Case No: C5/2007/0308

Neutral Citation Number: [2008] EWCA Civ 338
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AS/52642/2003]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 7th March 2008

Before:

LORD JUSTICE RIX
LORD JUSTICE LONGMORE
and
SIR ROBIN AULD

- -

Between:

NH (VIETNAM) **Appellant**

- and -

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

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Mr M Bovey and Ms R Chapman (instructed by Messrs Elder Rahimi) appeared on behalf of the **Appellant**.

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

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Judgment

(As Approved by the Court)

Lord Justice Rix:

1. This is, procedurally at any rate, an unhappy set of proceedings under which Miss NH is seeking asylum in this country in the light of the way she has been treated in her home country of Vietnam by reason of her adherence to the Quan Yin religion. It is, of course -- it goes without saying -- a matter of great anxiety for the appellant NH.

2. The essential facts, so far as they have been found so far, are that Miss NH has been a practising member of the Quan Yin religion and was arrested, questioned and ill-treated in October 1999, albeit released after a week. She was then able to practise her religion in secret or, at any rate, without further interference for something like three years, until she was arrested again in October 2002. On this occasion she was taken to a labour camp and required to do labour in the form of planting and harvesting vegetables, but also, to some extent, in the carriage of broken stones, which was primarily the work of male detainees. She remained in this labour camp for something like three months, until February 2003, when her father managed to obtain her release by the payment of a bribe, and arrangements were then made for her to leave the country and she came to the United Kingdom and claimed asylum.

3. Her claim for asylum has, as I indicated at the very beginning of this judgment, had an unhappy procedural course. In the first instance her claim was rejected by the Secretary of State essentially on the basis that her credibility was not accepted at all. She then appealed to the adjudicator Mr D P Herbert and by his determination dated 12 December 2003 his decision was again to reject the appellant's claim on the basis that there was no substance in them at all. He did not accept that she was ever detained or ill-treated as claimed.

4. The claimant then went before the Immigration Appeal Tribunal, Mr C P Mather, Vice President, and their decision of 29 October 2004 was that the matter should be remitted for hearing before a different adjudicator. The second adjudicator's decision of 18 February 2005 was to accept the credibility of the appellant, but ultimately to reject her claim to asylum on the basis that the matters that she had faced which, as I have said, he accepted as matters of fact, did not amount to a real risk of persecution in breach of Article 3. That was a decision of the adjudicator Mr F R C Such.

5. The matter then came before the Asylum and Immigration Tribunal, presided over by Immigration Judge Grimmett, whose decision, dated 20 June 2006, is the one under appeal today. Miss NH's submission to the Asylum and Immigration Tribunal was briefly described in paragraph 5 of that decision as follows:

> "Persecution was not merely physical abuse but included arbitrary detention without due process, slave labour and breaches of the right to practise one's religion freely. Prison conditions in Vietnam were very harsh."

6. However, the Asylum and Immigration Tribunal concluded again that the appellant had failed to produce evidence or persuade the tribunal that her treatment had been sufficiently severe to meet the high test of Article 3 persecution, and therefore they again concluded that her claim to asylum failed. That decision is again under appeal for this court on the basis that the tribunal had considered the position only under Article 3 and not under Article 9, which was certainly in issue before it. What is a matter still of debate on this appeal is whether it would be right to say, or it could be argued that, on the facts before the tribunal, not only was Article 9 an issue, but Articles 4 and 5 of the European Convention on Human Rights as well. Plainly, on the basis of the submission complaining about arbitrary detention without due process, it might be said that Article 5 was engaged and, similarly, on the basis of the complaint about slave labour, it might be said Article 4.2 was engaged; but at that point it does not seem that those two Articles (Article 4.2 and 5) were separately invoked in addition to Article 9. Of course, for purposes of complaining about persecution by way of breach of Article 9, it would be perfectly in order to take into account matters of arbitrary detention and slave labour as well, even if not under the specific labels of the separate Articles 4.2 and 5.

7. Now, an appeal to this court having been granted on the basis of the tribunal's failure to address in terms Miss NH's claim under Article 9, the position has been further complicated by an application to amend the grounds of appeal to this court to rely not only on the facts underlying Articles 4.2 and 5 but also specifically on those Articles in terms. What does that add to the complaint under Article 9 in circumstances where all the relevant facts were, or should have been, before the tribunal in any event? Well, the submission on this appeal of Mr Mungo Bovey, who has appeared for Miss NH, is that the test under Articles 4 and 5 may be different from the test under Article 9 for the purpose of a successful asylum claim. This goes back to the case of R (Ullah) v Special Adjudicator [2004] 2 AC 323 where the House of Lords considered, albeit in *obiter* observations, whether it was possible and, if it was possible, what would be necessary to achieve a successful claim for asylum, not by reference to Articles 2 and 3 but by reference to other Articles of the Convention and in particular Lord Bingham in paragraph 24 of his speech and Lord Carswell in paragraph 69 of his speech addressed those matters in terms of the need for a flagrant denial of the guaranteed rights in question.

8. Since then, the issue has arisen as to what the test of flagrant denial amounts to, and in the recent decision in this court of EM (Lebanon) v SSHD [2006] EWCA Civ 1531 it was held in the context of, at any rate, Article 8 that the test requires a complete denial of the guarantee in question and not merely what might be described as a bad case, whether that is glossed as flagrant or gross. That issue which, on the facts of that case, this court said was critical between success and failure is now on its way to the House of Lords, who have granted the petition to appeal to the asylum seeker. But Mr Bovey submits, in effect, first that the decision in EM is wrong (we can do nothing about that) and secondly that, in any event, the EM

test does not apply to Articles 4 and 5 because, he submits, although the matter is in issue, those are unqualified rights and rights which do not permit under Article 15 of any possible derogation. Therefore, he submits, the test should not be one of complete denial but should be the still difficult but lesser test of a bad breach.

9. On this appeal, by reference to NH's amended grounds of appeal, Mr Bovey seeks to submit as his primary case that this court should first of all take upon itself the issue of a breach under Article 5 of the Convention, then decide the right test which will apply to the breach of Article 5 for the purposes of asylum and persecution; and then, on the existing findings of fact, decide in favour of Miss NH that there has been such a gross denial as meets the test as properly formulated for the purposes of Article 5, and that we should therefore decide this appeal - without any need for reconsideration by the tribunal - on the ground that Miss NH has proved her claim to asylum. He does not seek to make that particular case by reference to Article 9 or Article 4.2.

10. As a fall-back submission, however, as his secondary case on appeal, he would submit that the matter should go back for reconsideration before the tribunal and for full reconsideration in respect of all of Articles 4.2, 5 and 9. Indeed, he submits that even if he were to fail in his primary case under Article 5, the matter should nevertheless go back for reconsideration on the basis of necessary further findings of fact in respect of Articles 4.2 and 9. Since the Secretary of State puts in issue whether any reference to Articles 4.2 or 5 are open to Miss NH at all, his final position, it seems to me, would be that it should at least go back for reconsideration under Article 9.

11. The Secretary of State, for her part, has, since 8 August 2007, made it plain in writing to NH and those advising her that they accept that the tribunal is in error in producing a decision which has only in terms considered Article 3 and has not considered a claim to asylum by reference to Article 9, and therefore accepts that the matter has to go back to the tribunal to address in any event Miss NH's Article 9 claim. However, that offer has not been accepted by those advising Miss NH or by Miss NH herself, who have come to this court to make the primary and alternative arguments to which I have referred.

12. In these circumstances it seems to me that this court is faced by a really most unsatisfactory state of affairs. The test for the purposes of an article such as Article 9 is, as I think Mr Bovey accepts, decided in this court by the analogous decision in respect of Article 8 in EM. That question is now before the House of Lords. We do not know whether the House of Lords will speak only about the test under Article 8 but we suspect that, as in Ullah, where the argument spread more widely across the spectrum of Articles outside 2 and 3, so that is likely to be the position in respect of EM when it reaches their Lordships' House. In any event, not only has the matter not been properly considered by the Tribunal through the prism of Article 9 but, whatever might be the success or otherwise of Mr Bovey's submissions in respect of Articles 4.2 and 5, they have not begun to consider Miss NH's case through the prisms of those two separate Articles.

13. In discussion with my Lords, therefore, we have formed the view that it is most probable that, whatever might be Miss NH's right to argue the position under Article's 4.2 and 5, a matter itself in dispute (because the Secretary of State says those points are not open to Miss NH), and whatever might be the right test to apply in the cases of Article 4.2 and 5 -- whether it be the EM test or some other test -- the matter would ultimately have to go back to the tribunal as not only the tribunal of fact, but also the specialist tribunal for the purposes of evaluating facts for the purposes of the Asylum Convention, for them to reconsider the matter again. In those circumstances we have suggested, in the course of argument to Mr Bovey, that, as a matter of case management of this appeal, it should be remitted to the tribunal for them to consider what are the full facts upon which a decision should be made in respect of Article 9 at least, and for them then to apply their specialist expertise to a decision in relation to the test of flagrant denial in respect of that Article.

14. That leaves the position so far as Articles 4.2 and 5 are concerned. The Secretary of State's first position there is that the points on those two Articles are not open because they did not form part of Miss NH's grounds of appeal to the tribunal in the first place and therefore are barred by reference to Rule 62(7) of the Asylum and Immigration Tribunal Procedure Rules 2005, which governed Miss NH's appeal to what had been the Immigration and Asylum Tribunal (and became the Asylum and Immigration Tribunal) at the relevant time when permission was granted on 4 April 2005. That is subject to the learning which has developed by reference to the decision in this court of AM (Serbia) v SSHD [2007] EWCA Civ 16 and the doctrine of Robinson obviousness, which derives from the earlier decision of R v SSHD ex parte Robinson [1998] QB 929.

15. Mr Bovey submits that, at any rate, the position under Article 5 is Robinson obvious. He accepts, I think, that that is not, or may well not be, the position in respect of Article 4 and the question of forced labour, because there are insufficient findings as to what might be the consequences of declining to do the work that Miss NH was required to do while she was detained in the labour camp. At any rate, Mr Bovey submits that this court should decide that the argument, in respect of Article 5 at least, is Robinson obvious.

16. In my judgment, while it is clear that, by reference to the facts and the submissions made to the Asylum and Immigration Tribunal and recorded by them in paragraph 5 (the passage which I have cited above), Article 4.2 relating to forced labour and Article 5 in relation to arbitrary detention were articles which were engaged by the facts laid and the case made before the tribunal, it is not possible, before reconsideration and further consideration of the facts in this case, to state whether those facts constitute so strong a case of breach for the purposes of the Robinson obvious doctrine - see page 946(c) of the judgment in that decision - as to allow me to say that Robinson obviousness has been reached.

17. In those circumstances it seems to me that it is for the tribunal of fact itself to decide whether to accede to the application which can be made to it to widen the grounds of appeal originally made to that tribunal from beyond Article 9

to take into account Articles 4.2 and 5 itself. The tribunal will have to consider that question against the background that it is the same facts, essentially, which are relied on for all three Articles and against the view which I have expressed that those facts, at any rate, engage the additional Articles 4.2 and 5. The tribunal will nevertheless also have to take into account the submissions of the Secretary of State. If the current submissions are maintained the argument under Article 4.2 and 5 would not be open in the absence of Robinson obviousness and in the absence of the tribunal's willingness to expand the scope of the remission, and it will be said that they should not expand that scope. That will be a matter for the tribunal on the matters and submissions placed before them on remission and reconsideration. Nevertheless, for the reasons which I have sought to explain, it seems to me that it would be gravely unsatisfactory for this court to attempt the task which Mr Bovey has asked us to perform on hypothetical (or at any rate incomplete) facts, and in advance of a reconsideration which is there to be had and which Mr Bovey submits would in any event have to follow, unless he had complete success here and now under Article 5, and indeed in advance of and against the looming background of the decision coming from the House of Lords sometime in the relatively near future in the case of EM.

18. Therefore, rather than deal with these submissions hypothetically on inadequate facts, the matter should -- at long last, whatever be the width which the tribunal itself decides in their own judgment and discretion to give to it -- be considered once and for all on what I very much hope will be a final reconsideration of this matter by the expert tribunal. It will be, in the light of this judgment, a matter for the parties and, ultimately, for the Asylum and Immigration Tribunal to decide whether a reconsideration, whatever its scope, should take place before the decision of the House of Lords in EM or only once that decision comes to hand.

19. For these reasons I think the order of this court which emerges is an order that the appeal should be allowed and that there should be a remission to the Asylum and Immigration Tribunal for full reconsideration, but that the scope of that reconsideration should ultimately be determined by the tribunal itself.

Lord Justice Longmore:

20. I agree. It is not particularly satisfactory that we are remitting this case to the Asylum and Immigration Tribunal to reconsider this matter for a second time, but the Secretary of State accepts that that is necessary so that the Article 9 arguments can be properly addressed. It is also unsatisfactory that after the Secretary of State notified his acceptance of that course to the applicant, the applicant has sought to argue the points under Articles 4 and 5, which have been identified by my Lord. In that event, the applicant can hardly complain that, in the absence of those points being Robinson obvious, it must be for the Asylum and Immigration Tribunal, on reconsideration, to decide whether, in the light of Articles 4 and 5 being potentially engaged, the points now sought to be made in relation to them should be permitted to be argued.

Sir Robin Auld:

21. I also agree that the matter should be remitted for the reasons given my Lord, Rix LJ and the expressions of concern expressed my Lord, Longmore LJ.

Order: Appeal allowed