Case No: C4/2008/1192; C4/2008/1194

Neutral Citation Number: [2008] EWCA Civ 288
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE PITCHFORD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 21st October 2008

Before:
LORD JUSTICE JACKSON

- -

Between:

THE QUEEN ON THE APPLICATIONS OF:

TA (PAKISTAN) — **First Applicant**

and -

ZI (PAKISTAN) — **Second Applicant**

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

- -

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Mr P Diamond (instructed by Barlow Robbins) appeared on behalf of the **Applicants.**

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

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Lord Justice Jackson:

1. This is an application for permission to appeal. The facts giving rise to this application are set out in the papers before me and have not needed to be recited at any great length at the hearing this morning. The claimants are sisters and citizens of Pakistan. Both claimants are practising Christians and their father is a Methodist minister. In 2001 the claimants' parents came to England following an incident in which extremists opened fire on the congregation at their church. The claimants' parents and two siblings obtained leave to remain in the United Kingdom but the claimants returned to Pakistan and lived in Pakistan with their respective husbands and children.

2. Extremists in Pakistan continued to make attacks on Christians. In 2004 both claimants came to the United Kingdom, together with their husbands and children. They claimed asylum on the basis that they had a well-founded fear of persecution in Pakistan on the grounds of their religion. The Secretary of State refused both applications and decided that they should be removed. The second claimant appealed the asylum decision. Both claimants appealed the removal decisions on human rights grounds. The appeals of both claimants were dismissed by the Immigration Appeal Tribunal and permission for further appeals was refused.

3. On 12 April 2006 both claimants applied for discretionary leave to remain. These applications were refused on 26 May 2006 and 12 June 2006 respectively. The claimants commenced proceedings in the Administrative Court, seeking judicial review of those refusals. On 23 February 2007 Collins J, upon considering the papers, refused permission to proceed with the judicial review claims. He noted that the recent applications to the Secretary of State for leave to remain were not new claims. In April and June 2007 the claimant submitted further representations to the Secretary of State. By letter dated 27 June 2007 the Secretary of State maintained his refusal to grant discretionary leave to remain. The claimants then amended their judicial review claims so as to encompass the Secretary of State's further decision dated 27 June 2007.

4. The claimants' application for permission to proceed with their judicial review claims came on for oral hearing before Pitchford J on 15 May 2008. Counsel advanced two arguments on the claimants' behalf. Pitchford J rejected both arguments and refused permission. The claimants now seek permission to appeal to the Court of Appeal in respect of the first argument only.

5. The starting point for this particular issue is the House of Lords decision in R(Ullah) v A Special Adjudicator [2004] 2 AC 323. Pitchford J deals with the facts of Ullah in some detail, and I need not repeat that recitation. For present purposes I shall draw attention to one sentence in the speech of Lord Bingham, which finds echoes elsewhere in the speeches in Ullah and which states a principle of great importance in the present proceedings:

> "I find it hard to think that a person could successfully resist expulsion in reliance on article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on article 3."

As I say, similar statements are made elsewhere in the speeches in Ullah.

6. The claimants brought proceedings in the European Court of Human Rights at Strasbourg in order to challenge the correctness of the approach of the House of Lords in Ullah. The European Court of Human Rights rejected the claimants' claims. The court's judgment included the following passage:

> "protection is offered to those who have a substantiated claim that they will either suffer persecution for, *inter alia*, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason). Where however an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself. Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world…While the court would not rule out the possibility that the responsibility of the returning state might in exceptional circumstances be engaged under article 9 of the Convention where the person concerned ran a real risk of flagrant violation of that article in the receiving state, the court shares the view of the House of Lords in the *Ullah* case that it would be difficult to visualise a case in which a sufficiently flagrant violation of article 9 would not also involve treatment in violation of article 3 of the Convention.
>
> In the present application the applicants have failed to make out a case of persecution on religious grounds or to substantiate that they were at risk of a violation of Articles 2 or 3. Neither applicant had herself been subject to any physical attack or prevented from adhering to her faith. Both had claimed to have received unpleasant telephone calls and to have felt at risk of attack. The essence of their case rests on the general situation in Pakistan where there have been, over the past few years,

> attacks on churches and Christians. The domestic authorities however gave weight to the fact that the Christian community in Pakistan was under no official bar and indeed had their own parliamentary representatives and that the Pakistani law enforcement and judicial bodies respectively were taking steps to protect churches and schools and to arrest, prosecute and punish those who carried out attacks.
>
> The applicants have emphasised that the police themselves fear the Islamic extremists and that the authorities have failed in the past to protect Christian churches despite the present of guards. Nonetheless, it is not apparent that the authorities are incapable of taking, or are unwilling to take, appropriate action in respect of violence or threats of violence directed against Christian targets.
>
> In those circumstances the Court finds that, even assuming that Article 9 of the Convention is in principle capable of being engaged in the circumstances of the expulsion of an individual by a Contracting State, the applicants have not shown that they are personally at such risk or are members of such a vulnerable and threatened group or in such a precarious position as Christians as might disclose any appearance of a flagrant violation of Article 9 of the Convention."

7. The claimants contend, in the present proceedings, that the law has moved on since the House of Lords decision in Ullah and that they can now establish a right to remain in the United Kingdom by reference to Article 9 and by reference to their rights under the Refugee Convention. This argument has been developed in oral submissions this morning by Mr Paul Diamond, counsel for the two claimants. Mr Diamond submits that the decision of the Court of Appeal in J v Secretary of State for the Home Department [2006] EWCA Civ 1238; [2007] Imm AR 1 marks a significant development of the law since the House of Lords decision in Ullah. J concerned a homosexual who applied for asylum in the United Kingdom on the grounds that he faced persecution in his own country of Iran by reason of his sexual orientation, because he was homosexual and homosexuals were liable to persecution in Iran. The Tribunal dismissed the appeal of J on asylum and human rights grounds. Although the Tribunal accepted that the claimants had practised homosexuality discreetly in Iran, it found that he had fabricated evidence of his experiences there and that he had never been of adverse interest to the Iranian authorities. The Tribunal took the view that the claimant had not been persecuted because he had conducted his relationships discreetly and it was not reasonably likely that he would be the subject of adverse attention from

the authorities on his return. The Tribunal took the view that, by modifying his behaviour, J would be able to live satisfactorily in Iran.

8. The Court of Appeal allowed J's appeal and remitted the matter to the Tribunal for reconsideration. Two paragraphs of the Court of Appeal's decision in J are relied upon, particularly by Mr Diamond in his submissions this morning. I shall read them out. At paragraph 16 Maurice Kay LJ said this:

> "In the present circumstances, the further reconsideration should be by a differently constituted Tribunal. It will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for "discretion" before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether "discretion" is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to "matters following from, and relevant to, sexual identity" in the wider sense recognised by the High Court of Australia (see the judgment of Gummer and Hayne JJ at paragraph 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the "discretion" which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that "related to or informed by their sexuality"… This is not simply generalisation; it is dealt with in the appellant's evidence."

9. At paragraph 20 of his concurring judgment Buxton LJ said this.

> "I would only venture to add one point. The question that will be before the AIT on remission will be whether the applicant could reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran. The applicant may have to abandon part of his sexual identity, as referred to in the judgment of Gummow and Hayne JJ in *S*, in circumstances where failure to do that exposes him to the extreme danger that is set out in the country guidance case of *RN and BB*. The Tribunal may wish to consider whether the combination of those two circumstances has an effect on their decision as to whether the applicant

> can be expected to tolerate the situation he may find himself in when he returns to Iran."

10. Mr Diamond submits that the principles which played a major role in the Court of Appeal's decision in J are equally applicable here. If the two claimants returned to Pakistan as Christians they would have to modify their behaviour in Pakistan to an unacceptable extent in order to avoid physical violence and persecution. Mr Diamond submits that, applying the principles set out in J, one reaches the conclusion that these claimants either have a right to asylum in this country because they have a well-founded fear of persecution by reason of their religion in Pakistan or, alternatively, they face infringement of their human rights because they cannot freely practise their religion and, if they do so, they face physical violence, so Mr Diamond places reliance upon Articles 9 and 3 of the European Convention on Human Rights.

11. These are arguments which I have to consider carefully. I also have to consider realistically the prospects of success of the proposed appeal. It is no kindness to appellants or to anybody else for this court to give permission to appeal if, on the law as it stands, the proposed appeal stands no real prospect of success. That is the principle which Rule 52.3 of the Civil Procedure Rules requires me to apply when hearing applications for permission. As Mr Diamond very fairly accepts, the case of Ullah is not referred to by the Court of Appeal in J. I find it quite impossible to believe that J has the effect of in some way undermining or partially overruling the decision of the House of Lords in Ullah. Mr Diamond observed in argument that the provision of the European Convention on Human Rights, which was at least implicitly in play in J, was Article 8. The provision of the European Convention on Human Rights which is in play in this case and which was in play in Ullah is Article 9. I do not believe that the statements of principle made by the House of Lords in Ullah concerning the position under Article 9 have been in any way affected by the Court of Appeal's decision in J.

12. Mr Diamond draws my attention to a sentence in paragraph 20 of the speech of Lord Bingham in Ullah which reads as follows:

> "It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it."

13. In argument Mr Diamond explained to me that he was saying that even though the claimants may have no right under the Human Rights Convention to remain in this country, nevertheless the United Kingdom can, in reliance on this principle, afford more generous rights than those which are, so to speak, policed by Strasbourg.

14. It seems to me quite clear from the decision of the Strasbourg Court, in litigation which these very claimants brought in the Strasbourg Court, that they do not have any right under Articles 3 or 9 of the European Convention to remain in this country. This country does not have a duty under the Convention to ensure the freedom of worship of the two claimants in Pakistan, in the country to which they face return. That has been expressly decided by the European Court of Human Rights and I cannot go behind the decision of the Strasbourg Court in that regard. Should I take the view that the Court of Appeal will allow more generous rights to the claimants on the basis of the sentence in paragraph 20 of Lord Bingham's speech upon which Mr Diamond relies?

15. I am afraid I am not persuaded by Mr Diamond's arguments. It seems to me that the position of the two claimants is precisely covered by the reasoning of the House of Lords in Ullah and the Court of Appeal's decision in J v SSHD - a case concerning treatment of homosexuals and not concerning freedom of worship in the country of origin - covers a very different situation. It does not and cannot affect the principles laid down by the House of Lords in Ullah. Those are the principles which would govern any appeal which the claimants might bring in the Court of Appeal.

16. I have come to the conclusion that the judgment of Pitchford J is correct. Pitchford J refused permission to proceed with the judicial review claim. In paragraph 18 of his judgment he said this:

> "Mr Diamond has submitted that notwithstanding the rejection of the application in Strasbourg, legal opinion has been moving in the United Kingdom. He relies upon the decision of the Court of Appeal in J v Secretary of State for the Home Department [2007] Imm AR 1. In **J** the claimant was an Iranian and a homosexual male. He sought asylum on the ground that he would be persecuted for his sexual orientation in Iran. In the event of a complaint the authorities would act to prosecute the offender. If convicted he would be subjected to a significant prison sentence or lashing. The Tribunal found that the claimant had lived discreetly in Iran and had never come to the attention of the authorities. Accordingly, he had no well-founded fear of persecution for his sexual identity."

17. Pitchford J then went on to quote extracts from the judgment of the Court of Appeal in J, including the passages which I have read out, and at paragraph 23 Pitchford J said this:

> "In my judgment, the Court of Appeal's decision in J has done nothing to undermine the judgment of the House of Lords in Ullah. The Court of Appeal was dealing not with setting the threshold for a decision whether there was a well-founded fear of

> persecution, but with the proper factual analysis upon which the judgment could be made whether the threshold was met. The court was not dealing with Article 3, against which there had been no right of appeal, but I accept that the principle can be applied equally to the Article 3 and Article 9 judgment. Transposed, the question is whether, if the claimant lived openly as a Christian worshipper in the receiving state, she would suffer such ill-treatment that it would involve the violation of Article 3 or flagrant denial of her Article 9 rights. Accordingly, I take the view that the application based upon the perceived development or error of law must fail."

18. I have carefully considered the whole of Pitchford J's judgment. I consider that that judgment was correct and that the proposed appeal to the Court of Appeal has no real prospect of success. For those reasons I refuse permission to appeal to the Court of Appeal.

Order: Application refused