Case No: C5/2007/2353

Neutral Citation Number: [2008] EWCA Civ 564
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/13354/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 23rd April 2008

Before:

LORD JUSTICE BUXTON
LORD JUSTICE SEDLEY
and
LORD JUSTICE MOORE-BICK

- -

Between:

MJ (IRAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr D Jones (instructed by Messrs Fisher Jones Greenwood) appeared on behalf of the **Appellant**.

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

- -

Judgment

(As Approved by the Court)

Lord Justice Sedley:

1. The appellant, who is an Iranian in his mid-20s, sought asylum here in mid-2001 asserting a well-founded fear of persecution on political and religious grounds were he to be returned. The detail of his claim is relevant only insofar as it will be necessary to touch on it in what follows. Having been refused asylum by the Home Office he appealed. The appeal came first before Immigration Judge Norris, who held in terms: (a) that if the appellant's case was true it did not disclose a well-founded fear of persecution for political reasons but (b) that in any case his case was not credible. Reference was made to the case of the applicant's brother, to whom I will refer as Z in order to maintain the anonymity which ordinarily attends these cases. At paragraph 56 Immigration Judge Norris made reference to the fact that the brother had made an asylum claim which had:

> "resulted in a finding of fact that the appellant was not in that case a credible witness"

2. I will have to come back in due course to the brother's role in this matter. But I need in addition to note that the first immigration judge, Immigration Judge Norris, went on at paragraph 59 to introduce unusual inversion of the refugee *sur place* argument by relying on the want of overt activity against the Iranian Government in the United Kingdom as potentially undermining the applicant's case.

3. This said, Immigration Judge Norris seems to me to deserve commendation for resisting the pressure of the Home Office Presenting Officer to use Section 8 of the 2004 Act to cut the corner on credibility findings. One repeatedly finds oneself wondering why the Home Office keeps relying on Section 8 as a substitute for dealing with the credibility issues on their merits.

4. At paragraph 60, his concluding paragraph, Immigration Judge Norris said this:

> "So far as any risk on return is concerned, I do not consider that this appellant would be at risk other than as a returning failed asylum seeker. There is no evidence that he is known to the authorities, he may well have been arrested once in relation to a student demonstration but this is again now five years ago and in my view even if it occurred would not now be of any relevance."

5. It was at that point of his determination that the Immigration Judge came closest to giving support to the submission now made to us by Mr Jones that he had in truth accepted, at least to a low level of probability, the account given by the applicant of having been arrested not as a participant in, but as somebody who happened to be around at the time of, a student demonstration against the regime. For the rest, as I have said, the entirety of the appellant's

account was rejected by Immigration Judge Norris. In my view, as Moore-Bick LJ suggested to Mr Jones in argument, the phrase "he may well have been arrested" is simply an infelicitous way, in the context of the entire determination, of saying "even if it were the case…".

6. For the rest, the findings of fact are clear and are consistently adverse to the appellant. An order for reconsideration was nevertheless made by Senior Immigration Judge Chalkley purely on the ground that risk at the point of return had not been adequately addressed.

7. Upon the first-stage reconsideration Immigration Judge Brunnen found that there had indeed been an error of fact in relation to the circumstances of the claimant's alleged arrest of the kind that I have described. The question, Immigration Judge Brunnen considered, was what impact this might have had on the assessment of risk on return. However, he expressly preserved the adverse findings of Immigration Judge Norris concerning the alleged involvement of the appellant in monarchist activity. The issues which he sent on for second-stage reconsideration concerned the possible impact of any detention that the appellant might have undergone upon the risk, if any, facing him at the airport on return.

8. The second-stage reconsideration came before Immigration Judge Holmes in Bradford. The hearing was adjourned because newly-served expert evidence emanating from the appellant's side (that of a Ms Enayat) appeared to raise a new case on the risk facing those active in the monarchist cause in Iran. It was, it seems to me, manifestly inadmissible within the terms of reconsideration; but on the resumed hearing it was agreed between the Home Office Presenting Officer, Lisa Birtles, and counsel for the appellant, Parosha Chandran, that the limit on the reconsideration issues was unworkable and that the whole case needed to be readdressed at large. Much of this was clearly due to the fair-minded approach taken by the Home Office Presenting Officer who is also, if I may say so, to be commended for having, unlike her predecessor before Immigration Judge Norris, disclaimed any reliance on Section 8 of the 2004 Act and for having argued her case as to credibility upon its intrinsic merits.

9. This said, the appellant, I would have thought, could have counted himself fortunate to have secured a *de novo* hearing of a claim which might well have been held, in the respects that had been reserved by Immigration Judge Brunnen, to have been perfectly tenably decided by Immigration Judge Norris. Having, however, cleared the decks and reheard all the issues of fact, Immigration Judge Holmes again reached a consistently adverse conclusion on the credibility of every material aspect of the appellant's case and also, as will appear in a moment, on something more besides. Mr Jones now contends that the substituted decision of Immigration Judge Holmes was flawed by what on reflection was the very thing that secured it -- the wiping clean of the factual slate and the redetermination by the Immigration Judge of the entire claim. Mr Jones persuaded Sir William Aldous, on a renewed application for permission to appeal, that the appellant was arguably entitled to retain the benefit of findings

of fact made in his favour by Immigration Judge Norris. Sir William gave him permission to appeal both on this ground and on a group of further grounds concerning the use made by Immigration Judge Holmes of what had happened in the appellant's brother's asylum claim.

10. I turn first to the ground concerning the allegedly fixed findings of fact. The short answer is that in law as in life you cannot have the penny and the bun. The appellant's counsel secured the benefit of a rerun of the entirety of the factual issues, escaping what would otherwise have been the major fetter of an adverse finding about his involvement in monarchist politics. It was intrinsic to any such rerun that Immigration Judge Holmes was to be at liberty to make his own findings. It is a misfortune for the appellant that he did so as adversely as, though on different grounds from, Immigration Judge Norris. His redetermination moreover focuses specifically on risk on the point of return and finds that there is effectively none.

11. It has been suggested to us by Mr Jones that counsel then appearing had not in fact consented to the course carefully recorded and endorsed by Immigration Judge Holmes in these terms among others:

> "11. In order to avoid further delay, and a further adjournment either to seek clarification from Immigration Judge Brunnen, or to pursue an appeal to the Court of Appeal to the effect that there is a material error of law in the dismissal of the Appellant's evidence that he was involved in monarchist politics, I was invited, by way of a joint application from both parties, to follow the exceptional course of finding that there was such an error of law, and then proceeding with a full reconsideration hearing today. Both parties were prepared for such a hearing and content to undertake it today without further adjournment. I am satisfied that this is the correct course to adopt. It is both fair to both parties, and a sensible use of public funds."

12. For more than one reason I do not accept that the Immigration Judge is open to any criticism for having taken this course. First of all, it would be directly contrary to the clear understanding that he had formed of what counsel and the Home Office Presenting Officer had agreed. Secondly, if the Immigration Judge had misunderstood what counsel had agreed to, one would have expected to find this asserted in the grounds which counsel thereafter settled and signed. But her grounds make no such allegation. They assert rather that, agreement or no agreement, there was no jurisdiction to go behind two sets of fact-findings: one as to the appellant's alleged monarchist activity, the other as to the appellant's having been detained and ill-treated. Such a proposition Mr Jones has however, quite rightly, not sought to make good. Instead he seeks to adduce some indications of statements made by his predecessor which allegedly support a claim that she herself has never advanced. This will not

do. It is she, not Mr Jones, who is visibly embarrassed by the endeavour to get her to do so.

13. There is, in any event, a further reason why this argument cannot stand up. Immigration Judge Norris had made no factual findings of any relevance in the appellant's favour. What he explicitly did was make provisional factual assumptions, on the basis of which he found that there was no risk of political persecution even if they were right, but then concluded that these assumptions were in any event ill-founded in fact. In my judgment this ground of appeal is therefore unsustainable.

14. The second group of grounds raises the question of the propriety of comparing the appellant's claim with his brother Z's claim in order to identify discrepancies between the two. Immigration Judge Holmes at paragraphs 35 and 36 of his judgment wrote the following:

> "35. I note that the Determination of Adjudicator Chandler in relation to [Z's] appeal makes no reference to [Z] asserting that;
>
> a) his mother had ever been detained by the Iranian authorities, or,
>
> b) he had a maternal uncle detained since 2001 by the Iranian authorities on suspicion of being involved in monarchist politics, or,
>
> c) he had a brother…who had been involved in leafleting in the local town on behalf of a monarchist group, or, in relation to his father's death in detention in 1989, or,
>
> d) he had a brother…who had been detained on suspicion of being involved in a student demonstration, or,
>
> e) he had a brother…who was wanted by the authorities.
>
> 36. The Appellant's assertion that his father was detained after the revolution because he had worked as a driver for senior military officials in the Shah's regime is not of itself so implausible as to be incredible. Nor is the assertion that in 1989 his father was detained because of expressions of support for monarchists in some writings that had been brought to the attention of the authorities. Nor is the assertion that his father died as a result of injuries sustained whilst in detention. On the other hand, if these assertions were true, I would have

> expected to see them made by the Appellant's brother [Z] as the background to, and in support of, his own asylum claim. They are not recorded as having been made by [Z] in the determination of Adjudicator Chandler of 13.10.04, and I am satisfied that if [Z] had made them that this would have occurred. If through some extraordinary chance they were omitted then I would expect there to have been a successful appeal by [Z]. In my judgement it is noteworthy that [Z] declares himself to be four years younger than the Appellant, and to have entered the United Kingdom in May 2004. As such he was seventeen in 2001, and therefore old enough to know what his brother's situation was at the time, and to have known of his mother's arrest if it occurred. By the time [Z] arrived in the United Kingdom he was nineteen and a half, and I am satisfied that he would not only have known of these matters if they had genuinely occurred, but would have reported them when making his asylum claim. In my judgement he would have given details of them if they had occurred, because if the family had the monarchist profile that the Appellant asserts as the basis for the risk that he faces upon return, it would be a profile that would equally apply to his brother [Z], and of which he would be acutely aware."

15. It is undesirable but unfortunately not uncommon in the asylum system to find that siblings or spouses' appeals have been separately heard. Where the first has succeeded, the Home Office routinely resists the introduction of either the record or the determination into the second one's appeal. Such resistance is generally justified because in principle no factual *res judicata* or issue estoppel is created by one determination in relation to others. In the case of Otshudi v SSHD [2004] EWCA Civ 893, giving a judgment with which the Vice-Chancellor and Chadwick LJ concurred, I said:

> "1. This appeal comes before the court by permission of Kay L.J. He was much influenced by the fact that, some ten months after an adjudicator had dismissed Mr Otshudi's appeal, another adjudicator, on almost identical evidence, had allowed his brother's appeal. For reasons to which I shall shortly come, this cannot furnish a ground of legal challenge…
> ….
> 10. Eleven days after the IAT dismissed Mr Otshudi's appeal, his brother's asylum and human rights claims, founded on the same evidence, were allowed by a different adjudicator,

> Mr L D Sacks. We are told today that the Home Secretary has not sought to appeal the decision. The fact of this discrepant decision was drawn to the attention of the IAT when permission to appeal to this court was sought but the IAT made no reference to it in their refusal. Although this is recounted in the appellant's skeleton argument, and although the single Lord Justice who gave permission to the appeal was concerned by it, no submission of law is now founded on the outcome of the brother's claim, and rightly so.
>
> 11. This is not the class of case which involves what Laws LJ has called "a factual precedent" -- for example a finding about the political situation in a given country at a given moment. It is an illustration, if an alarming one, of the fact that two conscientious decision-makers can come to opposite or divergent conclusions on the same evidence. But it is no more material to the legal soundness of the present adjudicator's decision than hers would be to the soundness of the second adjudicator's decision."

This court went on, it should be said, to invite the Home Office to give very serious consideration to the possible material injustice that might nevertheless be reflected in such discrepant decision-making (see also, in this regard, *Macdonald's Immigration Law* paragraph 18.144).

16. In the present case I can see no justification for allowing the Home Office to do what is pretty much the counterpart of what was attempted and failed in Otshudi. The purpose here would of course be to use a first claim which has failed in order to destroy a sibling's second claim. The same principle it seems to me has to apply in both situations.

17. For the Home Secretary, Ms Broadfoot, having reflected on this, has very properly abandoned the argument which she proposed to advance in defence of paragraphs 35 and 36 of the determination. She accepts, as I would for my part hold, that they should not be there at all and that any reliance on the brother's case for the purposes apparent in paragraphs 35-36 is not lawful. Indeed I should say in passing that we have found it difficult to ascertain how those paragraphs got there. The determination, without any witness statements and so forth, in Z's case appears to have been included by the Home Office in the case papers put before Immigration Judge Norris, which it should not have been. There is nothing to suggest, however, that it was raised or relied on before Immigration Judge Holmes or that his use of it was anything but his own idea. If so, it was not a good idea. If not, it was wrong of the Home Office Presenting Officer to invite him to make use of it.

18. It is quite another thing, I would stress, to cross-examine an appellant or any other witness about any conflict between the testimony that he or she has

given in another case, in particular a sibling's or spouse's case, and what that party or witness is now saying; or for that matter about any other material issue of which they can be expected to have knowledge. Evidence of what a witness or a party has said on an earlier occasion is generally admissible, subject to the well-known inhibition on self-corroboration and to the finality of answers going to credit alone.

19. Mr Jones did not initially put the issue in quite this way. He took the treatment of Z's case as an unjustified requirement for the appellant to produce corroboration from a particular quarter. It may, I suppose, be said that this followed from what the immigration judge did; but the real issue, as both counsel now accept, is the more fundamental one I have described. By a respondent's notice to this court the Home Office sought initially to fetch in more of the documentation in the brother's case. For the reasons I have indicated we declined to look at this material, and the respondent's notice was thereupon abandoned. If there was an evidential place for any of this material it was by way of cross-examination of the appellant before Immigration Judge Holmes.

20. The remaining question is therefore whether the use of this inadmissible material matters to the outcome of the case. The respondent's case is that the admittedly inadmissible findings about the brother's case were:

> "not a…significant part of the [immigration judge's] reasons for concluding that the Appellant's account was not credible"

21. Mr Jones submits, correctly in my judgment, that it is only if we are able to be entirely confident that the determination would have been the same in the absence of this inadmissible element in the Immigration Judge's reasoning that we can uphold this determination and dismiss the appeal.

22. Given that the two paragraphs of the determination with which he begins his deconstruction of the appellant's credibility are the ones dealing with Z's case it may seem difficult at first blush to say that these form no significant part of the determination. If, however, one takes the course of in effect placing a sheet of paper over paragraphs 35- 36 and re-reading the decision without them, the decision makes perfectly good sense. But this by itself is still not enough. It may still be that the attitude to the appellant's credibility engendered by the inadmissible material has infected the remaining credibility findings. The fact that the Immigration Judge has begun his credibility findings with the inadmissible material is certainly capable of lending force to the argument that this is what has happened here.

23. Giving weight to all these considerations I am nevertheless driven to the conclusion, first, that the determination is capable of standing on its own feet when shorn of the offending paragraphs and, secondly and as importantly, that the balance of the decision is visibly not infected by the erroneous passage. I put it this way deliberately. It might not be enough that the remainder was not visibly infected since a reasonable suspicion of taint might remain. But it

must in my judgment be enough to sustain the determination that it is visibly not so infected; so that, without reciting it, the substance of the determination is in my judgment sustainable.

24. Albeit in circumstances which do not reflect undimmed glory on the Home Office's conduct of this case, I would accordingly dismiss this appeal.

Lord Justice Moore-Bick:

25. I agree and there is nothing I wish to add.

Lord Justice Buxton:

26. I also agree. I would venture to add two points. With regard to the first issue: that is to say, what it was that Immigration Judge Norris had in fact found with regard to the applicant's detention, the history of the matter was as follows. The application for the section 103A reconsideration was settled by counsel, not counsel who had appeared before Immigration Judge Norris nor either Mr Jones or Ms Chandran who have already been mentioned by my Lord. On one level, understandably, that application set out or referred clearly to paragraph 60 of Immigration Judge Norris's determination. that is to say where he said: "he may well have been arrested once in relation to a student demonstration". As my Lord has said, that was not in itself a finding of fact and I doubt whether it should have been represented in the submissions as an acceptation by Immigration Judge Norris that "the appellant may have been detained and badly treated", which is something rather different from what is said by Immigration Judge Norris in paragraph 60. When the matter came before Immigration Judge Brunnen, where the applicant was represented by a third member of the Bar who was neither of those who had so far had the conduct of the case nor again Ms Chandran or Mr Jones, that submission, in the Immigration Judge's understanding as set out in paragraph 2, had turned into a positive statement that Immigration Judge Norris:

> "did accept that the Appellant had been arrested and detained with a considerable number of others after he was involved in a student demonstration in 2000."

27. Now I would only comment that, as this case shows and as the considerable difficulty that has been caused by investigation of this first point demonstrates, it is very important that claims are not made in respect of findings by the first immigration judge that cannot be sustained on a reading of the whole of the determination. Immigration judges considering reconsiderations cannot be expected, in my view, critically to read the whole of the previous determination in order to see whether what they are apparently being told by advocates is in fact well-founded. As my Lord Sedley LJ has demonstrated, a claim that the first immigration judge actually accepted that this appellant had been arrested and detained simply cannot stand up in the light of the whole of his findings. If that had been perceived, as it properly should have been, none of the first point would have been argued and we would not have had to go in

considerable detail into the further dispute about whether the alleged finding by Immigration Judge Norris had in fact been brought within the compass of the agreement that was undoubtedly made between the advocates who appeared before Immigration Judge Holmes. This is important because of the terms of the decision of this court in DK (Serbia) v SSHD [2006] EWCA Civ 1747. If it is going to be claimed that the reconsideration tribunal cannot go behind a previous finding of fact, as it was claimed in this case, then it must be clearly ascertained that that finding has indeed been made. That unfortunately does not seem to have been done in this case and I do not, I have to say, think that Immigration Judge Brunnen received all the help that he might have done when determining that point. However, the point in the context of this case is academic because as my Lord has said it is quite clear that both parties sensibly agreed in effect to start again in front of Immigration Judge Holmes, and the claims that that was not so have certainly not been satisfactorily verified to this court. If the latter were going to be pursued, at the very least there was needed a direct statement from counsel who appeared before Immigration Judge Holmes explaining not only what had happened but why the terms of the grounds that counsel drew after that encounter are clearly inconsistent with this allegation that the alleged finding of the previous tribunal remains untouched.

28. So far as the second point is concerned I would only say that I entirely agree with my Lord that material from other tribunal hearings may be properly deployed in a second hearing, certainly if the applicant in the second hearing has given evidence in the first proceedings (which is not this case), and indeed to explore the issue that Immigration Judge Holmes explored in her paragraph 36. That exercise can only be one of seeking to explore the credibility of the witnesses in the current proceedings. If that is going to be done there are at least two preconditions. First of all, everybody must be clear what is going to happen and secondly, and obviously, the witness whose credibility is under attack has to have the matter put to him in cross-examination. Now I can just about see a way in which that could have been done here, though it was not, and if it had been the cross-examiner would of course have been bound by the answer that he or she received as to the matter of credibility. But it simply could not be right for Immigration Judge Holmes, as far as we can see of her own motion, to refer to what had happened in the case of the brother Z as raising doubts -- I go no further than that -- but raising doubts as to the credibility of the present applicant's case without that matter ever having been explored with him.

29. For that reason alone that part of the determination cannot stand, but I respectfully agree with my Lord that the rest of the determination, read fairly, leads to the conclusion that he has proposed. The Immigration Judge, having dealt with the matter of the brother, then went on in some detail to give other, separate and independent circumstantial reasons why the account given by the applicant was implausible and those findings on their own, not infected in my view by the mistake that had earlier been made, were more than sufficient to justify her conclusion.

30. For those reasons therefore and for those given by my Lord I also would dismiss this appeal.

Order: Appeal dismissed