Neutral Citation Number: [2008] EWCA Civ 1213

Case No: C5/2008/0500

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/05149/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2008

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE HUGHES
and
MR JUSTICE HEDLEY

- -

Between :

PS (SRI LANKA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr A Morgan (instructed by Messrs Sriharans) for the **Appellant**
Ms K Olley (instructed by the Treasury Solicitor) for the **Respondent**

Hearing date: Thursday 23 October 2008

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Judgment

Lord Justice Sedley :

1. The facts of this case are short and disturbing. The appellant is a 26-year old Tamil woman whose family home is in the Jaffna Peninsula, where the insurgent LTTE has long been active. In November 2006 she was raped in her home, which was also her father's grocery shop, by two Sri Lankan soldiers who used to make purchases there. Five days later one of them returned with another soldier, and both of them raped her. A week or so later the same two returned and again raped her, on this occasion holding her father at gunpoint so that he would witness it. The appellant later tried to kill herself by pouring paraffin over herself and setting light to it. She failed, but her father took her to the home of her uncle with a view to her fleeing the country. This she was eventually able to do, but not before she had found herself pregnant and then miscarried or aborted. In the interim the soldiers had returned to her home, looking for her.

2. The Home Office refused to grant the appellant leave to remain either as a refugee or on humanitarian grounds, but on appeal IJ Courtney held that she was entitled both to asylum and to humanitarian protection. This determination was overset for error of law by SIJ Gill, who in a decision dated 7 December 2007 went on to redetermine the case against the appellant on both asylum and humanitarian grounds. Although it was sought to challenge the oversetting of IJ Courtney's determination, permission to appeal on this issue has been refused. Following an enlargement of time accompanied by a refusal of permission by Scott Baker LJ, Moore-Bick LJ on renewal granted permission limited to a challenge to SIJ Gill's approach to the legal effect of the rapes and their consequences.

3. Moore-Bick LJ, giving judgment on 10 June 2008 on the renewed application, considered, in summary form, the reasoning at §§14, 15 and 19 of SIJ Gill's determination – to which I shall return – and said:

> "11…….Mr Morgan submits that that somewhat brief treatment of the issue does not do proper justice to the law set out in *Horvath*, because it pays scant regard to the position of the applicant and the ability of the authorities to provide her with substantive protection against further assaults of that kind. Moreover, he submits that the findings made by the Senior Immigration Judge in §15 and 19 are not properly reasoned and are not based on evidence before the tribunal. In particular, he suggests that the conclusion in § 19 of the decision that the government can and will provide sufficient protection is based almost entirely on the decision in *LP (Sri Lanka)* CG [2007] UKIAT 00076, which no longer properly reflects the state of affairs on the ground in Sri Lanka.
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> 12. In the light of the findings made by IJ Courtney, which in many respects were not challenged on reconsideration, I am satisfied that there is sufficient force in the last submission to make it appropriate to give permission to appeal in this case, limited to those grounds."

4. Moore-Bick LJ then heard counsel on the amendment of his grounds, and made an order that they be amended to add the ground set out in paragraph 4 of an application to amend which had been submitted on the day of the hearing. That ground reads:

"SIJ Gill, in her reasoning (paragraphs 14 to 21), made two legal errors:

(1) she purported to make findings of fact outside her jurisdiction, regarding the future prospects of the appellant in Jaffna and/or Colombo, when such facts formed no part of the evidence in the appeal (paragraph 15), and

(2) she purported to derive such facts, contrary to the findings of IJ Courtney, from a tribunal country guidance case, *LP (Sri Lanka)*[2007] UKAIT 00076 (heard on 27 and 28 November 2006) which, on 25 May 2007, IJ Courtney had evidently considered overtaken by the continuing collapse of the ceasefire between the LTTE and the Sri Lankan government (paragraph 19)."

5. In opposition to Mr Morgan's skeleton argument seeking to make good these grounds, Ms Olley for the Home Secretary makes two straightforward submissions: first, that SIJ Gill permissibly found that the appellant, if returned, would no longer be at risk from the rogue soldiers who had raped her, with the result that the question of state protection did not arise; alternatively, that the SIJ was right to follow the country guidance in *LP*, a relatively recent case, in finding that there would be sufficient state protection. She submits that *LP* has now been effectively endorsed by the European Court of Human Rights in *NA v United Kingdom* (17 July 2008).

6. It remains the case, for reasons that will appear, that the single amended ground of appeal is largely off target. But in my judgment sufficient is now pleaded to sustain what has emerged as the appellant's true case, and Ms Olley, in the best tradition of Treasury counsel in asylum and human rights cases, has not sought to put unnecessary obstacles in the appellant's way.

7. The key passages of SIJ Gill's determination for present purposes are these:

> 15. Mr. Hourigan relied on the fact that the Appellant had been raped three times in the past, albeit by rogue soldiers. This does not assist because it is tantamount to suggesting that anyone who has been the victim of a crime in the past is reasonably likely to be at real risk of persecution by the Sri Lankan authorities. Given that it was accepted that the Appellant was raped by three rogue soldiers, the Appellant's past experience of being raped has as much bearing on the question as to whether she is at real risk persecution or serious harm or treatment in breach of Article 3 at the hands of the Sri Lankan authorities as it would have had if, instead of having been raped by three rogue soldiers, she had been raped by three civilian criminals - that is to say, it has no bearing. I accept, in general terms, Mr. Hourigan's submission that past ill-treatment is a factor to be taken into account when assessing the future risk. However, the fact that the Appellant was raped by three rogue soldiers means that this is not relevant to an assessment of the likelihood of the Appellant being at risk of persecution at the hands of the Sri Lankan authorities. Again, her past experience of being raped by three rogue soldiers has as much relevance to that question as it would have had if she had been raped by

three criminal civilians - that is to say, it has no relevance. Paragraph 339K of the amended Immigration Rules provides that the fact that a person has already been subject to persecution or serious harm will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. There are good reasons to consider this – that is, that the Appellant was raped in the past by rogue officers and that their actions were not sanctioned by the Sri Lankan authorities. If she has difficulties from them again, she would be able to obtain sufficient protection from the Sri Lankan authorities, albeit that she would have to travel to the government-controlled area to lodge complaints against them. I accept that there is evidence that females are used by the LTTE as soldiers as well as suicide bombers. However, the LTTE clearly also use males for both roles.

16. Accordingly, I have no hesitation in concluding, notwithstanding the caution I am aware I must exercise, that the Immigration Judge did err in law in reaching her conclusions at paragraph 37 that the Appellant is at real risk of persecution and treatment in breach of Article 3.

19. I turn to re-assess the risk on return on the basis of the guidance in LP, which stresses the fact that it is necessary for each case to be considered on its own facts. I confirm I have considered the Appellant's case on its own facts. The starting point is to decide whether the Appellant has a well-founded fear of persecution in her home area. The Immigration Judge found that the Appellant is at real risk of sexual harassment from the three individuals who had previously abused her. I agree with Miss Leatherland that this finding is inadequately reasoned. The evidence was that the Appellant's home area is in LTTE-control. Notwithstanding the fact that it seems that these three men had in the past made incursions into the Appellant's area on the three occasions she was raped, there is nothing to suggest a reasonable likelihood that these three individuals would come to know of the Appellant's return to her home area, especially as the area is in LTTE control and given her absence from her home for nearly a year. If they did make any incursions and if they did come to know that she had returned to her home (which I stress I find is not reasonably likely) then there is no reason why she should not seek the protection of the Sri Lankan authorities, by travelling to the government-controlled area and lodging complaints against the three individuals. If she did seek such protection, I am satisfied,

> having regard to LP, that such protection would be sufficient. At paragraph 224 of the determination in LP, the Tribunal said that it would not be possible for Tamils who come from LTTE-controlled areas to obtain any form of meaningful protection in their home areas from the Sri Lankan government. However, that conclusion relates to individuals who have a well-founded fear of persecution from the LTTE, and not individuals who are being sexually harassed by the government's own soldiers. Accordingly, I have concluded there is no real risk of the Appellant being subjected to persecution or serious harm or treatment in breach of Article 3 in her home area.

8. The second of the Home Secretary's propositions – that there was and will be a sufficiency of protection if protection is needed - is not made good simply by reliance on *LP*. That decision relates to the risk of ill-treatment by the authorities of Tamils returned to Colombo. The appellant's experience and continuing fear was not of ill-treatment by the authorities in Colombo: it was of repeated sexual abuse by state military personnel in Jaffna. Her case is that, with perpetrators in the uniform of the state, there was no sensible possibility of state protection from conduct bearing clear hallmarks of toleration and impunity, and that is why she fled. To this I can see no answer on the evidence. The second immigration judge's characterisation of the soldiers' conduct as no different from that of civilian rapists is, with respect, unsustainable. The whole point was that, unlike ordinary criminals, the soldiers were in a position to commit and repeat their crime with no apparent prospect of detection or punishment.

9. There was no contention, and there is no finding, that the appellant can and should relocate for safety to Colombo or anywhere else in Sri Lanka. I turn therefore to the prior finding of SIJ Gill that in this particular case any risk of repetition of the abuse can be discounted.

10. The appellant's case is now put by Mr Morgan, rightly, on her claim to protection from inhuman and degrading treatment rather than on persecution for imputed political opinion. The material law which SIJ Gill was therefore required to apply to the evidence is now found in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 by which Council Directive 2004/83/EC on minimum qualifications has been transposed, and in the Immigration Rules with which the Regulations are required to be read. The material provisions are these:

> **Regulation 2**
> …..
> "Person eligible for humanitarian protection" means a person who is eligible for humanitarian protection under the Immigration Rules;
>
> …..
>
> **Regulation 3**

3. In deciding whether a person is a refugee or a person eligible for humanitarian protection, persecution or serious harm can be committed by:

(a) the State;

(b) any party or organisation controlling the State or a substantial part of the territory of the State;

(c) any non-State actor if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including any international organisation, are unable or unwilling to provide protection against persecution or serious harm.

Immigration Rules

339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and

(iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of:

(i) the death penalty or execution;

(ii) unlawful killing;

(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

339E. If the Secretary of State decides to grant humanitarian protection and the person has not yet been given leave to enter,

> the Secretary of State or an Immigration Officer will grant limited leave to enter. If the Secretary of State decides to grant humanitarian protection to a person who has been given limited leave to enter (whether or not that leave has expired) or a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.
>
> 339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

11. The single test of whether a fear of persecution or ill-treatment is well-founded is whether on the evidence there is a real risk of its occurrence or recurrence. This straightforward formula now replaces the sometimes confusing variants which have been used over the years in leading cases here and abroad: see Macdonald *Immigration Law and Practice*, 7th ed, §12.27.

12. I have come to the conclusion that the reasoning in §19 cannot stand. In short, this is because either the test of risk has been set too high or, if it has been set at the right level, the facts are unquestionably within it.

13. The reason why the issue has to be approached on these alternative levels is that the SIJ has used the test of reasonable likelihood, which in *Sivakumaran* [1988] AC 958 was at one point used interchangeably with real risk. She has used it, however, in a context which suggests that she considered herself still to be finding facts, not assessing any consequent risk: there was, she held, "nothing to suggest a reasonable likelihood that these three individuals would come to know" of the appellant's return after a year's absence.

14. If this is so, the senior immigration judge was in my respectful opinion mistaken. The finding is the critical conclusion on risk. It required to be approached as such, not as a bare finding of fact. So approached, the question was whether there was, in the light of the ascertained facts, a real risk – not a reasonable likelihood – that the local troops would learn of the appellant's return and again try to take advantage of her. If, alternatively, the senior immigration judge was using reasonable likelihood as a synonym for real risk, the same issue had to be determined. In either case, for reasons to which I now turn, on the accepted evidence the only sustainable answer was that there was such a risk.

15. SIJ Gill speaks of the offending soldiers making "incursions" into the appellant's area. But although Jaffna is sometimes said to be under LTTE control, this does not mean that government forces are not stationed and able to move relatively freely there. These soldiers, for example, were able to target the appellant because they used to come to her father's store to make purchases. The clear inference is that they were stationed in the vicinity and – given the repetition of the rapes and the introduction of a third soldier - able to act with impunity. Nothing in this regard is said to have

changed materially since then. It follows that the factual premise – that these were marauders from outside the Jaffna region – was not tenable, and that the risk to be assessed was from local government troops.

16. In my judgment, given the legal test of risk and the centrality given (by Rule 339K, but by common sense too) to past experience as a guide to future risk, the facts accepted by both tribunals established a real risk that, if returned home, the appellant would again be targeted for rape by rogue soldiers stationed in the locality.

17. While such an evaluation of risk is ordinarily for the tribunal of fact, the evidence here was in my view such that no other conclusion was possible. I would accordingly allow this appeal on the ground that the appellant was and is entitled to humanitarian protection.

18. As to the form of order, we will consider counsel's written submissions. It will be relevant, however, to bear in mind that what form of protection to grant is in principle a matter for the Home Secretary: see Rule 339E. The court's provisional view is accordingly that this issue should be remitted to the Home Secretary for decision.

Lord Justice Hughes:

19. I agree.

Mr Justice Hedley:

20. I also agree.