Case No: C5/2008/0226

Neutral Citation Number: [2008] EWCA Civ 941
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/12351/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 8th July 2008

Before:

LORD JUSTICE WALLER
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE SEDLEY
and
LORD JUSTICE DYSON

- -

Between:

AK (IRAN)	**Appellant**
- and -	
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 V Sachdeva (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Sedley:

1. The appellant, who is now in his late 30s, is an Iranian national. He is also transsexual and in need of gender reassignment. Surprisingly -- at least to the outside world -- gender reassignment is not only accepted but widely practised in Iran. What is not tolerated there is homosexual activity, at least if it is conducted openly, and the appellant fears that he will be perceived and persecuted by the ignorant as a homosexual if he is returned. In 2006 he accordingly sought asylum and humanitarian protection here.

2. The Home Office turned down his application, but on appeal Immigration Judge Atkinson accepted that, as a member of a particular social group, he had a well-founded fear of persecution on a Geneva Convention ground and was entitled to asylum. The Home Office's application for reconsideration succeeded, however, without opposition at the first stage before Senior Immigration Judge Mather, who recorded:

> "Both parties were agreed that the Immigration Judge had made a material error of law in that he equated the risks to the appellant as a transsexual, with those of a homosexual."

3. At the second stage, Immigration Judge Ince, in a very careful and thorough determination, found against the appellant.

4. Before I go any further, I want to make three points about these two determinations. First of all Immigration Judge Atkinson had not made the jejune error of confusing transexuality with homosexuality. He had taken a good deal of care to distinguish the two, but had accepted the appellant's case that there was a real risk that others in Iran would not do so. Secondly, subject to the second issue before us, Immigration Judge Ince's determination is unappealable. Thirdly, both determinations are educated, thoughtful and humane. They illustrate how two conscientious fact finders can reach opposite conclusions on the same evidence.

The first stage reconsideration

5. Mr Williams for the appellant has not pursued in argument the first ground on which permission to appeal was given, namely whether Immigration Judge Atkinson had erred in law at all. The second issue under this head was whether, if he had not erred, the appellant could even so resile from his counsel's contrary concession. Mr Sachdeva for the Secretary of State has sought to put the points in the reverse order, contending that it is in any event now too late for the appellant to resile; and it is because Mr Williams took the same view that he decided not to press the point. For my part I would not have been content to follow this order of reasoning because I would not accept that even a wholly mistaken concession by which an asylum seeker's case has been forfeited is necessarily irretrievable. One

can only reach this question, in my judgment, once one has decided whether the concession was in fact wrongly made.

6. In my judgment the concession before Senior Immigration Judge Maher was not wrongly made. Since the issue has not been argued, I will say no more than that the concession, albeit in excessively short form, reflected the evidential fact that one could not without more treat a pre-operative transsexual living in Iran as being at a risk equivalent to that faced by overt homosexuals there. The decision of Immigration Judge Atkinson, conscientiously reasoned as it was, had made this bridge without a sufficient basis either in the objective evidence or --importantly -- in the appellant's own experience.

The second stage reconsideration.

7. A second stage consideration was therefore rightly directed. Its outcome, as I have said, was legally beyond reproach. But Mr Williams for the appellant submits that it was arrived at in breach of natural justice because the appellant had been abandoned by his lawyers the day before the eventual hearing and should have been given an adjournment to enable him to secure fresh representation. Sir Henry Brooke, granting permission to appeal, took the view that the matter was not straightforward and merited this court's attention.

8. The history, apart from one critical point, is not in dispute. Nor is Mr Williams' proposition that, if Immigration Judge Ince ought to have granted an adjournment rather than proceed, his decision cannot stand. The dispute is firstly as to whether the appellant actually asked the immigration judge for an adjournment, and secondly as to whether, even if he did not, the immigration judge should have adjourned of his own motion.

9. The sequence of events in bare outline had been this. Initially the appellant instructed Messrs Simmons who, however, withdrew from the case because they ceased during 2007 to do publicly funded work. The appellant went to another firm, Messrs Freemans in London, who undertook to represent him under the legal aid scheme, having granted him controlled legal representation. This was the firm who were representing him at the time of the first stage hearing before Senior Immigration Judge Mather.

10. In September 2007, however, Freemans withdrew because they took the view that the merits of the case did not justify continuation of representation under the scheme. They, however, did not send the appellant form CW4 which gives reasons for withdrawal of funding and notifies the client that it is possible to seek a review of the withdrawal from the Legal Services Commission. That, at least, is the appellant's case. He contacted the Refugee Council, who provided him with a list of solicitors and other advisers and who made temporary interventions on his behalf, seeking an adjournment for the hearing fixed for 13 September 2007.

11. On 4 or 5 September the appellant was seen by an adviser with the Immigration Advisory Service, which declined to act for him but referred him to the Harehills and Chapeltown law centre. Meanwhile, however, the IAS

gave the appellant advice, on the basis of which he attended in person on 13 September to seek an adjournment. Immigration Judge Ince granted it to him and later explained his decision as follows:

> "I concluded that it was not in the interests of justice to proceed as the case was a reconsideration and raised some difficult issues which would benefit from the Appellant being represented, namely whether transsexuals in Iran faced persecution. I did, however, warn the Appellant that the case would proceed on the next occasion irrespective of whether or not he had representation. I advised him that the six weeks that I was allowing for the adjournment would be more than sufficient for him to instruct fresh representatives and for them to be adequately prepared."

12. It is impossible to find fault with that decision or the terms in which it was expressed. However, the Harehills and Chapeltown law centre, having (through a solicitor employed by them) agreed to take on the appellant's case at the adjourned hearing, the day before the hearing withdrew from it and abandoned him. The appellant had understood that the law centre would not be instructing counsel but that the solicitor himself would attend. It was only on 29 October that he learned that this was not to be so.

13. I speak, I believe, not only for myself but for the court when I say that we are concerned that any lawyer should consider it permissible, and none the less so when acting pro bono as the law centre was, to withdraw from representing a client the day before the hearing, when no alternative representation is available.

14. In the situation with which he was presented the appellant is now adamant that he sought an adjournment. The immigration judge's notes, which have been made available to us, record no such application. They read:

> "No rep? I did, but they pulled out yesterday.
> Ready to proceed? Y"

15. The Home Office Presenting Officer's notes read simply:

> "Appeal proceeded smoothly on 30/10/07. Applicant was not represented"

16. The Home Office Presenting Officer has no recollection of an application and the appellant himself made no reference to having made one when applying to the AIT for permission to appeal. But the immigration judge, Immigration Judge Ince, who has been asked specifically about this, has sent a response which, with admirable candour, says:

> "Although I cannot be certain, I think that he did ask for more time to find representation."

17. He goes on to explain that, although he tries to keep a complete note, the fact that something does not appear in his note is not necessarily determinative; and he gives coherent reasons why the appellant's account marries up with the immigration judge's own practice.

18. It is worth setting the immigration judge's reasons, because they have a bearing on what we have to decide. In his letter of 7 July 2008 to this court, he wrote:

> "I note that in paragraph 15 of his statement of 20 February 2008 [the appellant] said that I had 'made clear that he would not adjourn the hearing because he considered that I had had sufficient time to find representation'. This is in line with my normal practice of always advising Appellants of the reasons why I was not willing to adjourn a hearing and is the sort of phrase that I would have used -- I would not simply have said 'No' as suggested by Wilson and Co in the second paragraph of their letter of 30 June 2008. In addition, my practice is to try to reassure Appellants in those circumstances that I would give them every opportunity to say whatever they wanted to say and would emphasise that Immigration Judges have a lot of experience in dealing with cases involving unrepresented Appellants -- whether I did so on this occasion, I cannot recall
>
> There was another reason why I did not think that an adjournment was needed in this case, (although whether I told [the appellant] I cannot recall), which was that his credibility was not disputed, (and remained so). He had been found credible by Immigration Judge Atkinson and that finding was preserved by the Tribunal at the first Reconsideration hearing. Consequently, the emphasis in the case was on his risk on return to Iran, which mainly involved consideration of the objective evidence which was already before me
>
> There is one other matter that I think it appropriate to comment on. In paragraph 2 of his statement of 27 June 2008 [the appellant] says that I did not ask him any follow up question concerning the circumstances of his representatives pulling out. It is my practice not to ask this since it not only involves potential breaches of solicitor/client

> confidentiality but also could lead to an Appellant inadvertently making incriminating statements which could damage his case, ('my solicitor said I had no chance', being an example)."

I should mention that Wilson and Co are the appellant's present solicitors.

19. In the light of all this new material it seems to me safest, and it will most certainly be more helpful, to approach this appeal on both possible footings: either the appellant asked for and was refused an adjournment; or the immigration judge, on learning what had happened, failed to offer him one. In either event, was the appellant treated with a degree of unfairness sufficient to vitiate the eventual determination?

20. Rule 21 of the Asylum and Immigration (Procedure) Rules 2005 provides:

> "**Adjournment of appeals**.
> 21. - (1) Where a party applies for an adjournment of a hearing of an appeal, he must –
>
> a) if practicable, notify all other parties of the application;
>
> b) show good reason why an adjournment is necessary; and
>
> c) produce evidence of any fact or matter relied upon in support of the application.
>
> **(2) The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined.**
>
> (3) The Tribunal must not, in particular, adjourn a hearing on the application of a party in order to allow the party more time to produce evidence, unless satisfied that -
>
> (a) the evidence relates to a matter in dispute in the appeal;
>
> (b) it would be unjust to determine the appeal without permitting the party a further opportunity to produce the evidence; and
>
> (c) where the party has failed to comply with directions for the production of the evidence, he has provided a satisfactory explanation for that failure."

21. I have highlighted (2) because it is the most material; but it has to be read in the context of the whole rule. Each of the first three limbs is predicated on a party's having applied for the adjournment. If there was no such application in the present case, rule 21 had no immediate relevance. But it is clearly of considerable indirect relevance if there is a continuing obligation on the immigration judge to keep an eye on the fairness of his or her own proceedings, because it cannot be right that a less stringent test is to be used if nobody has actually applied for an adjournment.

22. In my judgment, where an appellant has to the immigration judge's knowledge found himself, despite his best efforts, unexpectedly without representation, at least at a hearing at which it is apparent that professional representation would be of benefit to him it is incumbent on the immigration judge to consider -- and I deliberately adopt the vocabulary of rule 21(2) -- whether the appeal can be justly determined without a fair opportunity to obtain representation. It is evident that Immigration Judge Ince routinely adopts this approach, which chimes with holding of Munby J in R (Dirisu) v IAT [2001] EWHC Admin 970, at paragraph 42.

23. Here the immigration judge, having learned of the last-minute withdrawal of the appellant's lawyers, formed the view that an adjournment was not needed in order to deal justly with the appeal. This was a proper approach, but the immigration judge's immediate estimate of the demands of fairness cannot be conclusive. Whether the appellant seeks an adjournment or offers to go on without representation, it may be apparent there are issues with which he is not going to be able to cope on his own or to cope as well as he would with a representative.

24. Mr Sachdeva for the Secretary of State is right to point out that the adjournment of 13 September had been granted in order to enable the appellant's lawyers to produce further expert evidence, something which by 30 October they had failed to do. The case for a further adjournment on 30 October was simply to enable the appellant to find another advocate. Yet if he now succeeds where he failed before the immigration judge he will be better off than on 30 October because -- as his new solicitor's evidence indicates -- he may well have better objective evidence at a resumed hearing than he had previously had. I accept that the case for an adjournment did not, and still therefore cannot, depend upon what is now known about the availability of new expert evidence. It depends now as it did then solely on the need for an advocate. But the adventitious fact that better expert evidence may in consequence have become available cannot diminish the appellant's case. This is, after all, not civil litigation in which one party may have to be stopped from stealing a march on the other by procrastination. It is, or ought to be, a collaborative endeavour to get at the truth by the best available means.

25. There is even so no inalienable right to representation. The right to be heard, a right which can be surrendered but can rarely be taken away, belongs to the individual. One aspect of it is the right to be heard though an advocate; but that is an element which may be either voluntarily surrendered or forfeited by delay or prevarication. In the present case it was certainly not the latter which

occurred, and for reasons I have given I am not happy about holding that it was the former. Can the Secretary of State then show that the immigration judge was right, whether upon the appellant's application or of his own motion, to proceed without a further adjournment? I say "right" rather than "entitled" because what fairness requires is in principle a matter of law once the facts are established. A reviewing or appellate court is not confined to the bare rationality of the decision.

26. One question which may arise in such a situation is what good an adjournment would do. The reasons for the appellant's abandonment by a succession of solicitors manifestly had a bearing on this. In the new public funding dispensation, solicitors -- and on their behalf counsel -- are required to police the viability of their own cases. Even if the old system were still in operation they would be obliged to report on the merits of the case to the funding authority. It may have seemed likely to Immigration Judge Ince that an adjournment would result in another fruitless search for a publicly funded lawyer. But one must remember that, albeit by a process of reasoning which was imperfect, another immigration judge had found on the existing objective material in the appellant's favour. This was not, by that token at least, a hopeless case.

27. As Laws LJ indicated in the case of CA v SSHD [2004] EWCA Civ 1165 at paragraph 14, it is for the party asserting it to establish that an error of law was not material. I do not think that Mr Sachdeva is able to do that here. As Megarry J memorably reminded us in John v Rees & Others [1970] 1 Ch 345 at 347:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

28. While the immigration judge had taken careful account of the facts that the appellant's credibility was not in issue, and that what now mattered was his evaluation of the objective material, Mr Williams has, it seems to me, persuasively advanced a number of points on which an opportunity to find new lawyers might have made a difference. First, the appellant has found new lawyers: the search was not after all hopeless. Secondly, their research has established the potential availability of objective evidence supporting the appellant's case that transsexuals in Iran may face harassment and even persecution from, among others, the police.

29. Mr Sachdeva submits that any such evidence can form the basis of a fresh claim under Immigration Rule 353. So it may, but Rule 353 contains its own obstacle course; and in any case its existence cannot affect the merits and demerits of the present appeal.

30. I am far from saying that such evidence, assuming that it is in the event able to be placed before the AIT, will necessarily alter the outcome. But I do not think that one can say with confidence that it could not do so. Indeed, for the reason I have given it must be very rarely that an immigration judge can legitimately decide that representation and advice could not possibly improve an appellant's case. What is much more commonly the case is that an appellant, by delay or prevarication, has forfeited the right to representation which he would otherwise enjoy. But that was not this case.

31. Without therefore wishing to be, or even to seem, critical of the immigration judge's handling of the problem with which the law centre had at the last minute presented both him and the appellant, I would hold that he ought to have adjourned the hearing, despite its having been adjourned once before and despite the manifest care with which he went on to hear the case in the absence of representation, in order to give the appellant the opportunity to which the law entitled him of a fair chance to secure representation for the hearing of an appeal which was of critical importance to him.

32. We now know, although the immigration judge could not, that an adjournment would also produce some new objective evidence in support of the appellant's case. This cannot add to the reasons for holding that an adjournment should have been granted; but it supports my view that the appeal should be allowed and a rehearing of the second stage reconsideration directed -- taking the appellant's credibility, as before, as established but evaluating afresh whatever objective evidence is now placed by either party before the tribunal. I would so order.

Lord Justice Waller:

33. I agree

Lord Justice Dyson:

34. I also agree.

Order: Appeal allowed