Case No: C5/2008/1637

Neutral Citation Number: [2009] EWCA Civ 52
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AS/00266/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 27th January 2009

Before:

LORD JUSTICE RICHARDS

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Between:

FA (ERITREA) **Appellant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr M Henderson (instructed by the Refugee Legal Centre) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved)

Lord Justice Richards:

1. The applicant is a young woman who is a national of Eritrea. She arrived in the United Kingdom in September 2004 as an unaccompanied minor, then aged 16, and claimed asylum. Her claim was refused but she was granted discretionary leave until she reached the age of 18. An application for extension of that leave was refused and an appeal on asylum, humanitarian protection and human rights grounds was dismissed by an immigration judge. Reconsideration was ordered on the broad issue of military service. At the first stage of reconsideration it was found that the first immigration judge had erred in law in failing adequately to consider the risk to the applicant in Eritrea as regards military service and in giving inadequate reasoning for the conclusion that she had left Eritrea legally. At the second stage of reconsideration a panel of two immigration judges once more reached findings adverse to the applicant and dismissed her appeals.

2. The matter comes before me as a renewed application for permission to appeal against the tribunal's decision, permission having been refused by the tribunal itself and by Pill LJ on the papers. The case for the applicant has been presented by Mr Henderson, who did not represent her below. The main points he seeks to advance on the appeal are points not taken below.

3. The first issue concerns the panel's conclusion at the second stage of reconsideration that the applicant left Eritrea legally. This was a crucial finding in view of the risks faced by those who leave Eritrea illegally when at

or close to draft age and who would be perceived on return as draft evaders: see the tribunal's decision in MA [2007] UKAIT 00059.

4. The panel's reasoning is set out in a lengthy passage at paragraphs 28 to 36, I will not quote it. Factors taken into account included in summary these.

5. First, the applicant's core account of events in Eritrea had been found by the first immigration judge to be wholly lacking in credibility, a finding which stood for the purposes of the reconsideration.

6. Secondly, between 1995 and 1997 the applicant lived with her father in the Yemen where he was a diplomat in the Eritrean Embassy, and the panel found that she had travelled then with the benefit of an exit visa and properly issued Eritrean passport.

7. Thirdly, her father had subsequently worked for the Eritrean government in the Nationality and Passport Department of the Ministry of Interior, and on the panel's findings he continued to work for the government. As such he fell within one of the categories of those who on the objective material might well be issued with an exit visa. Given that the applicant was his young daughter who had been able to travel with him out of Eritrea in the past, the panel considered that the objective material was consistent with her having left Eritrea with a lawful exit visa and passport on the last occasion, in 2004.

8. Fourthly, the panel noted that when she left Eritrea in 2004 she had initially on her own account travelled to Yemen, to which she had travelled with her father lawfully in the past.

9. Fifthly and finally, the panel relied on an inconsistency in her previous statements. In her screening interview her account was that she entered this country on a forged passport, and she indicated that she had never had a passport of her own. In a statement a few weeks later she said that she had held an Eritrean passport in 1995 but it had expired. In cross-examination before the first immigration judge she had no answer in relation to that discrepancy, simply indicating that she did not remember. In a statement for the subsequent reconsideration hearing she sought to explain the answer in the screening interview on the basis that she had simply meant that she did not have an Eritrean passport at the time she left Eritrea in 2004, but she had had a passport while in the Yemen in 1995. She confirmed and added to that in cross-examination at the reconsideration hearing. The panel, however, rejected as incredible the explanation she had given of the answer in the screening interview. It found that inconsistency to be seriously damaging to her account of having left Eritrea illegally.

10. It is this last point at which Mr Henderson's submissions are directed. He submits first that it was unreasonable to place such weight on a single answer in the screening interview. The interview was extremely brief, the applicant was a child being questioned through an interpreter and it is not implausible that she might have understood the question as relating to the passport used for

her journey to this country. Further, she had given information about her Eritrean passport soon after the interview. In placing weight on the fact that, when asked about this at the hearing before the first immigration judge, she said she could not remember, the panel failed to take into account that no issue about the inconsistency had been raised by the Secretary of State in the intervening period of some three years. In any event the panel ignored the fact that the passport issued for her to travel with her family when she was no more than seven years old was hardly likely to be capable of being used by her travelling by herself many years later.

11. All those points are perfectly good arguments on the merits, and the case on the merits as it seems to me would probably have been advanced much more persuasively before the panel by Mr Henderson rather than by the legal representative who in fact appeared on the applicant's behalf. However, subject to consideration of a further specific point I cannot accept that it was unreasonable of the panel to take the inconsistency into account as it did or to reach the conclusion it did.

12. The further point is this. Mr Henderson submits that the screening interview as a minor was conducted without the presence of a responsible adult and was therefore in breach of the Secretary of State's policy at the relevant time. He relies on AA (Afghanistan) [2007] EWCA Civ 12, where a similar failure was relied on as a reason for remitting a case to the tribunal in circumstances where the tribunal's original decision had been found to contain errors of law.

13. Mr Henderson's reliance on the breach of the policy faces the very real difficulty that the point was not taken below, and neither the factual position concerning the interview nor the existence or application of the policy were explored by the tribunal. In my judgment it is simply too late to raise the matter now on an appeal that depends on identifying an error of law in the tribunal's decision. This difficulty was referred to in AA itself, in particular at paragraph 36, albeit the case was not on all fours with the present and in that case the court was able to get around the problem because separate errors of law had already been identified and this issue came into play only in relation to the question of remittal. In my judgment this ground, not having been raised at all below and not having had its factual basis established below, cannot now provide in itself a successful basis of a challenge to the panel's decision.

14. In any event it is important to place the inconsistency point in its proper context. As I have indicated, the tribunal's reasoning went much wider than this. In refusing permission to appeal on the papers, Pill LJ said that even if reliance on the inconsistency factor was unduly emphasised it did not invalidate the general conclusion. I agree. I recognise the care needed in assessing the risk on return in an Eritrean case of this kind, but in my view the panel did a proper job and had a series of cogent reasons sufficient to sustain their conclusion even if one were not to give the weight they did to the significance of this particular inconsistency. I see no realistic possibility that the tribunal would have reached a different conclusion even if the point about the interview being conducted in breach of policy had been raised before it

and found to be a good one. I do not think that an appeal on this issue would have a real prospect of success.

15. The other aspect of the application relates to Article 8 of the European Convention on Human Rights. The first immigration judge rejected the applicant's case on this. The issue was raised in the grounds for reconsideration but was not a ground upon which reconsideration was ordered. It is clear from the decisions at the first and second stages of reconsideration that no attempt was made thereafter to pursue it before the tribunal at either stage, yet Mr Henderson seeks now to challenge the first immigration judge's conclusion on Article 8.

16. Again I take the view that it is too late for him to do so. It is true that there is no mechanism for appealing the grounds on which reconsideration is ordered, though I leave open the question whether one can pursue an application to the administrative court for reconsideration in those circumstances. The important point is that any issue can be raised on the substantive reconsideration itself; that is clear from paragraph 21 of the judgment in DK (Serbia) [22006] EWCA Civ 1747. When that is not done before the tribunal I do not accept that it can be done for the first time on an appeal. It cannot be said that the tribunal erred in law at either stage of reconsideration by failing to take the point that was not raised by the parties and was not obvious in the Robinson sense (and I am satisfied that the Article 8 point was not a Robinson obvious point). I do not read DK (Serbia) as allowing an applicant, having failed to get reconsideration ordered on various grounds, then to take those grounds in the

Court of Appeal without having in the meantime raised them at the first or second stage of reconsideration.

17. I should make clear for the comfort of the applicant, though little comfort it will be, that, even if I were wrong on that, in common with Pill LJ I do not think that there was a basis here for finding a material error of law by the first immigration judge in relation to Article 8. Errors there were, but in my judgment they were not errors that undermined the conclusion reached by the first immigration judge. I do not think that it could be said to be disproportionate and in breach of Article 8 to require the applicant to return to Eritrea in the circumstances of this case, circumstances that I need not recount, or therefore that the first immigration judge might have reached a different conclusion in the absence of the errors that were made.

18. I have also borne in mind in reaching that view various House of Lords authorities referred to by Mr Henderson in his skeleton argument. In my judgment an Article 8 claim would not have a realistic prospect of success in any event, but my primary reason for rejecting the application in relation to Article 8 is the procedural one: that it is too late to take the point at all. If it was going to be taken it should have been taken before the tribunal on the reconsideration.

19. No fault of course attaches to Mr Henderson in relation to these matters. He has sought with vigour to persuade me that the court can and should entertain

various points now, although they were not pursued below. For the reasons given I do not accept that that is the case.

20. The renewed application must therefore be refused.

Order: Application refused