Case No: C5/2008/1604

Neutral Citation Number: [2008] EWCA Civ 1243
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/02007/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 13th October 2008

Before:

LORD JUSTICE JACKSON

- -

Between:

AL (ANGOLA) **Appellant**

- and -

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

- -

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Mr N Armstrong (instructed by Messrs Wilson & Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

Lord Justice Jackson:

1. This is an application for permission to appeal against the decision of the Asylum and Immigration Tribunal, Senior Immigration Judge Mather, in November 2007.

2. The facts giving rise to this application are as follows. The appellant is a citizen of Angola who was born on 3 June 1988. She arrived in this country on 13 February 2004 and claimed asylum. The asylum claim was refused but the appellant was granted leave to remain until 2 June 2006, the day before her eighteenth birthday. The appellant renewed her application for asylum in May 2006 as her eighteenth birthday approached. The Secretary of State refused that application on 22 January 2007. The Secretary of State also refused the appellant's request to remain in the United Kingdom on human rights grounds. The appellant appealed against the Secretary of State's decision to the Asylum and Immigration Tribunal. The appellant's appeal was heard on 17 April 2007 before Immigration Judge Lester. The appellant was accompanied at that hearing by her schoolteacher, Mrs Hann.

3. Immigration Judge Lester summarised the appellant's evidence as follows in paragraphs 11 to 13 of her determination:

> "11. Miss Pinto Leite said that she only had one younger brother. She did not have sisters. Her brother was in very poor health, being epileptic. Her father worked for the Red Cross, fitting artificial limbs. She had been captured by the rebels, but not for long. They did not mistreat her but she had a great sense of insecurity. There was shooting around her all the time. She was removed by her father who then arranged to take her out of the conflict in Angola to safety through his friend Osvaldo. Her younger brother should have travelled with her, but he was not well enough. Miss Pinto Leite understood that she was being taken to South Africa. But Osvaldo brought her to the UK. He stayed with her for two days and raped her on several occasions. At this point in her evidence the appellant broke down. This was still a very traumatic event for her to come to terms with. She had had tests from the GP and had not been made pregnant nor been infected with HIV. But her health had suffered in other ways. She had severe problems with her bowel and migraine attacks for which she was also receiving treatment from the GP.
>
> 12. Miss Pinto Leite said that she had been in touch with her parents at the time. After the rape, her

> mother left her father. He died a little later, in 2005, of emphesema [sic]. She had not been able to trace her mother even with the assistance of the school tutors who had helped her with the forms. She was not sure that her mother and brother were still alive".
>
> "13. Miss Pinto Leite explained that she was now living with a friend, Rosa, from Mozambique. This was the woman referred to by Ms Hann as having set up a direct debit on the appellant's account without her knowledge or consent so that her account was completely drained of funds. Rosa had said recently that the appellant would have to find somewhere else to live."

4. Mrs Hann, the schoolteacher, gave evidence about the good progress which the appellant had made at school. Immigration Judge Lester considered the evidence and promulgated her decision on 22 April 2007. The immigration judge accepted the appellant's evidence as truthful; she found that the appellant was a courageous but vulnerable young woman who had acquired a circle of friends and mentors through her school. The immigration judge rejected the appellant's appeal in relation to asylum but allowed her appeal on human rights grounds. The basis of the immigration judge's human rights decision was that although the appellant had not acquired a family life in the United Kingdom, she did have a private life here. Removal to Angola would be an unjustified breach of the appellant's rights under Article 8.

5. The Secretary of State applied for reconsideration of that decision. On 17 May 2007 Senior Immigration Judge Nichols made an order for reconsideration because she thought it arguable that Immigration Judge Lester's decision about Article 8 was inadequately reasoned.

6. The reconsideration hearing took place on 7 November 2007 before Senior Immigration Judge Mather. Both parties were represented but, as one can see from paragraph 27 of Senior Immigration Judge Mather's decision, neither party sought to call any evidence at that hearing. Senior Immigration Judge Mather found that there was a material error of law in the original determination. This was that Immigration Judge Lester did not properly deal with the question of whether Article 8 was engaged, nor did Immigration Judge Lester deal with the question of proportionality. Accordingly Senior Immigration Judge Mather went on to consider those questions afresh. Senior Immigration Judge Mather concluded that although the appellant had acquired a private life in the United Kingdom, returning the appellant to Angola would not be such an interference with the appellant's private life as to engage Article 8. The appellant could make new friends in Angola; also the appellant may be able to trace her mother and brother if she returned to Angola. Senior Immigration Judge Mather added that if he was wrong about that threshold question, it was nevertheless the case that removal

of the appellant to Angola would not be disproportionate. Accordingly removal would not give rise to a breach of Article 8.

7. In the result, therefore, Senior Immigration Judge Mather substituted a decision that the appellant's appeal against the Home Office decision should be dismissed.

8. The appellant now seeks permission to appeal to the Court of Appeal. She contends first that Senior Immigration Judge Mather was wrong to conclude that there was a material error of law in the decision of Immigration Judge Lester. Secondly, she contends, even if Senior Immigration Judge Mather was right to find such an error of law, he was wrong thereafter to go on and dismiss her appeal; and this second ground is advanced in a number of different ways.

9. The application for permission to appeal was considered on the papers by Stanley Burnton LJ, who refused permission. He made the point that the determination of Senior Immigration Judge Mather discloses no error of law; the original determination of Immigration Judge Lester was irrationally reasoned and in any event did not consider whether the applicant's removal would be disproportionate or explain why it would be so. Stanley Burnton LJ said that he had every sympathy with the appellant, but it was impossible to see that her removal would breach her rights under Article 8.

10. At the hearing today the appellant renews her application for permission to appeal to the Court of Appeal. Counsel Mr Nick Armstrong has urged her case forcefully and eloquently, concentrating on what he sees as her best points. The first matter argued by Mr Armstrong is that the history of this appeal has denied the applicant a proper hearing. She was not represented at the first hearing; at the second hearing she was represented but she did not call any evidence. The first immigration judge found that the applicant was vulnerable to exploitation, and this matter called for the hearing of oral evidence before the judge at the second hearing should go on to substitute a decision that the appellant's appeal be dismissed. Mr Armstrong submits that there should have been a full stage two hearing with oral evidence; there was an application for adjournment before Senior Immigration Judge Mather which was not properly considered and was not accepted. Mr Armstrong accepted in argument that it would have been possible for Ms Weber, who was representing the appellant at the hearing before Senior Immigration Judge Mather, to call her as a witness but she did not do so.

11. So far as that ground of appeal is concerned, although Mr Armstrong put it at the forefront of his submissions, logically it comes second in the sequence because the first ground of appeal is that there was no error of law. So perhaps I should deal briefly with the prior ground first. So far as that prior ground is concerned, I am afraid that there clearly was an error of law by Immigration Judge Lester at the initial hearing. The immigration judge, having found that there may well be a private life of the appellant in the United Kingdom, did not go on to consider whether that was such that her

removal would engage Article 8; the immigration judge did not carry out the necessary balancing exercise; she did not consider the questions formulated by the House of Lords in R (Razgar) v SSHD [2004] UKHL 27; and her reasoning to support the conclusion that removal of the appellant would be a breach of Article 8 was not properly reasoned or demonstrated to be correct on the basis of the facts as found by Immigration Judge Lester. So I am afraid that it is quite unarguable that Immigration Judge Lester made no error of law. It is quite unarguable that Senior Immigration Judge Mather erred in concluding that there had been an error of law at the first stage hearing.

12. Therefore I turn my attention to the second ground of appeal, which, as I say, is the ground which Mr Armstrong put at the forefront of his submissions. It seems to me that there are a number of insuperable obstacles in the path of the appellant. The first insuperable obstacle is that the facts as found by Immigration Judge Lester are set out in paragraphs 11 to 13 of her decision. Those facts were accepted as correct by the second immigration judge, Senior Immigration Judge Mather, and those findings of fact were not impugned by the error of law which Immigration Judge Lester had made. In the course of argument this morning I asked Mr Armstrong whether there were any findings of fact made by Immigration Judge Lester other than those set out in paragraphs 11 to 13 insofar as the claimant's evidence was concerned. Mr Armstrong very fairly accepted that all of the claimant's evidence accepted by Immigration Judge Lester was that which appears in paragraphs 11 to 13. He drew my attention to the observations about the appellant's vulnerability in paragraph 18, but he very fairly accepted that this flows from the findings of fact in paragraphs 11 to 13.

13. Those findings of fact seem to me, as they seemed to Senior Immigration Judge Mather, to lead only to one conclusion; that is the conclusion which Senior Immigration Judge Mather sets out in the latter part of his determination of November 2007. The key part of that determination reads as follows:

> "28. I accept that the appellant has a private life in the United Kingdom that has been acquired as a result of her being here, attending school and making friends. Despite the various accounts of being raped, recorded in paragraphs 3, 7 & 8 of the determination, I accept for the purposes of this assessment that the appellant was raped in the United Kingdom by Osvaldo as it seems to have been accepted by the Immigration Judge. Although there is no medical evidence, I accept that she has some minor medical problems and is, to some unknown extent, affected by the trauma of being raped and defrauded in the UK. She is apparently receiving some help for the medical and psychological problems. Such evidence as there is suggests the help is at the lower end of the scale.

29. As to whether breaching that private life would have serious consequences I make the following observations. The appellant has received some education which will be of use to her in Angola. She would take the benefit of it back with her. For most of the time she has been in education she was obliged to be because of her age. It is said that the appellant has made friends and mentors. She has no doubt benefited from that and I accept the mentoring is not something which can necessarily be repeated in Angola. She will be able to make new friends there. She has benefited from the kindness and attention of her teachers, and that is also something which she can build upon on return. It is said that the appellant does not have any family in Angola. She gave evidence that her father has died, but it is purely speculative to say that her mother and brother may have died or that she would not be able to find them. There is little evidence about the efforts made to trace her family from the United Kingdom. It would be easier to do so in Angola, especially as there is no satisfactory evidence to suggest that they have left the area where they were last heard of

30. Without any medical or psychiatric evidence I am unable to assess the degree of trauma suffered by the appellant, either as a result of the rape, the plundering of her funds or any of her other experiences. The trauma that she has experienced has largely been in the United Kingdom and therefore returning to Angola will not remind her of those incidents in the way that it might if she had been seriously mistreated there. The appellant is now an adult. I cannot find that any of those factors are such that Article 8 is engaged to protect her private life.

31. Even if I were wrong about that, and I had to move forward to perform the balancing exercise to decide whether her removal would be disproportionate, those are not factors which would make her removal disproportionate when set against the legitimate obligation of the United Kingdom to enforce immigration control. The United Kingdom has honoured its obligations to look after the appellant whilst she was a minor, and whilst there was a civil war in Angola. Neither of those factors apply anymore. The factors in her favour are those which I referred to in deciding that the

> consequences of the breach would not engage Article 8. They are not substantial. I find that it would not be a disproportionate breach of her rights under Article 8 to remove her, in the event that Article 8 is engaged at all."

14. It seems to me that those conclusions followed inevitably from the findings of fact made by the first immigration judge. I also note from paragraph 27 of Senior Immigration Judge Mather's determination that the appellant's representative had an opportunity to call the appellant to give further evidence but that opportunity was not taken, and of course one can understand why it was not taken. The appellant gave a full account of matters in her evidence to the first immigration judge, that evidence was set out very fully by the first immigration judge in paragraphs 11 and 13 and that evidence was accepted in its totality. It is difficult to see that the appellant could have improved her position by repeating that evidence at a further hearing.

15. The third ground advanced by Mr Armstrong this morning is that Senior Immigration Judge Mather erred in going behind the facts as found by Immigration Judge Lester. The passage which Mr Armstrong fastens upon for the purposes of this submission is the passage in paragraph 29 of Senior Immigration Judge Mather's decision which I read out a few moments ago. This is the reference to it being purely speculative to say that the appellant's mother and brother may have died or that she would not be able to find them. It seems to me that that observation by Senior Immigration Judge Mather is an entirely proper observation to make on the findings of primary fact made by Immigration Judge Lester. It seems to me to be a realistic conclusion, and I do not think that Senior Immigration Judge Mather can be criticised on that ground. Stanley Burnton LJ expressed sympathy for the applicant, and it is no comfort to the applicant when other judges express sympathy as well but the reality is that, when one looks at Article 8 of the European Convention on Human Rights and the case law upon it, this appeal has no prospect of success. Mr Armstrong urges upon me that the findings in relation to Article 8 should be respected by subsequent judges and courts. He draws attention to paragraphs 11 and 40 of the Court of Appeal's decision in Mukarkar v SSHD [2006] EWCA Civ 1045. He draws attention to similar observations made by Lord Bingham in the recent House of Lords case, EB (Kosovo) [2008] UKHL 41. Of course I accept all of that; however, where the assessment made in relation to Article 8 is scanty and flies in the face of the primary facts as found by the first immigration judge, the decision cannot stand.

16. It would be no kindness to this appellant for permission to be given for her appeal to go ahead. Accordingly, this application for permission to appeal is refused.

Order: Application refused