will be subjected to long delays in securing his entry clearance. The respondent's wife will of course suffer hardship as will the respondent as a consequence of his

removal. However, hardship even undue hardship is not the test. The test is whether the decision is proportional or is it reasonable to require the family members to leave the country. In this case there is no likelihood that the respondent's wife will leave with the respondent or that she will need to live with him for a long duration in Pakistan. The couple have lived together as a family for a relatively short time and they knew at the time of their marriage that the respondent's future stay in the United Kingdom was in serious jeopardy. With regard to the Adjudicator's view on the difficulties that the respondent is likely to face in obtaining entry clearance, we do not share those. Mrs Singh conceded that the respondent meets all the requirements under the Rules and as the Tribunal said in *Baljit Singh*, "It could be that, if the appellant's wife had been thought unable to work for the foreseeable future and the appellant upon return unlikely to receive a viable job offer from the UK, he might not be able to fulfil the maintenance requirement of paragraph 281 straightforwardly. However, as Mr Deller correctly pointed out, recent case law has only looked at whether an applicant's arrival would cause additional recourse to public funds. And as someone who had worked as a lorry driver in the past, the appellant was certainly in a better position than some foreign husbands to show he would soon find employment. It must also be remembered that as a result of Section 3 of the Human Rights Act 1998 all the provisions of the immigration rules (as well as other legislation) have to be read purposively so that their operation does not give rise to a violation of human rights. In certain circumstances denial of entry clearance to a spouse because of his partner's physical inability to re-enter the job market could give rise to an allegation based on financial discrimination contrary to Article 8 read in conjunction with Article 14." We note that the respondent's employment history in the UK is good and it is therefore reasonable to assume that he will have little difficulty in securing a viable job offer when he seeks an entry clearance or in the alternative he will be entitled to expect the Entry Clearance Officer to accept that his previous employment history would not cause him difficulties in obtaining employment soon after his admission to the UK.

12. For the above reasons we find that the respondent's removal to Pakistan would not be a disproportionate interference with his family life. We set aside the Adjudicator's decision and allow this appeal.

K Drabu
Vice President