

Neutral Citation Number: [2010] EWCA Civ 576
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/03458/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 10th May 2010

Before:

LORD JUSTICE WARD
LORD JUSTICE RICHARDS
and
LORD JUSTICE JACKSON

Between:

LN (ZIMBABWE)

Appellant

- and -

**SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

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Mr John Nicholson (instructed by Messrs Parker Rhodes Hickmotts) appeared on behalf of
the **Appellant**.

Ms Catherine McGahey (instructed by Treasury Solicitors) appeared on behalf of the
Respondent.

Judgment

Lord Justice Jackson:

1. This judgment is in five parts, namely Part 1 introduction, Part 2 the facts, Part 3 the appeal to the Court of Appeal, Part 4 the second and third grounds of appeal, part 5 conclusion.

Part 1. Introduction.

2. This is an appeal by an asylum seeker from Zimbabwe against a decision of the Asylum and Immigration Tribunal to the effect that her account of events was untrue and, accordingly, she does not have entitlement to asylum in the United Kingdom. In the documents before us the Home Office's asylum screening unit in Liverpool is referred to as "ASU". I shall use the same abbreviation in the course of this judgment. I shall in this judgment refer to the Asylum and Immigration Tribunal as "AIT".
3. After that very brief introductory section I now turn to the facts.

Part 2. The facts

4. The appellant is a citizen of Zimbabwe, born on 31 October 1979. Therefore the appellant is now aged 31. The appellant arrived in the United Kingdom on 6 May 2007 using a passport with a false name but showing her own photograph. This passport had been procured for the appellant by an agent and it included a visit visa to the United Kingdom. Nearly six months later, on 30 October 2007, the appellant made a claim for asylum.
5. The appellant made her claim for asylum at the ASU in Liverpool. Mr Dominic Minghella, an immigration officer at the ASU in Liverpool, created a document to record the appellant's initial claim for asylum. This document is entitled "ASU call note" and it was created, we can see from the computer entry, at 11.55 am on 30 October 2007. It contains the following paragraph:

"Basis of claim – [Applicant] states that her sister was married and lived in Ireland with her husband. [Applicant's] sister returned to Zimbabwe to visit on 16/03/07, and a week after she returned a group of four unknown men (whom [the applicant] described as 'gangsters') came to the house, and beat and raped [the applicant] & her sister. [Applicant] states that these men gave no indication as to who they were, or why they would do this. [Applicant's] sister could not speak after the attack, and died in hospital a few weeks later. [Applicant] claims that she reported this incident to the police, but adds that they did not do anything. [Applicant] sold sister's car and house, and used this money to come to the UK. [Applicant] states that she had no other problems in Zimbabwe beside this, and adds that this was the only reason that she came to the UK."

6. Mr Minghella signed the ASU call note as the officer who had created it. The appellant also signed the document. Later that day the appellant underwent a screening interview. It was made clear at the start of that interview that the appellant

would not be asked to give details of her asylum claim. Most of the questions asked related to the appellant's identity, background, travel, route to the UK and similar matters. However question 9.5 did ask "What was your reason for coming to the UK?" and the appellant's answer was:

"I was in danger from a gangster who targeted me and my sister because my sister had been living in Ireland for two years. Before she left, she was an MDC member."

7. On 8 November 2007 the applicant made a written statement in support of her asylum claim. She asserted that whilst in Zimbabwe she lived in Mutare. The Zanu-PF party forced the appellant to attend their meetings. The appellant's elder sister, Ester, was a member of the MDC party and used to attend MDC meetings until she got married and went to live in Ireland. In March 2007 Ester returned to Zimbabwe to visit the appellant and other family members. During April 2007 members of Zanu-PF twice came to the house where the appellant and Ester were living. On the first occasion the Zanu-PF members slapped and kicked the appellant and Ester but caused no serious injuries. On the second occasion (the night of 18 April) they attacked both women violently and raped the appellant. The wounds to Ester were so bad that she died soon afterwards in hospital as a result of loss of blood. The family buried Ester on 20 April 2007. After that, with help from her family the appellant fled to England via South Africa. That, in brief summary, is the account which the appellant set out in her statement dated 8 November 2007.
8. On 7 February 2008 the appellant underwent a second interview. This was the substantive interview in which she was questioned about the details of her asylum claim. The answers which the appellant gave during this interview included the following:

"30. To be clear then did she [the sister] ever go to a Zanu meeting?

Answer: No, she never did.

....

36: What date did your sister go to Ireland?

Answer: On 16 March 2005.

....

41: What date did your sister first return to Zimbabwe on holiday?

Answer: 18 March 2007.

....

44: What date did the Zanu PF first come to your house after your sister returned?

Answer: 2 April.

...

48: What date did the Zanu PF come a second time?

Answer: 18 April 2007.

...

54: Can you tell me what was written on your sister's death certificate?

Answer: It was written 'heart failure'. They

meant that it was caused by severe loss of blood.

...

62: After your sister was killed, when was the funeral?

Answer: The funeral was on 18 April.

63: The funeral took place on the same day your sister died?

Answer: Yes."

For present purposes I need not read out any other parts of that interview.

9. Five days after the interview, on 12 February 2008, the appellant submitted a second statement to the Home Office correcting certain of the answers which she had given in that interview. The appellant said that she had been forced to attend Zanu-PF meetings from 1999 to 2007. That is a period of eight years. The appellant also said that her answers to questions 62 and 63 were not quite correct. The appellant corrected her answers, stating that Ester's funeral started on the day that she died, but the burial was on 20 April 2007.
10. The Secretary of State duly considered the appellant's claim to asylum. On 16 April he sent his decision letter rejecting the appellant's claim to asylum as well as her claim to remain in the United Kingdom on human rights grounds. The reason for the Secretary of State's decision was that in his view there were many inconsistencies and discrepancies in the appellant's account of events. Accordingly the Secretary of State simply did not believe that account.
11. The appellant appealed against the Secretary of State's decision to the AIT. The hearing of her appeal was on 16 June 2008 before Immigration Judge Thorndike. The Immigration Judge rejected the appellant's appeal and confirmed the decision of the Secretary of State. For present purposes it is not necessary for me to go through that particular decision. The appellant applied for reconsideration. That application was successful. Senior Immigration Judge Waumsley on 15 July 2008 wrote as follows:

"I am satisfied that it is arguable that in the light of the Immigration Judge's acceptance of her evidence that she and her sister had been subjected to a 'particularly horrific attack' on the night of 18 April 2007, and that her sister had sadly died subsequently from the injuries she sustained on that occasion, it was not properly open to the Immigration Judge to determine her appeal, as he implicitly did on the basis that the only risk to the appellant on return to Zimbabwe which needed to be considered was risk from the Zimbabwean authorities themselves, as opposed to local members and supporters of Zanu-PF in the appellant's former home area, to whom she was known. It is also arguable that the Immigration Judges' consideration of the possibility of the appellant relocating in safety to another part of Zimbabwe was unduly simplistic in the light of the deteriorating general security and humanitarian situation in the country as a whole."

12. The reconsideration hearing duly took place on 17 November 2008 before Immigration Judge Kelly. At the start of that hearing both parties applied to put in fresh evidence. The Home Office Presenting Officer, Mr Shillitto, applied to put in evidence the ASU call note which I referred to earlier in this judgment, but which had not been put in evidence before Immigration Judge Thorndike or indeed the Senior Immigration Judge. That document was referred to, for better or for worse, as "the pre-claim statement".
13. Ms Khan, counsel for the appellant, applied to put in as fresh evidence a bundle of documents including the death certificate relating to Ester and also a medical report confirming the diagnosis of the appellant as HIV-positive, which was said to corroborate the assertion that the appellant had been raped on the occasion of the attack on 18 April 2007. There was some debate about whether fresh evidence should be admitted, how the Ladd v Marshall test applied and so forth. The upshot of that debate was that the Immigration Judge allowed both parties to adduce the fresh evidence upon which they wished to rely.
14. After that preliminary matter had been dealt with, the Immigration Judge proceeded to hear the oral evidence of the appellant and she was duly cross-examined on that evidence. The Immigration Judge then heard submissions from the advocates on both sides and reserved his decision, which was delivered in writing on 6 December 2008. By that decision he dismissed the appellant's appeal both in relation to asylum and in relation to her human rights claim.
15. The reasoning of the Immigration Judge on this occasion is to be gathered from paragraphs 30 to 47 of his decision. In essence the Immigration Judge's reasoning was as follows. He noted that the appellant had not claimed asylum in South Africa, the first safe country through which she passed and he noted that the appellant had delayed making an application for asylum in this country. However, he did not find those factors to be decisive. The Immigration Judge then turned to the ASU call note. He noted the conflicting arguments by the advocates about that call note. Mr Shillitto for the Home Office placed considerable weight upon that document and its inconsistency with the appellant's later statements and answers in interview. Ms Khan for the appellant submitted that no weight should be placed upon it: it was created at a time when the appellant was not being required to give the details of her asylum claim; she was not represented or given any proper warning; and in the circumstances it should be disregarded.
16. The Immigration Judge rejected the submissions of Ms Khan and he concluded that he should take the document into account. He then noted its inconsistency with the appellant's subsequent statements. He found the answers which were given by the appellant when she was cross-examined upon that document to be unsatisfactory. It was the content of that document and the appellant's responses when cross-examined about it which caused the Immigration Judge to reject the appellant's evidence and substantially to disbelieve what she said on all matters of significance to her claim. The Immigration Judge then turned to the death certificate relating to Ester (the fresh evidence introduced by the appellant). The Immigration Judge noted that this death certificate appeared to be based upon information provided by the appellant's brother some time after the event and he concluded that it was a document which carried little weight. When reverting to that death certificate a paragraph later he said:

"It may be that Ester died when the appellant was in Zimbabwe, but the appellant has not substantiated her claim as to the date or cause of her death."

17. Thus the Immigration Judge reached the conclusion that the appellant's evidence was substantially untrue and the death certificate relating to Ester did not substantially affect the position. On that basis he rejected the claim to asylum.
18. Finally, the Immigration Judge added a postscript to the effect that after the hearing on 17 November 2008 the decision of the AIT in RN (Returnees) Zimbabwe CG [2008] UKAIT 00083 had been drawn to his attention. The Immigration Judge reviewed his findings in the light of RN and he concluded that it would be safe for the appellant to return to Zimbabwe. She would be able to demonstrate her loyalty to Zanu-PF by reference to the fact that she had been attending Zanu-PF meetings for an eight-year period prior to her departure from Zimbabwe.
19. Such was the decision of the AIT. The appellant was aggrieved by Immigration Judge Kelly's decision. Accordingly she appeals to the Court of Appeal.

Part 3. The appeal to the Court of Appeal

20. By an appellant's notice dated 18 June 2009 the appellant appealed against Immigration Judge Kelly's decision on two grounds. The first ground was that the tribunal erred in law in allowing the respondent to rely on further evidence, namely the ASU call note. The second ground was that the tribunal erred in law in its application of the case of RN. Permission to appeal was refused on the papers but was subsequently granted at an oral hearing. At that oral hearing Ward LJ gave the appellant permission to appeal on both the pleaded grounds. He also gave leave to amend and permission to appeal on a third ground. That ground was that Immigration Judge Kelly had failed to attach proper weight to the death certificate produced by the appellant at the hearing on 17 November 2008.
21. The appellant's appeal has come on for hearing today. Mr John Nicholson is counsel for the appellant and Ms Catherine McGahey is counsel for the respondent, the Secretary of State. Mr Nicholson for the appellant very wisely did not press the first ground of appeal. I therefore say no more about the first ground of appeal save that the Immigration Judge was entitled to conclude that the fresh evidence tendered by both parties should be admitted. In doing so, however, the Immigration Judge needed to bear in mind that the appellant had not seen the ASU call note before the morning of the hearing and that the author of that note, Mr Minghella, was not being called as a witness.
22. Having made those observations, I say no more about the first ground of appeal but instead I shall pass directly to the second and third grounds of appeal and deal with them together.

Part 4. The second and third grounds of appeal

23. Mr Nicholson for the appellant submits that, having regard to the death certificate produced by the appellant and the course which events took at the hearing, the Immigration Judge erred in law in rejecting the entire factual basis of the claim. The argument, as it has evolved, has not run in perfect symmetry with the pleaded grounds of appeal, but no point is taken on that aspect by counsel for the respondent. So far as

the death certificate is concerned, counsel has taken us through that document, which is far from legible in the photocopies with which we have been favoured. The certificate clearly evidences that the appellant's sister Ester died on 18 April 2007. The cause of death is recorded as "internal bleeding". The death certificate is consistent with the appellant's account as related in her statement and in her interview. I do not think that the Immigration Judge was right effectively to dismiss the document as being of little weight. Undoubtedly the death was reported by the brother, but it does appear that other documentation was also provided to the authorities in Zimbabwe. The date of death shown on this official document coincides precisely with the date of death asserted by the appellant. Furthermore the cause of death shown on the certificate is consistent with the cause of death asserted by the appellant in her witness statement and in her answers during the interview.

24. Therefore I do not think that the Immigration Judge was entitled to come to the conclusion that the death certificate carried little if any weight, nor do I think that the Immigration Judge was entitled to say, really without more ado :

"It may be that Ester died when the appellant was in Zimbabwe, but the appellant has not substantiated her claim as to the date or cause of death."

If the Immigration Judge was going to come to that conclusion it seems to me that he would have needed to put forward more substantial reasons for rejecting the death certificate which had been produced to him.

25. The Immigration Judge effectively determined the issue of credibility by reference to the call note and the appellant's cross-examination in respect of that document. The Immigration Judge discusses the call note at paragraphs 33 to 40 of his decision. The Immigration Judge attaches particular significance to the fact that the call note has been signed by the appellant and that it contains the following declaration :

"I have not applied for Asylum in the United Kingdom before. I understand that if I give information that is incorrect or incomplete, action may be taken against me. I declare the information I have given is correct and complete."

26. In relation to that declaration the Immigration Judge records the appellant's evidence to the following effect:

"The appellant claimed that the statement had not been read back to her before she signed it; nor did she read it herself"

27. The Immigration Judge did not reject that evidence. Instead what he said was that she was made aware of its contents. It seems to me that in those circumstances it would not be appropriate to treat this document as equating to a statement of the appellant, particularly given the circumstances in which the ASU call note was prepared.

28. I do not consider that the ASU call note is capable of bearing the immense weight which the Immigration Judge placed upon it. First, as Mr Nicholson has submitted today, although the Immigration Judge described it as "a pre-claim statement", it is not the appellant's statement at all. It is Mr Minghella's summary of his conversation

with the appellant on an occasion when she was not expected to be giving details of her asylum claim at all. Furthermore it is a document upon which the Secretary of State placed no reliance in his refusal letter. It is also significant that the appellant was confronted with this document for the first time on the day of the hearing and she was cross-examined about it. As I have mentioned just now, the appellant denied that she had read it or had it read back to her. Furthermore the appellant denied the accuracy of the document in part. The document records her as stating that her sister died three weeks after the relevant attack. The appellant asserts that she did not say that to the immigration officer.

29. The ASU call note contains an oddity, which has perplexed both my Lords and both counsel and myself. That oddity is this. The ASU call note begins with the sentence which I have quoted:

"[Appellant] states that her sister was married, and lived in Ireland with her husband. [Appellant's] sister returned to Zimbabwe to visit on 16/03/2007 ..."

30. That statement in the call note is entirely consistent with the appellant's version of events in her witness statement and in the interviews. However the hearing before the Immigration Judge proceeded on the basis that the ASU call note did not have the date 16 March 2007 for Ester's arrival in Zimbabwe but 16 April 2007. It appears that the appellant was cross-examined on the basis that she had said to Mr Minghella that Ester returned to Zimbabwe on 16 April 2007. She accepted that she had put that incorrect date in what she said to the immigration officer. She apparently accepted that that was a mistake and that when she said 16 April she meant to say 16 March.
31. During the course of the hearing all of us in this court room were wondering whether the version of the ASU call note before this court differed from the original version and the version which would have been before the Immigration Judge. Ms McGahey, counsel for the Secretary of State, kindly had enquiries made and this afternoon at 2.00 p.m. it was confirmed that the document which we have is the same as the document which was originally prepared and the document which was adduced as fresh evidence before the tribunal. In those circumstances part of the appellant's cross-examination on this document proceeded on a false assumption and part of the Immigration Judge's reasoning about this document also proceeded on a false assumption, namely that the entry "16 March 2007" read "16 April 2007". I am bound to say that this is a very unsatisfactory state of affairs, when one bears in mind the critical role which the ASU call note played in the reasoning of the Immigration Judge.
32. The Immigration Judge found the appellant's answers in cross-examination relating to that document to be unsatisfactory. It is perhaps unsurprising that the appellant struggled when being cross-examined about that document. It was not a document which she had ever seen before. It was presented to her for the first time at the hearing on 17 November 2008. It was a document prepared at a time when she was not meant to be giving details of her asylum claim. Part of the cross-examination of the appellant proceeded on the basis that the document said something other than what it did say.

33. Whether the appellant was telling the truth to the Immigration Judge about her experiences in Zimbabwe or not I simply do not know. However, in my view the reasoning process by which the Immigration Judge arrived at the conclusion that the appellant was lying is flawed, essentially for two reasons: 1) the Immigration Judge attached to the ASU call note a degree of significance which could not possibly be justified; 2) the Immigration Judge was wrong to dismiss the death certificate as a document which did not support the appellant's case as to the date and cause of Ester's death. In my view the Immigration Judge's decision cannot stand.

Part 5. Conclusion

34. For the reasons set out in part 4 above, in my view the appellant's appeal must succeed. However, this court has no basis for saying that the appellant is entitled to asylum or to remain in the United Kingdom on human rights grounds. Accordingly in my view this matter should be remitted to the Upper Tribunal (which has now replaced the AIT) for redetermination.

Lord Justice Richards:

35. I agree. I think the remittal will now be to the Upper Tribunal.

Lord Justice Ward:

36. I also agree. So the appeal is allowed and the matter is remitted to the Upper Tribunal to be heard afresh by a different Immigration Judge.

Order: Appeal allowed