Case No: C5/2007/1784

Neutral Citation Number: [2008] EWCA Civ 458
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/06614/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 3rd April 2008

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE CARNWATH
and
LORD JUSTICE LLOYD

- -

Between:

ND (GUINEA) **Appellant**

- and -

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

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Mr T Buley (instructed by Duncan Lewis & Co) appeared on behalf of the **Appellant**.

Mr A McCullough (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Sedley:

1. The appellant in this case is a young man who arrived here seeking asylum from Guinea in 2003 at the age of seventeen. He was given discretionary leave to remain until his eighteenth birthday but his asylum claim was eventually rejected and a succession of appeals and reconsiderations failed to reverse that decision. The final process which brought the case to this court was a second stage reconsideration conducted in February 2007 by Immigration Judge Price of the appellant's asylum, humanitarian protection and human rights claims. The human rights claims were made under Article 3, in that respect largely mirroring the asylum claim, and under Article 8.

2. All three of them were rejected by Immigration Judge Price, but after an initial refusal on the papers permission to appeal was granted by Ward and Moses LJJ, limited in terms to the Article 8 issue. It followed that what was to be entertained by this court was solely the question whether there was an error of law in the rejection by Immigration Judge Price of the claim under Article 8. All three of us had independently on reading the papers formed the view that there was such an error and it was therefore no surprise when we were told shortly before the date of this hearing that the Home Office agreed that the appeal should be allowed on this ground and the matter remitted to the Asylum and Immigration Tribunal.

3. The reason we are nevertheless here today, and have spent very nearly as long on the issue which I am about to come to as if we had heard the full appeal, is that the parties fell out as to the ambit of what was to be remitted. We were laterly asked to endorse a compromise order which the parties, I think, now accept was unworkable in more than one respect. I will not take time explaining why. In consequence, the appellant, represented by Mr Buley, has come before the court today to ask us not to limit the remitted question to the Article 8 issue, but to leave the matter at large before the Asylum and Immigration Tribunal to the extent of authorising the tribunal to admit any fresh evidence which passes, broadly speaking, the Ladd v Marshall test and goes to any of the other issues (asylum, humanitarian protection or Article 3) which were canvassed below but upon which the appellant not only failed but failed to secure permission to come to this court. He is opposed -- in my judgment rightly -- by Mr McCullough for the Home Office in this endeavour. For reasons which I am now going to give very briefly, I would limit the remission in terms to the Article 8 issue.

4. Our power to remit is given nowadays by section 103B of the Nationality, Immigration and Asylum Act 2002. It permits us to "remit the case to the tribunal". The power that we implicitly have to set the terms of such remission is not in issue. The question, in my view, is simply what the justice of the case requires to be included and excluded.

5. Mr Buley has relied upon authority which relates to the ambit of a reconsideration, either under section 103A of the 2002 Act (see DK (Serbia) and others v SSHD [2006] EWCA Civil 1747) or under the

power of the AIT itself to order and conduct a reconsideration (see AH (Scope of s103A reconsideration) (Sudan) [2006] UKAIT 00038). Neither of those represents the power that we are exercising in the present case. In the first of the cases I have mentioned, however, something that I had earlier said in the case of Mukarkar v SSHD [2006] EWCA Civ 1045 was cited in this court by Latham LJ at paragraph 18 and reflects what I believe to be a general principle:

> "If a discrete element of the first determination is faulty, it is that alone which needs to be reconsidered. It seems to me wrong in principle for an entire edifice of reasoning to be dismantled if the defect in it can be remedied by limited intervention."

6. For the present, however, it is sufficient to say that, insofar as the Article 8 issue falls to be redetermined pursuant to this court's order, it will be open to the tribunal, pursuant to rule 51 of the Procedure Rules, to admit any further evidence which justice makes it appropriate to admit; and all the facts, as Mr McCullough accepts, will be at large again on the remitted appeal under Article 8. If Mr Buley's client comes by fresh evidence which changes the character of his case and improves it, either under the Refugee Convention or under Article 3, then he has open to him, as always, the route provided by rule 353 of the Immigration Rules to a fresh claim. That is the appropriate procedure, and it is not one for which it is appropriate for this court to provide a surrogate by pushing the door wider open on the remitted appeal than is legally justified.

7. I would therefore make an order in the following terms: 1) The appellant's appeal to the Court of Appeal is allowed and the decision of the AIT (Immigration Judge Price), following a hearing on 15 February 2007 in relation to Article 8, is quashed. 2) The case is remitted to the Asylum and Immigration Tribunal pursuant to section 103B(4)(c) of the Nationality, Immigration and Asylum Act 2002 for determination of the appeal under Article 8.

Lord Justice Carnwath:

8. I agree that the order proposed by my Lord is what justice requires on the facts of this case. I am not convinced, on the limited argument we have heard, that we have necessarily got to the bottom of the jurisdictional issues. Section 103B, which gives us our powers, limits an appeal to cases where permission has been granted by the appropriate appellate court and then gives us power to remit the case. It does not deal with the situation where permission is given on limited grounds, as in this case., . My initial assumption would be that, where the "issues to be heard" are so limited (as provided for by CPR 52.3(7)), the case before us is the case defined by those limited issues and that is what we would be remitting. That also seems to me to be in line with the general principle that there should be an end to litigation. However, I would not want finally to rule on that point. On the facts of this

case there is no suggestion before us that there is any material which would justify a wider consideration by the AIT on remittal. On those grounds it seems to me it is quite wrong to broaden the order, even if we had power to do so.

Lord Justice Lloyd:

9. I agree, for the reasons given by Sedley LJ, that the order allowing the appeal should be made in the terms that he has set out.

Order: Application allowed