Case No: C5/2008/0564

Neutral Citation Number: [2009] EWCA Civ 527
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No AA/00325/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 5th March 2009

Before:

LORD JUSTICE WARD
LORD JUSTICE LONGMORE
and
LORD JUSTICE MOORE-BICK

- -

Between:

MH (AFGHANISTAN)

Appellant

- and -

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

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

THE APPELLANT APPEARED IN PERSON, INTERPRETED BY MS N NAZEMI

Ms S Broadfoot (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

- -

Judgment

Lord Justice Longmore:

1. This applicant who applies for permission to appeal (and to whom I will refer as "MH") was born on 30 January 1986 and is a citizen of Afghanistan. He has four siblings, one of whom, a sister, was granted indefinite leave to remain in the United Kingdom on 23 April 2006. He is married with two children. On 16 May 2005 an Italian worker in Kabul, Clementina Cantoni, was kidnapped by non-state agents there. At the time the applicant says that he ran a grocery shop in Kabul and that he was told by a neighbouring shop owner of the identity of one of the persons involved in the kidnapping. That information the applicant then says he passed on to a man named Sabour, a police investigation officer. The applicant claims that he left Afghanistan in late September or early October 2005 following the arrest of the persons responsibility for the kidnapping and fearing repercussions from associates of those persons. The applicant claims he spent about one year working illegally in a factory in Iran. He says he then travelled to Europe seeking asylum and he got as far as Greece, where the authorities apparently sent him back to Turkey. There is no dispute that he was fingerprinted in Mytilini in Greece and that that fingerprinting was recorded on 6 November 2006 and was later revealed to authorities here by what is called the Eurodac database.

2. He claims that he was deported to Turkey, from where he then returned to Iran. The Secretary of State has always asserted that on 5 December 2006 an individual using the name of Mustapha Rezven, and claiming to be an Iranian national, was fingerprinted at the immigration controls in Calais by an assistant immigration officer named Deborah Matthews, now married and

known as Deborah Steele. These fingerprints were recorded on the immigration fingerprint bureau data base under reference IFBO6/069226/R. It is not disputed that the fingerprints appearing on that document match those taken from the applicant when he claimed asylum in the United Kingdom on 4 January 2008. He arrived in the United Kingdom on 27 December 2007, having on his case travelled from Iran via Turkey, first by ship and then by lorry. He claimed asylum in Liverpool on 4 January and was fingerprinted there on that day.

3. The applicant was refused asylum by the Secretary of State in a letter of a week later, 11 January. That stated that the information he had given about his journey from Afghanistan, while it did not go to the core of his claim, was deliberately misleading, especially since he had failed to mention in interview twice that he had claimed asylum in Greece. That was said to show a propensity to mislead the authorities in the United Kingdom and damaged his credibility about the details of the kidnap in relation to the Italian hostage. The applicant appealed, but on 23 January 2008 his appeal was dismissed by Immigration Judge Lawrence, who relied on what I may call the Calais fingerprint evidence, which had only been served by the Secretary of State 15 minutes before the hearing began, to conclude that the applicant had been in France on 5 December 2006, although the applicant had said that he did not know if he had ever been in France. On 29 January Senior Immigration Judge Perkins ordered reconsideration of that decision because in his view the applicant had not had a proper opportunity to consider the fingerprint evidence, and on 4 February 2008

Senior Immigration Judge Southern decided that, since the fingerprint evidence was essential to credibility, there had to be a completely fresh hearing. That took place on 20 February 2008 before Immigration Judge Neyman, and he made the following findings: firstly, the overwhelming evidence (ie the evidence of the Home Office fingerprint expert and of the applicant's own fingerprint expert) before him was that the man who called himself Mustapha Rezven and who had his fingerprints taken in Calais on 5 December 2006 and the appellant who had his fingerprints taken in this country in 2008 were one and the same person. That comes from paragraph 9(d).

4. Secondly, he found that the applicant's claim that he and Mustapha Rezven was not one and the same person was "not sustainable". That is paragraph 9(e). Thirdly, it was all very well hinting that the results could be due to some explanation/mix up/muddle/error query; by far and away the most likely explanation for the coincidence, however was that Mustapha Rezven and the applicant were one and the same person: paragraph 9(f). Fourthly, in the hearing the applicant was asked whether he had ever used the name Mustapha Rezven and he said that he had not. All the evidence was that he had, and his claim to the contrary damaged his credibility adversely: paragraph 9(g). Fifthly, in Calais on 5 December 2006 the applicant gave the wrong name, nationality and date of birth to the immigration officials. That clear and deliberate attempt to deceive the respondent showed that the applicant was prepared to deceive on matters of importance and it had a significant adverse effect on his credibility: paragraph 9(h).

Immigration Judge Neyman then also found that the fact that the applicant did not know or was mistaken as to significant details in relation to the kidnapping counted against his credibility; and the fact that the applicant allegedly made a sensitive phone call in relation to the identity of the kidnappers, disclosing his cooperation with the police in a public place where anyone could hear him, was also damaging to his credibility.

5. Immigration Judge Neyman accordingly dismissed the asylum appeal because, in his view, the applicant had failed to show that he was a credible witness, or that he was of adverse interest to anyone in Afghanistan for any reason and had therefore failed to discharge the burden of proof of showing that anyone in Afghanistan wished to subject him to any treatment engaging the Refugee Convention. Further, he said that the applicant was not in any of the categories of Afghans identified in the United Nations Commission for Refugee Country Report as having protection needs; nor was he in any other category which the objective evidence showed was at risk of persecution by anybody for any reason if returned to Afghanistan. The immigration judge also dismissed the humanitarian protection and Convention rights appeals for the same reasons as those given for finding that the applicant was not a refugee, concluding:

> "…there is no evidence before me that the situation in Afghanistan is such that returning the applicant there would engage article 3 or any other article of

the Refugee Convention on account of the general situation in Afghanistan."

6. The applicant sought permission to appeal from the Court of Appeal on the grounds: firstly, that the immigration judge took account of an irrelevant consideration in relying on the fingerprint evidence in the absence of any, or adequate, evidence of continuity, such as could reasonably be expected from the Secretary of State. Secondly, that the immigration judge failed to assess in the round the evidence regarding the applicant's knowledge about the kidnapping of Miss Antoni. Further, he failed to take account of relevant considerations in assessing the applicant's knowledge. Thirdly, the immigration judge had misdirected himself on the appropriate standard of proof when concluding that the applicant lacked credibility. Senior Immigration Judge Southern, to whom the first application for permission to appeal was made, refused permission, as did Sir Henry Brooke of this court on the papers. When it was orally renewed to this court, as the applicant was entitled to do, on 11 June 2008 he appeared by counsel, Mr David Chirico; and Sedley LJ and I, who were then the members of the court, were concerned to ensure that there was a proper record of continuity in respect of the fingerprint evidence, and, since it was not clear whether the expert had seen a manual print or only a computerised version, we adjourned the application to the full court with the appeal to follow if permission was granted. Our expectation was that a manual print would be produced and that, if it were, permission to appeal would be unlikely to be given.

7. I need not set out the protracted correspondence between the applicant's then solicitors and the Home Office and the data protection unit of the UK Border Agency, because it took very a considerable amount of time for the Calais fingerprints to be produced. I will read two paragraphs from a letter of Messrs Wilson & Co in the course of that correspondence. In their letter of 8 September 2008 to the Treasury Solicitor they said this:

> "In the present proceedings before the Court of Appeal, we argue that the Immigration Judge erred in law by assuming the existence of this fingerprint record, where the Secretary of State has failed to disclose it. However, we accept that any such error would not be material (and would therefore not require the intervention of the Court of Appeal) if the Secretary of State in fact holds satisfactory fingerprint evidence taken on 5th December 2006. This is the position we set out in our letters of May and June, and remains our position.
>
> We would be grateful if you could ensure that our letter of 24th July 2008 to the Data Protection Unit is followed up urgently, and/or tell us what we can do to ensure that it is followed up. Until your client either discloses the Calais fingerprint evidence or confirms that the evidence does not exist, the

> evidential position remains as it was at the last permission hearing: we are not in a position to concede anything."

So the position now is that that fingerprint evidence has been found and has been served on Messrs Wilson & Co, who have now come off the record. The result of that is that the applicant now represents himself on this application with the help of an interpreter.

8. The applicant now concedes that he was fingerprinted in Calais and that the fingerprints of Mustapha Rezven are in fact his fingerprints, and he tells us that he lied to the immigration officer at Calais because, in the first place, his life was in danger if he were deported back to Afghanistan; and in the second place his agent had told him that if he told the truth he *would* be deported back to Afghanistan. So it now appears that, after an elaborate charade which has lasted for nearly a year, the concerns of this court have been satisfied and the continuity has been shown and the applicant has had to (and does) accept that continuity. In those circumstances the only remaining question is whether there is anything in the other grounds of appeal to suggest that the decision of Immigration Judge Neyman was vitiated in law in any way. I have, of course, considered carefully that decision. I can see no error of law in that decision. The position is that the applicant's credibility was very adversely affected by his lies, but also, for the reasons that I have already indicated that were given

by Immigration Judge Neyman, his account was in any event full of inconsistencies.

9. In that situation this court, in my judgment, has no option but to dismiss this adjourned application and refuse this applicant permission to appeal.

Lord Justice Moore-Bick:

10. I agree. In the light of the remarks that the applicant made to us in the course of his submissions, I should just like to add this: he must understand that this court can only consider an appeal on a point of law arising out of the determination below. In my judgment there simply are no grounds for saying that the immigration judge made a material error of law, and in those circumstances there are no grounds for giving permission to appeal.

Lord Justice Ward:

11. When the applicant appeared before Immigration Judge Neyman in the Immigration Tribunal, he denied he was the man who was stopped at Calais. The immigration judge did not believe him. Because he did not believe him he did not believe his life was in danger. The applicant cannot appeal to this court, because the immigration judge made no mistake. He found, correctly, that the applicant was stopped at Calais. And because he made no mistake there can be no appeal to this court. I also agree therefore that the application must be dismissed.

Order: Application refused