Neutral Citation Number: [2009] EWCA Civ 856

Case No: C5/2009/0913

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
Designated Immigration Judge Shaerf
IA/12902/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE LLOYD
and
LORD JUSTICE GOLDRING

- -

Between :

NR(JAMAICA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

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Mr S. Chelvan (instructed by **Messrs Wilson & Co**) for the **Appellant**
Miss Carine Patry-Hoskins (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 14 July 2009

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Judgment

Lord Justice Goldring :

Introduction

1. On 19 March 1999 the appellant arrived in the United Kingdom from Jamaica. She was nearly 14. On 21 October 2005 she was sentenced, after a trial, to 5 years detention in a young offender institution for conspiracy to supply heroin and crack cocaine. She appeals against the decision of the Asylum and Immigration Tribunal, promulgated on 19 February 2009, which, on re-consideration, having disapplied the presumption under section 72(6) of the Nationality, Immigration and Asylum Act 2002 that she was a danger to the community, dismissed her appeal against the Secretary of State's decision ordering her deportation. The Tribunal permitted the Secretary of State to withdraw concessions he had previously made. It found that she did not have a lesbian identity as she claimed; that her past lesbianism was in the nature of teenage experimentation rather than a settled sexual orientation; that her present lesbian relationship was motivated by a desire to strengthen her claim for asylum. It rejected her account that she had been raped in Jamaica and left as a result of criminal gangs. Although in her grounds of appeal the appellant submitted that the decision was flawed in respect of those three aspects of the Tribunal's decision, she has only pursued the first two before us. She submits that her removal from the United Kingdom would contravene section 84(1)(g), of the Act. It would involve contraventions of articles 3, 8 with 14 and 10 with 14 of the European Convention of Human Rights.

2. Permission to appeal was granted by Senior Immigration Judge Gleeson. She suggested the reasoning of the Tribunal was inadequate and perverse regarding the finding in respect of the appellant's sexual identity.

3. The Secretary of State accepts the Tribunal made an error of law. It should have considered whether those with the appellant's sexual profile were at risk in Jamaica and, if so, whether it was reasonable for her to have to be discreet in her sexual relationships or confine herself to heterosexual relations in the future or whether she would be at risk because one of the co-defendants at the trial, with whom she had fallen out, might tell people in Jamaica about her sexuality. The case, it is submitted, should be remitted for consideration of those issues on the basis of the Tribunal's findings regarding her sexuality.

The first ground of appeal: the concession issue

4. On 7 December 2007, at the hearing before the first Tribunal, the Home Office presenting officer (the "HOPO") conceded that if the appellant was a lesbian she would be at real risk on return. The concession appears to have been made on the basis of an expert report produced by the appellant from Mr. Sobers. On 19 December 2007 the first Tribunal promulgated its decision dismissing the appellant's appeal. Among other things, it did not find the appellant was a lesbian. In respect of that concession, the Tribunal observed that:

> "[It] was a generous concession as we do not find the case law goes that far. Nevertheless it is a concession that we would honour were we to find the appellant is a lesbian."

5. Reconsideration was ordered. At the first stage reconsideration a new HOPO gave counsel for the appellant notice that the concession regarding risk on return would not be maintained at the second stage.

6. On 8 September 2008 there began the second stage reconsideration. As foreshadowed, the concession was not maintained. There was however a fresh concession. Ms Sreerahman, the then HOPO, having taken instructions from a senior caseworker:

> "…conceded the Appellant was a lesbian and in a relationship with Ms. S in 2006/7 and maintained she would not be at risk on account of her sexual orientation if returned."

7. The two person panel reserved its decision. It was unable to agree. A re-hearing was ordered.

8. On 24 November 2008, a fresh panel of three having been convened, a third HOPO, Mr. Miah, withdrew Ms. Sreerahman's previous acceptance that the appellant was a lesbian. He did so without notice. Having heard competing submissions as to whether it should permit the concession to be withdrawn, and having had its attention drawn to the case of *Carcabuk v Secretary of State for the Home Department* (unreported) 18 May 2000, a decision of the Tribunal presided over by Collins J, the Tribunal said that :

> "…all issues were live. We considered that paragraph 12(6) of [*Carcabuk*]…needed to be read in the light of what was said in paragraph 11: that it was open to the Respondent to withdraw a concession at any time before the hearing concluded…
>
> We would add that we consider the issue of the history of the concessions made and withdrawn by the Respondent in this appeal to be most unfortunate. We would not attribute this to the Respondent's "bad faith". It appears to us this may well have occurred because the Respondent has not taken the opportunity to review the case papers in good time before coming to the several hearings at the Tribunal. Further, and in the light of Mr Chelvan declining an adjournment when offered by the Tribunal, we find that the Appellant has not been disadvantaged in any material way."

The relevant authorities

9. Many authorities were drawn to the court's attention by Mr. Chelvan, who continues to represent the appellant, both in a very long skeleton argument and in oral submissions. Only two were relevant. As we made clear to Mr. Chelvan, it is not helpful and wastes valuable court time, to cite case after case which is merely illustrative of a principle and itself establishes nothing.

10. In *Carcabuk* guidance was offered as to the approach to be taken by tribunals to concessions. As was said [11-12]:

> "It is in our judgment important to identify the precise nature of any so-called concession. If it is of fact…the adjudicator should not go behind it. Accordingly, if facts are agreed, the adjudicator should accept whatever is agreed. Equally, if a concession is clearly made by a HOPO that an appellant is telling the truth either generally or on specific matters, the adjudicator may raise with the HOPO his doubts whether the concession as appropriate but, if it is maintained, he should accept it. But there is all the difference in the world between a concession and a failure to challenge. The former will bind the adjudicator, the latter will not. Furthermore, any concession can be withdrawn so that, for example, the case before the Tribunal can be presented in a different way to that before the adjudicator. It is open to a HOPO to withdraw a concession made before an adjudicator before the hearing is concluded, but the appellant must be given a proper opportunity to deal with the new case against him and unless there is good reason for the withdrawal such as the discovery of fresh material we doubt that the adjudicator should permit any adjournment which such withdrawal would be likely to necessitate…
>
> We can summarise the position as follows:-
>
> …(3) If the HOPO wishes to withdraw any concession made: in a refusal letter or explanatory statement, he must inform the appellant or his advisor as soon as possible and it will be for the adjudicator to decide if an application for an adjournment to enable the new case to be met is made, whether to grant it. If he does not, the concession will stand…
>
> (6) A concession can be withdrawn but, if a HOPO seeks to do this, the adjudicator must be satisfied that the appellant will not be prejudiced if the hearing continues and should only allow an adjournment if persuaded that there was good reason to have made and to withdraw the concession"

11. In *Secretary of State for the Home Department v Akram Davoodipanah* [2004] EWCA Civ 106, Kennedy LJ, with whose judgment Clarke LJ and Jacob J (as they then were) agreed, set out the principle in the following way [22]:

> "It is clear from the authorities that where a concession has been made before an adjudicator by either party the Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course…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 should not have made, then justice will require that the Secretary of State be allowed to withdraw that concession before the Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits."

12. As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted. Bad faith will almost certainly be fatal to an application to withdraw a concession. In the final analysis, what is important is that as a result of the exercise of its discretion the Tribunal is enabled to decide the real areas of dispute on their merits so as to reach a result which is just both to the appellant and the Secretary of State.

13. I do not accept, as was submitted by Mr. Chelvan, that before the Tribunal can permit the Secretary of State to withdraw a concession, it must satisfy itself the decision to withdraw was rationally made in public law terms; that it is required both to analyse the nature of the concession and the justification for its withdrawal as though it were an administrative decision of a public body; that it is only if something new has arisen after the concession has been made that it may be permitted to be withdrawn; that otherwise the withdrawal is unfair. Mr. Chelvan is confusing the role of the Secretary of State in taking an administrative decision (for example in respect of someone seeking asylum), and his role as a party to litigation deciding how that litigation should be conducted.

14. I reject too a submission by Mr. Chelvan that whenever an application to withdraw a concession is made by the Secretary of State without notice, he is obliged to seek an adjournment. That is a misreading of what Collins J said in paragraph 12(6) of *Carcabuk*.

15. Two concessions were withdrawn in the present case. The first was that if the appellant was a lesbian there was a real risk on return. That was made at the hearing on 7 December 2007. Notice of its withdrawal was given on 13 May 2008. The second was that she was a lesbian. That was withdrawn on 24 November 2008, on the first day of the second stage reconsideration hearing (the second day being 9 December 2008).

16. The basis of the withdrawal of the first concession was said to be the Home Office's Operational Guidance Note on Jamaica dated 7 February 2008. That stated (in paragraph 3.7.16) that:

> "There is no evidence that lesbians generally face serious ill-treatment in Jamaica and in the absence of evidence to the contrary may be certified as clearly unfounded."

17. This case was not certified. However, as Mr. Chelvan rightly points out, the previous Operational Guidance Note dated 4 December 2006 was in similar terms. He further

points out that the relevant Country of Origin Information Report on Jamaica of November 2007 stated that gay women in Jamaica were at risk of discrimination and violence. There was moreover nothing, he submits, in the Operational Guidance Notes to suggest any basis for what was there asserted. There was no proper basis for the withdrawal of the concession.

18. In my view the Tribunal was clearly entitled to permit the withdrawal of the concession. In the light of the objective evidence which existed at the time of the first hearing, it is questionable whether the concession should have been made in the first place. The first Tribunal plainly had doubts about its appropriateness in the light of the cases. The present Tribunal was entitled to consider that it was in the interests of justice for it to assess the nature of any risk to the appellant in Jamaica.

19. As far as the withdrawal of the second concession is concerned, it was submitted to the Tribunal that the Secretary of State was acting in bad faith. Mr. Chelvan makes the same submission to us. Mr. Miah first sought to justify the withdrawal of the concession on the basis that Ms Sreerahman made it under duress. That suggestion was without substance. He then wrongly sought to argue that the refusal letter of 6 August 2007 did not accept she was a lesbian. The Tribunal was not, submits Mr. Chelvan, entitled to substitute its own analysis, for which there was no proper basis.

20. In my view the Tribunal, having considered the competing submissions, was entitled in all the circumstances to form its own view as to the reasons for the withdrawal of the concession. It sufficiently set out its analysis and the reasons for it. Although there was no notice of the withdrawal of the application, Mr. Chelvan accepted there was no prejudice to his client. He did not seek an adjournment. He has not suggested any element of prejudice to us. In short, the Tribunal was entitled to reject the submission of bad faith. It was entitled in its discretion and for the reasons it gave to permit the concession to be withdrawn.

21. The first ground of appeal fails.

The second ground of appeal: the sexual identity issue

22. The Tribunal set out the facts at considerable length. As relevant to the grounds of appeal it said:

> "This leads us to conclude we are not satisfied even on the lower standard of proof that the Appellant was raped as a child. We do not know the reason why she was sent by her father to the United Kingdom. We accept she may have been sent because of something to do with criminal gangs in Jamaica but not because she had been raped.
>
> We find that on coming to London, as a teenager she experimented with different types of sexual identity. She then found herself imprisoned in all-female institutions. The Appellant told Renee Cohen [the psychologist] that while in prison she had become more socially confident and had been sexually active and that she had been lost and frightened in the years between leaving Jamaica and being imprisoned: see the

second and third paragraphs of page 6 of her report. We find that as a healthy, healthy, energetic and engaged young woman in such institutions she had and took the opportunity to continue her experimentations with her sexual identity: indeed, there was no alternative except celibacy.

So far as Angela is concerned we accept what she says about how she sees her relationship with the Appellant. We note that while detained the Appellant became a trained prison listener and increased her self-confidence and we find the Appellant was and is well able to manipulate her relationship with Angela. Consequently, we find the evidence on the Appellant's side shows that so far as she is concerned her relationship with Angela is not genuine. We are led to the conclusion she is using Angela as a means of bolstering her claim for international surrogate protection.

Her case was presented on the basis that it was not a "criminal gangs" claim: see the section entitled "Stated Case" in the Appellant's skeleton argument and submissions at the foot of page 3 of the Records of Proceedings of the second hearing before us. There was no evidence of the efforts by the Appellant to correct what she considered to be errors in the PSR and PAR. Mr Chelvan for the Appellant accepted in submissions that a person's sexual identity may be amorphous but went on to submit that in any event the Appellant was not heterosexual.

Renee Cohen did not have the benefit of the Appellant giving oral testimony and being cross-examined over the period of one and three quarter hours in a forensic setting or having any of the witness statements of Angela Smith or hearing directly from her.

The Appellant was just under 19 when the index offence was committed: see page 1 of the PSR. Until April 2008 she was in custody. Since then we accept she has been in some sort of relationship with Angela but we find she has not reciprocated Angela's passion and we conclude on the evidence before us that the Appellant's relationship with Angela is part and parcel of her campaign to be allowed to remain in the United Kingdom. We do not say the Appellant has not had homosexual relationships but we do say the evidence we have seen does not support her claim that her sexual identity is that of a lesbian.

The consequence of this finding is that the Appellant's claims for asylum under the Refugee Convention, humanitarian protection under paragraph 339C of the Immigration Rules and under Article 3 of the European Convention all fail."

23. It seems that its conclusion that the appellant had no settled sexual identity was based, as Miss Patry Hoskins submits, on a number of findings: first, its rejection that she was raped and consequently that could not explain her becoming a lesbian; second, the references in the pre-sentence report about having had sex with, and being involved with, different men; third, the references to men in the Parole Assessment Report; fourth, the fact that a large proportion of the time in which she had lesbian relationships was spent in an all-women institution, where if she wanted to be sexually active, there was no other option and, fifth, although her lesbian relationship with Angela Smith has existed for some time, it is not genuine.

24. Even taking into account that the Tribunal saw and heard the appellant, it seems to me its analysis is not without difficulty. A great deal of weight appears to have been placed on what was said very shortly in two reports. The appellant has now been in a series of exclusively lesbian sexual relationships over some 4 years. That is on its face cogent evidence that she is a lesbian, or predominantly a lesbian, by sexual identity. What might have begun as sexual experimentation with lesbianism could have ended with it being her sole or predominant sexual orientation. That does not appear to have been adequately considered or, at least, explained by the Tribunal. It is of course her sexual orientation at the time of the hearing which is important.

25. Moreover, the case is to be remitted to a fresh Tribunal in any event. Either that Tribunal will have to consider the risk to the appellant in Jamaica on the basis of the present findings, as the Secretary of State submits, or it will have to consider the issue of her sexuality afresh before considering the risk on return. Even if the present Tribunal was entitled to make the findings it did regarding the appellant's sexuality, it seems to me there are real difficulties in remitting the case to a fresh Tribunal in the narrow way submitted for by the Secretary of State. Among other things, the fresh Tribunal will have to assess how the appellant could reasonably be expected to behave in Jamaica in the light of her present sexuality. It seems to me that would be a difficult exercise fairly to carry out on the basis of the present Tribunal's limited findings regarding her present sexual identity. There was no finding, for example, as to how, in the light of its assessment of the nature of the appellant's present sexuality, she would be likely to behave if removed to Jamaica.

26. In all the particular circumstances of this case, I have come to the conclusion that the case ought to be remitted on a wider basis than that contended for by the Secretary of State. The fresh Tribunal should consider the appellant's sexuality afresh. Having done that, it should in the light of its findings, make the appropriate assessment of risk on return to Jamaica.

27. I would therefore allow the appeal on ground 2.

Lord Justice Lloyd: I agree

Lord Justice Mummery: I also agree