Case No: C5/2006/1814

Neutral Citation Number: [2007] EWCA Civ 193
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No. AS/04696/2004]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 13th February 2007

Before:

LORD JUSTICE TUCKEY
LORD JUSTICE ARDEN
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between:

LE (Democratic Republic of Congo) **Appellant**

- and -

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

- -

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MISS B McVAY (instructed by Messrs Biscoes) appeared on behalf of the Appellant.

MR J EADIE (instructed by Treasury Solicitor) appeared on behalf of the Respondent.

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Judgment

(As Approved by the Court)

Lord Justice Tuckey:

1. This is an appeal by LE from a decision of the AIT, which dismissed her appeal from an adjudicator, who in turn had dismissed her appeal from the Secretary of State's decision rejecting her asylum and related human rights claims. The AIT granted permission to appeal from its decision on the single ground that its panel should have accepted that a community psychiatric nurse was an expert qualified to give a diagnosis for post-traumatic stress disorder ("PTSD").

2. I shall explain how this point arises, but because it is the only point on the appeal I can deal with the other facts of the case quite shortly.

3. The appellant is a citizen of the Democratic Republic of Congo who is now aged 36. She arrived in the United Kingdom at the end of 2003 with her two children: A, who is now 14, and B, now 8. She claimed asylum on the basis that her husband had been a senior member of President Kabila's security personnel. As such he was accused of the President's assassination. He disappeared in January 2001. She fled to a friend living in another part of Kinshasa but was arrested and detained from June 2001 until she was helped to leave the country in December 2003. Whilst in prison she had been interrogated about her husband's whereabouts, beaten, and raped three times as a result of which she had become pregnant with her third child, born after she arrived in the United Kingdom. She had been able to escape because the prison had allowed her weekly visits to see A, who suffers from sickle cell anaemia. She believed that her husband had been caught and sentenced to death for the murder of the President. She feared that if she was returned to the Congo she would be treated in the same way as she had been before.

4. This claim was rejected in its entirety by the Secretary of State, the adjudicator and by the AIT on a full reconsideration of the appellant's case. After hearing her give evidence and being cross-examined, the AIT concluded that the appellant's account was "at core implausible and a fabrication". She was a wholly unreliable witness who had fabricated a story around the abundant objective evidence about what had happened after President Kabila's assassination. She was not in need of international protection and she had left the Congo for the United Kingdom for other reasons, probably because of A's health. It was A's health which formed the basis for Articles 3 and 8 claims and gives rise to this appeal.

5. Miss McVay, counsel for the appellant, argued before the AIT that A would suffer terribly at the suspension of his United Kingdom healthcare and that he would commit suicide if threatened with or returned to the Congo.

6. There were a number of reports before the tribunal. A obviously suffers greatly from his physical illness. It has caused degeneration of his hip and stunted his physical development. He also suffers episodes of pain about once a month which by the end of 2005 had started to make him feel that he wanted to harm himself and die. This resulted in his being referred to Portsmouth's Child and Adolescent Mental Health Services ("CAMHS"). Before the tribunal hearing A had been seen three times by Nigel Sampson, a community nurse specialist. In his report to the tribunal he explained that he was:

> "… a Registered Nurse (Mental Health) with additional specialist qualifications within Child & Adolescent Mental Health (ENB 603) to enable me to practice as an Advanced Nurse Specialist. I have worked for the Child & Adolescent Mental Health Services for 10 years, across various team settings".

7. Mr Sampson first saw A and the appellant on 19 January 2006. The following day he reported to their GP as follows:

> "[The appellant] and A provided as much information as they possibly could, due to the language barrier, a lot of questions could not be answered (as an appropriate interpreter could not be found in time for the appointment).
>
> A's low mood and negative thoughts are very much focused around his physical ill health and the bullying that he experiences within Priory School.
>
> He wishes that these would stop and that would make everything happier, although he realises that his physical ill health will not change.
>
> Upon exploration of A's mental health status, it all appears rather within the normal ranges, apart from his disturbed sleep and eating pattern, which again is mainly disturbed when he is in pain due to the sickle cell. On the whole he feels a fairly happy young man, except when he experiences pain or bullying, and at that time he makes negative comments about the value of his life."

The letter went on to set out what further steps Mr Sampson proposed in order to deal with A's and the appellant's health problems.

8. Mr Sampson's next letter to the GP of 20 February 2006 followed a further meeting with the appellant and A in the presence of an interpreter. This letter said:

> "… the situation regarding A has altered quite dramatically.
>
> … During the course of this interview it transpired that this family have had an extremely traumatic time in the Congo, including different family members being kidnapped by political soldiers during the night, [the appellant] being raped and subsequently having A as a result of this, and the children being cared for by family friends who emotionally cared for the children, however may not have been physically appropriate with them. The family fled from the Congo to this country and are still here with no legal long term documents, their case is currently being review [sic] by the Home Office and it is feared that if it is rejected and the family sent back to the Congo, then Mum would be arrested upon return and the children would be sent to different family members to be cared for …

> We feel … [the appellant] needs help in her own right and would benefit from psychological counselling, with an interpreter of course, to help her with some of her post traumatic difficulties and depressive thinking.
>
> The children are obviously picking up on Mum's trauma and presenting with post traumatic stress syndrome behaviours themselves, and therefore I have subsequently referred A to [a named Child & Adolescent Psychotherapist] for a full assessment.
>
> … I am writing to the school as A complains the bullying is carrying on, to see if we can alleviate this, and A himself is presenting with classic post traumatic stress behaviours and some depressive signs and symptoms, although we hope that through psychotherapy these will be alleviated. The main problem is that this family could be deported at any time and therefore we need to work with them sooner rather than later."

9. The same day Mr Sampson wrote to the Home Office referring to "this family's extremely traumatic history in the Congo" and asking for their case to be "treated differently" because if returned to the Congo A "would not be treated" for his physical illness and the family "would be split up due to [the appellant] being arrested upon return." Mr Sampson claimed that A's referral to CAMHS "centres around acceptance of his sickle cell anaemia and presenting with severe traumatic stress disorder". A had in fact been referred to CAMHS to deal with his acceptance of the physical consequences of his disease but the referral was not made because anyone had diagnosed PTSD, severe or otherwise.

10. The report to the tribunal to which I have referred is dated 23 March 2006. In it Mr Sampson says that he has been able to make a full assessment of A's needs and mental health status. He expresses his views on three questions which had no doubt been framed by the appellant's solicitors. These were directed to ascertaining the effect on A if he was sent back to the Congo. It was Mr Sampson's view that there was a risk of suicide. He says that A fears being sent to the Congo because:

    > "… in a nutshell … it would mean the splitting up of his family unit, the loss of his mother and brother (in terms of death), no further treatment for his Sickle Cell Anaemia and his own arrest by political forces back in the DRC".

    This report contains no diagnosis of PTSD and no reference to any assessment by the psychotherapist to whom Mr Sampson referred in his letter to the GP of 20 February.

11. So that was the evidence before the tribunal. After accurately summarising it they said:

    > "[We] treat with great caution the opinions of Mr Sampson. He is a nurse and is not qualified to diagnose PTSD. His complete change of opinions as to the magnitude of A's psychological problems is firmly based on a total acceptance of the account given to him of the family's experiences in the DCR and of the likelihood of the

appellant being detained as a political prisoner on return and the children therefore being abandoned.

> "We have rejected the account of past traumas and the claimed risk of the appellant being separated from her family on return. We are satisfied from the oral evidence as to [a friend's] loyalty and perseverance on the family's behalf that any suggestion of abuse within her care should be discounted. We are concerned that the very understandable moments of anguish and despair suffered by the appellant and her son as a result of his illness, of their separation from friends and family and of the uncertainty of these proceedings have been magnified into psychological/psychiatric illnesses."

12. The tribunal then turned to the risk of suicide by the appellant or A if they were returned to the Congo by reference to the decision of this court in J v Secretary of State for the Home Department [2005] EWCA Civ 629. Of the domestic risk as defined in that case they said:

> "We are satisfied that the appellant and her son are sufficiently stable to be able to overcome the disappointment of the final removal decision without resorting to suicide. Neither has attempted self-harm. Neither has been hospitalised as being mentally at risk and Mr Sampson's views, untrammelled by the history of past abuse which we have rejected, was that A had no real mental health needs. They are already in the care of very committed health/welfare professionals who could help them manage the problem. It is for the appellant and for A's counsellors in this country to disabuse him of the likelihood of his mother being thus imprisoned and taken away from him."

13. The tribunal went on to urge the Home Office to ensure that it followed its policy guidance and practice to mitigate the risk *en route* to the foreign country. As to the foreign risk, they reminded themselves that the Article 3 threshold was extremely high and that an important factor in the assessment was whether the fear of ill-treatment was objectively well founded. They concluded (at paragraph 33) that:

> "No evidence has been put forward to persuade us that the risk of either A or his mother attempting to take their lives on return would approach the threshold of Article 3. We are satisfied from the objective evidence that there are medical facilities in the DRC and that the appellant could continue to manage any depression with the mild anti-depressants which have sustained her here."

14. They then turned to the related issue of non-availability of treatment in the Congo for A's physical problems and concluded at paragraph 35:

> "On her own account the appellant has stated that A did receive medical treatment to manage his bouts of extreme pain [in Kinshasa]. There is no evidence … as to medical treatment even in this country which can wipe out the source of these unpleasant symptoms, including that of the hip joint pain. There is objective evidence as to

> a specific specialised sickle cell unit being available in Kinshasa. The appellant and her husband were living in Kinshasa before and she can resettle there with access to this medical treatment and with the support of at least one very good friend."

15. In her skeleton argument Miss McVay submitted that this appeal raised an important question of principle: are nurses such as Mr Sampson qualified to make a diagnosis of PTSD? She submits that they are and that the tribunal's conclusion to the contrary was an error of law which materially affects the decision which they reached. Mr Sampson's letters and report were the best evidence which could be obtained within the limited time and resources available to the appellant before the tribunal hearing in March 2006. The respondent did not challenge Mr Sampson's expertise and so, in the circumstances, Miss McVay submits we should allow the appeal and direct that there be a further reconsideration at which Mr Sampson could amplify his evidence and be cross-examined as necessary.

16. Miss McVay supports her submission that Mr Sampson was qualified and should be given the opportunity to amplify his evidence by reference to a statement which he has made since the tribunal hearing and a further undated document prepared by the Clinical Service Manager of the Portsmouth CAMHS. Put shortly, this evidence explains how mental health care has been devolved to multidisciplinary teams which include advanced nurse specialists, such as Mr Sampson, who are qualified to diagnose and treat PTSD. Mr Sampson says that he did in fact diagnose PTSD in this case. However, for reasons which I will explain, it is unnecessary to consider this material further because I do not think it affects the outcome of this appeal.

17. This morning we had some debate as to whether in fact Mr Sampson had ever made a diagnosis of PTSD. However, his recent statements say he did, the tribunal proceeded on this basis and so shall I. But in the material before the tribunal Mr Sampson had not sought to explain in any way the reasons for his diagnosis by, for example, reference to WHO guidelines. So on any view of his expertise, the tribunal were entitled to treat his diagnosis with caution. They did not in fact say that this evidence was inadmissible and it seems to me that the other reason which they gave for treating it with great caution was entirely compelling. One cannot read Mr Sampson's letters of 20 January and 20 February without concluding that his diagnosis was dependent upon acceptance of the appellant's and A's (incidentally inconsistent) accounts of their "extremely traumatic time in the Congo". This had led Mr Sampson, whose first assessment had been that A's mental health appeared to be "within the normal ranges", to say a month later that the situation had "altered quite dramatically". As the tribunal had entirely rejected the appellant's account of past trauma and what would happen to her and her family on return, the whole premise for Mr Sampson's diagnosis had disappeared. The tribunal were therefore entitled to treat it with great caution, whether or not he was qualified to make it.

18. The focus of this case is or should have been upon the risk to A on return. It was possible that his mental health was being affected by what the appellant told him. This was something which could be taken into account as part of his Article 3 claim. But it is clear from the passages which I have quoted in paragraphs 10 and 11 that the tribunal had this very much in mind, noting that it was for the appellant

and A's counsellors to disabuse him of the fears which he had expressed. Miss McVay rightly accepts that the tribunal correctly applied the decision of this court in J to the facts of this case, so there was no error in that process.

19. For these reasons I am satisfied that the tribunal made no error of law and there are no grounds for remitting it for further reconsideration to the AIT. The point of principle identified by Miss McVay does not arise. If it arises in another case it is important that evidence, such as that produced after the tribunal hearing in this case, should be before the specialist decision maker or makers and tested if necessary by cross-examination. That did not happen in this case, which is why I do not think that we should express any view on the point in the context of this appeal.

20. I should like to add that nothing I have said is intended to belittle or criticise the sterling support which the Portsmouth Health Authority, including its CAMHS and Mr Sampson himself, have given to the appellant and her family whilst they have been in their care. They are not in a position to assess the merits of asylum and related human rights claims and must take their patients as they find them.

21. But for the reasons I have given I would dismiss this appeal.

Lady Justice Arden:

22. I agree.

Lord Justice Lawrence Collins:

23. I also agree.

Order: Appeal dismissed.