Case No: C5/2008/2843

Neutral Citation Number: [2009] EWCA Civ 492
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: OA/30175/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 18th February 2009

Before:

LORD JUSTICE LAWS
and
LORD JUSTICE WALL

- -

Between:

OA (SOMALIA)

Appellant

- and -

ENTRY CLEARANCE OFFICER

Respondent

- -

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Mr M Symes (instructed by Wilson & Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

Lord Justice Laws:

1. This is a renewed application for permission to appeal against a decision of Immigration Judge Dawson given on 17 July 2008 on a second-stage statutory reconsideration. Permission to appeal was refused on the papers by Sir Henry Brooke. The Immigration Judge dismissed the appellant's appeal against the refusal of the Secretary of State on 21 May 2007 to grant him entry clearance to join his alleged spouse, who had been granted refugee status in the United Kingdom. The Secretary of State, having regard to paragraph 352A of the Immigration Rules, had not accepted that the parties were married and/or intended to live together permanently as they claimed and as was required by the Rule.

2. The appellant's appeal against that decision was first dismissed by an Immigration Judge on 28 January 2008. The Immigration Judge on that occasion referred to "paragraph 325A" which does not exist, but no doubt that was a typing error for 352. The first Immigration Judge did not accept that the marriage was genuine or subsisting.

3. There was a freestanding point taken before the first Immigration Judge. Mr Symes of counsel, who has represented the appellant throughout, submitted that the Entry Clearance Officer was guilty of racial discrimination against the appellant contrary to the material provisions of the Race Relations Act 1976. The complaint was of the following statement made by the ECO in the Notice of Decision:

> "I am aware that the majority of Somali family reunion applicants that are interviewed at this post provide an almost identical account in order to avoid the need to provide evidence of contact and financial support."

   The first Immigration Judge regarded this observation as "unfortunate and impermissible" (paragraph 42). He found however that it was "not racially motivated" (paragraph 46) and there was no evidence of racial discrimination.

4. Reconsideration of the first judge's decision was ordered on 4 March 2008 and a first-stage reconsideration hearing took place on 30 April 2008. On the race discrimination question, which fell within the scope of the reconsideration, the AIT panel conducting the first stage took up a point raised by the Home Office Presenting Officer as to the Immigration Judge's jurisdiction to consider race discrimination. This was that the ECO's observation was "not racial but nationality specific" and therefore the Immigration Judge had had no jurisdiction to consider it. The panel said (paragraph 15):

> "When the point was put to him, Mr Symes rightly acknowledged that he could not pursue the question of racial discrimination. The Tribunal has no jurisdiction to consider discrimination on grounds of nationality, which this was."

5. At the second stage Mr Symes sought to resurrect the point. Immigration Judge Dawson considered whether the matter having been concluded against him, effectively, by his concession at the first stage, it was now open to Mr Symes to canvass it. He said this:

> "34. The Tribunal in JA (Practice on Reconsideration: WANI applied) Ecuador [2006] UKAIT 00012 indicates in clear terms the approach to be taken in the context of the decision in Wani. I quote from the Judgement:
>
> 'It is clear from the Practice Direction that, where a reconsideration takes place in two stages, it is for those who deal with the first stage to determine conclusively all matters relating to the existence of a material error of law, and for those dealing with the second stage simply to incorporate the decision on that issue into their determination. Similarly, as explained in Wani it is (save in exceptional circumstances) not open to the parties to re-argue issues going to existence or otherwise material errors of law and for those dealing with the second stage reconsideration simply to incorporate the decision on that issue into their determination.
> …
> 36. In the case before me the Tribunal came to a clear conclusion that the Tribunal had no jurisdiction to consider the 'unfortunate observation' by the Entry Clearance Officer. It was open to Mr Symes to deploy further arguments at the time. His complaint was that it was only raised by the Presenting Officer at the last minute. This is not enough to satisfy me that he could not have put forward the arguments he now seeks to rely on that the observations by the Entry Clearance Officer should not fall within the nationality exclusions provided for in Section 19D of the Race Discrimination Act.
>
> 37. The Administrative Court in Wani left the door open at second stage consideration in terms that '…it must be open to the parties to argue that the binding authority or a material country guidance case has been overlooked or that there is a material error based on argument which have not been deployed. There may for example have been incompetence representations at the first hearing.'

> 38. With the Appellant having been ably represented at the first stage reconsideration and the opportunity then for argument to have been deployed I am not satisfied that it is now open to the Appellant to re-argue the matter before me."

6. Immigration Judge Dawson also found that the words complained of did not amount to race discrimination. He said (at paragraph 39):

> "39…as I observed to Mr Symes I would need some persuasion that the observation by the Entry Clearance Officer amounted to discrimination under the Race Relations Act 1976. My reading of the explanatory statement is that the Entry Clearance Officer sought to contrast the situation of the Appellant who in his view had been unable to provide an account identical to that of the sponsor, unlike the majority of Somali reunion applicants who could and so avoided the need to provide evidence of contact and financial support. It does not indicate that the Entry Clearance Officer applied a requirement or condition which she applied equally to persons not of the same social group (or nationality)."

7. The matter went before Senior Immigration Judge Grubb on the appellant's application for permission to appeal to this court. SIJ Grubb refused permission. He considered that the earlier panels dealing with the case were wrong to hold that the AIT had no jurisdiction to entertain the claim. He said:

> "the appellant's claim was that the ECO had adopted (and applied) racially discriminatory language on the grounds of his nationality, namely being Somali. That fell within s.19B (read with ss. 1 and 3) of the Race Relations Act 1976 (as amended). On the basis of the respondent's argument before it, the Tribunal considered the claim to be exempt from s.19B, it would seem, because of the terms of s.19D. For the reasons given in Ground 1, the Tribunal was wrong to have so decided. The exemption in s.19D does not apply in this case -- there is no relevant authorisation within s.19D(2) applicable here".

8. That may well be right, but Senior Immigration Judge Grubb proceeded also to hold that there was nothing in the race discrimination claim on the facts. This is what he said (paragraph 4 of his decision):

> "However, that error was not material to the outcome of the appeal. There is no merit in the substance of the appellant's racial discrimination claim. It is plain to me that the words of the ECO relied upon by the appellant are not capable of

> being racially discriminatory. The IJ took the same view at para 39 of his determination. I agree with his reasons and reject the argument in para 19 of the Grounds that this is not the proper meaning of the ECO's words. The ECO was merely contrasting the situation of the appellant with that of other Somali nationals making similar applications. It was a comment on the evidential state of the appellant's claim. It cannot, in my judgment, amount to a racially discriminatory statement based upon the appellant's nationality. It may well be an unfortunate statement, particularly if not borne out by evidence. However, its evidential impact disappeared when the IJ determined the facts for himself and dismissed the appeal under para 352A."

9. For my part I agree with that approach, but there is a further point. I do not think, with respect, that Senior Immigration Judge Grubb was right to hold as he did that Immigration Judge Dawson should have allowed Mr Symes to re-open the point. The division of function between the two stages of a reconsideration is very important for the proper working of what is a cumbersome procedure. There is in my view nothing exceptional in terms of the progress and procedure of the case here such as might justify a special course being taken.

10. There is a yet further point and in some ways the most compelling. The appellant does not seek to disturb the AIT's adverse findings relating to his claimed marriage and thus the very basis of his application to enter the United Kingdom. It is therefore acknowledged that he has no claim under the Rules and it is also accepted that any case under the Human Rights Convention can carry the matter no further. What then is the utility of canvassing the race issue? It is only because it may be a gateway to a claim for damages for race discrimination, which can only be brought in the county court: see the judgment of Clarke LJ as he then was in Emunefe v SSHD [2005] EWCA Civ 1002.

11. What might the damages recoverable by the appellant be in this case? Not compensation for loss of a potential right to enter the United Kingdom. It is conceded for all purposes that the appellant has none. I can see no substantial basis for the matter proceeding in the county court even if any other hurdle could be overcome. The appellant's status is wholly unaffected. Any claim for damages would be ephemeral at best.

12. Mr Symes applies to put in fresh evidence to show that the form of words complained of has been used in other cases. In all the circumstances it would be quite inappropriate to accede to that application.

13. For all those reasons I for my part would dismiss the application for permission.

Lord Justice Wall:

14. I entirely agree and cannot usefully add anything.

Order: Application refused