Neutral Citation Number: [2009] EWCA Civ 40

Case No: C5/2007/2770

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
HX/14596/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE THOMAS
and
LORD JUSTICE MOORE-BICK

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Between :

TK (Burundi)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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Mr Kwabena Owusu (instructed by **Messrs Monioro Less & Co**) for the **Appellant**
Mr Alan Payne (instructed by **Treasury Solicitor**) for the Respondent

Hearing date: 10 December 2008

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Judgment

Lord Justice Thomas:

1. The appellant, a national of Burundi, appeals against a decision of the AIT on grounds (as limited on the application for permission to this Court) to specific issues under Article 8. The appeal provides a clear example of the importance which can attach to the provision of independent supporting evidence where it is readily available and the part its absence can play in determining overall credibility where no credible explanation is provided for its absence.

The initial determination

2. The appellant was born in 1968 and arrived in the United Kingdom in March 1996. He claimed asylum on the basis of his fear of persecution in Burundi because of his ethnicity as a Hutu. That application was refused by the Secretary of State in February 2001. In October 2002 the decision to issue removal directions was served on him. He appealed. He failed to attend the hearing and the appeal was dismissed. An application for leave to appeal out of time was then made; the AIT remitted the matter for hearing before a different tribunal. That came on before Mr H R A Martineau, an Immigration Adjudicator. The appellant was legally represented by counsel and the Adjudicator had evidence from him. The Adjudicator in his decision dated 31 January 2005 dismissed his claim for asylum on the basis that no credible case had been put forward. The reasons given by the Adjudicator for disbelieving him included the failure of the appellant to put forward the strongest points of his case initially. In particular the appellant had not mentioned his claim to be at risk as a member of the FNL until his witness statement was served. He had added even more significant evidence (such as claiming he was a ringleader) during the course of his evidence at the hearing. The Adjudicator also considered that the reason he put forward for his fear of persecution was quite different to that first offered. The Adjudicator not only rejected his claim to be a member of the FNL but also considered it was likely that the appellant had invented his account of his time in a refugee camp in Tanzania, though he did not make that part of his findings.

3. Although the Adjudicator dismissed the asylum claim, he accepted the appellant's Article 8 claim based solely on the appellant's evidence that:

   i) He had started to work in the United Kingdom in 1997; since 2000 he had been working for the NHS; it was anticipated he would complete his staff nurse training by December 2005.

   ii) He had had a relationship with Miss Mutoni (who had been born in Rwanda) and they had a daughter who was born on 11 February 2004. He saw her frequently and regularly, three times a week for periods of three to four hours at a time. He had since separated from his daughter's mother but he supported both financially.

   There was no independent evidence in relation to Miss Mutoni or her daughter. The Adjudicator concluded without such evidence he could not make substantial findings in the appellant's favour. He concluded, however, that although 20 months of delay had been due to the appellant's solicitors, the remaining delay was caused by the Secretary of State and attached to this last very considerable weight. He decided the

appellant should not be removed, as it would constitute a disproportionate interference with his right to a private life.

4. Reconsideration of that decision was ordered in June 2006 on the basis that the Adjudicator had erred in his application of Article 8. In a further determination dated 26 February 2007 the AIT considered that there had been a material error of law by the Adjudicator in relation to the weight attributed to delay and that the appeal should proceed to a second stage reconsideration limited to the Article 8 claim. The AIT observed the delay might well have increased the appellant's ability to demonstrate his family and private life and made clear that it expected that the appellant would be able to put forward a properly formulated case.

The hearing before Immigration Judge Scobie

5. That second stage consideration was heard before Immigration Judge Scobie on 13 April 2007. At that hearing the appellant was represented by experienced immigration counsel. The appellant's evidence (as appears from the determination) was as follows:

   i) He did not live with his first daughter because he did not have a good relationship with her mother, Miss Mutoni; however he saw that daughter regularly.

   ii) He had a current partner and a daughter born 16 March 2007 (about a month before the hearing). The evidence in respect of this partner was recorded as, "Tailynne's mother's asylum application is somewhere in the system". The appellant did not live with his daughter or his current partner, but they visited him on a frequent basis; his evidence was that they proposed to move in with him very shortly and hopefully they would get engaged.

   However, no statements were provided from either of the mothers nor was there any written evidence of any financial contribution made. The appellant's explanation for this was that his relationship with the mother of his first daughter was not particularly good and she did not wish to become involved in matters relating to his immigration status. If he had pushed the matter he was frightened he would lose contact with his daughter which had been freely given by the mother. As regards his current partner, "he had not been asked to bring her along or to get evidence from her". At the hearing the Secretary of State disputed the strength of the family life presented by the appellant and relied on the absence of written statements and other evidence to which I have referred.

6. In reaching his decision, given on 7 June 2007, the Immigration Judge expressly referred to *Huang* [2007] UKHL 11 and *Razgar* [2004] UKHL 27. He proceeded to address the issue under Article 8 by reference to the five questions set out at paragraph 19 of the decision in *Razgar*.

   i) The Judge concluded there was no doubt the appellant had made a private life for himself in the UK and, regardless as to the views that he had as to the strength of the appellant's family life, the appellant did have a family life with which his proposed removal would be an interference.

ii) He found that Miss Mutoni, the mother of the first daughter, had indefinite leave to remain; his present partner had made an asylum claim, "and the best information I had was that it had not been finally resolved". It would be extremely difficult for the appellant to keep in touch with his family from Burundi and he would lose his job. He therefore concluded that Article 8 was potentially engaged.

iii) After dealing with the third and fourth questions in *Razgar* (which were common ground) he turned to the fifth question as to whether the interference was proportionate in pursuit of the aim of having in force an effective immigration control policy. He concluded that on balancing the following factors that the balance came down in favour of the appellant's removal:

a) The appellant had been in the UK for a number of years. There had been significant delay in dealing with his application. That had assisted him in building a private and family life in that he had an important job and two daughters. However, against him was the fact that there was a complete absence of evidence from the mothers of the two children; they had neither given oral evidence nor provided statements.

b) He did not consider that the explanations I have set out in relation to the absence of supporting evidence were satisfactory. As regards Miss Mutoni, the mother of the appellant's first daughter, whilst he could understand the reluctance of the mother to get involved in an immigration issue he considered it would have been relatively straightforward for her to sign a statement and found it difficult to understand her reluctance in circumstances where if the appellant were returned to Burundi she would lose £150 per month which he contributed towards his daughter's upkeep. As regards the appellant's current partner, he concluded as follows:

> "I found the appellant's reason for absence of evidence or a witness statement totally unacceptable. The appellant has been represented by legal representatives for some time who have done a very thorough job in connection with the case. To suggest that his partner is not here and did not give a statement because nobody mentioned the benefit of having her do so is in my mind totally lacking in credibility."

c) There was no independent evidence as to the money which the appellant claimed to put towards their keep. There was nothing about this apart from his own word. Although he had had the benefit of legal advice it was inconceivable that his legal representatives would not have understood the benefit of having documentary evidence relating to finances.

iv) All of these factors went to the strength of the relationship with his daughters. He concluded that in the light of what he had set out, "the appellant's family life was not as strong as he indicated".

v) He also referred to further matters counting against the appellant, including the fact that he had developed his family life in the UK in the full knowledge of his uncertain status.

vi) He concluded that, although the appellant would suffer from losing his job and he would suffer to some degree from any contact he had with his children, nonetheless the balance came down in favour of his removal.

7. The AIT refused permission to appeal to this Court on the basis that the Judge had applied the right test. An application for permission to appeal to this Court was rejected by Richards LJ on paper. The application was renewed and came before Maurice Kay LJ on 20 May 2008. The appellant appeared in person. He brought with him the woman whom he described to Maurice Kay LJ as "his fiancée" who had given birth to the second daughter on 16 March 2007. Maurice Kay LJ considered that it was arguable that the Immigration Judge had erred in law in rejecting the appellant's account because it was not supported by other evidence, uncontradicted though it otherwise was.

The service of further materials by the Secretary of State

8. On 19 November 2008, the Secretary of State served documentation in relation to the person the appellant described as his current partner and the mother of his second child - Deborah Ndagire. She had been born on 13 April 1974 and was a national of Uganda. She had arrived in the UK on 27 October 2004 with the assistance of an agent and claimed asylum the following day. The basis of her claim was that in 2000 her family had tried to force her to marry but she had refused to do so as she was a lesbian. She gave an account of being mistreated by her family and her clan and then being attacked and raped; she claimed she could not obtain any assistance as she was a lesbian. Her claim was rejected by the Secretary of State. On appeal, the Immigration Judge in a determination promulgated on 28 January 2005 dismissed her appeal on the basis that her account was not credible. On 28 February 2005 the AIT dismissed her application for permission to appeal on the basis that the Immigration Judge's findings supported a wholesale rejection of Miss Ndagire's entire account.

9. Therefore at the time of the reconsideration hearing of the appellant's appeal before Judge Scobie on 13 April 2007, the mother of the appellant's second daughter, Miss Ndagire, was in fact illegally in the United Kingdom. It was clear that his claim to be entitled to family life on the basis of the family life with his daughter born in March 2007 and the hopes to marry her mother would have been unsustainable had this been known.

10. Although the papers that set this out had been served upon the appellant's solicitors on 19 November 2008 (over three weeks before the hearing in this Court), there was no statement from the appellant to explain his conduct. We were told by counsel (who had not represented the appellant before Judge Scobie) on instructions obtained at a conference with the appellant six days before the hearing in this court, that at the reconsideration hearing before Immigration Judge Scobie the Home Office presenting

officer had information about the partner gained from what was on the Home Office computer. The appellant had not seen this information and so could not explain the detail, but he knew at least that much. On enquiry of counsel as to what enquiries had been made about the advice given by counsel who had represented the appellant at the hearing before Immigration Judge Scobie, we were told he had not been able to speak to him as he had been abroad and was likely to remain abroad for some time. This question was asked because the grounds for the appeal had been drafted by counsel who had represented the appellant at the hearing before Immigration Judge Scobie and nothing had been said in that which sought to support the account given by the appellant as to his reasons for not calling or obtaining evidence from the mothers of his two children and which the Immigration Judge had rejected.

11. Before the renewed application for permission came before Maurice Kay LJ, solicitors acting on behalf of Deborah Ndagire had written on 10 September 2007 asking the Secretary of State to review her position in the light of further representations and evidence. The letter set out further information in relation to Uganda and a further report on her medical condition. The partner was not identified. By the time of the hearing before Maurice Kay LJ the further representations had not been considered by the Secretary of State. They were, however, rejected in a letter dated 31 October 2008 in which it was made clear that Miss Ndagire had no basis to stay in the United Kingdom and should make arrangements to leave without delay. On 12 November 2008 her solicitors indicated that they would be making further representations on her behalf and would be submitting those by Friday, 14 November 2008. We were told that none had so far been received by the Secretary of State.

12. In the light of these matters and what we had been told orally by counsel and the questions to which they gave rise, we decided at the conclusion of the hearing that we would give the appellant the opportunity of putting in a written statement made on oath or affirmation by the following day, if he so desired, setting out his account of what had happened before Immigration Judge Scobie and before Maurice Kay LJ. The appellant provided on 11 December 2008 affidavits from himself and Miss Ndagire and documentation to which I refer at paragraph 17 below. The Secretary of State responded on 15 December 2008 in a short submission.

The submissions of the appellant on the appeal to this court

13. The appellant made two principal submissions on the appeal.

    i) Immigration Judge Scobie had not properly applied the law as laid down in *Razgar* (and the guidance of Lord Bingham at paragraph 20 as to the way in which the question of proportionality should be approached) and in *Huang* at paragraphs 14-15 and 19-20. If the Judge had done so he would have considered the evidence with more care and made clear findings of fact. He should have made proper findings on the level of family life and not merely left the position as he had done. It was also wrong in the circumstances for the Judge not to have accepted the appellant's evidence and explanation for not providing statements. He had speculated about the evidence that might have been before him instead of concentrating on the evidence that was actually before him. He should have assessed the appellant's credibility in the light of that. He had been wrong to place the emphasis he did on the evidence in relation to the finances; he should have followed the guidance given by

Baroness Hale of Richmond in *Beoku-Betts v SSHD* [2008] UKHL 39 at paragraph 4 where she stated that the central point about family life was that the whole was greater than the sum of its parts. The Immigration Judge's reliance on what the former partner might have done to assist the appellant was misplaced. He had no control over her. The effect of the approach of the judge had been erroneous in law and had prejudiced his consideration of the appellant's case.

ii) The Immigration Judge had failed to follow the Strasbourg Jurisprudence. There had been no references at all to Strasbourg Jurisprudence in the decision.

The weight to be attached to the evidence of the appellant and the findings on family life

14. At the heart of the decision of the Immigration Judge was his decision in relation to the appellant's credibility. It is clear that the Judge approached the matter against the background of:

i) The rejection by Mr Martineau of the appellant's case on asylum where he had not been believed.

ii) The reference by Mr Martineau as to the lack of independent evidence of the status or plans of the mother of his first daughter and his express statement that he could not make substantial findings in the appellant's favour about her.

iii) The opportunity afforded to the appellant by the delay that had occurred dealing with his asylum claim. It was clear from the decision in February 2007 that it was expected that he would have further evidence to support his claim.

iv) When the matter came on before Immigration Judge Scobie in April 2007, the appellant was represented, as the determination makes clear, by experienced and competent counsel. There can be little doubt that the judge had well in mind the background to which I have referred and the need for the appellant to produce some independent evidence to support his claim in respect of family life.

15. The task of the Immigration Judge was in the circumstances no different to that of any other Judge being asked to make a finding or series of findings where there was before him a party who had been disbelieved in an earlier part of the proceedings, had provided no independent evidence to support his account and was putting forward explanations of his failure to call supporting evidence that did not appear sustainable.

16. Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons. I accept, as did the Judge, that Miss Mutoni, his first partner, might well have been reluctant to help, but there was no evidence that any attempt had been made to seek her help in circumstances where her failure to help would result in serious financial disadvantage to the support to her child, and no

evidence as to the payments alleged to have been made. Nor in my view can Immigration Judge Scobie in any way be criticised for his rejection of the appellant's account of why he had not sought evidence from his current partner, Miss Ndagire. In my view the approach of the Judge on the evidence before him was an approach he was entitled to take in assessing the appellant's credibility; there was no error of law. On that evidence, he was entitled to reach the view that the family life was not as strong as the appellant claimed or in other words not strong at all. He was therefore entitled to come to the conclusion he demonstrably arrived at with great care, that the balance under Article 8 came down in favour of the appellant being returned to Burundi. In my judgment, there was no error of law and this ground of appeal fails.

The further evidence of the appellant served on 11 December 2008

17. In the affidavit served by the appellant on 11 December 2008 in the circumstances to which I have referred at paragraph 12, he stated that he believed that his former solicitor had presented to the Home Office the birth certificates for both children prior to the hearing; the mothers of the children were named on those birth certificates; the copies he served showed the parents on his second daughter's certificate. At the hearing before Immigration Judge Scobie on 13 April 2007, the Home Office Presenting Officer provided to his counsel a document with the names of his partner and ex-partner written on a piece of paper. He was asked to verify the names and dates of birth of his parents. He explained he did not know the date of birth of Miss Mutoni but stated that the information he was asked to check corresponded with her approximate date of birth. He had not been advised by his solicitors to seek evidence from his current partner or his former partner. Ordinarily his current partner would have come to court with him as she had on every occasion when he had been to a hearing. She had had a complicated birth about a month before and did not attend the hearing. He accepted that the Immigration Judge had correctly summarised his evidence in relation to his current partner in the terms I have set out in paragraph 5 above. His state of knowledge at the time of that hearing was that he knew her asylum application had been dismissed by an Immigration Judge and that there was no outstanding appeal before any court. He knew she had consulted a solicitor and he believed that the solicitor had made representations to the Secretary of State. At the time of his appearance before Maurice Kay LJ, he knew that representations had been made on behalf of Miss Ndagire to the Secretary of State and there had been no response. As to his relationship with Miss Ndagire, he had a genuine heterosexual relationship with her. It had not arisen to provide Miss Ndagire or himself with any advantage under immigration law. His evidence about his former partner, Miss Mutoni, had been correctly summarised by the judge; she had, however, provided him with a letter in support of his claim dated 20 November 2008 which was annexed to his statement. He had made monthly payments in favour of his daughter by Miss Mutoni since her birth. These had started at the level of £80 a month and increased to £150 a month; he produced bank statements purporting to show payments to Miss Mutoni. Miss Mutoni had told him the payments into her bank account were not helpful as she was in overdraft and the payments were applied by the bank to the reduction of her overdraft. She had asked him to give cash which he did. He produced bank statements purporting to show that. He also produced items of correspondence with Miss Mutoni and cards from his first daughter and set out further details of his relationship with that daughter. Miss Ndagire provided an affidavit which supported the appellant's account. In the submission served on behalf of the

Secretary of State, it was acknowledged that the Home Office presenting Officer had a vague recollection of handing in a note at the hearing, but had no recollection of the contents of the note.

18. It is striking that the account now given by the appellant for the failure of Miss Ndagire to attend the hearing before Immigration Judge Scobie is that she had a complicated birth. No explanation is given as to why the Judge was not told this; indeed the Judge was told that Miss Ndagire and their daughter visited him on a frequent basis, an account which appears inconsistent with his current explanation that her health prevented her from attending the hearing. Moreover there was no suggestion of complications in the birth in the medical report served by Miss Ndagire's solicitors with the representations made on 10 September 2007. It is also clear that the appellant knew that Miss Ndagire's rights of appeal had been exhausted by the time of the hearing before the judge; his evidence to the judge that the application was somewhere in the system must have been appreciated by the appellant (who holds a responsible position in the health service) to have been misleading. He has provided no evidence from those advising him at the time of the hearing which would support his account as to the advice he claims he was given. The bank statements provide little support for the payments as only four pre-date the determination by the Judge; those four statements are not consistent with his case that he was supporting his first daughter as they do not show, for example, any payments being made in the year September 2006- September 2007.

19. I regret to conclude that the appellant has provided no credible explanation as to his failure to call Miss Ndagire or for his misleading statement to the Immigration judge about her immigration status. The clear inference is that he did not call Miss Ndagire as to have done so would have revealed that what he had stated about her immigration status was untrue and the way he was advancing his claim under Article 8 was based on a significant area of fact that was unsustainable.

20. The importance of the evidence that emerged in this Court is to demonstrate how important it is in cases of this kind for independent supporting evidence to be provided where it would ordinarily be available; that where there is no credible explanation for the failure to produce that supporting evidence it can be a very strong pointer that the account being given is not credible. It is clear in the circumstances of this case that the Judge was in fact right to disbelieve the appellant. If the appellant had asked the mother of his second child, Ms Ndagire to give evidence, the truth about her immigration status would have emerged and his claim to base an entitlement to family life on his relationship with her and the child by her would have failed. That that was the inevitable consequence was made clear by the fact that his counsel accepted before us that he could no longer rely upon the relationship with Ms Ndagire and her daughter and the sole ground on which an Article 8 claim could be advanced was the relationship to his daughter by his first partner.

21. The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there

is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant.

22. In my view, therefore, it follows that the sole matter on which a claim to family life could properly have been made, namely his evidence about his relationship with his first daughter, has to be seen in the context of the further evidence which would have undermined the appellant's credibility, if the true facts had emerged before the Immigration Judge. That further reinforces the conclusion to which I had come that the Judge was clearly entitled to reject the evidence of the appellant as to the strength of the family life which he claimed.

No other error of law

23. As to the second ground of the appeal, Immigration Judge Scobie had, as is clear from his determination, the Strasbourg Jurisprudence as elucidated in the decisions of the House of Lords firmly in his mind. It does not appear that he was referred to any Strasbourg decisions. We were referred to *Rodrigues da Silva and Hoogkmer v The Netherlands* (Application No 50435/99, 31 January 2006) and in particular paragraph 41. However there was nothing in that decision or in the paragraph to which we were particularly referred which had any relevance to the present appeal.

24. In my view this was a ground of appeal which was merely re-stating in other terms the first ground of appeal, namely that the Judge had not followed the correct approach to Article 8 elucidated by the House of Lords in the three decisions to which I have referred. There was in the result no separate ground of appeal.

Conclusion

25. In my view, therefore, this appeal should be dismissed.

Lord Justice Moore-Bick:

26. I agree.

Lord Justice Waller:

27. I also agree.