Dbeis and others v Secretary of State for the Home Department

[2005] All ER (D) 283 (May)

[2005] EWCA Civ 584

Court of Appeal, Civil Division

Chadwick, Longmore and Carnwath LJJ

19 May 2005

Ken McGuire (instructed by Moss Beachley Mullem and Coleman) for the claimant.

Eleanor Grey (instructed by the Treasury Solicitor) for the Secretary of State.

Melanie Martyn Barrister.

Judgment

LORD JUSTICE CHADWICK, LORD JUSTICE LONGMORE and LORD JUSTICE CARNWATH

LORD JUSTICE CARNWATH:

1. This is an appeal from the Immigration Appeal Tribunal ("IAT"), who on 3rd September 2004 refused an appeal against a decision of an Adjudicator dated 28th July 2003. The only live issue concerns the treatment of the applicant's case under Article 8 of the European Convention of Human Rights.

Background

2. The appellant is a citizen of the Lebanon who arrived in the UK with her two young sons in February 2003 and claimed asylum. She claimed that she faced a risk of persecution on account of her religious beliefs. However that claim was not accepted and is no longer in issue. Her claim under Article 8 was based in particular on the personal circumstances of her son, Tarek, who suffers from cerebral palsy.

3. I can take a description of his condition from a letter dated 1st December 2003 from Jan Hennessey, Senior Paediatric Physiotherapist at Hounslow NHS Primary Care Trust (which was before the Tribunal, but not the Adjudicator):

"Tarek has cerebral palsy affecting all four limbs. This is a permanent non-progressive condition due to damage of the developing brain. It affects muscle control, balance and posture. Without appropriate treatment it can result in joint deformities which are painful and are further disabling."

The letter noted that since May 2003 Tarek had been attending Hounslow Heath Infants' School, which has specialist support for children with physical disabilities. It continued:

"Tarek shows potential for increased independence and development of his physical skills given the right environment, therapy treatment, and specialist equipment. His condition, however, is permanent and he will always require support and equipment..."

The adjudicator's decision

4. The Adjudicator dealt with the various grounds on which asylum was claimed including the claim in respect of Tarek's condition. (The appellant had been represented by counsel, Miss J Fisher.) He said:

"39. I note the medical evidence concerning the appellant's son and the treatment that he is receiving. It is clear from the appellant's oral evidence that the medical facilities which would be available to her son in the Lebanon are perfectly adequate and it appears that the only aspect of the appellant's son's care which is in any way different is the assistance which he is obtaining at school in the United Kingdom where I note that he attends a normal school but has been assessed with special educational needs and obtains that additional tuition and assistance which are given once such a special educational needs requirement has been established."

5. Later in his decision he specifically addressed Article 8:

"46. I have also considered Article 8 and under this Article I have to determine the following separate questions:

1. Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?

2. Is that interference in accordance with the law?

3. Does that interference have legitimate aims?

4. Is the interference proportionate in a democratic society to the legitimate aim to be achieved?

47. I have concluded from the objective evidence before me that it would be proportionate to return the Appellant to the Lebanon with her two children. There is objective evidence to show that there are adequate medical facilities available and this has already been conceded in any event by the Appellant in her own evidence.

48. The Appellant seeks now to try and obtain a better education for her children and in particular the child who has been assessed with special educational needs in this country but from the objective evidence before me there is an education system existing in the Lebanon and I see no reason at all why the Appellant's children could not take advantage of that system, notwithstanding the fact that it may be not as sophisticated as the one that exists in the United Kingdom and in coming to those conclusions I have taken in to account what has been stated in Bensaid and I have concluded that this is not a case where the Appellant's child is entitled to better treatment where both adequate medical facilities are available and education is also available. There are therefore, according to the principles set out in Mahmoud no insurmountable obstacles for the return of the Appellant and her two children"

Accordingly he rejected the appeal on both asylum and human rights grounds.

The appeal to the IAT

6. Since this decision was promulgated after 9th June 2003, any onward appeal to the IAT was limited to issues of law (see CA v Secretary of State [2004] EWCA Civ 1165, para 10, applying s 101 (1) of the Nationality, Immigration and Asylum Act 2002). It has become apparent in a number of cases in this court that this limitation was not widely appreciated at the time (see e.g. B v Secretary of State [2005] EWCACiv 61, para 2). Although the grounds of appeal to the IAT covered a range of issues of fact arising from the Adjudicator's decision, permission to appeal seems to have been

granted on all of them without distinction. However, the only ground which is now material is 5, which stated:

"The Adjudicator failed to consider that the applicant's right under Article 8 of the Human Rights Act would be breached if returned to the Lebanon."

7. Before the IAT she was represented by Mr Jaffar. In its decision, the tribunal noted that he conceded that all the grounds other than the Article 8 ground were unarguable. It continued:

"5... He requested that the decision of the Adjudicator be set aside as he had, according to Mr Jaffar, failed to give any consideration to the appellant's claim under Article 8. He said that in the circumstances the tribunal should direct a fresh hearing before a different Adjudicator. When we drew Mr Jaffar's attention to paragraph 46 to paragraph 48 of the determination which clearly and manifestly showed that the Adjudicator had not only considered but had also applied the relevant principles established in leading cases on Article 8 to the facts of this case, Mr Jaffar contended that the facts of the case before us were 'rare' and 'exceptional' due to 'compassionate circumstances' and the Adjudicator had failed to gave due weight to the compassionate circumstances as a consequence of which his balancing exercise was flawed. Mr Jaffar asked that we pay particular attention to the health and educational needs of the appellant child who suffers from cerebral palsy. Mr Jaffar said that this appellant requires special attention in his education which he gets here and if he were removed from this environment it 'could lead to an infringement of his rights under Article 8'. He said that the right to private life which is protected by Article 8 includes the ability of an individual to develop and form relationships with others."

The tribunal was referred (apparently without objection) to a bundle of letters and other documents relating to Tarek's condition, which had been expanded from those before the Adjudicator.

8. The tribunal expressed its conclusions on this issue as follows:

"7. Whilst we have some sympathy for the appellants, particularly the principal appellant for having to look after a child who suffers from a life long condition, we note from all the evidenced that is before us that cerebral palsy is not a condition that can be treated here or by being allowed to remain here the child will get better. We see no basis for concluding that the Adjudicator's conclusions were wrong either in law or on facts. None of the cases which Mr Jaffer so studiously has brought to our attention is

even of the remotest assistance to the appellants, despite the gloss that he has attempted to put on some of the dicta. ...

10. The only basis upon which the appeal was argued before us was that their removal to the Lebanon would be disproportionate and therefore in breach of their rights under Article 8 of the ECHR. We have of course looked at all the relevant evidence, medical as well as other. We have reminded ourselves that the Secretary of State has the statutory duty to maintain a fair and effective immigration control. The removal of the appellants has the legitimate aim of maintaining such control. It is trite law that no right of an alien to enter or to reside in a particular country is guaranteed by the European Convention on Human Rights. It is for the Contracting States to maintain public order by exercising their right, as a matter of well-established international law and subject to treaty obligations, to control the entry and residence of aliens.

11. The factual matrix at the time when the Secretary of State made the decision to remove in this case was no different to what it was before the Adjudicator or indeed before us. The Secretary of State carried out the balancing exercise as did the Adjudicator. We are far from persuaded that the decision made by the Secretary of State in this case was such that no reasonable Secretary of State would have made it. As one responsible for maintaining immigration control, the respondent has a margin of discretion and in our judgement, his decision to remove the appellants from the United Kingdom is not in breach of the rights of the appellants under Article 8 of the ECHR." (emphasis added)

The appeal

9. Before us, Mr McGuire has appeared for the appellant. He sought permission to adduce further letters and statements from those who have been concerned in Tarek's treatment since the IAT decision. We looked at them without prejudice to the issue of admissibility. We refused an application to adjourn the hearing, in order to receive the results of a multi-disciplinary assessment of Tarek which was due on 19th April.

10. The letters refer to the encouraging progress that Tarek has been making at his school, in spite of his continuing problems and anxieties. For example, a letter from the Refugee Arrivals Project (dated 25th January 2005) refers to the "dramatic change" in Tarek's demeanour and ability brought about by his opportunities in the UK. It contrasts this with the difficulties he would have if returned to the Lebanon where "he will not have the same opportunities and life chances".

11. Perhaps the strongest statement of support comes from Zoe Hunt, a community field worker with SCOPE, a charity with specialist interest in cerebral palsy. In a letter dated

29th September 2004, she criticises strongly the IAT's statement that the condition cannot be treated. She says:

"The condition of cerebral palsy is life long in the way that the damage to the brain remains the same. However, the symptoms of restricted movement, posture and co-ordination can be treated. Specialist physiotherapy, occupational therapy and equipment are essential to maximise Tarek's physical ability. It is absolutely essential for Tarek to have access to specialist teaching. This would not be provided in Lebanon. The school which he attended is inaccessible over many floors (Tarek is a wheelchair user) and he would not be able to attend {the} school. There are also no transition planning or prospects for Tarek to attend any form of further education. These facts are clearly paramount in ensuring that Tarek has the opportunity to lead an independent adult life."

She also comments that there are no laws in Lebanon ensuring that public areas are accessible to disabled people.

12. It is not clear from the letter what direct knowledge Miss Hunt has of conditions in the Lebanon. However there is also a report dated 9th April 2003 "Disability and Livelihoods in Lebanon", one of the authors of which is connected with the Lebanese physically handicapped union in Beirut. They comment on a study carried in 2002 of institutions for disabled people in the Lebanon. They found that special institutions for disabled children are common in the Lebanon but that -

"special institutions have much lower levels of education and attainment than mainstream schools and that few graduates find employment..."

More generally the study showed that disabled people are "one of several groups paying the price of Lebanon's current economic policies." It appears from this report that disabled children have specially protected rights under Lebanese law to education, but that in practice institutions "isolate" disabled children from ordinary life. The conclusion states:

"Disabled people have rights to education and support in getting appropriate employment but in Lebanon, disabled children don't get the education they deserve and disabled adults go on to fail in the labour market."

13. In relation to the IAT decision, Mr McGuire made two main points:

i) The IAT applied the wrong approach to Article 8 in that it asked itself whether the Secretary of State's conclusion was "such that no reasonable Secretary of State would have made it", rather than itself evaluating the material and arriving at a judgment.

ii) It made a material error of fact in proceeding on the basis that cerebral palsy is untreatable; and failed to consider the evidence that, notwithstanding the permanent nature of cerebral palsy, its effects can be ameliorated by specialist treatment and monitoring.

The Law

14. Since the Adjudicator's decision there have been two important judgments on the application of Article 8 in asylum cases. The first is the decision of the House of Lords in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 227, [2004] 3 WLR 58. The second is a decision of this court, Huang and others v Secretary of State [2005] EWCA Civ 105.

15. In Razgar an Iraqi of Kurdish origin had entered the United Kingdom from Germany and claimed asylum. He had resisted removal on the grounds that it would infringe his rights under Article 8. The application was certified by the Secretary of State as "manifestly unfounded" with the result that he lost any appeal rights in this country. He took Judicial Review proceedings to quash the certificate, supported by evidence from a consultant psychiatrist that he was suffering from psychiatric illness and would attempt to kill himself if returned to Germany and further material showing that he would not receive appropriate treatment there unless he was a suicide risk. The House of Lords affirmed the order of the judge and the Court of Appeal quashing the certificate. In the leading speech Lord Bingham reviewed the relevant caselaw in Europe and this country. He explained the role of the court exercising a supervisory jurisdiction in respect of such a certificate.

"17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

....

20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In Secretary of State for the Home Department v Kacaj [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:

"although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."

In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

16. Lord Bingham then considered the application of those principles to the facts of the case. He accepted that the first four questions would or might be answered in the claimant's favour. As to the last question of proportionality he said:

"24...Question (5), being more judgmental, is more difficult and, as already observed, the Secretary of State and the judge did not consider it. The Secretary of State, moreover, failed to direct himself that article 8 could in principle apply in a case such as this. Question (5) is a question which, on considering all the evidence before him, an

adjudicator might well decide against Mr Razgar. If, however, his phobia of returning to Germany were found to be genuine (whether well-founded or not), and if his account of his previous experience (including his account of the severe brutality he claims to have suffered) were found to be true, I do not think one can rule out in limine the possibility of a finding, properly made, that return to Germany would violate Mr Razgar's rights under article 8...."

17. There was no significant disagreement with Lord Bingham's statement of the principles; but his conclusion as to their application to the facts was supported only by a majority, Lord Walker and Lady Hale dissenting. Lord Walker said:

"Lord Bingham does not consider that the Court of Appeal fell into the error of comparing levels of psychiatric care available in the United Kingdom and Germany respectively but for my part I cannot avoid the conclusion that that was the Court of Appeal's only or principal concern, and that it did amount to a mistaken approach..." (para 38)

18. In Huang this court had to consider the proper approach to be taken by an Adjudicator in an appeal where called upon to determine whether the Secretary of State's decision to remove a claimant is a disproportionate interference with his rights under Article 8. The court rejected the view that the Adjudicator could only interfere with the Secretary of State's decision if it were one which no reasonable Secretary of State could make. Laws LJ discussed the relevant authorities, including Razgar. He distinguished between the merits of the policy itself, and its application to particular instances. Only the latter was properly a matter for the Adjudicator. The balance was explained as follows:

"56... The adjudicator has no business whatever to question or pass judgment upon the policy given by the Rules. In our judgment his duty, when faced with an Article 8 case where the would-be immigrant has no claim under the Rules, is and is only to see whether an exceptional case has been made out such that the requirement of proportionality requires a departure from the relevant Rule in the particular circumstances. If that is right, the importance of maintaining immigration control is a prior axiom of the debate before him. It is not at all the subject of that debate. There is no basis upon which he should defer to the Secretary of State's judgment of the proportionality issue in the individual case unless it were somehow an open question what weight should be given to the policy on the one hand, and what weight should be given to the Article 8 right on the other. In that case, no doubt, the adjudicator would have to address their relative importance. If he had to do that, we apprehend that he would be obliged to accord a considerable degree of "deference" to the Secretary of State's view as to how the balance should be struck. But that is not the position. The

adjudicator is not required to address the relative importance of the public policy and the individual right."

Later he summarised the Adjudicator's role by saying that the relevant statutory provisions -

"... require the Adjudicator to allow an appeal against removal or deportation brought on Article 8 grounds if, but only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the Rules." (para 59)

(Of the three cases before the court, one was remitted for redetermination. However the facts were so different from this case that I do not think any assistance is to be gained by reviewing them.)

Discussion

19. In the light of the law as so stated, Miss Grey, on behalf of the Secretary of State, does not seek to uphold the tribunal's reasoning. She accepted that they set the Adjudicator's duty of inquiry at too low a level.

20. However she submits that the reasoning of the Adjudicator himself was impeccable, and indeed that the questions that he set himself were identical in effect to those later authoritatively stated by Lord Bingham. She submits that it is open for us to say that, if the tribunal had directed itself properly, it could only have found that the Adjudicator's decision was correct in law and therefore would have been bound to dismiss the appeal. She urges us to take the same course. She submits that in any event the evidence submitted on the appellant's behalf, taken at its highest and even including the material submitted since the IAT's decision, does not reach the "exceptional" standard required by Lord Bingham.

21. We agree with her concession in relation to the IAT decision. It is clear from Huang that the Adjudicator's duty is not merely to consider whether the Secretary of State's decision fell within reasonable limits, but himself to consider, within the context of Article 8, the issue of proportionality. As Laws LJ explained (Huang, paras 25-26), that requires the Adjudicator to consider

"whether in substance there has been a violation of the appellant's Convention rights..., and at least in part that must be a factual question"."

22. No distinction was drawn in Huang between the function of the Adjudicator and that of the IAT. As I understand it, that was because the applicable law at the time

provided for an appeal to the tribunal on fact as well as law (the Adjudicator's decision in Huang itself was dated 13th January 2003, that is before 9th June 2003 when the law changed). Accordingly, in relation to an Adjudicator's decision falling after that date, as is the present, the IAT's jurisdiction must be treated as limited to issues of law as explained in CA.

23. It may be that, even on such an appeal, the human rights context may require "something more than the conventional Wednesbury test" (Huang para 45, citing Lord Steyn in R(Daly) v Secretary of State [2001] 2AC 532 para 27). In my view, however, it is unnecessary in the context of the present case to examine the possibly subtle differences between these approaches. What is quite clear from CA is that the tribunal's task is to see whether the Adjudicator made an error of law on the material before him.

24. As I understand it, the relevant material at that time relating to Tarek's condition was a letter of 12th May 2003 from the Ealing NHS Primary Care Trust, with an attached report of a consultant paediatrician. There is nothing in that which in any way undermines the Adjudicator's conclusions or demonstrates an "exceptional" case within the terms described in Razgar.

25. By the time of the IAT's hearing there was some additional documentary material, including a letter from SCOPE asserting that in the Lebanon Tarek would not have access to suitable educational faculties and would face a "negative attitude" towards his physical disabilities". In the light of CA this evidence was not strictly admissible before the tribunal. Accordingly although the tribunal erred in law for the reasons conceded by Miss Grey, if it had considered the matter correctly it would have been bound to reach the same result.

26. As to the new evidence, I would add this comment. Undoubtedly the circumstances are distressing, and it is a harsh result that Tarek is likely to be deprived of the higher standard of educational support which he can expect in this country. However, that on the authorities does not constitute an exceptional case, sufficient to override immigration control. While it is not for us to exclude the possibility of a new application to the Home Secretary, the additional material so far submitted on his behalf, although expressed in stronger terms, does not appear materially to alter the picture as presented to the Adjudicator.

27. Accordingly, I would dismiss the appeal.

LORD JUSTICE LONGMORE

28. I agree.

LORD JUSTICE CHADWICK

29. I also agree.