Case No: C5/2007/2814

Neutral Citation Number: [2008] EWCA Civ 557
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/09621/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 24th April 2008

Before:

LORD JUSTICE PILL
LADY JUSTICE ARDEN DBE
and
MR JUSTICE PATTEN

- -

Between:

OT (IVORY COAST) **Appellant**

- and -

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

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Mr P Lewis (instructed by Fisher Meredith LLP) appeared on behalf of the **Appellant**.

Mr J Hall (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is an appeal against a decision of the Asylum and Immigration Tribunal ("AIT") dated 12 July 2007, following a hearing on 4 June 2007 at which both parties were represented. The Tribunal dismissed an appeal against a decision of the Secretary of State for the Home Department to refuse asylum to OT (Ivory Coast) and to refuse claims under Article 3 of the Convention and on humanitarian grounds. There had been an earlier dismissal of the appeal by the Tribunal on 23 November 2005, but reconsideration was ordered and it took the form of a full hearing of the evidence.

2. OT is a citizen of the Ivory Coast. He was born on 25 December 1968 and arrived in the United Kingdom on 5 September 2005, claiming asylum two days later. He was served with a notice declaring him to be an illegal immigrant and on 21 September 2005 a decision was taken to remove him to the Ivory Coast, following the refusal of his claim to be a refugee.

3. In statements and in evidence before the Tribunal, OT described what had happened to him in Ivory Coast. It was his arrest on 26 July 2005 which led to him leaving Ivory Coast. He had arranged release from custody by means of a bribe. He described previous problems with the police in 1998 and 2000. He had been a member of Rassemblement des Républicains ("RDR") since 1995. He had no problems with the police until 1998.

4. The Tribunal set out the evidence of the appellant in considerable detail. He claimed to have been accused of being a national of Burkina Faso, which he was not. Reference to him as a Burkinabe was a term of abuse and insult in Ivory Coast. He was ethnically Dioula, and Dioula and Burkina are regarded as foreigners in Ivory Coast. A report was before the Tribunal from Miss Thalia Griffiths, whose expertise in Ivorian matters was relied on by the appellant. Miss Griffiths stated in her report:

> "…there is continuing targeting of Dioulas and RDR supporters in Ivory Coast, though as to the Dioula, a claim is largely unsubstantiated."

5. Reliance is placed by Mr Lewis who appears for the appellant, on the fact that the two points -- ethnicity and political -- are put separately. Mr Lewis has referred us to excerpts from the summary of evidence. The Tribunal referred at paragraph 69 to the appellant's statement:

> "…the fact that I am a Dioula, Muslim and a member of the RDR is the real reason behind my arrest."

6. They referred to this statement that he had been accused of being a national of Burkina Faso, though falsely so, and that was a big insult against him. At paragraph 77 they referred to his interview:

> "It's always the same order, where you come from the north Korhogo and you are Dioula. You are judged as being RDR or a rebel or attacker"

7. There are further references to his being described by officers as a Burkinabe. They note at paragraph 95 of his statement:

> "I believe that the real reason I was targeted and falsely accused of these attacks is because I am Dioula and a member of the RDR. The Government believes that Dioula are all members of the RDR…"

8. In a sentence at paragraph 130 the Tribunal summarised the appellant's case as now put. That summary does not appear under the heading "arguments" and submissions later in the determination. Paragraph 130:

> "The Appellant was not claiming persecution solely on ethnic grounds, but because of a combination of different factors, not least the perception by the police of his as a Burkinabe."

9. The Tribunal referred to the then country guidance case of AZ (risk on return) Ivory Coast CG [2004] UKIAT 00170. I recite paragraph 56 of the decision in AZ:

> "The evidence, however, is in the Tribunal's opinion far from showing that there is either a presidential policy of targeting low-level RDR members and supporters or an unchecked campaign on the part of non-government militias against such persons, on such a scale as to put at real risk any low-level RDR member or supporter."

10. Miss Griffiths also gave an expert report in that case, and the Tribunal in AZ, as recorded by the present Tribunal, concluded:

> "Having considered all of the evidence, the Tribunal does not consider that the oral and documentary evidence of Miss Griffiths constitutes evidence that this Appellant, a low-level member of the RDR who has never been arrested or detained by the authorities, and who left Ivory Coast in 2000, would be at real risk on return today…"

11. At paragraph 196 of the present case the Tribunal made this finding as to credibility.

> "For this reason, as well as others to which we shall come, we have serious doubts about the reliability

> of the Appellant's account for July 2006, and make an adverse finding of credibility."

12. The point is fairly made that it is not clear from a consideration of this determination to what extent the appellant's evidence was accepted and to what extent it was not. That finding appears under the last paragraph of the section headed "Findings on Credibility". Also in that section of determination is an important finding. Paragraph 192:

> "The absence of any evidence of political involvement for the RDR between October 2000 and July 2005, and in particular of the Appellant's participation in 25 March 2004 march, leads us to conclude that his RDR profile was distinctly low level."

13. In the light of the county guidance, that was an important finding and one which in my view the Tribunal were entitled to make. There is a separate section of the determination headed "Dioula Ethnicity" which begins with the observation that the appellant "makes much of his claimed Dioula ethnicity." They give detailed reasons why they do not find acceptable his evidence on that subject. They conclude at paragraph 200:

> "We do not dispute the possibility that the Appellant may have Dioula ancestry. However, we find as a fact that he was at all material times an assimilated southerner and Ivoirienne."

14. Criticism is made of the reasons for the Tribunal's finding in that respect and it is necessary to refer to the consequences of their reliability or otherwise. The "Conclusion" section of the determination is quite brief. The Tribunal state at paragraph 203:

> "We do not accept that the Appellant has made out a well-founded fear of persecution by reason of Dioula ethnicity for the reasons given at paragraph #197-201 above.
>
> 204. We find no evidence to suggest that the Apellant has suffered persecution by reason of his Muslim faith.
>
> 205. In assessing whether the Appellant has made out a well-founded fear of persecution for reasons of actual political allegiance with RDR, we note: [several factual matters are set out, but no conclusion is stated].
>
> 206. We turn next to consider whether the Appellant would be at risk by reason of imputed political opinion."

15. They then consider that claim and conclude:

> "We have found no evidence to justify that premise on the particular facts of this case, in the light of which we do not accept that this Appellant would face a risk on return for reasons of imputed political opinion."

16. I am prepared to assume that the general finding there expressed covered the previous paragraph -- actual political allegiance -- as well as the paragraph dealing with imputed political opinion. Paragraph 207:

> "We do not consider that his position is in any way changed by his association with RDR (UK)."

Association in the UK with RDR is a point which has not been pursued in this appeal.

17. Mr Lewis puts the claim made in this appeal simply. It is a combination of the factors mentioned by the Tribunal which create the risk of persecution. They must be considered cumulatively -- that is, the ethnic, religious and political factors. The Tribunal has erred in its consideration. It has considered them separately and not cumulatively and their findings involve an error of law. The case should be remitted, he submits, to the Tribunal for a further reconsideration.

18. Mr Lewis rightly refers to the case of GG (political oppositionists) Ivory Coast CG [2007] UKIAIT 00086. That decision was issued after the hearing of this case but before the determination. It is unlikely that the Tribunal was referred to it. The parties agree that the court should have regard to it in reaching its conclusions.

19. Guidelines are stated, and the case is stated to be a guideline case. Clearly these are statements of principle to which this court should have regard. Under the heading "Political Oppositionists", paragraph 83:

> "In this decision we have concentrated primarily on the issue of risk to RDR members and supporters (or sympathisers) or persons perceived as such."

20. It is necessary to read the paragraphs 84-86 almost in full:

> "We consider that taken as a whole the background evidence does not bear out that political oppositionists in the Ivory Coast in general face a real risk of persecution or serious harm or ill-treatment on return. However, where a person is able to establish a political profile as an activist political oppositionist (whether as a member from a southern political party (e.g. the RDR) or as a member of the northern-based FN), the position

> may well be different, at least so far as risk in that person's home area is concerned. For the sake of clarity we emphasise here that by activist or militant we mean something more than being someone with an official position in a local branch of a party. Likewise, a person who is not a member but merely a supporter of the RDR or the FN (or other oppositionist parties or organisation) may, depending on the circumstances, be able to show a real risk if he or she is also an activist.
>
> 85. In reaching the above conclusions we acknowledge that there were more incidents of threats and violence directed against certain political opposition parties (including the RDR) in 2006 than in 2005. However, as before, it was primary directed at oppositionists (especially RDR) leaders and activists and those closely involved with them. While the background evidence (including Mr Reeve's report) does bear out a continuing real risk of persecution or ill-treatment to high-level opposition party members or to activists, it does not demonstrate that low-level or medium-level members or supporters are at risk: the principle thrust of his report is that there is a serious risk on return to active members or supporters, not to low-level or medium-low-level oppositionists.
>
> 86. So far as the RDR is concerned (and in this regard its experiences appear typical of the other oppositionist parties), we find it significant that the reports of difficulties facing RDR members or those involved with the RDR predominantly relate to RDR leaders or activists or militants. Whilst there are also references in the main reports which identify difficulties for RDR members and supporters generally, these are far from showing a consistent pattern of violence or adverse treatment meeting the threshold of persecution or serious harm or ill-treatment contrary to Article 3."

21. At paragraph 88 the Tribunal considered "Additional risk factors":

> "The factors we have in mind are being of a particular ethnic or ethnographic background; being a northerner; being a Muslim and being a perceived West African immigrant. However, it seems to us that the background evidence, including Mr Reeve's expert report, reflects the fact that none of these is

> sufficient in itself to give a real risk. Even in combination with a lower or medium level political profile as an oppositionist, we do not think that such factors will normally give rise to a real risk, but we do not rule out that they may sometimes operate as additional risk factors with some significance. What we say below about the appellant's circumstances serves to illustrate this even when several factors relating to ethnicity, being a Muslim and a northerner, are taken into account alongside a finding that a person is a low-risk political oppositionist, the threshold of real risk may still not be reached."

22. There is therefore clear country guidance arising from the earlier case of AZ, and in more detail from CG, that the level of political involvement which the appellant has does not, on the findings of fact, involve a risk of persecution. Other possible factors were also considered by the Tribunal in CG.

23. Permission to appeal in this case was given on a limited basis. The grant by Buxton LJ is headed "Permission granted on the limited basis set in paragraph 2 below":

> "1. The AIT was entitled to find:
>
> i) that there was no evidence of danger of persecution on grounds of religion;
>
> ii). the only evidence as to involvement in the RDR in the Ivory Coast was a very low-level activity implausibly leading to persecution (paragraphs 192 and 205);
>
> iii) the evidence suggesting significant involvement in the activities of the RDR in London was unreliable (paragraphs 207-209).
>
> 2. I am, however, concerned about the way in which the AIT handled the allegations as to risk on the basis of Dioula ethnicity, largely for the reasons set out in paragraphs 15-22 of the Applicant's skeleton. The AIT may have too readily assumed that assimilation removed any danger for those who are Dioula by race. That assumption led the AIT to discount any danger of persecution of this Appellant by reason of Dioula ethnicity, thus disabling itself in considering whether in fact such persons are at risk in the Ivory Coast (para.203). The

> evidence as to Dioula ethnicity being a risk category may well have been thin, but when it is assessed the appeal may fail in any event. However, it is arguable that fuller findings should have been made about whether any general problems as to Dioula ethnicity affected this applicant and, if yes, whether the treatment of such persons amounted to relevant persecution."

24. Buxton LJ went on to sound a cautionary note about the respect due to the decisions of specialist tribunals, such as the AIT. Mr Hall, for the respondent, in his skeleton argument accepts the reservations which Buxton LJ has expressed about the treatment of ethnicity. We agree, and share Buxton LJ's reservations. There may be factors which enable the appellant to be recognised as Dioula in the southern part of the Ivory Coast. The respondent submits, however, that the error is not material to the decision in this case.

25. That concession having been made by the respondent, I do not consider it necessary to analyse in detail the Tribunal's grounds for reaching the conclusion that Dioula ethnicity was not a factor. Arguably, those reasons do not support the conclusion reached. Whether, finding that arguably the appellant would have been recognised as Dioula by race is relevant to the overall question whether he risks persecution is of course another issue which we need to go on to consider.

26. There was in this case no notification of an application to renew on the grounds on which Buxton LJ refused permission. One should, in my view, have been made. Buxton LJ made it clear that the grant was on a limited basis, and he made a clear finding that the Tribunal was entitled to find that the appellant's involvement in RDR was on a very low level, implausibly leading to persecution. We have been prepared to consider the case as put by Mr Lewis.

27. The courts do sometimes overlook procedural failures in this area because of their wish to do justice in the particular case and that generalisation applies strongly where it is an asylum application such as this one. But an appellant should not assume that the court will take such a view. It is not fair to the other parties. It does not assist the court in the proper discharge of its responsibilities and it does not assist the administration of justice. There should have been a notification of application to renew, or at least an attempt at explanation. A somewhat sophisticated one has been attempted today as to why such renewal is not considered necessary. There should also have been an application to adduce fresh evidence because the appellant, in writing at any rate, sought to rely on a report prepared by Miss Thalia Griffiths in response to the Tribunal's decision. (In the event, that report was only referred to when the court itself raised the point and, on my view of it, it did not need to be referred to as assisting the case. It is not a criticism of Mr Lewis that he failed to raise it earlier).

28. Having made the point that the Tribunal should have approached the question of risk on the basis that the appellant would have been, or was likely to be, recognised as Dioula, Mr Lewis submits that the appellant's ethnicity, taken with his support for the RDR, created a situation where there is a real risk of persecution. I refer, having mentioned it, to the additional evidence of Miss Griffiths. It does not, in my judgment, assist the appellant. Indeed, she refers to a Dioula who occupies an important office in Ivory Coast -- the speaker of the Parliament. And the further report does no more than state that there is evidence that "Dioula are assumed to be RDR supporters."

29. In my judgment the evidence does not demonstrate any risk of persecution of the appellant as Dioula. That ethnicity is not considered in the paragraphs to which I have referred in the recent guidance case. There is, at an earlier part of the determination, a reference to an expert report -- on that occasion from Mr Reeve -- about the ethnic complexities in Ivory Coast. He states, and indeed there is evidence of this from the appellant, "that southern Ivoiriennes, often lump all northern Ivoiriennes together with these immigrants under the collective ethnic name Dioula, which has inherently foreign connotations." Mr Reeve then goes on (and this is cited at paragraph 61 of the decision in CG) to consider the implications of that.

30. There is no suggestion that ethnicity alone creates a risk of persecution. The highest at which the relevance of ethnicity can be put, in my judgment, is in evidence that there may be an assumption that Dioula are members of the RDR. That far from ensures success for the present appellant, however. There is a plain finding of fact that the appellant was a low profile member and the country guidance demonstrates that such members are not at risk, save in particular circumstances which do not exist in the present case.

31. I have referred to the Tribunal's finding of fact about that and also to their general findings at paragraph 206 that the appellant would not face a risk on return by reason of his political associations. It is surprising that, having regard to the way in which the case was put, which appears to me to be essentially on the basis that the ethnicity was relevant in so far as it created an assumption of RDR membership, that the Tribunal did have a separate section of their determination headed "Dioula Ethnicity", as if there were a separate, a tenable, separate case of risk of persecution on ethnic grounds.

32. There was no evidence to support that. It follows that any error in the approach of the Tribunal to whether the appellant was likely to be found to be Dioula on his return is of no relevance whatever to the question of whether he is at risk of persecution. Had they found that he would readily have been recognised, and having made the findings of fact they did, I find it difficult to see how any decision other than the one which they did reach could be reached. I accept the submissions made on behalf of the respondent. Dioula ethnicity was only relevant to political opinion, which the AIT fully considered and rejected on the facts.

33. In my judgment there is no merit in this appeal. The determination was a very long one. It runs to 216 paragraphs, over 36 pages. As I have said, I see some force in the submission of Mr Lewis that it is not clear from the decision

what the Tribunal's findings as to credibility were, though their finding as to the low profile is clearly stated and was one they were entitled to reach. I have referred to the separate section of the determination dealing with the ethnic question. The Tribunal did not need those findings, which arguably were erroneous, to reach the decision they did. There was not arguably a free standing case based on ethnicity, and the relevance of ethnicity was limited on the evidence, including the country guidance, in the way I have described.

34. Considerable and conscientious work has gone into the preparation of this determination. Moreover, I am conscious of the difficult tasks, both factual and legal, which the AIT faces when considering cases. However, I do respectfully comment that the central points which arise in this case may, to some extent, have been lost in the detail of the determination. It is important that there should be a focus on how a case is being put by a party, followed by an analysis of the issues which arise, relevant findings of fact and conclusions reached on the relevant issues.

35. Having respectfully made that comment, I do repeat that the evidential conclusion about the low level political involvement is clear. Taking that finding with the country guidance and the conclusion eventually reached on the essential question of the possible risk of persecution the appellant can, in my judgment, have no complaint about the decision made or the way in which it has been made. For those reasons I would dismiss this appeal.

Lady Justice Arden:

36. I agree.

Mr Justice Patten:

37. I also agree.

Order: Appeal dismissed