Case No: C5 / 2010 / 0397

Neutral Citation Number: [2010] EWCA Civ 1584
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/05246/2009]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 1st December 2010

Before:

LORD JUSTICE RIX
LORD JUSTICE CARNWORTH
and
LORD JUSTICE STANLEY BURNTON

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Between:

NG (TUNISIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Ms Christa Fielden (instructed by the Immigration Advisory Service) appeared on behalf of the **Appellant**.

Ms Sam Broadfoot (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Stanley Burnton:

1. This is the appeal of NG against a decision of designated Immigration Judge Dearden dated 15 December 2009 rejecting his claim for asylum for leave to remain under the Asylum Convention and under the European Convention on Human Rights. The basis of his appeal is that there was a finding of fact which had been made at an earlier stage in the proceedings, to which I shall refer in due course, which should have been preserved and should not have been effectively rejected by the designated Immigration Judge in arriving at his decision.

2. The appellant is a citizen of Tunisia. He claimed asylum in this country on the ground that he had been persecuted in Tunisia by reason of his political affiliation, being an active member of the Al-Nahda party. He had been mistreated (indeed raped) while in prison, and he feared that if he returned or was returned to Tunisia he would be the subject of ill treatment again. His claim was rejected by the Home Secretary, he appealed and in August 2009 his appeal was heard by Immigration Judge Mensah. She rejected his claim on the basis that it was incredible. She made clear findings of lack of credibility on his part, but during the course of her determination she said this at paragraph 17:

> "It may well be the appellant was at some point arrested and tortured and this may even have resulted in the rape he has alleged. However I am not satisfied this was in any way connected to Al-Nahda or that he was of any interest to the authorities."

3. Subsequently the Immigration Judge made it clear that she had found the appellant incredible. In paragraph 20, having referred to an alleged arrest, she said:

> "In those circumstances I find the appellant was not arrested as claimed and has failed to demonstrate the authorities in Tunisia ever had an interest in him as a result of any suspicious he was connected to Al-Nahda. If I had found the appellant credible (which I do not) I would not have accepted there was a current risk of persecution or serious harm as a result of a suspicious of connection to Al-Nahda some 4 years ago."

4. There was an application for reconsideration of that decision on the basis that there were errors of law. The errors of law alleged were that by accepting that it may well be that the appellant had at some point been arrested and tortured, the Immigration Judge, having made that finding of fact, failed to take it into account when assessing the risk on return to Tunisia. Secondly, the Immigration Judge had failed to take into account objective evidence which it

was considered showed that returnees per se were often treated with suspicion and subjected to detention and ill treatment on return to Tunisia.

5. The application for reconsideration was considered by Senior Immigration Judge Waumsley, who was satisfied that both those matters raised arguable points of law which merited further consideration. He therefore ordered reconsideration and stated that all issues raised in the appellant's grounds may be argued.

6. Pausing there, for my part I would not have interpreted that part of paragraph 17 of Immigration Judge Mensah's determination as making a finding of fact. If she had been making a finding of fact, appreciating that she would have been applying the appropriate lower standard of proof, she would, I think, have said he was at some point arrested and tortured and was raped as he has alleged. That would have been the result of applying the lower standard of proof. His case that he had been arrested and raped depended entirely on his own evidence to the Immigration Judge and he was held to be incredible. When one reads the determination of the Immigration Judge as a whole, bearing in mind the relationship between the finding of incredibility and what is said to be the finding of fact which has been preserved, in my judgment, looking at the matter fairly, what Immigration Judge Mensah meant was even if he was at some point arrested and tortured, and even if he was raped as he has alleged, I am not satisfied that this was in any way connected to Al Nahda. That is not a finding of fact.

7. However, that there was a finding of fact was alleged on behalf of the appellant and that led to the order for reconsideration to which I have referred. The matter then went relatively soon afterwards again before Senior Immigration Judge Waumsley, who made the following order which is recited in the determination of DIJ Dearden:

> "Having considered the material before it and with the consent of the parties the Tribunal has decided that the original Immigration Judge made a material error of law. This reconsideration will now proceed to the issue of whether the appeal should be allowed or dismissed and to substituting a fresh decision to the appropriate effect."

8. Senior Immigration Judge Waumsley's order did not explicitly provide for the preservation of any particular finding on the part of Immigration Judge Mensah. In my judgment, if such findings are to be preserved when an order for reconsideration is made, it should be made clear in the order what if any findings are to be preserved. This order did not. Perhaps in those circumstances it is not surprising that when the matter did come back before Designated Immigration Judge Dearden, he did raise the question whether the appeal was to be considered afresh with all issues open for decision or whether there were in fact some findings which were to be preserved.

9. It has been argued on behalf of the appellant that the effect of the consent of the Home Secretary to the fact that there had been a material error of law on the part of Immigration Judge Mensah meant that she was accepting that there had in fact been a finding of fact rather than, as I consider there was, a statement that even if something had happened, without the finding that it had happened there was no risk on return to the appellant. That may be so but nonetheless there was no explicit or indeed implicit agreement that all findings of fact made in favour of the appellant would be preserved when the matter came back for rehearing before Designated Immigration Judge Dearden.

10. As I have already indicated at the beginning of the hearing, the DIJ remarked that he considered he was to consider the appeal afresh. Neither the applicants appearing for the parties sought to disagree with him, and the hearing then proceeded indeed on that basis. By way of example (but it is an important example), the appellant sought to persuade the Designated Immigration Judge that he was credible, that he had been persecuted on a number of occasions in Tunnisia on account of his association with and indeed his support of Al Nahda.

11. If the matter had been proceeding on the basis simply that there had been two errors of law referred to in the order for reconsideration, namely a failure to consider the objective evidence and a failure to take into account the implications of a finding of arrest and rape on one occasion, it would have been unnecessary and indeed inappropriate for the appellant to give evidence again and unnecessary and inappropriate for him and his advocate to seek to persuade the Designated Immigration Judge that he was credible.

12. The matter proceeded on the basis that all issues were open for proof and argument before the Designated Immigration Judge. In a very full and well reasoned decision as to which no complaint is made other than in relation to the suggested preserved finding of fact, the Designated Immigration Judge found (and it was the second time that it had been found) that the appellant was wholly incredible, that nothing that he said could be accepted. He said at paragraph 35:

> "…when one places all the credibility points together cumulatively one is driven to the inexorable conclusion that the Appellant failed to tell the truth on any subject."

A little further in that paragraph he said:

> "I take a different view from Immigration Judge Mensah. At paragraph 17 of her determination she says 'It may well be that the Appellant was at some point arrested and tortured and this may even have resulted in the rape he has alleged. However I am not satisfied this was in any way connected to Al-Nahda or that he was of any interest to the authorities.' I find that the Appellant has failed to

> show even to the low standard that he has been arrested, tortured or raped."

13. In my judgment that was a course and a determination that was open to Designated Immigration Judge Dearden, having regard to the generality of the order for reconsideration, the fact that there had been no agreement that any finding of fact made by Immigration Judge Mensah was to be carried forward and the fact that the hearing before him took place on the common basis that all matters were to be considered afresh. In those circumstances I would reject the contention that DK (Serbia) [2006] EWCA Civ 1747 required the Designated Immigration Judge to preserve the finding of arrest and rape in prison.

14. It is particularly unwelcome to require an Immigration Judge to preserve such findings in the circumstances where they depend entirely on the credibility of an appellant and in all other respects that credibility has been comprehensively destroyed. Be that as it may, in my judgment Designated Immigration Judge Dearden made no error of law and I would therefore dismiss this appeal.

Lord Justice Rix:

15. I agree

Lord Justice Carnwath:

1. I agree. I would only like to add two observations. The first is that I would underline what my Lord Stanley Burnton LJ has said about DK (Serbia). In my judgment DK (Serbia) is unlikely to give any assistance in a case where the credibility of an applicant has to be reconsidered anew at a reconsideration hearing. It was common ground in this case that NG's credibility was in issue at the reconsideration. That is what his representative skeleton argument at the reconsideration hearing said. NG gave oral evidence anew at the reconsideration hearing in support of his credibility. In the circumstances, and where his credibility had been rejected at the first hearing by Immigration Judge Mensah, it is in my judgment impossible to consider that a single finding could be preserved even if it could amount to a finding albeit on a lower standard of proof. Save in an exceptional case credibility seems to me to be likely to be all of apiece, especially where the applicant himself, as here, is saying that his arrest, torture and rape occurred on the occasion of and by reason of the discovery that he was a supporter of a political party, a critical aspect of his case which was totally rejected by Immigration Judge Mensah.

2. The second observation I would make is that it seems to me that this is yet another case where a reconsideration has been ordered, here ultimately by agreement, on the basis which appears to me to be at least in part ultimately a disagreement of fact or factual inference. Reconsideration is only permitted on an error of law, but it is my experience in this court that matters are forever getting here on the basis that a disagreement of fact has been regarded at the reconsideration stage as a question of law. Ultimately this means that the

statute is being disregarded and a merry go round of litigation is created without a proper jurisprudential basis.

Order: Appeal dismissed