Neutral Citation Number: [2008] EWCA Civ 909

Case No: C5/2007/2391

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AA/04445/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2008

Before :

LORD JUSTICE WARD
and
LORD JUSTICE MOORE-BICK

- -

Between :

LS (UZBEKISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Mr. N.S. Stanage (instructed by **Paragon Law**) for the **appellant**
Ms Susan Chan (instructed by the **Treasury Solicitor**) for the **respondent**

Hearing dates : 18th June 2008

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Judgment

Lord Justice Moore-Bick:

1. This is an appeal against a decision of the Asylum and Immigration Tribunal promulgated on 16th August 2007 dismissing the appellant's claim for asylum and humanitarian protection. The appellant is aged 22 and is a national of Uzbekistan. On 23rd January 2006 while employed as a stewardess by Uzbekistan Airways she entered this country after arriving on a flight from Tashkent to Birmingham. Instead of rejoining her plane for the flight out she remained in this country for a week before applying for asylum on the grounds that she was a lesbian and as such was at risk of persecution in her own country.

2. The appellant was interviewed on 7th March 2006 and in that interview she gave an account of the events that she said had led to her seeking asylum in this country. She said that in about June 2005 she had entered into a relationship with a woman slightly older than herself who also worked as an air stewardess and that in the course of a flight to Beijing the two of them had been discovered by another employee kissing in a curtained-off area of the aircraft in the vicinity of the galley. As a result their relationship was reported to her employer and by her employer to her parents who forced her to leave home. For about three months she shared a flat in Tashkent with her girlfriend, but people learned about their relationship and she began to suffer harassment and a certain amount of violence from people who objected to relationships of that kind.

3. The appellant said that on 20th January 2006 following one particular incident of harassment involving customs officers at the airport she and her girlfriend had gone to the police to make a complaint, but instead of taking the matter seriously the police turned on them. They were both beaten up and raped more than once by officers. As a result her friend was severely injured and both of them required hospital treatment. After that experience the appellant considered that her safety was at risk if she remained in Uzbekistan and so she escaped to this country when the opportunity presented itself.

4. The appellant's application for asylum was refused. In a decision letter dated 15th March 2006 the respondent noted that sexual relationships between women are not illegal in Uzbekistan and although he accepted that the police were known to abuse their position when interrogating those who are accused of committing criminal offences, he did not accept the appellant's account of her experiences because she had not committed, nor was she accused of having committed, any offence. The respondent accepted that lesbian relationships attract a significant degree of social opprobrium in Uzbekistan and that as a result the appellant was likely to suffer discrimination and a degree of harassment, but he did not accept that she was at risk of suffering ill-treatment of a kind that could properly be described as persecution or that would violate her rights under Arts 2 and 3 of the European Convention on Human Rights ("the Convention").

5. The appellant's appeal to the Asylum and Immigration Tribunal was heard by Immigration Judge Narayan on 12th June 2006. In addition to the evidence contained in the notes of her screening interview he had before him a statement from the appellant, in which she repeated in greater detail her account of the circumstances and events which had led up to her arrival in this country, a report from an expert witness, Miss Marjorie Farquharson, on political and social conditions in Uzbekistan and

reports from the United States Department of State and other sources on conditions in Uzbekistan. The appellant gave evidence and was cross-examined. At the hearing the respondent challenged the appellant's account of her experiences on the grounds that it was not credible, but did not challenge the central plank of her case, namely, her sexual orientation.

6. The Immigration Judge accepted the appellant's evidence of her sexuality; indeed, he had little choice but to do so, since that part of her evidence was not disputed. However, he did not accept her account of the events which had preceded her arrival in this country. He accepted that she had experienced some discrimination and social exclusion and could be expected to do so in the future if she were to return to Uzbekistan, but he did not accept that it was likely to amount to anything that could be described as persecution or that would infringe her rights under the Convention. He therefore dismissed her appeal.

7. The appellant applied for her case to be reconsidered on a large number of grounds. Many of those grounds were rejected, but on 17th July Senior Immigration Judge Nichols made an order for reconsideration, primarily on the grounds that Immigration Judge Narayan had failed to give proper consideration to whether appellant would be at risk of ill-treatment on her return to Uzbekistan.

8. On 16th March 2007 the first stage of the reconsideration took place before Senior Immigration Judge Drabu. On that occasion there was some argument about whether the findings made by Immigration Judge Narayan in relation to the appellant's credibility were open to challenge, but in the end the respondent's representative accepted that they were flawed and should be reconsidered. At the same time she also made it clear that on the reconsideration the respondent wished to challenge the appellant's assertion that she was a practising lesbian. In those circumstances at the request of the parties the judge adjourned the case for a full hearing on all issues by a differently constituted tribunal.

9. On 12th July 2007 the adjourned hearing took place before Immigration Judge Hollingworth. On that occasion he had before him the notes of the appellant's screening interview, the statement she had made for the hearing before Immigration Judge Narayan, a supplementary statement made by the appellant for the purposes of the reconsideration, Miss Farquharson's original report and also a supplementary report she had made for the reconsideration, as well as reports on conditions in Uzbekistan from Amnesty International, the US State Department and Human Rights Watch.

10. Immigration Judge Hollingworth promulgated his decision on 16th August 2007. Much of it is taken up with the issue of the appellant's sexual orientation and her account of the events which had led her to seek asylum in this country. For that purpose he embarked on a lengthy and detailed consideration of the evidence which led him to reject the appellant's account as incredible in all significant respects. Moreover, the conclusions which he drew also led him to reject as untrue what he described as the "core" of her account, namely, that she is a lesbian. Having reached that conclusion it inevitably followed that he rejected her assertion that she was at risk of ill-treatment in Uzbekistan by reason of her sexuality.

11. That, however, left the question whether, if the appellant were returned to Uzbekistan, she would be at risk of ill-treatment by virtue of the fact that she had left the country illegally and subsequently claimed asylum abroad. The judge dealt with that issue quite shortly in paragraph 57 of his decision in the following terms:

> "I now turn to the second aspect of the Appellant's claim in the alternative, that if she is returned she faces persecution or adverse treatment arising from her unauthorised departure from Uzbekistan. Having found the core of the Appellant's account untrue, there is no basis for finding that the Appellant has left her country of origin without the appropriate approval of the authorities. Even if she has, the authority of **OM (Returning Citizens) CG [2007] UKAIT 00045** suggests that her position will not cross the threshold of Article 3. She will be a single young woman returning to her country of origin in circumstances where the authorities will not know of her claimed sexual orientation. As the CG authority indicates, it is not impossible for the Appellant to obtain a passport outside Uzbekistan bearing in mind she has settled family ties in the country. There is no objective basis for finding as Miss Farquharson does that upon return the Appellant's unsuccessful application for asylum would be deemed an aggravating feature, particularly if what she says earlier is correct, that the Appellant's father may have influence which can be brought to bear."

12. Having found that the appellant would not be at risk of persecution or ill-treatment for any of the reasons put forward, the judge dismissed her appeal.

13. The appellant sought permission to appeal to this court on three grounds:

    (i) that despite the order made by Senior Immigration Judge Drabu adjourning the reconsideration for a full hearing on all issues (including by implication the issue of the appellant's sexual orientation), the tribunal had no jurisdiction as a matter of law to re-open that question;

    (ii) that the judge's finding that the appellant is not a lesbian was irrational and based to a material degree on findings that were not supported by the evidence;

    (iii) that the judge failed properly to consider and evaluate the evidence bearing on the risk to the appellant of ill-treatment on her return to Uzbekistan.

14. Buxton L.J. gave permission to appeal on ground (iii), but refused permission on grounds (i) and (ii). The appellant asked to renew her application in relation to grounds (i) and (ii) at an oral hearing and on 2nd April May L.J. directed that that application be made on the hearing of the appeal, with appeal to follow if granted. In the event we granted the appellant permission to appeal on ground (i), which gives rise to a narrow question of law on which the parties had in any event addressed us fully, but refused permission to appeal on ground (ii) for reasons to which I shall come in a moment.

(i) The scope of the tribunal's jurisdiction

15. Section 103A of the Nationality, Immigration and Asylum Act 2002, as amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, makes provision for the reconsideration of a decision by the Asylum and Immigration Tribunal on an appeal under the Act on the grounds of error of law. The statutory provisions do not themselves circumscribe the scope of such a reconsideration, but statements of principle can be found in a number of decided cases which support the conclusion that the tribunal should not normally re-open findings of fact forming part of the original decision unless they are undermined by an error of law which provided grounds for the reconsideration. Mr. Stanage's submission goes further than that, however: he submitted that on a reconsideration the tribunal has no jurisdiction in law to re-open findings of fact other than those infected by an error of law and consequently that in this case Immigration Judge Hollingworth had no jurisdiction to re-open the question of the appellant's sexual orientation.

16. In support of his submission Mr. Stanage drew our attention to three authorities. The first in order of decision is *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045; [2006] INLR 486 in which Sedley L.J. made the following observations:

> "43. I would add this on the procedural aspect of the case. Had the tribunal been right in its critique of the first determination in relation to Rule 317, it should have included in its order a direction that the immigration judge who was to continue the reconsideration should do so on the basis that the facts found by Mr Ince were to stand save insofar as the issue to be reconsidered required their significance to be re-evaluated.
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> 44. The reason why it is important to be rigorous about this is that reopening a concluded decision by definition deprives a party of a favourable judgment and renders uncertain something which was certain. If a discrete element of the first determination is faulty, it is that alone which needs to be reconsidered. It seems to me wrong in principle for an entire edifice of reasoning to be dismantled if the defect in it can be remedied by limited intervention, and correspondingly right in principle for the AIT to be cautious and explicit about what it remits for redetermination."

17. Those observations were considered by this court in the second case to which we were referred, *DK (Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747; [2008] 1 W.L.R. 1246, a decision on the scope of the tribunal's jurisdiction in relation to reconsiderations and the procedural rules applicable to them which are contained in the Asylum and Immigration Tribunal (Procedure) Rules (2005) ("the Rules"). Mr. Stanage relied principally on paragraph 22 of the judgment in that case in which Latham L.J. said

> "As far as what has been called the second stage of a reconsideration is concerned, the fact that it is, as I have said, conceptually a reconsideration by the same body which made the original decision, carries with it a number of consequences. The most important is that any body asked to reconsider a decision on the grounds of an identified error of law will approach its reconsideration on the basis that any factual findings and conclusions or judgments arising from those findings which are unaffected by the error of law need not be revisited. It is not a rehearing: Parliament chose not to use that concept, presumably for good reasons. And the fact that the reconsideration may be carried out by a differently constituted tribunal or a different Immigration Judge does not affect the general principle of the 2004 Act, which is that the process of reconsideration is carried out by the same body as made the original decision. The right approach, in my view, to the directions which should be considered by the immigration judge ordering reconsideration or the Tribunal carrying out the reconsideration is to assume, notionally, that the reconsideration will be, or is being, carried out by the original decision maker."

18. The third case to which we were referred was *HF (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 445 in which Carnwath L.J., responding to a submission that issues of credibility cannot be compartmentalised, said

> "25. I see the theoretical force of this argument. But it ignores practical reality and human considerations. Judgment of credibility in cases such as this is inevitably a difficult and imperfect exercise. Different tribunals hearing the same witnesses may reach quite different views. A search for theoretical perfection is doomed to failure. In practice many of these cases fall naturally into two parts: the first depending on as assessment of the applicant's account of his own past experiences, the second on a more objective appraisal of his prospects on return. That was the distinction drawn in *PE* and it is equally valid here in my view. It is sensible case-management and convenient for everyone to treat the decision on the first part as a fixed factor, so that the debate concentrated on the second part.
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> 26. From a human point of view, appearing in front of a tribunal in support of an asylum claim must be a gruelling experience at the best of times. To require it to be repeated on issues which have already been decided is not only wasteful of the tribunal's time and resources, but oppressive and potentially unfair for the applicant. This case illustrates both aspects. Instead of a relatively narrow inquiry into the threat currently posed by the GIA, and the consequences of the applicant's recent conviction, the

> tribunal had to undertake a full scale-review of the whole case from the beginning, leading to the laborious and time-consuming preparation of a decision running to 68 paragraphs. For his part, the applicant, now unrepresented and having to act as advocate and witness, was required to go back over the whole story for the third time, and reargue eight separate issues, without any credit for the favourable impression he had made on the two previous tribunals."

19. In my view there are many good reasons, as these observations make clear, why findings of fact made on the hearing of the original appeal should not be re-opened on a reconsideration unless they are undermined by an error of law. Fairness to the parties and the efficiency of the appeal process are but two of them. In addition, since, as Latham L.J. pointed out in *DK (Serbia)*, the concept is one of the reconsideration of a decision by the body that originally made it, there is the need to avoid the apparent irrationality of the same tribunal's reaching inconsistent decisions on the basis of the same evidence. However, none of these considerations is sufficient to enable the appellant to succeed in the present case and since the appellant's sexual orientation was not a live issue before Immigration Judge Narayan, such findings as he made were based on a concession rather than on a reasoned analysis of the evidence. There was therefore no risk of any actual or apparent irrationality in re-opening the issue. It thus became necessary for Mr. Stanage to contend that the tribunal did not have jurisdiction in law to do so.

20. The statutory provisions simply provide that a party to an appeal may apply for an order requiring the tribunal to reconsider its decision. Although, as Latham L.J. also noted in *DK (Serbia)*, the statute does not provide for a re-hearing, neither does it limit the scope of a reconsideration, although the tribunal itself may decide to do so by directions given under the Rules. It is also relevant to note that a reconsideration leads to a fresh decision on the appeal, whether that decision is the same as the original decision or differs from it: see Rule 31(3).

21. In *AH (Scope of Section 103 Reconsideration) Sudan* [2006] UKAIT 00038 the tribunal itself reached the conclusion that the reconsideration is of the appeal as a whole and is limited only by the grounds of appeal themselves, a conclusion which was accepted as correct by this court in *DK (Serbia)* (see in particular paragraphs 17 and 20 of the judgment of Latham L.J.). Moreover, the conclusion that the tribunal does have jurisdiction to re-open decisions of fact not tainted by error of law is expressly recognised by Latham L.J. in paragraph 23 of his judgment in that case in which he said

> "It follows that if there is to be any challenge to the factual findings, or the judgments or conclusions reached on the facts which are unaffected by the errors of law that have been identified, that will only be other than in the most exceptional cases on the basis of new evidence or new material as to which the usual principles as to the reception of such evidence will apply, as envisaged in rule 32(2) of the Rules. "

22. Mr. Stanage submitted that this passage indicates that it is only in cases where the tribunal has fresh evidence before it that it is entitled to re-open findings of fact not affected by an error of law, but that is clearly not correct because Latham L.J. clearly envisaged the possibility that there might be other, admittedly exceptional, cases in which the tribunal would be justified in taking that course. The important point for present purposes is that the court recognised that the tribunal's jurisdiction on a reconsideration extends to findings of fact not affected by any error of law. In my judgment the effect of an order for reconsideration is to put the appeal back into the hands of the tribunal which as a matter of law has jurisdiction to re-open any aspect of the case. How that jurisdiction should be exercised, however, is another matter and I would not wish to detract from anything said in the decided cases about the importance of retaining findings of fact and other conclusions which are not themselves undermined by errors of law.

23. For these reasons I would reject this ground of appeal.

(ii) Irrationality

24. Immigration Judge Hollingworth not only had the benefit of the notes of the appellant's screening interview and her two statements but of seeing her give evidence and being cross-examined. He was well placed, therefore, to assess the significance to be attached to the different ways in which she had described various aspects of the circumstances that had led her to seek asylum in this country and her response to the criticisms of her account made by the respondent's representative in cross-examination. He also had the opportunity to judge her general demeanour as a witness. Since he had the benefit of the objective evidence and the two expert reports of Miss Farquharson, he had background material against which to make that assessment. In the event he rejected the appellant's account in almost every respect, in some cases because of discrepancies between her various accounts, in some cases because her account was not supported by other aspects of the evidence and in some cases because he found her evidence inherently implausible. In the light of his conclusions on individual aspects of her story he rejected her claim to be a lesbian.

25. In her grounds of appeal the appellant identifies no fewer than twenty four respects in which the judge is said to have acted irrationally in making particular findings or reaching individual conclusions which culminated in his rejecting the appellant's evidence of her sexual orientation. I fully accept that the tribunal is bound to consider the evidence as a whole fairly and is not entitled to act perversely or irrationally when making its findings, but it is the sole judge of the facts and its findings cannot be challenged on the grounds that another decision-maker might well have taken a different view of the evidence or of the appellant's credibility generally. Only if it can be said that the evidence was not capable of supporting a finding (or, to put it another way, that no reasonable tribunal could have reached such a decision) is it open to challenge in this court. A finding as to the credibility of a witness in relation to a central issue in the case often involves considering many different aspects of the evidence, some of which are of greater weight than others. The evidence may not be all one way; some parts may point one way and others another. If the witness has given evidence and been cross-examined, as is usually the case, the general impression that he or she has made in the witness box may itself influence the decision. In the end the judge has to weigh up the conflicting indications and reach an overall conclusion.

26. In the present case Immigration Judge Hollingworth considered the evidence in detail and gave reasons for accepting or rejecting different aspects of the appellant's account before reaching the conclusion that he did not accept her evidence of her own sexual orientation. I do not think it can be said that any of his findings were irrational, but, as Mr. Stanage accepted, for an appeal to succeed on this ground it would be necessary for the appellant to persuade the court that enough of those findings were fatally flawed to undermine the judge's overall conclusion on that question. In my view there is no real prospect of her doing so. This is in reality no more than an attempt to re-open the tribunal's findings of fact, which is not permissible on an appeal of this kind. I would therefore refuse permission to appeal on this ground.

(iii) Risk of ill-treatment on return

27. In her first report, which concentrated mainly on the position of homosexuals in Uzbekistan, Miss Farquharson referred to article 223 of the Uzbekistani Criminal Code which makes it an offence for a citizen to leave the country without permission – what is described as "illegal exit abroad". The offence is punishable by imprisonment for up to 5 years, or up to 10 years where there are aggravating circumstances. It does not appear that Immigration Judge Hollingworth rejected that part of the expert evidence and there was no reason for him to do so. However, he does appear to have rejected the appellant's evidence that she left Uzbekistan without authorisation. I was puzzled for some time by the way the judge expressed himself in the second sentence of paragraph 57, in which he said

> "Having found the core of the Appellant's account untrue, there is no basis for finding that the Appellant has left her country of origin without the appropriate approval of the authorities.",

because I could not understand why the rejection of the appellant's description of her sexual orientation made it any more or less likely that she had left Uzbekistan without an exit visa. However, I think Miss Chan was right in submitting that the judge was saying no more than that, having disbelieved her evidence on a matter of such central importance, he had no basis for believing her evidence on that aspect of the case either.

28. It was the appellant's case that she had entered the United Kingdom in the course of her employment as an air stewardess and while here had deserted her employer in order to seek asylum in this country. By the time she made her claim for asylum she was no longer in possession of a passport, although since she was not stopped by immigration officials on entry she must have been carrying one at that time. It is not impossible, of course, that she did have a visa to leave Uzbekistan for a limited period otherwise than in connection with her work and that she destroyed her passport after arrival in this country, but it does not appear that the respondent ever suggested that that was the case or that her evidence was challenged on that basis. On the contrary, as far as I can see, it was accepted that she had been employed by Uzbekistan airways and that she had entered this country in the manner she described. On the face of it that was tantamount to leaving the country without the approval of the authorities. Miss Chan drew our attention to the judge's comment that he had been left with the impression that the appellant's arrival in the United Kingdom was far more orchestrated than she would have had him believe, and it may be that he was right to think that she had it all planned well in advance, but if the Immigration Judge was

minded to reject her evidence about the circumstances immediately surrounding her entry, he ought to have dealt with the issue fully and given reasons for his conclusion.

29. This flaw in the judge's reasoning might not be fatal if he were correct in his reliance on the decision in *OM*. Miss Chan submitted that that decision was directly applicable to the present case and that the Immigration Judge was obliged to apply it in the absence of any clearly distinguishing feature. The appellant in *OM* was a citizen of Uzbekistan who had left the country on 1st March 1996 when she was aged 23 with an exit visa in order to come to the United Kingdom as a student. She was granted leave to enter and on 23rd July 1996 she applied for asylum, but her application was refused. In August 2004 the respondent refused to vary the appellant's leave to enter, thus bringing about a situation in which she was obliged to leave the country. She appealed against that decision on both asylum and human rights grounds, relying on, among other things, the risk of ill-treatment on return.

30. The tribunal heard evidence from (among others) Mr. Craig Murray, at one time the United Kingdom's ambassador to Uzbekistan. He said that Uzbekistani embassies can renew passports, but the impression he gave was that they will do so only for favoured citizens. The tribunal was aware that the appellant's husband had recently returned to Uzbekistan and thought it likely that he had had to obtain some form of travel document in order to do so. Accordingly, it was not satisfied that it was not possible to obtain the renewal of a passport outside Uzbekistan. Moreover, the fact that he had returned, apparently without difficulty, detracted from Mr. Murray's evidence that those who stayed away after the expiry of their visas were subjected to severe punishment. Indeed, the tribunal expressed the view that there was no satisfactory evidence to show that those who had overstayed their visas were likely to be punished on their return.

31. In paragraph 47 of his decision Immigration Judge Hollingworth appears to have proceeded on the basis that the present case is on all fours with *OM*, but in my view there are some potentially important differences which call for explicit consideration. In the first place, there is the difference in the manner in which the appellant left Uzbekistan and entered this country. Unlike the appellant in *OM*, it appears that she may not have had permission to travel abroad otherwise than for the very limited purposes of her employment with the airline. As I have already observed, if the tribunal intended to reject that part of her account its findings are not altogether satisfactory and call for more explicit reasoning. If the appellant did not have an exit visa entitling her to travel abroad otherwise than in connection with her employment, there is an obvious possibility that by defecting during a routine stop-over she could be regarded by the authorities in the same light as one who has left the country without permission. I am unable to accept Miss Chan's submission that there is no possible difference between the two cases in this respect and it is not something to which the tribunal gave any consideration.

32. Second, the tribunal seems to have accepted that the appellant is no longer in possession of a passport, or at any rate it made no finding to the contrary. Although the Immigration Judge referred to the finding in *OM* that "it is not impossible for a person to obtain a passport outside Uzbekistan", it appears that in that case the appellant and her husband remained in possession of their passports, even if they had expired. It is not clear from the findings in that case how far that might affect a person's ability to obtain the renewal of his passport or the issue of some other travel

document in its place. Again, that is not something to which the tribunal gave any consideration.

33. In the light of Miss Farquharson's evidence that it is an offence for citizens of Uzbekistan to leave the country without authority and that those who are charged with criminal offences are liable to be ill-treated by the police, the tribunal ought in my view to have given more detailed consideration to this aspect of the appellant's case and in particular ought to have given explicit consideration to whether there is a real risk that the appellant will be charged with an offence on her return to Uzbekistan and if so, what the consequences for her might be.

34. For these reasons I would allow the appeal and remit the matter to the tribunal for reconsideration of this aspect of the appeal alone.

Ward L.J.:

35. I agree.