Neutral Citation Number: [2008] EWCA Civ 360

Case No: C5/2007/1732

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AS/06016/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2008

Before :

LORD JUSTICE TUCKEY
LORD JUSTICE SEDLEY
and
LORD JUSTICE WILSON

- -

Between :

YB (ERITREA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment 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)

- -

Mr E Fripp (instructed by Messrs White Ryland) for the **Appellant**
Mr A Payne (instructed by The Treasury Solicitors) for the **Respondent**

Hearing date: Friday 29 February 2008

- -

Judgment

Lord Justice Sedley :

1. The appellant is a 28-year-old Eritrean who came to this country in November 2004 and claimed asylum on arrival. He had entered on his own passport, which contained a lawfully obtained student visa, but for some reason he let it be taken by the agent who had assisted him to leave, via Sudan, without an exit visa. He has consistently explained that, although he had secured a place at Portsmouth University, he had not taken it up because of problems which he had begun experiencing with the Eritrean authorities and which finally impelled him to seek asylum here instead.

2. The Home Office rejected his application in February 2005, and he appealed to the AIT. By the time his appeal was heard, which was in May 2005, his claim to have a well-founded fear of political persecution in Eritrea stood on two footings: activities which had initially attracted the adverse interest of the authorities, and further activities *sur place* in this country. Immigration Judge Birt disbelieved his case in almost its entirety, but on a first-stage reconsideration the determination was held to have been shot through with error, and a full reconsideration was ordered. This took place in March 2007 before a two-judge tribunal (IJ Greasley and IJ Ross). Their decision too was adverse, but permission to appeal against it was granted by SIJ Gleeson because of the tribunal's apparent reliance on a decision of the AIT on refugees *sur place* which had been reversed by this court. The grant of permission to appeal does not make clear, as it should have done, whether it was intended to include a further ground relating to the tribunal's evaluation of the evidence. In fairness to the appellant we have considered both grounds.

3. The essence of the appellant's case was that, while employed with an Italian NGO, he had been working with a clandestine cell of the oppositionist Eritrean Democratic Party, monitoring internet traffic and circulating information about Eritrea which being suppressed by the government. When a notice was delivered to his home requiring him to report to the local governmental office, he realised that this presaged interrogation and worse, and fled to Sudan, learning on the way that his younger brother had been arrested as a hostage. Once here, he made contact with the EDP and was elected chairman of its Newcastle branch, containing some 30 members. In that capacity he had taken part in public demonstrations outside the Eritrean embassy, exposing himself to identification and ill-treatment if he were to be returned.

The evidence of EDP membership

4. The appellant called as a witness Mr Dawit Teweldeberhane, chairman of the UK section of the EDP, who confirmed the appellant's activity here and (indirectly) his membership of the party in Eritrea. Eric Fripp's first ground of appeal is that the tribunal did not engage satisfactorily with this testimony. This is what they wrote:

> 21. In relation to the facts of this case we accept the evidence of Mr Dawit that the appellant has been very active in the United

Kingdom in his work for the party. However there is no evidence that the appellant was active in Eritrea. In relation to the very important letter which was allegedly sent to the appellant informing him that he would have to report to the authorities, we are not satisfied that this letter is genuine, and do not believe the appellant's account of what occurred. In relation to the letter itself, as is apparent from this determination it was produced for the first time in the course of the appellant's evidence, and was not produced for the earlier appeal hearing, it had not been translated. He stated that it had been obtained from his sister who had sent it through a courier system in June 2006. We do not find it credible that the appellant would take the trouble to obtain other documents to support his claim, such as his membership card and letter, but would not request his sister to send the document which is central to his claim for asylum, because it explains why he suddenly decided to leave the country. In relation to the narrative that he has given about these events, we do not think that it is credible that an authoritarian regime which on the objective evidence has a record of arbitrarily arresting its citizens would in effect give the appellant notice that he was about to be detained in relation to his opposition activities by summonsing him to an interview, which he claims would have been understood by anybody as effectively a declaration that he was going to be questioned and detained. If an authoritarian regime wished to detain him, in our view he would simply have been arrested, and not in effect given a warning that he was about to be arrested. We find that the appellant's account of the casual way in which he was summoned to attend is not consistent with the general objective material as to the authoritarian nature of the Eritrean government. We also consider that it is noteworthy that at the very time when he fled the country he had indicated to the University of Portsmouth that he was experiencing difficulties in obtaining an exit visa. We consider that he had decided to leave Eritrea at an earlier stage, but had experienced difficulties in obtaining the relevant travel documents, and so he decided to come as an asylum seeker instead of a student. We place little weight on the documents which were obtained from Sudan relating to his membership of the party in view of his contradictory evidence about whether the letter was faxed or not, and also in view of the fact that the appellant said that the membership card came through Mr Dawit, a fact which Mr Dawit did not agree with. We also take into account that the letter was issued in Sudan as he was passing through, and not in Eritrea. As foreshadowed by Mr Fripp we cannot place much weight on the report submitted, in view of the circumstances in which it came before us.

5. This passage indicates very plainly why the tribunal were prepared to give only limited weight to Mr Dawit's evidence. It formed at best a modest part of an evidential pattern which, on analysis, was unconvincing. They did not in fact reject any of Mr Dawit's evidence, but they correctly related it to the larger issue they had to decide under the refugee convention: was the appellant outside his country of origin because of a fear of persecution for political reasons? They found not, and on the evidence they were in my judgment entitled to do so.

Refugees sur place

6. The second ground, concerning refugees *sur place*, is in the first instance one of law. But it is also necessary to consider whether, if the tribunal did ask itself the wrong question in law, the answer to the right question could have been different in the light of their findings of fact.

7. What the tribunal wrote was this:

> 23. As we have indicated we accept that the appellant is the chairman of the North Eastern region of the party; that he has attended a demonstration outside the embassy, and that he has done a considerable amount of work for the party in the United Kingdom. We have to consider whether this work would put him at risk on return. We have considered the decision of the Tribunal in AH Eritrea CG 2006 UKIAT 00078 in which at paragraph 39 it was stated that the position remains that unsuccessful asylum seekers per se are not at risk on return to Eritrea. The Tribunal has also decided in the case of Danian that a claimant is not entitled to asylum if he has manufactured his claim by reason of his activities in the United Kingdom. In our view there is an element of deliberation in the evidence that has been presented. It is not usual behaviour in our view for photographs to be taken of meetings. In our view the appellant has deliberately recorded his participation in political meetings to assist his claim for asylum. We are not prepared to go so far as to say that this was the only reason why he became involved in the party in the UK. Mr Fripp was not able to point us to any authorities or objective material which indicated that the authorities in Eritrea have the means and the inclination to monitor the activities of expatriates in the United Kingdom, particularly those who operate from Newcastle. Even if photographs were taken by the Eritreans of the demonstration outside the embassy, it is unlikely that they would be able to identify him from these photos and put his name on a list of persons to be detained at the airport. Whilst the objective material paints a bleak picture of the suppression of political

> opponents by the government, the appellant has failed to satisfy us to the appropriate standard that his activities in this country would put him at risk of ill treatment on his return. As we have indicated we place little weight on the evidence of the expert report, and the evidence of Mr Dawit on this point is unsupported by any objective evidence.

The legal relevance of activity sur place

8. There seems no real doubt that the tribunal have relied on the AIT's own decision in *Danian*: they say in terms "The Tribunal has also decided in the case of *Danian*…." They have thus manifestly overlooked this court's reversal of that decision (see [2000] Imm AR 96). This is far from the first time in recent years that the AIT has either ignored or overlooked decisions of this court. It should never happen, and there is no logistical or other reason why it should. The case had apparently not been mentioned in argument: had it been, it would have been the duty of both advocates to point out this court's reversal of the AIT. If the tribunal are to refer to an unargued decision, as they may legitimately do in support of an apparently uncontroversial point, it is incumbent on them to make sure that it has not been overset or departed from by a higher court.

9. The effect both of this court's decision in *Danian* and of the change in the Immigration Rules brought about by the transposition of the Qualification Directive 2004/83/EC is that there is no such bald principle as the AIT proceeded upon. But there may be a new tension between what this court decided in *Danian* and what the Qualification Directive now provides.

10. In *Danian*, adopting the considered submission of the UNHCR, Brooke LJ (at 557), with the concurrence of Nourse and Buxton LJJ, held:

> "…I do not accept the Tribunal's conclusion that a refugee sur place who had acted in bad faith falls out with the Geneva Convention and can deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and that there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered."

11. The Directive in art. 5 says:

> *International protection needs arising sur place*
>
> 1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.
>
> 2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin…

This has to be read together with art. 4(3), which says:

> The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
>
> ……..
>
> > (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country.

12. Rule 339P, which is designed to transpose the Directive, correspondingly provides:

> A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activities which have been engaged in by a person since he left the country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return**.**

13. A relevant difference is thus recognised between activities in this country which, while not necessary, are legitimately pursued by a political dissident against his or her own government and may expose him or her to a risk of ill-treatment on return, and activities which are pursued with the motive not of expressing dissent but of creating or aggravating such a risk. But the difference, while relevant, is not critical, because all three formulations recognise that opportunistic activity *sur place* is not an automatic bar to asylum. The difficulty is in knowing when the bar can eventually come down. To postulate, as in *Danian*, that the consequence of a finding that the claimant's activity in the UK has been entirely opportunistic is that "his credibility is likely to be low" is, with respect, to beg the question: credibility about what? He has

ex hypothesi already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it *is* well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse.

14. The Directive does not directly confront this problem by, for example, simply shutting out purely opportunistic claims. Its sole permitted purpose is to set common minimum standards for the implementation of the Geneva Convention, and it could probably not have adopted such a rule consistently with the governing definition of a refugee in art. 1A of the Convention. But by art 5(3), perhaps oddly, it does allow 'subsequent' – that is, presumably, repeat - applications to be excluded if these are based on activity *sur place*, whether opportunistic or not.

15. For the rest, it is evident from the way art 5(2) is formulated that activities other than bona fide political protest can create refugee status *sur place*. What then is the purpose of art. 4(3)(d)? The answer is given in the text itself: it is "to assess whether these activities will expose the applicant to persecution or serious harm if returned". This would seem not to be the purpose identified in *Danian*. It suggests that what will initially be for inquiry is whether the authorities in the country of origin are likely to observe and record the claimant's activity, and it appears to countenance a possible finding that the authorities will realise, or be able to be persuaded, that the activity was opportunistic and insincere. In that event – which can only in practice affect opportunistic claimants - the fear of consequent ill-treatment may be ill-founded.

Surveillance of activity sur place

16. What is said by Alan Payne on behalf of the Home Secretary is that, although the AIT mistakenly referred to a superseded decision on refugees *sur place*, the mistake was not material. The AIT stopped short of finding that the appellant's activities in this country were wholly self-serving. What was critical was their finding that there was no evidence that the Eritrean authorities had the means and the inclination to monitor the activities of expatriates in this country, particularly in Newcastle. They had, in other words, taken the approach required by the Directive and the Rules.

17. In terms of approach, this seems right. We were nevertheless sufficiently concerned at the way the AIT had dealt with this aspect of the case, albeit it did not feature in the grounds of appeal, to invite submissions on it. At the close of argument the appeal was accordingly adjourned so that Mr Fripp could apply to amend his grounds and so that written submissions could then be exchanged. In the event Mr Fripp has submitted an eight-page written argument containing nothing that can be identified as a further ground of appeal. He has been helped out, however, by Mr Payne, who identifies the question as whether the AIT has materially erred in law by

    (a) relying on the absence of objective evidence that the Eritrean authorities had the ability or desire to monitor the activities of expatriates throughout the UK, or

(b) concluding that that, even if photographs were taken of demonstrators, it was unlikely that the Eritrean authorities would be able to identify the appellant and/or place his name on a list of people of interest to the authorities.

18. As has been seen (§7 above), the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had "the means and the inclination" to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which "paints a bleak picture of the suppression of political opponents" by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive.

Conclusion

19. In my judgment the combination in §23 of the misdirection on *Danian* with the handling of the objective possibilities and probabilities give cause for concern that this claim has not been properly adjudicated on. I would allow the appeal to the extent of remitting to a differently constituted tribunal the issues arising from activity sur place for determination in the light of this court's judgment.

Lord Justice Wilson:

20. I agree.

Lord Justice Tuckey:

21. I also agree.