

C4/2003/2502

Neutral Citation Number: [2004] EWCA Civ 1528  
IN THE SUPREME COURT OF JUDICATURE  
IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice  
Strand  
London, WC2  
Tuesday, 9 November 2004

B E F O R E:

**LORD JUSTICE AULD**

**LORD JUSTICE MAY**

**LORD JUSTICE GAGE**

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**LAHCENE GAOUA**

**Claimant/Applicant**

-v-

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant/Respondent**

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(Computer-Aided Transcript of the Stenograph Notes of  
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Official Shorthand Writers to the Court)

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**MR M S GILL QC** (instructed by Tyndallwoods Solicitors) appeared on behalf of the  
Applicant

**MS L GIOVANNETTI** (instructed by the Treasury Solicitor) appeared on behalf of the  
Respondent

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J U D G M E N T  
(As Approved by the Court)

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1. LORD JUSTICE GAGE: This appellant is by birth an Algerian and a Berber, and was born on 24th January 1972. He appeals against a decision of the Immigration Appeal Tribunal dated 22nd September last year. By its decision the Immigration Appeal Tribunal reversed the decision of the adjudicator who had allowed an appeal by the appellant against refusal of asylum by the Secretary of State for the Home Department, the respondent. It is not in dispute in this appeal that the decision of the Immigration Appeal Tribunal was flawed. The appellant seeks to reinstate the decision of the adjudicator. The respondent contends that the matter should be remitted to the Immigration Appeal Tribunal for a re-hearing of its appeal against the adjudicator's decision by a differently constituted Tribunal.
2. The background facts are as follows. The appellant arrived in the United Kingdom in December 2000. He entered illegally on a false French passport. He was assisted to enter the United Kingdom by a man called Ibrahim Benmerzouga who helped the appellant obtain false documents and provided him with accommodation for some months in Leicester. In September 2001 Benmerzouga, together with an associate of his, Baghdad Meziane, was arrested under the Terrorism Act 2000. On 17th January 2002 the appellant, together with 11 other men, was arrested in raids in Leicester under the Prevention of Terrorism Act. All of the men arrested on that occasion were of North African extraction. Ultimately the appellant was not charged with any offences under the Terrorism Act. He was charged with possession of a false French passport and obtaining employment using a false identity. In September 2002 he was sentenced to eight months' imprisonment which he has now served. On 2nd April 2003, following a high profile trial in Leicester, Benmerzouga and Meziane were convicted of various offences involving supporting and assisting Al Qa'eda terrorism. Each was sentenced to 11 years' imprisonment.
3. The arrests of the appellant and the 11 others, and the trial of Benmerzouga and Meziane, attracted a great deal of publicity, both locally in Leicester, nationally and internationally. On arrest the appellant applied for asylum on the basis that he had a well-founded fear of persecution under the 1951 Refugee Convention, and also on grounds of Human Rights Article 3. The basis for his claim is that, having been arrested as part of an anti-terrorist campaign in this country, he would be considered by the Algerian authorities as being associated with terrorist organisations. In consequence, on return to Algeria he would be detained and tortured to establish links and give information with those organisations.
4. I turn now to the decision of the adjudicator. He stated the issue before him as follows:

"The issue in this case is whether the Appellant because of the circumstances of his arrest would be placed at serious risk of persecution or ill treatment and torture if returned to Algeria. The Appellant was arrested and initially detained with a number of others on 17th January 2002 in Leicester as part of a security operation under the Prevention of Terrorism Act 2000. These arrests attracted substantial press interest, locally, nationally and indeed internationally. Some examples of the reports are included in the Appellant's bundle."

5. The adjudicator heard evidence from the appellant and had placed before her on behalf of the appellant reports from two experts on conditions in Algeria. Those experts were Dr Seddon and Dr Joffe. There were also other documents dealing with conditions in Algeria and background information which were before her. The reports of the experts are in the bundle of documents which are before this court. Not all the background information has however been put before this court. Dr Seddon's report specifically related to the appellant. At page 14 of the documents Dr Seddon set out the fears of the appellant. He stated:

"He is afraid that were he to return or be returned to Algeria he would be detained, harassed and persecuted, and possibly imprisoned and even tortured. He would be particularly at risk as a person who had left Algeria illegally and entered the UK on a false passport, who had been arrested in the UK under the new Terrorism Act and imprisoned there before being sent back, and who was also a Berber and supporter of the FFS (a Berber political party)."

6. His conclusion is set out at pages 15 and 22 of the documents before this court. At page 15 he states as follows:

"There can be very little doubt that the Algerian authorities in the Embassy in the UK and in Algeria will have followed the well-publicised news of the arrests and subsequent trials of those arrested. There is a real risk that, although M Gaoua was not charged under the Terrorism Act, the label of 'terrorist' will stick, and he will be subjected to intensive interrogation on return to Algeria on the grounds that 'there is no smoke without fire'. From what is known of the reaction of the Algerian security services to even the slightest possibility of association on the part of an individual with the Islamist terrorist groups, it is entirely possible that he will be detained on arrival and held for further questioning. Given the atmosphere in Algeria today -- and in the context of the broader international 'war against terrorism' after 11 September 2001 -- I would say that this is in fact likely."

7. At the end of his report he concludes that the appellant would be likely to be subjected to inhumane and degrading ill treatment with the possibility of threat to his life during detention.
8. Dr Joffe's report was made in respect of a different asylum seeker. Nevertheless it confirms the thrust of Dr Seddon's report. The subject of his report was another man concerned in the Leicester anti-terrorist investigations. That man has been referred to as Y and was the subject of an appeal to the Immigration Appeal Tribunal. The report of that decision is with the court papers.
9. The adjudicator's conclusions are contained principally in paragraphs 21 and 23 of her decision. In paragraph 21 she states:

"The Appellant was arrested under the Prevention of Terrorism Act 2000

and although he was later charged and sentenced for fraud offences I am satisfied that the Algerian authorities would have had an interest in his case, whether they obtained the information from the British authorities or the press is immaterial. The cases were highly publicised. They would also have been aware that the Appellant was considered to be a fraudster rather than a terrorist. However the Appellant was arrested as part of an operation which did apprehend two others who were charged with terrorist offences. The Algerian authorities would be aware of the Appellant's return because of the need to obtain travel documents from the embassy and the information passed to the security services in Algeria. The Algerian government in their fight against the terrorist groups who have been involved in violence for the past decade are keen to obtain information about such groups. I find that there is a reasonable chance that the Appellant will be perceived as having information about the terrorists arrested in Leicester and will face detention at the airport on return."

10. In paragraph 23:

"The CIPU report states that in two reports from 2001 there have been no reports of returned asylum seekers facing any persecution or ill treatment on return. However these reports are from 2001 and so are not up to date. Dr Joffe reports on the situation following the escalation of violence and the events of September 11 2001 and shows an increased risk for those involved in or suspected of involvement in terrorist activities. I find that the Appellant would be detained at the airport and because of his perceived links with the terrorists in the United Kingdom there is a reasonable chance that he would face persecution and treatment in breach of Article 3."

11. The Secretary of State, the respondent, appealed against that decision and permission was granted, we are told, on six grounds. Before the Immigration Appeal Tribunal there was a further report from Dr Frederic Volpi. His report supports the conclusions of Drs Seddon and Joffe. The Immigration Appeal Tribunal referred to the evidence of the experts and its conclusion is set out in paragraph 24 of its decision. It reads:

"In conclusion, we do not find that the appellant would be of any interest to the authorities on return. If their intelligence is as good as claimed, this would readily become apparent. While the risk of ill-treatment on return cannot be ruled out, we are not satisfied on all the material before us that there is a real risk that the appellant would suffer ill-treatment prior to the authorities being satisfied that he was what he always said he has been -- a person of no political involvement whatever. The Tribunal's observation that there had been no reports of complaints made about returned failed asylum seekers from Europe needs to be seen in the context of the report from Dr Joffe and the reference to two cases in 1991. We do not feel that those two examples -- one of which has in the immediate aftermath of the events of September 11th -- cause the central

conclusions of the Tribunal to be in any way doubtful. We have very carefully considered the distinguishing features of this appellant. In the end each case has to be looked at on its own facts. However, despite giving very careful attention to the reports of the various experts we are unable to accept that the appellant has established that there is a real risk of his Article 3 rights being breached on his return. We do not agree that an opinion would be imputed to the appellant. Counsel was not able to suggest with any degree of conviction that this would be so. He acknowledged there would be a difficulty in causation. We consider that he was right to be doubtful that a claim could be pursued under the 1951 Convention. However, had it been necessary to do so, we would not have been satisfied that it was established that there was a real risk of persecution on return for the same reasons as we have set out above in relation to Article 3."

12. Before this court the Secretary of State's position is as follows. It is accepted that in some respects the Immigration Appeal Tribunal's decision is flawed. In particular reference is made to paragraph 19 of the Tribunal's decision, in which there appears the following sentence:

"There is no real evidence of any link between the appellant and the others arrested."

13. It is conceded on behalf of the Secretary of State that that is inaccurate. There was evidence to link the appellant with at least one of the two men who were convicted of offences under the Terrorism Act. It is also accepted on behalf of the Secretary of State that the Immigration Appeal Tribunal's reasoning in regard to the experts' reports may not be sufficient. That was ground 4 of the notice of appeal to this court by the appellant.
14. Further, it is accepted that the decision of the Immigration Appeal Tribunal in this case is in conflict with the decision of a differently constituted Immigration Appeal Tribunal in the case of Y v Secretary of State, for which the reference is CC/46753/2001, dated 8th June 2004. That is the case for which Dr Joffe's report was prepared and it concerned one of the 11 men who were arrested with the appellant on 17th January 2002. The facts are very similar. The Immigration Appeal Tribunal allowed the appeal of Y, holding that there was a real risk of his being treated in breach of the Convention and also in breach of Article 3.
15. Accordingly, the issue before this court is, as I have said, whether or not the matter should be remitted to the Immigration Appeal Tribunal, as is contended for by the Secretary of State, or the adjudicator's decision reinstated, as is contended for by the appellant. Put another way, it seems to me that the issue is that the exercise which this court is involved in is to determine whether the decision of the adjudicator is arguably flawed. If it is not, there is no purpose in the decision being remitted to the Immigration Appeal Tribunal; it would be bound to dismiss the appeal. If, on the other hand, it is arguable that it is in any way flawed, then in my judgment it should be

remitted to the Immigration Appeal Tribunal differently constituted for consideration to the extent that we find that it is flawed.

16. The appellant's position is as follows. It is submitted by Mr Gill on behalf of the appellant that the adjudicator's findings were correct in relation to the Convention ground and also correct in relation to the ground of breach of Article 3. It is submitted by Mr Gill that the adjudicator's decision is unassailable. Alternatively, if we were to conclude that so far as the Convention ground is concerned her decision may arguably be flawed, he submits that her decision on the human rights ground cannot be described in any way as flawed, and accordingly we should only remit the Convention ground for further consideration by an Appeal Tribunal. Finally, he concedes that if we think that it may be arguable that her decision is flawed on both grounds, then it is inevitable that the matter must be remitted to an Immigration Appeal Tribunal to be dealt with on the basis of the primary facts as found by the adjudicator.
17. The respondent's position is that there are arguments to show that the adjudicator's decision on both grounds is flawed and that the whole matter should be remitted to a freshly constituted Immigration Appeal Tribunal.
18. I approach this matter first on the basis of the Convention ground. I have already referred to the relevant paragraphs in the adjudicator's decision. The point made by Ms Giovannetti for the respondent is that the adjudicator never at any stage identified the Convention reason which she found established. She submits that being persecuted for connection with terrorists is not the same as being persecuted for political opinions.
19. Mr Gill, on the other hand, submits that in this case it is "blindingly obvious", to use his phrase, that the adjudicator accepted and found that there was a political motive to what the Algerian authorities would do when the appellant, if he was, was returned. It is submitted by Mr Gill that his connection with those who were radical Islamists in this country would be bound to lead to the inference that any detention, interrogation and torture by the Algerian authorities was for political motives.
20. The approach of an adjudicator, and indeed the Immigration Appeal Tribunal, to deciding this issue is to be found in a speech of Lord Bingham in Sepeet & Bulbul v Secretary of State for the Home Department, which is reported in the INLR reports for 2003 at page 322. At paragraph 22 Lord Bingham states as follows:

"In his judgment in R (Sivakumar) v Immigration Appeal Tribunal [2001] EWCA Civ 1196, [2002] INLR 310, at para [23], Dyson LJ stated:

'It is necessary for the person who is considering the claim for asylum to assess carefully the real reason for the persecution.'

"This seems to me to be a clear, simple and workmanlike test which gives effect to the Refugee Convention provided that it is understood that the reason is the reason which operates in the mind of the persecutor and not

the reason which the victim believes to be the reason for the persecution, and that there may be more than one real reason. The application of the test calls for the exercise of an objective judgment. Decision-makers are not concerned (subject to a qualification mentioned below) to explore the motives or purposes of those who have committed or may commit acts of persecution, nor the belief of the victim as to those motives or purposes. Having made the best assessment possible of all the facts and circumstances, they must label or categorise the reason for the persecution. The qualification mentioned is that where the reason for the persecution is or may be the imputation by the persecutors of a particular belief or opinion (or, for that matter, the attribution of a racial origin or nationality or membership of a particular social group), one is concerned not with the correctness of the matter imputed or attributed but with the belief of the persecutor: the real reason for the persecution of a victim may be the persecutor's belief that he holds extreme political opinions or adheres to a particular faith even if in truth the victim does not hold those opinions or belong to that faith."

21. It is perhaps worthy of note that at no stage in either the decision and reasons of the adjudicator or of the Immigration Appeal Tribunal is that passage from Lord Bingham's speech mentioned.
22. Ms Giovannetti has also referred us to a passage in the speech of Lord Steyn in the case of R v Secretary of State, ex p Sivakumar [2003] UKHL 14. At paragraph 17, and I cite only part of that paragraph, Lord Steyn said:

"Counsel for the Home Secretary submitted that persecution by agents of the state in the process of investigating suspected terrorist acts necessarily falls outside the protective net of article 1A. On the other hand, counsel for the applicant submitted that such persecution in the course of an investigation into suspected terrorist acts necessarily falls within the protective net of article 1A since terrorism involves matters of political opinion. Both submissions go too far ... It all depends on the facts."

23. In my judgment it is at least arguable that the adjudicator in this case failed to direct herself correctly when considering this question. As May LJ pointed out in the course of argument, at paragraph 21 in the last sentence the adjudicator said:

"I find that there is a reasonable chance that the Appellant will be perceived as having information about the terrorists arrested in Leicester and will face detention at the airport on return."

24. That links with the last sentence of paragraph 23 which I shall quote again:

"I find that the Appellant would be detained at the airport and because of his perceived links with the terrorists in the United Kingdom there is a reasonable chance that he would face persecution and treatment in breach of Article 3."

25. From those passages it seems to me that it is arguable that the adjudicator elided the asylum claim with the human rights claim. In most cases both claims will run together and there would be no distinction. This case in my view is the exception. When dealing with this asylum case what the adjudicator should have asked herself was: what was the real reason for the risk of detention of the appellant by the authorities and persecution upon his return? Was it because the authorities would perceive him to hold radical Islamic opinions, or was it just to obtain information about Algerian terrorists in the United Kingdom? In my view the distinction is important. The latter arguably would not give rise to an asylum claim; the former would. The adjudicator's decision does not in my judgment resolve this issue; nor for that matter does the decision of the Immigration Appeal Tribunal. In my view, so far as that ground is concerned, the matter must be remitted for rehearing by a differently constituted Immigration Appeal Tribunal.
26. I turn next to the ground of human rights. On this issue, in my opinion, Mr Gill for the appellant is on much stronger ground. He submits that the Immigration Appeal Tribunal came nowhere near satisfying the test set out by Laws LJ in the recent case of Subesh & Ors v Secretary of State for the Home Department [2004] EWCA Civ 56. In short he submits that in this case the adjudicator did consider all the background information as well as the reports of Drs Seddon and Joffe. He submits that the adjudicator made a careful analysis of the reports; there were no misdirections of law; there was no unreasonable approach to the evidence; and the adjudicator's findings were clear, simple and referred to the relevant authorities. So it is submitted that her decision is unimpeachable and the grounds of appeal of the Secretary of State are simply argumentative and seeking to disagree with those conclusions.
27. Against these submissions Ms Giovannetti submits that there are grounds for criticising the adjudicator's decision on this ground as well as the Convention ground. She submits that the adjudicator attached too much weight to the experts' reports and particularly by reference to the assessment of risk. She submits that there is no proper assessment by the adjudicator of the other objective evidence and that she did not attach sufficient weight to that other background information.
28. On this ground for myself I find Ms Giovannetti's submissions far less convincing than those of Mr Gill, but I can see that assessing the background information requires a rather lower test on appeal and can be "more readily overturned", in the words of Hale LJ, as she then was, in Indrakumar. In my view since I have concluded that the matter should be remitted to the Immigration Appeal Tribunal on the asylum ground, it seems to me it would be better for the human rights ground in addition to be remitted to the Immigration Appeal Tribunal. In my judgment it is arguable that the two grounds were not given the proper separate consideration that they ought to have been given by the adjudicator. It seems to me therefore that it is overwhelmingly desirable that the a new Immigration Appeal Tribunal should have before it all the matters for the whole appeal and not just part of it. If the appellant's arguments on this ground are as sound as Mr Gill submits that they are then he will succeed, at least on the human rights ground if not on the other ground. Again he is free to deploy, and will have the opportunity of deploying, all his arguments on both grounds at the hearing.



29. For these reasons I would allow the appeal and remit the matter for a rehearing before a differently constituted Immigration Appeal Tribunal.
30. LORD JUSTICE MAY: I agree.
31. LORD JUSTICE AULD: I also agree that the appeal should be allowed for the reasons given by my Lord and to the extent that both the asylum issue and the human rights issue should be remitted to the Immigration Appeal Tribunal differently constituted.

Order: appeal allowed.