Case No: C5/2009/0028

Neutral Citation Number: [2009] EWCA Civ 733
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/13645/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 17th June 2009

Before:

LORD JUSTICE LAWS
LORD JUSTICE LONGMORE
And
LORD JUSTICE LLOYD

- -

Between:

MD (GUINEA)

Appellant

- and -

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

- -

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Mr C Yeo (instructed by Messrs Lawrence Lupin) appeared on behalf of the **Appellant**.
Mr D Blundell (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Laws:

1. This is an appeal, with permission granted by Senior Immigration Judge Storey on 17 September 2007, against a decision of Immigration Judge Froom promulgated on 19 July 2007 and taken on a statutory reconsideration. Immigration Judge Froom dismissed the appellant's appeal against the Secretary of State's refusal of asylum on 17 November 2006. The appellant is a national of Guinea, born on 6 May 1990, so, at the date of the hearing before Immigration Judge Froom, on 10 July 2007, she was seventeen years old. She claimed to have entered the United Kingdom illegally on 10 October 2006, having flown from Sierra Leone a few days after leaving Guinea. She claimed asylum the same day as she arrived, but, as I have said, that was refused on 17 November 2006. The appellant was, however, granted discretionary leave to remain until her 18th birthday, which fell on 6 May 2008. That was, as I understand it, because she was an accompanied minor, and the Secretary of State was not satisfied that adequate arrangements for her reception would be in place on her return to Guinea. The appellant's appeal against the refusal of asylum was first heard by Immigration Judge Hussein and dismissed in a determination promulgated on 24 January 2007. Immigration Judge Hussein found that the appellant's account had been manufactured.

2. However, on 22 February 2007 Senior Immigration Judge Storey ordered reconsideration on the ground that Immigration Judge Hussein had failed -- contrary to the immigration rules and other policy statements -- to take account of the appellant's minority in assessing her credibility. The case was then adjourned by consent for a second stage reconsideration at which the merits would be revisited. The appellant's case for asylum is described by Immigration Judge Froom at paragraphs 3-7 inclusive of his determination. There is, as I understand it, no criticism of this account as a detailed and accurate description of the appellant's case. There is no point in my replicating the same material in different language, and I will set out paragraphs 3-7 in full.

> "3. The basis of the appellant's claim is set out in the statement as follows. The appellant was born in Daka, in Labé, Guinea. Her parents separated when she was young and she did not know her mother very well. She has an older sister. Her father remained and she grew up with her half-brothers and sister. Her father wanted her to go to study the Holy Qur'an but she did not want to go. Thereupon he would beat her with electric wires on her back.
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> 4. The appellant first met her boyfriend after leaving school in Daka town centre. His name was Musa Bah and he was a Christian. He wanted to marry the appellant but his father refused because he was a Christian. The appellant used to meet him

frequently in secret without her father knowing. Her father decided to arrange her marriage to one of his relatives. His name was Mamadou Oury Barry and he was the Imam of the local mosque. He was around 60 years of age. The appellant refused but her father told her that she had to marry him. If she refused, he would tie her up and drag her to his house. She was therefore forced to marry him about six months before she came to the UK. The appellant's husband already had two wives. The appellant told him she did not love him and that her father had forced her to marry him. He forced her to sleep with him and, if she refused, he would beat her with his hands and sometimes he pushed her against the wall. She lost contact with her boyfriend. Sometimes she would run back to her father's house but her husband would always send people to bring her back. One night he hurt her badly on her left leg when he pushed her onto a table. The appellant decided to run away.

5. The next day, while her husband went to the mosque, she ran away. She went to her boyfriend, Musa's, house. She showed him her scars and told him that she could not go back to her husband or her father's house. She could not go to her mother's house because they had no relationship as her father had stopped her seeing her. Also she did not want to disturb her mother. She asked Musa to help. However, he did not have much money because he was a student living with her parents. The appellant decided to stay with him as she had no other solution. They lived in a small area of Daka and everyone knew each other. It was not long before some people who knew she was staying with Musa informed her father. Her father also guessed she had been at Musa's house because he knew she was close to Musa and had no-one else. The next day her father and husband came to the house. There was no-one at home apart from the appellant, Musa and the housekeeper. Everyone else had gone to work. The appellant's father and husband found her with Musa. They shouted at them and they both started beating Musa.

6. The appellant ran away. She went to her maternal uncle's house in Daka. He did not live very far away. She explained everything to him and, as he did not have a very good relationship with her father, he told her she could stay at his

> house. The same day he took her to the Chief of Daka. Because the police never helped with such problems they had to see the Chief first. The appellant was not present at the meeting but afterwards her uncle explained that people who had money could do what they wanted and, if they took the case to the police, they would end up in prison. The appellant and her uncle went to town to buy clothes for her because she would be staying with him for a long time and then they went back home. When they arrived they saw the appellant's uncle's son crying. Musa's family and friends had come to the house and threatened to beat her uncle's family in revenge for what happened to Musa. They had beaten her uncle's son. They had forced the door and smashed up everything in the house. They said they would come back for the appellant. Fearing for his and his family's safety, the appellant's uncle decided to take her to Sierra Leone, which he did the next day.
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> 7. In Sierra Leone, he introduced the appellant to a woman, called Nene. She agreed to take the appellant abroad and her uncle gave her the money. Then she left. The appellant stayed with Nene for three or four days and then was taken to the airport. The plane came directly to the UK. The appellant did not know where she was at first. Nene took her to the Home Office, where the appellant claimed asylum. She fears returning to Guinea because she fears she will be killed by Musa's relatives and friends. Her father would also punish her and send her back to her husband against her will. Her husband is a very violent man. She cannot go to the authorities for protection as the police only help people who have money. There is nowhere else she could go in Guinea. If she goes to a different area, she will be treated as an outsider."

3. In addition to all these facts, Immigration Judge Froom also noted (paragraph 21) that the appellant had been subjected to female genital mutilation at a young age. Immigration Judge Froom proceeded to review the evidence. There are also passages in the determination to which I must refer further, in which he specifically addresses the fact of the appellant's minority. His conclusions begin at paragraph 33, which I must read:

> "In the light of the consistent background evidence, it is clear that the appellant's account of being forced into marriage by her father before the legal

> age limit and the subsequent account of domestic violence and spousal rape is plausible. The appellant has also given a relatively consistent account, although in accordance with the Home Office policy and procedures, she was not interviewed [I interpolate that was because of her age]. In reaching my conclusions as to how much weight to attach to each element of the appellant's claim I have looked at the totality of the evidence, including her written and oral statements, the background evidence, the medical evidence and the expert reports. I have kept in mind her age."

4. Having passed comment on various aspects of the evidence in the intervening paragraphs, the immigration judge said this at paragraph 41:

> "The cumulative effect of my assessment of the evidence is to find the appellant has concocted a story, or one that has been concocted for her, in order to furnish an unfounded asylum claim. I find her account of her forced marriage and the ensuing physical abuse, leading in turn to her escape from her husband and the discovery of her with her former boyfriend by her father and husband, to be untrue. I also reject her claim as regards her uncle assisting her to escape. She might have been beaten by her father at some time in the past but that does not demonstrate a real risk of persecution on return."

5. It is clear that Senior Immigration Judge Storey, granting permission to appeal, was troubled by what he considered to be a contrast, if not a contradiction, between paragraphs 33 and 41; and the first ground of appeal in this court is that no logically adequate reasons are given for the "jump", as it is put, from the one to the other. Thus it is said in paragraph 6(3) of Mr Yeo's skeleton argument:

> "The intervening paragraphs are incapable of justifying the negative finding at paragraph 41 given the positive findings at paragraph 33 and given the medical evidence [that is to say, the evidence essentially of extensive scarring]."

6. It is convenient to deal with this ground of appeal straight away. It is first to be noted with respect that Senior Immigration Judge Storey mischaracterised the finding at paragraph 33. He said:

> "The positive credibility findings concluded that she had been forced into marriage and had suffered domestic violence."

Senior Immigration Judge Storey referred at this point to paragraph 33. But Immigration Judge Froom had made no such finding. He merely stated that the appellant's account of forced marriage, domestic violence and rape by her husband was plausible and that the appellant had given a relatively consistent account. His conclusion at paragraph 41 was that, in light of his assessment of the whole of the evidence, this account was nevertheless untrue. There is no inconsistency. In the intervening paragraphs the immigration judge articulated a number of concerns which, as it seems to me, notwithstanding Mr Yeo's submissions to the contrary, rationally justify this conclusion. I will not set out the whole of the narrative, for the particular points have been summarised in tabulated form by Mr Blundell in his skeleton argument for the respondent as follows. Paragraph 21 sets out the following points:

> "(1) There was an inconsistency between the Appellant's claim to have been controlled by her father and to have maintained a sexual relationship with her boyfriend [36];
>
> (2) She was vague about the distance of her Koranic school from where she lived [36];
>
> (3) She was vague about the length of her relationship with her boyfriend and needed assistance with this [36];
>
> (4) She could not initially remember the date of her marriage [36];
>
> (5) There was no element of secrecy to the relationship she conducted with her boyfriend which was inconsistent with the family and religious context she had described [37];
>
> (6) It was inevitable that word of the relationship would have reached her father given his position [37];
>
> (7) Although she claimed that she conducted her relationship whilst her father was at the mosque, there were difficulties with the timings given that her boyfriend was at school, she was at Koranic school and meetings involved walking some distance [37];
>
> (8) There was an inconsistency in her later claim that her father spent all afternoon and evening at the mosque given that he was supposed to be a trader in the city [37];

> (9) Her claim that people who knew she was at Musa's house told her father where she was, was consistent with [the immigration judge's] view that her father would have discovered the relationship in any event [38];
>
> (10) Her claim that her father guessed she was at Musa's house was inconsistent with her evidence of being kept at home in a strict, religious household [38];
>
> (11) It was also inconsistent with her evidence that her father only discovered the relationship when she told him about it [38];
>
> (12) The claim that Musa's family sought revenge against her uncle's family was incredible, particularly given that the uncle sheltered and assisted the Appellant [39];
>
> (13) If only those with money could access help from the police it was not clear why her uncle could not have assisted [40];
>
> (14) The background evidence suggested it was unlikely that a young girl in this position would complain, but this was actually what she had done, through her uncle [40]."

7. I quite accept that some of these points are small matters of detail but the force which is to be attributed to them depends of course on their being taken cumulatively. It is to be remembered that this court has all too often enjoined immigration judges to look at an appellant's evidence or indeed any relevant witness's evidence as a whole and in light of all the evidence in the case. It has often been said that an isolated finding of implausibility taken against an appellant is legally fragile unless it is clear that the finding has been properly rooted in the context of all the evidence. In this case the immigration judge has arrived at a view about the plausibility of one aspect, of course a central aspect of the appellant's case. He has expressed that view in paragraph 33. But that is not a finding, as my Lord, Lloyd LJ, pointed out in the course of the argument. When one comes to see what the judge's findings are, they are rooted in the whole of the evidence including points small and large. It seems to me that any complaint about that is in truth a matter of fact not law. It is to be noted that Senior Immigration Judge Storey granting permission himself said this:

> "The immigration judge went on [I interpolate that is after paragraph 33] to give sound reasons for concluding that the appellant's account of her sexual relationship with a boyfriend contained

> significant inconsistencies and was vague in its particulars and implausible. In reaching this finding the Immigration Judge took fully into account the evidence as to local customs and practices."

8. So he did. Accordingly, in my view, in the light of his overall impressions of the evidence, Immigration Judge Froom was entitled to reject what looked at in isolation was a plausible account of a forced marriage, domestic violence and spousal rape. The second ground concerns the evidence about scarring on the appellant's body. This focuses on paragraph 35, which I shall read:

> "The appellant claims that her father is a strict Muslim, who has influence in her home town of Taka because of his wealth. He is a trader. The appellant says he physically abused her by beating her with electric cables when she refused to attend Koranic school. The Fulani are strict Muslims and they live mainly in the Labe region. The appellant has marks on her arms, shoulder and back consistent with beatings. Whilst I accept Dr Seear's credentials to comment on scarring, his report suffers from a serious defect in that he fails to make any comment on the age of the scars. This is a significant point because the appellant's account is that she was abused by her father in order to force her to marry Mr Barry and also by Mr Barry. Those incidents took place, by her account, within 14 months of the examination. It would have been of assistance if Dr Seear had commented on the stage of healing. The impression given by his report is that the scars are now all well-healed. His report is therefore more helpful to the appellant is supporting her claim to have been abused by her father after the age of eleven, when her father took her out of school and forced her to attend Koranic school. I accept that the appellant might have suffered beatings from her father as a child."

9. The complaint is that the immigration judge failed to evaluate the severity of ill-treatment which this scarring evidence entailed, in particular failed to consider and decide whether it might be repeated if she were returned to Guinea. The case of Demirkaya v SSHD [1999] Imm AR 498 and paragraph 339K of the Immigration Rules are referred to. However, as it seems to me, the fact that the scars were as it were undated was a serious omission, in the sense that it very greatly reduced the utility of this material as evidence supporting the appellant's case. The scars were consistent with an earlier account of beatings by her father relating to her objecting to having to attend the Koranic school. The immigration judge was entitled to associate the scars with this earlier episode and to conclude inferentially that they were not attributable to anything else. In those circumstances it does not seem to me

that it was necessary for the immigration judge to do more than he did as regards any question of the appellant's safety on return, a matter to which in fact he adverted at paragraph 43.

10. The fourth ground is one for which the appellant needs permission to amend its grounds of appeal. It is that the adverse findings of fact made by the immigration judge are perverse. I mean no discourtesy to Mr Yeo in dealing with this summarily. There is nothing in it. As the ground virtually itself states, this is a complaint that in truth is parasitic on the other grounds. This is not a perverse decision in any sense. I would refuse the permission that is required.

11. The third ground of appeal as it is enumerated in the grounds themselves is also one for which permission is required and it was the ground to which Mr Yeo went first in the course of his oral submissions this morning. It is to the effect that the immigration judge failed to give due weight or attention to the fact that the appellant was a child. Mr Yeo's amended skeleton contains references to a good deal of academic material on the nature of memory and recall in children and to various published sets of guidance relating to the treatment of child evidence, particularly in immigration cases. The broad point being taken is that a child may well give what is essentially a true account of past events, which however may appear to an adult to be false because it does not satisfy adult notions of narrative chronology, plausibility and consistency. There is some assistance in the Immigration Rules, paragraphs 30 to 352ZB, and in the UNHCR handbook and there are also other UNHCR guidelines. There is a chief adjudicator's guidance note, guidance of the IARLJ and Home Office asylum process instructions and yet further guidance from the Home Office. The skeleton argument in its amended form descends into a good deal of detailed criticism of the immigration judge. The essence of it, I apprehend, may be found in these short paragraphs:

> "5.2 There is no evidence in the determination that the immigration judge appreciated any of the following important considerations.
>
> (a) that at the time of the hearing the Appellant was a child and her evidence needed to be treated and assessed differently to that of an adult;
> (b) that the Appellant was a younger child when much of her account was given and
> (c) the appellant was describing events that had taken place when she was even younger.
>
> This amounts to a serious failure to take account of a highly relevant consideration.
>
> 5.3 Further, there is no sign in the determination that the immigration judge has given more emphasis to objective factors than to the subjective evidence

> of the Appellant. Far from it; the immigration judge's own analysis of the subjective evidence has overridden the objective factors.
>
> 5.4 There is no sign in the determination that the immigration judge attached any significance to the manner of questioning at the hearing. All of the material on children as witnesses and the guidance suggests that evidence given in response to leading questions in court in cross-examination by a Presenting Officer with no special training in dealing with children would be very likely to be flawed evidence. It is notable that the immigration judge relies for his adverse findings on the evidence given by the Appellant at the hearing."

12. The importance of dealing very carefully with the evidence of children must not in my judgment be allowed to usher in a whole subspecies of asylum litigation based on complaints that immigration judges have not dealt with every nook and cranny of all the reasoning to be found in the very extensive literature on the subject. The immigration judge must of course show himself aware of the child's age and be sensitive of it. He is likely to recognise the particular importance in a child case of the effect of the background objective evidence, and the fact moreover that inconsistencies and other defects which might be fatal to the veracity of an adult's account may not necessarily be so when a child's evidence is involved. But it is of particular importance that the plethora of guidance coming from many sources is not to be degraded into a set of concrete rules, departure from any one of which then falls to be characterised as an error of law. It is not for example a rule of law that a child's evidence should be accorded "a liberal application of the benefit of the doubt", a phrase appearing in some of the guidance documents. That said, the phrase represents or points to an approach which in some cases it may be very useful to have in mind. In the present case the immigration judge first, at paragraph 10, recalled the basis upon which reconsideration had been ordered. He quoted Senior Immigration Judge Storey's direction given on 22 February 2007 as follows:

> "Given the [immigration judge's] acceptance that the appellant was a minor…his evident failure to take this fact into account when assessing credibility, contrary to the Immigration Rules, the UNHCR handbook, IDI policy and case law (see AA (Afghanistan) EWCA Civ 2007), means that it is extremely arguable that his determination discloses an arguable error of law having a real possibility of leading on reconsideration to a different decision."

13. Then Immigration Judge Froom sets the necessary scene for the second-stage reconsideration which he is conducting and that scene consists in the very

materials to which Mr Yeo refers in this amended ground of appeal. At paragraph 13 Immigration Judge Froom said this:

> "As noted, the appellant's claim to be a minor is accepted by the respondent. In view of her age, at the beginning of the hearing I introduced the person's present to the appellant, I explained the nature of the proceedings and I noted she was accompanied by her social worker, Ms K Walker. Mr Macrae indicated that he wished to cross-examine the appellant on all aspects of her claim and therefore the issues on which oral evidence have to be called could not be narrowed. I consider that the hearing complied with the Chief Adjudicator's Guidance Note No 8 of April 2004, paragraphs 4.1-4.9. I gave the appellant breaks, when requested. Having heard her evidence, I formed the view that the appellant was sufficiently mature to understand the importance of the hearing and the need to answer questions accurately and truthfully. She is now 17 and she confirmed she knew the importance of telling the truth. I note that the appeal statement she made on 2 January 2007, which she adopted at the hearing, contains detailed and mature observations on *inter alia* the position of women in Guinea."

14. Then the immigration judge not only concludes that the appellant was possessed of a sufficient degree of maturity to understand the need to respect the truth but also finds that she was the author or at any rate the signatory to a document, which presumably she must have understood, namely a document containing what the immigration judge described as detailed and mature observations about the position of women in Guinea. At paragraph 24 of the determination the immigration judge stated in terms that, in view of the fact that the appellant was a minor, he had "given particularly close attention to the background evidence". He then delivers a full summary of relevant background objective information. In my judgment the judge has given proper recognition to the facts of the appellant's minority and dealt with it appropriately. The essence of Mr Yeo's complaint is that in those intervening paragraphs 34 to 40 there is no sign that the immigration judge treated the appellant's evidence any differently from the way in which he might have treated the evidence of an adult. But he formed a view of this witness's maturity. He had formed that view against a plain awareness of the very materials upon which Mr Yeo now relies. It was not part of his task to incant repeated references to those materials so as to ensure the reader at every stage that he had them in mind. Nor is it the law that the objective evidence in a case like this has to override any deficiencies in the child's own evidence. The judge's duty plainly is to form an individual judgment about the quality of the evidence in every case, taking account of the particular difficulties that can arise with child evidence. I see no trace of any basis on which to conclude

that the judge did anything different here. The fact that he did not refer to all the sources of guidance enumerated by Mr Yeo does not produce the conclusion that he has failed to assess the appellant's evidence in a proper manner. I wholly accept, as I have already said, that a child's evidence needs careful treatment. I do not consider it to be demonstrated that this judge failed to fulfil that requirement. I would refuse leave to add this further ground of appeal and in all the circumstances would dismiss the appeal.

Lord Justice Longmore:

15. I agree.

Lord Justice Lloyd:

16. I also agree.

Order: Application granted