Case No: C5 2005/2475

Neutral Citation Number: [2006] EWCA Civ 1276
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMM IGRATION APPEAL TRIBUNAL
DESIGNATED IMMIGRATION JUDGE DR R KEKIC and
IMMIGRATION JUDGE MRS R MORRIS
CC/17533/00

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 05 October 2006

Before :

LORD JUSTICE AULD
LORD JUSTICE RIX
and
LORD JUSTICE HOOPER

- -

Between :

GUSTAVO SUAREZ OCAMPO	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

(Transcript of the Handed Down Judgment of
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- -

Mr Declan O'Callaghan (instructed by **Selva & Co**) for the Appellant
Miss Nicola Greaney (instructed by **Treasury Solicitor**) for the Respondent

- -

Judgment
As Approved by the Court

Lord Justice Auld :

Introduction

1. This is an appeal by Gustavo Suarez Ocampo, with the permission of the Asylum and Immigration Tribunal ("AIT"), from its decision on 7th October 2005 refusing his asylum appeal following a "reconsideration" hearing.

2. The issue in the appeal is whether the AIT erred in law in its consideration of the appellant's and his daughter's credibility in their evidence before them in support of his unsuccessful appeal against refusal of asylum, having regard to the acceptance by a Special Adjudicator of the daughter's credibility in her similar evidence to him in her earlier successful appeal against refusal of asylum.

The facts

3. The appellant's and his daughter's case in outline in both appeals is as follows. As a serving police officer in Colombia, he had been involved in the arrest of a senior narco-trafficker, Senor Grajales, who had significant links with the main Colombian guerrilla movement, the Revolutionary Armed Forces of Colombia ("FARC"). FARC had been fighting the Colombian government since the 1960's, and controlled large swathes of the country. He had been designated to guard Senor Grajales and, in consequence, had become a marked man by FARC. Persons connected to FARC had threatened and attacked him, causing him, in May 1997, to flee Colombia and to seek asylum in this country. Following his flight, his daughter had been threatened with death because of her relationship to him, and she too had then fled, seeking asylum here in February 1998.

4. The Secretary of State, in February 2000, refused her application for asylum and leave to enter. She successfully appealed that refusal before a Special Adjudicator, both she and the appellant having given evidence to him in support of her appeal. In his decision, promulgated on 17th September 2000, he found the following account given by them of the threats by FARC to his life giving rise to similar threats to her after his flight, to be credible. In July 1997 she had received telephone calls asking where her father was. On 19th July 1997, the family apartment had been broken into and documents disturbed. The family had moved to another city. On 20th September 1997, she had been subjected to a violent assault by men who had wanted to know where the appellant was. She had received a letter with a coffin drawn on it. In November and December 1997, she had received telephone calls and requests about the whereabouts of the appellant. The family home had again been attacked and, this time, vandalised. The word "FARC" had been sprayed on the walls. In January 1998, she had received a telephone call that she was to be killed as their chief was in prison. She had then fled Colombia.

5. The Secretary of State did not appeal the Adjudicator's asylum decision in favour of the appellant's daughter. And, by a decision letter of 29th November 2000, granted her refugee status, with its attendant international rights. In 2003 she was granted British citizenship.

6. In the meantime, the Secretary of State, in July 2000, had also refused to grant the appellant leave to enter or to grant him asylum. In September 2005, after a long and tangled procedural history, the matter reached the AIT by way of a reconsideration.

7. It is plain from the story thus far, that the accounts of the appellant and his daughter in their respective applications for asylum and in the evidence each gave in support of the other's appeal were mutually supportive, both depending essentially upon the truth of the appellant's account of having had to flee Colombia for fear of what FARC would do to him if he remained there.

8. At the hearing of the appellant's appeal before the AIT in September 2005 the Secretary of State specifically sought to undermine his credibility by adducing a copy of a record of an interview of him on 10th May 1997 in the course of his own application for asylum, a record demonstrating material inconsistencies with the account he had later given in support of his daughter's successful appeal in 2000. The Secretary of State maintained that it was "new and compelling" evidence that could not have been placed before the Adjudicator in her appeal.

9. The appellant, on the other hand, sought to rely upon the grant of refugee status to his daughter and the findings of the Adjudicator as to her credibility in her successful appeal. He maintained that those findings bound the AIT in his appeal unless the Secretary of State could show that they were fraudulently obtained. However, he did not suggest that the Adjudicator's findings as to *his* credibility in his daughter's appeal were similarly binding on the AIT.

The AIT's determination

10. The AIT dismissed the appellant's appeal on asylum grounds. In doing so, they rejected the plea of res judicata or issue estoppel advanced by the appellant in respect of his daughter's evidence in her appeal. In dismissing his appeal they stated that they were not bound by the findings and outcome in her appeal, even though her claim had relied heavily on the evidence of the appellant. Their role, they stated, was to consider the matter on the material before them, including the Adjudicator's findings in the daughter's appeal and the appellant's previous inconsistent account recorded in his May 1997 interview. Their stated approach was that they should only depart from that Adjudicator's findings on the basis of "new and compelling evidence" not before him – very close to a *Ladd v Marshall* approach. They regarded the May 1997 interview record of the appellant as "new" in the sense that it arose in the course of *his* application for asylum, and, as they considered, could not properly have been put before the Adjudicator in his daughter's later appeal. And they considered it "compelling" in the inconsistencies that it demonstrated between the account he had given in interview in support of his own application for asylum and that which he gave in his daughter's and his appeals. They also found material inconsistencies in the daughter's evidence to them.

11. In adopting that approach, the AIT had the benefit of guidance given by the Immigration Appeal Tribunal in *Devaseelan v SSHD* [2003] Imm AR 1, to adjudicators hearing "second appeals" concerning the same applicant raising the same or similar issues. The guidance included, in paragraph 39 (1) and (4) of the Tribunal's determination, how a "second" adjudicator should approach evidence as to matters that could have been, but were not, before the "first" adjudicator:

> "(1) The first adjudicator's determination should *always* be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. …"
>
> "(4). "Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection. An appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of credibility. … It must also be borne in mind that the first adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first adjudicator."

12. The AIT appeared to have some reservation as to the applicability of that guidance to the circumstances of this case, because it was not a second appeal by the same applicant. Nevertheless, they approached their decision very much along *Devaseelan* lines, setting themselves, as I have indicated, a relatively rigorous test for departing, to the extent that they did, from the acceptance by the Adjudicator in the daughter's appeal of her evidence and that of the appellant in her support. This is how, in paragraphs 35 and 36 of their determination, they dealt with the appellant's case:

> "35. We find that this principle [Res Judicata] does not apply to the appellant's case. It cannot be argued that, because his daughter's appeal was successful (even though it relied on her father's alleged problems), the findings in that appeal must be accepted by us in our consideration of the appellant's appeal. …
>
> 36. We find that the Adjudicator's determination is one piece of the evidence before us which must be assessed along with the rest of the evidence, oral and documentary evidence. We find that had the appellant's appeal already been heard and determined, and had this been a further appeal, perhaps on human rights, our starting point would have been that determination as per *Devaseelan* 2002 UKIAT00702. However the determination of the Adjudicator placed before us, and relied upon by the appellant, *relates to his daughter and not to him.* We accept that her claim has relied heavily upon the appellant's and we also note that he was called as a witness at her hearing and that both he and his daughter were found to be credible by the Adjudicator. We do not accept, however, that that decision binds us in any way. Our duty is to make our own assessment of the evidence before us, to assess the evidence of both the appellant and his daughter and to consider their evidence in the context of the objective situation in

> Colombia. It is also a fact of course that the Adjudicator who allowed Maria's appeal *did not have before him all the evidence that we did*."

13. As to the "newness" of the evidence, the AIT stated at paragraph 37 of their determination:

> "37. … We are prepared to accept … that new and compelling evidence is required before an Adjudicator's findings can be 'set aside'. We find that there is new evidence before us and by this we mean evidence that was not before the previous Adjudicator. … We have had the opportunity to consider the appellant's interview record, second witness statement, documents adduced in support of his claim relating to the alleged injuries sustained, and oral evidence. None of this was before the previous Adjudicator and we therefore find that it is new evidence and that we are entitled to consider it in reaching our decision. … We also find that it would have been most inappropriate for the Secretary of State to have adduced the appellant's interview record as evidence in his daughter's appeal as suggested by Mr O'Callaghan. Asylum applications are made in confidence and the interviews conducted with applicants are confidential to that particular application. It would have been a breach of confidentiality for the Secretary of State to have used evidence adduced by one asylum seeker in a case of another unless he had permission do so. Should the representatives have wanted the appellant's interview record to form part of the evidence in Maria's appeal it would have been for them to submit it, not for the Secretary of State".

14. As to the compelling nature of the evidence, the AIT, after identifying and reviewing in great detail, in paragraphs 41 to 53 of their determination, a host of inconsistencies in the appellant's two accounts and when considered against the objective and other evidence including that of his daughter, summarised their conclusion at paragraphs 54 to 56 as follows:

> "54. We find that the inconsistencies … are compelling and as such as find that there is both new and compelling evidence before us. We find that we are able to make our own assessment of all the evidence before us, most of which was not before the other Adjudicator, without being bound in any way by his findings.
>
> 55. We note that the two main incidents which the Adjudicator relied upon to allow Maria's appeal were the very incidents no longer relied upon by the appellant for his appeal. We also note that although the evidence to that Adjudicator was that following the appellant's resignation from the police force "*a number of further incidents occurred …*", we have been given details of only one in April 1997. We note that the appellant and his daughter gave oral evidence on different dates and that

> no reasons are given as to why Mr Ocampo was found to be credible. …
>
> 56. Having considered all the oral and documentary evidence as a whole and having placed it in the context of the country information, we find neither the appellant nor his daughter to be credible witnesses. Whilst we accept that the appellant was a policeman and that as such he may well have had some problems, we find that he has embellished these for the purposes of his asylum application. We find there are serious difficulties with his evidence, as will be apparent from the problems detailed above, and we also find that there are difficulties with the evidence given by his daughter. The documents he adduced, which are photocopies only, have not assisted his claim and indeed have contradicted parts of it. Having considered them as part of the whole, we do not find them to be reliable. …"

The submissions

15. Mr Declan O'Callaghan, on behalf of the appellant, has sought to rely upon *res judicata* and cognate principles in respect of the daughter's refugee status as a result of the Adjudicator's acceptance of her evidence and, in consequence, allowance of her appeal. His argument ran thus. The holder of the status, by definition, possesses a well-founded fear of persecution and requires international protection as from the date of decision. The holder – here the appellant's daughter – must be treated as having been truthful with regard to such fear. Her asylum appeal was considered by an appropriate tribunal, which gave a final, judicial determination. The Adjudicator, in reaching that determination, found her to be a credible witness. His unappealed decision is a decision in *rem*, and, therefore, unless impeached in an appropriate court and not obtained by fraud or collusion, is conclusive evidence for or against all persons, whether parties, privies or strangers to the matters actually decided.

16. It followed from those propositions, Mr O'Callaghan submitted: 1) that the Adjudicator's determination of the appellant's daughter's appeal in 2000 is conclusive evidence of the fact that she had been persecuted by the FARC guerrillas searching for her father and that they had threatened to kill her; and 2) given the inextricable binding up of the daughter's and the appellant's respective claims for asylum, the Secretary of State has sought to undermine his grant of refugee status to her consequent on the findings of the Adjudicator by challenging her credibility in the appellant's appeal to the AIT.

17. As to the Secretary of State's reliance, in particular, on the record of the appellant's interview on his own application for asylum in May 1997 as "new and compelling" evidence which was not available to the Adjudicator in 2000, Mr O'Callaghan maintained that it was an abuse of process. It amounted, he said, to a collateral attack on the Adjudicator's decision and the consequent grant of refugee status to the daughter. He submitted that the Secretary of State should be estopped from mounting such a collateral challenge, in the absence of proof of fraud by her on fresh evidence discoverable with reasonable diligence at the time of her appeal, relying upon the

decision of the House of Lords in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, in particular Lord Bridge's identification, at 483E-G, of the common law rule that:

> "the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered."

18. Mr O'Callaghan also referred the Court to a determination of the Immigration Appeal Tribunal in *TK (Consideration of Prior Determination – Directions) Georgia* [2004] UKIAT 00149, not directly considering Lord Bridge's formulation, but which, he maintained, was consistent with it. In that case, which concerned an appeal by a woman against refusal of asylum where there had been a previous unsuccessful appeal by her husband on much the same evidence, the Tribunal stated at paragraph 19 of the determination:

> "… Unless some very good reason was advanced to the contrary for example, compelling new evidence to show that X's evidence (which originally had been disbelieved) was mistakenly appraised by the original Adjudicator, a future Adjudicator is, in the Tribunal's view, not merely entitled to read the Determination in X's case but also to treat it as determinative as to X's account."

19. In the light of those authorities, Mr O'Callaghan submitted that the Secretary of State could not go behind the daughter's evidence in her appeal when considering her evidence and that of the appellant in his appeal unless there was "new", as well as compelling evidence. He maintained that the AIT wrongly found that the May 1997 interview record of the appellant was "new" evidence merely because it had not been placed before the Adjudicator in the daughter's appeal. The test as to whether the evidence is "new", he said, is whether the Secretary of State could not, with reasonable diligence, have made it available to the Adjudicator before he delivered his decision in the daughter's appeal. He maintained that there had been a failure of reasonable diligence here, especially having regard to the following circumstances. First, the Adjudicator, before considering the daughter's appeal, had granted the Secretary of State's representative a month's adjournment to enable him to prepare himself for cross-examination of the appellant, thus giving the Secretary of State an opportunity to identify all the material in his possession relevant to that task. Secondly, there was no rule of law requiring the Secretary of State to treat the interview record of the appellant as confidential to his application and thus unusable in the daughter's appeal.

20. Mr O'Callaghan maintained, therefore, that the AIT should have proceeded on the basis that the daughter was credible with regard to the events she claimed to have experienced after the father had left Colombia, namely that she had been put in fear of her life by supporters of FARC seeking to find her father.

21. Miss Nicola Greaney, on behalf of the Secretary of State, relied on the reasoning of the AIT in dismissing the appellant's appeal, but, as a preliminary point, relied on

their unappealed contingent finding that, even if the appellant had had a well-founded fear of persecution in Colombia, there was no reasonable likelihood of persecution if he was returned, and, in any event, there was a reasonable likelihood of sufficiency of protection for him there.

22. With regard to the appellant's reliance upon *res judicata* and cognate principles, Miss Greaney made three free-standing submissions:

    i) if such principles applied to public law claims, there was flexibility in their application in that they could be departed from where the interests of justice required, and that justice required it in this case.

    ii) section 96 of the Nationality, Immigration and Asylum Act 2002, which does not govern the appeal, specifically providing for and prescribing the extent to which there could be re-litigation in asylum and human rights appeals, by analogy arguably supported an inference that Parliament did not intend principles of *res judicata* or *issue estoppel* to apply to appeals in this context; and

    iii) the AIT's approach was consistent with the *Devaseelam* guidelines, which have been approved by this Court in *Djebbar v SSHD* [2004] EWCA 804, [2004] INLR 466, at paras 30, 31 and 40, as sensible, practical guidance, not incorporating any principle of *res judicata* or *issue estoppel*, and providing suitable flexibility of approach to ensure consistency of approach while doing justice in each individual case.

23. Under any of those approaches, Miss Greaney submitted, the AIT did not err in holding that it was not bound by the Adjudicator's finding of credibility of the appellant's daughter in her appeal, and was free to consider her credibility along with that of her father on his appeal in the light of new and compelling evidence indicating the contrary.

Conclusions

24. In my view, it is at the very least doubtful whether the principles of *res judicata* or *issue estoppel* have any application, certainly in their full rigour, to appeals before immigration tribunals, any more than they do to successive claims for judicial review; see e.g. *R v Secretary of State for the Environment, ex p Hackney LBC* [1984] 1 WLR 592; and *R(Munjaz)Mersey Care NHS Trust & Ors* [2003] 3 WLR 1507, CA, per Hale LJ, as she then was, giving the judgment of the Court at paras 78 and 79, while allowing for the possibility in appropriate circumstances of abuse of process as a means of preventing the re-opening of a matter. And the recent approach of the Court of Appeal in *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] INLR 268, was to treat *Ladd v Marshall* principles as starting points, with a discretion to depart from them in exceptional circumstances; see per Carnwath LJ, giving the judgment of the Court at para 82. The *Devaseelan guidelines,* in their application to fact finding by successive immigration tribunals, represent much the same approach, as Judge LJ, as he then was, giving the judgment of the Court in *Djebbar,* indicated in approving the *Devaseelan* guidelines:

> "28. … The second application is a fresh application, requiring proper consideration on such merits as it may enjoy, approaching the issues contemporaneously. Although it is indeed a 'fresh' application, a second or subsequent application is not and is not deemed to be a first application, and it is not properly to be treated as if it were. Re-litigation of issues which have already been resolved is contrary to the public interest, and nothing in the process suggests that the first application should or must automatically be treated as irrelevant to second applications arising in cases like those with which we are presently concerned. If the first application may be relevant, then the extent of its possible relevance and the proper approach to it should be addressed as a matter of principle. That is what the [Devaseelan] guidance purported to provide.".

25. In my view, the *Deevaseelan guidelines* are as relevant to cases like the present where the parties involved are not the same but there is a material overlap of evidence, as the Immigration Appeal Tribunal observed in *TK Georgia*, at paragraph 21 of their determination. Clearly, the guidance may need adaptation according to the nature of the new evidence, the circumstances in which it was given or not given in the earlier proceeding and its materiality to securing a just outcome in the second appeal along with consistency in the maintenance of firm immigration control. It should also be borne in mind, as Hooper LJ pointed out in the course of counsel's submissions, that admission of new evidence may, as a matter of fairness, operate for, as well as against, a claimant for asylum. In immigration matters, as in other areas of public law affecting individuals, public policy interests of firmness, consistency and due process may have to be tempered with considerations of fairness in particular circumstances.

26. Accordingly, in my view, the AIT rightly rejected any application in the circumstances of this case of the strict principles of *res judicata* or *issue estoppel* and, with them, the contention that they could only take account of, and rely upon, the new evidence if the dishonesty of the appellant had not been previously establishable. Equally untenable, in my view, was Mr O'Callaghan's recourse, in his submissions to this Court to the suggestions: 1) that the AIT, in acting as it did, in some way interfered with the daughter's status as a refugee acquired as a result of the Adjudicator's finding in her favour; and/or 2) that that finding was a judgment *in rem* so as to render by implication his acceptance of her evidence, and effectively that of the appellant in the same proceeding, as conclusive of its effect against all persons including the Secretary of State in the appellant's appeal. The daughter's status as a refugee is not affected by any finding in reliance on new and cogent evidence that the appellant lyingly supported her in her successful appeal against refusal of asylum. To the extent that it may reflect on the credibility of her evidence in her appeal and in the appellant's appeal, it has no effect at all on her status as a refugee. And, as I have said and Mr O'Callaghan has acknowledged, any finding of the Adjudicator in the daughter's appeal in reliance upon the appellant's evidence, cannot, as a matter of *res judicata* or *issue estoppel* or, under the principles of *Ladd v Marshall*, be binding against him.

27. So, what is left, save to judge the matter as one of fairness and maintenance of proper immigration control, along the lines of *Devaseelan*? Mr O'Callaghan did not pray in aid fairness or justice as a reason for disregarding the new evidence. He cannot and does not challenge the AIT's finding that the appellant lied in his account of what caused him to seek asylum here. His acceptance that, if the appellant cannot succeed on his *res judicata/status* arguments, he cannot overcome the materiality of the inconsistencies thrown up by the new evidence, is an inescapable acknowledgement that justice or fairness would not be served by allowing this appeal.

28. The same goes for Mr O'Callaghan's challenge to the "newness" of the evidence on the basis - which may be technically correct - that it does not meet the *Ladd v Marshall* requirement that it could not, with reasonable diligence, have been put before the Adjudicator in the daughter's appeal. However, I should not leave that aspect without expressing reservations about the AIT's resort to confidentiality of the appellant's interview record as a reason for it not being available to the Adjudicator in the daughter's appeal. If he gave an account in support of his own application which, if the Secretary of State's representatives had been alert to it at the time, would have been material to his credibility as a witness in her appeal, I do not see why it could not have been put to him when giving evidence on his daughter's appeal arising essentially and substantially out of the same claimed facts. However, it was not put to him then, and it is plain that if it had been, it would have damaged rather than assisted his daughter's case as well as his credibility on his own part of the story in her support.

29. In the circumstances, it is my view that, as a matter of common-sense and fairness, the AIT rightly took into account what Mr O'Callaghan has acknowledged to be material inconsistencies in the appellant's two accounts, the second of which was not before the Adjudicator in his daughter's appeal and which logically, legally and fairly affects the final outcome of his appeal. Reliance by the Secretary of State on the new evidence is not a collateral attack on her refugee status or otherwise an abuse of process. It also follows, in my view, that the AIT did not, in the circumstances, need to go as far as they did in the *Ladd v Marshall* direction to justify their reception of the "new" compelling evidence. They had sufficient flexibility of the *Devaseelan* kind to take the decision it did regardless of that consideration. Such an approach, as Miss Greaney submitted, has proper regard for the public interest, as well as that of individual applicants for asylum, in giving effect to a consistent and fair immigration policy of according, so far as possible, such status only to those who satisfy the criteria for it.

30. I should add, for the record, that I have considered, but not found helpful on the facts of this case, the unreported decision of this Court in *R(Otshudi) v SSHD* [2004] EWCA Civ 893.

31. In the circumstances, it is not necessary for me to deal with Miss Greaney's "preliminary point" as to risk of persecution and/or sufficiency of protection in the event of the appellant's return to Colombia, upon which the Tribunal would have found for the Secretary of State if it had found for him on the main issue. In any event, the appellant has not sought permission to appeal against those contingent findings.

32. Accordingly, I would dismiss the appeal.

Lord Justice Rix:

33. I agree.

Lord Justice Hooper:

34. I also agree.