



**Upper Tribunal
(Immigration and Asylum Chamber)**

MH (pending family proceedings-discretionary leave) Morocco [2010] UKUT 439 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

On 20 September 2010

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Before

SENIOR IMMIGRATION JUDGE JARVIS

Between

MH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr P Lewis, Counsel instructed by Dexter Montague & Partners Solicitors

For the Respondent: Mr R Hopkin Home Office Presenting Officer

1. In MS (Ivory Coast) [2007] EWCA Civ 133 it was accepted, following Ciliz v Netherlands (Application no. 29192/95) [2000] ECHR 365; [2000] FLR 469, that a decision to remove an applicant in the process of seeking a contact order may violate Article 8 ECHR, in particular on the basis that removal of a parent/applicant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and, more importantly, denied the applicant all possibility of any further meaningful involvement in the proceedings which may breach Article 6 ECHR.
2. A refusal to adjourn proceedings before the Tribunal may have similar consequences.
3. It is the respondent's practice (consistent with the Human Rights Act 1998), not to remove or deport parent(s)/parties when family or other court proceedings are current and to grant short periods of discretionary leave, to extend temporary admission, or release a person pending the outcome of the family proceedings. The use of curtailment is discretionary in such circumstances (see Home Office Guidance re-issued in October 2010).
4. Where such a case arises before the Tribunal it is usual for the appeal to be allowed pursuant to Article 8 ECHR, rather than for the proceedings to remain within the Tribunal system to be

adjourned, perhaps more than once. The respondent will normally then grant a short period of discretionary leave bearing in mind any relevant facts found by, or observations of an Immigration Judge. It is for the respondent to decide on the period of leave in each case.

5. Where an application for contact (or a residence order, or for other relief) is successful then a parent/party may make application for further leave to remain in the UK. If unsuccessful, then it will be for the respondent to consider what steps to take in relation to that individual.

DETERMINATION AND REASONS

1.

This appeal is being dealt with under the transitional provisions relating to the transfer of functions of the Asylum and Immigration Tribunal (AIT) to the Upper Tribunal.

2.

The appellant, a citizen of Morocco, whose date of birth is given as 15 July 1976, appeals the decision of the respondent made on 11 May 2009 to curtail his leave to remain in the UK, pursuant to para 323(ii) of HC 395, the respondent not being satisfied that the appellant's marriage was subsisting (see para 281(iii) of HC395), he having originally been granted leave to enter as a spouse on 28 November 2007 until 19 November 2009, but having separated from his wife in or around September 2008 after the marriage broke down. The appellant appealed to an immigration judge. He accepted that his marriage was no longer subsisting and that he could not succeed in showing that he met the requirements of the immigration rules, but sought permission to remain in the United Kingdom (UK) under article 8 ECHR in order to pursue an existing application in family proceedings for an order for contact with his daughter.

3.

By a determination issued on 19 May 2009 Immigration Judge M A Khan, sitting at Hatton Cross, dismissed the appeal, having refused a request for an adjournment of these proceedings pending the outcome of his application for an order for contact with his daughter. Immigration Judge Khan finds that as the appellant at present has no contact with the child, he does not enjoy family life in the UK and that he has limited private life given that he has been working in the UK, but that the public interest in his removal outweighs any interference with that private life and removal is necessary in a democratic society and he can continue his private life from Morocco by correspondence and telephone.

4.

The judge then finds that there is provision in the rules for those who already have contact with their children and want to pursue that contact but the appellant has had no contact since June 2008. There is no CAF/CASS report to date and the position is uncertain. He finds that there are no removal directions yet and that if the appellant manages to gain contact before the respondent decides to give directions for removal, then he can provide further evidence at any hearing of his appeal on removal.

5.

The appellant sought permission to appeal and on 14 June 2010 Senior Immigration Judge Goldstein found that the grounds, particularly those relating to the refusal of the Immigration Judge to adjourn the proceedings, arguably showed that the judge may have made a material error of law for all or some of the reasons given in the grounds.

6.

He gave directions for the further conduct of the appeal on 12 July 2010, and it is in this way that it comes before me now.

Submissions

7.

Mr Lewis indicated that there was now a final hearing listed for 26 November in the proceedings in the family court, at Bristol County Court, and that a CAFCASS Report was in preparation although not yet disclosed to the parties to those proceedings. He relied upon his grounds and submitted that the judge had failed to apply the guidance in MS (Ivory Coast) v SSHD [\[2007\] EWCA Civ 133](#) (22 February 2007) in failing to adjourn the proceedings and that it would be a breach of Article 8 rights to remove the appellant now. He relied upon his grounds in submitting that the appeal should be allowed and the appellant granted a period of discretionary leave as appropriate.

8.

Mr Hopkin submitted that in the future the provisions of para 248A of HC395 which deal with an application for leave to remain as a person exercising rights of access (sic) to a child resident in the UK, would be available to the appellant, but in the meantime he conceded that the judge had fallen into material error of law for the reasons advanced by Mr Lewis and was equally content that either the appeal be allowed and a period of discretionary leave granted, or that these proceedings be stayed pending the outcome of the family proceedings.

9.

Mr Lewis, in response, submitted that rather than stay the proceedings, in the light of the guidance in MS (Ivory Coast), the correct course was to allow the appeal and direct that discretionary leave be granted. It was important not to potentially affect the family proceedings and the appellant was paying privately to be represented in these proceedings, and was raising article 6 ECHR concerns. There appeared to me to be no good reason why these proceedings should remain extant within the tribunal at this time, and in the light of the matters to which Mr Lewis drew attention and to which I return below, I took the view that the better course was for the appeal to be allowed pursuant to article 8 ECHR and for the appellant to be granted a period of leave to enable him to focus fully upon the family proceedings from a position of legal entitlement to be present in the UK.

10.

Mr Hopkin was content that the appeal be allowed and indicated that he would recommend a period of discretionary leave of nine months to enable the clarification of the position within the family proceedings.

11.

However, it is important that time be taken to set out in some detail, more of the facts of the case, of the guidance in MS (Ivory Coast), and the reasons for its existence, as well as the reasons why the judge got it wrong in this case, as summarised by Mr Lewis in his skeleton argument, to which I now refer.

12.

The appellant is a national of Morocco who entered the UK on 28 November 2007 and was granted leave as the spouse of a British national. He was granted leave until 19th November 2009 but, in or around September 2008, his relationship broke down and they separated. The appellant set out in some detail the circumstances of the relationship with his wife in his statement but fundamental to this appeal is that on 12 March 2006 the appellant's wife gave birth to their daughter, YB.

13.

In or around November 2008 the appellant sought advice with respect to having contact with his daughter and his wife commenced divorce proceedings. The Children Act proceedings have been the subject of substantial delays. None of that delay appears to have been on account of the action, or indeed inaction, of the appellant. Approximately one year ago CAFCASS were ordered to prepare a report in the family proceedings. They have still not produced a report and it is understood that those acting on his behalf are now considering challenging that failure by way of Judicial Review proceedings.

14.

On 12 February 2009 the Secretary of State wrote to the appellant and informed him of his intention to curtail his leave. The appellant states that he did not receive that letter and so was unable to respond. The Secretary of State then proceeded to curtail the appellant's leave. The appellant appealed out of time against that decision and time was extended.

Failure to adjourn

15.

The central ground of appeal before the Immigration Judge was that, pending the outcome of the Children Act proceedings, it would be in breach of the appellant's private and family life and right to a fair trial (Articles 6 and 8 ECHR) to be frustrated in his attempts to obtain contact with his daughter through the family courts. Detailed grounds of appeal were lodged against that decision and it was listed for hearing. The matter was adjourned on three occasions on account of the fact of the delays in the Family Court. When this matter was listed for hearing on 10 May 2010 a further application for adjournment was made.

16.

It was explained to the Immigration Judge that there had been yet more delay in obtaining the CAFCASS report but the matter had been listed to be heard on 28 May 2010. Counsel (Mr Lewis) informed the Immigration Judge that he had spoken to the solicitor with conduct of the family proceedings and she anticipated that the report would be prepared shortly, though there could be no guarantee. She had confirmed the contents of her letter dated 7 May 2010 to Counsel but also emphasized that she was of the view that an important factor in the Children Act proceedings would be whether the appellant was working and whether he had adequate accommodation to facilitate contact.

17.

An application was made for the matter to be adjourned pending the outcome of those proceedings. The Home Office was asked their view of the application and an experienced Presenting Office expressly stated that they did not object. The facts as outlined above were referred to in support of the application as was the decision of the European Court of Human Rights in *Ciliz v The Netherlands* [2000] 2 ELR 469. In that case the ECHR found there to be violation of Article 6 and 8 and stated as follows:

"The authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed (see the *Keegan* judgment cited above, p. 19, § 50)"

18.

It was submitted that the AIT had previously found that it would not be appropriate to proceed and that all that had changed was the lapse of time. That lapse of time had not in anyway been caused or prolonged by the appellant. There would be no prejudice and the Secretary of State in any event was not objecting to the application. It was contended that in the interests of justice, and to ensure that the rights of the appellant and his child were properly protected, the appeal should be adjourned.

19.

The Immigration Judge refused the adjournment and the only reason given was that “this court cannot be kept waiting forever”. In the determination the Immigration Judge states as follows: (paragraph 6)

“This Tribunal is of the opinion that this jurisdiction is not bound by any future rights that the appellant may be granted by another jurisdiction. This appeal is against the respondent’s decision to curtail the appellant’s leave as a spouse. This Tribunal cannot be kept waiting in anticipation of an outcome of another jurisdiction and especially where there is no rule or procedure or authority permitting such a delay in proceedings in this tribunal. The adjournment request is refused and the case is to proceed”

20.

I see no reason to doubt Mr Lewis’ summary of that application to the judge, the fact of which is recorded in the judge’s record of proceedings on 10 May 2010.

21.

It is contended that in refusing the adjournment the Immigration Judge misdirected himself. Whilst “this Tribunal” may not be bound by any future “rights that the appellant may be granted by another jurisdiction” it would clearly be extremely relevant to the issues to be determined if contact is ordered to take place with a child who is a British national. Whilst the appellant’s appeal was against the respondent’s decision to curtail his leave, as a one-stop appeal the detailed grounds alleged that the decision was contrary to Articles 6 and 8 ECHR and was not therefore confined to this issue. Indeed it was specifically stated in those grounds of appeal as follows:

“The appellant’s appeal ought to be adjourned pending the outcome of the Children Act proceedings. In the absence of this following the decision in MS (Ivory Coast) the appellant’s appeal ought to be allowed under Article 6 and 8 of the ECHR, and the appellant granted discretionary leave pending the outcome of the Children Act proceedings”

22.

It is contended that the Immigration Judge was wrong to assert that there was no rule or procedure permitting such a delay in proceedings in this Tribunal. The Immigration Judge had power, pursuant to section 5(3)(h) of the Tribunal Procedure (First-tier Tribunal) Rules 2009, to adjourn the proceedings. Similarly, he was wrong to find there was no authority in support of taking such action and indeed he was specifically referred to the decision in Ciliz v The Netherlands [2000] 2 ELR 469. Accordingly his statement that there was an absence of any such authority amounted to a material misdirection.

23.

The Immigration Judge later stated as follows: (paragraph 29)

“These uncertainties [in the family court proceedings] remain. There are currently no removal directions against the appellant. Should he manage to gain contact in the mean time, it will be open to him to provide further evidence at any further hearing of his case upon removal”

24.

The Immigration Judge appears to have assumed that there would be “further hearing of his case upon removal” but fails to identify on what basis the appellant would obtain such a further appeal. This is a one-stop appeal where the appellant is obliged to raise all the issues in relation to his case. Again, it is contended that in assuming that the appellant would be able to raise these issues at a further hearing the Immigration Judge misdirected himself when determining whether it would be against the interests of justice for the appeal to proceed.

25.

It was specifically submitted in support of the application that if the appeal were to proceed and, on the basis of the facts as they presently stood, the Immigration Judge were to find that articles 6 and 8 would not be breached, the effect would be the appellant would no longer have any basis for remaining in the UK. Even if the Secretary of State were to comply with the policy of not removing those who are involved in family proceedings the appellant would no longer be permitted to work nor would he be entitled to any support. Accordingly he would lose his job and potentially his accommodation. Given the importance that that could have in relation to his application for contact with his child (as confirmed by his family law solicitor) the decision of the Tribunal could potentially have a significant impact upon his ability to pursue contact with his daughter. In such circumstances the rights of both the appellant and his child would have to be considered.

26.

The Immigration Judge makes no reference at all to this submission when giving his reasons for refusing the adjournment.

27.

It is contended that in all of the circumstances the Immigration Judge should properly have adjourned the case. Alternatively, it is contended that the failure to adequately address relevant submissions and/or provide adequate reasons for rejecting those submission amounted to a material error of law.

Failure to consider with proper scrutiny

28.

It is a trite submission that in cases involving human rights there is a requirement to consider the evidence with an anxious scrutiny. It is contended that the consideration recorded by the Immigration Judge to have been given to the appeal would indicate that the Immigration Judge failed to consider the appeal with that standard of care. The Immigration Judge records:

“The appellant’s case is set out in his application form and the interview with the entry clearance officer.”

29.

In fact, there is neither an application form nor an interview record.

30.

The Immigration Judge then states that: (paragraph 19)

“Notice of appeal is expressed in general terms only and does not address any of the detailed matters raised by the respondent in the refusal notice.”

31.

The Judge was referred to the grounds of appeal which, it is contended, cannot reasonably be described as having been expressed in "general terms". They clearly address the history of the application and provide a specific response, based upon law and authority, as to why the reasons given by the Secretary of State were wrong. The failure by the Immigration Judge to properly consider or review the grounds of appeal is material given the overt failure by the Immigration Judge to make any reference to the authorities cited in those grounds of appeal which were fundamental to the issues to be determined.

32.

Those grounds were expanded upon and developed in submissions before the Immigration Judge. The Immigration Judge was specifically referred to the policy of the Secretary of State not to remove an individual who is applying through the family courts for contact with their children. The Immigration Judge was also referred to and provided with a copy of the published policy on Curtailment of Leave which states that the use of curtailment is discretionary - and specifically cites the example of where children of an individual are present in the UK as an example of where discretion may be exercised not to curtail leave. It was contended that the existence of such discretion and policies were clearly relevant to any assessment of proportionality.

33.

The Immigration Judge was referred to a letter from the appellant's family law solicitor dated 7 May 2010 that confirmed that the appellant's presence in the UK was fundamental to his ability to pursue the proceedings for contact with his child. He was then referred to the decision of the ECHR in Ciliz v The Netherlands [2000] 2 ELR 469 where a challenge was brought by a Turkish national who had been pursuing an application for contact with his child. The applicant in that case was accused of having shown little and then intermittent interest in the child and of only pursuing the application as a means of remaining in the Netherlands. The ECHR found that the removal of the applicant did amount to an interference and stated as follows: (paragraphs 71-72)

"In the view of the Court, the authorities not only prejudged the outcome of the proceedings relating to the question of access by expelling the applicant when they did, but, and more importantly, they denied the applicant all possibility of any meaningful further involvement in those proceedings for which his availability for trial meetings in particular was obviously of essential importance. It can, moreover, hardly be in doubt that when the applicant eventually obtained a visa to return to the Netherlands for three months in 1999, the mere passage of time had resulted in a de facto determination of the proceedings for access which he then instituted (see the W. v. the United Kingdom judgment cited above, p. 29, § 65). The authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed (see the Keegan judgment cited above, p. 19, § 50).

In sum, the Court considers that the decision-making process concerning both the question of the applicant's expulsion and the question of access did not afford the requisite protection of the applicant's interests as safeguarded by Article 8. The interference with the applicant's right under this provision was, therefore, not necessary in a democratic society. Accordingly, there has been a breach of that provision".

34.

The Immigration Judge was then referred to the decision in MS (Ivory Coast), in which the Court of Appeal considered the case of Ciliz v The Netherlands [2000] 2 ELR 496. The Court held (para 75) that it was not open to the AIT to rely on the Secretary of State's assurance or undertaking that the

appellant would not be removed until a contact application had been resolved. Some form of leave to remain ought to be granted if a breach of Article 8 is anticipated, albeit that that might be quite short.

35.

It was submitted that the Secretary of State had implicitly accepted that the appellant could not be removed whilst the contact proceedings are continuing and accordingly it was contended that leave should be granted to allow him to pursue those proceedings. Specifically, the Immigration Judge was referred to the duty on the court to ensure that the relevant issues could be determined in the Children Act proceedings - *Ciliz v Netherlands* (ref) where it was found that “the authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore, acted in a manner which has enabled family ties to be developed (see the *Keegan* judgment cited above, p. 19, § 50).”

36.

It was submitted that the failure to do so or to regulate his leave in order that he could pursue his application would amount to a breach of Articles 6 and 8 ECHR.

37.

The Immigration Judge fails to make any reference to the submissions outlined above nor does he refer to any of the authorities cited in support. Indeed the Immigration Judge does not even mention the fact that it was being alleged that Article 6 as well as 8 was being relied upon. That failure amounts to a material error of law. In *Jain v SSHD* [2000] INLR 71 at 76E-F per Schiemann LJ, in describing what was necessary to demonstrate an error of law by the IAT: “I can add a third possible challenge which is made here, namely that the Tribunal’s conclusions were not expressed with the requisite degree of clarity or did not deal adequately with the main submissions.” Such error is also referred to in *R (Iran) v SSHD* [2005] EWCA Civ 982 at 9(ii) and (iii).

38.

The only apparent reason given by the Immigration Judge for dismissing the appeal was his finding that the appellant did not enjoy family life in the UK. The Immigration Judge makes no reference to the evidence that prior to the breakdown in his marriage the appellant had been a committed father and cared for his daughter. Nor does he refer to the evidence given as to why contact had not continued as being because of the opposition to that desired contact by the appellant’s ex wife.

39.

The ECHR has repeatedly found that a bond amounting to family life within the meaning of Article 8 exists between the parents and the child born from their marriage-based relationship and that such natural family relationship is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents see *Berrehab v Netherlands* . It was contended that there is family life in existence and the appellant is clearly making attempts to develop this, see *Keegan v Ireland* . The Immigration Judge makes no reference to this submission.

40.

Further even if, which is not accepted by the appellant, the Immigration Judge had been entitled to find that there was no family life in existence, the Immigration Judge makes no reference to the appellant’s attempts to establish contact with his child when considering the appellant’s private life. Such a factor is, it is contended, fundamental to the consideration of private life and the failure to make any reference to it at all when considering this amounted to a material error of law.

41.

As indicated, Mr Hopkin conceded, and, I find, rightly so, that there had been a material error of law through failure to apply the guidance in *MS (Ivory Coast)*, and Mr Hopkin did not seek to challenge any of the other grounds advanced for the reasons given, nor to defend the determination of the Immigration Judge in any respect.

42.

I am satisfied that the arguments advanced by Mr Lewis on behalf of the appellant are all made good, for the reasons given, and therefore find that there is material error of law in the determination of the Immigration Judge, and in re-hearing the matter, recalling the consent of Mr Hopkins and indeed his submission that the appeal be allowed on Article 8 grounds, the appeal is dismissed under the Immigration Rules and allowed under Article 8 ECHR.

43.

I also recall that Mr Hopkin will be recommending a grant of discretionary leave of at least 9 months to enable the appellant to participate as fully as is possible in the family proceedings. As has been said, assuming that he were to be successful, then he would be able to make an application for further leave under para 248A of HC395.

44.

The appeal is dismissed under the Immigration Rules.

45.

The appeal is allowed pursuant to Article 8 ECHR and a grant of discretionary leave of an appropriate period will normally follow.

Signed

Senior Immigration Judge Jarvis

Judge of the Upper Tribunal

Date