Case No: C5/2006/1439; C5/2006/1439/B

Neutral Citation Number: [2008] EWCA Civ 1509
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HR/00253/2004]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 3rd December 2008

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE KEENE
and
LADY JUSTICE SMITH DBE

- -

Between:

AE (IVORY COAST)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Mr M Henderson (instructed by the Refugee Legal Centre) appeared on behalf of the **Appellant**.

Mr K Beal (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Sedley:

1. This appeal comes before the court by leave of Ward LJ and myself. It is a challenge to the determination of the Asylum and Immigration Tribunal, made as long ago as 22 December 2005, that the adjudicator who dismissed the appellant's human rights appeal had made no material error of law in doing so.

2. The appellant is a woman from Cote D'Ivoire, now aged 41, who came here lawfully in October 2001 as a student, but who not long after her arrival became ill and was diagnosed as HIV positive. Initially she used her own funds to pay for medical treatment. She told her partner, whom she had left in Cote D'Ivoire with their child, about her condition, but his response was to sever all contact. The appellant has also lost contact with her young daughter and with her parents, who live in very modest circumstances on a small pension. It is not certain to what extent this has been due to ostracism and to what extent to disruption caused by civil war.

3. In June 2004 (that is, before the reforms which brought the Asylum and Immigration Tribunal into being) the appellant's appeal against the Home Office's refusal to grant humanitarian protection was dismissed by an adjudicator, Mrs SM Thew. In short the adjudicator accepted that the appellant's case was exceptional but held that in order to rank for Article 3 protection it had also to be extreme, which in her judgment it was not.

4. Under the transitional provisions, the appellant's challenge to this decision came before a panel of Senior Immigration Judges now sitting as the Asylum and Immigration Tribunal in December 2005. The reason for the long interval was that the decision of the House of Lords in N v SSHD [2005] UKHL 31 had been awaited. The Asylum and Immigration Tribunal concluded that the adjudicator had made no material error of law, but their determination, in our present view, is flawed in two important respects. First, and perhaps understandably since these were the early days of the new system, they fail to distinguish between the first and second stages of reconsideration, bringing in matters arising since the adjudicator's decision and reappraising much of the evidence for themselves in the course of deciding whether the adjudicator had made an error of law. Secondly, it is not apparent from the determination whether they concluded there had been no error of law at all or whether any error was immaterial.

5. For these broad reasons, without developing them in detail, we suggested to counsel at the start of this hearing that the adjudicator had plainly, albeit quite understandably, made an error in setting a double hurdle when it had become clear from the decision in N in the House of Lords, now effectively endorsed by the Grand Chamber of the European Court of Human Rights, that the single hurdle under Article 3 is exceptionality, and that the Asylum and Immigration Tribunal had equally plainly failed to identify that error as a discrete first stage of their consideration. Had they done so, they would have been bound to go on to consider and reappraise the full available body of evidence at a second stage hearing.

6. It was accordingly put by us to both parties that this remains the appropriate course. Following a brief adjournment Mr Beal and Mr Henderson accepted this, albeit each wished to put down markers for the remitted hearing. Mr Beal was concerned that both parties should be able to adduce up-to-date evidence. Mr Henderson was concerned that the adjudicator's finding of exceptionality should not be disturbed. He was also concerned that there should be as little delay as possible in holding the remitted hearing, since the appellant's access to treatment in the United Kingdom is restricted for the present by her immigration status.

7. What has concerned us for our part is that by simply remitting the case without guidance we may not be giving the Asylum and Immigration Tribunal as much help as we might. All we think it right to say, however, is the following. The decisions of the House of Lords and of the European Court of Human Rights in N, while they pose a single test of exceptionality, do not indicate either the requisite degree of exceptionality or what kind of exceptionality is required if Article 3 is to be engaged. What we know is that the facts of that case, in contrast to those of D v UK [2004] EWHC Civ 2733 and a handful of other cases, did not reach the Article 3 threshold.

8. If we are now remitting this case for reconsideration it is because we consider, albeit without hearing full argument, that its special facts are capable of reaching the high threshold recognised by N. It is one thing, and a harsh enough thing, to return an HIV-positive individual to a country where medical facilities are markedly poorer than they are here, with the result that he or she is likely to die an earlier and more wretched death. It is arguably another to return an HIV-positive individual in an unusually needy medical state to a county where there is not only a real risk that she will have no family or friends to look after her, but a near certainty that she will lose the little that remains of her eyesight. Contrary to what the Asylum and Immigration Tribunal seems to have thought, we are unable to see that it matters whether the appellant's blindness is AIDS-related or results from sickle cell syndrome. What matters is the prospect of being blind, terminally ill, unmedicated and alone.

9. While we do not consider that it is appropriate to place a formal ring fence around the adjudicator's finding of exceptionality since it is an evaluation and not a fact finding, we would be surprised if the Asylum and Immigration Tribunal were now to take a different view. We agree, however, that they must take account of all relevant information now available. It will then be for them to judge how exceptional the appellant's case is and in what respects, and to decide whether in the light of these features it reaches the threshold delineated by N.

10. Although, finally, we are aware of the pressures of time and resources which the Asylum and Immigration Tribunal faces, it is in everybody's interest that the remitted second stage hearing should take place as soon as possible. The order of the court will be that the appeal against the decision of the Asylum and Immigration Tribunal given on 22 December 2005 is allowed, and the case remitted to a differently constituted tribunal for a second stage reconsideration.

Order: Application granted