Neutral Citation Number: [2007] EWCA Civ 1064

Case No: C5/2007/0258/AITRF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Asylum and Immigration Tribunal
Immigration Judge Mrs C M Phillips
HX/19216/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2007

Before:

LORD JUSTICE MUMMERY
MR JUSTICE DAVID RICHARDS
and
SIR PAUL KENNEDY

- -

Between:

MN (RWANDA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Eric Fripp (instructed by **Messrs Lawrence Lupin**) for the **Appellant**
Ms Eleanor Grey (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: Wednesday 10th October 2007

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Judgment

Sir Paul Kennedy:

1. This is an appeal from a decision of the Asylum and Immigration Tribunal promulgated on 20th December 2006, permission to appeal having been given in this court by Sir Henry Brooke.

History

2. The appellant is a native of Rwanda and a Tutsi. She was born on 10th March 1978, so she is now 29 years of age. For the first 16 years of her life she lived with her parents and her brothers in Kigali, the capital of Rwanda, where her father was an accountant.

3. Then in April 1994 the Hutus in power began the period of genocide of Tutsis which lasted for about 100 days and received international condemnation. On 1st May 1994 Hutu militia men arrived at the home of the appellant where she, then aged 16, was with her mother, the male members of the family being in hiding. The appellant and her mother had not joined them because the appellant was unwell. Both women were raped. A week later the same militia men returned. On that occasion one of the appellant's brothers was present and he tried to protect the women. He was attacked and executed before their eyes. Again the women were raped, and the appellant's parents were killed. The only survivors, it seems, were three of her brothers. She was taken off and held by the militia for two months, and during that period she was constantly raped. Prominent amongst her abusers was Major Ninja. Then, when her captors heard heavy artillery, they made off and she escaped to an orphanage where she found her two younger brothers. She stayed there a few weeks, then the violence ended.

4. At that stage she was reunited with her brother Gilbert Kayumba. He found accommodation for her and her two younger brothers. She finished schooling, obtained qualifications, and for at least two years, from 1998 to 2000 worked as an accountant, having previously received some treatment, including treatment in Kenya, for loss of speech.

5. By 1998 Hutu militia men, who had fled when the RPF obtained power, were drifting back to Rwanda. Many, including her family's attackers, were reported and imprisoned. Then, in 2000, a number were released. She claims–

   (a) She was arrested because she was involved with an organisation trying to get justice for victims of genocide.

   (b) Major Ninja was apparently rehabilitated and was given a post with government forces. She learnt of that from the television, and he also approached her apologising and wanting to marry her or live with her, and –

   (c) She was scared. She gave up work and consulted a pastor, who allowed her to stay for a time and then helped her to leave.

Arrival In UK: Refusal of Asylum and First Appeal

6. On 4th July 2001 the appellant and her brother Gilbert arrived in the United Kingdom by air from Kigali. She was given a 24 hour transit visa, but overstayed, and on 13th September 2001 she claimed asylum. Perhaps because of the changes taking place in Rwanda it was not until 13th August 2004 that the Secretary of State gave his decision. Her application was refused. She appealed and on 2nd February 2005 her appeal was heard by an adjudicator, Mr Turcan. The appellant gave evidence, with the assistance of an interpreter, and the adjudicator found her account to be "essentially truthful". He was satisfied that she had a genuine fear for her safety at the hands of Major Ninja, but he was unable to find that she faced a real risk of persecution at his hands or that she would, if returned, be in danger from Hutus or of any interest to the present government. Her appeal against the refusal of asylum therefore failed, and that decision still stands. But the adjudicator went on to consider the appellant's alternative claim that, because of what she had undergone and its effect upon her, it would be a breach of her human rights, and in particular of her rights under Article 3 of the European Convention on Human Rights were she to be returned to Rwanda. The adjudicator had before him medical reports from Dr Seear and Dr Sandra Evans which indicated that the appellant was a highly traumatised individual suffering from post traumatic stress disorder and in need of long term support. On the basis of that material the adjudicator felt able to say that a decision to return her to the country where she was subjected to traumatic and horrifying experiences would amount to a breach of Article 3.

First Stage Reconsideration

7. The adjudicator gave inadequate reasons for that conclusion, as the Asylum and Immigration Tribunal decided in response to an application by the Secretary of State, and at a first stage reconsideration on 22nd August 2006 Senior Immigration Judge King found the absence of reasons to amount to an error of law. It was then agreed that the credibility findings should be maintained, and that the issue for the second stage reconsideration should simply be–

> "… that the issue simply is that of the appellant's medical profile as to whether a return to Rwanda in those circumstances would amount to a breach of Articles 3 or 8."

The Senior Immigration Judge suggested that the appellant's representatives should provide more information as to her current personal circumstances for the reconsideration hearing, but, save that there was some amendment of the appellant's own evidence and the medical reports, that additional information does not seem to have been forthcoming.

The Second Stage Reconsideration

8. The second stage reconsideration by the AIT, from which this appeal lies, took place before Immigration Judge Phillips at Hatton Cross on 2nd November 2006, the Determination being promulgated on 20th December 2006. The appellant gave evidence with the assistance of an interpreter. It emerged that she had last heard of

her younger brothers in about March 2004 when they were asking in a letter why the appellant and her brother Gilbert had not returned to "granny's", and spoke about living with "Joyce". In May 2005 she heard from a friend in Rwanda that the younger brothers were no longer in Rwanda and might be in Uganda. By the time of the hearing in 2006 the appellant was no longer living with her brother Gilbert and she had not seen him for about three months. His claim for asylum had been refused in July 2005, and he had gone into hiding with friends. He did telephone his sister, but, to safeguard his position, he did not tell her his address. The appellant told the immigration judge that she would contemplate suicide if required to return, and in paragraphs 28 to 33 of the determination the judge carefully analysed the five medical reports which were before her, dealing with them in chronological order. Before us Mr Fripp, for the appellant, accepted that the judge's analysis of the medical evidence was accurate, so I can to some extent restrict my review of that evidence.

The Medical Evidence

9. The first report before the judge was from the appellant's general practitioner, Dr Joyce, and it has not been produced to us. The second report was from Dr Sandra Evans, an experienced consultant psychiatrist who saw the appellant on 23rd December 2004 at the request of her solicitors. The appellant had, she said, spent the previous year at a school in this country learning English, and spoke it reasonably well. She had stopped attending the school in March 2004, but continued to live in a house in Romford which she shared with her brother. She felt low each year when it came round to the anniversary of the genocide, and was clearly disturbed when attempting to tell the doctor what had happened. She complained of sleeping poorly despite medication in the form of Citalopram (a common treatment for depression and PTSD, which was prescribed for the appellant by her GP). Over a period of about 18 months the appellant received some therapy from the Medical Foundation for the Care of Victims of Torture, and she felt guilt in relation to the brothers she had left in Rwanda. I need not attempt to repeat all that the appellant told the doctor, but Dr Evans confirmed the diagnosis of PTSD, recommended referral to the local Mental Health Team with stronger medication, and ended thus–

> "If MN were forcibly returned to Rwanda it is likely to further traumatise her, and result in deterioration in her already fragile mental state. She avoids the company of other Rwandans, partly in fear of meeting Hutus, but also because they provide the stimuli for further intrusive thoughts and experiences."

Ms Khanam is a counselling psychologist with Newham Primary Care Trust. The appellant was referred to Ms Khanam by her GP, and Ms Khanam saw the appellant about 16 times between March 2005 and April 2006 when Ms Khanam's place was taken by a clinical psychologist, Dr Anne Lane. In her report of 16th February 2006 Ms Khanam gives a picture broadly similar to that given by Dr Sandra Evan, and records that the appellant "rarely leaves the house unless she is going to college which she motivates herself to do". Ms Khanam was concerned about what she perceived to be a high risk of suicide if the appellant were to be forced to return to Rwanda. When her brother had lost his appeal in 2005 she had reacted badly, but remained committed to therapy and in need of specialist treatment for her PTSD. Ms Khanam concluded–

> "It is important to highlight that returning to Rwanda is extremely like (sic) to have a detrimental impact on MN's mental state. I strongly advise that she should be supported to remain in the UK and should not be returned to a placed where she experienced such trauma. In my opinion it is likely to place her at a high suicide risk."

10. Dr Anne Lane's report is dated 15th August 2006, when the appellant's condition was "very unstable", because of her anxiety about the future. In June 2005 the appellant was expressing a desire to die whenever her condition became acute, and Dr Lane considered it to be "extremely important that she be supported to stay in the UK and not face the threat of having to return to a place where her life has (sic) under such extreme threat." The doctor concluded by expressing her view that any further disruption would put the appellant at a high risk of suicide.

11. The psychologists worked with a psychiatrist, Dr Sara Dimic, who saw the appellant on various occasions between 29th July 2005 and 11th August 2006. The history, diagnosis, and prognosis were as recorded by others, but by the time that Dr Dimic was reporting, the appellant was "on and off her medication" and denied having suicidal plans at the moment. But she said that she would rather kill herself than go back to Rwanda. The doctor accepted the reality of that threat, saying that "her suicidal risk would be very high if sent back to the place of traumatic events".

Background Material

12. The immigration judge assessed the medical evidence in the context of the background material before her, including reports which dealt with health care in Rwanda. In May 2003 it was estimated that there were 300 doctors in the country, with five referral hospitals for more advanced medical care, and health care centres each serving an estimated 25,000 people. But, as is so often the case, the provision of health care was uneven. In the Human Rights Watch Report "Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda", dated 30th September 2004 it is said at page 21 that–

> "Those in need of assistance are spread out. While there are many programs available to city residents, those in distant districts suffer."

This particular appellant was a city dweller.

The AIT's conclusions

13. The immigration judge was satisfied that the appellant was at the time of her determination suffering from PTSD and depression for which she was receiving treatment, and as to what might be available in Rwanda, the judge said–

> "Although the objective evidence demonstrates problems with the provision in Rwanda the evidence before me … does not demonstrate that the appellant's medication, namely Citalopram, Venlafaxine and Chlorpromazine is not available in Rwanda."

The judge then referred to the appellant's brother having gone to ground, but noted that he did offer her supportive contact by telephone. She also noted that the appellant has not previously self-harmed or, according to Dr Dimic, developed any acute suicidal plans.

14. The judge noted that in *J (Sri Lanka) v Secretary of State for the Home Department* [2005] EWCA Civ 629; [2005] All ER (D) 359 (May); [2005] Imm AR 409; [2006] INLR 354 it was considered appropriate to look separately at the risk of suicide in the United Kingdom on hearing of an adverse decision, the risk in transit, and the risk in the destination country. For reasons which the judge explained, and which are now accepted to be adequate, she found that the risk of suicide in the UK and on the way to Rwanda could be managed in such a way that it would not attain the Article 3 threshold. Mr Fripp does, however, point out that the judge, in paragraph 50 of her determination, did envisage that the protective measures for the journey "could, with the cooperation of the appellant and her brother, include returning the appellant along with her brother, in accordance with normal procedures which are designed to ensure that family members are returned together." Mr Fripp complains that, as the appellant's brother has gone to ground, the judge was speculating, but, as it seems to me, the approach was realistic. Her brother, although in hiding, has been supportive, and as Ms Grey for the respondent pointed out, if the appeal fails her brother may decide to go with her to offer support or he may be arrested. Clearly the judge's conclusion was not contingent on the brother being available when deportation takes place.

15. That brings me to the heart of this appeal, which is an attack on the judge's assessment of what would happen to the appellant in Rwanda. In paragraphs 51 to 54 the judge said–

> "51. On return to Rwanda I have noted that the appellant has had supportive contact with a friend and with cooperation would be returned with her brother and would not be transported to an area where her family were killed and the appellant was assaulted. Her brothers in their letters stated that they were anxious to regain contact with the appellant. The adjudicator found any subjective fears of persecution that the appellant had on return were not objectively justified.
>
> 52. In oral evidence the appellant claimed to have had access to medical treatment in Rwanda in the past and, against the background of the objective evidence, taken in the round, I find there is no real risk that she will be unable to access any medical treatment she requires for PTSD or depression on return to Rwanda.
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> 53. I have looked at all the evidence in the round and weighed this up: including the evidence which I have not specifically referred to in the findings set out above. I have considered all the submissions. I have taken careful note of the lower standard of proof. Having done so I uphold the respondent's appeal.

> 54. I find that the evidence does not meet the threshold required. I find the appeal should not succeed because there is no real risk that the appellant's subjective fears, which have been held not to be objectively well founded will cause her to respond to a removal decision by committing suicide in the United Kingdom before removal, or en route to Rwanda, or following arrival in Rwanda."

The judge also found that the appellant had not established any breach of Article 8.

16. Mr Fripp's submits that the reasoning in paragraphs 51 and 52 is so inadequate that the decision should be quashed and remitted for reconsideration.

Authorities

17. The approach to be adopted in cases of this kind, where it is said that Article 3 and/or Article 8 can be invoked because a victim of trauma will be at risk of suicide, if returned to his or her country of origin, was considered by this court in *J (Sri Lanka)* (supra), and the approach there suggested has received support in subsequent cases, including in particular *AJ (Liberia) V SSHD* [2006] EWCA Civ 1736. Before us it was accepted to be the right approach and it was clearly the approach that the judge in this case attempted to follow, explicitly referring to the *J* case. In paragraph 25 of *J* Dyson LJ, giving the judgment of the court, set out the general test to be applied, namely whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment, or punishment.

18. As Hughes LJ said in paragraph 12 of *AJ* (citing other authorities) the application of that test in a suicide case involves an extension upon an extension of Article 3–

> "First, Article 3 is extended to carry the capacity to fix responsibility upon a contracting (sending) state when exercising its immigration policy for the foreseeable actions of a non-contracting state over which it has no control. Such cases are conveniently referred to as "foreign" cases. Second Article 3 has the capacity to fix the sending state with responsibility even where whatever may happen to the returned person is not the responsibility of the destination state either, but arises because of a factor internal to him and because of the contrast between circumstances in the two countries."

In *J* at paragraphs 26 to 31 Dyson LJ has set out six non-exhaustive but helpful matters to have regard to when seeking to apply the general test. In the present case there was no problem with the first two matters. The judge recognised the severity of what it was said would happen if the applicant were to be removed, and its causal link with the proposed deportation. The third matter to be considered was that, in this type of case, for the reasons given by Hughes LJ in *AJ*, and recognised by the European Court in *Bensaid v UK* [2001] EHRR 10, the Article 3 threshold is particularly high simply because it is a foreign case. That does not mean that in principle an Article 3 claim in a suicide case cannot succeed but–

> "30. Fifthly, in deciding whether there is a real risk of a breach of Article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against their being a real risk that the removal will be in breach of Article 3.
>
> 31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms that too will weigh heavily against an applicant's claim that removal will violate his or her Article 3 rights."

In relation to the fifth matter Mr Fripp was reluctant to accept in its entirety the proposition that, in the present case, the fear was not well-founded because he wanted to emphasise that the appellant genuinely believes that the problem does exist. However, as Ms Grey pointed out, precisely because in reality the problem does not exist there is a better chance that in time the appellant will come to terms with reality.

Submissions and Conclusions

19. Mr Fripp submitted that the judge erred in law because she attached too much significance to the possibility of supportive contact in Rwanda when it was far from clear that the appellant would have any support from her brothers, and she failed to give sufficient weight to the appellant's genuine fears (as, for instance, Black J did in *Kurtaj v SSHD* [2007] EWHC 221 (Admin). As Ms Grey explained, *Kurtaj* was a very different type of case, with different evidence and a different issue at stake. Mr Fripp submitted that, if sibling support were removed from paragraph 51 of the determination, there would be no reasoning left to support the judge's conclusion. He did not seriously seek to challenge the judge's conclusions in relation to the availability of health care.

20. Ms Grey submitted that the judge was entitled to decide as she did on the available evidence, and that her determination does adequately set out her reasoning process. In dealing with family support the judge chose her words carefully, and what she said was not unrealistic. She looked at the past and at the future, and considered the matter in the round, as she was required to do. In *KR (Iraq) v SSHD* [2007] EWCA Civ 514 it was stated, at paragraphs 35 and 46, that what was required was a rounded assessment of the risk that if returned to her country of origin the appellant would be driven to commit suicide. The judge in the present case made that assessment, and reached a tenable conclusion. I entirely agree. The judge had a difficult and anxious task. She obviously dealt with the matter with considerable care, and in my judgment the reasons which she gave her conclusion as to the risk on return to Rwanda adequately explained her approach to the evidence before her. Her conclusion was one which was open to her, as Mr Fripp concedes. In my judgment there was no error of law, and there is no reason for this court to intervene, whatever sympathy it may have for this unfortunate appellant.

21. I would therefore dismiss this appeal.

Mr Justice David Richards:

22. I agree.

Lord Justice Mummery:

23. I also agree.