C1/2002/1944

Neutral Citation Number: [2003] EWCA Civ 227
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2

Friday, 7th February 2003

B E F O R E:

LORD JUSTICE POTTER
LORD JUSTICE CHADWICK
LORD JUSTICE TUCKEY

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ALTHEA SONIA BRITTON

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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(Computer-Aided Transcript of the Palantype Notes of
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MR R DRABBLE QC and MR M HENDERSON (instructed by Messrs Winstanley-Burgess, London EC1V 2TQ) appeared on behalf of the Appellant
MISS J RICHARDS (instructed by Treasury Solicitors, London WC1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE POTTER: Lord Justice Tuckey will give the first judgment.

2. LORD JUSTICE TUCKEY: This is an appeal by Althea Britton from the Immigration Appeal Tribunal who dismissed her appeal from a special adjudicator who had dismissed her appeal from the Secretary of State's refusal to grant her asylum. It was also contended that to return to her to Jamaica would be a breach of her Article 3 rights. This contention was rejected by the Secretary of State, the special adjudicator and the IAT as well.

3. The appellant says on this appeal that the IAT did not deal, or did not deal properly, with one of the grounds of appeal and misdirected itself both as to the asylum and human rights claims.

4. The appellant, who is a Jamaican citizen, entered the United Kingdom in December 1999 when she was given six months leave to enter as a visitor. She has since been joined by her three older children; her two younger children are still in Jamaica. The appellant overstayed, but applied for asylum after she was arrested in April 2001. The basis of her claim was that she was afraid to return to Jamaica because her family had been suspected of being informers and had been subjected to appalling violence at the hands of gangs associated with the two main political parties, the PNP and the JLP.

5. The special adjudicator said he had no reason to doubt any of the evidence given by the appellant or the other witnesses who gave evidence on her behalf.

6. Put shortly, the appellant and her family had always lived in a poor area of West Kingston, close to the boundary between two constituencies, one held invariably by the PNP and the other by the JLP. The appellant's uncle Lorenzo and cousin Carlos had been active members of the PNP until 1995. When they left the party they were suspected of betraying it. Another uncle was murdered in 1995 because the PNP believed he was a JLP informer. The following year PNP gunmen burst into the family's house looking for Lorenzo and Carlos but they narrowly escaped. However in January 1999 gunmen opened fire on a family gathering in the street, killing Carlos. The appellant's eldest daughter was subsequently threatened and told by a gang member that they were after the whole family.

7. Since the appellant had been in England, her uncle Junior, who reported Carlos's murder to the police, was threatened that his entire family would be killed if he gave evidence against the two suspects who had been arrested. In June 2001 a bomb was taken into the yard of the family home and the house was burnt down. In October 2001 two of the appellant's other cousins were murdered.

8. The appellant's case was supported by Mr Lewis, who had taught in a nearby school in this area of Kingston. He said that the appellant's family had been branded as informers and he had seen groups outside the family home threatening the family and to burn the house down.

9. An expert's report said that informers were regarded as the lowest form of life in Jamaica. They ran very high risks. Historically the political parties had enforced loyalty through violence. This was no longer accepted practice, but the gangs still existed and much of their violence was still politically motivated. The police did not exert effective control over them and could not provide adequate protection for individuals against them. Other country information put before the special adjudicator supported these conclusions.

10. The special adjudicator rejected the asylum claim because he concluded that the appellant had not shown that she would be persecuted for membership of a particular social group or for

political opinion. He also considered sufficiency of protection in the context of the asylum claim, about which he said:

> "In deciding this appeal it is necessary for me to refer to the CIPU report on Jamaica. Section 2 of that report provides a full account of the law enforcement and security forces in Jamaica. Having read this report it occurs to me that rather than being inadequate, ineffective or even non-existent, the security forces in Jamaica are somewhat over zealous 'the JCF (Jamaica Constabulary Force) are armed and an armed response is often used apprehending criminal suspects, for example the killing of seven men in a police shoot out in March 2001'. Although the report recognised that the crime levels of Jamaica are regarded as high particularly on the slum areas there was a nineteen per cent drop in violent crime by 1997."

11. We do not have the CIPU report referred to by the special adjudicator which was dated April 2001, but I have assumed that the report we do have, which is dated December 2001, is in much the same terms as the earlier one.

12. The special adjudicator dismissed the Article 3 claim:

> "... for the same reasons as stated in my findings relating to the asylum claim ..."

These included a finding that the internal flight option was open to the appellant.

13. The IAT gave leave to appeal on the ground that the special adjudicator's decision did not appear to provide adequate or sufficient reasons for his conclusions. The grounds of appeal included a complaint that when dealing with sufficiency of protection, the special adjudicator had not referred to the evidence that the police were unable to control the gangs and could not provide sufficient protection to those who were targeted by them. The notice of appeal also made the point that the CIPU report was not inconsistent with that evidence. The appellant also complained that the special adjudicator had not given separate consideration to the human rights claim.

14. The IAT rejected the challenge to the special adjudicator's conclusion that the appellant could not attribute her fear to actual or imputed political opinion or membership of a social group, for reasons which they spelt out at some length. Those reasons were challenged on this appeal, but the Secretary of State does not seek to support them. It is not necessary to consider them further, for reasons which will become apparent in a moment.

15. After dealing with the two Convention reasons advanced by the appellant in support of her asylum claim, the IAT proceeded to say:

> "In the circumstances we see no relevance in considering the sufficiency of protection issue. Nevertheless for completeness, we agree with the Adjudicator that the objective report indicates that the law enforcement and security forces in Jamaica, rather than being inadequate, ineffective or even non-existent, are somewhat over zealous and are armed. An armed response is often used apprehending criminal suspects."

They then conclude:

> "In the circumstances we find that the appellant has failed to discharge the burden of proof upon her to the appropriate standard that she will be [persecuted] for a Convention reason or subjected to ill-treatment which

breaches her human rights if she is returned to Jamaica.

Her appeal is therefore dismissed."

16. The conclusion about sufficiency of protection would have been fatal to the asylum claim, even if the Tribunal were wrong about the Convention reasons. That is why we are not concerned with that aspect of the case.

17. This appeal has focused on the way the IAT dealt with the human rights claim. This, as one can see, is dealt with in a few words after saying that the sufficiency of protection issue was of no relevance. That is surprising in view of the complaint about the lack of reasons in the special adjudicator's decision and, as Miss Richards on behalf of the Secretary of State accepts, wrong in so far as it is premised on the fact that the sufficiency of protection issue was of no relevance. The fact that the appellant had not shown a Convention reason so could not claim asylum was no answer to her Article 3 claim. If she could show that she and her children would not be provided with sufficient protection from inhuman and degrading treatment, her human rights claim would be made out.

18. Miss Richards, however, submits that although the IAT considered it to be irrelevant, it had in fact found that there was sufficiency of protection. As the test for sufficiency of protection is the same under the Refugee Convention as it is under Article 3, dismissal of the latter claim was, she says, inevitable. So despite the error in the IAT's reasoning, their determination should stand.

19. In support of the limited reasons which are given both by the special adjudicator and by the IAT as to why protection is considered to be sufficient, she has referred us to the CIPU report and made certain submissions about it. She says it shows that there is a system of criminal law and a police force in Jamaica and the fact that the police are not always effective in controlling the gangs does not mean that there is insufficiency of protection in that country.

20. I might have accepted these submissions if I thought that the IAT had dealt satisfactorily with the sufficiency of protection issue. But I do not think they did. As I have said, one of the grounds of appeal to the IAT was that the special adjudicator had not dealt with the appellant's evidence on this issue or given reasons for his conclusion. Nor do the IAT. The fact that the law enforcement and security forces in Jamaica are overzealous does not mean that they exert effective control. Nor does the fact that they use armed response when apprehending criminal suspects. The CIPU report which we have seen does refer to gang violence in Jamaica, particularly in Kingston and the police's ability to control it. It may be that on consideration of that material it can properly be concluded that there is sufficiency of protection. But neither the special adjudicator or the IAT refer to that part of the report in their decisions, or appear to have given it any consideration in the light of the appellant's evidence to which I have referred. It may well be, of course, that the IAT gave such scant consideration to the evidence on this issue because they thought it was irrelevant. But that is a further reason for getting them to reconsider it.

21. I would therefore allow this appeal and remit the appellant's case to the IAT to enable them to reconsider the sufficiency of protection issue in the light of all the evidence.

22. On that issue, as I have already said, Miss Richards argues that the test is the same under Article 3 as it is under the Refugee Convention. The test under the Convention is to be found in the speeches of the House of Lords in <u>Horvath</u> [2001] 1 AC 489, as elaborated by this court in <u>Banomova v Secretary of State for the Home Department</u> [2001] EWCA Civ 807 (particularly at paragraphs 28 and 29). She submits that this test will be satisfied it if can be

shown that there is an effective police force which does try to control the gangs, even if they are not always successful in doing so.

23. This point has not been fully argued before us. But as an indication of his argument to the contrary Mr Drabble QC, for the appellant, says that for the purposes of Article 3 the protection of the Home State will only be sufficient if it removes the real risk of serious harm. He relies on what the Commission said in the case of HLR v France [1998] 26 EHRR 29 at paragraph 46 on page 40 of the report:

> "Strict criteria have to be applied in determining whether there is a risk of treatment proscribed under Article 3, owing to the absolute character of that provision. In this respect, the Commission wishes to stress that only the existence of an objective danger can be taken into account, such as the nature of a political regime in the State to which the interested party is likely to be deported or a specific situation which exists in that State. A finding that there is such a danger does not, however, necessarily involve any responsibility on the part of the Government of the receiving State."

In other words, Mr Drabble says that it may not be an answer to an Article 3 claim to say that the State has done all it can to remove the risk. If that is different -- as I think it obviously is -- from the test under the Refugee Convention, Mr Drabble says so be it. He seeks to derive support for this argument from what Auld LJ said in the Divisional Court in R (Dhima) v IAT [2002] INLR 243 and what this court said in McPherson v Secretary of State for the Home Department [2001] EWCA Civ 1995.

24. We have also been referred to the decision of this court in Secretary of State for the Home Department v Krepel, 26th July 2002, in which it expressed views about this point, which Mr Drabble contends related only to the particular facts of that case, but the Secretary of State says decided the point against him. This decision was given on a renewed application for permission to appeal. But it is obvious, from the judgment of Buxton LJ, that the point was fully argued by leading counsel on behalf of the applicant, Mr Nicol QC. So this judgment should obviously be considered by any Tribunal or court having to decide this point even though it was given on an application for permission to appeal.

25. Mr Drabble did not ask us to decide the point on this appeal. Indeed, he suggested that we should not do so. I think it would be unwise to do so without findings of fact. I have, however, set out the argument so that the IAT can understand how the issue arises. It may be that their view of the facts will not make it necessary for them to resolve it. If they have to, however, I hope that what I have said has identified the issue for them.

26. LORD JUSTICE CHADWICK: I agree.

27. LORD JUSTICE POTTER: I too agree.

ORDER: Appeal allowed with costs and the case remitted to the IAT for rehearing in the light of the observations of the court; assessment of the appellant's public funding.

(Order not part of approved judgment)