Neutral Citation Number: [2009] EWCA Civ 114

Case No: C4/2008/1601

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE CRANSTON
CO/5660/04

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2009

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE JACOB
and
LORD JUSTICE LLOYD

- -

Between :

THE QUEEN ON THE APPLICATION OF AM (SOMALIA)	**Appellant**
- AND -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Raza Husain and Mr Ronan Toal (instructed by South West Law) for the **Appellant**
Mr Gerard Clarke (instructed by the Treasury Solicitors) for the **Respondent**

Hearing date: Monday 19 January 2009

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Approved Judgment

Lord Justice Sedley :

History

1. The appellant, a national of Somalia now 32 years old, lived with his family in Baidoa. In 1997 fighting in the civil war reached Baidoa. Two of his brothers fled, but the appellant, his mother and one of his brothers stayed to try to protect the family property. His mother and brother were shot dead. The appellant too was wounded and probably left for dead, but he recovered and escaped. For three years he moved about the country to avoid the fighting. When finally he returned to Baidoa and found what had happened, he became disoriented, lost his memory and began wandering aimlessly. Relatives tried to care for him and arranged a marriage, but that soon fell apart. Meanwhile his brother Ibrahim had reached this country in 1999, and his other brother Ali in 2003. Both were recognised as refugees and now live in Bristol. Ibrahim has a family of his own.

2. The appellant arrived here by air in December 2003 and claimed asylum. His claim that he had come directly from Somalia – which he blamed on the agent - was false: he had in fact sought asylum in Italy the previous month. It now appears – though there has been no definitive finding of facts – that he had left Libya in a boat which broke down at sea, drifting for 3 weeks. When rescue finally came, only 15 of the 90 people on board were still alive. The survivors were taken to Italy, where they were treated in hospital. This was why the first EU landfall and the initial asylum claim were both made in Italy.

3. Once in the United Kingdom the appellant went to live with his older brother in Bristol. Both brothers and his elder brother's wife have since taken care of him. He has now been seen by a consultant psychiatrist, Dr Huws, whose reports were before the Administrative Court. They record, in short, that the appellant feels that he has lost everything except his brothers, and that enforced separation from them would cause a deterioration in the depressive illness and PTSD which Dr Huws diagnosed as manifestations of unresolved grief and which were causing the appellant to contemplate suicide. Dr Huws considered that successful counselling required a stable social context. The brothers confirmed that they were providing this: although the appellant was now accommodated in a hostel, he slept at Ibrahim's house, and one brother was always with him. Ibrahim described the appellant's continuing anxiety and his unwillingness to go out alone. Both he and Dr Huws anticipated that, if removed, the appellant would cease to be able to cope with his own fragile mental state.

The Dublin Regulation

4. We are indebted to Cranston J for a judgment – [2008] EWHC 1312 (Admin) – which, among other things, sets out with clarity the successive legislative frameworks governing rights of appeal for asylum-seekers whom it is proposed to remove to a safe third country.

5. In short, what was the Dublin Convention and is now known as the Dublin Regulation (EC 343/2003) seeks to prevent forum-shopping among EU states by requiring the country of first arrival, if asked to do so, to process an asylum-seeker's claim. Because removal for this purpose is capable in some cases of undercutting individuals' Convention rights, the combined effect of s.11 of the Immigration and Asylum Act 1999 and s.93 of the 2002 Act was to bar in-country appeals once a third country certificate had been issued save where a human rights claim had been made and had not been certified by the Home Secretary as clearly unfounded. Absent such a certificate, s.82 of the 2002 Act gave a right of appeal against removal without requiring the appellant first to leave the United Kingdom. It followed that a "clearly unfounded" certificate was a necessary accompaniment to a third country certificate if an in-country appeal was to be prevented.

6. The 2004 Act repealed and replaced these provisions, though without altering their substantial effect, from a date which was in due course fixed by statutory instrument as 1 October 2004. The same instrument made transitional provision for the continuance in effect of s.11 certificates "issued" before that date.

This case

7. Once the history outlined above had been established, Italy accepted responsibility under the Dublin Convention for examining the appellant's asylum claim. The Home Secretary in March 2004 accordingly prepared a safe third country certificate, which would have permitted removal to Italy without consideration of the asylum claim; but by the time it was served in October 2004 the statutory provisions under which it was drawn up had been repealed, and Cranston J in due course held it to have been a nullity. It was followed, on 21 October 2004, by a fresh letter refusing to consider the asylum claim in this country, rejecting the contention that removal to Italy would breach the appellant's art. 8 rights, and certifying that contention as clearly unfounded. This certification, if valid, meant that no appeal could be brought until the appellant had left the country: effectively, it stifled any appeal. The appellant nevertheless, without leaving, gave notice of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002 (once in November and again in December 2004) against the decision.

8. Nothing of relevance then happened until, in April 2008, the Home Secretary sent a letter withdrawing the original certificate (which Cranston J eventually held to have been in any case a nullity) certifying the human rights claim as clearly unfounded under paragraph 5(4) of Sch.3 and enclosing a fresh third country certificate, this time under paragraphs 4 and 5 of Sch.3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

The Administrative Court decision

9. The appellant brought judicial review proceedings challenging the lawfulness of the successive certificates. For cogent reasons which can be read in full at §19-29 of his judgment, and which are not now contested, Cranston J held that the first third country certificate, having been composed but not having been served before the repeal of the empowering legislation, had not been "issued" in time and so was a nullity.

10. Paragraph 5(2) in part 2 of Sch 3 to the 2004 Act says that a person whose claim is the subject of a third country certificate "may not bring an immigration appeal by virtue of section 92(2) or(3) of that Act" – that is to say, an in-country appeal. Paragraph 5(4) of Sch.3 says that a person whose human rights claim has been certified as clearly unfounded "may not bring an immigration appeal by virtue of section 92(4)(a) of that Act". The question was therefore whether the fresh third country certificate together with the certificate under paragraph 5(4) of Sch.3, issued as a precaution shortly before the High Court hearing in 2008, operated to stifle the appeal, if – which was also contested – such an appeal had meanwhile been validly instituted, so long as the appellant remained in this country.

11. The appellant now appeals with the permission of Longmore LJ on the first and third issues addressed below. On the second issue – whether the claim was in any event certifiable – the application for permission to appeal was refused on the papers and has been renewed before this court.

The appellant's case

12. The case for the appellant is that since the first certificate was void, having been issued and served when its statutory foundation had ceased to exist, the notices of appeal given by him in November and December 2004 entitled him to remain in the UK while the appeal was determined; and the re-certification of his claim in April 2008 could not stifle the appeal because it had already been brought. Secondly, and in any event, it is submitted on his behalf that the accepted facts made it impossible to certify the claim as clearly unfounded. While the second ground, if right, would make the first redundant, the first raises a point of general importance which ought to be addressed. In either case it has also to be decided whether there is in being a valid notice of appeal.

When is an appeal "brought"?

13. Cranston J's conclusion on the first question was this:

> "34. In my judgment the concept of bringing an appeal refers to a process. It is not a one-off event, when the appeal is initiated. Admittedly there are provisions in the immigration legislation which prevent an appeal from being "brought or continued" (e.g. Nationality, Immigration and Asylum Act

> 2002, ss 96, 97, 97). However, that does not deprive "bring" of its ordinary meaning in the context of appeals in paragraph 5(2). "To bring an appeal" has a transactional quality about it and the prohibition on bringing an appeal operates on any ongoing appeal. The prohibition did not have to operate expressly as one on bringing and continuing an appeal. The safe third country certificate of earlier this year therefore stopped any existing appeal in its tracks".

14. While I see the force of this reasoning, I am unable to adopt it. An appeal, without doubt, is a process. But if initiating it is, as Cranston J rightly says, a one-off event, so may bringing it be. It depends entirely on what meaning one is to invest the latter verb with.

15. Taking the word "bring" out of context for the moment, the dictionaries confirm that it is capable of meaning either to initiate or to conduct proceedings. The statutory context is therefore critical. As to this, the case for the appellant, capably put before us by Raza Husain, is that the 2002 Act in ss. 96 and 97, by using the phrase "brought or continued" in relation to appeals, shows that in this context at least Parliament regards the bringing of an appeal as a single event and its continuation as what follows. Cranston J acknowledged this statutory usage but found it insufficiently persuasive. In my respectful view it is not only persuasive but strongly indicative of the answer to the present question.

16. The issue can also be usefully addressed from the point of view of consequences. If the construction advanced by Gerard Clarke for the Home Secretary is right, it is open to her to stifle an in-country appeal by issuing a certificate at any time up to the promulgation of the appellate body's determination. Mr Clarke supports such a legislative intent by a submission that the overall purpose of the successive Acts has been to tighten the net (his phrase) on asylum-seekers. It would take a great deal to persuade me, even if this is so, that Parliament had silently sanctioned something so time-wasting and unfair. It would also leave one wondering why, in that case, Parliament had provided distinctly by s.99 of the 2002 Act for appeals to "lapse" when certified under ss. 96, 97 or 98, and why by s. 104 it had provided that an appeal against an immigration decision was to be treated as pending from "when it is instituted" to when it is "finally determined, withdrawn or abandoned" or when it lapses.

17. I accept Mr Husain's submission that, while there is an unhelpful disparity of vocabulary in the legislation, Parliament has made clear by the use of words such as "pending" or "continued" when it is speaking of a continuing process, and has also made it clear by the use of the phrase "brought or continued" that the former is a single event and the latter the process which follows.

Was the claim lawfully certified?

18. The foregoing may be sufficient, subject to the question of the validity of one at least of the notices of appeal, to answer this claim in the appellant's favour. But since it is of wider significance than the construction of now repealed statutory words, I propose to treat the certification itself as an independent ground of appeal.

19. I set out at the start of this judgment the apparent history of this case and why it is that the appellant contends that, albeit Italy is ready to process his asylum claim, to remove him there would involve a disproportionate interference with his art. 8 rights. Art. 8 of the ECHR, it will be recalled, requires the state to respect the individual's private and family life except where the interference is lawful and - in summary – proportionate. Mr Clarke accepts that art. 8 is engaged. In the light of what this court said in *AG (Eritrea)* [2007] EWCA Civ 801, §26-38, about the "minimum level of severity" required by the second principle in *Razgar* in order to engage art. 8, he was right to do so. It is engaged because removal is not only likely to provoke a psychological breakdown but would also sever him from his present family life, which is all he has.

20. The question for the court is not whether in all the circumstances removal is nevertheless proportionate: it is whether the Home Secretary can properly decide that the contrary argument is bound to fail. While the decision to certify is for the Home Secretary alone to make, she acts in doing so as judge in her own cause, since the practical effect of a certificate is that any appeal against her decision to remove, if it can be prosecuted at all, is highly likely to fail. There would otherwise be little point in having a certification system. The courts are at least as well placed as a departmental official to appraise the tenability of a human rights claim. It follows, as Mr Clarke properly accepts, that on judicial review the courts can be expected to give close scrutiny to a decision to certify a claim and, if the claim appears to them viable, to be prepared to overset the Home Secretary's view that it is not. (Since this appeal was argued, the decision of the House of Lords in *ZT (Kosovo)* [2009] UKHL 6 has confirmed the correctness of this approach.)

21. In the present case the Home Secretary was satisfied that Italy had perfectly adequate psychiatric services to which the appellant would have access both before and after an asylum hearing. It is made clear by his decision letter of 21 October 2004 that he considered this to be a sufficient reason for not departing from his policy of removal in Dublin cases. In my judgment this is plainly contestable: indeed I would think that the contrary argument, before an independent judicial tribunal, has a good chance of success.

22. The Dublin system has nothing to do with the merits of individual cases: it is designed simply to prevent forum-shopping while ensuring that every asylum claim is properly processed. By itself it does not address the problem of removals which may violate Convention rights. That is catered for by the separate obligation of the Home Secretary not to act inconsistently with such rights.

23. Thus the question in the present case is whether an independent adjudication could find substance in the contention that to follow the Dublin procedure in this appellant's case would be disproportionate. In my judgment it undoubtedly could.

24. One has first to bear in mind that in Dublin cases the sole purpose of removal is to enable another state to entertain the same claim as has been made in the United

Kingdom. It is not, as it is in the case of other removals, to return to their country of origin someone who has failed to establish any right to be here. The imperative of effective immigration control therefore has little bearing: that lies in the future.

25. Next, it is necessary to consider the availability of medical services in Italy in relation to the appellant's own needs. There is no evidence that he speaks a word of Italian. But, more importantly, there are strong grounds for thinking that, parted from what remains of his family, the very support which has enabled him to make a moderate degree of recovery will be absent. And, if, as is distinctly possible in the light of his brothers' successful claims, he is given asylum in Italy, all that will lie ahead there is a life of isolation and probable relapse. In other words, this is a case in which, on appeal, an immigration judge might well hold that the lawful purpose of the Dublin Regulation was not sufficient to justify the damaging effect on this appellant of disrupting what is now his private and family life by compelling him to present his asylum claim in Italy rather than here.

26. I would accordingly quash the certification that the human rights claim made in opposition to the decision to remove the appellant to Italy was clearly unfounded.

Is there a valid notice of appeal?

27. The handling of the appellant's case has been beset by confusion originating from more than one source. Neither of the two notices of appeal identified the refusal of leave to enter on 6 October 2004, which the Home Secretary contends was the single appealable immigration decision. But the second one identifies the Home Office letter of 21 October 2004, and Mr Clarke honourably accepts that this letter is capable of constituting an immigration decision within s.82(2)(g) or (h) of the 2002 Act, which respectively cover removal of persons unlawfully in the UK and removal of illegal entrants. Taking it shortly, he accepts that if, but only if, the appellant succeeds in establishing the ineffectiveness of the without-foundation certificate on both grounds – as he has now done – there was and is a good notice of appeal against a material immigration decision.

28. This being so, it is unnecessary to deal with Mr Hussain's arguments in refutation of these conditions.

Conclusion

29. In respectful disagreement, therefore, with the very careful judgment of Cranston J, I would allow this appeal on the grounds that, at the time of the issue of the Home Secretary's second certificate that the appellant's opposition on human rights grounds to removal to Italy was clearly unfounded (the first such certificate having been void), an in-country appeal had already been brought and could not be stifled by the certificate; and that the certificate was in any event bad in law because the human rights claim could not properly be said to be clearly unfounded.

Lord Justice Jacob:

30. I agree.

Lord Justice Lloyd:

31. I also agree.