

Neutral Citation Number: [2008] EWCA Civ 878

Case No: C5/2008/0163

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE
ASYLUM AND IMMIGRATION TRIBUNAL
AA/10922/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2008

Before :

LORD JUSTICE PILL
LORD JUSTICE LAWS
and
LORD JUSTICE CARNWATH

Between :

JT (Cameroon)
- and -
Secretary of State for the Home Department

Appellant

Respondent

Mr Robert Jay QC and Mr Tasaddat Hussain (instructed by **Messrs Parker Rhodes**) for the
Appellant
Miss Lisa Giovannetti (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 7 July 2008

Judgment

Lord Justice Pill :

1. This is an appeal against a decision of the Immigration Appeal Tribunal dated 22 October 2005 whereby the Tribunal dismissed the appeal of JT against the refusal of the Secretary of State for the Home Department (“the Secretary of State”) refusing JT’s application for asylum on 10 September 2006. An earlier appeal had been dismissed on 7 November 2006 but reconsideration was ordered on the basis that it was arguable that there had been a material error in the approach to medical evidence. Permission to appeal to this court against the decision on the reconsideration has been granted by the Tribunal.
2. By a form of consent dated 22 February 2008, the parties agreed that the appeal should be remitted to a differently constituted Tribunal. The Secretary of State agreed that it was arguable that the Tribunal had erred by placing too much reliance on Section 8 of the Asylum & Immigration (Treatment of Claimants etc) Act 2004 (“the 2004 Act”). The Senior Immigration Judge granting permission to appeal took a similar stance.
3. The application for remittal by consent came before Laws LJ who took the view, with which I respectfully agree, that the appeal should remain in this court so that the Section 8 issue can be considered here.
4. The appellant is a citizen of Cameroon who arrived in the United Kingdom on an unknown date in 2004, by air, using false papers. He used two identities while in the United Kingdom. He claimed asylum in July 2005, following his arrest. He was interviewed at length and, on 16 September 2005, the Secretary of State issued a notice refusing asylum and leave to enter the United Kingdom.
5. Section 8 of the 2004 Act provides, in so far as is material:

“8. Claimant's credibility

- (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
- (2) This section applies to any behaviour by the claimant that the deciding authority thinks -
 - (a) is designed or likely to conceal information,
 - (b) is designed or likely to mislead, or
 - (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.
- (3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead—

- (a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,
 - (b) the production of a document which is not a valid passport as if it were,
 - (c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,
 - (d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or other document connected with travel, and
 - (e) failure without reasonable explanation to answer a question asked by a deciding authority.
- (4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.
- (5) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.
- (6) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being arrested under an immigration provision, unless—
- (a) he had no reasonable opportunity to make the claim before the arrest, or
 - (b) the claim relies wholly on matters arising after the arrest.”
6. The appellant’s case was that his sisters became involved in youth politics in Cameroon on behalf of a group critical of the government. When they were arrested, he attempted to find them and joined street marches and protests. In the event they had fled to the United Kingdom. The appellant claimed that he had been arrested in October 2003 by reason of his association with his sisters. He was able to escape and stayed in hiding to regain his health. On return to Cameroon, he would be identified as one in whom the authorities had an adverse interest and he was at risk of serious harm.
7. The Tribunal considered the question of credibility in considerable detail. The section headed “findings of fact” began with a reference to Section 8 and the conduct to which it was believed to apply. The Tribunal went on to state that it was not accepted that the appellant had escaped from detention in the way he had described. The Tribunal was not satisfied that the appellant had any political profile in Cameroon. It had not been established that the appellant faced serious harm on return to Cameroon.

8. The reasoning in the decision which has given rise to concern is in paragraph 52:

“In all the circumstances, and looking at the evidence in the round, I must apply the appropriate low standard of proof to the Appellant’s account. As set out above, I am satisfied that very serious damage has been sustained to [the appellant’s] credibility by virtue of the operation of Section 8.”

9. There are many grounds of appeal against the Tribunal’s fact-finding exercise, including an alleged failure to give proper weight to the medical evidence, and a failure to give sufficient weight to the in-country evidence when assessing the credibility of the account given. Mr Jay QC, for the appellant, has sought to rely only on the ground relating to the use of section 8. He accepts that a challenge to the Tribunal’s finding on credibility on the other grounds would be very difficult to sustain and that, in the absence of the reference to section 8, the decision could not have been challenged. Accordingly, we confine our consideration to section 8.
10. On behalf of the appellant, Mr Jay’s general submission is that fact-finding is a judicial responsibility and the evidence must be considered “in the round”. A judicial tribunal should not be told by Parliament how to assess the credibility of witnesses, which is a judicial function. Read literally, section 8(1) leaves the Tribunal no choice; if the relevant behaviour occurred, it must be taken into account as damaging the claimant’s credibility. Section 8 offends against the common law principle of legality, it is submitted, as being arbitrary legislation. Secondly, it offends against the constitutional principle of separation of powers.
11. If not struck down on those grounds, section 8(1) should be read down by reading the word “shall” in the sub-section as meaning “may”, it is submitted. Alternatively, by a suggestion that arose in the course of the hearing, the word “potentially” should be read in before the word “damaging”. The section should be read as not restricting the Tribunal’s global assessment of credibility. If those submissions fail, Mr Jay argues that a strong warning should be given to judges not to permit section 8 to distort their assessment of credibility as a whole.
12. It appears that the perceived need for section 8 arose out of concern that those seeking entry to the United Kingdom were being advised to “throw away documents or refuse to co-operate either with the process of determining their country of origin and their passage into the country or with re-documentation for return purposes” (Mr David Blunkett, then Secretary of State, in the House of Commons on the second reading of the Bill on 17 December 2003, Hansard volume 415, Col 1588).
13. The Bill, which led to the 2004 Act, was introduced in the House of Lords and both parties rely on statements by the sponsoring Minister, Baroness Scotland of Asthal, not on *Pepper v Hart* principles but to adopt her approach to the meaning and effect of section 8. Baroness Scotland stated (Hansard 5 April 2004, columns 1683-1685):

“I made it clear at the beginning that [the clause] is not determinative, because an exercise of judgment still has to take place, but these are factors which should properly be taken into account. . . . The clause will not force a deciding authority to give undue weight to any of the factors it lists; it will merely

ensure that all these factors are considered in a systematic and transparent way. . . . Although [the clause] prescribes that certain behaviour is to be regarded as damaging to the claimant’s credibility, it prescribes neither the extent to which credibility is to be regarded as damaged nor the weight to be given to an adverse credibility finding on any point. What it does is provide a framework for decision makers so that all the listed factors are considered in a systematic and transparent way that is consistent across all stages of the process. The person adjudicating the decision will be free to come to a just decision within the context of the circumstances they find”.

14. In *SM (Section 8: Judge’s process) Iran* [2005] UK AIT 00116, the Tribunal considered the effect of section 8:

“9. The matters mentioned in section 8 may or may not be part of any particular claim; and their importance will vary with the nature of the claim that is being made, and the other evidence that supports it or undermines it. . . .

10. In our judgment, although section 8 of the 2004 Act has the undeniably novel feature of requiring the deciding authority to treat certain aspects of the evidence in a particular way, it is not intended to, and does not, otherwise affect the general process of deriving facts from evidence. It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some aspects of the evidence may be matters to which section 8 applies. Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and, despite section 8, and although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole.”

15. For the Secretary of State, Miss Giovannetti, submits that, even in a case in which a breach of the European Convention on Human Rights (“the Convention”) is alleged, it is not open to a court to read the word “shall” in section 8(1) as if it were the word “may”. Section 8 can, however, be applied, in the manner contemplated by Baroness Scotland, and by the AIT in *SM*. Miss Giovannetti affirms the submission as to the effect of section 8(1) made to this court on behalf of the Secretary of State in *Y v Secretary of State for the Home Department* [2006] EWCA Civ 1223:

“The Secretary of State accepts that section 8 should not be interpreted as affecting the normal standard of proof in an asylum/human rights appeal. There is nothing in the wording of

the Act that requires (or indeed permits) such a result. The effect of section 8 is simply to ensure that certain factors relating to personal credibility are taken into account when that standard of proof is applied. The weight and significance of those factors will vary according to the context and the precise circumstances of the behaviour.”

However, in the present case, the judge was in error, it is submitted, in beginning his assessment of credibility with a detailed assessment of matters arising under section 8 and then by the statement at paragraph 52 already cited.

16. In fairness to the Tribunal, I note that, when considering section 8, the Tribunal stated, at paragraph 27, that it was not “a determinative factor on credibility, but as one of the matters that I should take into account when weighing the evidence that is placed before me”. There was substantial conduct within the categories specified in section 8, including the use of a false travel document to enter the United Kingdom, a long delay in applying for asylum and the use of two identities in the United Kingdom. Moreover, the Tribunal conducted a very detailed assessment of matters relevant to credibility, other than section 8 matters, and the Tribunal did state, at paragraph 52, that it was “looking at the evidence in the round”. I do not regard the positioning of the section 8 reference in the determination as necessarily fatal. I do, however, agree with the parties that there is a real risk that section 8 matters were given a status and a compartment of their own rather than taken into account, as they shall have been, as part of a global assessment of credibility.

17. In construing Acts of Parliament, the court must respect the sovereignty of Parliament. Even when the court is construing legislation in the context of the Convention, and can apply the Human Rights Act 1998, the court’s powers are constrained. In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, Lord Nicholls of Birkenhead stated, at paragraph 33:

“Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant.”

18. In *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428, Lord Steyn affirmed that “Parliament legislates against the background of the principle of legality” (page 470). In the *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, Lord Hoffman stated, at page 131:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.”

19. Section 8 can, in my judgment, be construed in a way which does not offend against constitutional principles. It plainly has its dangers, first, if it is read as a direction as to how fact-finding should be conducted, which in my judgment it is not, and, in any event, in distorting the fact-finding exercise by an undue concentration on minutiae which may arise under the section at the expense of, and as a distraction from, an overall assessment. Decision-makers should guard against that. A global assessment of credibility is required (*R (Sivakumar) v Secretary of State for the Home Department* 2003 UKHL 14, [2003] 1 WLR 840).
20. I am not prepared to read the word “shall” as meaning “may”. The section 8 factors shall be taken into account in assessing credibility, and are capable of damaging it, but the section does not dictate that relevant damage to credibility inevitably results. Telling lies does damage credibility and the wording was adopted, probably with that in mind, by way of explanation. However, it is the “behaviour” of which “account” shall be taken and, in context, the qualifying word “potentially” can be read into an explanatory clause which reads: “as damaging the claimant’s credibility”. Alternatively, the explanatory clause may be read as: “when assessing any damage to the claimant’s credibility”. The form of the sub-section and Parliament’s assumed regard for the principle of legality permit that construction.
21. Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject to that, I respectfully agree with Baroness Scotland’s assessment, when introducing the Bill, of the effect of section 8. Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder.
22. Issues may arise as to precisely what conduct is capable of coming within section 8, and as to the relevance of that conduct to assessment of credibility in a particular case, but it is not, in my view, necessary to go into further detail to determine this appeal. Safeguards are incorporated within the wording of the sub-sections.
23. I would remit the case to a differently constituted Tribunal for full consideration, including a fresh assessment of the claimant’s credibility.

Lord Justice Laws :

24. I agree that the order proposed by Pill LJ should be made for the reasons given by him. For my part I would read the adverb “potentially” into s.8(1), before the word “damaging”. If that is done, the section does not affect the power and duty of the judicial decision-maker in every instance to reach his own conclusion upon the credibility of the claimant. It therefore offers no offence to the integrity of judicial impartiality. This approach, moreover, seems to me to accord with the view of the Asylum and Immigration Tribunal itself at paragraph 10 of its determination in *SM (Iran)* [2005] UKAIT 00116.

Lord Justice Carnwath :

25. I agree with both judgments.