Case No: C5/2008/1026

Neutral Citation Number: [2008] EWCA Civ 1337
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/05231/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 4th November 2008

Before:

LORD JUSTICE TOULSON

- -

Between:

KM (ZIMBABWE)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Ms J Stevens (instructed by Messrs Trott & Gentry) 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 Toulson:

1. This is a renewed application for permission to appeal against the dismissal of the appellant's asylum and human rights appeals. She is a citizen of Zimbabwe, born on 3 February 1976. She claims to have left Zimbabwe on 21 December 1999 using her own passport and to have come to London via other destinations. She entered as a visitor on a six-month visitor's visa which she says was stamped on her passport. Subsequently she applied for leave to remain as a student and this application was refused. In 2002 her passport was unlawfully stamped with what purported to be a grant of indefinite leave to remain. Armed with that passport she applied for a National Insurance number, leaving her passport at the DSS Office. On her return she was arrested for possession of a false instrument and bailed to appear at Waltham Forest Magistrates' Court. She jumped bail and in her absence was sentenced to a suspended term of imprisonment.

2. In March 2007 she applied for asylum. Her account was that she had been employed in Zimbabwe by the central bank of Zimbabwe. A senior manager, to whom I will refer as X, made sexual advances to her which culminated in him raping her in November 1999. A few days later he tried the same thing again but she rebuffed him. After this his attitude towards her changed. She was accused of leaking information to the MDC and members of her family were harassed by the security police, who asked questions about her. The enmity of X may have been exacerbated by her making threats to expose him. Her claim in short was that she would be at risk of persecution by the authorities on her return because of the ill-will which he was likely still to bear towards her, and his ability, because of his position in the Zimbabwean regime, to be able to cause her to suffer serious ill-treatment.

3. Her application was refused by the Home Secretary. On appeal, the first immigration judge who considered the matter concluded that even if her account were believed she would not be at risk on her return. He rejected the idea that the alleged rapist would seek to inflict revenge on a junior member of staff who had rebuffed him in the manner summarised some eight years earlier.

4. Reconsideration was ordered on the sole ground that it was arguable that the immigration judge erred in his assessment of risk to the appellant on return as a failed asylum seeker. On reconsideration, Immigration Judge Radcliffe dismissed her claims. He found her to be incredible. He said in paragraph ten of his determination, under the heading "Findings of Fact", that he had taken into account all the background evidence in the case as well as considering "the core of the claim, namely the rape allegation". He acknowledged that it may not always be possible for a rape to be reported to the police; nevertheless he was not satisfied to the relatively low standard of proof required that X had intercourse with the appellant. In reaching that conclusion he relied among other things on inconsistency in her evidence. She said that she mentioned the

rape to her uncle about a week after the event, and the immigration judge observed:

> "This evidence ran contrary to what she had said in interview and in her statements when she had mentioned no such complaint."

Moses LJ, who considered the application on paper, accepted that in that regard the immigration judge fell into error because in her witness statement at paragraph 30 she had said as follows:

> "The following day, on my return from work my uncle said he had had people asking him questions about me and my involvement in the MDC and what he knew about my work at CBZ. I had to tell him everything that had gone on so he would know how to protect himself and his family."

The implication in that statement is that she had then disclosed to her uncle the alleged rape to which she had been subjected and therefore it was wrong to say that this was a new piece of evidence. Moses LJ also accepted that criticism could be made of the immigration judge for rationalising how a rape victim might have been expected to behave, in particular whether she would have been expected to have gone to hospital or to a GP to check if she was pregnant. But he considered that there was no realistic prospect of an appeal succeeding because of other findings made by the immigration judge, which he regarded as untainted by any criticism which might have been made of the immigration judge in relation to the matters to which I have just referred. In particular the immigration judge went on to make adverse findings of credibility against her because of her late application for asylum coupled with her deceptive behaviour in this country. The immigration judge concluded that as far as any risk was concerned, whether personal to X or because of perceived political opinion, he found that the risk after nearly ten years away from Zimbabwe would be minimal. He said:

> "I doubt very much if [X] has any desire to seek revenge against a junior member of staff who spurned his fumbling advances."

That conclusion of fact mirrored the conclusion of the first immigration judge who considered her appeal. The reconsideration ordered earlier was not because there was something impugnable in that conclusion, but because the first immigration judge had arguably not adequately considered the risk which she faced for a different reason, namely by virtue of being a failed asylum seeker. It is said that it was a gross minimisation to refer to X as having merely made "fumbling advances"; but I cannot see that that undermines the reasoning of the immigration judge in this regard. His thought process was precisely parallel to that of the first immigration judge, who had proceeded on the hypothesis, but not factual acceptance, that her complaint about rape was true.

5. Ms Stevens has argued that the immigration judge acknowledged that the rape allegation was "the core of the claim", and that therefore if his finding in relation to the rape allegation is suspect it must follow that his entire conclusion is similarly suspect. I do not accept that argument. Her complaint of rape was the core of the claim in the sense that it was the point from which her account began, but it by no means followed that, if she had been raped, she therefore had a valid claim to asylum or humanitarian protection, on the relatively low standard of proof required, for the reason identified by the first immigration judge. This judge, looking at the evidence as a whole, concluded that he thought there was no realistic risk of this lady being subjected to ill-treatment on her return because of resentment by X stemming from her response to what he had allegedly done to her, now almost ten years ago.

6. Like Moses LJ, I can see no real prospect of this appeal succeeding. Accordingly this renewed application is refused.

Order: Application refused