

CO/3119/2002

Neutral Citation Number: [2003] EWHC 373 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Tuesday, 18 February 2003

B E F O R E:

MR JUSTICE WALL

THE QUEEN ON THE APPLICATION OF DAWKINS

(CLAIMANT)

-v-

IMMIGRATION APPEAL TRIBUNAL

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
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MR TOAL appeared on behalf of the CLAIMANT
MISS ANDERSON appeared on behalf of the DEFENDANT

J U D G M E N T

1. MR JUSTICE WALL: This is an application for judicial review of a determination of the Immigration Appeal Tribunal notified on the 11th April 2002, by which that Tribunal refused the applicant, Mr Garfield Dawkins, permission to appeal against the decision of an adjudicator, Ms A D Baker, who had dismissed his appeal against the decision of the Secretary of State, taken on the 23 April 2001, for his removal to Jamaica as an illegal entrant after the refusal of this asylum application. Permission to apply for judicial review was given by Lightman J on the 19th April 2002.
2. The determination by the Immigration Appeal Tribunal is in two parts. The first part addresses the fact that the application for permission to appeal was out of time. The initial application should have been in by the 9th November 2001 and was not lodged until 21st November. However, thereafter, there was a substantial delay before any proper explanation was provided for the absence of an application in time, and the Tribunal considered that, in those circumstances, there were no special circumstances, and accordingly, refused to extend time under rule 80 sub-rule 3.
3. However, the Tribunal went on to consider the merits of the application and the grounds of appeal which were attached to the application and decided, for reasons which it gives, that the adjudicator was, in effect, entirely within the exercise of her discretion on the facts she found to refuse to allow the claimant's appeal against the Home Secretary's refusal, and in those circumstances decided that on neither ground should the application for permission to appeal be granted.
4. I propose to approach the case from the other direction, although I heard an argument on both limbs. It seems to me that if I am against the claimant on the second limb, that is, effectively, the 'merits', and if I take the view that the decision of the Tribunal in those circumstances was one essentially within its discretion and that it cannot be described as either unreasonable or irrational, then there is no point in considering the question of time, however interesting the argument addressed to me may have been.
5. In these circumstances, I propose to go to the adjudication. The issue which the case throws up is a sensitive one because the applicant is a homosexual, now aged 25, and is a citizen of Jamaica. The essence of his claim is that it would be a breach of his human rights, and in particular Article 8, were he to be returned to the jurisdiction of Jamaica where homosexual activity is a criminal offence; not just because of that factor, but because he will suffer an element of persecution or disruption to his life in that jurisdiction. The case was put on a much broader basis before the adjudicator but essentially in this application for judicial review counsel for the claimant effectively and, I think, realistically, concentrated on Article 8 of the European Convention for his argument.
6. The claimant arrived in the United Kingdom on 5th March 2000. He did not immediately apply for asylum. He applied for asylum on 8th February 2001.
7. The adjudicator began her adjudication by reciting in some detail the reasons given by the Home Secretary in the refusal letter. For my purposes, I do not think it necessary to recite those, as of course it is the adjudicator's determination with which I am concerned.
8. The applicant gave evidence to the adjudicator, as did his friend, H. In the latter respect, the situation was extremely sensitive because H told the applicant's representatives, and had not previously told the applicant, that he was HIV positive.

9. This information was, in due course, related to the applicant who, unsurprisingly, was somewhat shocked by it and the consequence was that, whereas there had, of course, previously been a sexual relationship between the applicant and H they, as I understand it, have ceased to be partners, and certainly there is currently no family life between the applicant and H. The applicant told the adjudicator that in Jamaica there was a great deal of persecution, that he wanted a better life, he wanted to live freely and to do what he wanted to do.
10. There had been a period in England when he had been living with a woman and whilst his behaviour does not seem particularly attractive in this regard, it does not seem to have been taken into account adversely by the adjudicator. The applicant's case was that he had gone to live with Maxine because his brother, that is the applicant's brother, had been told that the applicant was a homosexual; and fearful of the reaction by his brother, the applicant had begun a relationship with Maxine in order to demonstrate to his brother that he was not homosexual.
11. It appears that the relationship with Maxine descended into violence, and certainly there is a reference to the applicant having been arrested in relation to violence to Maxine, although, once again -- and it is a measure perhaps, of the adjudicator's fairness -- she does not appear to have taken that factor into account as relevant for the purposes of the adjudication.
12. The relationship with H has also been fairly curious because there had been a time when the applicant had been in prison on remand, and it appears that had happened because H had made out a story that the applicant had threatened him with a gun, and he had been arrested and charged. He was, however, subsequently released, when H withdrew the allegations and made it clear that they were untrue.
13. The claimant told the adjudicator that he had begun his sexual activity in Jamaica when he was 20 years old, that is to say in 1997, early 1998; that he had maintained regular sexual activity by meeting his various partners either at a hotel or a guest house, that he had undergone training as a tailor from the age of 17, had left Jamaica when he was 22. For a time he had lived in Jamaica following his commencement of homosexual activity. He had gone to gay nightclubs for three nights each week and had attended those for a period of approximately three years. He had begun his association with H in Jamaica and they had first met in December, 1999.
14. He had lived in a guest house. There had been two couples there, both male and gay; he and H had formed one of those two couples. On occasions they had gone together to a discotheque for gay people. Sometimes H had gone on his own. H had come to the United Kingdom in February, 2000. The claimant did not know why H had left Jamaica but he had told the applicant that he would see if the applicant could join him in the United Kingdom.
15. He accepted that his relationship with Maxine had been a pretence or a sham relationship, and answered a particular query about the relationship with H because the applicant had not made contact with him, or appeared to have been unable to make contact with him on arrival.
16. As far as H was concerned, he told the adjudicator that he was HIV positive and was being treated. He had leave to remain in the United Kingdom until 31 October 2002 for combination therapy for HIV. He also gave a history which confirmed most substantially what the applicant had told the adjudicator, except that he told the adjudicator Mr Dawkins was unaware that H was HIV positive.

17. The principal facts upon which the applicant sought to rely were that in Jamaica he had suffered punishment at the hands of a mob by whom he had been chased, and by the police, although the police had not arrested him for homosexuality but for theft, and had slapped him rather than caused him serious injuries.
18. However, he did have severe scarring on his torso and his lower back, which the adjudicator accepted was the result of an attack. He pointed out that homosexuality remained illegal in Jamaica. It was argued upon his behalf that homosexuality was capable of falling within the definition of a "social group" and that the applicant, despite his relationship with Maxine, was gay. It was argued on his behalf that when the applicant had attempted to report the serious attack on him, he had not been helped by the police and reference was made to the continuous nature of the ill-treatment accorded to homosexuals in society and the discrimination against them in Jamaica.
19. This, it was argued, gave rise to a well-founded fear of ill-treatment amounting to persecution. It was, it was argued, a combination of those factors, not simply any one incident, which caused him to have a well-founded fear of return.
20. It was then argued that Articles 2 and 3 of the European Convention were engaged, and in respect of Article 8, submissions were made that the prohibition of sexual acts was an interference with the appellant's right to respect for family and private life. The consequence of his removal to Jamaica would not only be the physical danger he would be in, but that he could not be openly homosexual.
21. The adjudicator then went on to consider the background situation in Jamaica, having directed herself appropriately on the authorities of *Sahm Jain V SSHD (CA)[2000]INLR*. She took into account, specifically, an Amnesty International Report headed "Killings and Violence by Police" and recommendations and other articles concerning the situation of homosexuals in Jamaica. In particular she referred, in some detail, to the Amnesty International Report that reported that:

"The gay and lesbian community in Jamaica face extreme prejudice. Sexual acts in private between consenting male adults remain criminalised and punishable by imprisonment and hard labour."
22. Moreover, the government, it was said, had vigorously defended those laws and that:

"Those subjected to such abuse by the police are unwilling to report for fear of further retaliation."
23. On the other side, she reported two activities, both in relation to the police and the Bureau of Special Investigations, and a prominent human rights activist advising the Ministry of National Security and Justice with a view to greater toleration.
24. She also pointed out, as undoubtedly is the case, and as the Amnesty report confirmed, that Jamaica suffered from appalling levels of violent crime.
25. She pointed out that there was a particular popular song inciting violence against homosexuals, which appeared to have enjoyed considerable popularity.
26. She was also provided with a BBC Radio 4 report which caused her to conclude that whilst there was widespread societal distrust of homosexuality, the situation was in fact improving. She concluded that such discrimination as there was in Jamaican society was not state sanctioned and, in reaching that conclusion, she had:

"Taken account of the state sponsored bodies now in place and their activities in seeking to protect homosexuals and prosecute crimes against homosexuals."

27. She then went on to make a total of some 26 findings of fact. I do not need to read all of those out but I pick out, I hope, the most significant. She accepted that the applicant was homosexual. She accepted that he had undertaken homosexual activity since he was 19 and did so for three years prior to leaving Jamaica at the age of 22. She found that he was able to visit homosexual nightclubs regularly, about three times a week, in order to meet other homosexuals, and that he was able to engage in sexual activity by returning with them to guest houses for that purpose. She pointed out that he had never been prosecuted.

28. She found that two and a half years prior to the interview, he had been stabbed. He thought that this was the result of his being gay. He was hit with a stone and chased by a crowd in Kingston. The attack rendered him unconscious and he had to go to hospital. The police had done nothing because they didn't want to get involved.

29. It had taken him some time to recover from that attack. She accepted that there was a reasonable degree of likelihood that the scars on his torso were the result of that attack. She made a finding about his treatment by the police who had:

"Just slapped my face and ears, nothing major."

30. She found that he had been told by H not to claim asylum on arrival but to pretend he had come as a visitor for fear of being forcibly returned by the UK authorities.

31. He had been able to conduct his homosexual activities in Jamaica without discrimination on account of his employment and housing or other living conditions. She said that:

"Against the context of the background and high levels of violence in Jamaica, whilst noting that he was attacked outside a gay night club, noting that he visited a gay night club at least three times a week until the date of his departure over a three-year period, I do not regard it as established to a reasonable degree of likelihood that he was attacked on account of his homosexuality."

32. Slightly later on, she said that:

"The appellant has not established that he left Jamaica owing to either societal or police or the authorities' discrimination or persecution of him as a homosexual."

33. His lifestyle, on the evidence she had, was not curtailed as a result of his homosexuality, and he had not established that there was a reasonable degree of likelihood that he and H had a relationship which fell under the terms of Article 8.

34. She concluded, finally, that she was doubtful as to the truth of the claims made by both the applicant and H that the police mounted a prosecution against the applicant on the word of H, and that the defendant had a shotgun. Nevertheless, having found the balance of his evidence to be credible, she accepted the account as possibly true.

35. Against that background, she came clearly to the conclusion that the applicant had not made out his case. She said:

"The appellant, on his own history and having taken into account the background evidence concerning the situation of homosexuals in Jamaica has

not made out that there is a reasonable degree of likelihood of him suffering treatment amounting to persecution on account of his homosexuality. I accept that homosexuals constitute a social group for the purposes of the Refugee Convention.

"With regard to the human rights appeal, the standard of proof and the burden of proof are the same as that in the asylum appeal. On the above findings of fact I must dismiss the human rights appeal.

"Under Article 8 I have to determine the following separate questions:-

- (i) Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
- (ii) Is that interference in accordance with the law?
- (iii) Does that interference have legitimate aims?
- (iv) Is the interference proportionate in a democratic society to the legitimate aim to be achieved?"

She went on to say:

"The core right in this instance under Article 8 is the appellant's private life, including his sexual life which deserves respect. His right is primarily not to be interfered with by the state in relation to what he does in private at home and to the efforts by the state to protect him from interference by others.

"It is submitted that the appellant's wish to form homosexual relationships is a right which is denied to him in Jamaica through a combination of societal prejudice and through the state of Jamaica law, which continues to make homosexuality illegal.

"Whilst it is correct that the law renders homosexuality illegal, adopting the reasoning in Jain CA [2000]Imm AR 76 and having regard to the appellant's clear evidence of his freedom to give his life without state or societal interference save for two incidents, one of which was two and a half years prior to his departure, and in respect of which it is far from clear that he was attacked owing to his homosexuality, given it was not repeated.

"I find that the rights of the appellant have not been denied and will not be by his return. I make this finding against the above finding that the relationship between the appellant and H is not of a sufficiently settled nature to be one which engages consideration of the appellant's rights under Article 8. He could be returned to Jamaica as a practising homosexual, and on the evidence of H he would not be accompanying the appellant. This would be due to H being in receipt of medical treatment in the United Kingdom for his condition of HIV positive and since their relationship has not been demonstrated to be other than a casual one.

"Noting the submissions in respect of the appellant being precluded from making any application under paragraph 295A of HC 395, an application for entry clearance for the purpose of returning with H, this does not fall within the ambit of Article 8. There is insufficient evidence before me to support the

suggestion that there would be any subsisting relationship between them at that time.

"Insofar as there may be some interference, by virtue of the imposition of criminal sanctions causing the appellant to be secretive in the conduct of his homosexual relationships in Jamaica, I have had regard to the background evidence as to the lack of societal discrimination against homosexuals and the specific evidence of the appellant regarding his own homosexual activity and work as a trainee. There has not been shown a substantial degree of likelihood of the appellant's Article 8 rights will be interfered with should he continue his homosexual life in Jamaica. The appellant does not face a real risk of persecution and discrimination because of his sexuality in Jamaica on the above findings of fact."

36. I have gone through the adjudicator's decision with some care because it seems to me, I have to say, that she addresses all the issues with great thoroughness and with great fairness and that her findings are in fact unassailable. In these circumstances, unless there is some very unsubstantial error of law in her approach to this case, it seems to me that not only was she entitled to reach the conclusions which she did but that the Immigration Appeal Tribunal was inevitably bound to refuse the applicant permission to appeal.
37. I was, with the counsel's assistance, taken through a substantial number of the relevant authorities beginning with Modinos V Cyprus 16 EHHR 485 [1993], a decision of the European Court of Human Rights, which decided that there was a breach of Article 8 where the citizen of the state in question, who was a practising homosexual, complained of the Greek law which rendered male homosexual conduct in private between adults a criminal offence. That was held by the European Court to be a breach of Article 8. The reference to that case was picked up by the English Court of Appeal in a pre-Human Rights Act called Sahm Jain v Secretary of State for the Home Department [2000] Imm AR 76, a case which involved an Indian couple, homosexuals, who feared discrimination and persecution if they returned to India.
38. In that case, the Court of Appeal referred to the broad international consensus that everyone has a right to respect in their private life which included sexual life and that, on the face of it, a statute which rendered illegal homosexual activity, was likely to be a breach of Article 8. Of course, at that stage, the Human Rights intervention was not enforced in the United Kingdom.
39. I was then referred to three cases, ZA & M [2002] EWCA Civ 952, also decisions of the English Court of Appeal, this time after the Human Rights Act had come into force, when there was a broad discussion of the impact of Article 8. The Court of Appeal recorded a submission that there was at present no Strasbourg case law which decides that such an expulsion from the UK could involve a breach of the claimant's rights under Article 8; but this was of course, as it were, not an extra-territorial case, whereas what was being considered in this case, or these two cases, was whether Article 8 could indeed be applied extra-territorially.
40. In the course of giving judgment in that case, Schiemann LJ made this remark, which in my judgment is highly significant:

"However, all causation and human rights questions are very fact sensitive and I consider that it would be wrong to pronounce on the matter in the abstract."

41. It was submitted to the court that whatever the position which the European Court of Human Rights had currently reached, the Court of Appeal was free to develop its case law under the Human Rights Act. Schiemann LJ accepted that proposition and posed the question as to whether the Court of Appeal should rule that:

"No immigration policy considerations could justify the return of an individual to a country where his expression of his sexual desires with another adult in private is in any way inhibited."

On that submission, Schiemann LJ commented as follows:

"For my part I would not rule in such broad terms. This is a difficult area. Consider a proposed expulsion of a heterosexual man to a destination State which has and enforces laws which would inhibit that man from marrying or from founding a family of more than, say, one child - for instance laws which prohibit marriages between persons of different races or laws which place at a severe disadvantage those who have more than one child. These are not fanciful examples and I consider that we should develop the law on a case by case basis in the light of the facts of that case rather than rule on points in the abstract."

42. He then considers the three cases, two of which were remitted for re-hearing and one was dismissed.

43. Finally, I was referred to the recent position of the Court of Appeal in Ullah V Do [2002] EWCA Civ 1856, which forms the basis of the application by the claimant for an adjournment on the basis that the outcome of that appeal to the House of Lords might be determinative one way or the other of the case currently before me. The question, fair and square, before the court in that case was this:

"To what extent does the Human Right Acts inhibit the United Kingdom from expelling asylum seekers who fall short of a well-founded fear of persecution?"

The Article of the convention under consideration in Ullah V Do is Article 5, but as the Court of Appeal recognised, their decision, under Article 9, would have wider implications.

44. The submissions that were put to the Court of Appeal in Ullah v Do really covered the spectrum. The Master of the Rolls commented as follows:

"The act of removing either [Mr Ullah or Ms Do] will, if it takes place, be an act of a public authority done to a person within the jurisdiction. If the consequence of this act will be that the person will be removed to a country where his or her Article 9 rights will not be respected, will this infringe the Convention and the HRA? To this question Mr Blake suggested a qualified answer. 'Yes', provided that the restriction on religious freedom is severe. Mr Gill was not prepared to accept such a qualification. His primary submission was that all that Miss Do had to demonstrate was that there was 'real risk' that, if she were removed to Vietnam, her Article 9(1) rights would be infringed. "

45. For the Secretary of State Miss Carss-Frisk QC's primary submission was that removal of a person from this country pursuant to our immigration laws was not capable of engaging Article 9 of the Convention. Alternatively, she submitted that Article 9 would only be engaged if removal would be likely to lead to a 'flagrant' breach of the individual's Article 9 rights.

46. At the conclusion of the case, the court said this, having decided that in both cases:

"A removal decision to a country that does not respect Article 9 rights will not infringe the HRA where the nature of the interference with the right to practice religion that is anticipated in the receiving state falls short of Article 3 ill-treatment. It may be that this does not differ greatly, in effect, from holding that interference with the right to practice religion in such circumstances will not result in the engagement of the Convention unless the interference is 'flagrant'.

"This appeal is concerned with Article 9. Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other Article of the Convention is, or may be, engaged. Where such treatment falls outside Article 3, there may be cases which justify the grant of exceptional leave on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the Convention."

47. Those dicta are, it seems to me, fatal to the applicant's case in the matter before me. And, of course, I bear in mind that the Court of Appeal itself in Ullah V Do gave permission for an appeal to the House of Lords which I understand will be heard before the end of the summer term.
48. Clearly, if the House of Lords dismisses the appeals in Ullah V Do, the law will remain as stated by the Court of Appeal and it is only in the event of the House allowing the appeal and making some trenchant statements that the case before me could be decided in a different way.
49. However, it does seem to me that the main thrust of all the authority currently available is effectively encapsulated in the phrases I have cited from the Master of the Rolls' decision. And I come back to the proposition advanced by Schiemann LJ in ZA & M, that these cases are essentially fact sensitive. It simply cannot be the law, in my judgment, that merely because the law of Jamaica has a criminal statute which criminalises homosexual behaviour, that mere fact cannot, of itself, be sufficient to require this country to grant immigration status to all practising homosexuals in Jamaica. On that basis, anybody who was a homosexual could come to this country and claim asylum.
50. Therefore, the matter must be fact sensitive, and the applicant must show something in addition to the mere fact that he is a homosexual. In my judgment, the overwhelming weight of the authorities is that an applicant in the position of this applicant has to bring himself either within Article 3 or at least show some substantial substratum fact that he is going to be subject to substantial discrimination and/or violence and abuse.
51. So I come back to the facts of this case where the adjudicator found that that part of the case was not made out, something which she was plainly, in my judgment, entitled to do. In those circumstances, it seems to me that there is no error of law by the adjudicator and it must follow that the Immigration Appeal Tribunal was entirely within the ambit of its discretion in refusing permission to appeal. In those circumstances, fascinating as the argument addressed to me on the out of time question, I do not propose to develop it, save to say that I would have needed some considerable persuasion to be able to find that the IAT failed to exercise its discretion appropriately or was in any way irrational or unreasonable in seeking to uphold the

rules. But as I say, it is not necessary to consider that question as this application falls first of all. In those circumstances the applicant's claim for judicial review will be refused.

52. Do you need a certificate?
53. MR TOAL: My Lord, yes, I do.
54. MR JUSTICE WALL: Yes. Very well.
55. MR TOAL: May I also ask for permission to appeal to the Court of Appeal against your decision?
56. MR JUSTICE WALL: On what basis?
57. MR TOAL: My Lord, on the basis that the factual findings made by the adjudicator were sufficient to engage us delay and were sufficient to render unlawful the decision to remove the claimant to Jamaica. It would be on that basis.
58. MR JUSTICE WALL: I see. Well, I think you will have to persuade the Court of Appeal to that effect. If they take the view that that is arguable then --
59. MR TOAL: Thank you my Lord.
60. MISS ANDERSON: My Lord, have you formally asked for my costs, although I do not think we are subject to the usual legal aid restriction?
61. MR JUSTICE WALL: Yes. Help me about this jurisdiction because in the jurisdiction in which I normally sit, we discourage one public body asking for costs against another public body.
62. MISS ANDERSON: Well, usually costs follow the event --
63. MR JUSTICE WALL: Yes.
64. MISS ANDERSON: -- as it were but because of a legal aid restriction, I think the formulation, and I am sure your learned associate has it to hand, is something like, the interest party has his costs but not to be without further order. I think it is not even enforced, I think it is not to be --
65. MR JUSTICE WALL: Assessed.
66. MISS ANDERSON: Assessed, my Lord.
67. THE CLERK OF THE COURT: The current wording is that, determination of the claimant's liability for the payment of such costs be postponed pending further application.
68. MISS ANDERSON: Further application -- and there never is.
69. MR JUSTICE WALL: Can you object to that in principle?
70. MR TOAL: I do not think I can, my Lord.
71. MR JUSTICE WALL: Very well. I will make the normal order. Thank you both very much.