**Neutral Citation Number: [2008] EWHC 3162 (Admin)**

Case No: CO/7919/2006

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London. WC2A 2LL

19/12/2008

B e f o r e :

**NICOLA DAVIES QC**

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**Between:**

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| **SABA TESFAMICHAEL** | **Claimant** |
| **- and-** | |
| **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant** |

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**Richard Drabble QC and Eric Fripp (instructed by Duncan Lewis & Co) for the Claimant**
**Lisa Giovannetti (instructed by Treasury Solicitor) for the Defendant**

**Hearing date: Wednesday 10 December 2008**

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**HTML VERSION OF JUDGMENT**

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**NICOLA DAVIES QC:**

1. This is a claim for judicial review seeking:

   i) a mandatory order that the Secretary of State for the Home Department do implement the decision of the Asylum and Immigration Tribunal ('AIT') promulgated on 20 February 2006 granting the claimant leave to remain in the United Kingdom as a refugee;

   ii) a quashing of the order of the decision of the Home Office contained in a letter dated 24 August 2006 refusing the claimant leave to remain in the UK and containing a proposal to give directions to remove her to Ethiopia.

2. The claimant is a national of Eritrea born in Ethiopia on 2 July 1981. She lived in Ethiopia but entered the United Kingdom on 3 July 1998 having, it is claimed, fled Ethiopia to avoid persecution by reason of her partly Eritrean national background. At this time war had broken out between Ethiopia and Eritrea. Individuals of Eritrean

descent living in Ethiopia were the subject of harassment and persecution, one such being the father of the claimant.

3. The claimant immediately sought asylum in the United Kingdom stating that she was an Eritrean citizen formerly resident in Ethiopia. Temporary admission was granted pursuant to para 21 of Schedule 2 of the Immigration Act 1971. This has since been extended and represents the basis upon which the claimant is permitted to remain in the United Kingdom. A delay of six years ensued until the claimant was interviewed on 27 August 2004 concerning her claim. By a letter dated 1 November 2004 the defendant refused the claimant's application for asylum on the basis, inter alia, that there were no substantial grounds for believing that the claimant on return to Eritrea would face persecution due to her race and imputed political opinion contrary to Articles 2 and 3 of the ECHR.

4. The claimant exercised her right of appeal to an Adjudicator which was heard on 14 February 2005. The Adjudicator accepted that throughout the claimant had identified herself as being of Eritrean nationality. He accepted that she possessed a well founded fear of persecution by reason of her religion if she were to be removed to Eritrea which would violate her right pursuant to Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedom. The Adjudicator went on to find that the claimant could be safely returned to Ethiopia and upon this basis dismissed her asylum appeal. He also dismissed the appeal on human rights grounds. The claimant applied for leave to appeal the decision to the Immigration Appeal Tribunal (IAT'). In April 2005 the IAT was replaced by the AIT. The claimant's application was treated as an application for reconsideration under the new scheme and was granted.

5. On 23 January 2006 the appeal was heard by a panel of the AIT for reconsideration. At the hearing the presenting officer on behalf of the defendant conceded that the appeal should have been allowed given the Adjudicator's findings in respect of religious persecution in Eritrea and from it a breach of Article 3. Specifically the presenting officer said that the defendant did not take issue with any of the findings made by the Adjudicator nor did he challenge the conclusions drawn as to the fear of religious persecution and breach of Article 3. He did however say that the defendant may decide to issue fresh removal directions in this case.

6. The panel concluded thus:

"The parties have agreed that the decision of the Adjudicator is in material error of law in that his conclusions are plainly contrary to the findings that he has made in paragraph 50 of his determination. We are satisfied that the Adjudicator erred in aw and upon a review of all the relevant evidence, using the Adjudicator's clear and reasoned findings of facts, which are not challenged, we find that the appellant is a refugee and also that her removal to Eritrea would breach her protected rights under Article 3 of the ECHR. We conclude that her fear of persecution for a Convention reason in Eritrea is well founded and that she is entitled to international protection as a refugee under the 1951 Convention on Refugees. We further conclude that with regard to removal to Eritrea, the removal would be unlawful as it would lead to her ill treatment contrary to her protected rights under Article 3 of the ECHR.

DECISION

6. The original Tribunal (Adjudicator) made a material error in law and we substitute the decision as follows:

'The appeal is allowed on asylum grounds.

The appeal is also allowed on human rights grounds' "

7. The Defendant has not sought permission to appeal the decision. On 27 March 2006 and chasing on 24 April 2006 the claimant's solicitors wrote to the defendant's representatives requesting refugee status papers. On 3 May 2006 a reply was sent to these letters. It informed the claimant that the defendant had decided to set further removal directions to Ethiopia and that they 'will be sent to you shortly. This will generate a fresh right of appeal which will doubtless be dealt with in due course.'

8. On 31 July 2006 solicitors acting for the claimant issued a letter before action preliminary to contemplated judicial review proceedings of the refusal to act upon the decision of the AIT. On 24 August 2006 a 'Notice of Refusal of Leave to Enter' was issued indicating that the defendant had decided to refuse her application for asylum. The grounds included:

   "17. You have claimed that if you are to be returned to Eritrea you will suffer torture or even death. However in the light of all the evidence available and for the reasons outlined above, together with lack of credence attached to your claim, there are no substantial grounds for believing there is a real risk that you would face treatment contrary to Articles 2 and 3.

   ....

   21. In the light of all the evidence available it has been concluded that you have not established a well-founded fear of persecution and that you do not qualify for asylum. Your asylum claim is therefore refused under paragraph 336 of HC395 (as amended) and has been recorded as determined as 1 November 2004."

9. A notice of appeal against the decision was entered on the claimant's behalf. On 25 September 2006 proceedings for judicial review were issued. On 27 February 2007 Pitchford J granted permission. The AIT appeal proceedings were repeatedly adjourned. In what appear to be somewhat unsatisfactory circumstances the matter came before an Immigration Judge on 25 March 2008. The Judge made a number of findings. He stated that it was not within his remit to consider whether the defendant had acted beyond its powers in making directions for the removal of the claimant to Ethiopia, it being 'a matter which will be determined by Judicial Review' but went on to consider the refusal of the asylum claim and the removal directions set out in the letter dated 24 August 2006, as amended by a letter dated 13 November 2006. The Judge dismissed the claimant's appeal. Reconsideration of this decision was granted, the proceedings have been adjourned in view of the Administrative Court proceedings.

**Claimant's case**

10. The claim rests upon two propositions of law:

    i) The defendant is bound by the unappealed decision of AIT promulgated on 20 February 2006 which determined the claimant's entitlement to protective status in the United Kingdom under 1951 Refugee Convention;

    ii) In the light of the determination by the AIT that the claimant is a refugee, her proposed removal from the United Kingdom to Ethiopia without justification based upon the interests of national security or public order, breaches Article 32(1) Refugee Convention.

11. On behalf of the claimant it was contended that it was the function of the AIT to reach a conclusion as to the status of the claimant. That is what it did and it concluded that the claimant was a refugee. On behalf of the claimant Mr Drabble stated that she came within the definition of refugee as set out in Article 1A(2) of the Refugee Convention:

Article 1

DEFINITION OF THE TERM "REFUGEE" A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

12. The AIT decision was described as a legitimate and appropriate means of determining if a person is a refugee. It is prescribed by the rights of appeal as set out in ss 82-84 of the Nationality Immigration and Asylum Act 2002. In particular reliance was placed upon s.84(l)(g).

84(1)(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

It was accepted by both parties that the decision of an independent appellate body is binding upon the defendant.

13. Further, reliance was placed upon the decision of *Saad, Diriye* and *Osorio v SSHD* [2001] EWCA Civ 2008; [2002] INLR 34 in which the Court of Appeal considered the relation of asylum appeals provisions and the determination of refugee status. The case concerned an appeal pursuant to s8(l) of the Asylum and Immigration Appeals Act 1993. It was accepted that the 2002 Act and its provisions are the successor to this statute. For the purpose of the claimant's case it was stated that the relevant provisions are the same. Lord Phillips MR delivered the judgment of the Court, the defendant relies in particular upon the following passages:

**"[16]** It follows that, absent a clear parliamentary indication to the contrary, we would expect our primary and delegated legislation to provide a system whereby claimants may have it determined whether they are refugees. It is only that determination which gives them access to Convention rights. We therefore approach questions of construction on that basis."

*The Secretary of state: The primary decision maker*

**[20]** The refugee claimant cannot make use of his Convention rights unless he can have it determined whether or not he is a refugee. There is no doubt that in this country the primary decision maker in practice is the Secretary of State. We are concerned with cases where the Secretary of State has taken the primary decision. We are not however to be taken as deciding that the question whether a person is a refugee can never be decided by the courts.

**[21]** The Convention says nothing about *procedures* for determining refugee status, and leaves to States the choice of means as to implementation at the national level. It would be consonant with our obligations under the Convention for the decision-making process to be entirely left to the Secretary of State:

'Whether a state takes steps to protect refugees within its jurisdiction and if so which steps, are matters very much within the realm of sovereign discretion. For States parties to the Convention ... however the outer limits of that discretion are confined by

the principle of effectiveness of obligations, and the measures it (sic) adopts will be judged by the international standard of reasonable efficacy and efficient implementation. Legislative incorporation may not itself be expressly called for, but effective implementation requires, at least some form of procedure which can be identified, and some measure of protection against laws of general application governing admission, residence and removal.' (Goodwin-Gill *The Refugee in International Law* (Oxford University Press, 1996), at p 324).'

**[22]** As will appear, there is no express obligation imposed on the Secretary of State in any statute to determine each request that an applicant be recognised as a refugee. It is common ground that in some cases the Secretary of State can remove an applicant to a third country for that determination to be made. We are not concerned with such cases. As for the remaining cases, instead of providing an overall express regime for each application to be recognised as a refugee to be determined, Parliament has adopted a piecemeal approach and provided for the question of refugee status to be determined in a variety of specific situations connected with actions taken under the Immigration Acts."

14. Parliament having provided the mechanism for determinations as to refugee status, such a determination having been made by the AIT, it is claimed that the defendant is now bound by the finding and consequentially the claimant, is afforded the protection of the provisions of Article 32(1) Refugee Convention which states:

"32(i) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

Put shortly the claimant's position is this: a determination as to refugee status having been made by an appropriate tribunal, it follows by reason of the finding that the claimant is 'lawfully in their territory' and thus the protection of Article 32 is invoked.

**Defendant's case. Abuse of Process**

15. The defendant submits that the Court should not entertain this application as the question of the claimant's removal to Ethiopia is part of an alternative process namely the AIT and any subsequent request for reconsideration. In those circumstances a claim for judicial review amounts to an abuse of process.

16. It is clear that hearings as part of the AIT process have been adjourned to allow for the judicial review determination. The issue raised in the proceedings is fundamental to the claimant's position as a refugee. It requires to be determined. The AIT and reconsideration process does not provide an appropriate alternative remedy. I reject the claim that these proceedings amount to an abuse of process.

**Article 32 of the Refugee Convention**

17. Ms Giovannetti on behalf of the defendant summarised the position thus:

i) There is a very significant difference between a determination that a person is a refugee within the definition of Article 1(A)(2) and grant of status;

ii) Whilst accepting that the defendant will give effect to the determination of a Tribunal it will not always be the case that the Tribunal has determined as a matter of fact and law that the applicant is entitled to the grant of status;

iii) In the present case although the Tribunal found that the claimant 'met' the refugee definition it did not find that she was entitled to status, neither as a matter of fact or law.

18. In essence the defendant's case is: the AIT's findings of fact are not sufficient to establish that the claimant has a right to be granted asylum in the U.K. The defendant accepts that the claimant satisfied the Article 1(A)(2) Refugee Convention definition of 'refugee' but disputes that she is entitled to a grant of asylum as such a right would only arise if the AIT's findings of fact demonstrated that the requirements of paragraph 334 of the Immigration Rules were satisfied including the requirement that refusing asylum would result in the claimant 'being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of [a Convention reason].'

19. I have some difficulty with this reasoning. As part of its process the AIT had to make a determination as to the question of whether or not the claimant is a refugee. It did so. Its process was part of the legislation identified by Lord Phillips MR in *Saad.* I am unable to dismiss this authority as a 'red herring' as suggested by Counsel for the defendant. Moreover, it is clear from the wording of the Senior Immigration Judge at the AIT that the finding having been made the AIT considered that the claimant was now considered to be entitled to the protection of the 1951 Convention.

20. The specific protection sought is that provided by Article 32. I am grateful to Counsel for the defendant for her helpful and detailed written submission reflecting the diversity of academic opinion and analysis of this provision. However the distinguishing feature of this case is that the determination of the issue of 'refugee' had been made.

21. Miss Giovannetti drew the court's attention to two authorities: Re: *Musisi* reported as *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 and *Szoma v Secretary of State for the Department of Work and Pension* [2005] UKHL 64 [2006] 1 AC 564. In *Szoma* Lord Brown held that Article 32 only applies to those who have been determined to be refugees. At p. 573 he stated:

    "The term 'refugee' in article 32(1) of the Refugee Convention can only mean someone already determined to have satisfied the article 1 definition of that term (as for example in article 23 although in contrast to its meaning in article 33). Were it otherwise there would be no question of removing asylum seekers to safe third countries and a number of international treaties such as the two Dublin Conventions (for determining the EU state responsible for examining applications lodged in one member state) would be unworkable."

22. I am satisfied that a determination of the 'refugee' status of the claimant in accordance with Article 1 of the Refugee Convention was made by an appropriate Tribunal, the AIT. The decision is binding upon the defendant and affords the claimant the protection of Article 32(1). Accordingly I grant the relief sought by the claimant.