

C4/2003/2125

Neutral Citation Number: [2004] EWCA Civ 106  
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

Thursday, 29 January 2004

B E F O R E:

LORD JUSTICE KENNEDY

LORD JUSTICE CLARKE

LORD JUSTICE JACOB

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SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant/Respondent

-v-

AKRAM DAVOODIPANAH

Respondent/Appellant

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(Computer-Aided Transcript of the Stenograph Notes of  
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MR RAZA HUSAIN (instructed by The Rights Partnership, Birmingham) appeared on behalf of  
the Appellant

MR GERALD CLARKE (instructed by Treasury Solicitor) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE KENNEDY: This is an asylum-seeker's appeal from the decision of the Immigration Appeal Tribunal which, on 25 July 2003, allowed an appeal by the Secretary of State against the determination of an adjudicator. The issue at stake is the extent and effect of concessions alleged to have been made by the Home Office Presenting Officer before the adjudicator.

#### Background

2. The appellant is a native of Iran, born on 26 January 1967, now 37 years of age. She grew up in Tehran and qualified as a nurse, working at the Al-Ghadir Hospital, Tehran. On 15 August 1995 she married Mojtaba Boozary, an accountant. There were no children, and it is the appellant's case that she has been unfaithful, having more than once had extra-marital relationships.
3. One such relationship was with Reza Mortezaei. On 18 November 2001 she met him by arrangement in a rest room at the hospital during her shift. By then her husband was suspicious. He tried to contact her, went to the hospital, was directed to the rest room, but could not get in because the door was locked. She escaped out of the window and went to a friend's house where she hid. With the aid of another friend she went on the following day, 19 November 2001, to Tabriz near the border, and raised some money there by selling her watch and her jewellery.
4. On 22 November 2001 she left Tabriz by lorry and arrived in the United Kingdom on 4 December 2001. She then claimed asylum. However she failed to return her statement of evidence form within 10 days, so on 4 January 2002 her application was refused. Had she not fled she would, she contends, have been arrested for adultery, the penalty for which is death by stoning.
5. On 29 January 2001 her solicitors gave notice of an appeal to the adjudicator. The matter then came before an adjudicator at Birmingham in October 2002. She contended that removal to Iran would be in breach of the Refugee Convention and in breach of her rights under the European Convention on Human Rights.
6. The appellant gave evidence before the adjudicator and called one witness. The adjudicator also considered written material placed before her, including material relating to conditions in Iran. Before she gave evidence the appellant had made two written statements. At paragraphs 17 and 18 of her determination, when dealing with the respondent's case, the adjudicator said:

"17 Having now had the benefit of seeing the appellant's statements, filed within the appeal proceedings, the respondent concedes that if the appellant succeeds in persuading me that her account is accurate, she would be a refugee within the definition contained in section 1 (A)(2) of the Refugee Convention, as she would come under the umbrella of a social group. It is also conceded that should she be convicted of adultery, the punishment could be stoning to death, and this is supported by objective evidence.

18 The issue for the respondent is credibility. The respondent does not believe that the appellant is credible."

7. The adjudicator then set out the evidence given at the hearing before turning to the submission made by Miss Mepsted, the Home Office Presenting Officer on behalf of the respondent. At paragraph 28 the adjudicator said:

"It was submitted on behalf of the respondent that the sole issue was that of credibility. It was accepted that the appellant was a member of a social group within the Refugee Convention, and that the penalty for adultery could be stoning to death. Essentially, did I believe the account given by the appellant?"

The Presenting Officer's submissions in relation to credibility were then summarised. At paragraph 32 the adjudicator turned to the submissions made by Mr Henry Davies, counsel for the appellant. That paragraph reads:

"It was submitted that if I found the appellant to be credible then the claim should succeed both under Article 1 (A)(2) of the Refugee Convention, and also under the ECHR. As the issue was solely in relation to credibility, my attention was drawn to the line of authorities helpfully summarised in Macdonald's Immigration Law and Practice (Fifth Edition)."

8. The adjudicator went on to compare the accounts given by the appellant as to her time in Iran and her journey to the United Kingdom. Allowing for inconsistencies, she found that the appellant had committed adultery with possibly one or two persons, that her husband was suspicious and that as a consequence she left Iran clandestinely and in a hurry.
9. The respondent had conceded that the appellant, as an Iranian adulteress, did come within the definition of a social group contained in Section 1 (A)(2) of the Refugee Convention. The objective evidence led the adjudicator to conclude that the appellant's evidence would not be fairly assessed in Iran, and further that as an adulterous wife she could be deprived of her life by stoning. The appeal was therefore allowed, both under the Refugee Convention and under the European Convention on Human Rights.

#### Grounds of Appeal to IAT

10. On 15 November 2002 the Secretary of State sought leave to appeal to the Immigration Appeal Tribunal on three grounds:
  - (1) That the appellant was not a member of a social group. Adulteresses, it was said, cannot be said to constitute a social group sharing an "immutable" characteristic, and the social group argued for does not exist independent of the persecution feared.
  - (2) Even if the social group did exist there is no serious possibility of persecution because in order to be found guilty of adultery under the Islamic Penal Code the adultery must be witnessed by at least three others before there can be death by stoning. In this case there were no witnesses.
  - (3) Given the high threshold for Article 3 claims - that is to say those alleging torture or inhuman and degrading treatment - set by Bensaid v United Kingdom [2001] 33 EHRR 205, the evidence available did not demonstrate a risk of such treatment.
11. When considering whether to grant leave to appeal the Immigration Appeal Tribunal noted that the Home Office Presenting Officer who drafted the grounds of appeal had apparently conceded before the adjudicator that the appellant was a member of a social group, and considered that in relation to that issue the adjudicator was entitled to find as she did. However ground (2) was considered to be arguable and it was said that the tribunal may also want to consider whether the lack of any finding concerning risk on return at the hands of the husband was a material factor.

#### Before the IAT

12. The case was heard before the Immigration Appeal Tribunal on 18 March 2003 and the decision was given on 25 July 2003. The advocates were not those who had appeared before the special adjudicator. Mr Jones appeared as the Home Office Presenting Officer and Mr Bedford of counsel appeared on behalf of the present appellant. The first ground of appeal was not pursued on the basis that Mr Jones could not go behind the concession made below even if he thought it erroneous, a view which the Immigration Appeal Tribunal apparently shared. The other two grounds of appeal were pursued, and the point raised by the Immigration Appeal Tribunal itself, namely the lack of any finding as to risk at the hands of the husband, was also addressed.
13. The Immigration Appeal Tribunal held that there was a two-fold basis to the claim - risk at the hands of the authorities and at the hands of her husband. The decision in relation to the Refugee Convention was not limited to risk from the authorities, but the conclusion on the human rights grounds did only refer to the risk of death by stoning.
14. The tribunal went on to hold that the adjudicator was not entitled to find that the present appellant was at risk at the hands of her husband. The authorities could not produce the required number of witnesses as to her adultery, and her husband had not made any complaint or sought to lodge any charges against her; nor was he said to have made any threats. The tribunal therefore concluded that the adjudicator would not be entitled to find that the present appellant would be at risk were she to return.
15. The grounds of appeal to this court were drafted by Mr Raza Husain who has appeared before us. He drafted those grounds in September 2003; they are two:
  - (1) that the Immigration Appeal Tribunal erred in re-visiting the question of whether, if the appellant's historical account was substantially true, she faced a real risk of ill-treatment contrary to the Refugee Convention or contrary to Article 3 of the European Convention on Human Rights because risk assessment had been conceded before the adjudicator.
  - (2) It is alleged that there was no sufficient basis in the background material for the tribunal to reverse the adjudicator's evaluation of risk.

#### Further Evidence

16. After the grounds of appeal had been filed the appellant made a further statement on 28 October 2003 in which she dealt with the potential risk from her husband, namely that he would inform the authorities, and she said a friend at the hospital had told her by telephone that her husband continued to show an interest in her whereabouts. She also pointed out that if her husband had not reported her adultery the hospital would have done so.
17. Mr Davies, who had appeared for the appellant before the adjudicator, made a statement on 23 December 2003 asserting that the adjudicator's determination accurately reflected the concessions made by the Presenting Officer, at any rate, as he understood them. He said:

"There was a clear and common understanding between all the parties that the Home Office Presenting Officer expressly conceded that, if the adjudicator was satisfied as to the appellant's credibility, then there would be a well-founded fear of persecution for a Convention reason. This is clearly set out at paragraph 17 of the adjudicator's determination."

#### Presenting Officer's statement

18. On 20 January 2004 the Home Office Presenting Officer Miss Mepsted made a statement exhibiting her notes which she said showed that she had conceded that the appellant was a member of a social group but not that she was of interest to the authorities or that her husband would cause trouble for her if she were to return. Miss Mepsted, it is fair to say, had no clear recollection of the hearing itself.
19. The adjudicator's own notes have also been placed before us. They add nothing of substance to her determination.

### Conclusion

20. With the assistance of counsel we have examined the documentation before us, and I have come to the conclusion that before the adjudicator it was conceded not only that the appellant was a member of a social group, but also that if her account of her life in Iran and the circumstances in which she left were to be accepted then there would be no need for her to prove that she would be at risk for a Convention reason if she were to be returned. I reach that conclusion for a number of reasons:
  - (1) It seems to me that the whole content and structure of the adjudicator's determination compels one to that conclusion, when setting out the respondent's case and in setting out the appellant's case in the passages cited above, and in the way in which she deals with the material before her. It is of course possible for an adjudicator to overlook a relevant issue, and the evidence relating to it, but this is a careful decision prepared within 10 days of the hearing and promulgated a week later. As Mr Gerald Clarke for the Secretary of State has pointed out before us, the adjudicator does make some reference to the objective evidence in paragraph 41 onwards, but only as a prelude to paragraph 44 in which she, in effect, as Mr Husain submits, expresses her approval of the concessions she understood to have been made.
  - (2) Mr Clarke also invited our attention to the notes prepared by Miss Mepsted, the Presenting Officer before the adjudicator. Those notes include submissions as to risk, but it seems clear that they were prepared, as Mr Husain submits, before the hearing and before any concessions had been made.
  - (3) The recollection of Mr Davies accords with what seems to me to have been the understanding of the adjudicator as to the extent of the Presenting Officer's concessions, even though allowance must be made for the fact that in December 2003 he was recalling a hearing 14 months earlier.
21. Surprisingly the issue I have just considered was never really ventilated before the Immigration Appeal Tribunal. There, the hearing proceeded upon the basis put forward on behalf of the Secretary of State, namely that the only relevant concession was as to the appellant's membership of a social group. So the Immigration Appeal Tribunal never had to rule as to whether there had been a concession as to risk, and, if so, as to whether they should allow that concession to be withdrawn.
22. It is clear from the authorities that where a concession has been made before an adjudicator by either party the Immigration Appeal Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course. (See, for example, Ivanauskieine v Secretary of State for the Home Department 2001 EWCA.Civ 1271, and Carrabuk v Secretary of State for the Home Department, a decision of the Immigration Appeal Tribunal presided over by Mr Justice Collins on 18 May 2000. Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a

concession can be refused. What the tribunal must do is to try to obtain a fair and just result. In the absence of prejudice, if a Presenting Officer has made a concession which appears in retrospect to be a concession which he or she should not have made, then probably justice will require that the Secretary of State be allowed to withdraw that concession before the Immigration Appeal Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits.

23. That leads me to the question of what should now be done in this case. In my judgment the appeal should be allowed and the case should be remitted to the Immigration Appeal Tribunal to consider whether to allow the Secretary of State to withdraw the concession as to risk made before the adjudicator. For the avoidance of doubt, I make it clear that there can be no application to withdraw the concession that the appellant was a member of a social group or the adjudicator's findings of fact as to what happened in Iran - that is accepted by Mr Clarke before us having taken specific instructions on the point.
24. If the Immigration Appeal Tribunal decides to permit the withdrawal of the risk concession, I envisage that it will then decide to deal itself with that issue, giving both sides a proper opportunity to deploy evidence and make submissions in relation to it. The result does not seem to me to be a forgone conclusion and I say no more about it, save to point out that the appellant's latest witness statement is an indication that there are apparently some material matters in relation to that issue which were not before the adjudicator.
25. LORD JUSTICE CLARKE: I agree.
26. LORD JUSTICE JACOB: I agree.

Order: Appeal allowed with the costs subject to detailed assessment.