Case No: C5/2008/0696

Neutral Citation Number: [2008] EWCA Civ 1000
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/10081/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 30th July 2008

Before:

LORD JUSTICE KEENE

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YT (Eritrea) **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr D Jones (instructed by Messrs Popkin & Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED

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Judgment

(As Approved by the Court)

Lord Justice Keene:

1. This is a renewed application for permission to appeal from a decision of the Asylum and Immigration Tribunal ("the AIT"), permission having been refused on the papers by Tuckey LJ. The applicant is a female citizen of Eritrea born in April 1982. She arrived in this country in September 2002 as a domestic servant of a Kuwaiti family. She claimed, but was refused, asylum. Most of her personal history is not in issue. She and her family fled to Sudan from Eritrea in 1991 when she would have been aged, on my calculations, about 9. They did so because her father had been an active member of the opposition ELF-RC. Her father was subsequently abducted and disappeared, as did her brother. She joined that party but at a low level, cleaning the party offices. Eventually she was sent to Kuwait as a domestic servant.

2. After her arrival in London she became a member of the ELF-RC branch here. She said that she participated in two or three, or perhaps four, demonstrations. When the party split in June 2004, she joined the ELF-NC. She said that all of this would put her at risk if she were returned to Eritrea. She also contended that she would be regarded as a draft evader in Eritrea, and she relied on medical evidence that she suffered from depression. In consequence, she alleged that she had a valid asylum claim and a claim under Article 3 of the ECHR, or alternatively a claim to humanitarian protection under Rule 339C of the Immigration Rules.

3. Her appeal against the Home Office refusal of these claims was heard by Immigration Judge Thorndike, whose determination is dated 27 September 2007. He said that he found no reason to disbelieve her account of having fled to the Sudan, of the abduction of her father and brother, and of her domestic service in Kuwait and London. However, the judge found that there was no evidence that she was of any interest to the Eritrean authorities. He role in the London branch of the ELF-RC was a very minor one, and he said that she was very vague as to the number of demonstrations she had attended; only one held on 19 August 2005 was supported by any evidence, nor was there any evidence that she would be singled out in Eritrea for robust and intense questioning simply because she was a failed asylum seeker. He noted that she left the country in 1991 when there was no conscription, so she would not be seen as a draft evader. The immigration judge found that there was not a reasonable risk that she would be subjected to ill-treatment simply because she might indicate that she did not wish to undertake military service. So he dismissed her asylum claim and her claims under the ECHR.

4. The immigration judge then turned to the claim for humanitarian protection, which he allowed for two reasons set out in paragraph 57; in the circumstances, I need not read those. They were, however, the basis for the Secretary of State seeking reconsideration of the decision, the immigration judge having decided to allow the appeal on humanitarian protection grounds. Essentially, reconsideration was ordered because of the inadequacy of the reasons for finding a need for humanitarian protection, and for meeting the requirement of the Immigration Rules as to there being any serious harm which gave rise to the need for such

protection. That derives, I should say, from the terms of paragraph 339C of the Immigration Rules.

5. Prior to the reconsideration hearing, the applicant put in a rule 30 reply seeking to uphold the decision on the basis that the immigration judge should have allowed the appeal under the Refugee Convention. It also said that Immigration Judge Thorndike had erred in failing to make findings on or to take account of certain documents, to which I shall come in a moment.

6. The reconsideration was dealt with by Senior Immigration Judge Eshun, whose decision sent on 25 January 2008 is the one which it is now sought to appeal against. Judge Eshun set out the history of the matter, including the findings of Immigration Judge Thorndike and the terms of the rule 30 notice. It was found that paragraph 57 of Judge Thorndike's decision contained material errors of law. I need not go into those, because that is no longer a live issue.

7. As for the rule 30 points, Senior Immigration Judge Eshun recorded that the applicant's then representative accepted that the Immigration Judge's findings as to the Article 3 claim were not challenged. That is recorded in paragraph 24. The claim under the Refugee Convention was dismissed. As for the point about documents, the Senior Immigration Judge noted that Judge Thorndike had accepted that the applicant was involved with the ELF. In the event, Judge Eshun set aside the earlier decision, and substituted a decision dismissing the appeal as to humanitarian protection.

8. The challenge to that decision has been narrowed somewhat since Tuckey LJ refused permission on the papers in this case. It is now accepted that the first Immigration Judge did err in law, but it is argued that the Senior Immigration Judge erred in failing to engage adequately with the applicant's reply. Mr David Jones, who I emphasise did not appear below, argues two matters. I take them in reverse order. It is said, first of all, that the defects in Judge Thorndike's reasoning about humanitarian protection affected his findings on the Article 3 claim, and yet Judge Eshun did not deal with that. There was in fact a viable Article 3 claim, given the applicant's circumstances as a young and vulnerable woman.

9. I have pointed out to Mr Jones in the course of this hearing that paragraph 24 of Judge Eshun's decision expressly records that no challenge was being mounted to Judge Thorndike's findings on the Article 3 claim. Those findings were that there was no real risk of Article 3 ill-treatment on return to Eritrea. On the face of it, given that concession, Judge Eshun was entitled not to deal further with the Article 3 claim, or for that matter any claim under the Refugee Convention, because one simply cannot get any claim under the Refugee Convention on its feet if there is no Article 3 claim. The refugee claim could only be based on possible persecution, which in itself would fall within Article 3.

10. Having had his attention drawn to that paragraph, Mr Jones suggests that perhaps it may not mean what, on the face of it, it says, and has sought to apply for this matter to be stood out. I am not prepared to accede to that application; the concession to which I have referred has been there in stark terms ever since this

decision by Senior Immigration Judge Eshun was sent to the parties back in January of this year. If there had been any suggestion that that misrecorded or in some way misrepresented the position taken at the hearing, that is a matter which both could and should have been raised long before now. It is important that these matters be dealt with without delay, and for those reasons I am not prepared to accede to the application.

11. The other main matter raised concerns the documentation. This Mr Jones really puts at the forefront of his case today, and this is a reference to the fact that a letter had been lodged from the ELF-NC Youth Union Chairman in the United Kingdom dated 9 January 2006, which in its first numbered paragraph said this:

> "It is organizational obligation to a member of ELF-NC to participate on every demonstration which [is] organized by our organization or by any other Eritrean opposition groups. Therefore I would like to confirm that Mrs [YT] had participated on more than four rallies (demonstrations), some of which are in front of [the] Eritrean Embassy, 10 Downing Street, and in front of the Libyan Embassy."

12. It is said that the first immigration judge was therefore wrong in saying that only one of the demonstrations referred to by the applicant was supported by any evidence, and that the Senior Immigration Judge was wrong to treat this as going only to the applicant's involvement with the party. It went to the degree of risk, it is said, that the applicant may have come to the attention of the Eritrean authorities. Mr Jones submits that her activities in the United Kingdom can well lead to a risk of persecution on return. He refers to and relies upon the decision in YB **(**Eritrea**)** v SSHD [2008] EWCA Civ 360, and though he recognises that the applicant has been out of Eritrea since 1991, she had been involved, he submits, for some years in party activities in the United Kingdom, and her family had a history of such involvement.

13. I have to say that I do not find this ground persuasive. First of all, the letter upon which reliance is placed is couched in somewhat strange terms. It seems to be saying that the applicant must have been at these rallies because she was, as a member, obliged to do so; rather than that the author actually knew that she had attended. The fact is that, as Immigration Judge Thorndike recorded in his decision, the applicant herself was very vague about the number of demonstrations which she had attended. This can be seen from paragraphs 23 and 43 of the determination. She did not give any sort of detail about where or when those had happened, apart from the one which was accepted by the immigration judge.

14. In any event, all this in my judgment cannot lead to a successful appeal, in the light of the concession that the immigration judge's findings under Article 3 were not being challenged at the reconsideration. That claim was one which was not based solely upon events in Eritrea, but also sought to reflect the activities of the applicant in this country. That is essentially what this argument goes to: the risk

of ill-treatment on return. It is an argument, therefore, which cannot stand in the light of that concession.

15. In all those circumstances, I cannot see any realistic prospect of a successful appeal in this case, and the application therefore will have to be refused.

Order: Application refused.