Neutral Citation Number: [2001] EWCA Civ 1520
IN THE SUPREME COURT OF JUDICATURE C/2001/0270
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London WC2

Friday, 5th October 2001

B e f o r e :

LORD JUSTICE JUDGE

LORD JUSTICE JONATHAN PARKER

-and-

MR JUSTICE BODEY

- - - - - - - -

CAROLINE MONICA DEREVA
Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

- - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of
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MS ANNE-MARIE SHEEHAN (instructed by Dozie & Co Solicitors, London N15 4NP) appeared on behalf of the Appellant
The Defendant did not attend and was not represented

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J U D G M E N T
(As approved by the Court)
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Friday, 5th October 2001

1. LORD JUSTICE JUDGE: This appeal has a lengthy history. The appellant is a young woman born in 1975 in Kenya of the Kikuyu Tribe. She seeks asylum in the United Kingdom. She arrived here when she was just 21 years old. It was 2nd February 1996. She immediately sought asylum. Her application was refused on 22nd April 1999. A special adjudicator refused her appeal on 3 June 1999. The Immigration Appeal Tribunal refused an application for permission to appeal on 22nd June that year. She took proceedings by way of judicial review. Permission was granted to her, and on 29th June 2000 the decision of the Immigration Appeal Tribunal was quashed by consent. The reason noted in the consent order related to the credibility findings made by the special adjudicator.

2. The Immigration Appeal Tribunal then heard the substantive appeal on 22 September 2000, refusing the appeal by a decision notified on 27 September. Leave to appeal to this court was refused by the Immigration Appeal Tribunal but granted by the single Lord Justice on 9 April 2001. We have now heard the appeal.

3. The story immediately before the arrival of the appellant in this country needs at least brief mention. She was at the relevant time a student. She joined the February 18th resistance army, FERA, while she was a student. That organisation was a political organisation strongly and violently opposed to the government. It was not only prescribed but, on the evidence we have and the assumptions made about the appellant's credibility (if her treatment was anything to go by) fiercely and violently repressed.

4. In early 1995 due to a government announcement that FERA was planning to invade the country, there was a police crackdown on its supporters. The attention of the police, where the appellant was living, was drawn to her involvement with FERA. In March 1995 she was detained. Her period of detention ended in July 1995. She was tortured. Among the methods of torture were electrocution, sexual abuse and water torture. The result was that she (as I understand it though I am not absolutely sure about this and it does not matter for the purposes of the appeal) required treatment as an inpatient in hospital.

5. Following her return to the police station from hospital there was no further room for her to be detained so she was released with conditions that she report twice weekly. During the course of her reporting she was further tortured. This torture took the form of systematic rape. She was also forced to clean up urine and faeces. She continued reporting until she left Kenya. She obtained a passport and, with the aid of others, she managed to make her escape.

6. The Secretary of State for the Home Department allowed his representative before the Tribunal to accept that the hearing before it should proceed on the basis that her evidence was accepted. The appeal to the Tribunal proceeded on a very narrow point. It was accepted by the Tribunal that, in view of the history and the way in which the case had developed, it was necessary for the Secretary of State to show that there had been a change in circumstances before it could conclude that the risk to her had been removed. It was to be presumed that a woman who had undergone this sort of treatment continued to have a well-founded fear of persecution unless it was shown otherwise, and, as I have said, the Tribunal proceeded on the basis that the submission was correct.

7. Having examined the evidence, the Tribunal concluded its judgment:

> "We are therefore persuaded that there has been a change within Kenya during the period during which the Appellant has been absent from the country; such that there is no longer any real likelihood that she would be

persecuted for the reasons that are put forward on her behalf. That being so we uphold the conclusion reached by the Special Adjudicator albeit for reasons different from his."

8. In other words the decision of 3rd June 1999 was upheld; hence this appeal.

9. The submission made on behalf of the appellant is not that the Tribunal misdirected itself in law. Plainly, the Tribunal fully understood the consequences of the treatment which the appellant had undergone and the effect that it should have on the decision before them. The argument is that the findings by the Tribunal were perverse. That is always a difficult submission to make and, if I may say so, the submission before us was handled with care, but tenaciously, by Miss Sheehan on behalf of the appellant.

10. The decision of the Tribunal depended primarily, though Miss Sheehan suggested exclusively, on the evidence from the Country Information and Policy Unit for Kenya dated April 2000. Importantly, in my judgment, the analysis was made available to several organisations which play an important role in this field including, among others, Amnesty International, the Joint Council for the Welfare of Immigrants, JUSTICE, the Medical Foundation for the care of Victims of Torture, the Refugee Council, the Refugee Legal Centre and the United Nations High Commissioner for Refugees. At paragraph 5.49 the report focuses specifically on FERA. The entire passage reads:

> "During late 1994 to mid 1995 FERA was considered to be a major threat. On 3 February 1995 the Kenyan Government issued a statement accusing FEM/FERA of recruiting disaffected Kenyan youths and giving them military training to mount operations in Kenya including cattle rustling, arson, bank robberies and attacks on businessmen and the police. They alleged the movement was based in neighbouring Uganda and led by a Brigadier John Odongo. The scare over FEM/FERA activity in Western Province led the Kenyan authorities to charge a number of people with suspected membership... Charges against a number of defendants were later dropped, four were convicted and sentenced to between five and six years. A number of the FEM suspects later reported that they had experienced maltreatment, including torture, and had only signed confessions under duress. Membership of FEM/FERA has since receded. John Odongo and FERA chairman Patrick Wangamati went into exile in Ghana. On 6 October 1997, Wangamati returned to Kenya. He was detained, held incommunicado and interrogated on his return, and was pardoned in December 1997. He announced publicly that FERA had been officially dissolved. Whilst there was a time when members and people associated with FERA were in considerable danger of persecution in Kenya there is no evidence that this is still the case."

11. We have considered the point raised by the single Lord Justice giving permission to appeal, that the conclusion expressed in the last sentence of the passage I have just read could mean no more than that there was no evidence either way of continuing persecution, or that the absence of any evidence simply means that it was or must have been suppressed. The difficulty with that construction is that, reading the passage as a whole, it is plainly reflecting what is believed to be a major change in Kenya between early 1995 when the appellant was herself a victim of the suppression of the organisation of which she was a member or supporter, and so tortured, and the date when the report was compiled. The organisation to which she belonged has been dissolved. Plainly that is a reference to the

past. Its chairman had returned from exile (another reference to the past) and had subsequently been pardoned. All that occurred in December 1997. Reading the passage as a whole a contrast is drawn between alarming events in 1995 and 1996, and the position now.

12. There is a further and important piece of material in this report. At 5.52 the report reads under the heading “Freedom of Speech and of the Press”:

> “The Constitution provides for freedom of speech and the press, although the authorities' broad interpretation of colonial-era sedition and libel laws limited free expression. These sedition laws, which were used to prevent freedom of expression, were replaced in November 1997. The print media remains candid and independent. There are four daily newspapers that report on national politics. The largest, the Daily Nation, is independent and often publishes articles critical of government policies. There are a large variety of weekly tabloid publications, many of which are highly critical of the Government. Some independent periodicals reported that the business community came under pressure from the Government to refrain from placing advertisements with them.”

13. That passage is significant to the further limb of evidence identified by the Immigration Appeal Tribunal in reaching its conclusion. There was no evidence available to, or produced by or on behalf of, the appellant that former members of FERA had been subjected to ill-treatment after FERA itself had been dissolved, or that there was any persecution of members in any way at all. Given the greater freedoms enjoyed by the press in Kenya it seems improbable that news of torture of the kind undergone by the appellant, or targeting or persecution of former members of FERA, would not have emerged. That is lent particular force by the fact that no such evidence was produced from any of the organisations identified earlier in this judgment to which this report was sent.

14. Given the two limbs to the factual conclusion reached by the Immigration Appeal Tribunal, first, the changes noted by the Country Information and Policy Unit; and second, the absence of any evidence whatever of any kind to show that members of the dissolved organisation were mistreated or liable to be mistreated, it is difficult to see how this court would be entitled to interfere with the conclusion that the appellant's justified basis of fear of persecution when she came to this country no longer continued to be well-founded. The decision reached by the Tribunal on the basis of the evidence presented to it seems to me to have been one which it was entitled to reach. Even in this sensitive area, and given the undoubted ill-treatment which this unfortunate young woman had sustained at the hands of the authorities in Kenya in 1995, there is, in my judgment, no proper basis on which we should or could interfere with the conclusion to which the Tribunal came.

15. Accordingly, in my judgement, this appeal should be dismissed.

16. LORD JUSTICE JONATHAN PARKER: I agree.

17. MR JUSTICE BODEY: I also agree.

(Appeal dismissed; legal aid assessment).