EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Kingarth
Lord Wheatley
Lord Marnoch

[2008] CSIH 10
XA52/06

OPINION OF THE COURT

delivered by LORD KINGARTH

in

APPEAL

by

D.M.

Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Devlin; Drummond Miller
Alt: Webster; C. Mullin, Office of the Solicitor to the Advocate General

30 January 2008

[1] The appellant identifies herself as a citizen of Zimbabwe. She arrived in the United Kingdom on 22 December 2004, along with her dependent child, and claimed asylum. She maintains her claim. The central basis of her claim is that she has a well-founded fear of persecution arising out of certain actions taken by the Zanu-PF Youth against her husband and herself. In particular, the broad outline of her claim is that on 6 August 2004 a group of young men came to the house in rural Zimbabwe where she

and her husband lived and accused her husband of being involved in activities on behalf of the Movement for Democratic Change, of which organisation he was a member. They beat him and dragged him away. On 9 August 2004 they returned to the house. They told her that her husband had escaped. They threatened to make her disappear if she failed to co-operate. In fear for her safety, and with the help of friends of her husband, she left Zimbabwe and went to Botswana, and ultimately on 1 September 2004 was taken into South Africa, where she stayed with someone known to her husband's friends. That person obtained false South African passports for her and her daughter, which they used to leave the country on 21 December 2004. The appellant also claims, having regard to her same fears, that removal to Zimbabwe would breach her human rights, in particular her rights under Article 3.

[2] Her claim to asylum was initially refused by the respondent by letter dated 28 January 2005. She appealed against that refusal to the Asylum and Immigration Tribunal ("the Tribunal"). By determination dated 9 April 2005 an Immigration Judge ("the first Immigration Judge") dismissed her appeal both as respects her asylum and human rights claims. It was accepted before him that her nationality and identity were not in issue. He noted, however, "a number of difficulties with certain aspects of her account" and concluded *inter alia*

> "It is clear to me that a number of aspects of the appellant's account have been invented. I find that these inventions materially affect the credibility of the core of her account and therefore her asylum claim must fail".

[3] The appellant sought an order requiring the Tribunal to reconsider its decision under section 103A of the Nationality, Immigration and Asylum Act 2002 (as amended by section 26 of the Asylum and Immigration (Treatment of Claimants, etc.)

Act 2004) ("the 2002 Act"). On 10 May 2005 a Senior Immigration Judge ordered reconsideration, saying *inter alia*

> "Arguably the Immigration Judge failed to make clear findings in particular whether the appellant's husband had been detained and had successfully escaped ... It is the above matter which is at the core of the claim and arguably the Immigration Judge was in error of law in not making sufficiently clear findings of fact".

[4] The appeal was reconsidered in the first instance by two members of the Tribunal (a Senior Immigration Judge and an Immigration Judge) on 23 September 2005. They decided that there had indeed been an error of law in the previous determination. At paragraph 3 of their written reasons they explained the respect in which the first Immigration Judge had erred, saying in particular

> "We are not satisfied that the Immigration Judge made findings or sufficiently clear findings on relevant and core aspects of the claim which may have made a material difference to the outcome."

At paragraph 4 they concluded

> "The error of law is that the Tribunal failed to make clear and proper findings of fact. In those circumstances the evidence has to be reheard afresh".

[5] The reconsideration was therefore adjourned and transferred to another Immigration Judge ("the designated Immigration Judge") for further hearing and ultimate determination. After a hearing on 15 November 2005, at which the appellant was represented by a solicitor, Mr. McArthur, the designated Immigration Judge decided, in a determination promulgated on 25 November 2005, that

" ... although original Tribunal made a material error of law, after fresh hearing the determination remains that the appeal is dismissed on asylum and human rights grounds".

[6] The designated Immigration Judge records (at para. 8) that at the outset of the hearing the respondent's representative lodged a supplementary bundle of documents (containing documents apparently not in the original bundle of documents before the first Immigration Judge) including copies of the passports of the appellant and her dependent child. He records, and before us it was accepted, that no objection was taken at this stage to the lodging of any of these documents. It is later recorded that the respondent's representative sought to question not only the credibility of the appellant's core account but also - apparently arising from consideration of the passports - the credibility of her claim to Zimbabwean nationality . Further, at paragraph 19 the designated Immigration Judge records that although some concern was expressed by the appellant's representative

"However, no objection had been taken to late filing. I had allowed Mr. McArthur an additional 40 minutes or so prior to the one hour lunch adjournment to consider matters. As to nationality, while it had not been put in issue previously it was an obvious point given that the Appellant did not dispute arriving on a South African passport ... ".

[7] The designated Immigration Judge gives the reasons for his ultimate decision at paragraphs 23 to 37 inclusive. In paragraphs 26 to 33 he sets out a number of detailed reasons for disbelieving the appellant's account of what happened in Zimbabwe and of her movements thereafter, all related to the nature of the account itself and the consistency with which it had been maintained. He found, for example, in relation to her claim that her husband was an active MDC member, that there had

been "embellishment, revealing a lack of reality underlying the account"; that the lack of any information, or apparent concern, regarding her husband "suggests to me very strongly that his detention and escape never happened"; and, further, that the story of how her travel was arranged and financed was "beyond belief". He accepted (at para. 36) that a number of the features of her account of what had happened to her were consistent with the background evidence (apparently relating to what could happen in Zimbabwe), but considered that "the extent of invention, on the other hand, goes to the core of the account".

[8] In addition, at paragraph 35 he says

> "A person who arrives in possession of an apparently genuine national passport must expect an inference that she possesses that nationality. Contrary to the submission for the Appellant, it is not for the Respondent to adduce proof that it is a genuine document. It would be for the Appellant to rebut it. The Presenting Officer advised me that the passports are considered to be genuine documents. The Appellant describes them at paragraph 11 of her latest statement as 'fake'. There is no more she could say about the passports, as she claims to have no knowledge of how they were obtained. I have to assess this in the context of the other evidence."

At paragraph 37 he concludes by saying

> "For all these reasons the Appellant has failed to persuade me, even to the lower standard, of the truth of any of the essential aspects of her claim. As to the facts I can make no findings in her favour. She has failed to show that she is a national of Zimbabwe; that her husband was ever detained; that her husband escaped; that she was ever threatened; that she left her home place or her country, or travelled to the UK, because she feared persecution or ill-

treatment; or that the authorities in Zimbabwe have any adverse interest in her now."

[9] The appellant has appealed to this court, on a point of law, under section 103B of the 2002 Act, with leave of the Tribunal, against this decision of the designated Immigration Judge on reconsideration.

[10] Mr. Devlin for the appellant presented essentially two broad submissions, both arising out of the admission in evidence of the passports and the apparent use made of them by the designated Immigration Judge in relation to the question of the appellant's nationality.

[11] First, he submitted that, for a number of what might broadly be categorised as procedural reasons, it was not open to the designated Immigration Judge, in all the circumstances, to question the credibility of the appellant's claim to be Zimbabwean, and in particular to use the passports to do so. Her nationality had not been questioned before; indeed it was expressly conceded before the first Immigration Judge. Neither the arguable error of law identified by the Senior Immigration Judge who ordered reconsideration, nor the error of law found by the Tribunal at the first stage of reconsideration, related to the original finding as to her nationality, which had been based on a concession. This was underlined by the reference to the appellant in paragraph 1 of the reasons issued on 23 September 2005 as a citizen of Zimbabwe. In that connection it was significant that paragraph 14.4 of the relevant Asylum and Immigration Tribunal Practice Directions directed that the written reasons for finding that the original Tribunal had made a material error of law should form part of the determination of the Tribunal which completes the reconsideration of the appeal and that only in exceptional cases could the decision contained in those written reasons be departed from or varied. In general, a designated Immigration Judge at the second

stage of a reconsideration should proceed on the basis of previous findings which had not been the subject of the identified error in law. Reference was made to certain observations of Latham LJ in *DK (Serbia)* v *Secretary of State for the Home Department* 2007 2 All ER 483, in particular at paragraphs 14 to 25. Although it was accepted (as was recognised by Latham LJ in the passage referred to) that previous findings could be challenged if new evidence was allowed to be led or there were other exceptional circumstances justifying that course, there would still require to be some underlying error of law relating to these findings. In the present case it could not be said that the passports lodged were new evidence, they having been handed over by the appellant on arrival. There were no exceptional circumstances. Furthermore, no indication had been given within five days of the order for reconsideration that the respondent intended to contend that the Tribunal should uphold the initial determination "for reasons different from or additional to those given in the determination" (as was required under Rule 30(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005), nor had notice been given, as soon as practicable after the parties had been served with the order for reconsideration, that the respondent wished to ask the Tribunal to consider "evidence which was not submitted on any previous occasion ... " (as required under Rule 32(2) of the 2005 Rules). In particular notice under Rule 32(2) would have been necessary in relation to the lodging of the passports, and to the apparent evidence given in relation to them by the respondent's representative as recorded at paragraph 35 of the designated Immigration Judge's determination.

[12] Secondly, even if it was open to the designated Immigration Judge to consider the passports and any submissions based upon them, it was unfair for him to have proceeded to consider them without adjournment. It was accepted that, as recorded,

when the question of the possible implications of the passports arose the appellant's representative was given time to consider the position (in consultation with the appellant) and that on return the appellant's agent did not ask for any further time or for an adjournment. Nevertheless, the circumstances were such that the designated Immigration Judge should have adjourned, *ex proprio motu*. It was obvious that there were investigations (for example of the South African Embassy), which could have been undertaken. Reference was made to *R* v *Cheshire County Council ex parte C* 1998 ELR 66 and *de Smith on Judicial Review of Administrative Action* 5th edition at para. 9-018.

[13] Looking to the decision as a whole, and in particular paragraph 36, Mr. Devlin submitted that it could not be said that the questioning of the appellant's nationality based on the passports was not material to the overall determination. The decision should be quashed, and the appeal remitted for (further) reconsideration.

[14] Mr. Webster for the respondent submitted that it could not be said that the designated Immigration Judge was not entitled to consider the appellant's claim to be a Zimbabwean national. In circumstances where the error of law which had been detected in the determination of the first Immigration Judge involved a failure to make any clear and proper findings in fact, there was no limit either express or implied in the remit to the designated Immigration Judge. Properly understood the remarks of Latham LJ in *DK (Serbia)* v *Secretary of State for the Home Department* amounted to no more than an acknowledgement that the Tribunal, at the first stage of a reconsideration, could often reasonably be expected to use its powers to direct that the submissions or evidence in that reconsideration be restricted to one or more specified issues. Power so to direct was to be found in Regulation 31(4) of the 2005 Rules. There had been no such directions in the present case. It was plain that the whole of

an appeal could, absent restrictive directions, be reconsidered. Reference was made to *AA* v *Secretary of State for the Home Department* 2007 1 WLR 3134. In any event, it was accepted by Latham LJ, and by the appellant, that findings could be reassessed in light of new evidence which the Tribunal allowed to be received. In so far as the question of nationality was reconsidered, this was prompted by the passports which had been lodged without any objection. So doing, the appellant's agent could be taken to have waived any objection based on the absence of notification under Rules 30(1) or 32(2), neither of which were referred to in the grounds of appeal. It was in any event not clear in the circumstances that either rule was necessarily engaged. The passports had been referred to before, and the question of the appellant's credibility (including relative to the circumstances in which the passports had been obtained) had always been an issue.

[15] Further, as to the question of fairness, Mr. Webster submitted that the designated Immigration Judge who gave time to consider the question which had been raised, and to whom no motion was made for further time or for an adjournment, was reasonably entitled to proceed as he did. He had no obligation to adjourn *ex proprio motu*. *R* v *Cheshire Council ex parte C* was concerned with a different question; in that case a motion to adjourn having been made.

[16] Finally, Mr. Webster submitted that, in any event, nothing in the designated Immigration Judge's consideration of the passports or his consideration of the appellant's claim to be Zimbabwean could be said to have been material. It was essential to her claim, regardless of her nationality, to prove that the events had happened in Zimbabwe, causing her to flee, as she described. It was clear that the reasons why the designated Immigration Judge could not accept this aspect of her claim were those to be found in paragraphs 26 to 33. This had nothing directly to do

with her claimed nationality. In so far as he disbelieved her claim to be Zimbabwean, it was not clear that this was based to any extent on the passports. Rather, as appeared from the last sentence of paragraph 35, it was the result of the view as to her credibility which had already been reached on the core aspects of her account. He made no finding that she was a South African national.

[17] Having carefully considered the issues raised in this appeal we have come to the view that it falls to be refused.

[18] In the first place, we are not persuaded that it was not open to the designated Immigration Judge to consider the question of the appellant's claimed nationality. On the face of it, the remit to the second stage of the reconsideration was open-ended, the Tribunal having decided that the first Immigration Judge had failed to make clear and proper findings in fact. In short, what was decided was that in those circumstances "the evidence had to be re-heard afresh". In our view paragraph 14.4 of the Practice directions - designed to ensure that, at least generally, any decision at the first stage of a reconsideration about a previous error of law is not "departed from or varied" at the second stage - does not have the significance contended for in this case. In any event, we think the reference to the appellant in paragraph 1 of the reasons given by the Tribunal at the first stage of this reconsideration was, in context, no more than a narration of the appellant's claim to be a Zimbabwean citizen. That said, we see force in the submission that ordinarily the Tribunal on any "reconsideration", however widely based, should not, at least without good reason, seek to question findings previously made which could not be said to have been affected by the material error of law which has led to the appeal being reconsidered. Although it may not always be easy in practice to draw the line as to which findings were and which findings were not so affected, this, we are inclined to think, is the thrust of the remarks made by

Latham LJ in *DK (Serbia)* v *Secretary of State for the Home Department*. Be that as it may, it is perhaps enough to note for present purposes that it was recognised in that case, and was accepted (subject to one caveat) on behalf of the appellant before us, that it would be open to a designated Immigration Judge at the second stage of a reconsideration to question previous findings on the basis of any new evidence which was allowed to be presented. As to the caveat (that even then there would have to be some error of law underlying the relevant findings) there is in our view no support in *DK (Serbia)* v *Secretary of State for the Home Department* for that contention, and we are not persuaded that it is soundly based. In the present case it seems clear that such reconsideration as there was of the appellant's claim to be Zimbabwean was prompted by the acceptance into process for the first time of the relevant passports, both apparently *ex facie* valid. No objection was taken on the appellant's behalf to the lodging of the documents. In these circumstances we consider that the appellant must be taken to have waived any right to found on any apparent absence of notice under Rule 32(2) (or indeed under Rule 30(1) - if applicable, which we are inclined to think is at least open to question). We do not accept, incidentally, that on a fair reading of para. 35 of the determination the designated Immigration Judge could be said to have recorded (far less accepted) "evidence" from the respondent's representative about the passports, as opposed to a submission to the effect that the respondent was not to be taken to accept that they were false.

[19] Further, we are not persuaded, on the basis of the information before us, that the designated Immigration Judge can be said to have acted unfairly by considering the question of her claimed nationality in light of the apparent question raised by the passports which had been lodged. Despite having been given further time to consider the question with the appellant and to take her instructions, there was no information

before us to suggest that it was then claimed, as part of any objection made after the adjournment for lunch, that the appellant and her agent needed further time to consider the matter or to make further enquiries of any kind. No motion to adjourn was made. Instead, on the face of it, although the appellant's agent complained about the change of position he appeared content to found, in seeking to allay any concerns about this matter, on the appellant's knowledge of Zimbabwe and on the fact that she was a Ndebele speaker (see e.g. para. 20). In these circumstances, we cannot accept the submission that the designated Immigration Judge had a duty *ex proprio motu* to adjourn. Nor is it a submission which gains any support from *R* v *Cheshire County Council ex parte C*.

[20] In any event, we are unable to accept, having carefully considered the determination as a whole, that any error in the designated Immigration Judge's consideration of the passports or of his assessment of the credibility of the appellant's claim to be Zimbabwean could be said to have been material to the rejection of the appeal. It was essential to the appellant's claim, regardless of her nationality, to prove her account as to what happened to her husband and herself in Zimbabwe and that these events caused her to flee to South Africa and leave for the United Kingdom in 2004. It is, we think, abundantly clear that the reasons why the designated Immigration Judge could not accept her evidence on these matters (notwithstanding that he appears to have accepted that she had indeed lived in Zimbabwe - see e.g. para. 32) are those to be found in paragraphs 26 to 33 of the determination. As previously noted these reasons all related to features of the account itself and to the consistency with which it had been maintained. The designated Immigration Judge's reasoning in these paragraphs (which does not relate at any point to the question of her nationality) is not impugned in this appeal. Further, while it seems that the

question of whether the designated Immigration Judge could accept that the appellant was Zimbabwean was at least raised by consideration of the passports, the clear indications are (particularly from the last sentence of paragraph 35) that the unfavourable answer to that question (so far as the appellant was concerned) was reached on the basis of his concerns as to her credibility in relation to what might be described as her core account.

[21] In these circumstances the appeal is refused.