Case No: C4/2004/2157

Neutral Citation Number: [2005] EWCA Civ 893

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL**

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 20 July 2005

**Before :**

**SIR MARK POTTER, PRESIDENT OF THE FAMILY DIVISION**
**LORD JUSTICE KEENE**
and
**LORD JUSTICE SCOTT BAKER**

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**Between :**

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| **"HC"** | **Appellant** |
| **- and -** | |
| **The Secretary of State for the Home Department** | **Respondent** |

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(Transcript of the Handed Down Judgment of
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**Mark Henderson** (instructed by **Messrs Wesley Gryk**) for the **appellant**
**Steven Kovats** (instructed by **The Treasury Solicitor**) for the **respondent**

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# Judgment

Lord Justice Keene:

## INTRODUCTION.

1. The appellant is a Palestinian, born in 1971 in a refugee camp in the Lebanon. He grew up in that camp, known as Camp 100, which is located near the town of Sidon. There is no dispute that he is a homosexual. He is also a Muslim. He left the Lebanon in December 1998 and travelled via Turkey and Morocco to the United Kingdom, arriving here in December 1999. He claimed asylum on arrival in this country. For some reason he was not interviewed until November 2002, but in January 2003 the Secretary of State refused his asylum claim and refused leave to enter.

2. The appellant appealed against that decision to an adjudicator on Refugee Convention and human rights grounds, but his appeal was dismissed by a determination dated 23 July 2003. He then appealed to the Immigration Appeal Tribunal ("the IAT"), which granted him permission to appeal without limiting the grounds, but the appeal to the IAT was unsuccessful. He now appeals against the IAT's decision to reject his appeal.

## THE ROLE OF THE IAT.

3. The date of the adjudicator's decision is of significance. As it came "on or after 9th June 2003", section 101(1) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") was applicable by virtue of S.1. 2003 No. 1339, Article 4, and consequently the right of appeal to the IAT existed only on a point of law. This does not seem to have been appreciated by the constitution of the IAT which heard and determined the appeal. In its determination it summarised the challenge to the adjudicator's decision as being

> "that the Adjudicator's conclusions are in error of law *as well as fact*": paragraph 3. (emphasis added)

It proceeded to hear oral evidence and then dealt with the factual issues in the case on their merits, concluding in paragraph 9 that

> "the Adjudicator's decision to dismiss the appeal was correct on facts and sound in law."

4. This court has recently had occasion in *Miftari v. Secretary of State for the Home Department* [2005] EWCA Civ 481 to emphasise the limited nature of the IAT's jurisdiction under the 2002 Act. That jurisdiction only exists if a point of law is properly before the IAT in the grounds of appeal or, in the case of an appeal by an applicant for asylum, if there is an obvious point of Convention jurisprudence which may avail the appellant: *R v. Secretary of State, ex parte Robinson* [1998] Q.B. 929. But even when an error of law in the adjudicator's decision has been identified, that does not entitle the IAT to re-consider the merits of the claim in the light of the factual evidence at the time of the IAT hearing. As Buxton LJ stated in *Miftari* at paragraph 30

> "Since the IAT now has jurisdiction to determine only points of law, it cannot put itself in the position of the lower court and decide the whole of the case as it stood there. Unless the decision on the point of law determines the case on the basis of the facts already found below, the IAT has to remit."

The other two members of the court agreed. I cannot therefore see any justification for the procedure adopted by the IAT in the present case, which appears to have reflected the earlier and much wider jurisdiction of that body under the Immigration and Asylum Act 1999.

5. Were there points of law properly before the IAT? In answering that question, it needs to be borne in mind that one is dealing in such cases with a public law decision made by a statutory adjudicator. The concept of a point of law in the public law context has been extensively considered in a number of recent decisions of this court. In *Railtrack plc v. Guinness Limited* [2003] EWCA Civ 188; [2003] RVR 280, Carnwath LJ emphasised that, when dealing with appeals from a specialist tribunal,

> "issues of law in this context are not narrowly understood."

He went on to say at paragraph 51:

> "The court can correct 'all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings' (*R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 862 per Lord Templeman; see also *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed (1995), p 686, para 15-076). Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached 'upon an incorrect basis of fact', due to misunderstanding or ignorance (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 321, para 53, per Lord Slynn of Hadley). A failure of reasoning may not in itself establish an error of law, but it may "indicate that the tribunal had never properly considered the matter … and that the proper thought processes have not been gone through' (*Crake v Supplementary Benefits Commission* [1982] 1 All ER 492, 508)."

The other members of the court agreed.

6. The *Railtrack* decision was followed in *E v. Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044, where this court held that irrationality or procedural irregularity or even in certain circumstances a mistake of fact can amount to an error of law. It said that appeals of law

> "are treated as encompassing the traditional judicial review grounds of excess of power, irrationality, and procedural irregularity." (paragraph 42.)

7. I agree with that analysis. If a decision-maker acts in such a way as to render his decision vulnerable to challenge on normal judicial review grounds, he will invariably have erred in law.

8. Applying those principles to the grounds of appeal lodged with the IAT against the adjudicator's decision, I am quite satisfied that those grounds raised a number of points of law. Before identifying those, however, it is necessary to summarise briefly the evidence put before the adjudicator, the facts which she found and the conclusions which she drew from those facts.

**THE EVIDENCE BEFORE THE ADJUDICATOR.**

9. There was, first of all, evidence from the appellant himself which seems to have been treated as credible by the adjudicator, at least to the extent that it dealt with his own personal circumstances. Having grown up in Camp 100, he had then studied and worked in Russia between 1990 and 1995, when his residence permit expired. He then returned to the Lebanon and worked initially as a sales assistant in a supermarket in Sidon. In January 1997 he began working in a friend's grocery shop in Camp 100, and then opened a video rental shop next door. However, there was an explosion at his video shop. The appellant said that the Lebanese police came but did no follow-up investigation. Three or four weeks later a leaflet was distributed in the camp, falsely accusing him of having adult pornographic videos in the shop.

10. A few weeks after that, a second leaflet was circulated, showing a headless body, and saying that the shop must close immediately. Then a man called Yasser Al Khateb came and told the appellant that he and a friend had caused the explosion and distributed the leaflets because he knew that the appellant was gay. He said that that was against the Muslim religion and that the appellant must leave the camp. As a result of these threats, the appellant left the camp and went to Beirut, where he stayed with an aunt for six weeks before leaving the country.

11. Those facts appear to have been found by the adjudicator. What was in issue was what would happen if the appellant were sent back to the Lebanon. His evidence was that he could not live in Camp 100 because it was known there that he was homosexual. He said that he could not safely stay in Beirut. "As a Palestinian I could not live in a Christian area and as a gay I could not live in a Muslim area."

12. He was supported on that aspect by written evidence from Dr Alan George, a specialist in Middle Eastern political and economic affairs and from 1984 until 1992 the Lebanon Author for the Economist Intelligence Unit. In his report Dr George referred to very considerable discrimination in the Lebanon against Palestinian refugees, who are prohibited from buying property in that country. He described government policy as seeking to discourage the integration of such refugees into the Lebanese community, with a ban on Palestinians working in over seventy trades and professions. His report stated that the Lebanese police have no presence in the Palestinian refugee camps and are in general reluctant to become involved in matters which appear to be intra-Palestinian. Nor, he said, would the appellant be able to seek

effective assistance from those within the refugee camps, where Palestinian groups operated an autonomous and arbitrary system of justice.

13. Dr George also emphasised the appellant's vulnerability as a homosexual in the Lebanon. He confirmed that homosexuality is condemned by Muslims both in Lebanese and Palestinian society, that homosexuals are subject to abuse and serious discrimination and that, while not literally impossible for a gay man to live in a Muslim area of Lebanon, it would be extremely difficult for him to do so. Dr George did not accept that the appellant would be safe in Beirut.

14. A witness statement by Dr Paolo Galizzi, a friend of the appellant, was also before the adjudicator. It referred to visits by him to the Lebanon in 2002 and to the risks of blackmail or arrest if gay men spent the night together or met openly. The adjudicator also had a bundle of background information before her, dealing with the situation in the Lebanon. This included the Home Office (CIPU) Country Assessment dated April 2002, a United States State Department report dated 31 March 2003 and two reports by the International Lesbian and Gay Association (ILGA). The CIPU report recorded that the Lebanese Penal Code made homosexual acts a criminal offence, punishable with imprisonment not exceeding one year, but stated that the authorities do not actively prosecute homosexuals. It added that "open homosexual relationships are not allowed". It also incorporated material from a letter from the British Embassy in Beirut stating that in theory Palestinian refugees in Lebanon could move freely but

> "In practice, however, there are certain barriers to their freedom of movement. Whilst Palestinians can live outside the camps, it is often too expensive for them to do so. Their ability to move to another camp depends whether they can find appropriate accommodation. In the already over crowded southern camps, construction work is prohibited. There is little habitable space available for newcomers, unless they are planning to cohabit with family members. In Beirut, the North and the Bekaa, where there are no building restrictions, living space is more plentiful and rents tend to be less."

15. The State Department report noted that the Lebanese government did not attempt to assert state control over the Palestinian camps. The first ILGA report (2000) stated that homosexuality per se was not a crime in Lebanon:

> "To the contrary: the free expression of opinion, whether on behalf of the gay community or any other group – as well as the freedom of any group to associate – is protected both by the Lebanese constitution and by the Universal Declaration of Human Rights."

It then went on to note that the police in Beirut had summoned the general manager of an internet provider in an attempt to extract the identities of those running a gay Lebanese web site and described those police actions as

> "part of a long-standing pattern of hostility not only to gay and lesbian communities but to freedom of expression and association in general."

It asked readers to write in protest. The further ILGA report, dated 2002, commented that a body known as LEGAL, Lebanese Equality for Gays and Lesbians, had reported that the government was cracking down on homosexual activity and that the "Morals Police" actively pursued homosexuals to detain them.

**THE ADJUDICATOR'S DECISION.**

16. The adjudicator referred to some of this background material in paragraph 11 of her decision, including what the CIPU Report said about homosexual relationships. She also noted Dr George's evidence about it being extremely difficult for a gay to live normally in any Muslim area of Lebanon, but she went on to quote from the first passage I have quoted in paragraph 15 from the first ILGA report, referring to the Lebanese Constitution and the Universal Declaration of Human Rights. She then commented as follows:

> "This reveals less difficulties for homosexuals than Dr George's report and as it is provided by a Gay and Lesbian organisation, I shall rely on it."

17. The adjudicator recorded that, in practice, few Palestinians received work permits and those were mainly for unskilled occupations. While Palestinians were not obliged to live in one of the refugee camps, it was often too expensive for them to do otherwise. She accepted that homosexuals faced difficulties in Lebanon but stated that the position was more relaxed in Beirut. She noted that the appellant had never been arrested or detained.

18. The adjudicator then dealt with the appellant's own evidence about the explosion at his shop, the leaflets and the threats from the man Yasser Al Khateb. She stated about these events that

> "I find that this was a criminal act by an individual rather than persecution for a convention reason."

No further explanation for this finding was given, but in paragraph 20 the adjudicator said:

> "Whatever measures may be taken by the state, it certainly does not mean that serious crimes will not occur. The occurrence of such crimes is not a test for Convention protection. Possible ill-treatment by individuals cannot constitute persecution for the purposes of the 1951 Convention. Bearing in mind both my findings and the objective background information that the authorities do not actively prosecute homosexuals, I find that returning the appellant to Lebanon would not expose him to a real risk of persecution for a Convention reason."

19. The adjudicator also found that there were parts of the Lebanon where it would be reasonable for the appellant to go, away from Camp 100. The reasoning for this finding relied on the fact that the appellant had lived in Beirut with his aunt for six weeks without difficulty before leaving the country, and that

> "he has stated that he worked in the city of Sidon. The objective background material indicates that it is possible for Palestinians to move from one camp to another and live outside the camps. The appellant has been out of the country since 14.12.98, a period of over four years."

20. The adjudicator dismissed both the asylum and the human rights appeals.

**THE APPEAL TO THE IAT.**

21. The criticisms of her decision advanced in the appellant's grounds of appeal to the IAT were several. It was contended that she failed to apply the proper test in respect of persecution by non-state agents; that she failed to take into account the evidence about the prospects of Palestinians relocating elsewhere in the Lebanon, especially when homosexual, including the "extensive country evidence" submitted by the appellant; that she had misunderstood the evidence from ILGA; and that she had failed to consider the cumulative effect of being both a Palestinian and a homosexual. These grounds of appeal undoubtedly raised points of law, given the meaning to be attached to that concept in a public law context.

22. I turn therefore to consider how the IAT dealt with these points. It is far from being an easy exercise, because the IAT heard evidence and dealt with the appellant's claims on their factual merits. On the issue of how the adjudicator approached persecution by non-state agents, the IAT said nothing in its decision about the adjudicator's statements in paragraph 20 of her determination. Insofar as it dealt with the risk of persecution of the appellant because of his homosexuality, it simply said

> "We have been shown no objective evidence that homosexual men face persecution in Lebanon. We have seen evidence that homosexual acts in public attract criminal sanctions as homosexual activity is forbidden under the law in Lebanon. Nevertheless as Dr George admitted and as is borne out by the objective evidence homosexual acts committed in private do not attract adverse attention of authorities and the authorities do not actively go out looking for people engaged in such acts. Taking the evidence of the appellant at its highest as did the Adjudicator, the appellant may well have faced difficulties if he had continued to live in the Camp at the time (1999) but we are far from persuaded that he would now face a real risk of persecution for a Convention reason were he to return to live in the Camp."

23. The IAT's decision says nothing about the criticisms of the adjudicator's consideration of the evidence about the prospects of a gay Palestinian refugee relocating elsewhere in the Lebanon. It carried out its own assessment of this, based on the evidence put before it, stating at paragraph 12:

> "In any event we find that there is overwhelming evidence that the appellant can relocate in Lebanon. The relocation will not cause him undue hardship and nor is it unreasonable to expect him to relocate. There is no prohibition on his relocation as a

> Palestinian refugee either in law or in reality. As Dr George admitted nearly half the Palestinian refugees live outside the formal limits of Camps. We do not accept the evidence of Dr George that the appellant can not live in a non Muslim area or that he will come to the attention of the "fundamentalists" if he were to live in a Muslim area. There is, with respect, no basis for this assertion. There is no evidence that homosexuals face persecution in Muslim areas in Lebanon either from the authorities or non State agents. There is evidence that homosexual activities conducted openly are not tolerated by the authorities as the law prohibits homosexual acts. With regard to the attitude and the conduct of non State agents to homosexual activities, evidence falls far short of establishing, on the standard of reasonable likelihood, that the appellant faces a real risk of persecution from them if he were to conduct himself with discretion."

24. The IAT made no comment about the ground of appeal alleging that the adjudicator had misunderstood the evidence from the ILGA reports.

**DISCUSSION.**

25. I cannot avoid the conclusion that this appeal must succeed, first and foremost because the IAT has not adequately dealt with the points of law raised in the appeal with which it was dealing. It has quite improperly carried out a fresh assessment of the merits of the appellant's asylum and human rights claims. That is not its task under the 2002 Act. This court is bound by the decision in *Miftari*, including the proposition from paragraph 30 of Buxton LJ's judgement, quoted at paragraph 4 of this judgment. Both parties accept the binding force of *Miftari*.

26. In arriving at the conclusion expressed in the previous paragraph, I have considered whether the alleged errors of law by the adjudicator were clearly ill-founded, so that little purpose would be served by remitting this matter for reconsideration. The criticism of her approach to non-state agents seems to me to have considerable justification. To assert, as she did, that

> "possible ill-treatment by individuals cannot constitute persecution for the purposes of the 1951 Convention"

is, on the face of it, wrong in law. It is well-established that the persecution referred to in Article 1A(2) of the Refugee Convention may be at the hands of those other than state officials, so long as the state is unwilling or unable to provide protection against such persecution: *R. v. Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477. Of course, as the House of Lords decision in *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489 made clear, such state protection is not required to reach a level where no violent attacks at all can occur. It may be sufficient without achieving complete protection. But even where there is a systemic sufficiency of state protection,

> "a claimant may still have a well-founded fear of persecution if he can show that [the] authorities know or ought to know of

> circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require " – per Auld LJ in *R (Bagdanavicius) v. Secretary of State for the Home Department* [2003] EWCA Civ 1605; [2004] 1 WLR 1207, at paragraph 55(6)."

27. There might be an argument that, read in context, the statement by the adjudicator to which I have referred did not mean what it apparently said but was merely dealing with the *level* of protection required. But it was preceded by the adjudicator's bald statement, finding that the explosion and the leaflet distribution was

> "a criminal act by an individual rather than persecution for a convention reason."

That is a puzzling statement, since an act can be both a criminal act by an individual *and* persecution for a convention reason, and it does not merely lack any further explanation but tends to suggest that the adjudicator did think that criminal acts by individuals could not amount to such persecution. In other words, it reinforces the impression left by the sentence I have quoted in paragraph 26 that she did not properly understand the legal approach to be adopted towards the issue of alleged persecution by non-state agents. In the light of the appellant's evidence about his experiences in the camp, that was one of the vital issues in the case.

28. Her apparent error in that respect might not have mattered, had her decision been able to withstand scrutiny on the question of relocation within the Lebanon. But here her treatment of the evidence of Dr George gives rise to concern. She regarded him as having over-stated the difficulties for homosexuals in the Lebanon because, as she saw it, the first of the ILGA reports referred to the protection given to freedom of expression and of association by the Lebanese constitution and the Universal Declaration of Human Rights. As set out earlier in this judgement, the adjudicator regarded that as indicating "less difficulties for homosexuals than Dr George's report". Before us, Mr Henderson has submitted that this misunderstands the ILGA report, which was dealing, in the passage relied on by the adjudicator, with the theoretical legal position, not with the practical situation which existed in real life, where the ILGA reports expressly talk about the government cracking down on homosexual activity and "morals police" actively pursuing and detaining homosexuals. It is argued on behalf of the appellant that the passage relied on by the adjudicator provided no basis for concluding that Dr George had exaggerated the real-life problems faced by homosexuals in the Lebanon, even if not Palestinians.

29. I am persuaded by that argument. The adjudicator should not have treated the passage in question from the ILGA report as showing any different situation from that described by Dr George. By itself, that would not amount to an error of law. But nowhere does the adjudicator deal with the substantial amount of evidence before her which pointed to the acute problems faced by a man who was both a Palestinian refugee and a homosexual trying to relocate elsewhere in the Lebanon. Some of that evidence has been summarised earlier in this judgment. The two characteristics of being a Palestinian and being gay needed to be looked at in combination. Any rational consideration of this issue needed to take into account the evidence about the legal ban on Palestinians owning property in the Lebanon; the evidence about

accommodation being too expensive in much of the Lebanon; the legal exclusion of Palestinians from many trades and professions; the few work permits granted to them; and the evidence about the extreme difficulty a homosexual would have in living normally in any Muslim area of the country. Nowhere does the adjudicator appear to have taken account of the accumulation of those factors.

30. Her reasoning when concluding that the appellant could reasonably (and safely) relocate relied on several factors. One was the fact that he had lived without difficulty with his aunt for six weeks in Beirut before leaving the country. That does not tell one very much about his prospects for living safely in Beirut on a long-term basis. She also relied on his having worked in the city of Sidon. That may show that some black market employment is possible, but he was still *living* in Camp 100 at the time. The statement that it is possible for Palestinians to move from one camp to another ignored the evidence from Dr George about the difficulties a young gay man would have in so doing and the suspicion which would attach to him if he sought to do so. Finally, the fact that he had been out of the country for over four years does not assist with the dangers which the evidence indicated would be faced by a young homosexual in any Muslim part of the Lebanon, especially if Palestinian.

**CONCLUSION.**

31. I can only conclude that there was considerable force in the grounds of appeal to the IAT which asserted that the adjudicator failed to take relevant evidence into account when dealing with the issue of relocation. That is an error of law, and it means that the IAT was not justified (even if it had adopted the proper approach to its task) in concluding that the adjudicator's decision "was correct on facts and sound in law". For all those reasons, I am satisfied that the IAT's decision cannot stand. The IAT misunderstood its statutory task. There were sound reasons for concluding that the adjudicator had erred in law. I would allow this appeal and remit this matter to the new Asylum and Immigration Tribunal for a fresh decision to be made on the appellant's appeal.

**Lord Justice Scott Baker:**

32. I agree.

**President:**

33. I also agree.