Neutral Citation Number: [2013] EWCA Civ 1523

Case No: C4/2012/2229 + 2229 (B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
(HHJ GILBART)
REF: CO9540/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 26th November 2013

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
and
LADY JUSTICE SHARP

- -

Between :

The Queen (on the application) of AA (Iran)	**Appellant**
- and -	
Upper Tribunal (Immigration and Asylum Chamber) & Anr	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Richard Drabble QC and **Mr Paul Draycott** (instructed by **Paragon Law**) for the **Appellant**
Mr Neil Sheldon (instructed by **Treasury Solicitors**) for the **Respondent**

- -

Judgment

Lord Justice Maurice Kay :

1. This is the latest of a series of cases in which the failure of the Secretary of State to comply with her duty under Article 19(3) of the Reception Directive (2003/9/EC) and its domestic progeny, Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005, has given rise to a claim that the refusal of an application for asylum or humanitarian protection and the dismissal of subsequent statutory appeals are legally flawed. In each case, the claimant arrived in the United Kingdom as an unaccompanied minor and applied for asylum. Regulation 6(1) provides:

> "So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the minor's family as soon as possible after the minor makes his claim for asylum."

I shall refer to this as "the tracing duty". In *KA (Afghanistan) v Secretary of State for the Home Department* [2013] 1 WLR 615 I described the Secretary of State's failure to comply with this as "systemic". I added (at paragraph 16):

> "The inference … is that the Secretary of State failed to discharge the duty to unaccompanied minors … because she adopted the policy of granting them leave to remain until they reached the age of 17½ whereafter any further application would be considered on its merits. By that time, of course, the duty to endeavour to trace would be close to expiration because of the imminence of majority."

The other significant cases in this Court were *DS (Afghanistan) v SSHD* [2011] INLR 389; *HK (Afghanistan) v SSHD* [2012] EWCA Civ 315; and *EU (Afghanistan) v SSHD* [2013] Imm AR 496 CA.

2. In the present case, the appellant, a citizen of Iran, arrived in the United Kingdom as an unaccompanied minor on 21 January 2009 and claimed asylum. He was then a month short of his sixteenth birthday. His date of birth is 27 February 1993. He is therefore now aged twenty.

The procedural history

3. On 29 June 2009, the Secretary of State refused the appellant's application for asylum but granted him discretionary leave to remain (DLR) until 27 August 2010. An appeal to the First-tier Tribunal (FTT) was dismissed on 19 August 2009. On 25 August 2010, he made an application for further leave to remain on asylum, humanitarian protection and human rights grounds. It was refused by the Secretary of State on 22 November 2010. The appellant again appealed to the FTT but his appeal was dismissed on 27 January 2011. On 22 February 2011 the FTT refused his application for permission to appeal to the Upper Tribunal (UT). He applied to the UT for permission to appeal but on 7 July 2011 permission was refused. By then he was eighteen.

4. The decision of the UT dated 7 July 2011 was then sought to be challenged by an application for permission to apply for judicial review in accordance with *R (Cart) v*

Upper Tribunal [2012] 1 AC 663 SC. Langstaff J refused permission to apply on the papers on 18 November 2011 but on 16 March 2012 Judge Gore QC, sitting as a Deputy High Court Judge, granted permission following an oral hearing. The substantive hearing took place before Judge Gilbart QC but, on 19 July 2012, he refused the application; [2012] EWHC 1784 (Admin). However, Judge Gilbart QC granted the appellant permission to appeal to this Court and Sir Richard Buxton later granted permission in relation to further grounds. We heard the appeal on 12 October 2013, by which time the appellant was aged 20. This was the ninth occasion on which the appellant's case received judicial consideration.

5. It is important to keep two things in mind. The first is that the decision which is being challenged in the present proceedings is the refusal by the UT on 7 July 2011 to grant permission to appeal against the decision of the FTT dated 22 February 2011. The question is whether that was an unlawful refusal of permission. The second point is that from the moment Judge Gore granted permission to apply for judicial review on 16 March 2012, this has been a substantive judicial review case, freed from the shackles of the second-appeals test which *Cart* requires to be satisfied when consideration is being given to an application for permission to apply for judicial review in these unusual circumstances. Unfortunately, this was not fully appreciated in the submissions before or the judgment of Judge Gilbart or in the initial skeleton arguments in this Court.

The appellant's case

6. As I have said, the foundation of the appellant's case is the Secretary of State's failure to comply with the tracing duty when he was still a minor. His complaint is that his factual case that he would be at risk of persecution and mistreatment on return to Iran because of the involvement of his father and his uncle in KDPI activities prior to his departure was disbelieved (twice) by the FTT in circumstances where he might have had a better chance of being believed if he had had the fruits of the proper discharge by the Secretary of State of the tracing duty. In other words, tracing might have produced material which would have supported his account. In order to evaluate this case, it is necessary to see what the two FTT decisions found.

The FTT decision of 19 August 2009

7. The appellant's case before the first FTT (Immigration Judge Stott) was that his father had been killed by the Iranian authorities for his KDPI activities some ten years previously. The appellant had left Iran some years later after he had been reluctantly involved in distributing leaflets for the KDPI at the behest of his uncle. Fearing that this would lead to his persecution, his mother arranged his clandestine departure from Iran. He had arrived in the United Kingdom in the back of a lorry shortly before his sixteenth birthday.

8. Immigration Judge Stott rejected the essential features of the appellant's case, finding that neither the father nor the uncle had been involved with the KDPI; that the father had not been killed by the Iranian authorities; and that the appellant had not lost contact with his family in Iran as he had claimed. On the contrary, the appellant was an economic migrant. The appellant did not seek to appeal Immigration Judge Stott's decision. No point had been taken at that stage about the tracing duty.

The FTT decision of 27 January 2011

9. The appellant's second appeal followed the Secretary of State's refusal of his application for further leave to remain. His case on asylum and risk on return was essentially the same as had been presented to and rejected by Immigration Judge Stott. His case pursuant to Article 8 of the ECHR had developed with the passage of time – he had been studying and integrating in this country and he now had a girlfriend. At the date of the hearing before the FTT (Designated Immigration Judge Garratt and Immigration Judge Landes), he was seven weeks short of his eighteenth birthday.

10. Although the appellant's counsel sought to persuade the FTT to go behind Immigration Judge Stott's findings of fact, it declined to do so, considering that, as a matter of law, they should stand and, in any event, it agreed with them. So far as contact with the family in Iran was concerned, the appellant had recently approached the Red Cross but this had not yet produced any information. The FTT concluded:

> "The appellant's claim to have lost touch with his family is also brought into question by the later evidence that the appellant has contacted the Red Cross with a view to tracing his family. We find it is inconsistent, as did the first Immigration Judge, that the appellant would not have contacted his family members in Iran during his time in the United Kingdom. He has conceded that he did not contact the Red Cross until after his first appeal was dismissed and his representatives had advised it. We believe this contact to be a self-serving attempt by the appellant to show that the credibility findings of the first Immigration Judge are wrong. The letter from the Red Cross is inconclusive. There is no indication what investigations have actually been made by the organisation or what information they had been given in order to commence their investigations. We must therefore accept that the First Immigration Judge's conclusion that the appellant had not lost contact with his family members in Iran."

11. The FTT had regard to section 55 of the Borders, Citizenship and Immigration Act 2009 and the need to treat the best interests of a child as a primary consideration but, unsurprisingly in view of the findings of fact and the appellant's rapidly approaching 18th birthday, concluded that his removal would not be a disproportionate interference with his Article 8 rights. No issue was raised about the tracing duty or the systemic failure to comply with it.

12. The ultimate refusal of permission to appeal to the UT (Senior Immigration Judge Gleeson, 20 May 2011) ended with the words:

> "The [FTT] reached proper, intelligible and adequate conclusions on the evidence before it and these grounds of appeal do not disclose any arguable errors of law therein."

Although that decision came after the Court of Appeal had decided *DS (Afghanistan)*, in which judgment was handed down on 22 March 2011, the grounds of appeal which were under consideration had been settled before *DS*. By the time that Judge Gilbart

came to consider the substantive judicial review of Senior Immigration Judge Gleeson's decision, he had the benefit of *DS* and *HK* but *KA* and *EU* had not yet been decided.

Discussion

13. As I have said, the appellant's case in this Court is constructed on the failure of the Secretary of State to comply with the tracing duty. In attempting to synthesise the legal principles in relation to the significance of that failure in *KA*, I observed that, in the light of *DS* and *HK*, the failure may be relevant to judicial consideration of an asylum or humanitarian protection claim and also to consideration of the section 55 duty in the context of Article 8. I referred (at paragraph 25) to a hypothetical spectrum with, at one end, a credible and cooperative claimant who has no surviving family in his home country or who has lost touch with them and, at the other end, a claimant whose account of having no surviving family or of having lost touch with them is disbelieved and who is being uncooperative. The former may be able to rely on the Secretary of State's failure to comply with the tracing duty whereas the latter may not because he has failed to prove risk on return and because there would be no causative link between the Secretary of State's failure to comply with her duty and any need for protection.

14. On behalf of the appellant, Mr Richard Drabble QC submits that if Immigration Judge Stott or the second FTT had considered the Secretary of State's failure to comply with the tracing duty, the finding that the appellant has not lost contact with his family in Iran might not have eventuated. He further submits that this is not a case in which the appellant had failed to cooperate with the Secretary of State in the sense in which that concept was used in *KA* when the negative end of the hypothetical spectrum was identified. In short, compliance with the tracing duty might have enabled the appellant to resist the adverse inference of continuing contact which proved fatal to his case.

15. As *KA* and its subsequent application in *EU* make clear, cases in this area are fact-sensitive. In truth, the failure to comply with the tracing duty in the present case had no impact on the repeated rejection of the appellant's primary case that he is a refugee at risk of persecution by reason of imputed political opinion. That is not a child-orientated assertion. It is an assertion that was categorically rejected within its own terms. Once it was rejected, it was a short step to the inexorable inference that the appellant had not lost contact with the family whose whereabouts remain known to him. Two constitutions of the FTT saw and heard the appellant give evidence. He was cross-examined at some length on the second occasion, resulting in the FTT forming a clear view of its own. Mr Drabble submits that it was wrong to allow disbelief about the essentials of the asylum claim to "morph into" a positive finding of continuing contact. I do not agree. Absent the persecutory background, continuing contact is inherently likely. Although the finding is inferential, it is unassailable. It follows that the case is properly positioned towards the end of the *KA* spectrum in relation to which there is no causative link between the non-compliance with the tracing duty and the appellant's case on a need for protection. As Mr Neil Sheldon submits on behalf of the Secretary of State, non-compliance with the tracing duty simply does not bite on the appellant's claim.

16. There is another aspect of the case to which I should make brief reference. The original grounds of appeal and skeleton argument on behalf of the appellant (to which Mr Drabble was not party) would have required us to consider whether consideration of the appellant's Article 8 case by the FTT – in particular the consideration of section 55 and the best interests of a child as a primary consideration – was flawed because of the failure of the FTT to consider his best interests by express reference to the checklist set out in section 1 of the Children Act. The basis for such a submission was said to reside in *R(Tinizaray*) *v SSHD* [2011] EWHC 1850 and the approach there taken to *ZH (Tanzania) v SSHD* (2011) 2 AC 166 SC. In the event, Mr Drabble did not press that ground of appeal. He was right not to do so. In *SS (Nigeria) v SSHD* [2013] EWCA Civ 550, Laws LJ said (at paragraph 55) that *Tinizaray* should not be regarded as "establishing anything in the nature of a general principle" about section 1 of the Children Act. I respectfully agree. Mr Sheldon tells us that, notwithstanding what Laws LJ said, some tribunals continue to adopt the *Tinizaray* approach. In my view they should not do so. *Tinizaray* should receive its quietus.

Conclusion

17. It follows from what I have said that I would dismiss this appeal.

Lady Justice Sharp:

18. I agree.

The Master of the Rolls:

19. I also agree.