Case No: C5/2007/0936

Neutral Citation Number: [2007] EWCA Civ 1422
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AIT No: HX/07105/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 31st October 2007

Before:

THE PRESIDENT OF THE QUEEN'S BENCH
LORD JUSTICE CARNWATH
and
LORD JUSTICE TOULSON

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Between:

AB (Democratic Republic of Congo)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr R Husain (instructed by Matrix Chambers) appeared on behalf of the **Appellant**.

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

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Judgment

(As Approved by the Court)

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Lord Justice Toulson:

1. AB is a citizen of the Democratic Republic of Congo. He was born on 9 July 1979. He entered the United Kingdom illegally on 4 November 2002 and claimed asylum 3 days later. His application was refused for reasons set out in a letter from the respondent dated 5 January 2003. He appealed against that refusal.

2. Most unfortunately, there have been four hearings of his appeal by different adjudicators or immigration judges. On each of the first three occasions the decision was set aside on appeal and a rehearing ordered.

3. This is an appeal from the decision reached on the fourth hearing by a senior immigration judge and an immigration judge. The tribunal promulgated its decision on 30 November 2006. It dismissed his asylum claim and a claim made by him under article 8 of the European Convention. There is no appeal in respect of the asylum claim, but he appeals against the dismissal of his article 8 claim.

4. The genesis of that claim is that the appellant is now married to a woman whom he met in December 2003. She also comes from the DRC. In May 2005 they entered into a customary marriage followed by a church service. In October 2005 she gave birth prematurely to a son, who sadly died when he was 16 days old. The psychological effect on her was severe. A report from her general practitioner dated 29 December 2005 said that she was suffering "a profound bereavement reaction presenting as a depression which rendered her slow, weak, erratic and unmotivated to do anything".

5. A copy of his report was sent to the respondent in support of a request for a certificate of approval for the appellant to marry her under Section 90(3)(b) of the Asylum and Immigration (Treatment of Claimants) Act 2004. This request was granted on compassionate grounds, and they went through a civil ceremony of marriage on 9 February 2006.

6. At about the same time she became pregnant again and she was seven months pregnant at the time of the hearing before the Tribunal. Although there was some improvement in her mental health, a psychiatric report dated 25 May 2006 concluded that she was suffering from a severe depressive episode with psychotic symptoms. The psychiatrist also expressed the opinion that in her present physical and emotional state a return to the DRC would be highly detrimental for her.

7. The appellant's wife's own position was that she came to the UK in August 2000 at the age of 16 and went to live with her older sister, who had come to the UK in January 1996. She was granted refugee status as a dependant of her sister.

8. The basis of the appellant's article 8 claim was that in all the circumstances in his enforced removal to the DRC would involve an interference with his family life to a degree which would contravene the Article.

9. The tribunal recognised that there was family life between the appellant and his wife. As to her refugee status, the tribunal noted that they had no direct evidence as to the basis on which it was granted, but the psychiatric report referred to her obtaining refugee status as a dependant on her sister (although it also contained reference to her having suffered undefined abuse in the DRC).

10. They concluded that they were not satisfied that her refugee status was an insurmountable obstacle to her return.

11. They noted that it was not suggested that her health was such an obstacle, and that she could receive treatment in the DRC. Accordingly, they found that the appellant's return to the DRC would not be an interference with his family life.

12. The tribunal also found that if the appellant's removal would interfere with his family life, there were no truly exceptional circumstances such that his removal would contravene article 8, applying the law as it was understood prior to the House of Lords' decision in Huang v Secretary of State for the Home Department [2007] UKHL 11 [2007] 2 AC 167.

13. The first ground of appeal is that in the absence of knowledge as to the basis of the appellant's wife's refugee status, the tribunal was wrong to conclude that she could safely return there. The second ground of appeal is that the tribunal was wrong to apply the "truly exceptional circumstances" test, if article 8 was engaged. The third ground of appeal is that, in relation to the question whether article 8 was engaged, the tribunal paid insufficient attention to the grant of the certificate of approval for her marriage and marginalised the importance of her state of health.

14. The argument has concentrated on the first ground. Sedley LJ granted permission to appeal on all grounds but he particularly referred to the ground regarding the appellant's wife's refugee status. In granting leave to appeal, he said:

> "This is not the first case to reach this court in which the Home Office has succeeded by allowing doubt to be cast on the third party's refugee status when it alone holds the record showing why that person was granted asylum… It is evident…that this mattered in the present case. But it is also cogently arguable that the AIT made an impermissible leap from ignorance of the grounds of the grant of asylum to the wife to a conclusion that it was reasonable to expect her to return to the Congo with A. If anything followed

> from the want of information it was arguably the contrary."

15. For the reasons mentioned by Sedley LJ, it is a question of some practical importance how a tribunal should proceed when it knows that a relevant third party has been accorded refugee status, but does not know the detailed basis.

16. It was submitted by Mr Husain on behalf of the appellant that the fact that the third party had been granted refugee status should have been accepted by the tribunal as establishing at least a prima facie case that there would be an insurmountable obstacle to that party returning to his or her country of origin. Mr Johnson on behalf of the respondent submitted that the burden was on the appellant to establish the existence of such an insurmountable burden. In some circumstances an appellant might be able to do so by pointing to a recent grant of refugee status to a third party, but he submitted that this was not so in this case. If, as here, the third party had been granted refugee status merely as a dependant, that could not establish even a prima facie case that there would be an insurmountable obstacle to the third party returning to his or her country of origin. He therefore submitted that the tribunal was not only entitled, but right, to disregard her refugee status as a basis for finding that there was an insurmountable obstacle to her returning to the DRC with the appellant.

17. Mr Johnson also applied under Ladd v Marshall [1954] 1 WLR 1489 to admit evidence of the immigration appeal tribunal's determination in the case in which the appellant's wife and her sister were granted refugee status. The purpose for which he wished this evidence to be admitted was to confirm that the appellant's wife was indeed granted refugee status as a dependant of her sister, as the tribunal had concluded in the present case.

18. We have looked at the document de bene esse. I do not consider that it would have materially assisted the respondent. It is true that it confirms that refugee status was given to the appellant's wife as a dependant of her sister, but it also explains the basis on which refugee status was granted to her sister. The tribunal said:

> "The DRC is in a very unsettled condition and the evidence of the reception of returned asylum seekers, particularly from the UK is such that her return does indeed expose the appellant to the serious risk of imprisonment and with it rape. The conditions in prison are clearly inhuman and degrading anyway. This would be a breach therefore of Article 3."

19. At the time of that determination the appellant's wife was aged 18. The logic of that paragraph would have applied equally to her, and Mr Johnson does not suggest otherwise. The point which this illustrates is that where refugee status is granted to an applicant and dependants, the grounds might or might not apply to the dependants in their own right. In the present case, the determination would have been helpful to the appellant, because it would have

shown that her sister had been granted refugee status on grounds which on their face would appear to have been logically applicable to herself apart from being a dependant of her sister. It would not, of course, have established that conditions in the DRC have since remained the same.

20. This led to wider discussion. We were referred by Mr Johnson to a decision of the Immigration Appeal Tribunal presided over by the president (Ouseley J) in SS v SSHD [2004] UKIAT 00126. In that case the appellant and her husband were citizens of Sri Lanka. The husband had been granted indefinite leave to remain several years earlier in different political circumstances from those which obtained at the time when his wife's claim was being decided. The tribunal was aware from its own knowledge that there had been a significant change in the situation since the appellant's husband had been granted indefinite leave to remain, and it rejected the argument that his refugee status was nevertheless to be taken as raising an insurmountable obstacle to his return.

21. It is for an appellant to establish a claim under article 8. A third party's refugee status may be relevant to such a claim. Where an appellant asserts that there would be an insurmountable burden to that person returning to his or her country of origin, and relies on his or her established refugee status to support that proposition, in my judgment the starting point for a tribunal should be to take it that the person concerned could not reasonably be expected to return to his or her country of origin unless it has some basis to suppose otherwise. A reason to suppose otherwise may come from the tribunal's own knowledge (as in SS v SSHD) or from the material placed before the tribunal by the respondent. This is not to place a legal burden on the respondent. It is merely to recognise that, in the absence of any reason to suppose otherwise, it is natural to conclude from a third party's grant of refugee status that it would be unreasonable to expect that person to return to his or her country of origin. I do not consider that a different approach should apply merely because refugee status was granted to the third party as a dependant of another. As this case demonstrates, that may or may not be material but only the details of the case will show.

22. There are reasons of fairness and practicality for taking this approach. As Sedley LJ observed in granting leave to appeal, the Home Office will hold the record showing the details why a person was granted refugee status. If there has been a change in conditions in the relevant country in the interim, that is a matter which either the tribunal will know about or the respondent will be able to raise. I do not see justice or practical benefit in adopting an approach which would make it incumbent on an appellant in every case to re-prove the third party's original entitlement to refugee status, or to prove its basis or to adduce positive evidence that there had been no subsequent material change (particularly since in many cases the respondent might not seek to suggest otherwise).

23. It follows that in my judgment the tribunal was wrong to adopt the approach that it did without further investigation. I have some sympathy for the tribunal, and for the respondent, in that the point about the appellant's wife having

refugee status appears to have been raised for the first time at the hearing of the latest of a series of appeals. However, his article 8 claim had been foreshadowed in some detail by a witness statement and the point about her refugee status could not properly be ignored. Once it was raised, it had to be explored. The case was further complicated by the appellant's wife's state of health which had caused the respondent to approve her marriage. Looking at the material regarding the appellant's wife's refugee status and her state of health, I have come to the conclusion that article 8 was potentially engaged. The respondent has properly accepted that if the court came to that conclusion there would have to be a re-hearing in accordance with the law as it has been laid down by the House of Lords in Huang.

24. I would therefore allow this appeal and direct a fresh hearing of the appellant's article 8 claim.

Lord Justice Carnwath :

25. I agree. I am also concerned at the need for yet another consideration of this long running case. I also have sympathy with the tribunal, which was faced with a new point without the necessary information in support. However, in the light of material now before us, and in the very unusual circumstances of this case, I agree that fairness demands that the article 8 claim be reconsidered on the basis of the full facts.

The President of the Queen's Bench:

26. I agree with both judgments.

Order: Appeal allowed.