Case No: C5/2008/2084

**Neutral Citation Number: [2008] EWCA Civ 1396**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**
**[AIT No: AA/01390/2007]**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 24th November 2008

**Before:**

**LORD JUSTICE JACKSON**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**EI (RUSSIA)** — **Appellant**

**- and -**

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

- - - - - - - - - - - - - - - - - - - - -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - - - - -

**Ms S Khan** (instructed by Messrs Cole & Yousaf) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

- - - - - - - - - - - - - - - - - - - - -

# Judgment

**(As Approved by the Court)**

**Crown Copyright©**

**Lord Justice Jackson:**

1. This is an application for permission to appeal. The facts giving rise to the application are as follows. The appellant was born in Nigeria. He grew up in Nigeria as a Nigerian citizen. At the age of 20 the appellant came to Russia where he was a student. He settled in Russia for a period. It is the appellant's case that he became a Russian citizen and lost Nigerian citizenship. He married in Russia and had a child there. Whilst in Russia he suffered racial abuse, as a result of which he and his wife and their son and daughter went to Denmark where they applied for asylum. The appellant was transferred to the United Kingdom by the Danish authorities where he now lives together with his ten-year-old son Khristian. He applied for asylum in the United Kingdom. The wife and daughter remained in Denmark where they continued to apply for asylum with a view to later settling in the United Kingdom.

2. The appellant's application for asylum was refused by the Secretary of State. There was an appeal by the appellant to the Asylum and Immigration Tribunal. That appeal was unsuccessful. There was an order for reconsideration and a second hearing before the Asylum and Immigration Tribunal in May 2008 at Bradford. The judge at the second hearing was Immigration Judge Holmes and he promulgated his decision on a date which is not entirely clear but it would appear to be mid or late May.

3. The immigration judge accepted that the claimant had suffered persecution in Russia but he came to the conclusion that there would be a sufficiency of protection, and accordingly the claim on that basis to refugee status was not made out. Likewise, the human rights claim was not made out. The immigration judge went on to conclude that it would open to the appellant to return to Nigeria; if he had lost his status as a Nigerian citizen he could readily regain it and there would be no breach of Article 8 of the European Convention on Human Rights if he were required to return to Nigeria, and he could go there, if he and his wife cooperated, together with his son.

4. The appellant was aggrieved by the decision of Immigration Judge Holmes and applies for permission to appeal to the Court of Appeal on two grounds. The first ground is that the immigration judge applied the wrong test in relation to sufficiency of protection. Ms Khan, who appears for the appellant, submits that the immigration judge applied the Horvath ([2001] 1 AC 489) test when he ought to have applied the test set out by the Court of Appeal in Svazas v SSHD [2002] EWCA Civ 74.

5. The first point to note is that the majority of incidents of which the appellant complains in Russia concerned persecution by non-state agents. Those were the incidents which the respondent accepted to have occurred at the start of the hearing. So far as the persecution by state agents is concerned, there is only one specific incident which the immigration judge accepted. The immigration judge's approach to the issue of sufficiency of state protection is set out in and around paragraph 49 of the decision. So far as this ground is

concerned, it was considered in writing by Richards LJ on 16 October 2008. Richards LJ wrote as follows:

> "1. There was no arguable misdirection by the IJ. The principles set out at para 47 of his decision were in substance *Horvath* principles. *Svazas* does not depart from *Horvath* though it underlines that more will be needed in practice to establish sufficiency of protection where state officials are involved in the ill-treatment. (It is to be noted that in *Svazas* Simon Brown LJ and Sir Murray Stuart-Smith do not appear to go as far as Sedley LJ: see the observations at para 12.61 of MacDonald's Immigration Law & Practice.)
>
> 2. In applying the relevant principles the IJ took express account of the fact that some of the ill-treatment emanated from police officers, and in reaching his view on sufficiency of protection he considered the action taken by the state to combat illegal police activity (para 48). His conclusion on sufficiency of protection was reasonably open to him."

6. Ms Khan has put her submissions forcefully and clearly, and the point is not an easy one. However, having reflected on the passages in Svazas, which Ms Khan relies upon, and the reasoning of the immigration judge in the first part of his decision of May 2008, I have come to the conclusion that the analysis of Richards LJ is correct and that this ground of appeal would not succeed. Even if I am wrong, however, the appellant could not succeed on this ground alone unless he also succeeds on the second ground.

7. So far as the second ground of appeal is concerned, here Ms Khan contends that the immigration judge failed properly to consider Article 8 because he disregarded the interests of the son; and, says Ms Khan, the interests of the whole family must now be considered following the recent decision of the House of Lords in Beoku-Betts v SSHD [2008] UKHL 39.

8. That ground of appeal seems to me to be distinctly weaker than the first ground of appeal. It can be seen from the latter part of Immigration Judge Holmes's decision that he does consider the position of the family as a whole, including the position of the appellant's son, even though the decision of Immigration Judge Holmes pre-dates the House of Lords' decision in Beoku-Betts. In relation to this ground Richards LJ wrote as follows:

> "Although the IJ did not consider the applicant's son's own rights under article 8 in quite the way he might have done if the judgment of the HL in *Beoku-Betts* had been available to him, he did consider the position of the family as a whole when

> examining the applicant's article 8 claim. He found, as he was entitled to do, that the son would be able to travel to Nigeria with the applicant and that any separation of the son would be the result of the parents' refusal to cooperate and their desire to frustrate the removal process. Whether that is looked at from the point of view of the applicant or of the son, the circumstances are such that the applicant's removal to Nigeria could not be said to be in breach of article 8. It is not arguable that the IJ fell into material error."

9. In relation to that aspect of the case, I am quite satisfied that the analysis of Richards LJ is correct and even if I am wrong in relation to the first ground of appeal I am quite sure that the second ground of appeal has no prospect of success. Accordingly, for all of these reasons the application for permission to appeal is refused.

**Order:** Application refused