Case No: C5/2008/1884

Neutral Citation Number: [2009] EWCA Civ 241
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No AA/04456/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 12th February 2009

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE DYSON
and
LORD JUSTICE LONGMORE

- -

Between:

JN (CAMEROON) **Appellant**

- and -

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

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Mr J Nicholson (instructed by Rochdale Law Centre) appeared on behalf of the **Appellant**.
Ms C Patry-Hoskins (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Dyson:

1. The appellant is a national of Cameroon. He claimed asylum in the United Kingdom on the basis that he feared persecution by reason of the fact that he had escaped from prison and also because he had in the past been accused by the chief of his village of plotting to kill the president of Cameroon.

2. The Secretary of State for the Home Department refused the claim for asylum and the appellant appealed to an immigration judge. Immigration Judge MacDonald dismissed the appellant's appeal, rejecting almost every part of his account and concluding, at paragraph 80, that the appellant's account was not credible and was a fabrication. The immigration judge was satisfied that the appellant was of no interest either to the authorities in Cameroon or to the local chief in his village. The High Court made an order for reconsideration and the matter came before Senior Immigration Judge Eshun for a first stage reconsideration hearing. The Senior Immigration Judge found that the immigration judge had not made an error of law and therefore affirmed his decision. The appellant now appeals against the decision of the Senior Immigration Judge.

3. The principal ground of appeal identified in the grounds of appeal and the skeleton argument is that neither the immigration judge nor the Senior Immigration Judge grappled with the first and main ground of appeal raised by the appellant. This was because the immigration judge and the Senior Immigration Judge had failed to address the appellant's claim to fear persecution, which was not based on his having been a member of a human rights organisation, The Organisation Droits de Homme ("ODH"), but rather on the fact that he was at risk from the chief of his village who had accused the appellant in October 2006 of plotting to kill the president. Although discrete criticisms are made of the Senior Immigration Judge's determination, I do not find it necessary to consider these. The issue for the Senior Immigration Judge was whether the determination of the immigration judge contained errors of law. That is also the issue for this court.

4. In order to decide this issue it is necessary to examine the determination of the immigration judge in some detail. The immigration judge summarised the appellant's evidence at paragraph 20-32; this included:

> "He said he had heard that the practice of FGM had been introduced to his village in October 2006 when he was told that his female cousin had undergone circumcision. When the Appellant found out about this he told the people in the village to report it to the police but they had been afraid to do so. The Appellant had returned home and explained to his human rights organisation what was happening in his village. They would not believe his account without evidence and this is why the Appellant had returned to the village in

> order to take photographs which he did about ten or fourteen days after his earlier visit in October 2008."

5. At paragraph 23 the immigration judge said that:

> "The Appellant confirmed that although the chief had been present at the circumcision where the Appellant had taken his photographs he did not react. He had been surprised that the soldiers had come to arrest him a few days after he had returned to Douala. He had been told at the police station that he had been accused by the chief of the village of planning some action with village people to kill the President Paul Biya and that the Appellant was teaching crime to the people. He said he thought the chief had done this because he had been frightened when he had come to take his photographs and that this might cause him problems."

6. At paragraph 26 he said:

> "He said he had not given the photographs he took to his human rights organisation on his return home he had put them in a bedroom intending to wait for the next meeting of the human rights organisation but that the police came for them before he was able to do so."

7. The appellant also, before the immigration judge, adopted his first witness statement as his evidence in chief. In this he said that his house at Douala was attacked on 5 November 2006 when his father was shot and killed and his wife raped. He was beaten and taken into detention at the police station. He was told that he was being detained because the village chief had said that he was plotting to kill the president. He had given more details in a statement dated 18 December 2006 in support of his application for asylum. In that statement he said that the raid on 5 November was by government soldiers. It was they who attacked him, his father and his wife. He spent seven days in a police cell. After seven days he was transferred to prison, where he was incarcerated for about another twenty-one days. He was not interrogated, nor was he ill-treated in any way. He was then released as a result of a bribe, with the assistance of his uncle.

8. Mr Nicholson, who appeared for the appellant before the immigration judge as he has today in this court, submitted to the immigration judge that the appeal had little to do with the appellant's human rights activities. At paragraph 54 of the immigration judge's determination he is recorded as having said that the appeal was more to do with the appellant's efforts to encourage people to complain about what he said was wrong (which resulted in the village chief being frightened by his activities and who sought to deflect attention away from his own activities) than making false and malicious accusations against him. The effect of these false and malicious accusations was to cause the appellant's father to be murdered, his wife raped and the appellant to be imprisoned.

9. As to this, the immigration judge said at paragraph 55:

> "I disagree because the whole basis upon which the Appellant's claim rests is that it was his human rights activities which brought him into conflict with the chief in the first place. I consider that in assessing the overall credibility of the Appellant's account it is necessary to look at the credibility of his claim to have been a human rights activist. I do not accept that this claim becomes irrelevant just because the Appellant has conceded (paragraph 27 page 5 at the Appellant's second witness statement) that neither the chief or the authorities were aware of his involvement with the human rights organisation."

10. He then proceeded to consider the credibility of the appellant's claim to have been a human rights activist, as well as the credibility of his account of what happened in October and November 2006. The immigration judge examined the appellant's claim to have been a member of the ODH. He noted that the appellant gave vague and generalised answers to questions about his activities. The appellant said that he attended regular monthly meetings of the ODH. The immigration judge observed that he would have expected the appellant in those circumstances to have known the names of the people involved in the ODH, but he knew only very few of them. The immigration judge also noted that the appellant was uncertain about the correct name of the organisation.

11. All of these matters led the immigration judge to say at paragraph 59 that the credibility of the appellant's claim to be an active member of the ODH was damaged. At paragraph 60 the immigration judge said that he did not find it credible that the appellant would be sent out into the field alone to obtain evidence of female genital mutilation -- a practice which, although not illegal, might be perceived to be an attempt to undermine the authority of the local chief.

12. There was a letter dated 16 April 2007 from an organisation which was said to be the ODH. This letter was before the immigration judge. It indicated that the ODH was well aware of the risks of opposing the local chief. The

immigration judge said that his most serious concern was as to what the letter of 16 April 2007 did *not* say.

> "61. However my most serious concern is not so much what the letter from ODH says as what it did not say. The Appellant's evidence is that he was sent by ODH to obtain evidence from his village. They were well aware of his concerns regarding FGM (paragraph 19 page 4 second witness statement Appellant's bundle) and in the third paragraph of their letter the ODH say that he was asked to obtain more evidence and in consequence of what he did he became a victim of the traditional ruler. The letter also states that most of the information they gathered regarding the Appellant is from relatives. If that were the case the ODH would without doubt have been aware of the circumstances of the Appellant's arrest and his imprisonment on false charges and that during his arrest his wife was raped by Government soldiers and his father killed with impunity. These are all serious human rights violations and matters about which any human rights organisation would be concerned. I would have expected ODH at the first opportunity to have raises the serious issues at the highest level. At the very least I would have expected to see some reference to these events in the ODH letter together with some indication as to what steps have been taken by them to verify and report the Appellant's claim.
>
> 62. According to the report of the Fact-Finding Mission to Cameroon dated January 2004 complaints of human rights abuses can be submitted to the National Commission for the Human Rights and Freedoms (NCHRF). At paragraph 4.9 of the report (page 126 Respondent's bundle) it is stated that the NCHRF provides an umbrella organisation over all the human rights groups within Cameroon and they cooperate with other human rights groups.
>
> 63. If ODH were aware of the Appellant's arrest and treatment of his family that is a clear example of persecution of a human rights activist and of his family. I question why they have not said this in their letter or given any information as to what action they have taken to report the incident. Had they done so it would have supported the Appellant's claim but their failure to do so casts significant doubt on the Appellant's claim that his

> wife was raped and his father was killed and also cast doubt upon his own detention.
>
> 64. I consider the fact that the letter is silent on these points casts serious doubt on the reliability of the information contained in the letter from ODH."

13. At paragraph 68 the immigration judge said this:

> "I consider that what the Appellant had done in his village by photographing or filming a traditional method of circumcision, which is not illegal in Cameroon, could not form any basis on which to make the village chief think he might be a threat. The Appellant has acknowledged that he was not known to have been working for a human rights organisation and as the Appellant admits he was considered to be just a simple person from the village. He acknowledged that the chief was at the ceremony and saw him filming, yet he did not do anything. There has never been any suggestion in the Appellant's evidence that the chief was upset at the Appellant talking to people about their right to wages. If there was any such concern I question why the Appellant was not warned off whilst he was in the village. It seems to me to be completely irrational that the chief should wait until after the Appellant returned to Douala before making a complaint to the police that the Appellant was plotting to kill the president and encouraging young people in the village to commit crime. Not only were these accusations false they were absurdly false and once found to be so would reflect badly on the chief."

14. Then it is also necessary to have regard to what the immigration judge said at paragraphs 69-71:

> "69. The Appellant acknowledges that the chief had absolute power in his village but the Appellant was either unwilling or unable to say that he exercised any power or influence outside his home or tribal area. The fact that the Appellant describes the chief as a Government delegate does not persuade me that he would be in a position to influence the police in Douala to enable them to arrest the Appellant on dubious charges.

> 70. The report on the mission to Cameroon has the following to say tribes and chiefdoms:
>
> > '13.3 Dr Kamga of Nouveaux Droits de L'Home informed the delegation the human rights violations that occurred within tribes mainly occur in the north of Cameroon. Most of the human rights cases in Cameroon do not come directly from the Government. Lamidos have power over their subjects and the Government gives Lamidos freedom in return for the support of the village in the elections. Therefore the Government turns a blind eye to the human rights abuses.
> >
> > 13.4 Dr Kamga added that human rights violations within tribes are more prevalent in the north…'
>
> 71. I accept that chiefs do have power within their own villages but the objective evidence clearly shows that human rights violations mainly occur in the north of the Cameroon within chiefs own tribal areas. Mr Nicholson relied on the Operational Guidance Note on the Cameroon (paragraph 3.9.8 page 32 Appellant's bundle) in support of his submission that chiefs are all powerful in the Cameroon. However the paragraph clearly relates to the power of chiefs in the north and extreme north provinces where chiefs are permitted by Government to detain people in their own private prisons. The Appellant village is not in the north it is in the west province and there is no suggestion anywhere in the objective material that chiefs in the west province exercise such power. Further in neither report does it suggest that an individual chief's influence extends beyond his tribal area."

15. The combination of all these factors, and others which I have not mentioned, led the immigration judge to conclude at paragraph 72 that the appellant's account was implausible and lacked credibility. But the matter did not stop there because the immigration judge then considered the credibility of the appellant's account about his detention and his escape from prison. At paragraph 73 he said:

> > "I found that the Appellant's account of his treatment in prison does not reflect the seriousness of the charges he claims he was facing. The Appellant was held for approximately 28 days seven of which he was held in police cells and 21 in

> Newbell Prison. During that time there is no evidence he was ill-treated or that he suffered any kind of physical harm. He was not charged with any offence. It is not credible that if he was accused of plotting to kill the president and inciting the young people in his village to crime that he was not interrogated in depth. His evidence is that in effect he was not interrogated at all. All that he was told was what he was accused of which he denied. This account is not consistent with the objective evidence as to how the authorities treat prisoners in Newbell Prison. The USSD Report for the year 2006 (page 37 Appellant's bundle) comments as follows:
>
> > 'In Douala's Newbell Prison and other non-maximum security penal detention centres prison guards inflicted beatings and prisoners were reportedly chained or at times flogged in their cells. Authorities administered beatings in temporary holding cells within police of gendarme facilities.
> >
> > Two forms of physical abuse commonly reported by male detainees were the bastonnade where authorities beat the victim on the souls of the feet and the balancoire during which authorities hung victims from a rod with their hands tied behind their backs and beat them, often on the genitals.
> >
> > Security forces reportedly continued to subject prisoners and detainees to degrading treatment including stripping them, confining them in severely overcrowded cells, denying them access to toilets or other sanitation facilities and beating detainees to extract confessions or information about alleged criminals. Pre-trial detainees reported that they were sometimes required, under threat of abuse, to pay '*cell fees*' a bribe paid to prison guards to prevent further abuse.'"

16. At paragraph 74 the immigration judge noted that the appellant's account of being held in a cell on his own was inconsistent with the USSD reports of chronic overcrowding. At paragraph 75 he said that he found the appellant's account of his escape, with the assistance of bribery from his uncle, lacking in credibility. He said:

> "Whilst I acknowledge that there is corruption in the Cameroon and this is widely reported in the objective material, I do not believe that the appellant's uncle would have been able to find anyone willing, even for a large bribe, to face the possibility of being charged with helping someone accused of plotting to kill the president, to escape."

17. The immigration judge also found the appellant's account of his release from prison to be vague. He concluded therefore that the appellant had not been in prison and that this too cast doubt on his claim that his family had been harmed during his arrest. The immigration judge then turned to the documents relied on by the appellant to support his case that his father had been murdered and his wife raped by the soldiers. There were apparently genuine certificates issued by the authorities which appeared to show that the appellant's father and wife had indeed suffered these terrible fates. The immigration judge dealt with these documents at paragraphs 77-79 of his determination in the following terms:

> "77. I have taken into account the documents produced by the Appellant in support of his claim that his father is dead and his wife has been repaid. In considering these documents I have applied the principles set out in Tanveer Ahmed [2002] UKIAT 00439. These principles are:
>
> (i) In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
>
> (ii) The decision-maker should consider whether a document is one on which reliance should be properly be placed after looking at all the evidence in the round.
>
> 78. These are the principles which I have applied and I have considered all the evidence in the round. With the exception of the documents I am satisfied that all the other evidence which I have referred to above points to the fact that the Appellant's claim is not genuine and that he has fabricated his account to fear persecution in the Cameroon. In addition to this as I have already observed there is widespread corruption in the Cameroon and again I quote from the USSD Report (page 50 Appellant's bundle) as follows:

> ‘Corruption remained a [serious] problem in all branches of Government. The public perception was that judicial and administrative officials were open to bribes in almost all situations. According to a transparency international survey published in December 2005 an average household paid $205 (113, 000 cfa francs) each year in bribes, or more than 20% of the average person’s annual income, the average annual income per person was approximately $80 (44,000 cfa francs).’
>
> 79. After considering all the evidence in the round I am satisfied that the weight of the evidence is against the Appellant’s claim and accordingly I do not attach any weight to the documents produced by the Appellant in support.”

18. I can now turn to the grounds of appeal. What was the principal ground of appeal assumed little significance in the argument before us. The immigration judge clearly understood the basis of the appellant’s claim, i.e. that he was at risk by reason of what the village chief had done. The immigration judge understood that the appellant was not saying that he feared persecution because he was a member of a human rights organisation; but his claim to have been a member of a human rights organisation was relevant to the credibility of his account of what the local chief had done. It was therefore necessary for the immigration judge to decide whether the appellant was a human rights activist as part of the enquiry into whether his account of what the chief and soldiers had done was true. For this reason, in my judgment, there is no proper basis for criticising paragraph 55 of the immigration judge’s determination. It seems to me that the immigration judge did not fail to grapple with the relevant issues that were before him and I would reject this first ground of appeal which, as I have said, played very little part in the oral argument before us.

19. Instead Mr Nicholson concentrated on two principal criticisms of the immigration judge’s decision. First, he submitted that the immigration judge failed to make proper findings in relation to the certificates. Were these genuine documents? If so, why did they not provide real support for the appellant’s case? I would reject this ground of appeal. The immigration judge decided at paragraph 78 that, with the exception of a certificate, all the other evidence pointed to the fact that the claim was not genuine and that the appellant had fabricated his account. It is true that at paragraph 79 he put the point rather less bluntly when he said that the weight of the evidence was against the appellant’s claim, but in my view the two paragraphs must be read together. The language at paragraph 78 is clear and unequivocal. The appellant’s account was rejected as a fabrication. That must mean that the entirety of his account was rejected for that reason.

20. The immigration judge was entitled, after looking at all the evidence in the round, to reject the entirety of the appellant's account and to decide that the certificates could not be relied upon. That approach was permitted by Tanveer Ahmed [2002] UKIAT 0439. In fact, the immigration judge went further and pointed to objective evidence that corruption is a serious problem in all branches of government in the Cameroon. That evidence supported the inferential finding made by the immigration judge that the certificates had been obtained by bribery.

21. During the course of argument Mr Nicholson submitted that there were grounds for attacking the conclusion in paragraph 78 that the whole of the appellant's account had been fabricated. In particular, he argued that part of paragraph 68 was unsustainable. It will be convenient to repeat the relevant passage:

> "It seems to me to be completely irrational that the chief would wait until after the Appellant returned to Douala before making a complaint to the police that the Appellant was plotting to kill the president and encouraging young people in the village to commit crime. Not only were these accusations false they were absurdly false and once found to be so would reflect badly on the chief."

22. It was submitted by Mr Nicholson that this part of the immigration judge's reasoning was simply wrong. It was perfectly rational for the chief to wait until the appellant had returned to Douala before making the complaint to the police. Furthermore, it was wrong to say that these allegations were absurdly false. I cannot accept that this part of the immigration judge's reasoning is tainted by error of law. First, it was not perverse reasoning. Other immigration judges might have expressed themselves differently and indeed more cautiously.

23. Secondly, paragraph 68 is only one element of a complex set of reasons whose cumulative effect led the immigration judge to his overall conclusion. The passage which is criticised was not expressed to be a particularly important element of the immigration judge's reasoning. In relation to the alleged events in October 2006, the immigration judge made it clear that the most important point was that what the letter from the ODH, dated 16 April 2007, did *not* say. It is also clear that the points made at paragraph 73-76 in relation to the alleged imprisonment were considered by the immigration judge to be particularly telling. It is true that paragraphs 73-76 are immediately preceded by paragraph 72, in which the immigration judge says that he concludes that the appellant's account is implausible and lacks credibility. But it is plain that when he reaches his final conclusion at paragraph 80 that the account is not credible and is a fabrication, the immigration judge is taking account of all the reasons set out at paragraphs 56-79 and not merely those set out at paragraphs 56-71. I would therefore reject the first principal criticism of the immigration judge's decision.

24. The second criticism is that the immigration judge failed to take into account an important piece of objective evidence. At page 79 of what has been called the appellant's bundle there is an article about female genital mutilation in Cameroon by Austine Arrey. On the second page of that article there appears this passage:

> "Later that night after the reception hosted by the MDCA Douala branch, the pastor on his way home was attacked by some unknown people. He was beaten and discovered later by innocent passer-bys who took him to the hospital. He later died of his injuries.
>
> The people were later arrested after one of them surrendered to the gendarmes and had confessed that they had been ordered by the chief to exact punishment on Pastor John Ayuk for defying him. The chief has never been arrested. He has never even been questioned. The chief is a staunch member of the CPDM Central Committee and thus one of the untouchable people of the current regime."

25. Mr Nicholson relied on this evidence before the immigration judge to illustrate "the position of a traditional chief who has some involvement with the government."

26. Mr Nicholson submitted that:

> "…the chief of the Appellant's village was both powerful and untouchable and the Appellant's account that this brought the village into conflict with the Appellant and his human rights organisation is plausible." [See paragraph 45 of the immigration judge's determination]

27. I have already referred to paragraphs 69-71 of that determination. I would accept the submission of Miss Hoskins that there is nothing in the article about the killing of the pastor which casts doubt on the correctness of paragraphs 69-71. The important point is that there is nothing in the article to indicate that the chief in that case had exerted any influence over the police or any other state authorities. The immigration judge accepted that chiefs have power in their own villages, but the question was whether a chief from a village would have influence to persuade soldiers to arrest and incarcerate a person in Douala, three hours' drive away. The article relied on by the

appellant did not shed any light on the answer to that question. It may be said that the immigration judge should have dealt explicitly with the article, but it is clear that it could not have reasonably have made any difference to his reasoning or the outcome of the appeal. For these reasons I would reject the second criticism of the immigration judge's decision and I would dismiss this appeal.

Lord Justice Longmore:

28. I agree. Mr Nicholson for the appellant opened his application by submitting that he had three main complaints about the decision of Immigration Judge MacDonald. He said, first, the judge had set the appellant up to fail by attributing to him a contention that he was a human rights activist and then finding that he was not, when the appellant's argument was actually that he had angered the local chief, who retaliated by falsely asserting to the police in the town of Douala that the appellant was part of a plot to kill the president.

29. Secondly, Mr Nicholson said that the judge had not given any weight to apparently authentic certificates recording that the appellant's father had been murdered and his wife had been raped. Mr Nicholson said, thirdly, that the judge had, while accepting that the chiefs in the north of the country had power to put people they did not like into prison, said that the chiefs in the west did not exercise such power and that the appellant who came from the west had therefore no well-founded fear of persecution, without taking into account the well-attested incident of a pastor in the west who had been murdered on an order of a chief in the west.

30. On the renewed application for permission to appeal, Ward LJ said he thought very little of the first point. So do I. The question was, why did the appellant anger the local chief? It was part of the appellant's explanation that he was asked by a human rights group to take photographs of an incident of female genital mutilation. Immigration Judge MacDonald found that not to be a credible part of the appellant's account. In fact, he found all the appellant's account to be incredible, as my Lord has pointed out. So the immigration judge did not set the appellant up to fail. On the contrary, he found that his account was not credible; the human rights part of that account being part of the story which Immigration Judge MacDonald did not believe.

31. Ward LJ thought there might be something more in the second and third points, but, as far as the second point is concerned, on analysis the judge correctly applied the tests set out in Tanveer Ahmed, referred to by my Lord; [2002] United Kingdom IAT 00439. On the proper reading of his decision, Immigration Judge MacDonald looked at the evidence as a whole, apart from the documents. He decided that apart from the documents he was satisfied the appellant's account was not genuine but fabricated, and he then said that the documents did not displace that conclusion. He also said that corruption was a serious problem in the Cameroon and that officials were commonly bribed. The obvious inference is that Immigration Judge MacDonald thought that these documents, while apparently authentic, were probably procured by bribery. His conclusion that he could not place reliance on the documents was a conclusion which was open to him. It is a curious fact that the

document recording the gunshot wound in the chest relates to a man whose name is different from that of the appellant. We were, however, assured that an adequate explanation of that fact was given in evidence to Immigration Judge MacDonald, and there is no reason to suppose that the immigration judge did not have regard to such explanation.

32. In relation to a third point, the immigration judge did record the tragic death suffered by the pastor in paragraph 45 of his decision. It is said that he did not address the consequences of the event in his findings. But he did say in terms that, unlike chiefs in the north, chiefs in the west did not have, or exercise, power to incarcerate persons they did not like. He also said in paragraphs 69-71 that chiefs in the west did not exercise power or influence outside their home or tribal area. The incident of the pastor was inside the tribal area. It is the fact that the police in Douala were a considerable distance away from the chief's village. Again, the immigration judge came to a conclusion to which, in my view, he was entitled to come. I can see no error of law.

33. The decision as a whole can be criticised as being somewhat diffuse and in places over enthusiastic about giving reasons why the appellant had to be disbelieved, but I see no error of law, and Senior Immigration Judge Eshun was not herself wrong, in my judgment, to come to that conclusion. I also would dismiss this appeal.

Lord Justice Sedley:

34. Although on the papers permission to appeal had been refused, on renewal Ward LJ adjourned the application to the full court with the appeal to follow if permission were granted. Having heard Mr Nicholson this morning we granted permission to appeal. It follows, however, from the two judgments which have been delivered that the appeal for which we gave permission fails.

35. This is a conclusion which, left to myself, I am not certain that I would have reached. Certainly one could not have upheld the immigration judge's determination for the reasons given on a first stage reconsideration by the Senior Immigration Judge. Apart from anything else, she had either not appreciated or had forgotten that her sole remit was to decide whether the immigration judge's determination on his own findings disclosed a material error of law. Instead she repeatedly interpolated her own findings of fact.

36. Miss Hoskins for the Home Secretary has wisely not sought to adopt the Senior Immigration Judge's reasons for holding there to have been no error of law in the immigration judge's decision. She has simply argued that, properly approached by this court, it contains none. I recognise the force of my Lords' reasons for agreeing with this argument. I do not entirely share them, but given the majority view that Miss Hoskins' submission is broadly right, little would be gained by my developing my reservations.

37. I would add simply that, had we allowed this appeal by substituting for the Senior Immigration Judge's determination a holding that the immigration judge had erred materially in law, the result would have been that the appeal

would have proceeded to a second stage reconsideration on merits, on which even then I would not have held out a great deal of hope for the appellant. That, however, is not the legal test. As it is, permission to appeal will be granted. The appeal will be dismissed.

Order: Application granted; appeal dismissed