Case No: C5/2009/0890

Neutral Citation Number: [2009] EWCA Civ 962
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/03171/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 24th July 2009

Before:

LORD JUSTICE WALL

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Between:

TN (ZIMBABWE) **Applicant**

- and -

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

- -

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Mr H Southey (instructed by Refugee and Migrant Justice) appeared on behalf of the **Applicant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

Lord Justice Wall:

1. This is a renewed application by the applicant for permission to appeal against a second-stage reconsideration of his appeal against the decision of the Secretary of State not to permit him to reside in this country following the Secretary of State's letter refusing his asylum claim.

2. The applicant is a citizen of Zimbabwe born on 12 April 1986. He arrived in this country on 6 April 2008 and immediately claimed asylum. He was refused permission to remain by a Home Office letter dated 24 April. His appeal to Immigration Judge Lane was refused on 31 July. Reconsideration of the Immigration Judge's decision was ordered on 5 September and determined by Senior Immigration Judge Taylor on 23 February of this year. She took the view that no error of law had been disclosed and therefore refused a further reconsideration. It is against that which the applicant seeks permission to appeal.

3. The point has been very well and concisely argued today on the applicant's behalf by Mr Southey and I am grateful to him.

4. In order to explain the point, I think it necessary to look at the application in a little more detail. I have in my papers the application for asylum made by the applicant's mother, which was heard by Miss Clayton, an adjudicator, who gave a decision promulgated on 23 June 2004. The applicant's mother applied for asylum under the Refugee Convention on the basis that she was a supporter of the MDC in Zimbabwe, that she had been beaten by the representatives of the majority party and that she had effectively been forced to flee the country because of those assaults upon her. She had also, she said, been asked to distribute T-shirts to members of the MDC. There were also other issues of fact which she raised.

5. In summary the position was that the adjudicator found her incredible, did not accept any part of her evidence. Therefore she had failed to persuade the adjudicator, according to the appropriate standard, that she had a well-founded fear of persecution for a Convention reason in Zimbabwe. Therefore her asylum appeal was dismissed.

6. The complaint made in this application is that the Immigration Judge hearing the applicant's appeal determined it, effectively, by reference to the adjudication made in relation to the applicant's mother; that this was unfair because the applicant had not been a party to those proceedings and had had no opportunity to have any input into them; and that therefore the decision of the Immigration Judge so to decide the matter rendered the proceedings unlawful and indeed unfair for that reason; that such an approach was contrary to the decisions of this court, notably the decision in AA(Somalia) v SSHD [2007] EWCA Civ 1040 and the judgment of Carnwath LJ in that case; and that, accordingly, permission should be granted to appeal to this court to raise the question as to the effect of previous findings by tribunals in relation to

fresh applications by different parties and the extent to which the new tribunal is bound by the findings of fact made by the original tribunal, particularly where the applicant in the fresh tribunal has had no opportunity to make any input into the findings and indeed has not been a party to them.

7. Mr Southey has helpfully taken me to the case of AA (Somalia), which is in my papers. I should perhaps say at this point that the renewed application orally made today is because Sir Richard Buxton, a retired judge of this court, took the view that no error of law had been demonstrated and that the case fell comfortably within the guidelines presented by AA (Somalia) and one other case.

8. I think it helpful for this purpose if I read part of the headnote to AA (Somalia), by which of course this court plainly would be bound. The finding, on page 1 of the document I have been given, reads as follows:

> "…dismissing the first appellant's appeal and…allowing the second appellant's appeal [by majority] 'the guidelines given by the IAT in *Devaseelan* [a reference given] as to the effect of previous findings by one adjudicator or immigration judge on a later appeal involving the same parties, had previously been approved by the Court of Appeal, and later extended to cases which, although they did not involve the same parties, did involve a material overlap of evidence. Under those guidelines, the earlier decision or findings were treated as a starting point and, in the absence of new material displacing those findings, an immigration judge hearing a later appeal was required to regard the issues as being settled by the first immigration judge's determination and to make his findings in the second case in line with that first determination. Such an approach found its basis in the general principles of administrative law which included the need for consistency and treatment between the cases. However, the need for the overlap of evidence to be 'material' meant that a mere overlap of evidence would be an insufficient test and would introduce undesirable uncertainty. Rather, the guidelines should be applied to cases such as those where the claimant considered by the first immigration judge and the claim considered by the second immigration judge arose out of the same factual matrix, such as the same relationship, or same event or series of events. Furthermore, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether the previous decision was in favour of or against the Secretary of State, because

> while the Secretary of State was a direct party to the first decision, the claimant was not; and it is one thing to restrict a party from re-litigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party."

Mr Southey helpfully took me to the passages in Carnwath LJ's judgment, at paragraph 69 onwards, which are well-known and to the decision of Ward LJ in the same case.

9. I think it important, against that background, to look at this particular case as it appeared to the Immigration Judge initially dealing with the applicant's case. Because if it is the case, it seems to me, that the Immigration Judge simply and solely decided this applicant's appeal on the basis of his mother's refusal or the refusal of his mother's application, then the point may well be worthy of argument and might be arguable in this court. Of course that is Mr Southey's submission, and he takes me through the judgment of Immigration Judge Lane promulgated or prepared on 31 July 2008.

10. I think it important to look at what Immigration Judge Lane said and did, because he did have the opportunity, to which he refers, of hearing the applicant give evidence. He says that he had carefully considered all the documentary evidence very carefully. I read from paragraph 23, which is before the reference to AA (Somalia) kicks in:

> "I have had the opportunity of hearing the appellant give oral evidence and I have considered all the documentary evidence very carefully. I have considered the documentary evidence and all evidence together as a totality before making any findings of fact. I have placed the account given by the appellant regarding past events in Zimbabwe in the context of the background evidence relating to that country. I sought to distinguish peripheral from 'core' parts of the appellant's account. I find that the appellant is not a witness of truth. I find that no part of his account regarding past events in Zimbabwe may be relied upon. I find the appellant has come to the United Kingdom for reasons wholly unconnected with a fear of persecution in Zimbabwe. I find the appellant is not the child of a MDC supporter, member or activist. I find that the appellant has never been subjected to attacks or harassment by war veterans either as alleged or at all."

11. He then goes on to explain the reasons for reaching those conclusions. There is first of all an extensive citation from AA (Somalia) and another decision of

this court in Ocampo [2006] EWCA Civ 1276 and, in particular, there is a reference and a citation from the judgment of Carnwath LJ, to which I have already referred.

12. The argument was put to the Immigration Judge that, because the factual matrix was not the same as it was in the case of the appellant's mother's appeal, there was only a minimal overlap of facts. Secondly, it was argued that the applicant, or the appellant as he then was in the appeal before the Immigration Judge, was not a party to the first appeal and not even a witness, as the appellant was in Ocampo. The argument was therefore put to the Immigration Judge that the tribunal should decide the present appeal on its own merits on the evidence before the tribunal.

13. The Immigration Judge deals with that argument in paragraphs 28 onwards of the reasons. He rejects the submission. He finds that the factual substratum is more than "a mere overlap" and he goes on with these words:

> "The appellant had no reason, by his own account, for fleeing Zimbabwe other than that he was harassed and abused by war veterans and ZANU-PF members on account of his mother's alleged membership of the MDC. The appellant would not have been subjected to such abuse or harassment had his mother not been a member of the MDC and had she not fled Zimbabwe, leaving war veterans to make repeated visits to the appellant in order to establish her whereabouts."

14. He then cites from the appeal of the applicant's mother. He then goes on to say, and this is relied upon by Mr Southey:

> "I find that the very basis of the appellant's appeal is predicated on his assertion that his mother was a member of the MDC and that she was perceived by war veterans and ZANU-PF members as having been a member of the MDC. This is, in effect, the same factual matrix upon which the mother's appeal had been based. That factual matrix had been rejected by the previous Adjudicator as untrue."

15. And then he goes on with a further reference to Devaseelan v SSHD [2002] UKIAT 00702 but continues in the same paragraph:

> "I have not been provided with any such reason. I find there are no good reasons at all to depart from the findings of the previous Adjudicator and those findings should form *the starting point* [my emphasis] in my assessment of credibility in the present appeal."

16. He goes on:

> "However, it is important that I should consider all the evidence, to hear account of the relevance of the determination of [the mother's] appeal together with the appellant's own evidence."

17. And then in paragraphs 30, 31, 32 and 33 the Immigration Judge, as it seems to me, goes on to give specific reasons why, irrespective of the account of his mother, the Immigration Judge nonetheless finds that the evidence given by the applicant or appellant before him as being incredible.

> "30. I did not find it reasonably likely that war veterans visited the appellant's home in order to harass and beat him over a period of years as alleged. The pretext of the beatings had been in order to ascertain the whereabouts of the appellant's mother. The appellant's mother['s] own statement indicates that the war veterans are well aware that she was living in the United Kingdom. The appellant's own evidence is not consistent with that statement; he says the war veterans did not believe him when he told them that his mother was in the United Kingdom. There is also a discrepancy in the evidence as to whether the visits made by the war veterans were 'continuous' or whether, as the appellant now alleges, they had ceased for a period of a year, during which time he got married. Had the appellant been telling the truth, I find he would have been able to have given a consistent account of these events when required to do so.
>
> 33. I also do not find it reasonably likely that the appellant would have remained in Zimbabwe for as long as he did given the continuous nature of the assaults he suffered at the hands of the war veterans. The appellant claimed that, following his brother's death, he…did not care regarding his own welfare. He has not explained what made him change his mind in this regard and choose to flee the country and also why he should have chosen to have got married at a time when he knew that the war veterans might wish to cause him further harm. I also do not find it reasonably likely that, throughout this lengthy period, war veterans should not have attempted to disrupt the appellant's business or attack him at his place of business.
>
> 32. I have had regard to the photographs. There is a photograph showing the appellant with bruising and

> swelling on his face. The photograph is not dated. I accept the photograph shows that the appellant had suffered some injuries. Likewise, I have a photograph of what appears to be a corps[e] lying in a coffin but I have no way of knowing whether this is or is not the appellant's brother as alleged.
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> 33. The other documents produced by the appellant are unhelpful. The medical report or outpatient certificate clearly bears the wrong date stamp, a fact which bears upon its authenticity."

And in paragraph 36 the Immigration Judge concludes:

> "I have to consider the cumulative effect of these findings and observations upon my assessment of the totality of the evidence. I have to formulate a factual matrix upon which to base my conclusions."

18. And he then goes on with the reference to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and continues:

> "Taking the findings of the previous Adjudicator's determination of [the mother's] claim as a starting point, and having regard to the observations which I have set out above, I find that the appellant has never come to the attention of the Zanu-PF or war veterans in Zimbabwe. I find that he will present to the Zimbabwean authorities as nothing more or less than a failed returning asylum seeker."

19. In my judgment those are independent findings of fact as to credibility made by the Immigration Judge irrespective of, and not dependent upon, the findings in relation to the applicant's mother. It seems to me, therefore, that on the facts of this particular case the Immigration Judge was entitled to, and indeed did, properly follow the AA (Somalia) guidelines and dealt with the matter appropriately on all the evidence. Thus it was that, when the matter came for reconsideration before Senior Immigration Judge Taylor in February of this year, she plainly took the view, although she cited very fully from both AA and Ocampo, that no error of law could properly be detected in the Immigration Judge's approach, because the Immigration Judge had both taken the factual matrix as a starting point and had then proceeded to deal with the evidence as the Immigration Judge found it to be as an independent exercise.

20. In these circumstances it seems to me that the point which Mr Southey raises would be of interest and importance had Immigration Judge Lane not followed the AA and Ocampo guidelines. But it seems to me that, on the facts of this case, that is precisely what the Immigration Judge has properly done. In all the circumstances I do not think I can detect any error of law in the approach adopted by the Immigration Judge. That certainly was the view of

Senior Immigration Judge Taylor. I bear in mind -- indeed it is at the forefront of my considerations -- that for this appeal to go forward I would have to take the view that it stands a reasonable prospect of success and, on the facts as they were found below to be, I do not think that it would. Whilst the point itself is one of importance and a suitable case will need, I think, to be reconsidered by this court, I have come to the clear view that this is not a case for that reconsideration and that therefore there is no compelling reason why this particular appeal should be heard.

21. And, accordingly, despite the attractive way it was put to me, the application will have to be refused.

Order: Application refused