Case No: C5/2008/3002

Neutral Citation Number: [2009] EWCA Civ 905
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: IA/03922/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 15th July 2009

Before:

LORD JUSTICE WALLER
LORD JUSTICE KEENE
and
LORD JUSTICE ELIAS

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Between:

TF (ANGOLA)

Appellant

- and -

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

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Ms M Plimmer (instructed by the Greater Manchester Immigration & Aid Unit) appeared on behalf of the **Appellant**.
Mr N Sheldon (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Elias:

1. This is an appeal against the decision of Immigration Judge Brunnen who, in the course of the second stage reconsideration, dismissed the appellant's appeal that a removal back to Angola would involve a breach of her rights under Article 8 of the European Convention of Human Rights.

2. The background is as follows. The appellant is a citizen of Angola who claimed asylum on 3 January 2003. She had come to the United Kingdom with her oldest son, then aged six. That application failed, being finally determined on 15 August 2003. On 2 January 2004 she married Mr M, also a citizen of Angola. He had been granted exceptional leave to remain on 7 March 2002. The context in which that was granted was as follows. Mr M had made a claim for asylum. The basis of his claim had been that he had been a policeman in Angola and had been the body guard of the commandant to the police. The commandant was put under house arrest for assisting the opposition group UNITA and Mr M allowed him to escape. He says that in consequence he was detained and tortured by the MPLA government for some eight months before the commandant helped him to escape.

3. The Secretary of State rejected his asylum claim. He found that even if the account given by Mr M was true, it demonstrated a fear of prosecution rather than persecution. Ill-treatment would not be for Refugee Convention reasons. But in any event the Secretary of State indicated that he was doubtful about the credibility of Mr M. He said this at paragraph seven:

> "Further doubts as to your alleged fear of persecution can be drawn from the fact that although you were the Commandants bodyguard since 1998, and you accompanied him wherever he went, you claimed to have been ordered to guard him when he was placed under house arrest. The Secretary of State is of the opinion that the Government authorities would not have placed the Commandant's own bodyguard, who had been in his service for over three years and served him loyally, on guard duty to watch over him to ensure he didn't escape. Therefore, the Secretary of State has reasons to doubt the credibility of veracity of your claim."

   The Secretary of State did, however, on the same date that asylum was refused grant exceptional leave to remain, which was stated to be "because of the particular circumstances" of the case. It was not at the time explained what were those circumstances. That exceptional leave was later converted into an indefinite leave to remain on 18 January 2006.

4. The couple now have two young children, both of whom are British citizens. In March 2007 the appellant applied for indefinite leave to remain on the basis

of her marriage. The Secretary of State refused that application. There is an immigration judge's decision on 8 April 2008 which found that the decision of Secretary of State did interfere with the appellant's Article 8 rights. That was the subject of an appeal and the Senior Immigration Judge ordered reconsideration, which was to take the form of a full hearing. It is that decision which is under consideration.

5. At the hearing evidence was received from the appellant and her husband. The latter dealt with matters surrounding his asylum claim. The judge made it plain that he started without any assumption that Mr M was either credible or not credible. He did not hold it against him that the Secretary of State had cast doubts upon his credibility because he noted that even if Mr M had been unhappy about that, there would have been no point in appealing it once he had been given exceptional leave to remain. Equally however he was not prepared to infer that the Secretary of State must have accepted his credibility by granting him exceptional leave to remain.

6. The immigration judge set out the immigration history. He pointed out that it was never clear why the Secretary of State had concluded that exceptional leave to remain should be granted. It is common ground that the judge merely had to consider Article 8. He set out the well-known five questions formulated by Lord Bingham in the Razgar case ([2004] UKHL 27). He found that there was family life between the appellant and her husband and three children, but not between her and any other relations of her husband, in the UK. He reminded himself that following Beoku-Betts [2008] UKHR 39, he had to consider the impact of the decision to remove the appellant and all the members of the family. The question was whether the removal of the appellant would have consequences to the family of such gravity as potentially to infringe Article 8. In answering that question he directed himself as follows:

> "In order to answer this question in relation to family life it is necessary to decide whether there is any insurmountable obstacle to the whole family returning to Angola and enjoying their family life together there."

In determining that question the judge considered whether there was a real risk of harm to Mr M on a return to Angola. He observed that Mr M's claim to be at risk in Angola had never been the subject of any judicial decision.

7. He then gave a number of reasons why he doubted the truth of Mr M's account. First, Mr M said that his father had been an officer in the MPLA army and then had defected to UNITA. The immigration judge considered it highly unlikely that in those circumstances his son would become a policeman in the service of the government. Second, it was also highly unlikely for someone who was the son of a UNITA fighter and the commandant's personal body guard to have been put in charge of guarding the commandant. Third, he had arrived in the United Kingdom via France but had not sought asylum there. The judge therefore concluded that, looking at the evidence in the

round, he was not satisfied that there was a reasonable degree of likelihood that the account was true. He added that he did not think that the fact that Mr M had been granted exceptional leave to remain implied any acceptance that he would be individually at risk in Angola. He then noted that Mr M suffered from certain health problems, diabetes and hypertension, and took this into account but concluded that they could be catered for in Angola. The judge's conclusion was that there was no insuperable obstacle to Mr M, the appellant and the three children all returning to Angola and living there as a family. Accordingly the interference was not of sufficient gravity to constitute an infringement of Article 8. Strictly that determined the appeal. Nonetheless the judge went on to consider the issue of proportionality and to satisfy that even if Article 8 rights had been interfered with, it was proportionate to return the family to Angola.

Grounds of appeal

8. There are in effect three grounds of appeal. The first is that the judge erred in setting the test that there were no insurmountable obstacles to their return. As Sedley LJ indicated when initially refusing leave to appeal on paper, that is putting the test too high and the judge did err in identifying it in that way. The judgment of Sedley LJ in VW (Uganda) v SSHD [2009] EWCA Civ 5 at paragraph 19 confirms, in line with earlier cases such as the House of Lords' decision in EB (Kosovo) [2008] UKHL 41, that it is only necessary to ask whether the family can reasonably be expected to relocate. That part of the appeal is therefore sustained. However, that does not determine the appeal. It is common ground that in order for the appeal to succeed it is necessary for the applicant to go on and establish that the error of law is a material one. It was on this basis that Sedley LJ initially rejected the appeal as having no reasonable prospect of success. The issue is whether the application of the correct test would necessarily have led to the same conclusion, and he was satisfied that it would.

9. The second ground of appeal takes issue with this analysis. It is submitted that even on the facts as found by the judge, had he applied the right test he might have reached a different conclusion. In my judgment there is no realistic prospect that he would, and the argument barely figured in the submissions of Ms Plimmer, counsel for the appellant. The appellant and her husband had lived for 29 and 40 years respectively in Angola, the younger children had no significant ties in this country and the older one could be expected to adapt back to life in Angola. There were medical problems, namely diabetes and hypertension, affecting Mr M but, as the immigration judge found, they could be dealt with in Angola. He would not face any risk of persecution on return. In the circumstances it was plainly reasonable for them to relocate in the country of their origin.

10. The applicant's third ground questions the factual basis of the immigration judge's decision. She submits that it was at least arguably the case that the Secretary of State had already determined that Mr M would be at risk of ill-treatment on return when he granted exceptional leave to remain in 2002. If that was the Secretary of State's conclusion, the judge could not reopen that question. He would be entitled to consider whether the risk was still present

some seven years later but the starting point would have to be that there had been a risk in the past. The basis of this argument stems from what is termed a consideration minute, which was not before the immigration judge. This was provided to the applicant by the Secretary of State following the refusal of permission on paper by Sedley LJ. It is dated the same day as the letter refusing asylum and is written by the same person. It is in the following terms:

"CONSIDERATION MINUTE

Asylum refused on 7 March 2002 under paragraph 336 of HC 395 (as amended) for the reasons given in the Reasons for Refusal letter aside, and the claim is hereby recorded as having been determined.

CONSIDERATION-

- Applicant fears persecution from the Government of Angola as he helped the Commandant of the police force to escape.
- Applicant was arrested and detained for 6 months and was beaten, interrogated and tortured.
- Applicant has no links with Luanda and at present cannot be returned.
- Applicant's mother and two brothers are in the UK and have been granted ELTE.
- Applicant's father was killed by the Government as he was originally in the army but changed sides and joined UNITA.

The applicant has been given ELTR for the reasons given above/in accordance with Country Policy."

The relevant policy referred to was adopted when Angola was in the throws of the civil war which ended shortly after Mr M came to the UK in 2002. It provided *inter alia* that no-one should be sent back to Angola, even failed asylum seekers, if they had no current links with Luanda.

11. The high water mark of the applicant's case, as ably advanced by Ms Plimmer was that this minute demonstrates that the Secretary of State must have accepted that the appellant would be subjected to ill-treatment if returned to Angola. It showed that the core of the account was accepted. However, she later realistically resiled from that position. She recognises that the minute and the decision letter must be read together and that this leaves some ambiguity about the Secretary of State's views. She contends, however, that they raise a serious question mark as to precisely what the Secretary of State had accepted in 2002. It was incumbent on the Secretary of State to produce this minute to the tribunal and this had not been done. Now that it had been produced it plainly raised issues which an immigration judge ought at least to

explore. It was simply not possible without the matter being remitted for further consideration to know what conclusion the immigration judge might reach with respect to the Secretary of State's position back in 2002. That could potentially have affected the decision. If, for example, it transpired that the Secretary of State did believe at the time that there was a risk of ill-treatment on return, then that would provide cogent evidence that Mr M would be at risk if returned now. If he were subject to any such risk then of course it would be reasonable for him not to return to Angola and for the applicant and the children to remain with him.

12. The Secretary of State submits that the minute does not materially affect the judge's analysis at all. First, he says it is impossible to conclude that the Secretary of State was in the minute indicating that he did believe the account by the applicant. That was simply an unsustainable inference given the suspicions as to credibility expressed in paragraph 7 of the decision, particularly since both documents were written by the same person. Furthermore, the more likely interpretation of the minute was that exceptional leave to remain was being given on the basis of a policy. The minute indicates that the Secretary of State understood that Mr M had no current links to Luanda and therefore, in accordance with the policy, he could not be returned. Third, and most importantly, he submitted that whatever doubts were created by the consideration minute, it was inconceivable that those doubts could be resolved in the way which could satisfy any immigration judge that the Secretary of State had formed the view that there was a real risk that this applicant would face ill-treatment if returned to Angola. The most that could result from a more intensive interrogation of the minute is that the judge would be left in some confusion about precisely what the Secretary of State did believe the position to be in 2002, but that would inevitably mean that the judge would simply have to make his or her own assessment of that risk in the light of evidence advanced before the judge. That is precisely what this judge did.

Conclusion

13. I accept the submissions of the Secretary of State. I think it most likely that Mr M was given exceptional leave to remain on the basis of the policy alone, but I accept that the terms of the minute do leave some doubt about that. However, even read on its own and without reference to paragraph 7 of the decision letter, it is ambiguous. It is not clear whether the so-called considerations set out in the minute are merely a statement of what the Secretary of State had been told or whether they were intended to have a greater significance than that amounting to some kind of finding. Nor is it clear whether the exceptional leave to remain was granted on the basis of an acceptance of the consideration set out in the letter or in accordance with the terms of the policy or both. If the minute had stood alone, I would accept that it would be necessary to send the matter back for further consideration. If it did state a concluded view of the Secretary of State as to the credibility of Mr M then it would not be appropriate for the immigration judge to revisit that issue. But it does not stand alone. Even interpreting the minute as favourably as one can for Mr M, it still leaves a conflict between what the document says and what is stated in paragraph 7 of the document.

14. There is no way now in which that conflict could be satisfactorily resolved. It follows that the judge would inevitably be left in a state of confusion and would have to look at the matter afresh. That is precisely what this judge did. Having reached the evidential conclusions he did, there can, as I have indicated, be no doubt that he would have reached that conclusion even if there had not been the misdirection to which I have referred.

15. It follows that the appeal fails.

Lord Justice Waller:

16. I agree.

Lord Justice Keene:

17. I also agree.

Order: Appeal dismissed