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EM (Lebanon) (FC) v Secretary of State for the Home Dept [2008] UKHL 64[1]

My Lords,

61 For the reasons given by my Noble and Learned friends Lord Hope and Lord Bingham, I would agree to allow this appeal. I feel no need to elaborate on the Flagrancy test. Instead, I intend to explore further the legitimacy of breaking up the family life, and the need to include the best interests of children when deciding Article 8 cases.

The Right to Respect for Family Life

62 The right to respect for family life is more than a fundamental principle of our law under the ECHR and Human Rights Act, but a universally recognised human right included in the Universal Declaration of Human Rights 1948, the international covenant on civil and political rights 1996, as well as most recently being indoctrinated into the EU by Article 7 of the European Charter of Fundamental Rights. The importance of protecting Article 8 has been emphasised in both Strasbourg and the UK. Huang v SSHD [2007] UKHL 11, states the core values Article 8 aims to protect

> "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

[1] The assignment asks students to write a 2,500 word judgment of a well known migration case. It has not been altered for publication apart from formatting.

and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives" para 18.

63 The case before us is one described as a foreign case, of which the threshold test is much greater. However, Article 1 ECHR provides that the States 'shall secure to everyone within their jurisdiction the rights and freedoms of the convention', including all people claiming or affected by the asylum claim irrespective of their nationality. What needs to be determined here is whether the removal of the Appellant and AF to Lebanon would damage and break up their family life, to such an extent that it would breach their rights under Article 8. If it is found that the family can satisfactorily be returned abroad, there will be no breach of Article 8. The approach was identified in Huang and depends on whether "the life of the family cannot reasonably be expected to be enjoyed elsewhere" para 20.

64 In deciding this, a key factor that must be taken into account, is not simply the rights of the appellant, but other family members who may be affected by the decision to remove. This was emphasised in Beoku-Betts v SSHD [2008] UKHL 39, which stated, "The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others" para 4.

Best interests of the child

65 In this appeal, the family life the appellant is claiming is that of her and her son. In determining the proportionality of whether her removal to Lebanon would interfere with her right to respect for family life, the rights and interests of AF must be of paramount importance. Neulinger v Switzerland (2010) 54 EHRR 31 identifies "a broad consensus...in support of the idea that in all decisions concerning children, their best interests must be paramount" para 135. The reference list in support of this claim is extensive, highlighting numbers of international provisions which refer to the best interests of the child as a

“paramount” or a “primary consideration”, including the second principle of the United Nations Declaration on the Rights of the Child 1959; articles 5(b) and 16(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; and article 24 of the European Union's Charter of Fundamental Rights.

66 For our purposes, the most important obligations for the UK are contained in article 3(1) of the UNCRC, and section 55 of the Borders, Citizenship and Immigration Act 2009, which highlight that in all actions concerning children, regardless of the authority, including decisions about immigration by the Secretary of State, there is a need to promote the welfare, and treat the best interests of a child as a primary consideration. Unfortunately, this has not always been the approach taken by courts; the Court of Appeal in its earlier decision on this case decided the child’s interests were not important in deciding the asylum claim of the mother. Moreover, NG (Pakistan) v SSHD [2007] EWCA Civ 1543 the Court of Appeal stated, “It was the mother's article 8 rights that were under scrutiny, not the father's or even the children's” para 9. These are approaches of which I cannot agree, and I believe the Court of appeal erred in its decision not to take into account the needs, and interests of AF.

67 Case law from several jurisdictions undermine their approach; the case of ZH (Tanzania) v SSHD [2011] UKSC 4 highlights “that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be “in accordance with the law” for the purpose of article 8(2)” Para 24. Despite the facts of that case relating to the interests of children who are citizens of the UK, who would be forced to leave the country. The principle is applicable to all children regardless of their status; there is a need for the Home Secretary and the courts to treat their needs as the most important factor in Article 8 decisions when their welfare is potentially at risk. When determining this, factors to be taken into account include the child’s emotional welfare and their level of dependence on the parent.

68 Nevertheless, even though the best interests of the child should be taken into account as 'a primary consideration', this does not mean they will have to be 'the primary consideration.' Other considerations taken either alone or cumulatively may outweigh the best interests of the child. As the Federal Court of Australia explained in Wan v Minister for Immigration and Multi-cultural Affairs [2001] FCA 568,

"[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration" para 32.

Of course when determining the best interests of the child, it does not automatically lead to a decision consistent with those interests, but so long as the interests of the child are treated as the most important consideration, there is every possibility that the other considerations, could outweigh those best interests. The thing to remember however, is the need "to consider those best interests first" ZH (Tanzania) para 26

Proportionality

69 When assessing the proportionality of removing a parent and child to their home country where Article 8 would be infringed in that country, the State must justify any possible infringement with a legitimate aim, after a close examination of the facts. This was emphasised by Lord Bingham in EB (Kosovo) v SSHD [2008] UKHL 41, "there is in general no alternative to making a careful and informed evaluation of the facts of the particular case" para 12. When dealing with the facts in EB (Kosovo), Lord Bingham said:

"The authority will, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal if the effect of the order is to sever a genuine and subsisting relationship between parent and child." para 12

70 Of course, states have the right to control the entry and exit of persons within its jurisdiction; Article 8 is not an absolute right to remain. In the case before us, the legitimate aim under Article 8(2) related to the economic-well being of the country. Strasbourg has however outlined certain factors that must be taken into account when conducting a proportionality test in Űner v The Netherlands (2007) 45 EHRR 421

"The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled." para 58

A point of upmost importance for the courts to look for is the existence of more than normal emotional ties between the parent and child when assessing the difficulties the child may face on return to the expelling country. If the child only has a minimal reliance on the parent whom because of removal, they would lose close contact, the infringement of Article 8 may be sufficient with the legitimate aim not to invoke the child's best interests. In Anam v UK [2011] ECHR 940 family life was found between the claimant and his parents because of a higher degree of reliance on his mother. Therefore, if there were extremely strong reliance shown by the child towards the parent, it would be highly disproportionate to interfere with their Article 8 rights.

71 In addition to this, as expounded in Rodriguez Da Silva v Netherlands (2007) 44 EHRR 729, if sending the parent and child back to their country of origin would lead to "insurmountable obstacles in the way of the family living" para 39. It would be highly

disproportionate to rely on any exception under Article 8(2), except for in exceptional circumstances based on the facts of the case. In that case, the court considered “that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under article 8.” Para 44

72 A fundamental case in assessing the proportionality of the welfare of a child is Re J (A child) [2005] UKHL 40, which assessed the implications of the Hague Convention on the Civil Aspects of International Child Abduction. Baroness Hale identified “the application of the welfare principle may be specifically excluded” if “it is in the best interests of children for disputes about their future to be decided in their home countries” para 20. This is a difficult test, on the one hand, it is generally accepted that UK courts cannot pass judgement on foreign jurisdictions, and family disputes should be settled in their home countries, where representations of all affected parties can be heard. On the other hand, if the system of law is so discriminatory, as to possibly engage Article 14 ECHR, is it acceptable to return the parent and children. In our case, since the courts in Lebanon would have no choice but to award custody to the father or his relatives, with the appellant having no right of appeal because of the system of law in place in Lebanon, “then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard” Re J para 39. Furthermore, Article 20 of the Hague Convention provides that:

“The return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”

73 The purpose of Article 20 is to ask the question of whether the action or inaction in the foreign country would be inconsistent with the fundamental principles of the expelling state. This provision was not included in our law in 1985 because it was uncertain at the time of

what the UK's fundamental principles relating to the protection of human rights were. However, since the Human Rights Act 1998, the UK has a clear stance on this issue. The principle of non-discrimination between sexes in family disputes is a widely recognised fundamental in our law, and if we were to apply Article 20, as Baroness Hale described in Re J, "we would be entitled, though not obliged, to decline to return a child on that ground alone." Therefore, "Any discrimination in the foreign country which was contrary to Article 14 of the Convention on Human Rights would allow, but not require, the court to refuse to return the child." para 45. This shows the importance of taking into account the foreign system of law, when deciding the best interests for the child's future.

The present case

74 Ever since the birth of her son, the appellant and AF have been mutually dependant on each other. AF has had no one but his mother to care for him, and adhere to the general needs a child requires. However this not simply a conventional mother son relationship, the appellant is and has been the only person to show him true love. His father has not had contact with him since his birth, been sent to prison for failing to support him, and shown a deep desire to not have children as shown from his past horrific abusive behaviour. Therefore the only family life that subsists is that between the appellant and AF. If the appellant were to be returned to Lebanon, she would lose custody of her son, and at best, would only be allowed occasional visitation rights. I not only agree that this would be a flagrant denial of the appellants right to family life with her son, but also an extremely flagrant violation of AF's article 8 rights to be cared for by the only family he has ever known.

75 It is in my opinion no doubt, that AF's right to family life with his mother can in no way be replaced by that of a new life with his father, or relatives of whom he has never had contact. I believe based on the extreme facts of the case, the rights of AF must weigh as

strongly, if not more so than those of the appellant. It was wrong of the Secretary of State and the Court of Appeal not to have regard to his welfare when making their decisions. If they had, they would have realised the emotional trauma AF would almost certainly have suffered on return to Lebanon. His world would have been upended completely. The emotional ties between the appellant and AF and the obstacles that would be faced are far too high to allow immigration policy to interfere with their rights under Article 8.

76 There has been much disagreement concerning rights under Article 14 in this case. Lord Hope expressed at para 15, "On a purely pragmatic basis the Contracting States cannot be expected to return aliens only to a country whose family law is compatible with the principle of non-discrimination assumed by the Convention." But, for the reasons highlighted at para 73 of my own judgement, I would disagree. The removal of a child and mother back to a system of law, which operates in such a discriminatory fashion between sexes, having no regard for the welfare of the child, would in my opinion violate the appellants Article 14 rights sufficiently when read along with those of Article 8, especially since the Article 8 claim is only relevant because of the system of law applicable in Lebanon.

77 For these reasons, and those given throughout my judgement, I would allow this appeal.

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