Neutral Citation Number: [2009] EWCA Civ 385

Case No: C5/2008/1012

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AIT No: IA/00092/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2009

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE WILSON

- -

Between :

FH(BANGLADESH)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

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Mr John McLinden (instructed by **Messrs Chance Hunter**) for the **appellant**
Miss Kate Olley (instructed by **Treasury Solicitors**) for the **respondent**

Hearing date : 22 April 2009

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Judgment

Lord Justice Maurice Kay :

1. On 10 October 1986 the appellant, a citizen of Bangladesh, arrived in the United Kingdom. He gave his name as Syed Mohammed Shweb. He was then 19 years of age. He requested leave to enter as a visitor. He was granted temporary admission but was served with a notice requiring him to submit to further examination. On 27 October 1986 he was refused leave to enter. He was served with a notice to that effect. It also included removal directions. As a condition of his temporary admission he was required to report to Heathrow Terminal 4 on 2 November 1986 for removal to Bangladesh. He failed to do so. Instead, he went to ground. He changed his name to Faruk Apu Hamid and later obtained a passport in that name. He remained undetected by the immigration authorities until March 2004. In the intervening years he successfully applied for National Insurance registration in his assumed name in which he also registered with the National Health Service. He opened a bank account using the same identity. For almost 18 years he was employed in various Indian restaurants. He paid taxes. He has never claimed social security benefits, nor has he been convicted of any criminal offence. He has parents and siblings in Bangladesh to whom he has customarily remitted a third of his earnings. Between 1989 and 2005 he was in a stable relationship with a woman. Although the relationship came to an end, they are still on good terms. On 2 May 2003 he made an application for indefinite leave to remain by reference to his long residence but it was rejected because it did not enclose the appropriate documents. On 16 March 2004 he made a second application. It was refused by the Secretary of State on 4 December 2006. The appellant appealed. At first his appeal was dismissed in a determination promulgated by the Asylum and Immigration Tribunal (AIT) on 28 February 2007 but it transpired that there had been a mix-up about the time and place of the hearing and a reconsideration was ordered. On 11 January 2008, the AIT dismissed the appeal. It is against that decision that he now appeals to this court.

2. It was not until 1 April 2003 that the Immigration Rules were amended so as to include specific provisions permitting the grant of indefinite leave to remain on the ground of long residence in the United Kingdom. Prior to that, the position was dealt with pursuant to an extra-statutory concession. It was set out in successive editions of the Immigration Directorate's Instructions to the civil servants who administered it. The principal provisions of the extra-statutory concession were the following:

> "2. When considering an application, where a person has 10 years or more continuous lawful residence, or 14 years continuous residence of any legality, indefinite leave to remain should normally be granted in the absence of any strong countervailing factors such as
>
> - An extant criminal record, apart from minor non-custodial offences; or
>
> - Deliberate and blatant attempts to evade or circumvent the control, for example by using forged documents, absconding, contracting a marriage of convenience etc …

4. Indefinite leave should normally be granted to a person who has completed a continuous period of 14 years or more, regardless of its legality. Leave should only be refused if there are serious countervailing factors …

6. Where a person has been served with a notice of intention to deport account should be taken of the decision in *Ofori*. This judgment held that the Secretary of State was entitled to conclude that the extra period of residence gained by the appellant while pursuing his appeal should not count towards the 14 years continuous residence of any legality required under the [long residence concession].

However, each case should be considered on its merits and the length and quality of the overall period of residence should still be taken into account, together with all other relevant factors, and balanced against the need to maintain an effective control."

3. When indefinite leave to remain on the ground of long residence was brought into the Immigration Rules in 2003, paragraph 276C provided that indefinite leave to remain may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met. Paragraph 276B is in the following terms:

"The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) He has had at least 10 years continuous lawful residence in the United Kingdom; or

(b) He has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions … or of a notice of intention to deport him from the United Kingdom; and

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) previous criminal record and the nature of any offence of which the person has been convicted; and

(f) compassionate circumstances; and

(g) any representations received on the person's behalf; and

(iii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application."

Paragraph 276D provides that indefinite leave to remain is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.

4. For present purposes, the striking difference between the terms of the extra-statutory concession and paragraph 276B is to be found in paragraph 276B(i)(b). Essentially, it stops time running following service of a notice of liability to removal or of a decision to remove by way of directions or of an intention to deport. I shall refer to it as "the clock-stopping provision". Under the extra-statutory concession, time only stopped running during the course of appellate proceedings. In view of the fact that the appellant was served with removal directions on 27 October 1986, it is common ground that he cannot satisfy paragraph 276B. He has no case under the Immigration Rules. His appeal to the AIT was on Human Rights grounds. In particular, he sought to rely on Article 8 of the European Convention on Human Rights and Fundamental Freedoms. At the hearing, it was conceded that he does not have a family life in this country for the purposes of Article 8. Reliance was placed on his private life. It was submitted that to remove him to Bangladesh now would be an unjustified and disproportionate interference with the right to respect for his private life.

The decision of the AIT

5. The Immigration Judge accepted that removal would amount to an interference with the appellant's right to respect for his private life and that the interference would have sufficiently grave consequences to engage Article 8. However, the appeal was dismissed. The reasoning of the Immigration Judge is to be found in the following passages:

> "28. I found, however, that such an interference would be in accordance with immigration law and have the legitimate aim of immigration control.

29. The appellant was aged 19 when he arrived. He is now aged 40. He has therefore spent half his life in Bangladesh and half in the UK.

30…. He obviously has strong ties with his family in Bangladesh otherwise he would not have been remitting a third of his income to them over the past 21 years.

31….. The appellant has assimilated into the UK culture and has little experience as an adult of living in Bangladesh … but I have taken into account that the appellant's experience of living as an adult in the UK and the trade that he has learnt in the UK (he is a restaurant manager) would, no doubt, stand him in good stead if he were returned to Bangladesh.

32. I accepted also that the appellant had worked throughout his time in the UK, paid tax on those earnings; never claimed a benefit and has no criminal convictions. I further accepted that he obviously has strong emotional ties with the two witnesses who gave evidence.

33. It was submitted that delay was a factor that I should take into account. The respondent has taken two years and nine months to make a decision on the … application. I did not find that delay was a relevant factor on the facts of this case. The appellant had absconded from his temporary admission in 1986 and had made no effort to contact the respondent until he made this application under the long residency provisions in 2004. I did not find that there was any policy or Rule which would have benefited the appellant if the respondent had made a decision on his case closer in time to his application.

34. Having considered all this evidence I did not find that these factors in the appellant's favour outweighed the legitimate aim of immigration control. Although the appellant established a private life in the UK, such a private life was established when he had no lawful right to be here and when he was living under a false identity which he had created. No evidence was given by the appellant that he would face any particular obstacles on his return to Bangladesh. Instead his case was put on the basis because he has been in the UK for 21 years he would simply prefer to live here rather than in Bangladesh. I did not find that this personal preference is a matter which is relevant on the question of proportionality.

35. Having considered all the evidence, I therefore found that it was proportionate to the legitimate aim of immigration control to return the appellant."

The grounds of appeal

6. The original grounds of appeal by reference to which I granted permission to appeal following an oral hearing (Laws LJ having refused permission on the papers), sought to contend that, although the appellant cannot satisfy the requirements of Rule 276B, it was incumbent upon the Immigration Judge to consider the rationale or spirit of the Immigration Rules and the extra-statutory concession which preceded them, in order to inform his assessment of what weight should be given to the interests of immigration control when making a judgment on proportionality. The transcript of the judgment whereby I granted permission to appeal shows that I did so "after considerable hesitation", observing that the appellant had "a difficult case". For reasons which I shall shortly give, I am satisfied that the original grounds of appeal cannot succeed.

7. However, that is not the end of the matter. At the hearing of the substantive appeal Mr McLinden, on behalf of the appellant, sought to put his case in an alternative way. It now transpires that, contrary to what was thought to be the case on the occasion of the hearing in the AIT and the hearing of the oral application for permission to appeal, the extra-statutory concession did not cease to apply at the moment when the Immigration Rules were amended in 2003. Whether by oversight or otherwise, it continued to exist until it was formally withdrawn on 1 or 2 March 2006. The withdrawal was prompted by the case of *OS(10 years lawful residence) Hong Kong* [2006] UK AIT 00031, which was heard in the AIT on 1 March 2006. In *OS* at the earlier hearing before the Immigration Judge the Home Office presenting officer had asserted that the concession had been withdrawn when the Rules relating to long residence were introduced. On reconsideration, the AIT stated (at paragraph 5):

> "That was not true. Not only had the concession not been withdrawn then, but we were told by both parties before us that on 28 February 2006 the concession still appeared on the Home Office website, within the Immigration Directorate's instructions."

8. The version shown to the AIT on that occasion was dated September 2004. It began, "rather surprisingly" in the appropriate observation of the AIT, with the words

> "There is no provision within the Immigration Rules for a person to be granted indefinite to leave remain solely on the basis of the length of his or her residence."

9. As a matter of inference, immigration officials had continued to apply the concession on the basis of their instructions, notwithstanding the amendment of the Rules in April 2003. In *OS*, the appellant succeeded before the AIT because he was able to rely on the concession. Within hours of the hearing, the concession was formally withdrawn. However, as a matter of chronology that was some two years after the appellant in the present case had applied for indefinite leave to remain. On this basis, Mr McLinden submits that (1) the Secretary of State ought to have determined the application for indefinite leave to remain within that two year period; (2) it would then have been determined by reference to the concession and without the operation of the clock-stopping provision; and (3) upon such a determination, the appellant's years of evasion and false identity may not have been determinative of the case against him.

Error of law

10. An appeal from the AIT to this Court only lies on a point of law: section 103B of the Nationality, Immigration and Asylum Act 2002. I indicated in paragraph 6 of this judgment that I do not consider that the original grounds of appeal can succeed. They are founded on the central submission that the Immigration Judge failed to consider the rationale or spirit of the Immigration Rules and the extra-statutory concession in order to inform his assessment of what weight should be given to the interests of immigration control when making a judgment on proportionality. Mr McLinden submits that, as the Rules and the concession enable a person to obtain indefinite leave to remain after 14 years, the fact that the appellant has been in this country for much longer than that is potentially a weighty consideration in the balancing exercise. The reason why I consider that argument to be unsustainable is that the actual length of the appellant's residence in this country was expressly taken into account by the Immigration Judge. In my judgment, the part of his reasoning set out in paragraphs 28 to 35 of the determination (see paragraph 5, above) deals in terms with both the length and the quality of the residence. In particular, paragraph 29 states:

> "The appellant was aged 19 when he arrived. He is now aged 40. He has therefore spent half his life in Bangladesh and half in the UK."

11. The Immigration Judge was well aware of the 14 year qualification period. He had referred to it earlier in his determination. In these circumstances, I am satisfied that, within its own terms, the consideration of proportionality by the Immigration Judge was not legally erroneous.

12. The alternative way in which Mr McLinden puts the case is far more cogent. However, it is first necessary to identify an error of law upon which to construct it. In my judgment, such an error of law is to be found within paragraph 33 of the determination. Plainly, the Immigration Judge had been invited to consider delay as a relevant factor. He referred to the passage of 2 years and 9 months between application and decision but did not consider that to be a relevant factor "on the facts of this case". He found it to be irrelevant in part because:

> "I did not find that there was any policy or Rule which would have benefited the appellant if the respondent had made a decision on his case closer in time to his application."

13. It was entirely appropriate for the Immigration Judge to consider whether there had been such a policy or rule. However, it now transpires that he was in error in finding that there was not. That is because of the curious continuation of the extra-statutory concession until March 2006. In the circumstances, although the appellant fell foul of the clock-stopping provision in paragraph 276B of the Rules, like *OS*, he would have been entitled, at least until 1 March 2006, to have his application considered also by reference to the extra-statutory concession, in which case he would not have been prejudiced by such a provision.

Materiality

14. For an error of law to sustain a successful appeal, it has to be a material error.

15. I am persuaded that the period of two years and 9 months from application to decision constituted culpable and undue delay on the part of the Secretary of State, and that, adapting the language of Dyson LJ in *Secretary of State for the Home Department v Rashid* [2005] EWCA Civ 744, paragraph 52, it was productive of conspicuous unfairness. I also bear in mind that delay of such a nature may be relevant in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control: *EB(Kosovo) v Secretary for the Home Department* [2008] UKHL 41, per Lord Bingham of Cornhill, at paragraph 16. This conclusion is fortified by the fact that, following the application made on 16 March 2004, the appellant's solicitors wrote chasing letters on at least five occasions between 20 September 2004 and 18 August 2005. When they received no response, the Member of Parliament for the area in which the appellant resides also wrote on two occasions in an attempt to elicit a decision. We have received no explanation, and indeed it is difficult to imagine that there could be an acceptable explanation, for such a lack of response. It seems that the appellant must have made his application of 16 March 2004 significantly earlier than the application of *OS*. I say that because *OS* was seeking to establish long residence by reference to the 10 year period. As he had only come to the United Kingdom in 1995, he cannot have made his application very much earlier than 7 September 2005, the date upon which the Secretary of State refused it. I am satisfied that (1) on any reasonable basis, the Secretary of State ought to have reached a decision upon the appellant's application substantially before March 2006 and (2) if such a timely decision had been made, on the basis of *OS* the Secretary of State ought to have considered the extra-statutory concession in addition to the Immigration Rules.

16. The final question is whether, in such circumstances, the appellant might have received a favourable decision. It would not have been plain sailing for him. Although, under the concession, 14 years continuous residence of any legality "normally leads to a grant of indefinite leave to remain", this is only "in the absence of any strong countervailing factors such as … deliberate and blatant attempts to evade or circumvent the control, for example by using forged documents, absconding, contracting a marriage of convenience etc". Notwithstanding residence in excess of 20 years, the appellant had undoubtedly made deliberate and blatant attempts to evade or circumvent the control. However, this must now be considered in the light of *ZH(Bangladesh) v Secretary of State for the Home Department* [2009] EWCA Civ 8. In the course of his judgment, Sedley LJ (with whom Keene and Smith LJJ agreed) said (at paragraphs 16 to 18):

> "The use of a false identity … was held against him. But no account was taken, as it seems to me it needed to be taken, of the reason he gave for using it: that he was afraid of being detected as an illegal immigrant. That of course compounds the illegality of his presence here, but it is a different reason from the more sinister reason for using a false identity, which is to commit frauds … The practical question for the Immigration Judge is whether there are any reasons in the public interest why the appellant, despite his prolonged evasion of immigration controls, should not now be allowed to stay. To use the evasion itself as a reason is to defeat the purpose of the rule."

17. There are manifest differences between *ZH* and the present case. In *ZH* there had been no fraudulent registration for National Insurance or other public purposes. On the other hand, and no doubt for that reason, the appellant there had not been paying tax or national insurance contributions in respect of his many employments.

18. The conclusion I draw from all this is that I consider it at least possible that if the Secretary of State had given timely consideration to the appellant's application and, in so doing, had had regard to the concession as well as to the rules, there might have been a different outcome, particularly so in the light of the approach illustrated by *ZH*. It is not inevitable that the proportionality exercise would have favoured immigration control.

Conclusion

19. For these reasons I have come to the conclusion that this appeal should be allowed. The appropriate disposal is to quash the extant decision of the AIT and to remit the case for further reconsideration.

Lord Justice Wilson:

20. I agree.

The President of the Queen's Bench Division:

21. I also agree that this appeal should be allowed for the reasons given by Maurice Kay LJ.