Case No: C5/2007/1402

Neutral Citation Number: [2008] EWCA Civ 65
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/07457/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 18th January 2008

Before:

LORD JUSTICE SEDLEY,
LORD JUSTICE HOOPER
and
LORD JUSTICE RIMER

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Between:

MT (AFGHANISTAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr D Jones (instructed by Messrs Halliday Reeves) appeared on behalf of the **Appellant**.
Mr P Patel (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Sedley:

1. The appellant, an Afghan citizen of Muslim upbringing, arrived in the United Kingdom in 2001 and claimed asylum on what were broadly grounds of politics and ethnicity. The application was rejected by the Home Office and in April 2003 an appeal against the rejection failed, largely on grounds of credibility. Nothing, however, was done to remove the appellant. In 2004 further representations were made on his behalf, but to no effect. Then in April 2006 a fresh claim was made on the ground that the appellant now had a well-founded fear of persecution and of inhuman treatment for reasons of religion. He had, in short, become a convert to Mormonism and contended that both as an evangelist and as an apostate he would run the risk of being tried and executed were he to be returned. The Home Office, refusing asylum on this fresh ground, accepted the factuality of the appellant's membership of, and priesthood in, the Church of Jesus Christ of the Latter Day Saints, but took the view that he could practise his religion without drawing attention to himself and could, if necessary, relocate within Afghanistan.

2. There was no basis on which the Home Office could doubt the fact of the appellant's membership of the Mormon Church, but equally no reason why they should accept the genuineness of his conversion. When the appellant appealed to the AIT the Home Office presenting officer was allowed to challenge him about it, but the immigration judge in the event ruled that (surprisingly, as he himself described it) the Home Office at the case management hearing had conceded that the credibility of the appellant's conversion was not in issue and that it was therefore not open to him to go behind it.

3. There was evidence to suggest that the appellant's association with the Mormon Church had begun shortly after the failure of his first appeal. His baptismal certificate is dated July 2005. There was therefore a real issue which could and in my view should have been explored at the appeal hearing. It seemed to me, as it seems to Immigration Judge Scobbie who heard the first appeal, extraordinary that, instead, this concession was made at the case management hearing. It also seems to me, with respect, to have been questionable whether the immigration judge was bound by it. If he was then he should not have allowed any questioning in relation to it. If he was entitled to allow such questioning, as he did, I do not understand what obliged him thereafter to regard the issue as foreclosed in the appellant's favour. Nor do I understand why there was no cross-application on the issue by the Home Office thereafter.

4. The consequence, as Parishil Patel for the Home Office accepts, is that the appellant has to be treated -- despite a history which is redolent of opportunism -- as a genuine convert to a faith which calls upon him ,wherever he finds himself, to proselytise. It also means that he must be treated as a Muslim whose apostasy will become known. These untested assumptions are compounded by the fact that nobody appears to have told the immigration judge that being a priest in the Mormon Church denotes no particular office or

responsibility. Every admitted adherent, following an initial baptism, becomes a "priest" of this church; in the appellant's case, within a month. Although the immigration judge was able to work out that it was not the equivalent of an orthodox ecclesiastical priesthood, he was driven by the paucity of information to describe the appellant as "not a rank-and-file convert" and as having "quickly been promoted" within his local church. It followed that the post of elder, to which the appellant had been promoted in less than seven months, needed also to be viewed with some reserve.

5. The fresh asylum claim was made the month after the appellant's promotion to elder. In Shirazi v SSHD [2003] EWCA Civ 1562 paragraph 32, I drew attention to the relative ease with which an asylum claim could be generated by a religious conversion and to the need for fact finders to be cautious about accepting such claims.

> "I am conscious of the ever-present risk of creating a back door to asylum by allowing claims to apostasy on the part of nationals of theocratic states to establish without more a well-founded fear of persecution. It is especially so when many religious bodies in this country are very ready to welcome converts and may even be seeking them out. That, no doubt, makes great caution appropriate in deciding both on the genuineness of conversions and on the question of causation which can arise in the case of refugees *sur place*. But it cannot properly affect the judicial reading of the data about the situation in the country of the applicant's nationality."

6. To what was said there I would add, in the light of this case, that it is in my view incumbent on the Home Office -- which may well have little to go on in this regard when it decides a claim on paper -- to keep the issue open so that if there is an appeal it can be properly explored by a tribunal on evidence which can be tested and judicially evaluated. This is so even though -- as David Jones for the appellant points out -- it is open to the Home Office itself to call an asylum seeker in for a further interview about a claimed late conversion. What the Home Office then reaches will, however, be an administrative decision. If the claim goes further it is every bit as important that the conversion be the subject of a judicial decision. In the case such as the present, where conversion has come only in the wake of two unsuccessful attempts to secure asylum on other grounds, such caution is especially necessary.

7. The present appeal, brought by leave of Dyson LJ, seeks to establish an error of law in Immigration Judge Scobbie's dismissal of the appellant's appeal. On a review of that determination, ordered by Senior Immigration Judge Drabu (because it was arguable that insufficient attention had been given to evidence post-dating the principal case relied on by the immigration judge, namely AR (Christians – risk in Kabul) Afghanistan [2005] UKIAT 00035),

Senior Immigration Judge Spencer held that it displayed no error of law. He did so in part by himself evaluating the post AR evidence, but that was because the real thrust of the challenge was based on perversity. It was argued, as it still is, that what had subsequently happened to a man named Abdur Rahman, who had apparently been prosecuted and sentenced to death for apostasy in 2006, incontestably demonstrated a real risk to other apostates, especially those such as the appellant who would draw attention to their apostasy by evangelising.

8. In AR, a reported case heard in November 2004, a tribunal of three concluded that, on the evidence then available, Christian converts, evangelists included, did not face a real risk of persecution, at least in Kabul. One element of the decision was that the evidence before the tribunal included no factual or anecdotal evidence to demonstrate such a risk in practice. By the date of the appellant's hearing before Immigration Judge Scobbie this had changed. There was evidence that Abdur Rahman, who had converted to Catholicism in Germany and had then been removed to Afghanistan had, in 2006, been placed on trial in a Sharia court for apostasy and sentenced to death. The sentence had not been confirmed by the president as the law required it should be, and Rahman had then been offered asylum in Italy and spirited out of the country. But the case had created serious unrest with vociferous demands for his execution.

9. The Afghan constitution, at which we have looked briefly in the course of this hearing, provides by article 3 (in an unofficial English translation):

> "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam."

By article 7:

> "…the state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights."

By article 130:

> "While processing the cases, the courts apply the provisions of this Constitution and other laws."

10. It is sufficient to remark that these are, on the face of them, contradictory provisions which do not offer cast-iron guarantees. This material and the Rahman case were both the subject of the expert's report put in on the appellant's behalf before the immigration judge. Its author was Dr Antonio Giustozzi, a research fellow at the London School of Economics and an authority on modern Afghanistan with recent first-hand knowledge of the country. Although the immigration judge found the report "very general in its content" and not "heavy in sources", neither of these qualifications detracts

from its content or relevance in the present context. This is Dr Giustozzi's account of the Abdur Rahman case:

> "The only case of Afghan convert to Christianity to have emerged publicly is that of Mr Abdur Rahman, which was widely publicised in the Western press. Mr Rahman, himself a returnee from Germany, was arrested and faced a claim by the Supreme Court that he should be tried according to the Shariat. This caused a wave or protests including from US President Bush. President Karzai came under pressure to address the issue, but proved unwilling to confront the conservative judiciary. Rahman was first offered freedom in exchange for retracting his conversion, which he refused to do. Karzai opted then to insist with the State Prosecutor for the release under protective custody of Mr Rahman under a technicality and then have him transferred abroad immediately, before a new arrest warrant could be issued or some harm could be inflicted on him by Islamic radicals. Rahman was offered asylum in Italy. According to the deputy Attorney General, Rahman was released because he had to undergo medical tests in order to establish whether he was suffering from mental problems. It is important to point out that Mr Rahman had not declared his conversion in public, but had confided himself to family members. His father then proceeded to report him to the authorities. Following Karzai's move, hostility against Christian converts in Afghanistan has spread. Karzai was criticised for having circumvented Afghan laws, while street demonstrations took place, demanding Rahman's return to Afghanistan for trial and Afghan MP criticised his released from jail."

11. That passage is substantially footnoted with references to apparently reliable sources. The conclusion of Dr Giustozzi was that the appellant, if he were to be returned, would be "extremely exposed" with no support likely from his own family and a risk of attack by Islamic zealots as well as of prosecution on a capital charge.

12. The immigration judge, justifiably treating AR as not binding but as highly persuasive absent any new evidence, noted the Rahman case but reached this conclusion about it:

> "44. I considered whether there was anything in the subsequent background information or in the expert's report to suggest that I should come to a different view from that arrived at in AR. It

> appeared to me that the main development had been the case of Abdur Rahman which was described as the first known apostasy case. Mr Rahman had been sentenced to death in 2006 which sentence required to be approved by the President. He had failed to do so and my reading of the documentation suggests that the President engaged in some technical 'sleight of hand' to ensure that Mr Rahman was released and is likely to be granted asylum in Italy.
>
> "45. The background information suggests that there was public dissatisfaction at the manner in which this was handled. A Compass Direct report suggests that 2 other Christians have subsequently been arrested elsewhere in the country. The report is unable to give any other detail as to where they were arrested and why they were arrested. There were suggestions of other Christians being harassed but the information in the report was so sketchy as to be of no major assistance to me."

13. This was the subject of the central challenge when the first stage reconsideration came before Senior Immigration Judge Spencer in March 2007. Having considered it he wrote:

> "16… I am not satisfied that the immigration judge made an error of law in taking the view that the objective evidence considered by the tribunal in AR did not show that there was a real risk to Christian converts who proselytised. That being so the remaining issue is whether the additional evidence that was placed before him, which had not been before the tribunal in AR pointed to a different conclusion….Although Ms Ganning [the appellant's counsel] made much of the fact that in AR the tribunal had no evidence of the actual prosecution of Christians for apostasy, whereas in this particular case the immigration judge had the evidence relating to the prosecution of Abdur Rahman, nonetheless I do accept the argument of Ms Graham [the Home Office presenting officer] that the case of Abdur Rahman demonstrated that the authorities in Afghanistan were not prepared to pursue the prosecution of a Christian convert for apostasy. That means in my view that despite the anger that the failure to prosecute aroused among extremists at the date of the decision by the immigration judge there was no evidence of any successful prosecution against a Christian for apostasy or for proselytising. I agree with Ms Graham that the report in Compass

> Direct fails to establish why it was that two other Afghan Christians had been arrested…. In my view the immigration judge did not make an error in law in failing to conclude that on the evidence before him there was a real risk of serious harm to the appellant as a Christian convert or a proselytiser on return to Afghanistan. In these circumstances he did not make a material error of law and his determination of the appeal shall stand."

14. The finding of Senior Immigration Judge Spencer that the Rahman case does not merely, as Immigration Judge Scobbie had found, fail to demonstrate a general risk to Christian converts in Afghanistan but that it affirmatively shows that there is none is, in my judgment not (as Mr Patel gamely submits) a strong but tenable finding. It is, in my respectful view, a wholly untenable one which stands the evidence on its head. On the evidence it was possible at the material time for a Christian convert in Afghanistan to be tried and sentenced to death for apostasy by a Sharia court. It was also possible for him to escape execution if the president was willing to incur the odium of religious extremists and perhaps too if international pressure was brought to bear on him, as had happened in Rahman's case. That is how the evidence then stood, but it was the evidence of a single case.

15. Does this then matter, since it was not how the original immigration judge, whose decision was under scrutiny, had approached the issue? Mr Patel has not sought to argue that it does not matter. He relies on the senior immigration judge's finding as the reason why there was no error of law in the first determination. For the reason I have given I am afraid that this will not avail him, for it is a perverse finding. But the question remains, I think, for this court whether the first immigration judge did in fact err in law. As to this, I consider that his analysis of the evidence, which I have quoted, is too sketchy to pass muster. It does not address the central question whether what had apparently happened to Rahman showed a real risk -- not necessarily a likelihood -- that similar persecution on religious grounds and similar inhuman treatment might await other apostates, especially those who evangelised (an activity to which the immigration judge unfortunately referred more than once as "carrying out" or "engaging in apostasy").

16. What then is this court to do? It seems to me that if the material before the immigration judge admitted only of a conclusion that it established a real risk to the appellant if he were returned, then this appeal has to be allowed outright. If, however, two views were rationally possible, the decision has to be retaken. With, I admit, very considerable hesitation I have concluded that the latter is the case here and that the right course is to remit the appeal for re-determination, as indeed Mr Jones has invited us to do. Whilst Senior Immigration Judge Spencer's error might suggest that the only answer is the opposite, it is the correctness of Immigration Judge Scobbie's decision that we are ultimately concerned with (and, indeed, that Senior Immigration Judge Spencer was concerned with). His error was to give insufficient consideration to the material before him -- an omission which can

and should be corrected without our predetermining it and on up to date material.

17. Mr Patel has honourably accepted that in the absence of any cross-application by the Home Office following the decision of Immigration Judge Scobbie, the Home Office cannot on any such remission reopen the genuineness of the appellant's conversion, nor therefore of the imperative to proselytise. These will have to continue to be assumed in the appellant's favour but, as Mr Jones points out, more water has by now passed under the bridges and an up to date assessment of risk to Christian converts and/or evangelists may be no bad thing.

18. I would accordingly allow this appeal and remit the initial appeal for re-determination by a different immigration judge or judges, pursuant to directions to be given by the President of the AIT. It is not, I think, for this court to say whether the re-determination should have country guidance status. I note that AR did not have that status but I would leave all such directions to the President or, if appropriate, to the tribunal itself.

Lord Justice Hooper:

19. I agree.

Lord Justice Rimer:

20. I also agree.

Order: Application allowed