Neutral Citation Number: [2010] EWCA Civ 225

Case No: C5/2009/1186

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Asylum and Immigration Tribunal

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2010

Before :

LORD JUSTICE WALL

- -

Between :

FN (Zimbabwe)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Miss Charlotte Bayati (instructed by Thakrar & Co - Solicitors) for the Appellant
No-one attended on behalf of the Respondent

Hearing date: 8th October 2009

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Judgment

Lord Justice Wall:

1. This is a renewed application for permission to appeal, permission having been refused on the papers by Moses LJ. I initially heard oral submissions from Miss Charlotte Bayati of counsel as long ago as 8 October 2009. At that point, I had not been able fully to read the papers in the case, and I thought that the fairest way of dealing with the application was to hear Miss Bayati and then to reserve judgment. This is what I did.

2. When I finally sent the proposed version of my handed down my judgment to counsel in January 2010, I apologised to the applicant and to her legal representatives for the fact that intense pressure of other work, followed by the papers being mislaid during the Christmas vacation, prevented me from dealing with the matter fully until January 2010. I was, moreover, also grateful to the applicant's solicitors for providing me promptly on my request with a duplicate set of papers, which I had taken the opportunity to re-read.

3. Having read the proposed draft judgment, Miss Bayati took the view that, with the passage of time, I had either overlooked or failed properly to deal with the third of the points which she raised in relation to her statement under CPR Part 52 PD 4.14A which, she argued, represented a stand alone ground of appeal.

4. In these circumstances, I again decided that the fairest course was to give Miss Bayati the opportunity to re-argue the whole application. Having heard her on 10 February 2010, I once again reserved judgment. Over the following few weeks, including the fortnight on which I have been on compensatory leave, I have carefully reconsidered Miss Bayati's arguments, and re-read the relevant authorities. My view, however, remains that this application must be refused.

5. The difficulty which faces the applicant in pursuing her application remains, in my judgment, the same; namely that to render an appeal arguable she has to demonstrate that in rejecting her case on credibility (a matter essentially for the judge at first instance, and one, moreover founded in the factual substratum of the case), Senior Immigration Judge Gill (the SIJ) arguably made an error (or errors) of law.

The background

6. The applicant is 43 and a national of Zimbabwe. She came to the United Kingdom via South Africa on 19 January 2008 as a visitor, and claimed asylum some 4-5 weeks later on 22 February 2008. The Home Office letter refusing her application is dated 14 April 2008. Her appeal against that refusal was heard by Immigration Judge Turquet and dismissed in a reserved judgment dated 5 June 2008. Reconsideration was ordered on 20 August 2008, and the first stage of that reconsideration took place on 3 December 2008. Designated Immigration Judge Appleyard found that IJ Turquet had materially erred in law; that her determination should be set aside in its entirety and that the AIT should consider the evidence afresh at a hearing at which all issues remained at large. That hearing took place before the SIJ on 11 February 2009. In her reserved judgment, which is dated 18 February 2009 the SIJ dismissed the applicant's

appeal on asylum, humanitarian and human rights grounds. It is from this decision that the applicant seeks permission to appeal.

The applicant's case

7. The applicant's case is that she was an active member of the Movement for Democratic Change (the MDC) in Zimbabwe from 2000 onwards and ran a vegetable stall in the Entumbane Market either in or near to Bulawayo, where she lived. She was appointed organising secretary of her constituency in 2003, her duties included the issuing of MDC membership cards, and "party material and campaign". She attended meetings and demonstrations.

8. In 2005 she was a victim of the government's campaign known as "Operation Murambatsvina". The market in which she worked was adversely affected and part of her home was destroyed.

9. On 1 October 2007 she was arrested during a march and was beaten by the police. She was, however, bailed by her sister and charged with an offence under the Zimbabwean Public Order Security Act. She was due to appear in court on 30 November 2007, but fled to South Africa on 25 November 2007. Since her safety in South Africa could not be guaranteed, she paid an agent to arrange for her to come to this country.

10. The applicant has three children aged 21, 10 and 11. The latter appears to be living with the applicant's sister, who is not engaged in any political activity. The two elder children appear to be living in Botswana.

11. The applicant's case is that were she to return to Zimbabwe she would be either killed or detained by ZANU PF or the authorities.

The argument

12. In her skeleton argument, Miss Bayati identifies three issues. She submits that the SIJ made errors of law: (1) in her assessment of the applicant's evidence in relation to Operation Murambatsvina; (2) in her approach to the documentary evidence; and (3) in her approach to, and findings about, whether or not the applicant would be able to demonstrate loyalty to the ruling regime.

13. As to the first, Miss Bayati submits (and the SIJ found) that the applicant's evidence was consistent with the objective evidence as to the timing of the operation and the locations affected by it. She submits that the SIJ was wrong to disbelieve the applicant's evidence that only part of her home was destroyed and, as a consequence, to find that the applicant's account was not credible. Miss Bayati quotes from the objective evidence to the effect that "700,000 people, nearly 6% of the total population have lost their homes, livelihoods or both as a result of the evictions, while 2.4 Million people, some 18% of the population have been either directly or indirectly affected by Operation Murambatsvina". Miss Bayati emphasises the word "or" in that citation.

14. Miss Bayati submits that the SIJ has taken one piece of evidence out of context to support her view that the applicant's account was not credible without looking at the

remainder of the evidence on the same issue. She submits that the objective evidence directly supports the applicant's account and that, as a result the SIJ has erred materially in law in rejecting the applicant's account as incredible.

15. In this context – as in others – Miss Bayati relies on the decision of the AIT in ***RN (Zimbabwe)*** [2008] UKAIT 00083 (***RN (Zimbabwe)***). I cite the summary contained in the first five paragraphs of the decision: -

> 1. Those at risk on return to Zimbabwe on account of imputed political opinion are no longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. To that extent the country guidance in ***HS*** is no longer to be followed. ***But a bare assertion that such is the case will not suffice, especially in the case of an appellant who has been found not credible in his account of experiences in Zimbabwe.***
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> 2. There is clear evidence that teachers in Zimbabwe have, once again, become targets for persecution. As many teachers have fled to avoid retribution, the fact of being a teacher or having been a teacher in the past again is capable of raising an enhanced risk, whether or not a person was a polling officer, because when encountered it will not be known what a particular teacher did or did not do in another area.
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> 3. It is the CIO, and not the undisciplined militias, that remain responsible for monitoring returns to Harare airport. In respect of those returning to the airport there is no evidence that the state authorities have abandoned any attempt to distinguish between those actively involved in support of the MDC or otherwise of adverse interest and those who simply have not demonstrated positive support for or loyalty to Zanu-PF. There is no reason to depart from the assessment made in ***HS*** of those who would be identified at the airport of being of sufficient interest to merit further interrogation and so to be at real risk of harm such as to infringe either Convention.
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> 4. Although a power sharing agreement has been signed between Mr Mugabe on behalf of Zanu-PF and Mr Tsvangirai on behalf of the MDC, the evidence presented does not demonstrate that the agreement as such has removed the real risk of serious harm we have identified for anyone now returned to Zimbabwe who is not able to demonstrate allegiance to or association with the Zimbabwean regime.
>
> 5. General country conditions and living conditions for many Zimbabwean nationals have continued to deteriorate since the summer of 2007. Some may be subjected to a complete deprivation of the basic necessities of life, for example access to food aid, shelter and safe water, the cumulative effect of which is capable of enabling a claim to succeed under article 3 of the ECHR. But that will not always be the case and each claim must be determined upon its own facts.
>
> (emphasis supplied)

16. Miss Bayati submits the applicant will be unable, on her return "to demonstrate support for or loyalty to the regime or Zanu-PF".

17. As to her second point, Miss Bayati concentrated on the MDC card which the applicant had brought with her, but which had been mislaid (probably, as the SIJ found, by the Tribunal). The SIJ thus only had a copy of the card. Miss Bayati submitted that the SIJ was wrong in law not to follow the decision of the House of Lords in ***R v Secretary of State for the Home Department ex parte Khawaja*** [1984] AC 74 (***Khawaja***) and to decide whether or not the card was genuine. Either the card was genuine or it was not. That was the question. If it was (as the SIJ should have found) then, plainly, the applicant would have grave difficulty in persuading anybody in Zimbabwe that she could demonstrate loyalty to the current regime.

18. Instead, Miss Bayati argued, the SIJ had followed the later (and far less authoritative) case of ***Tanveer Ahmed*** [2002] UKIAT 00439, and had asked herself whether the card was reliable and what weight she should give to it. By doing so, and by deciding to give the card no weight, the SIJ had committed an error of law.

19. As to her third point, Miss Bayati repeated her reliance on ***RN (Zimbabwe)*** and in particular cited paragraphs 227-229 of the decision, in which the AIT had said:-

> 227. The means by which loyalty to the regime may be demonstrated will vary depending upon who is demanding it. Production of a Zanu-PF card is likely to suffice where an individual is confronted with such a demand, for example at a road block. But even that may not protect the holder from serious harm in rural areas where the adverse interest is in the community as a whole because the area is one in which the MDC made inroads in the Zanu-PF vote at the March 2008 elections.
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> 228. People living in high density urban areas will face the same risk from marauding gangs of militias or War Veterans as do those living in the rural areas, save that the latter are possibly at greater risk if their area has been designated as a no go area by the militias.
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> 229. The evidence suggests that those living in the more affluent low density urban areas or suburbs are likely to avoid such difficulties, the relative security of their homes and their personal security arrangements being sufficient to keep out speculative visits. Many of those with the means to occupy such residences are in general likely to be associated with the regime and so not a target on the basis of doubted loyalty. Others may enjoy such a lifestyle as a result of a more circumspect relationship with the regime falling short of actual association, but which is, nevertheless, such as to give the appearance of loyalty.

Miss Bayati's written advocate's statement filed pursuant to CPR Part 52 PD 4.14A

20. Following Moses LJ's rejection of the permission application on paper, Miss Bayati properly submitted a statement pursuant to CPR Part 52 PD 4.14A. In that statement, she submitted, in particular, that even if the court rejected the first two of the points contained in the skeleton argument, the AIT had materially erred in law in its

approach to and assessment of risk with reference to the Country Guidance before it, as set out in the case of ***RN (Zimbabwe)***. In relation in particular to the third ground, Miss Bayati cited paragraphs 225 to 234 of the decision (part of which I have set out above) which she advanced with a substantial number of added emphases by way of underlining. She pointed out that Bulawayo was an MDC stronghold, and that the applicant would be returning as a failed asylum seeker. It was unlikely, she submitted, that an individual from Bulawayo, such as the applicant, would fall within a category who would be viewed as supportive of the ruling party. She relied on paragraph 231 of ***RN (Zimbabwe)*** for the proposition that the applicant would find it very difficult to demonstrate loyalty to the regime. The applicant would be at risk. The SIJ had not addressed or considered this issue when assessing risk, and that was a material error of law.

21. Paragraphs 230 and 231 of ***RN (Zimbabwe)*** read as follows:-

> 230. It remains the position, in our judgement, that a person returning to his home area from the United Kingdom as a failed asylum seeker will not generally be at risk on that account alone, although in some cases that may in fact be sufficient to give rise to a real risk. Each case will turn on its own facts and the particular circumstances of the individual are to be assessed as a whole. If such a person (and as we explain below there may be a not insignificant number) is in fact associated with the regime or is otherwise a person who would be returning to a *milieu* where loyalty to the regime is assumed, he will not be at any real risk simply because he has spent time in the United Kingdom and sought to extend his stay by making a false asylum claim.
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> 231. But, apart from in those circumstances, having made an unsuccessful asylum claim in the United Kingdom will make it very difficult for the returnee to demonstrate the loyalty to the regime and the ruling party necessary to avoid the risk of serious harm at the hands of the War Veterans or militias that are likely to be encountered either on the way to the home area or after having returned there. This is because, even if such a person is not returning to one of the areas where risk arises simply from being resident there, he will be unable to demonstrate that he voted for Zanu-PF and so he may be assumed to be a supporter of the opposition, that being sufficient to give rise to a real risk of being subjected to ill-treatment such as to infringe article 3.

Discussion

22. I propose to take Miss Bayati's points in the order in which I have set them out.

Issue 1: Did the SIJ make material errors of law in her assessment of the applicant's evidence in relation to Operation Murambatsvina?

23. The first point to note, as Miss Bayati acknowledges in her skeleton argument, is that the applicant can only succeed if she can demonstrate that it was not open to the SIJ to make the assessment which she did. Miss Bayati herself uses the appropriate shorthand when she submits that, in summary, she had to show that the SIJ's findings were not supported by the evidence and / or were ***Wednesbury*** unreasonable: - see

Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223.

24. Put in this way, and having reconsidered the matter carefully over the period during which this second judgment has been reserved, I have to say that I remain of the view that it was open to the SIJ to find as she did. The passage from the COI report is in very general terms, and it was for a matter for the SIJ to decide whether or not she believed the applicant when the latter told her that only two rooms of her home had been destroyed. The SIJ is careful to consider the points in favour of the applicant (see paragraph 61) and to balance those against other parts of the applicant's evidence, notably the inconsistent evidence which she gave about her ability to operate her business as a market trader.

25. I remind myself (as I think I must) that I was not the judge at first instance. I might have found the applicant credible: I might not. My task is quite different: see in the family context the judgment of Cumming-Bruce LJ in ***Clarke-Hunt v. Newcombe*** (1983) 4 FLR 432 at 456F-G cited with approval in ***G v G*** [1985] 1 WLR 647. I have to decide whether or not there was material upon which the SIJ could properly make her findings. If there was, that is an end of the matter, and no error of law has been committed. Having now read the SIJ's reasons several times, I remain of the view that her conclusions on this point are not ***Wednesbury*** unreasonable: that they are not obviously inconsistent with the COI report and that there was material upon which the SIJ could properly disbelieve the applicant. For these reasons, the first point fails.

Issue 2: Did the SIJ misdirect herself in law in her approach to the documentary evidence submitted by the applicant?

26. The critical issue here is the MDC card. Once again, the SIJ is astute to identify the factors which support the applicant's case. She takes responsibility on behalf of the Tribunal for having lost the original card.

27. The critical point of law, however, relates to the relationship between ***Khawaja*** and ***Tanveer Ahmed***. This was not a point overlooked by the SIJ. In paragraph 75 of her determination she says:-

> Ms Phelan (counsel then appearing for the applicant) suggested that the Tribunal in ***Tanveer Ahmed*** was not referred to the judgment in ***Khawaja*** and appeared to suggest that I should not follow the guidance in ***Tanveer Ahmed*** (to the effect that one should focus on the question whether the contents of documents are reliable as opposed to whether they are genuine), and that I should make a finding that the MDC case is either genuine or fraudulent. I reject this. ***Tanveer Ahmed*** was decided in 2002. It is inconceivable that the panel in ***Tanveer Ahmed***, chaired by Collins J, the then President of the (IAT) was unaware of the judgment in ***Khawaja***, delivered in 1983. There is nothing in the reasoning of the Tribunal in ***Tanveer Ahmed*** which is inconsistent with the judgment in ***Khawaja***. Furthermore, ***Tanveer Ahmed*** is a starred decision, and therefore binding on me. Accordingly, I decline to make any finding as to whether the MDC card the applicant submitted is a genuine card. I focus my attention instead on the question whether the contents of the document are reliable and I decide this point on the evidence as a whole.

28. Does this paragraph contain an error of law? The summary of principles set out in paragraph 38 of ***Tanveer Ahmed*** is as follows:-

> 1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
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> 2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
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> 3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2.

29. This summary of principles follows an extensive citation of authority. As the SIJ points out, this is a starred decision "intended to give guidance on the questions raised" – see paragraph 3. It is not difficult to see why ***Khawaja*** was not cited, since the two principal issues in that case comprised: (1) what was the proper definition of "illegal immigrant" under the 1971 Act?; and (2) what was the proper function of the court when dealing with applications for judicial review? In relation to the latter, the House of Lords held that in order to make a decision which affected the liberty of the subject the court had to be satisfied on the civil standard of proof to a high degree of probability that the facts upon which the decision was based did in fact exist before the decision was taken. Thus a statement by an immigration officer that he had reasonable grounds to conclude that X was an illegal immigrant did not preclude the court from examining the evidence relied upon in support of the statement.

30. With all respect to Miss Bayati, this seems some way from the practical guidance in ***Tanveer Ahmed*** which, in my judgment, the SIJ was entitled to follow. The consequence, therefore, in my judgment is that on the facts of this case it was not necessary for the Secretary of State to prove to a high degree that the MDC card was a forgery. The SIJ was entitled to look at its content, and to decide if its content was reliable.

31. Once again, it seems to me – even after further reflection - that when viewed in this light it was properly open to the SIJ to make the findings which she did. In my judgment, therefore, the SIJ made no error of law on the second point.

The applicant's Issue 3: did the SIJ err in law in her approach to and findings on whether the applicant would be able to demonstrate loyalty to the ruling regime?

32. Although Miss Bayati argued all three points when she re-appeared before me on 10 February 2010, this, I think, is the point upon which she relies most strongly – not least, of course, because she argued that it can exist on its own and independent of her first two points. In order to reconsider it, therefore, I have taken the opportunity to re-read the country guidance determination of the AIT in ***RN (Zimbabwe)*** [2008] UKAIT 00083, as well as the reasons for her decision given by the SIJ.

33. In this context it is, I think, important to remember part of what was said by the AIT in ***RN (Zimbabwe)*** cited in paragraph 12 above. For ease of reference, I will repeat what I have in mind:-

> ….. But a bare assertion that such is the case will not suffice, especially in the case of an appellant who has been found not credible in his account of experiences in Zimbabwe.

34. It is at this point that the SIJ's findings of fact take central stage. If the applicant is not believed, and if the SIJ was entitled to find, as she did, that it was "not reasonably likely that (the applicant) was an MDC member and / or activist and / or supporter, or that she suffered in any way in Operation Murambatsvina, or that she took part in any demonstrations or marches, or that she was ever arrested or detained" – in short, if the SIJ was entitled to find, as she did, that the applicant's entire account was a fabrication, then it must follow that the SIJ was entitled to find that the applicant would not be of interest to the Zimbabwean authorities; that there was no real risk that the applicant would be unable to demonstrate loyalty to the ruling regime; and that she was not at real risk of persecution or serious harm of treatment in breach of Article 3 on account of not being able to demonstrate support for the ruling regime.

35. In my judgment there was material upon which the SIJ could properly make her findings, and it follows that the third point also fails.

36. Paragraphs 32 to 35 above set out my thinking on the third point as at January 2010. Since that time, I have re-read the papers, but remain of the same view. In deference, however, to Miss Bayati's sustained argument, I think I should expand a little on my reasoning.

37. I note that under the heading "Assessment", which begins at paragraph 54 of the SIJ's reasons, the latter makes it clear that she has considered the entirety of the documentation, and the country guidance, with which she expresses herself as being "very familiar". No complaint is made about her analysis of the burden and standard of proof. Having identified the matters in paragraphs 59 to 61 which support the applicant's claim, the SIJ in the following paragraphs deals with a number of inconsistencies in the applicant's account. In my judgment, these are all properly matters which the SIJ was entitled to weigh, and I find myself unable to criticise the individual findings which the SIJ makes.

38. Having concluded (as she was entitled to conclude) that, in short, she rejected the applicant's entire account (paragraph 82) the SIJ turned to the risks posed to the applicant as a failed asylum seeker. Here, as it seems to me, she was entitled to apply her findings of fact to the reasoning in ***RN (Zimbabwe).*** As importantly, however, for present purposes, she did consider the question of the applicant residing in Bulawayo which, as was clear from the evidence, was an MDC stronghold.

39. In paragraph 86 of her reasons, the SIJ comments:-

> The difficulty in this case is that, notwithstanding the facts that the (applicant) and her advisers were plainly fully aware of the guidance in ***RN (Zimbabwe)***, she was not asked whether she would be able to demonstrate

> loyalty to the ruling regime. As the Tribunal said, the burden of proof is upon the (applicant). Since I do not have any direct evidence from the (applicant) as to whether she would be able to demonstrate loyalty to the regime (with the result that I cannot assess whether her evidence about this is truthful or not) I have to reach a finding by assessing the other evidence before me. That other evidence includes the fact that she had not given a credible account of any difficulties in Bulawayo.

40. The SIJ then goes on to cite paragraphs 227 to 229 of ***RN (Zimbabwe)*** before repeating the point that she does not know where the applicant' sister lives, and concluding in paragraph 88:-

> (The applicant's) descriptions of the problems her sister and mother have experienced did not include anything to suggest that they had had problems from the "war veterans", "youth militia" or "green bombers" and Zanu-PF supporters. I take into account the fact that (the applicant) has not given any credible evidence that she suffered any difficulties during Operation Murambatsvina.

41. In my judgment, the matters I have identified are sufficient to meet Miss Bayati's criticism that the SIJ had ignored the fact that the applicant would be returning to a part of the country where loyalty to the regime would be assumed to be the fact and that, as a failed asylum seeker, she would ***per se*** be at risk.

Conclusion

42. Although the case was fully and carefully argued, I remain of the view that an appeal against the SIJ's decision would not stand any reasonable prospect of success, and that there is no other compelling reason to entertain an appeal. With renewed apologies for my delay, the application will be dismissed.