Case No: C4/2008/1420

Neutral Citation Number: [2008] EWCA Civ 1500
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MRS JUSTICE HOBBS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 14th November 2008

Before:

LORD JUSTICE PILL

- -

Between:

THE QUEEN ON THE APPLICATION OF MA (SUDAN) **Appellant**

- and -

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

- -

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Mr D Chirico (instructed by Sutovic & Hartigan) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is a renewed application for permission to apply for judicial review and is made by MA (Sudan), who arrived in the United Kingdom on 24 September 2006. He sought asylum. Other relief was sought which is not material at this stage.

2. On 4 October 2006 the Secretary of State allocated the case to the fast track. On 4 October the decision by the Secretary of State, adverse to the applicant, was made. That went before an immigration judge, who upheld the Secretary of State's decision on 16 October 2006. Application for reconsideration was made; that was refused by a senior immigration judge on 20 October 2006. On 5 November 2006 solicitors now appearing for the applicant received an expert report on conditions in Sudan from Ms Sarah Maguire. On 8 November 2006 a fresh claim was made. It was submitted that the additional information now available entitled the applicant to a fresh review of his case. On 10 November (letter dated the previous date, 9 November) the Secretary of State refused to accept the representations as a fresh asylum claim. Judicial review was sought on 29 November 2006. It was refused on paper by Walker J on 29 January 2007. The application was renewed orally and was refused by Dobbs J, having heard counsel for the applicant (who also appears today), Mr Chirico, and counsel, Mr Dunlop, for the Secretary of State.

3. Application was then made to this court, and Sir Henry Brooke refused permission to appeal on a consideration of the papers on 10 September 2008. He stated:

> "There is no real prospect of success on this appeal. The AIT dismissed the original appeal and statutory review was not directed. This application appears to represent an attempt to reargue the original appeal with additional evidential material from Miss Maguire that is a very long way from being persuasive in all the circumstances of this particular case."

He added:

> "I can see no reason why the AIT was arguably irrational in allowing this appeal to proceed on the fast track."

That is the ground of appeal (2): there was an error of law by the Secretary of State in allocating this case to the fast track. That is a separate issue. Sir Henry Brooke did grant an extension of time but refused a stay.

4. Removal directions had been issued on 17 November 2006. The applicant remained in custody until 8 February 2007 and was therefore in custody for at least three months.

5. The applicant is a Sudanese national. He comes from Shearia in Darfur and is a non-Arab Darfurian. It is not disputed that he cannot safely return to Darfur; the question underlying the proceedings is whether he can safely be returned to Khartoum. That issue has been the subject of detailed consideration by the Tribunal, and I have been referred to the case of HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 a decision of a tribunal over which the President, Hodge J presided.

6. On the first ground of appeal what is challenged is the rationality of the Secretary of State's decision to refuse a review. That question is dealt with in paragraph 353 of the Immigration Rules:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered."

7. "Significantly different" is defined in this way:

> "The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

8. Reference has been made to decisions in which the test to be applied has been considered: WM(DRC) v SSHD, SSHD v AR (Afghanistan) [2006] EWCA Civ 1495. Reference has been made to the judgment of Buxton LJ at paragraphs 9 and 10.

9. The Secretary of State must satisfy the requirement of anxious scrutiny. The test is whether:

> "there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return"

Buxton LJ accepted that the Secretary of State can, and logically should, treat his own view of the merits as a starting point but it is only a starting point.

10. The decision letter is in some detail. It refers to a submission made by the solicitors that the immigration judge had made an error of fact in relation to what the applicant had said at his screening interview. I will mention factual issues later.

11. At page 39 of the third tab of the big bundle a letter is cited. The letter is set out :

> "Your second submission is that your client should be recognised as a refugee due to him allegedly originating from 'one of the villages or areas of Darfur which are *'hotspots'* or '*rebel strongholds'* from which rebel leaders are known to originate.' This area of your client's claim has been considered by Immigration Judge Grant at paragraph 30. It is noted that the case of HGMO states in relation to risk factors that 'the evidence justifies identification of some particular risk categories and some particular factors which may be of special relevance in considering an individual claim. (Paragraph 266) The case goes on to state that 'the risk to a returnee would be aggravated if the latter would be regarded as coming from a '*hotspot'* in Darfur.' (Paragraph 267) It is noted that the case of HGMO does not state that someone who comes from a Darfuri hotspot is automatically at risk but instead that it is a factor that needs to be considered. Appropriate consideration has been given to this point by the Immigration Judge.
>
> The case of HGMO states that 'In the Tribunal's view it is not possible, therefore, to infer that a person whose village was attacked by the Janjaweed would, for that reason alone, be regarded on return to Khartoum as a member or active supporter of a rebel movement.' Therefore even if it could be proven that your client's village had been attacked then that does not mean that he is in need of protection, Immigration Judge Grant makes it clear at Paragraphs 25-29 that she does not find your client credible.
>
> You have submitted an expert report by Sarah Maguire, one of the people who provided expert evidence in the case of HGMO. The Asylum and Immigration Tribunal in the case of HGMO found Ms Maguire's testimony to have

> evidential limitations. Immigration Judge Grant fully and fairly considered the objective evidence before her. This expert report can only be considered in the context of all the reports that made up HGMO and other available evidence."

12. Immigration Judge Grant, at paragraph 8, described the documents placed before her:

> "1) a respondent's bundle described on the form PF1
> 2) a Home Office supplementary bundle containing the Country of Origin Information Reports from Sudan dated April 2006
> 3) a decision of the Asylum and Immigration Tribunal in the case of HGMO."

The immigration judge did not have Ms Maguire's report before her.

13. At paragraph 30 the immigration judge stated:

> "I have considered whether there will be any risk on return to the appellant on account of his claimed ethnicity. Although the objective background material indicates that the Berti are one of the minor tribes who have also been targeted for persecution the appellant has not established that he is a person from an area of Darfur which is a hot spot or rebel stronghold from which rebel leaders are known to originate".

At 45:

> "In my conclusion the appellant is not from such an area. From his claim made in initial interview and in his subsequent interview that he left Sudan because of war and hunger not because he was being persecuted as a result of living in an ethnic minority stronghold which was targeted by the Janjaweed militia for ethnic cleansing."

14. Complaint is made, though it is not the central point of this appeal, that the immigration judge did not mention the ethnic reference also made in the screening interview as a reason for leaving the Sudan.

15. Mr Chirico has addressed the court in considerable detail and persistently but, as he accepted when the point was reached, his point on the first ground is a simple one. It is that the immigration judge did not have Ms Maguire's report before her. The report fills the gap which permitted the immigration judge to reach the conclusion she did. There is now evidence, it is submitted, that the town, Shearia, from which the applicant had come is a hotspot or rebel

stronghold within the meaning of HGMO, and inevitably that is fresh material which requires in the circumstances of this case a fresh review.

16. However incredible the applicant is found to be, it is submitted if in fact he does come from Shearia -- that is not in dispute -- and if on return persons who originate from Shearia may be at risk of persecution in Khartoum, then the claim is made out, and the Secretary of State's decision not to permit a fresh review at which the overall factual situation would be considered is irrational. It is submitted that the Secretary of State has erred in the way she put it in the paragraph I have cited because the adverse findings on credibility do not alter the basic position just described, that someone from Shearia, however incredible, is on return to Khartoum at risk of persecution. The careful submissions have been wide-ranging but the first ground is essentially reduced to that question and whether, having seen Ms Maguire's report, the Secretary of State acted irrationally in declining a review.

17. Reliance has been placed by the Secretary of State on the limitations about Ms Maguire's evidence which were expressed in the case of HGMO, at which along with another expert she gave evidence. Mr Chirico submits that the expert witness has learned her lessons on those adverse comments insofar as they are relevant, and has had regard to them in the report under consideration in this case.

18. In HGMO the tribunal recorded, at paragraph 267:

> "Both Mr Verney and Ms Maguire stated that the risk to a returnee would be aggravated if the latter would be regarded as coming from a 'hotspot' in Darfur."

It is stated at paragraph 269:

> "The Tribunal was not given any comprehensive list of places regarded by the witnesses as being 'hotspots'."

Paragraph 270:

> "However, we do think, although not constituting a risk factor in itself, that the finding of a reasonable likelihood that a non-Arab Darfuri originates from a village known to be closely associated with the current rebel leadership is a relevant consideration when examining individual merits of a claim: there is evidence that the rebel leadership's origins are known. Hence where an immigration judge is presented with credible and specific evidence regarding the history of the particular place from which a person claims to emanate, this consideration will be relevant. Similarly, we consider it would also be a relevant, albeit not

> necessary decisive, consideration if the person concerned has spent any time in Chad [that does not arise in this case].

19. It is necessary to refer to the relevant passage in Ms Maguire's report. Before doing that I refer to earlier findings of the tribunal in HGMO, to which I have been referred, paragraphs 168 to paragraph 170, at which the comments to which the Secretary of State refers in the letter of 9 November 2006 are set out. The Tribunal stated at paragraph 166:

> "Her report did not show that on certain key issues she had borne in mind the duty on any expert to identify evidence contrary to his or her own opinion."

20. Paragraph 169:

> "We also consider that her written report showed a tendency to exaggerate."

Other comments are made to which I do not propose to refer. It is right to say that at paragraph 170 the Tribunal concluded by stating that it had "benefited significantly" from the input of Ms Maguire and the other expert into the appeals.

21. Ms Maguire stated in the introduction to her report:

> "I am asked to consider whether the appellant's village of origin could be said to be a 'rebel hotspot' within the terms of the judgment in HGMO."

That issue, in a long report, is dealt with at page 8:

> "*Is the Appellant from a 'rebel hotspot'*?
>
> The AIT in the HGMO case appeared to be of the view that the conflict in Darfur was and is of a 'sweeping nature' rather than a series of attacks. My choice of the phrase 'a concerted campaign to…rape their way across and around Darfur' used in the reports I have prepared for the HGMO case did not mean to imply that the Janjaweed were able to start at one place and move across Darfur without hindrance. There were rebel-controlled areas where the GoS and Janjaweed did not attempt to invade or where they were repelled. There were also rebel areas of the GoS and Janjaweed targeted for attack, including Tawila, Shangil Tobayi, Shearia and Khor Abeche.
>
> It is not apparent from the available papers whether the appellant is from the town of Shearia or the area of Shearia. The town of Shearia has changed hands

> during the course of the conflict. Once known as a GoS 'garrison town' it was described by USAID as having been subject to a rebel takeover in September 2005 and was described in June 2006 as one of several 'rebel held' towns. In October 2006, USAID describes the area of Shearia as being beset by increased intra-rebel group fighting, in an apparent attempt to gain and / or maintain control of the area.
> In April 2006, the Secretary General's report to the Security Council described a rebel camp in Reel, close to Shearia [town].
>
> On 5th November 2006, the GoS admitted that a team of government employees had disappeared in Shearia since 23 October 2006.
>
> In my view, therefore, the town of Shearia and much of the area of the same name will be considered by the GoS to be a rebel stronghold within the terms of the HGMO judgment."

22. It is whether the Secretary of State's decision is irrational in the light of that information that I have to decide. I have referred to the citation by the Secretary of State in the decision letter of paragraphs 266 and 267 of HGMO and the reasoning which accompanies them. They specifically cite the view of the tribunal in HGMO that it is not possible to infer that a person whose village was attacked by the Janjaweed would for that reason alone be regarded on return to Khartoum as a member or active supporter of a rebel movement.

23. In my judgment it was not irrational of the Secretary of State to reach that conclusion. Very full consideration in HGMO was given to the situation. Whether an area was a hotspot was undoubtedly a factor which ought to be taken into account. What also had to be taken into account was the significance of Ms Maguire's evidence. In my judgment the Secretary of State was entitled to decide, as she did, that, given the overall position of returnees to Khartoum, as to which the immigration judge would have had considerable information in the background material, the statements made by Ms Maguire as to the troubled history of Shearia do not mean that inevitably the Secretary of State had to order a review. No criticism can be made of the absence of the report before the immigration judge, no criticism of the applicant himself or of solicitors now instructed who did not appear initially at the screening stage. Solicitors were instructed at that stage, and they did not obtain the expert report. I have regard to the careful consideration in HGMO of what is an appropriate approach, and in my judgment the material provided as to the troubled history of the Shearia region did not compel the Secretary of State to conclude that a fresh review was within the meaning of paragraph 353, as construed, required.

24. The second ground is in relation to the immigration judge's findings of fact. Mr Chirico rightly accepts that unless the door is opened by the first ground, then errors of fact if there are any by the immigration judge are not relevant to the issue. I see force in the submission that in referring to the facts at all, as the Secretary of State did in her letter of 9 November 2006, she was in error but it may not have been understood how the point was being put on behalf of the applicant, as it has carefully been put today by Mr Chirico.

25. The consideration by the immigration judge of the evidence would have been relevant upon a review. I have asked Mr Chirico about this. I considered it part of my duty to at least consider this point, about the complaints made. There were comprehensive findings against the applicant on the question of credibility. I see some force in the absence of acknowledgement of the mention of the ethnic factor in the screening interview. I am prepared to accept for present purposes that the immigration judge did get the exchange rate wrong, though had the point been important I would have expected evidence about that, and not merely an assertion in a written submission made to the court. The immigration judge found that the applicant had been untruthful even about his age and had been untruthful about the entire history of events. There will be cases where that finding of credibility is most relevant to the first question to be considered, namely whether the fresh material which is to be considered along with the existing material created a realistic prospect of success. But in the way, succinctly and in my judgment rightly, put by Mr Chirico, the accuracy of the factual findings does not arise on the central point I have to decide.

26. The point has been made that there was no allegation of an error of law by reason of the alleged factual errors. It may be, and for present purposes I accept, that when the application for consideration was refused the alleged factual errors -- certainly in relation to the exchange rate -- had not emerged and been placed before the Senior Immigration Judge. In this case, the case put is as I have described and I need not make any further determination of whether there is an error of law arising from the factual issues -- I must assume there is not -- and whether the factual issues do bear upon the first issue, which it is conceded they do not.

27. I deal much more briefly with the other submissions made. The first is that there was an error of law in allocating the case to the fast track. Reference has been made to the guidelines of February 2006. Mr Chirico submits that no Darfuri case should at the material time have been allocated to the fast track notwithstanding the applicant being a single young man. I am unable to accept that it was irrational to allocate the case to the fast track. That would be a heavy burden to discharge, and I found nothing to indicate that the Secretary of State was required to act otherwise. It is further submitted that it was irrational to conclude that removal was imminent once events had taken the course that they had. I am not able to accept that submission; I find nothing erroneous in the procedure followed by the Secretary of State in this case. It is not in my judgment arguable that the detention of the applicant until early February 2007 was unlawful.

28. I have, with counsel's help, given careful consideration to the issues which arise in this case. It has already been considered by two High Court judges and one member of this court. I am unable to accede to the application, which, for the reasons I have given, must be refused.

Order: Application refused