Case No: C5/2008/0150

Neutral Citation Number: [2009] EWCA Civ 308
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/02471/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 11th March 2009

Before:

LORD JUSTICE DYSON
LORD JUSTICE THOMAS
and
LORD JUSTICE RICHARDS

- -

Between:

HS (ZIMBABWE)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Official Shorthand Writers to the Court)

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Mr M Henderson (instructed by Messrs Bhatt Murphy) appeared on behalf of the **Appellant**.
Mr S Kovats (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Richards:

1. This case has been listed before the court for directions because the parties are unable to agree how it should be dealt with in the circumstances that have arisen.

2. HS resists return to Zimbabwe, contending that she will be at risk of persecution and of Article 3 ill-treatment because she has sought asylum in the United Kingdom. In February 2006 the Secretary of State reached an adverse decision on her claim. She appealed to the AIT and was originally successful before an immigration judge, but reconsideration was ordered. The case was then identified by the tribunal as a suitable one for updated country guidance. The decision reached on the reconsideration, having regard to the guidance adopted, was that HS's appeal should be dismissed. That decision was promulgated in November 2007.

3. An application was made for permission to appeal to this court on grounds relating primarily to the tribunal's assessment of country conditions but also relating to individual features of HS's case. Permission was refused by the tribunal and by Laws LJ on the papers. A renewed application came on for hearing in July 2008, but the court stayed the application pending the determination by the House of Lords of the appeal in RB (Algeria) v SSHD, which included an issue as to the correct approach of an appellate court towards complaints about the fact-finding process of a lower court in a human rights case where an appeal lies only on a point of law.

4. The decision of the House of Lords in RB (Algeria) has now been handed down (see [2009] UKHL 10), but in the event it is not said by either party to have any material effect upon HS's case.

5. In the meantime, however, there have been separate developments of importance. In November 2008 the tribunal promulgated a new country guidance decision, RN (Returnees) Zimbabwe CG [2008] UKAIT 00083. The Secretary of State decided not to challenge that decision.

6. Thereafter, in late December 2008, the Secretary of State proposed that the present application for permission to appeal be withdrawn by consent, on the basis that the Secretary of State would withdraw her original immigration decision of February 2006 but would reconsider HS's asylum and human rights claims in the light of the new country guidance in RN and would make a new decision on the claim. Similar proposals have been made in relation to a substantial proportion of the numerous appeals and applications for permission to appeal that have previously been stayed pending determination of the challenge to HS, (i.e. the former county guidance decision to which these proceedings relate).

7. So far as the present case is concerned, the Secretary of State has now given effect to her proposal, to the extent within her power, by formally withdrawing her February 2006 decision. That was communicated to HS and the court yesterday. The Secretary of State's position is that this step and the fact that HS's case will now fall to be reassessed in the light of the new country guidance render the existing proceedings academic and that the application for permission to appeal should therefore be withdrawn.

8. HS resists the course put forward by the Secretary of State. Mr Henderson submits on her behalf that withdrawal of the original immigration decision does not bring the appeal proceedings to an end or render them moot and that an appeal will not be academic unless the Secretary of State actually accepts HS's case for asylum in the light of the new guidance in RN. Her lawyers have pushed hard to get the Secretary of State to give a prompt indication of where she stands on the effect of RN on HS's claim. Complaint is made about the failure to give any such indication to date. As a result of correspondence between the parties, the Secretary of State has agreed to consider HS's case and to make a decision on it within six months of any order for withdrawal or dismissal of the proceedings in this court, but HS regards that as unacceptably long. Mr Henderson adheres to his submission that the Secretary of State is acting wholly unreasonably in the matter, and in the circumstances HS is not prepared to withdraw her application to this court on the basis of the Secretary of State's proposal.

9. Mr Henderson has put forward on her behalf an alternative proposal, that in the absence of any indication by the Secretary of State that she will now accept HS's claim the case should be remitted to the tribunal for further reconsideration in the light of RN. For her part, the Secretary of State refuses to consent to that course, since it is not accepted that the tribunal erred in law in relation to the country guidance adopted in the decision in HS or in relation to the application of that guidance to HS's individual circumstances. HS in turn contends that the reason given by the Secretary of State for refusing to consent to a remittal is not supported by the rules or by the practice in other cases.

10. The result is a stand off, and, in the absence of agreement between the parties it is for this court to direct how the case is to be dealt with.

11. In my judgment it is plainly inappropriate for the present proceedings in this court to continue. No useful purpose will be served by extended argument as to whether the country guidance in HS is affected by material error of law when that guidance has already been superseded by the new guidance in RN. Nor can it serve a useful purpose to engage in debate as to whether the tribunal in HS erred in law in dealing with the individual features of HS's case: her case needs to be reassessed as a whole in the light of the new guidance. Even if she were granted permission to appeal and were successful in the appeal, the most that could realistically be achieved by way of remedy would be a remittal to the tribunal for a further reconsideration. In my view, there is no realistic possibility of this court substituting a decision of its own that HS is entitled to succeed in her asylum claim rather than remitting the matter to the tribunal.

12. The Secretary of State's proposed approach offers a much more sensible way of achieving a reassessment of the case in the light of the new guidance. It means that there will be a fresh immigration decision. If that decision is favourable, it will be an end to the matter. If it is adverse, there will be a right of appeal to the tribunal, which can then examine the case afresh on the basis of the new decision by the Secretary of State, the new guidance and indeed any more recent material about conditions in Zimbabwe. The Secretary of State has not accepted in terms that an adverse decision will trigger a right of

appeal, but I can see no reason why it should not do so. How the tribunal would approach such an appeal is a matter for the tribunal.

13. Even in the absence of agreement between the parties, the court is in a position to give effect to the Secretary of State's proposed approach by the simple expedient of refusing HS's renewed application for permission to appeal against the tribunal's decision. That will draw a line under the existing proceedings and enable the fresh decision-making process to take place. The fact that the Secretary of State has allowed herself a six-month period for making a fresh decision does not militate against the adoption of that course. It is shorter than the period within which any resolution could be achieved by continuation of the present proceedings, even if that were capable of achieving anything useful.

14. The alternative suggested by Mr Henderson, of remitting the case to the tribunal, is not open to the court at this stage, in the absence of consent by the Secretary of State, and would in any event be a less satisfactory approach than having a fresh start.

15. For those reasons I would deal with the matter before the court by refusing the renewed application for permission to appeal.

Lord Justice Thomas:

16. I agree. I too would refuse leave to appeal.

Lord Justice Dyson:

17. I also agree.

Order: Application refused