Case No: C5/2007/1095

Neutral Citation Number: [2008] EWCA Civ 77
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No. AA/07485/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 22nd January 2008

Before:

LORD JUSTICE CARNWATH
LORD JUSTICE THOMAS
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between:

NJ (IRAN) **Appellant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Mrs H Gore (instructed by Corbin & Hassan Solicitors) appeared on behalf of the **Appellant.**

Mr S Kovats (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**..

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Judgment

Lord Justice Carnwath:

1. This is an appeal from a decision of the AIT (Immigration Judge Birkby) given on 29 January 2007. The applicant is a citizen of Iran who came to this country in March 2006 and claimed asylum on the basis of fears of persecution from Iranian authorities because of her activities with women's groups in Iran. The most significant event dealt with in the evidence was a political demonstration on 8 March 2006 in Tehran where it was said demonstrators had been violently attacked and women beaten. Subsequently it was said the friends of the appellant had been arrested and detained. The appellant feared that under torture her friends would disclose her name and that she would be arrested, detained and tortured. The case came first before Immigration Judge Macdonald. He gave a decision on 22 August 2006. Although he dismissed her appeal he found her credible on a number of aspects. He said this:

> "In summary I accept that the appellant was a member of a women's culture centre. I find her role was low-key and that she was not known to the authorities. I accept that she attended the International Women's Day demonstration on 8 March 2006 and that she was one of the many people struck by baton-wielding police as they broke up the demonstration. I find that the police action was intended to disperse and intimidate those at the demonstration. I am satisfied that no arrests were made at the demonstration and consequently the Appellant's fear that her friends may disclose her name to the authorities is without foundation.
>
> 41 On the basis of the objective material before me I do not consider that the Appellant is of any interest to the authorities in Iran because of her membership of the Women's Cultural Centre or her attendance at the demonstration."

2. He added that on the totality of the evidence he did not consider that the conduct crossed the threshold of severity required to constitute persecution.
3. There was an application for reconsideration of that decision. The burden of the application was that in holding that there had not been any arrests following that event the Immigration Judge had ignored material in the papers giving objective evidence that there were such arrests. On 4 September 2006 Senior Immigration Judge Waumsley ordered reconsideration. The reasons he gave were as follows:

> "The grounds on which the appellant has applied for an order for reconsideration may be summarised as follows:

1. In rejecting the appellant's account that friends of hers had been arrested during or after the International Women's Day demonstration in Tehran on 8 March 2006 because there were no reports of such arrests in the objective material, the immigration judge failed to take account of objective material before him which reported that such arrests had in fact taken place;

2. An application to adduce fresh documentary evidence relating to such arrests."

4. He later commented:

> "Ground 2 is misconceived. Reconsideration lies on a point of law only. It was manifestly not an error of law on the part of the Immigration Judge not to take account of evidence which was not before him at the time of his decision.
>
> …ground 1 clearly raises an arguable point of law which merits further consideration. Reconsideration is therefore ordered, limited to the issue raised in ground one."

5. The next stage was for a decision to be made as to whether there was in fact an error of law. It appears that that was dealt with by the AIT sending to the representatives of the parties a "notice of reconsideration". This was on 2 November 2006. It said that the senior immigration judge who has considered the case thought that there was a clear material error of law as identified in the grounds for review and the order for reconsideration read together, and the notice invited the parties to consider whether they would agree that this reconsideration should be subject to a direction in the following terms:

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

The parties were invited to respond to that within 14 days.

6. It seems that the parties did accept that direction because the next stage was the hearing before Immigration Judge Birkby on 12 January 2007. Both parties were represented, the appellant by Mr Newman and the respondent by Miss Pope. The Immigration Judge records this at paragraph 3.

> "This appeal comes before the Tribunal as a reconsideration of the Appellant's appeal which was original determined by an Immigration Judge in a decision promulgated on 22nd August 2006. At the reconsideration hearing on 23rd November 2006 a Senior Immigration Judge decided as follows:"

(There is then set out the direction which I have already quoted.)

7. Paragraph 4 continues:

> "At the hearing before me both representatives agreed that I should consider all the evidence and issues in the case afresh. However Miss Pope on behalf of the Secretary of State conceded that the Appellant had attended at a demonstration in Iran on 8 March 2006 in Daneshgo Park in Tehran. Miss Pope however made no further concessions at the outset of the hearing, although I should state that during submissions she accepted that the objective evidence showed that arrests had been made at that demonstration. Miss Pope indicated that credibility was in issue. Consequently I have considered all matters in issue save for what the Home Office has conceded."

8. The judge heard evidence, including evidence from the appellant, and heard submissions from the parties and references to the documentation. He dismissed the appeal but on rather different grounds to those of the previous judge. He accepted that there had been a demonstration on 8 March and arrests had been made following the demonstration. He also accepted that human rights abuses are widespread in Iran, particularly as taken by the state against political activists, and that women's groups have been targeted. However, he did not accept that the appellant was a credible witness. In paragraph 15 of his decision he went at some length through what he regarded as the discrepancies in her evidence which led him not to accept much of her account. In paragraph 16 he accepted that she had attended a demonstration in March 2006 but made no further positive findings. In his conclusion at paragraph 16 he said:

> "The Appellant has so undermined her credibility by the matters that I have stated above that I am unable to [accept her credibility]. I do not find that the Appellant was ever involved in any women's group in Iran. She has not proved to me the reason she was attending the demonstration in Iran on the day in question was because of an involvement in a women's group. I do not accept the Appellant has ever been arrested or detained in Iran or ever ill

> treated. I do not accept that she was ever attacked by the police in March 2006 or at any other time."

So in conclusion he did not accept that she left Tehran fearing persecution or ill-treatment.

9. The tribunal refused permission to appeal but an application was made to appeal to this court. The sole ground of appeal put forward was that the second tribunal erred in not regarding itself as bound by the findings of credibility in the first decision and in particular in not limiting itself to the issue identified by the Senior Immigration Judge when he ordered reconsideration, which, as I have said, was limited to the question of whether there were arrests. Permission to appeal was granted by Sir Henry Brooke on 5 August 2007. He said this:

> "It is arguable that Immigration Judge Birkby's duty was confined to a reconsideration of the single issue referred to him, and that he could not enlarge his jurisdiction through any agreement between the parties."

10. But he added that the Court of Appeal would wish to see statements from both representatives before the immigration judge explaining how they came to make the agreement which is referred to in his determination. Accordingly we have been supplied with statements by Mr Newman for the appellant and Miss Pope for the respondent. Mr Newman says that he represented the appellant when the case came forward. He recites the form of the direction on 23 November 2006 which I have read. He continued:

> "In ordering the reconsideration, the sole direction made by the Senior Immigration Judge was that the matter should not be put before the original Immigration Judge. No directions were either sought or made in relation to the extent to which the evidence already heard was to be relied on at the reconsideration or the extent to which the matter was to be re-heard as opposed to merely reconsidered. The notice of reconsideration hearing, dated 29 November 2006, which were accompanied by standard directions in respect of the service of a witness statements and evidence bundle.
>
> 4. Prior to the hearing, I spoke with the Respondent's representative Miss Pope. I recall asking her about the ambit of the order for reconsideration. She informed me that she understood that what had been ordered was effectively a rehearing de novo. I did not have any specific instruction on the point. However, having regard to the terms of the order and directions that

> had been made, it seemed to me reasonably clear that the Respondent's interpretation was correct and the matter had been listed for effectively a rehearing before a differently constituted tribunal.
>
> 5. At the commencement of the hearing, the Immigration Judge raised the question of whether the matter was to proceed as a rehearing. Miss Pope submitted that the tribunal must consider the evidence and issues in the case afresh. I responded that her interpretation did not appear inconsistent with the order for reconsideration and directions made. The Immigration Judge did not invite any further submissions and appeared satisfied that the matter should proceed in the manner suggested by the Respondent. Accordingly, the immigration judge reheard the evidence subject to those concessions made by the Respondent as outlined in paragraph 4 of the determination."

11. It is quite clear from that account (which accords with the recollection of Miss Pope) that there was agreement between the representatives of the parties as to the scope of the hearing before Immigration Judge Birkby. In those circumstances it seems very difficult to see how the appellant can now seek to reopen the matter on the basis that the representatives should not have made that agreement. However, as Sir Henry Brooke implicitly recognised, it might be arguable that, if this was a matter of jurisdiction, agreement of the parties would not be sufficient to extend the powers of the tribunal. Mrs Gore, who has appeared today for the appellant and was not involved in the previous hearing, has sought to argue that this indeed a matter of jurisdiction. She has referred us to the relevant cases. The leading case in this court is DK (Serbia) The Secretary of State [2007] Imm AR 411; [2006] EWCA Civ 1747. In that case Latham LJ reviewed the rules and directions relating to reconsideration. He referred to a decision of the AIT, AH (Sudan) [2006] UKAIT 00038; [2006] Imm AR 504 in which the Tribunal itself had given guidance as to the approach on reconsideration hearings. The paragraph on which Mrs Gore primarily relies is paragraph 26 of AH where the Tribunal suggests that the rules give powers to restrict submissions or evidence on reconsideration and to impose limits on judicial time spent on reconsideration, for example the matters to be subject to examination or cross-examination and the issues to be addressed.

12. The Tribunal says that decisions under those rules are, "matters of good housekeeping" but they continue as follows:

> "If (despite some material error of law) an issue or matter has been properly and satisfactorily dealt with in the first decision, there is no reason why further time should be spent on it in the reconsideration. Although the Tribunal considering the appeal has all

> the grounds of appeal before it, it also has -- indeed it has just been considering -- the previous decision, then it must be at liberty to adopt those parts which it considers are sound. The principle perhaps goes further than that. Because the process is reconsideration, we would incline to the view that in general the Tribunal should always adopt those parts of a previous decision which are not shown to be unsound."

13. Mrs Gore says that the second Tribunal should have adopted the previous finding in relation to the credibility of the appellant on the basis that that had not been found to be unsound in law. However, I do not see the passage there as suggesting that this is a matter of jurisdiction which cannot be subject to an agreement between the parties. That I think also appears from Latham LJ's judgment at paragraph 20, where he says:

> "I consider that the reasoning of the Tribunal was essentially sound as to the jurisdictional ambit of a reconsideration. That does not provide a complete answer to what should be the scope in practice of any particular reconsideration. The jurisdiction is one which is being exercised by the same Tribunal, conceptually, both at the first hearing of the appeal, at then at any reconsideration. That seems to me to be the key to the way in which reconsiderations should be managed in procedural terms."

14. He goes on:

> "21 In the first instance, in relation to the identification of any error or errors of law, that should normally be restricted to those grounds upon which the immigration judge ordered reconsideration, and any point which properly falls within the category of obvious or manifest point of Convention jurisprudence as described in Robinson [[1998] QB 929.] Therefore parties should expect a direction either from the immigration judge ordering reconsideration or the Tribunal on reconsideration restricting argument and the points of law identified by the immigration judge when ordering the reconsideration. Nothing in either the 2004 Act or the rules, however, expressly precludes an applicant from raising points of law in respect of which he is not successful at the application itself and there is no appellate machinery which would enable an applicant who is successful in obtaining an order for reconsideration to challenge the grounds upon which the immigration judge ordered such reconsideration.

> It must however be very much the exception, rather than the rule, that a Tribunal will permit other grounds to be argued. But clearly the Tribunal needs to be alert to the possibility of an error of law other than identified by the immigration judge, otherwise its own decision may be unlawful."

15. That certainly suggests that the normal rule will be that the second consideration is limited to those matters which were the subject of the finding of illegality, but the word "normally" and indeed the whole tenor of the passage make clear to my mind that this is a matter of practice not jurisdiction. Accordingly, it seems to me that the point which Sir Henry Brooke thought might be arguable and led him to grant permission is not on consideration of the authorities made out. The alternative way it is put is to say: well, even if that is right, the immigration judge should not have proceeded simply on the basis of the agreement of parties, having regard to the principles of "anxious scrutiny". It was his job to go behind that agreement if necessary and to look at the papers for himself and determine the scope of the proceedings. For myself I have some sympathy with the argument that the Immigration Judge should have looked beyond the document which had set up the hearing, and considered the previous decision of the Senior Immigration Judge ordering reconsideration, and have sought the views of the parties specifically on it.

16. However I cannot say that his failure to do that was an error of law, which would justify this court intervening, in circumstances where the parties were represented and their representatives acceded to the case proceeding on the basis it did. Indeed the appellant was called to give oral evidence on all the matters relating to her case. Accordingly it seems to me that this appeal must fail and for my part I would simply dismiss it.

17. **Lord Justice Thomas:**
    I agree.

18. **Lord Justice Lawrence Collins:**
    I also agree.

Order: Appeal dismissed