CO/1909/2003

Neutral Citation Number: [2003] EWHC 2778 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 6th November 2003

B E F O R E:

MR JUSTICE EVANS-LOMBE

- - - - - - -

THE QUEEN ON THE APPLICATION OF DIABY

(CLAIMANT)

-v-

IMMIGRATION APPEAL TRIBUNAL

(DEFENDANT)

- - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

- - - - - - -

MR R SCANNELL (instructed by Luqmani Thompson & Partners) appeared on behalf of the CLAIMANT
MISS J ANDERSON (instructed by Treasury Solicitors) appeared on behalf of the DEFENDANT

- - - - - - -

J U D G M E N T

Thursday, 6th November 2003

1. MR JUSTICE EVANS-LOMBE: This is an application for judicial review of the refusal of the applicant's application for permission to appeal by the Immigration Appeal Tribunal, from the determination of an adjudicator on 18th December of last year refusing the applicant's claim for asylum.

2. An introduction to the facts of this case is conveniently found in the first two paragraphs of the adjudicator's reasons, which read as follows:

> "The Appellant is a national of Cote d'Ivoire, she was born 6 March 1992. The appeal is against a decision by the Respondent [Secretary of State for the Home Department] on 30 November 2001 which gave directions for the Appellant's removal from the United Kingdom pursuant to section 16(1) Immigration Act 1971 following the Respondent's refusal to recognise the Appellant as a refugee under paragraph 336 of HC395 (The Immigration Rules). The appeal is under section 69(5) Immigration and Asylum Act 1999 on the basis that the Appellant claims the decision to issue removal directions against her was contrary to the United Kingdom's obligations under the 1951 United Nations Convention relating to the status of refugees. In a Statement of Additional Grounds filed under section 74 Immigration and Asylum Act 1999 the Appellant has also claimed if she is returned to Cote d'Ivoire her human rights will be breached, and she relies on Articles 2, 3 and 8 European Convention for the Protection of Human Rights and fundamental freedoms. There is therefore a separate appeal under section 65 Immigration and Asylum Act 1999 relating to the Appellant's human rights.
>
> The Appellant arrived in the United Kingdom on 16 March 2001; she arrived on a train and subsequently claimed asylum on 8 October 2001. By the time the Appellant claimed asylum she was five months pregnant. Her daughter Shara Diaby was born on 5 January 2002 in London. The Appellant's daughter is a dependant on her mother's claim. The Appellant has provided a statement of evidence dated 19 October 2001; she was also interviewed in relation to her claim for asylum on 19 November 2001. Subsequently the Appellant has made a further statement dated 8 August 2002. The Appellant's claims both in relation to asylum and her human rights can be summarised as follows:
>
> (a) The Appellant was born in Daloa, she is a Muslim from the Gula ethnic group. The Appellant's parents are both now dead. The Appellant's father, when he was alive was the Imam for a mosque in Daloa, where the Appellant and her family lived. Most of the people of Daloa are Christians and had always given the Appellant's family problems."

3. It appears from her evidence before the adjudicator that in February 2001 the claimant suffered two physical attacks in the streets of her home town, Daloa. Furthermore, her house was burnt down, trapping her parents in it, in circumstances which she found suspicious. As a result, fearing for her safety, she fled from the country, initially to Abidjan on 1st March, from there to France on 5th March 2001 and thereafter to the United Kingdom on 16th March 2001. As I have said, she claimed asylum on 8th October 2001 but was rejected by the Home Office on 30th November 2001.

4. Soon after her arrival in this country the claimant met a Mr Bangali Diaby, also an Ivorian. The child, the birth of which is described in the initial paragraphs of the adjudicator's reasons, was the result of a relationship almost immediately formed with him.

5. The claimant appealed the rejection of her claim for asylum. That came before an adjudicator on 20th August 2002, when a hearing took place. On 20th September 2002, the reasons which I have just quoted from were dictated and they were thereafter published on 27th September 2002. Those reasons rejected the appeal against the refusal by the Home Office of the claimant's asylum claim and refused leave to appeal. The results of the adjudication are summarised at paragraph 14 of the reasons as follows:

> "In the light of my findings set out above I do not consider this Appellant has a well founded fear of persecution for a Convention reason on being returned to Cote d'Ivoire at the present time. In the circumstances the asylum appeal is dismissed. In addition, I do not find this Appellant's return to Cote d'Ivoire could place her at risk of torture or other inhuman or degrading treatment, and I do not find the Appellant's rights to a private and family life with her partner would be breached if she were returned to Cote d'Ivoire at the present time. In the circumstances the human rights

appeal is also dismissed."

Those conclusions at paragraph 14 were based on a detailed summary of the evidence before the adjudicator, which she sets out at length in the earlier paragraphs of the reasons.

6. In the meantime, on 19th September there was an attempted coup in the Ivory Coast by dissident soldiers from one of the Muslim ethnic groups in the north of the country. The evidence before the adjudicator showed that the population of the Ivory Coast is made up of 39 per cent Muslims, mainly living in the north of the country, 26 per cent Christians, mainly living in the south and west of the country. The balance of the population, 17 per cent, are traditional animists. The coup has, it seems, failed, but inter group resentment stirred up by the coup resulted in riots and strikes and substantial loss of life.

7. On 15th October 2002 an application for permission to appeal was made by the claimant to the Immigration Appeal Tribunal. The coup and its effect on civil life in the Ivory Coast was not mentioned in the grounds of appeal. The appeal was disposed of on paper by the Vice President of the Immigration Appeal Tribunal. His adjudication is dated 18th December 2002 but was published on 14th January 2003. I will read the text of the adjudication, which rejected the application for permission to appeal. It reads as follows:

> "The claimant, a national of the Cote d'Ivoire, made an application for asylum which was refused by the respondent on 30 November 2001. She appealed. Her appeal was heard by an adjudicator (Ms C J Wright) who in a determination promulgated on 27 September 2002 dismissed her appeal and her human rights claim. The grounds of appeal are attached. The Tribunal has read the grounds of appeal and the determination. The claimant gave evidence before the Adjudicator. The basis of her claim was that [she] was a Muslim and that her father was the local Imam and that she had been attacked by local villagers and that her parents' house had been burnt and she now no longer knows the whereabouts of her parents and her sister. The claimant lives with another Ivorian, and has a child by him. He has exceptional leave to remain until 2003 [I pause to say that has now been extended to indefinite leave to remain]. The Adjudicator accepted that the claimant was a Muslim, that her father was the Imam of a local mosque and that she and her family were attacked by Christian neighbours on various occasions. She accepted the account given of the attack on two occasions in February 2001. She then went on to review the remainder of the claimant's evidence, the claim that she would be attacked again and persecuted by Christians from her local area. She then reviewed the objective evidence which said that 39% of the population were Muslims and 26% were Christians and approximately 17% followed traditional Animist beliefs. She then went on to find that the claimant did not have a well-founded fear of persecution for a Convention reason on being returned to the Cote d'Ivoire. There is no error of law in that finding and the question of internal relocation does not arise as a result of that finding. Additionally she quite properly found that there would be no breach of the claimant's human rights if she was returned to the Cote d'Ivoire with her child. The Tribunal applying the guidance given in Mahmood found that it would not be disproportionate to remove her to the Cote d'Ivoire in pursuance of immigration control. There is no error of law in the determination and no reasonable prospect that the grounds of appeal will succeed."

Then this final important sentence:

> "Doubtless the claimant will not be removed until the current situation in the Ivory Coast calms."

8. The application to this court is for judicial review of the refusal of leave to appeal. The application for permission for judicial review came before Stanley Burnton J on 18th July of this year. I was informed by counsel for the Secretary of State, who appeared on that occasion, that, but for the final sentence in the Immigration Appeal Tribunal's reasons, Stanley Burnton J would have dismissed the application for leave to appeal. However, the order that flowed from Stanley Burnton J's disposal does not limit the appeal to any particular aspect of the case. I agree with Stanley Burnton J's view, and that of the Immigration Appeal Tribunal, that in the light of the material before the adjudicator, set out at length in her reasons, those reasons disclose no error of law.

9. It is, however, clear from the last sentence of the reasons that the Vice President knew about the coup in the Ivory Coast and appreciated that the effect of that coup would be, or indeed was, to stir up dissent and trouble amongst the population of that country. However, we do not know how much he knew or from what source. No evidence of the happenings in the Ivory Coast was before the Vice President in arriving at his disposal in writing of the application for permission to appeal.

10. I was shown extensive evidence from apparently reliable sources of the state of civil society in the Ivory Coast following the coup. That evidence included reports of the Deputy United Nations High Commissioner for Human Rights resulting from a visit to that country between 23rd and 29th December 2002. I was also shown the latest Foreign Office travel advice of 3rd April of this year. That is the most recent of the evidence of what is going on in the Ivory Coast which was available. The Foreign Office statement reads materially as follows:

> "On 19th September 2002, a group of armed rebels based in the north of the country tried unsuccessfully to overthrow the government by force. A peace agreement was signed in Paris on 25 January 2003. Many government supporters in Abidjan blamed the French for what they saw as a bad agreement. There were a number of large demonstrations. Some of these were violent, with destruction of property (French buildings were targeted) and threats to westerners. The airport was closed by violent crowds on 31 January. Although the peace process continues, the security situation in Abidjan remains tense."

That, as I have said, was the most recent evidence of the current state of civil society in the Ivory Coast.

11. I have no evidence of what the position is today, some six months later. However, on the basis of the material that I have seen, I take the view that an adjudicator, confronting those problems today, might well have taken a different view of the risk incurred in returning a single woman to the Ivory Coast, where her home area was one which, it appears from the evidence, was particularly affected by civil disturbances in which Muslims were targeted by their Christian neighbours.

12. The claimant's apparent objective in pursuing an appeal from the refusal of permission to appeal by the Immigration Appeal Tribunal is the entirely reasonable one of preventing her removal to the Ivory Coast on the basis of a finding by an adjudicator of the conditions in that country which now may well be substantially out of date. She seeks to achieve this result by obtaining a quashing of the Immigration Appeal Tribunal's order refusing permission to appeal. However, there is an alternative route available to her, that is by immediately applying again on the new facts against any decision to remove her to the Ivory Coast. I am not able to see why the claimant prefers the former route.

13. As a result of inquiry by myself, I understand that the Secretary of State is prepared to undertake that no steps will be taken to remove the claimant to the Ivory Coast during a period of 14 days after this judgment. Nonetheless, the claimant maintained her application for judicial review, and I must deal with it.

14. It was submitted by counsel for the claimant that the process of appeal from the decision of an adjudicator is, by authority, to be treated as part of the overall decision-making process on her application. I accept that submission.

15. It is secondly submitted that it is a facet of the immigration appeal process that the Immigration Appeal Tribunal is able to apply its accumulated knowledge and expertise in dealing with the facts of particular cases and does not have to rely exclusively on material produced in evidence before it. I again accept that that is the case. There are great advantages in that procedure with a view to the speedy disposal of immigration cases.

16. It is thirdly submitted that, consequent on those two submissions, if accepted, if follows that where facts are known to the Tribunal which are not pleaded or the product of material before the Tribunal, the Immigration Appeal Tribunal has a duty to investigate and give weight to those facts in coming to its decision. There is no direct authority, or none to which I was referred, which directly supports that submission. It is, however, contended that that is a conclusion that this court can arrive at by analogy with other cases, in particular: Ravichandran [1996] Imm AR 97 in the Court of Appeal; ex parte Robinson [1997] 4 All ER 210, again the Court of Appeal; and Naing and Eyaz (unreported) a decision of Davis J on 21st March 2000.

17. It seems to me, however, that those cases only deal with the duty of the Immigration Appeal Tribunal to take unpleaded points which emerge clearly from the material before the Tribunal and which point to error in the decision of the tribunal appealed from and are likely to affect the result of the appeal. Those cases establish that, notwithstanding the provisions of the rules, in particular rule 18(6) of the Immigration and Asylum (Procedure) Rules 2000, which provides, "The Tribunal shall not be required to consider any grounds other than those included in the application", there is a duty on the Immigration Appeal Tribunal in those circumstances to take into account such unpleaded point in arriving at its decision. I say "unpleaded"; by "unpleaded" I mean not mentioned in the grounds of appeal.

18. It was further submitted on the authority of the case of Haile [2002] INLR 283 that it would be open, and would have been open, to the Immigration Appeal Tribunal to admit further evidence of the state of civil society in the Ivory Coast and in consequence have granted permission to appeal and directed a further hearing before an

adjudicator. The Haile decision was an exceptional case. In that case the Court of Appeal admitted evidence to demonstrate that the adjudicator had made what was described as a "regrettable mistake" as to important facts affecting the decision.

19. In all those cases the new point or new evidence tended to show that the decision appealed for was wrong. Rule 18(7) of the 2000 Rules provides:

> "Leave to appeal shall be granted only where -
>
> (a) the Tribunal is satisfied that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

It seems to me that (b) is not applicable in this case. The rule appears to be a reflection of the Civil Procedure Rules on summary judgment and provides for the circumstance where it is important, for reasons other than the likelihood of success, that an appeal should take place. In the normal case the Rules direct the Immigration Appeal Tribunal to being satisfied that the appeal would have a real prospect of success in deciding whether to grant permission.

20. The material question is what was the position of the adjudicator in this case, and therefore what view the Immigration Appeal Tribunal should have taken of his decision. It is clear that the change in circumstances brought about by the coup had not happened by the time the matter came before the adjudicator, and certainly not by the time of the hearing before her on 20th August. It was only beginning to happen when the adjudicator's decision was being dictated and published. The relevant facts were not pleaded as a ground in asking for permission to appeal from the adjudicator's conclusion, and there was no material before the Immigration Appeal Tribunal when that matter came to be dealt with by the Vice President as to the state of civil society in the Ivory Coast as a result of the coup.

21. It follows that the new material could not be admitted to show that the decision of the adjudicator was wrong. As I have found, in agreement with Stanley Burnton J and the Immigration Appeal Tribunal, the adjudicator's decision was unchallengeable on the basis of the evidence and material before her.

22. To now require the Immigration Appeal Tribunal to have regard to the new material would be, in my judgment, to distort the proper appeal process provided for by the relevant rules. Furthermore, it seems to me to serve no purpose, and in particular to serve no purpose which the claimant in this case cannot achieve by other means, i.e. by her now forthwith re-applying for judicial review of any decision by the Secretary of State to remove her to the Ivory Coast in the new circumstances which have resulted from the coup in that country. That application can be considered, and it can be considered not only in the light of the material that was before me, but in the light of up-to-date material of the state of society in that country, and in particular the risks which a woman of the applicant's age and religion would be faced with on return to that country, and in particular to her home town, or, if such were thought to be appropriate, to another area in the Ivory Coast dominated perhaps by people of her own religion. The ability to apply again protects this country from being in breach of its obligations under either Convention.

23. It seems to me therefore, for the reasons which I have sought to set out, that this application should be dismissed.

24.

25. MR SCANNELL: My Lord, I do seek your Lordship's permission to appeal. Shortly stated, this is a matter that raises an important point of principle, I think that has been agreed by both sides, in particular in relation to the potential extension of the Robinson principle and also in relation to the first submission that I made as to whether the Tribunal, having identified the current change, was not obliged to look at the claimant's circumstances in the light thereof. I suggest they are important points to be properly considered by the Court of Appeal.

26. MR JUSTICE EVANS-LOMBE: What do you say about that?

27. MISS ANDERSON: My Lord, in my respectful submission a clear answer has been given to the issue. Also, there is a clear alternative route for this particular claimant. In the circumstances my submission is that there are no proper grounds for leave to appeal, but of course my learned friend has the option of applying to the Court of Appeal if he does think that there is a point that they would want to take up. In my submission, it would not be appropriate to grant leave to appeal at this stage.

28. MR JUSTICE EVANS-LOMBE: Do you want to add anything?

29. MR SCANNELL: Nothing.

30. MR JUSTICE EVANS-LOMBE: No, I am going to decline permission.

31. MR SCANNELL: My Lord, the only outstanding matter is that the claimant has the benefit of a public funding certificate and I would ask for a detailed assessment of costs.

32. MR JUSTICE EVANS-LOMBE: Yes, can you have that.

33. MR SCANNELL: I am grateful.

34. MISS ANDERSON: My Lord, as far as costs are concerned, can I just ask for the usual order where there is a public funding certificate. I think it is the national lottery order rather than the pools order - if you win the national lottery you have to pay the costs. I think it used to be called the pools order. If you won the pools then you would have to pay.

35. MR JUSTICE EVANS-LOMBE: I will make the usual order.