[2015 Gib LR 111]

SM (ALGERIA) v. HEAD OF THE CIVIL STATUS AND REGISTRATION OFFICE

SUPREME COURT (Prescott, J.): January 30th, 2015

Immigration—asylum—proportionality—deportation of asylum seeker after 12 years in Gibraltar may be proportionate interference with private life—evidence of few social ties in Gibraltar, not learning English, lack of personal development or integration means private life minimal contrasted with knowledge of language, extensive family and no threat to safety in home country

The appellant appealed against the respondent's decision to refuse his asylum application.

The appellant was an Algerian national who had entered Gibraltar in 2003. Shortly after arrival, he was arrested for being in Gibraltar without a valid permit; the Magistrates' Court made an order for his removal and he spent three months in prison before the removal order was revoked and he was released. For the next five years, he lived in Gibraltar and had no contact with the immigration authorities, until June 2008, when his solicitor contacted them in order to resolve his residency status.

In January 2009, the appellant claimed asylum. In October 2011, the respondent refused that application. The appellant sought judicial review of that decision, but the judicial review was superseded by an appeal pursuant to reg. 31 of the Asylum (Procedures) Regulations 2012.

The appellant submitted that his removal from Gibraltar would constitute a disproportionate interference with his right to private life, in violation of s.7(1) of the Constitution, on the basis that he had lived in Gibraltar since 2003. The respondent submitted in reply, *inter alia*, that (a) the state had a broad margin of appreciation in immigration cases, with the result that a state's immigration policy could override issues under art. 8 of the European Convention on Human Rights ("ECHR"), and (b) the appellant should not, in the interests of the economic wellbeing of Gibraltar, be allowed to remain, because Gibraltar had a small taxpayer base and unconstrained immigration would place significant strain on the community's access to housing, healthcare and education.

Held, dismissing the appeal:

(1) Deportation of the appellant would not violate his right to private life under s.7(1) of the Constitution. It would constitute an interference with his right to private life engaging the operation of s.7, given that he

had lived in Gibraltar since 2003, but that interference would be proportionate. The length of time the appellant had spent in Gibraltar did not by itself establish that he had any significant private life that would outweigh legitimate immigration controls. In fact, he had adduced minimal evidence of the existence of a private life in Gibraltar: there was no evidence that he had formed any social ties or developed any friendships or lasting relationships in Gibraltar; there was no evidence that he had learned the English language; and there was no evidence of any personal development or integration into the Gibraltarian community. Conversely, there was nothing to suggest that he would suffer any hardship or injury, or be subject to any threat to his safety or wellbeing, if he were returned to Algeria. He spoke an Algerian language and had extensive family in Algeria, meaning that a return to Algeria would not cause him any material detriment but would allow him to reintegrate into a social network which he appeared to be lacking in Gibraltar. There would therefore be no breach of s.7(1) of the Constitution in deporting him: the balance of proportionality was tipped firmly in favour of the respondent (paras. 15–16; paras. 29–32).

(2) The concept of the margin of appreciation used in relation to the ECHR did not apply to a domestic claim made under the Constitution (para. 20).

(3) Section 7(1) of the Constitution and art. 8 of the ECHR did not include a right for the appellant to choose where he would prefer to live (para. 29).

(4) A proportionality exercise was necessary when considering whether the removal of the appellant to Algeria would constitute a disproportionate interference with his right to private life but it was not the case that deportation would constitute a disproportionate interference with the right to private life only in exceptional cases (para. 23).

(5) The fact that there was a delay by the respondent in resolving the appellant's immigration status and asylum claim would be factored into the proportionality exercise to determine whether deportation would constitute a breach of his rights under s.7(1) of the Constitution, but such a delay could not, in and of itself, confer on him a right to remain in Gibraltar. Factoring the element of delay into the proportionality assessment did not result in a different conclusion being reached: he had a very minimal private life in Gibraltar and the lawful operation of immigration controls as proposed by the respondent would therefore be proportionate notwithstanding any delay (para. 39).

Cases cited:

(1) *AG (Eritrea)* v. *Home Secy.*, [2008] 2 All E.R. 28; [2008] Imm. A.R. 158; [2007] I.N.L.R. 407; [2007] EWCA Civ 801, applied.

(2) *Bensaid* v. *United Kingdom* (2001), 33 E.H.R.R. 10; 11 B.H.R.C. 297; [2001] I.N.L.R. 325, referred to.

(3) *EB (Kosovo)* v. *Home Secy.*, [2009] 1 A.C. 1159; [2008] 3 W.L.R. 178; [2008] 4 All E.R. 28; [2008] H.R.L.R. 40; [2008] U.K.H.R.R. 1087; (2008), 25 B.H.R.C. 228; [2008] Imm. A.R. 713; [2008] I.N.L.R. 516; [2008] UKHL 41, applied.
(4) *Huang* v. *Home Secy.*, [2007] 2 A.C. 167; [2007] 2 W.L.R. 581; [2007] 4 All E.R. 15; [2007] 1 F.L.R. 2021; [2007] H.R.L.R. 22; [2007] U.K.H.R.R. 759; (2007), 24 B.H.R.C. 74; [2007] Imm. A.R. 571; [2007] I.N.L.R. 314; [2007] UKHL 11, applied.
(5) *KM (Iran)* v. *Civil Status & Reg. Office*, 2013–14 Gib LR 613, referred to.
(6) *Pretty* v. *United Kingdom* (2002), 35 E.H.R.R. 1; [2002] 2 F.L.R. 45; [2002] 2 F.C.R. 97; 12 B.H.R.C. 149; 66 B.M.L.R. 147, referred to.
(7) *R. (Razgar)* v. *Home Secy.*, [2004] 2 A.C. 368; [2004] 3 W.L.R. 58; [2004] 3 All E.R. 821; [2004] H.R.L.R. 32; [2004] Imm. A.R. 381; [2004] I.N.L.R. 349; [2004] A.C.D. 83; [2004] UKHL 27, applied.

Legislation construed:

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.7: The relevant terms of this section are set out at paras. 11–12.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 17 (1953)), art. 8(1):

"Everyone has the right to respect for his private and family life, his home and his correspondence."

J. Restano for the appellant;
R.R. Rhoda, Q.C., Attorney-General, and *K.M. Drago, Crown Counsel*, for the respondent.

1 **PRESCOTT, J.:** On January 16th, 2009, some six years after his arrival in Gibraltar, the appellant claimed asylum in Gibraltar. An asylum interview was carried out on June 22nd, 2011. On October 13th, 2011, the respondent refused the application. At the time, there was no right of appeal against his decision and, in the event, the appellant commenced a claim for judicial review.

2 On November 8th, 2012, the Asylum (Procedures) Regulations 2012 ("the 2012 Regulations") came into force and provided for a right of appeal to the Supreme Court in respect of a refusal to grant an asylum application.

3 This is an appeal pursuant to reg. 31 of the 2012 Regulations against the decision of the respondent. This appeal supersedes the claim for judicial review which, on May 15th, 2013, was ordered to proceed as an appeal pursuant to the 2012 Regulations.

4 In *KM (Iran)* v. *Civil Status & Reg. Office* (5), this court ruled that appeals pursuant to the 2012 Regulations should proceed by way of full rehearing whilst according a degree of respect to the decision of the respondent.

5 This appeal is advanced only on Ground 5 of the memorandum of appeal dated July 26th, 2013, namely that the appellant's removal would constitute a disproportionate interference with his right to private life.

The factual background

6 The appellant is an Algerian who was born in 1978 in Skikda, Algeria. He was 25 years of age when he arrived in Gibraltar as a stowaway on November 7th, 2003. Shortly after arrival, he was arrested for being in Gibraltar without a valid permit. The Magistrates' Court made an order for his removal from Gibraltar, and he spent a total of three months in prison, after which time it appears that the removal order was revoked and the appellant released.

7 Thereafter, and for the next five years or so, the appellant made no contact with the immigration authorities until June 2008 when the appellant's solicitors wrote to the Principal Immigration Officer setting out the background and enquiring what steps were being taken to resolve his residency status. A holding reply was received two days later.

8 On January 16th, 2009, solicitors for the appellant wrote to the Principal Immigration Officer, the Chief Minister and the Governor requesting a discretionary residence permit and/or refugee status and/or subsidiary protection. Six days later, a holding reply was received from the Principal Immigration Officer. On January 28th, 2009, the Governor replied indicating his unwillingness to consider exercising his discretionary powers under s.19 of the Immigration, Asylum and Refugee Act 1962 in view of the fact that open dialogue was to be explored and that legal proceedings were being contemplated.

9 Despite some further correspondence, it appears that no decision was taken by the Principal Immigration Officer on the grant of asylum on the grounds that the application was not considered genuine. As a direct result of that decision, the appellant commenced judicial review proceedings. Permission was granted, and a consent order followed by which it was agreed that the appellant had made a claim for asylum on January 16th, 2009. The sum of £6,000 was paid to the appellant by way of arrears of financial assistance. Thereafter, the appellant was interviewed, asylum refused, and the judicial review proceedings commenced as a result were subsumed into this appeal.

The statutory background

10 The Asylum Regulations 2008 ("the 2008 Regulations") were made pursuant to the Immigration, Asylum and Refugee Act 1962 and came into force on October 2nd, 2008. The respondent is "the Authority" under the 2008 Regulations who considers requests for asylum.

11 The statutory basis for this appeal stems from s.7(1) of the Constitution, which provides that "Every person has the right to respect for his private and family life, his home and his correspondence." Similar rights are contained in art. 8 of the European Convention on Human Rights ("ECHR") and art. 7 of the Charter of Fundamental Rights of the European Union.

12 Section 7(3) of the Constitution provides:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit . . ."

13 By virtue of s.18(8)(a)(i) of the Constitution, this court is enjoined to take account of decisions of the European Court of Human Rights. It is not in dispute that, given the fact that art. 8 is analogous to s.7 of the Constitution, they should be construed in a similar way.

14 It is not in dispute that *R. (Razgar)* v. *Home Secy.* (7) (endorsed by the House of Lords in *EB (Kosovo)* v. *Home Secy.* (3)) sets out the correct approach to art. 8 (and, by analogy, s.7), essentially by way of a five-point test, namely ([2004] 2 A.C. 368, at para. 17):

> "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?"

15 Question 1: Will the proposed removal be 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? It is not in dispute that the proposed removal would be an interference with the applicant's right to private life.

16 Question 2: Will such interference have consequences of such gravity as potentially to engage the operation of art. 8? In this case, the interference is the intention to remove the appellant from Gibraltar, and the consequences of the interference would likewise be removal. The appellant submitted that, given that he has lived in Gibraltar since 2003, Question 2 must be answered in the affirmative. In *Razgar* (7), Lord Bingham explained (*ibid.*, at para. 18) that:

> "Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts* v. *United Kingdom* (1993), 19 E.H.R.R. 112."

The purported removal of a person from a country in which he has resided for 11 years, in my view, must attain the minimum level referred to by Lord Bingham. I am reinforced in that view by the comments of Sedley, L.J. in *AG (Eritrea)* v. *Home Secy.* (1) ([2008] 2 All E.R. 28, at para. 28): "while an interference with private or family life must be real if it is to engage Art 8(1), the threshold of engagement (the 'minimum level') is not a specially high one." Given the low threshold, I answer Question 2 in the affirmative.

17 Question 3: If so, is such interference in accordance with the law? It is not in dispute that the interference is regulated by and in accordance with the law.

18 Questions 4 and 5: Is such interference necessary in the interests of the economic wellbeing of Gibraltar and is it proportionate to the legitimate public end sought to be achieved? Before I deal with these questions substantively, I wish to say a word on the issue of the margin of appreciation.

19 The respondent submitted that, when considering the question of proportionality, regard ought to be had to the margin of appreciation which a state has in immigration cases. It was further submitted that, where there is an absence of consensus across the contracting states of the Council of Europe, the margin of appreciation afforded to a state is generally a wide one. Further, given that, in immigration cases, there is no consensus among contracting states as to the best means of enforcing an immigration policy, the margin of appreciation should be wide, with the

resultant effect that a state's immigration policy can override art. 8 issues.

20 With respect to the respondent, I find this approach to be misconceived. The margin of appreciation point has no applicability to this case because this is a domestic case which pleads a violation of the Constitution and, although s.7 of the Constitution is mirrored by art. 8, it is the breach of s.7 that forms the basis of the claim. If the complaint before the court had as its sole basis a violation of a human right enshrined in the ECHR, then consideration of the application of European law in the context of the state's domestic situation, policy, and law would come into play. This is not such a situation. Of course, that is not to say that this court should not draw guidance from European jurisprudence on the point and accord such deference to those authorities as it sees fit, but the principle of deference cannot be confused with the principle of the margin of appreciation.

21 I now turn to Questions 4 and 5. Pursuant to s.7(3)(a), interference with the right to private life is permitted if it is in the interests of, *inter alia*, "the economic well-being of Gibraltar." It is not in dispute that maintaining effective immigration policy is capable of coming within the definition of the "economic well-being of Gibraltar." The material question is whether such interference is justified in the sense that it is proportionate.

22 The respondent submitted that the appellant should not, in the interests of the economic wellbeing of Gibraltar, be allowed to remain. This is because Gibraltar has a small taxpayer base and unconstrained immigration places significant strains on the community's access to housing, healthcare and education.

23 Questions 4 and 5 necessarily entail undertaking a proportionality exercise, evaluating the rights of the appellant against the interests of the community by the state's exercise of legitimate immigration control. I am persuaded that the exercise involves no test of exceptionality. In *Eritrea* (1) (*ibid.*, at para. 25), Sedley, L.J. reiterated the view expressed by Lord Bingham in *Huang* v. *Home Secy.* (4) that, while the practical effect of art. 8 "is likely to be that removal is only exceptionally found to be disproportionate, it sets no formal test of exceptionality and raises no hurdles beyond those contained in the Article itself."

24 That said, it is also of note, as Lord Bingham observed in *Razgar* (7) ([2004] 2 A.C. 368, at para. 20), that "the severity and consequences of the interference will call for careful assessment at this stage" and such an assessment must incontrovertibly involve careful consideration of the particular facts of the case. As Lord Bingham also observed in *Kosovo* (3) ([2009] 1 A.C. 1159, at para. 12), "there is in general no alternative to making a careful and informed evaluation of the facts of the particular

case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

25 *Huang* provided some guidance as to the various considerations which should be weighed when considering applications under art. 8 ([2007] 2 A.C. 167, at para. 18):

> ". . . [T]he main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved."

26 I remind myself that this application centres solely on the right to private life, and it is helpful to consider the significance of the term. In *Razgar* (7) ([2004] 2 A.C. 368, at para. 8), the court quoted *Bensaid* v. *United Kingdom* (2):

> "Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world."

Lord Bingham went on to say that private life was a broad term, and referred to *Pretty* v. *United Kingdom* (6) (35 E.H.R.R. 1, at para. 61), where the court held that private life covered "the physical and psychological integrity of a person."

27 Clearly this is not a case where gender identification, sexual orientation, sexual life or mental health are relevant; this case sits in the realm of the physical and psychological integrity of a person and his right to identity, personal development and the right to establish and develop relationships. It is with this in mind that I turn to consider the evidence.

28 The only evidence from the appellant with regard to the private life he has established emanates from a witness statement which he made in 2009. That witness statement deals almost exclusively with the period from his arrival in 2003 to 2005, and recounts his experiences *vis-à-vis* the local authorities. There is no current evidence covering the five years from 2009 to date. As highlighted by counsel, the only evidence in the appellant's witness statement relating to private life are the following statements: "I want to regularize my status and get a work permit so that I can lead a normal life here" and "I am at home in Gibraltar, I have learned the Spanish language and integrated here quite well."

29 In this case, there is no evidence that the appellant has formed any social ties, there is no evidence that he has developed any friendships or lasting relationships, and there is no evidence that he has learned the English language, which is the official and, some might say, predominant language of Gibraltar. Despite his claim that he has integrated well here, there is no evidence of that. Other than his assertion that he has learned the Spanish language, there is no evidence of personal development and no evidence of even marginal integration into the Gibraltarian community. I am not persuaded that length of time spent in Gibraltar by itself establishes any significant private life such as would outweigh legitimate immigration controls. As Lord Bingham observed in *Huang* (4) ([2007] 2 A.C. 167, at para. 18), the Strasbourg court has "repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live." In light of the scarcity of evidence pointing to acquisition by the appellant of a private life in Gibraltar, it appears that this case turns more upon the appellant's perceived right to choose where to live, rather than an interference with private life.

30 There is no current evidence relied upon by the appellant to the effect that, if he is returned to Algeria, he will suffer hardship or injury or be subjected to any threat to his safety or wellbeing. In addition, the appellant speaks the Algerian language and he has extensive family in Algeria consisting of parents, four brothers, four sisters, cousins and uncles. Although this does not detract from any claim the appellant may make

with regard to the existence of a private life in Gibraltar, it does provide reassurance that return to Algeria will not cause him any material detriment but will allow him reintegration into a social network which he appears to be lacking here.

31 *Eritrea* (1) provides some useful comparative guidance. There the court found that a 14-year-old boy whose claim had not been processed for four years, who had no known family in Eritrea and could not speak the language, but who had acquired an education, psychological support and a social circle in the United Kingdom had established a private life which was such as to raise the question of the proportionality and necessity of removing him, notwithstanding the legality and proper objects of immigration control. This contrasts sharply with the present case where there is a connection with Algeria but, other than passage of time, no real connection with Gibraltar so as to validate any substantive claim to private life.

32 In circumstances such as these where the right to private life is so tenuously engaged, the refusal of permission to remain would not, in my view, prejudice the applicant in a manner sufficiently serious so as to amount to a breach of the rights protected by s.7. Thus, the balance of proportionality is tipped firmly in favour of the respondent who, in the circumstances, must be permitted to give effect to his system of immigration control.

33 There is one last matter I need to deal with, and that is the possible effect of delay by the respondent in dealing with the appellant's claim. In *EB (Kosovo)* v. *Home Secy.* (3), the question of delay was considered by Lord Bingham, who was of the view that delay might be relevant in one of three ways ([2009] 1 A.C. 1159, at paras. 14–16):

1. ". . . [T]he applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier."

2. Any relationship which the appellant enters into is likely to be "imbued with a sense of impermanence," but, if years pass without removal, the impermanence will fade and the expectation to stay will increase.

3. "Delay may be relevant . . . in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

34 Not having established the development of any personal or social ties, or of any relationships, it is difficult to see how any delay could have prejudiced the appellant as envisaged by Points 1 and 2 above. Quite the

opposite, despite having had the benefit of the delay, he has, notwithstanding, been unable to show that deeper roots have been established during the period of the delay, or that his claim to private life has been strengthened as a result.

35 In relation to Point 3 on Lord Bingham's list, delay may also be relevant if (i) the delay is shown to be the result of a dysfunctional system, which (ii) yields unfair results. I have summarized the chronology in this case at paras. 6–9 of this judgment and I do not propose to rehearse it. I am of the view that blame for the delay, if any is to be apportioned, must be shared between the appellant and the respondent.

36 The appellant arrived in Gibraltar in November 2003 and was released from custody three months later, in early 2004. For five years thereafter, he made no contact with the authorities, until mid-2008, and did not make a claim for asylum until 2009. Whilst I accept that the authorities could have contacted him during this period, if the appellant did not request resolution of his residency status until 2008, he can hardly lay the blame for delay during this five-year period at the feet of the respondent.

37 Once the claim for asylum was lodged in 2009, the respondent's refusal to consider the same on the basis that it lacked merit is, I must say, somewhat surprising, and no doubt that stance caused some delay in the three years which followed thereafter.

38 Even if the delay were shown to be the result of a dysfunctional system, it has not, upon the evidence and for the reasons given above (para. 34), yielded unfair results.

39 In any event, the issue of delay generally and in relation to Point 3 in particular is in my view only of relevance "in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control" (Lord Bingham in *Kosovo* (3) (*ibid.*, at para. 16)). In other words, it is to be factored into the evaluation exercise. The existence of delay, even if it is delay on the part of the respondent, cannot of itself endow a right on the appellant to remain in Gibraltar. Any right the appellant may have acquired to remain emanates from s.7 and from a determination that the actions of the state amount to such a degree of interference as to prejudice those rights sufficiently to amount to a breach.

40 To decide otherwise would be effectively to hold that any illegal immigrant who has spent a minimum amount of time in Gibraltar would be entitled to remain indefinitely, even though his rights under s.7 were not engaged.

41 Factoring the element of delay into the equation in the present case does not, in my view, result in a different conclusion being reached. Given my finding of the existence of a very minimal private life, the lawful

operation of immigration control as proposed by the respondent is proportionate notwithstanding any delay.

42 For these reasons, the appeal is dismissed.

Appeal dismissed.
