

## Right to Private and Family Life and to Family Unity

*AS (Pakistan) v Secretary of State for the Home Department* [2008] EWCA Civ 1118 (15 October 2008)

The England and Wales Court of Appeal recently allowed an appeal against a decision of the Asylum and Immigration Tribunal regarding the deportation of AS, a Pakistani national. The Court held that the Tribunal erred in two respects: first, in finding that deportation would not interfere with AS' right to respect for his private and family life (under art 8 of the *European Convention on Human Rights*), and second, in its assessment of proportionality.

### Facts

AS came to the United Kingdom on a student visa in 1998, and married L in September 2003. Although his student visa had expired, AS was granted leave to remain in the UK as a spouse until November 2005. AS committed two motoring offences in the following year. In October 2003, he was convicted and fined for driving without 'L' plates. In June 2004, he was arrested and charged for causing death by dangerous driving. For the latter, AS was sentenced to three years' imprisonment.

AS was served with a deportation notice in May 2006, and released from prison in January 2007. He appealed the decision of the Secretary of State to deport him, mainly on the grounds of interference with his private and family life. The appeal was dismissed, as was AS' appeal to the Tribunal in December 2007. In the meantime, L had become pregnant and gave birth to the couple's first child in May 2008.

The Tribunal assessed whether the deportation would infringe AS' private and family life by reference to Lord Bingham's 'five questions' from *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27. Although the Tribunal accepted that AS had established a private and family life in the UK, it did not accept that the deportation engaged art 8. After considering evidence of conditions in Pakistan, particularly the conditions affecting AS' wife if she were to accompany him, the Tribunal concluded that L would not suffer unreasonable hardship if required to relocate. The Tribunal also concluded that AS could expect to find employment in Pakistan, and receive any required psychological treatment there.

Although the Tribunal thought that this was sufficient to dispose of the appeal, it went on to consider the issue of proportionality. The Tribunal examined AS' two motoring offences, and concluded that AS had 'displayed a disregard for the laws of the United Kingdom over a prolonged period of time'. This led to the finding that the interference with AS' rights was proportionate to the legitimate aim achieved by deportation.

### Decision

In the Court's view, the Tribunal was correct in using Lord Bingham's five questions as a framework for its analysis. However, the Court also held that the Tribunal had assessed the conditions that L would face in Pakistan (as a Western woman) in the wrong context. The conditions were mainly relevant to the question of proportionality, rather than the interference with AS' private and family rights in the first place. Once the Tribunal had (correctly) established that AS and his wife had established a family life in the UK, it was evident that deportation would interfere with these rights.

The Court observed that ‘the degree of interference ... is likely to depend more on the disruptive effect of relocation itself, rather than on the social and political conditions likely to be encountered in the country of destination’. It also confirmed that the threshold for engaging art 8 is not high, and that the Tribunal was wrong to find that art 8 had not been engaged (especially in light of the Tribunal’s findings about AS’ family circumstances, employment and social ties).

On the issue of proportionality, the Court criticised the Tribunal’s approach and assessment. It found that the Tribunal was too critical of AS’ character and criminal behaviour, and failed to consider factors such as his good behaviour in prison, low risk of re-offending, and psychological trauma he was found to have suffered after the 2004 accident. This led the Tribunal to a flawed assessment of the ‘public interest’ in deporting AS, and it was found to have struck an unfair balance between AS’ interest and the community’s interest. The Tribunal’s reasons for decision should have more clearly explained why the public interest outweighed the interference with AS’ private and family life.

The Court also found that the Tribunal had failed to consider the effect of AS’ deportation on L’s private and family rights. In light of the House of Lords decision in *Beoku-Betts v Secretary for the Home Department* [2008] UKHL 39, the Tribunal should have considered the impact on the ‘family unit as a whole’. In this case, L had lived in the UK her whole life, had strong ties to the UK and an established private life, and the couple had a young child. These factors ought to have been fully considered by the Tribunal.

### **Relevance to the Victorian Charter**

This decision may assist a Victorian court’s consideration of s 13 (the right not to have privacy, family or home unlawfully or arbitrarily interfered with) and s 17 (protection of the family by society and the State, and recognition of family as ‘the fundamental group unit of society’) of the *Charter*.

Together with the House of Lords’ decision in *Beoku-Betts*, the decision indicates that the effect of a measure on an individual’s *Charter* rights may require assessment against the rights of spouses and the ‘family unit as a whole’. Further, the Court of Appeal’s reasoning on the proportionality of the interference with AS’ private life may also assist Victorian Courts in their assessment of a range of *Charter* rights that cannot be interfered with ‘arbitrarily’.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1118.html>.

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