Case No: C5/2008/2468

Neutral Citation Number: [2008] EWCA Civ 1508
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: IA/11721/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 5th December 2008

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE KEENE
and
LADY JUSTICE SMITH DBE

- -

Between:

HT (CAMEROON)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr R Husain and **Mr S Chelvan** (instructed by Messrs Wilson & Co) appeared on behalf of the **Appellant**.

Mr P Greatorex (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Sedley:

1. HT has been given permission to appeal to this court against an adverse determination of the Asylum and Immigration Tribunal on his claim for asylum. The appeal has been directed to be heard with two other appeals raising the same or related issues. The hearing of the three appeals has been fixed for 3 and 4 February 2009.

2. The determination against which HT appeals to this court was made by Senior Immigration Judge Warr on a reconsideration hearing conducted at Field House in London on 30 May 2008. Reconsideration had been ordered by another senior immigration judge following the initial dismissal of HT's appeal against the Home Secretary's refusal of asylum by the Asylum and Immigration Tribunal (Immigration Judge Clapham and Mr A Armitage) sitting in Glasgow on 5 October 2007. The reason why the first hearing of the appeal took place in Glasgow was that HT was at the time detained pending removal or deportation in the Dungannon House removal centre in South Lanarkshire. The reason why the reconsideration took place in London was that by then HT had been released and had been provided with housing in Blackburn, Lancashire. Nobody suggests that the location of either hearing was in itself legally faulty.

3. But the case comes before us today because the Home Secretary has taken the preliminary point that the jurisdiction to hear any appeal against the Asylum and Immigration Tribunal's determination (or determinations) lies with the Inner House of the Court of Session and not with this court. If this is right then neither the convenience of continuing with this appeal in tandem with other related appeals nor the difficulty of applying long out of time to the Court of Session has any relevance. It is a pure question of law. It is moreover one which will evaporate, probably in the near future, if and when the Asylum and Immigration Tribunal is absorbed into the new national tribunal structure.

4. The Asylum and Immigration Tribunal, like its predecessor the Immigration and Asylum Tribunal, is a tribunal whose jurisdiction extends to the whole of the United Kingdom. Any member of it may lawfully sit and adjudicate north or south of the border or across the Irish Sea. Until the Nationality, Asylum and Immigration Act 2002 was amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, the distribution of appeals from the tribunal was governed by a simple judicial policy of comity and discouragement of forum-shopping. It was set out by Brooke LJ in R (Majead) v IAT [2003] EWCA Civ 615 and reflected by the Court of Session in Tehrani [2004] Scot. CS 102. One might have hoped -- although it would have flown in the face of experience -- that the Home Office would recognise the good sense of this and go on leaving it to the courts. But no: we now have to grapple with departmentally-promoted legislation which, far from resolving or clarifying the issue, has brought everyone into court to wrangle about it. The reason for the wrangling is that the legislation, while directing that any further appeal be to the appellate court of the jurisdiction in which the initial appeal was decided, does not tell the

reader what "decided" means: where there has been a reconsideration, does it mean initially decided or does it mean decided on reconsideration?

5. The immediately relevant legislation is s.103A and s.103B of the 2002 Act, introduced as part of the wholesale reform of the immigration and asylum appellate system by s.26 of the 2004 Act. The essential system, by which the tribunal's jurisdiction is by way of appeal from a decision of the Home Secretary, is preserved. But instead of a second appeal within the appellate tribunal, the single-tier system now works by reconsideration of an appeal if, but only if, an error of law is found in the initial decision. S.103A enables either party to such an appeal to apply to the High Court or the Outer House of the Court of Session, depending on where the appeal was decided, for an order that the tribunal reconsider its decision. There being only one decision in such a case, that particular provision is unproblematical in point of venue. S.103B then provides as follows:

> "103B **Appeal from Tribunal following reconsideration**
>
> (1) Where an appeal to the Tribunal has been reconsidered, a party to the appeal may bring a further appeal on a point of law to the appropriate appellate court.
>
> (2) In subsection (1) the reference to reconsideration is to reconsideration pursuant to-
>
> (a) an order under section 103A(1), or
>
> (b) remittal to the Tribunal under this section or under section 103C or 103E.
>
> (3) An appeal under subsection (1) may be brought only with the permission of-
>
> (a) the Tribunal, or
>
> (b) if the Tribunal refuses permission, the appropriate appellate court.
>
> (4) On an appeal under subsection (1) the appropriate appellate court may-
>
> (a) affirm the Tribunal's decision;
>
> (b) make any decision which the Tribunal could have made;
>
> (c) remit the case to the Tribunal;
>
> (d) affirm a direction under section 87;
>
> (e) vary a direction under section 87;

(f) give a direction which the Tribunal could have given under section 87.

(5) In this section "the appropriate appellate court" means-

(a) in relation to an appeal decided in England or Wales, the Court of Appeal,

(b) in relation to an appeal decided in Scotland, the Court of Session, and

(c) in relation to an appeal decided in Northern Ireland, the Court of Appeal in Northern Ireland.

(6) An appeal under subsection (1) to the Court of Session shall be to the Inner House."

6. It is submitted by Paul Greatorex on behalf of the Home Secretary that there is a deliberate distinction between "reconsidered" in subsection (1) and "decided" in subsection (5). This appeal was decided in Scotland but then reconsidered in England, with the consequence that the jurisdiction to hear any further appeal lies with the Inner House. Had reconsideration not been ordered, it is beyond question, Mr Greatorex points out, that any application for reconsideration under s.103A would have lain only to the Outer House. Equally, the submission goes, s.103B contemplates an allocation of jurisdiction according to where the original decision was taken, even if in such a case reconsideration followed.

7. For the appellant (who is of course the respondent of this application) Raza Husain submits that the right answer was and is the contrary. The whole point of the new system was that it was to be a single-tier system. That is why, rather than preserve internal appeals, the new tribunal was empowered only to reconsider one of its own decisions if it found an error of law in the initial determination. Both the vocabulary and the substance of the process, Mr Husain submits, are directed to establishing a single decision on any appeal from the Home Secretary. That decision will of course be the first one unless, for error of law, it is reconsidered. In that event the first decision is supplanted by the second, and there is still only one decision. All of this is consistent with this court's analysis in DK (Serbia) [2006] EWCA Civ 1747 -- see especially paragraph 22.

8. Although both sides understandably and not unhelpfully introduce ramifying arguments in support of their position, I mean no disrespect by not following these down their interesting byways. The point is a simple one, and for my part I am in no doubt that Mr Husain's answer is in law the right one. It also happens to make better practical sense, since it is likelier to be in the locus of the reconsideration decision that the appellant now is – a consideration which is probably more relevant than Mr Greatorex's otherwise interesting point that

his construction would mean that everyone would know from the start where any eventual appeal was going to be located.

9. As Smith LJ pointed out in relation to the excellent flow chart prepared and provided by Mr Greatorex -- which I will take the liberty, with his permission, of annexing to this judgment for others to make use of -- if in this case a reconsideration had been ordered by the Asylum and Immigration Tribunal, all the following stages would have taken place in England and yet, if Mr Greatorex was right, an appeal would still have returned the case to Scotland.

10. In my judgment, then, the "decision" referred to in s.103B is the Asylum and Immigration Tribunal's determination of an appeal against the Home Secretary's decision, whether that determination is the one first made or, where a reconsideration has been ordered, the one reached on reconsideration. This construction, as it seems to me, gives the correct effect to the language and purpose of the legislation. I would accordingly so rule, with the consequence that this appeal will remain in the court's list.

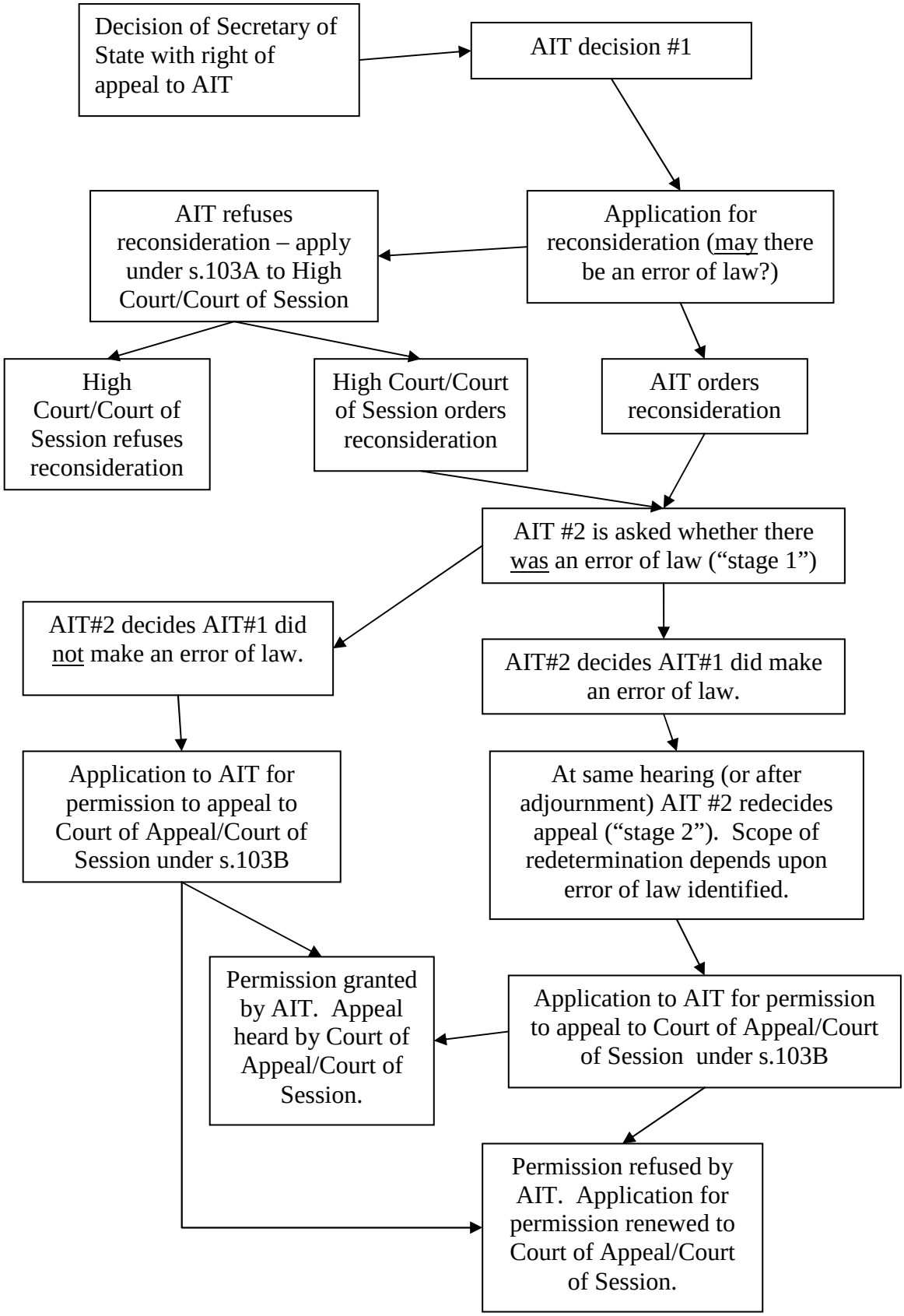
Lord Justice Keene:

11. I agree.

Lady Justice Smith:

12. I also agree.

Order: Appeal to be heard in Court of Appeal


Decision of Secretary of State with right of appeal to AIT
AIT decision #1
Application for reconsideration (may there be an error of law?)
AIT refuses reconsideration – apply under s.103A to High Court/Court of Session
High Court/Court of Session refuses reconsideration
High Court/Court of Session orders reconsideration
AIT orders reconsideration
AIT #2 is asked whether there was an error of law ("stage 1")
AIT#2 decides AIT#1 did not make an error of law.
AIT#2 decides AIT#1 did make an error of law.
Application to AIT for permission to appeal to Court of Appeal/Court of Session under s.103B
At same hearing (or after adjournment) AIT #2 redecides appeal ("stage 2"). Scope of redetermination depends upon error of law identified.
Permission granted by AIT. Appeal heard by Court of Appeal/Court of Session.
Application to AIT for permission to appeal to Court of Appeal/Court of Session under s.103B
Permission refused by AIT. Application for permission renewed to Court of Appeal/Court of Session.