Case No: C5/2007/2566(Y)

Neutral Citation Number: [2008] EWCA Civ 687
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. HX/01016/2004]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 22nd May 2008

Before:

LORD JUSTICE RICHARDS
LORD JUSTICE STANLEY BURNTON
and
SIR PAUL KENNEDY

- -

Between:

RA (LEBANON)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr C Williams (instructed by Messrs Wilson & Co) appeared on behalf of the **Appellant**.

Mr R Keller (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Sir Paul Kennedy:

1. This is an application for permission to appeal from a decision of the Immigration Appeal Tribunal on a ground which did not commend itself to the Asylum and Immigration Tribunal on 5 May 2005, when it gave permission to appeal. Subsequently, on 5 February 2008, the parties signed a consent order, and the first contention made on behalf of the Secretary of State is that we are in no position today to deal with this renewed application for permission to appeal because of the consent order.

2. However, if there is no merit in the ground of appeal in respect of which permission is sought, it is unnecessary at this stage to go into the detail in relation to the consent order. So it seems appropriate to consider first whether the ground of appeal which the appellant now wants to pursue has any real prospect of success.

3. The appellant is a native of Lebanon, now aged 40, who was said to have reached the United Kingdom in August 1999. He then claimed asylum and his application was refused. He appealed and the appeal came before an adjudicator in March 2004, when the Secretary of State was not represented. The appellant sought relief both under the Geneva Convention and under the European Convention on Human Rights. He said that he was Palestinian, having been born in Syria and having lived in camps in Jordan and the Lebanon. He said he had suffered intermittent ill-treatment from one faction then from another, until finally, when threatened with death, he managed to leave and make his way to the United Kingdom.

4. As a member of FATA he had been captured and interrogated for two months by Hizbollah in Southern Lebanon. In 1993 he and his father had been captured again and held for six months, during which time he was tortured because he was a supporter of Arafat. His torturing did not lead to injury. His mother was killed by the Israelis; his father died in 1997 and he had no family left in Syria or the Lebanon. The only protection offered by fellow supporters of Arafat was advice to move and not to leave the camp at night, but he feared the Hamas group and had no prospect of state protection. The adjudicator found the appellant's account to be largely credible, but recognised that much of his account related to quite a long time ago, and in paragraph 11.1 he said:

> "I do not consider, bearing in mind the troubles which were afflicting the Palestinians in general, that the appellant's story puts him in a category of one who was persecuted in particular. I do consider, however, that there is a problem about his return to the Lebanon where, whatever his involvement in the politics of Arafat, he will be scrutinised. It is unlikely that the Lebanese would welcome him and if he did return he would be likely to be handed over to the Syrians as an Arafat follower."

Nevertheless, the adjudicator concluded that the appellant would not be of interest to the Lebanese authorities. In paragraph 14 he said:

> "The Appellant claims that he fears persecution by the state. I agree that the Lebanese do not treat Palestinians properly and in a humanitarian fashion, but there is nothing in the appellant's evidence to suggest that the Lebanese themselves actively pursued him or that he had committed offences during the Civil War which the Lebanese would punish, there being no amnesty for Palestinians. I therefore do not believe that he would be of interest to the Lebanese authorities"

And in paragraph 15 the adjudicator went on:

> "The Appellant also claims persecution by individuals within the State, namely Hamas and Hizbollah. I do not find that the incidents of violence shown towards him were exceptional (torture but no injury) and the fact that he was released would indicate that he was of little interest to men renowned for their violence and lack of mercy."

At paragraphs 16 and 17 the adjudicator concluded thus:

> "I find, on the fact of this appeal, that the ill-treatment by individuals feared by the Appellant is not of sufficient severity as to cross the threshold of persecution. Therefore such ill-treatment by individuals cannot constitute persecution for the purposes of the 1951 Convention.
>
> Given these conclusions, I find that the Appellant has not discharged the burden of proof of having a well-founded fear of persecution for a Convention reason. I come to the conclusion that the Appellant's removal would not cause the United Kingdom to be in breach of its obligations under the 1951 Convention."

The adjudicator then turned to the European Convention on Human Rights and in particular Article 3, and considered the appellant's possible fate on return. At paragraph 19 he said this:

> "It has become usual to say that if persecution at the high standard required has not been proved under the Asylum Convention that it would not be usual to

> grant an appeal under Article 3 since they stand and fall together. In the unusual circumstances of a Palestinian who has suffered, albeit only a shade above the usual discrimination and persecution of all Palestinians in refugee camps and will be returned, not to his own country, but to a country where no welcome exists, I should take a broader view of this appeal under Article 3. I have accepted that the Appellant has been a fighter and follower of Arafat in the Lebanese situation and a person whom the rivals of Arafat would be glad to see out of the way. If he were to be returned to the Lebanon he would either be handed over to the Syrians to an uncertain fate or sent back to the Refugee camp where he would have no protection against the rival factions. I find therefore that if the Appellant is now returned to his country of nationality, there is a real risk he will suffer a breach of his protected rights under Article 3."

Articles 8 and 15 were also relied upon but the adjudicator did not find in the appellant's favour in relation to either of those articles.

5. The Secretary of State appealed on the basis that the adjudicator misunderstood the law in relation to Article 3, submitting that the true test is whether there is real risk or serious possibility of the appellant being exposed to cruel, inhuman or degrading treatment on return. Furthermore, the finding as to what would happen on return was, the Secretary of State submitted, speculative and did not take into consideration the evidence that the Ein el-Hillweh camp is under the control of FATA. Permission to appeal was granted and the appeal was heard by the Immigration Appeal Tribunal on 21 October 2004 when the Secretary of State was represented. For the appellant it was contended that paragraph 19 of the adjudicator's reasons did not disclose any error of law, but the Immigration Appeal Tribunal accepted the argument of the Secretary of State, saying at paragraph 9 of its determination:

> "The authorities on the matter, and in particular the comments in Bensaid ECHR, 44599/98, quoted in the grounds of appeal of the Secretary of State, indicate that there is a need to set a high threshold for Article 3 claims, particularly where the infliction of harm apprehended by the claimant is the responsibility of the Receiving State. In this context, we are of the view that the criticisms made by the Secretary of State of the Determination, are well founded, and that the adjudicator has not, as he expressly states in paragraph 19, applied the correct test and high standard of proof. We therefore agree that the determination is unsafe in this respect".

6. The tribunal then considered whether to deal with the matter itself or remit it for a further hearing. It decided against remission, but its reasons for deciding against relief, pursuant to Article 3, were sparse.

7. The appellant then put forward three grounds of appeal, which were as follows. 1) The tribunal has erred in not accepting that the appellant had suffered, if only a shade above, the usual discrimination and persecution of all Palestinians in the refugee camps as sufficient to satisfy the high threshold for Article 3 claims. It is submitted that the persecution and discrimination of Palestinians in the camps is already at a high level and accordingly -- a shade above the usual -- is capable of satisfying the high threshold of Article 3. 2) The tribunal was wrong in capacity that a militia force such as Alfata is capable of providing sufficient protection in line with the guidelines of Horvath v SSHD [2001] AC 489. 3) The tribunal had erred in not remitting this matter to be heard again, as the appellant was found to be credible and that then exists discrimination which requires protection, especially that the appellant is stateless.

8. On 5 May 2005 the Asylum and Immigration Tribunal granted permission to appeal. Permission to appeal was not granted in relation to ground 1, but was granted in relation to ground 2. What the tribunal said on that occasion was as follows:

> "While the Tribunal's analysis [and it was referring to the Immigration and Asylum Tribunal] in paragraph 8, and in particular, paragraph 9 of its determination could arguably have been more fully and more clearly set out, what the Tribunal is apparently here finding is that the Adjudicator in paragraph 19 of his determination has not properly examined whether there is (a) a sufficient risk of (b) sufficiently severe treatment so as to engage Article 3. The Tribunal was entitled to conclude that the adjudicator had not applied the correct approach and that the adjudicator's determination was unsafe -- the Tribunal was hereby finding an error of law by the Adjudicator "

9. The tribunal then turned to the question of the manner in which the appeal should be disposed of, having regard to the merits of the appellant's case. The tribunal dealt with this matter in the seven lines of paragraph 10 of the determination. It is reasonably arguable that this analysis of the merits may be insufficient in law or may contain insufficient reasoning and may err in law in omitting to consider the points raised in paragraph 2 of the grounds of appeal, which was arguably a relevant point requiring consideration. The Deputy President added this observation:

> "This is an appeal in which, if I still had power to do so, I should have asked the parties for

> submissions directed to the setting aside of this determination and the rehearing of the appeal."

The matter then went to sleep, for reasons related to the appellant's legal representation which I need not now revisit.

10. On 13 November 2007 the appellant's new solicitors and counsel submitted grounds of appeal by reference to a skeleton argument prepared by counsel, in which the appellant sought to resurrect ground 1 of his grounds of appeal. The ground in respect of which he had not received permission to appeal. At paragraph 24 onwards it was submitted that the Immigration Appeal Tribunal should not have concluded as it did; there was no reason to believe that the adjudicator's approach to Article 3 was wrong in law. At paragraph 33 of his skeleton argument, counsel put it this way:

> "It is submitted that from reading the determination as a whole the adjudicator directed himself to the high threshold of ill treatment necessary to engage article 3 and furthermore applied the correct low standard of proof to primary findings of fact upon which he went on to judge that the article 3 threshold had been exceeded."

11. On 10 December 2007 Buxton LJ granted the necessary extension of time for filing the appellant's notice and ordered that the application for permission to argue ground 1 of the original grounds of appeal be listed with the appeal in respect of which leave had been granted. The application was given, for convenience, a separate number: 2566Y. The Secretary of State then decided to negotiate a settlement, and on 5 February 2008 the parties signed the draft consent order which read as follows:

> "It is ordered that the appeal be allowed and the matter remitted to the Asylum and Immigration Tribunal for reconsideration with no order as to costs."

The final paragraphs of the Statement of Reasons read as follows:

> "The Respondent has now reviewed this case following the grant of permission. [The Respondent considers that the determination of the Immigration Appeal Tribunal dated 29 January 2005 did not contain sufficiently detailed reasoning and was therefore unsafe in law.] The Respondent is of the view that, rather than incur the expense and time in contesting [the substantive matters in] the appeal, it is a more proportionate use of resources not to defend it and to permit the matter to be redetermined. The decision of the AIT is now over two years old and

> the Respondent considers it appropriate to allow the AIT to consider this case in light of the most recent guidance on the conditions in Lebanon, in particular in Lebanese refugee camps.
>
> Accordingly, the Respondent agrees not to contest the appeal, on the basis that the matter will be remitted to the Asylum and Immigration Tribunal for reconsideration."

12. There was a suggestion that the draft consent order had in fact been made formal by Laws LJ on 27 March of this year, but that appears to be erroneous. In fact, no order has every been made, so far as we could ascertain.

13. On 14 April 2008 the Civil Appeal Office pointed out to both parties that the consent order, as drawn, did not specifically address the original ground 1, and if the sought permission to appeal were to be granted in relation to that ground and it were then to succeed, it would restore the adjudicator's determination. The appellant then decided to pursue his application for permission to appeal in relation to that ground, which brings the matter before us today. The Secretary of State contends that, because of the existence of the consent order, the applicant is in no position to pursue his permission to appeal, and anyway the ground is devoid of merits. In my judgment, ground 1 is totally devoid of merit. Reading the adjudicator's determination as a whole, and in particular paragraph 19, it is difficult to believe that he applied the right legal test, considered separately from the test in relation to the appropriate standard of proof. He was addressing Article 3; but when addressing Article 3 he could not divorce himself from what he had said in the earlier part of his determination which, as it seems to me, is difficult to reconcile with what he says in paragraph 19. As HHJ Huskinson said, the Immigration Appeal Tribunal was entitled to conclude that the adjudicator had not applied the correct approach and that amounted to an error of law, rendering his determination unsafe.

14. We have been invited this morning by Mr Williams, who said everything that could be said on behalf of the appellant in relation to this application, to have in mind -- as I do have in mind -- the decision of the House of Lords in AH (Sudan) v SSHD [2007] 3 WLR, page 832, and in particular paragraph 30 of the speech of Baroness Hale, where she said:

> "To paraphrase a view I have expressed about such extra tribunals in another context the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right."

15. I, for my part, would apply that observation to what was said by HHJ Huskinson in the context of this case. Accordingly, I find myself driven to the conclusion that permission to appeal should not be granted and, if my

Lords agree, that seems to me to render the question of jurisdiction -- arising out of what took place between the parties in terms of agreeing to a consent order -- of no real consequence. I would refuse permission to appeal.

Lord Justice Richards:

16. I entirely agree.

Lord Justice Stanley Burnton:

17. I also agree.

Order: Application refused on ground 1, allowed on ground 2