Case No: C5/2008/0618

Neutral Citation Number: [2008] EWCA Civ 1264
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/03099/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 16th October 2008

Before:

LORD JUSTICE WARD
LORD JUSTICE LONGMORE
and
LORD JUSTICE JACKSON

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Between:

MM (IRAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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THE APPELLANT APPEARED IN PERSON.

Mr A Payne (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent.**

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Judgment

(As Approved by the Court)

Lord Justice Ward:

1. The appellant is a 30-year-old citizen of Iran, who arrived in this country in January 2006. His claim for asylum was refused by the Secretary of State for the Home Department. His case, to put it in its most summary form, was this: he claimed that he feared persecution in Iran because of his political opinion, he being an active member of the Kurdish Democratic Party of Iran. In particular, however, he said that he feared his cousin, whom he discovered was a member of the Ettela'at, the Iranian government's secret police service. He said that he discovered that his cousin had become involved in torturing people and in having extra delight in having that captured on a video recording. He, the appellant, was unfortunately unmasked as a member of the KDPI by the cousin's daughter with whom he was somewhat involved. The result, he says, is that he in turn was subjected to the torture that the cousin apparently enjoyed. This consisted of acts of buggery or attempted buggery and other acts of sexual humiliation and degradation imposed upon the victims by the cousin and his allies. He claims that his own ordeal was captured on a video recording. He fled from the country, taking some of the CDs with him from the cousin's house; not, it has to be said, his own humiliation.

2. The Secretary of State did not believe him, so he appealed, and the appeal was determined by Immigration Judge Lever on 6 July 2006. The appellant had produced at that hearing a DVD or a CD to show this alleged degrading conduct but, as the judge recorded, only one third of that CD was playable, the other part being "unreadable probably due to the poor condition of the CD". The immigration judge found little credibility attaching to the appellant's claims and in particular, he said, in paragraph 43 of his determination:

> "Having watched the DVD I concluded that what I saw was an act of consensual activity between two men."

   The appellant was granted a reconsideration of that decision, and that came before Immigration Judge Irvine, who dismissed it on 12 November 2007. In that reconsideration, directions had been given for the appellant to make a readable copy of the DVD available and for there to be a typed transcript to be prepared. As it turned out, however, the first part of that DVD "could be viewed reasonably well" but "the second part of the DVD was far less clear and the picture quality was very poor and frequently broke up." As for the third part, "it was extremely difficult to make out the scene because the picture quality was very poor and the picture broke up and 'froze' or it returned to the beginning of the DVD."

3. Consequently it was held by Immigration Judge Irvine:

> "I am satisfied that the appellant and his representatives had been given every opportunity to produce in evidence the contents of the DVD".

And he commented on the failure to do so. He concluded:

> "30. The only part of the DVD which I was able to view was the first part, and I am entirely satisfied the scenes which I viewed were scenes of consensual homosexual activity and not of torture. Although the scenes in the second part did show the appellant's cousin holding a knife in one hand, he was clearly engaging in homosexual activity with the first man who did not appear to object in any way as to what was happening. Although there was a plaster on each of his buttocks, I did not see what injury, if any, was underneath the plasters and I did not see any sign of bleeding or ill-treatment. I am unable to comment as to whether homosexual activity as performed by the appellant's cousin does or does not sometimes include aggressive play acting, but I can only say I am satisfied that what I saw was not overt torture by one man on another.
>
> 31. As regards the third part of the DVD, it was extremely difficult to see much detail of what was happening, but what I did see did not satisfy me these were scenes of torture."

4. Consequently the Immigration Judge, having reminded himself that "when considering the reliability of the documents and the DVD it is for the party who produces the document including a DVD to show that it is reliable", concluded:

> "I do not find that if [the cousin] was so well disposed to the appellant that, on account of his KDPI activities, he would then drug the appellant, and force him to endure anal penetration by [the cousin] and other men together with other homosexual acts, all designed to cause him to confess anti-government activities, and yet leave him free to wake up and escape from the house."

In other words, the immigration judge did not believe a word of it and so dismissed that appeal.

5. Tuckey LJ gave permission to appeal, giving as his reasons this:

> "The Applicant and his advisers have only themselves to blame for the fact that neither I.J. was able properly to view the copy of the DVD which they were shown. But I have now seen what is

> obviously a much better copy. The so-called second and third parts (in fact the first and second parts of the new copy) broadly show what is described in the appendix attached to the DVD with the papers and add a good deal to what I.J. Irvine described in paras. 30 and 31 of his decision. I have accordingly granted the extension of time and permission to appeal to enable this court to consider whether what can now be seen on the DVD justifies a further reconsideration by the AIT. It maybe this can be done by consent. In any event the applicant should be legally represented before this court and/or the AIT."

Sadly Mr M is not represented, and we have heard his submissions through an interpreter.

6. The position taken by the Home Secretary today is that she is prepared in the exceptional circumstances of this case to allow the appellant to make a fresh claim and to consider the matter in that way, but otherwise the appeal is resisted. The appellant pursues his appeal.

7. So the question is essentially this: should this court admit the fresh evidence that is contained in the DVD which has been produced to this court? We have been referred very properly by Mr Payne, who appears for the Secretary of State, to the judgment of this court in E v SSHD [2004] EWCA Civ 49, where the position was carefully reviewed. There the court said:

> "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

So, as this court has held, a mistake of fact can amount to an error of law where it creates an unfairness and where the findings were made in ignorance of relevant material. The mistake in this case is of an existing fact or a fact that may be proved to be an existing fact, namely the extent to which he was subjected to sexual degradation. The video recording would go a long way towards establishing a part at least of the appellant's story.

8. The third requirement is that the appellant should not have been responsible. Here the appellant is undoubtedly in difficulty. As the Asylum and Immigration Tribunal had made plain, it was for the appellant to ensure that a proper video recording was produced, and it clearly was not. This has caused me considerable concern. We have here a litigant in person speaking through an interpreter. It is perfectly apparent that there have been produced a number of copies of videos or different video recordings. As Tuckey LJ has himself observed, and as I saw from my viewing of this horrible material, the two DVDs are different; and so there is, it seems to me, huge confusion as to what was being shown on which and who had what at the material time.

9. I move to the fourth requirement: that the mistake must have played a material (but not necessarily decisive) part in the Tribunal's reasoning. Here I am totally satisfied that it does. As Tuckey LJ observed, the video shows activity very different from that which was apparently seen by Immigration Judge Irvine. On the DVD presented to this court and marked by the appellant as 'Aram', which he says is the genuine one, it is perfectly apparent that the victim is covered with blood, especially around his buttocks. Indeed the perpetrator of this activity has blood on his hands. There may be blood on the floor; a knife is being wielded; the man is being slapped; the man is being hit; and it shows activity which is at least capable of presenting a wholly different connotation far removed from being consensual homosexual activity. So this is a highly material piece of evidence, which would have an important part to play in the assessment of the credibility of the appellant.

10. So should the confusion about why no proper video was produced count against the appellant in this case? All of these matters are to be judged under a general panoply of doing justice and achieving fairness, and leave should only be granted in exceptional cases. I am satisfied that the explanations for confusion are cogent enough to put this case into that exceptional category and to say, in the interests of fairness and justice, that the fresh evidence should be admitted.

11. The Secretary of State submits, however, that the proper course is to dismiss this appeal and allow the applicant to bring his fresh claim pursuant to paragraph 353 of the Immigration Rules, which allows a fresh claim to be submitted, and the Secretary of State will then determine whether it does amount to a fresh claim. Submissions will, according to the rule, amount to a fresh claim if they are significantly different from the material that has previously been considered. Submissions will only be significantly different if the content has not already been considered and, taken together with previously considered material, create a realistic prospect of success notwithstanding its rejection.

12. I am troubled that unfairness will be done to this appellant if he were forced down that route. It may or may not be treated as a fresh claim: that would be a matter for the Home Secretary to judge, and we cannot forecast that decision. But, on the question of "significantly different", there I am troubled. I have already decided that the material will make a significant difference, and to that extent it may be said that the introduction of this DVD will introduce something significantly different and so fall within Rule 353. But his case will not be properly advanced if it is to be advanced against a background of adverse findings of fact already having been made against the appellant when, if the material were put before a reconsideration of those facts, the credibility findings might be otherwise. In my view the proper course is to allow the appeal and to remit the matter to the Tribunal, where it would end up in any event if a fresh claim were the path which has to be taken as suggested by the Secretary of State. The question then is whether it should be remitted to Immigration Judge Irvine or another member of the Tribunal. I have well in mind the submissions made by Mr Payne, who has represented the Secretary of State admirably in this appeal. He directs our attention to the well known case of DK (Serbia) v SSHD [2007] 2 All ER 483, where Latham LJ, commenting on the new procedure for reconsideration, said that "it depends upon the reconsidering tribunal not revisiting matters of fact not covered by the matters remitted." But therein lies the whole difficulty. I do not see how adverse findings of fact can stand if the video will have an important bearing on credibility. It may lead to a wholly different view being taken, and in my judgment the only fair and just way for this to go back is to go back to a fresh mind so that the impact of the DVD one way or the other results in findings which give no appearance of having been shaped by the earlier hearing.

13. Consequently I would allow the appeal and remit the matter to the AIT to be heard by an immigration judge other than Immigration Judge Irvine. I am confident that Immigration Judge Irvine will not see any discourtesy to him in that direction. I intend no such thing; it is the appearance of justice which is more important.

Lord Justice Longmore:

14. I agree

Lord Justice Jackson:

15. I agree.

Order: Appeal allowed