Neutral Citation Number: [2005] EWCA Civ 1438

Case No: C5/2005/1049

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Immigration Appeal Tribunal
HX/18362/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2005

Before :

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

- -

Between :

	A (IRAQ)	**Respondent/Appellant**
	- and -	
	THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant/ Respondent**

- -
- -

Susan Chan (instructed by Treasury Solicitors**)** for the Appellant
Abid Mahmood (instructed by Messrs. Harbans Singh & Co) for the Respondent
Hearing date: Wednesday 9th November, 2005

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Judgment

Lord Justice Carnwath :

The issue

1. 1. The short issue in this case is whether the Secretary of State was entitled to raise on appeal to the IAT, not having taken the point before the Adjudicator, the objection that the asylum claimant, as a self-confessed torturer under Saddam Hussein's regime in Iraq, was excluded from the protection of the Refugee Convention by Article 1F.

2. 2. Article 1F provides that the provisions of the convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

> "(a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nation."

1. 3. The Secretary or State relies principally on (b). The purpose and history of Article 1F, and the meaning of the term "political" in (b), were discussed in detail by the House of Lords in *T v Immigration Officer* [1996] AC 742.

The facts

1. 4. A is an Iraqi national of Kurdish origin. He arrived in the UK in July 2000 and claimed asylum. His asylum interview form included a statement that he had been "forced to become a member" of the Fedayeen, and his life was in danger because of this. The application was refused by the Home Office in a letter dated 5th April, 2002. The letter recorded his case, as understood by the Secretary of State, that he and his family had been persecuted because of their ethnic origin and that because of this he was "forced to join the Fedayeen Saddam Commandos", and that he had then been asked by members of the Ba'ath party to become an Arab, but had refused. The Secretary of State disbelieved his account, and rejected his claim that he was at risk of persecution under the then Saddam Hussein regime.

2. 5. His appeal to the Adjudicator was heard in September 2003. By then of course the situation in Iraq had changed dramatically, following the fall of Saddam Hussein's regime. A's claim also changed its emphasis. In a

statement dated 16th August 2003 (submitted by the solicitors then acting for him) he asserted that he had been a *voluntary* fighter for the Fedayeen Saddam Commando for six years. He said:

> "The fact that I had volunteered demonstrates that I will face persecution and vengeance attacks from the opposition parties and families"

He added:

> "Persons that were instrumental in the violence, harassment and torture and hold an elite position such as myself would easily be singled out, targeted and killed."

6. Before the Adjudicator, A appeared in person and the Secretary of State was represented by Miss Thandi. The Adjudicator recorded that the appellant was "happy to represent himself", and that he confirmed the correctness of both his asylum interview and the witness statement (the apparent contradiction was not noted). He also gave oral evidence:

> "He went on to say that he had been a member of the Fedayeen for six years and had to implement the policies of the party and was very well known to the Kurdish people. He had participated in arresting them and they were taken into detention and tortured. He had actually physically assaulted both Kurds and Arabs and had beaten them with cables and used falaka." (para 4)

7. The Adjudicator generally accepted his account. He concluded:

> "I found the appellant to be a credible witness and I accept his evidence that he had joined the Ba'ath party in 1994 and also the Fedayeen and more importantly, he had taken part in detaining and harming both Kurds and Arabs… The objective background material shows that people who were not only part of the Ba'ath party, but also members of the Fedayeen and who actively carried out human rights abuses against the Iraqi population, would be subject to revenge attacks and reprisals and indeed possibly likely to face death themselves.
>
> Accordingly, I find that if the Appellant were returned to Iraq itself, there would be a real risk that he would face attacks and at the worst could well be killed because of his past activities…"

He found that there would be insufficient protection from the state authorities. Accordingly, he held that to return him to Iraq would be in breach of the Refugee Convention, and of Article 3 of the European Convention of Human Rights.

8. Before the Adjudicator there was no reference to Article 1F of the Convention. However, the Secretary of State then applied for and obtained permission to appeal to the IAT on a number of grounds, one of which was that in the light of the claimant's admissions of voluntary involvement in torture, the Adjudicator should have considered whether he was excluded from the Refugee Convention by Article 1F.

9. Before the IAT, the claimant again appeared in person. The appeal was dismissed. The IAT accepted that it would have been open to the Adjudicator to raise the Article 1F issue of his own motion, even though not relied on by the Secretary of State. However, the Tribunal did not accept that he had committed any legal error by failing to do so:

> "In our judgment there are considerable difficulties in applying this particular provision, particularly where, as in this case, it was the claimant's case, that he had been forced to participate in the Fedayeen. Accordingly, it is difficult to see whether his actions would, or could, fall within either sub-paragraphs (a), (b) or (c) of 1F if he was under pressure to do as he did. Furthermore, there are always issues as to whether or not these are political crimes given the nature of the regime which the claimant was involved…." (para 10)

The Tribunal also commented on the procedural problems involved in raising this issue, in circumstances where the claimant was unrepresented, particularly if the point had occurred to the Adjudicator only after the hearing.

The Appeal

10. The Secretary of State appeals to this court with permission given by Pill LJ. Miss Chan, for the Secretary of State, submits that the Tribunal erred in treating this as a matter of discretion for the Adjudicator. She relies on the decision of this court in *R v Secretary of State ex p Robinson* [1998] QB 929, and a starred decision of the Tribunal, *Gurung v Secretary of State* [2002] UKIAT 4870. On the basis of those authorities, she submits that it was mandatory for the Adjudicator to consider the application of Article 1F in a case where the facts or material before the Tribunal disclosed that as an "obvious" point.

11. On the facts before the Adjudicator, she says, there was clear and undisputed evidence that the claimant had voluntarily participated in acts of torture. Such acts should have been regarded as at least falling with Article 1F(b), as "serious non-political crimes", and therefore excluding the claimant, as a matter of law, from the protection of the Convention. She accepts that, if she is successful on the appeal, fairness requires that the matter should be remitted to the AIT.

12. Mr Mahmood, for the claimant, did not, as I understood him, dispute that torture of the kind committed by his client was a "serious crime". Nor was it part of his case to support the IAT's suggestion that it could be categorised as

"political". (In the light of the authorities discussed in *T v Secretary of State*, which was not mentioned by the Tribunal, I can see no basis for that suggestion.) He made two principal submissions: first, that the *Robinson* "obvious" test was limited to points in favour of the claimant, and could not be relied on by the Secretary of State. He relies on comments to this effect by Maurice Kay LJ in *Miftari v Secretary of State* [2005] EWCA Civ 481, although he accepts that the point did not arise for decision in that case and that *Gurung* does not appear to have been referred to. Alternatively, he submits that the Tribunal had been entitled to find that the point was not "obvious", having regard to the claimant's case that he had been forced to participate in the Fedayeen. An indication of the lack of "obviousness" was the fact that it was not until the Court of Appeal that the Secretary of State had clearly identified the paragraph relied on in Article 1F.

Statutory provisions

1. 13. I start by identifying the statutory provisions which governed the appeals to the Adjudicator and the IAT. This is not a straightforward task, in view of the legislative changes since the appeal was launched in April 2002. I am grateful to Miss Chan's help in preparing a detailed note on this aspect.

2. 14. The appeal to the Adjudicator was under section 69 of the Immigration and Asylum Act 1999. Section 69(1) allowed a person refused asylum to appeal on the ground that his removal would be "contrary to the Convention" (defined as meaning "contrary to the United Kingdom's obligations under the Refugee Convention: s 69(6)). The appeal at that stage was not affected by the enactment of the Nationality, Immigration and Asylum Act 2002, because the relevant event (in this case, the Secretary of State's decision) took place before 1st April 2003. The Adjudicator's powers and duties therefore continued to be governed by the 1999 Act.

3. 15. By section 77(3) he was permitted to take into account "any evidence which (he) considers to be relevant to the appeal". As to the decision, Schedule 4 para 21 provided:

> "… an adjudicator must allow the appeal if he considers –
>
> (a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case…
>
> but otherwise must dismiss the appeal."

The relevant Immigration Rules provided that an asylum applicant should be granted asylum "if he is a refugee as defined by the Convention…", and is at risk of persecution if the application is refused (rule 334); but otherwise it should be refused (rule 336).

1. 16. Because the Adjudicator's decision was promulgated after 9th June 2003, the appeal to the IAT was governed by the 2002 Act. Section 101(1) limited such an appeal to "a point of law". (This was to be contrasted with the previous regime, under which there was a general right of appeal to the IAT, with leave, on law or fact (1999 Act Sched 4 para 22).) By section 102, the Tribunal's powers on such an appeal included the power to "make any decision which the adjudicator could have made", or to "remit the appeal to the adjudicator". They also had power to "consider evidence about any matter which they think relevant to the adjudicator's decision" (s 102(2)). Comprehensive guidance as to the scope of an appeal under this regime, and the powers of the IAT, was given by this court in *R(Iran) v Secretary of State* [2005] EWCA Civ 982. The court confirmed that, once a material error of law had been shown, the IAT was free to determine what relief to grant on the basis of an up-to-date consideration of the facts, or to remit the matter to an adjudicator.

2. 17. Since the date of the IAT's decision, a new regime for asylum appeals has been introduced by the Asylum and Immigration (Treatment of Claimants) Act 2004, which provides for a single right of appeal to a new Asylum and Immigration Tribunal ("AIT") established by that Act. This does not affect the substance of the issues before us, but, if the appeal has to be remitted for reconsideration, it will go to the AIT.

The authorities

1. 18. I turn to the authorities relied on by Miss Chan. In *Robinson* the main substantive issue related to the question whether it would have been reasonable for a claimant to have relocated within his own territory (the so called "internal flight alternative"). A separate issue concerned the Adjudicator's failure, in considering that question, to take into account the claimant's evidence as to the practical difficulties of relocating. This criticism had not been made in the grounds of appeal to the IAT, but it was argued that the point should have been considered by the Adjudicator or by the Tribunal of their own motion. Although the Court of Appeal rejected the argument on the facts, it gave guidance as to the duty of the appellate authorities and the courts in such circumstances.

2. 19. In *Robinson*, unlike the present case, the court was concerned with the obligation of the appellate authorities to consider points *in favour* of the claimant. This aspect was emphasised in argument by Mr Blake QC for the claimant, relying on the "anxious scrutiny" principle. That is a reference to the well known passage in the speech of Lord Bridge in *R v Secretary of State ex p Bugdaycay* [1987] AC 514, 531G:

"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision surely calls for the most anxious scrutiny."

1. 20. Giving the judgment of the court, Lord Woolf MR accepted it as common ground that, regardless of the way the matter was presented by the appellant, the Adjudicator was entitled to "apply his own understanding of the convention and its jurisprudence to his findings on the facts presented to him". The question of internal flight alternative, in the court's view, was an issue which was central to the UK's obligation under the Convention, and which might therefore have to be considered by the Adjudicator "whether the appellant raises it or not" when deciding pursuant to rule 334 (ii) whether the appellant is a refugee (p945B-C). He continued:

"It follows from what we have said that it is the duty of the appellant authorities to apply their knowledge of Convention jurisprudence to the facts as established by them when they determine whether it would be a breach of the Convention to refuse an asylum seeker leave to enter as a refugee, and that they are not limited in their consideration of the facts by the arguments actually advanced by the asylum seeker or his representative…" (p945B-F).

1. 21. The next passage is the one principally relied on by Miss Chan as setting out the appropriate test. To understand the context it is necessary to quote it in full:

"It is now, however, necessary for us to identify the circumstances in which it might be appropriate for the Tribunal to grant leave to appeal on the basis of an argument not advanced before the special adjudicator, or for a High Court judge to grant leave to apply for judicial review of a refusal of leave by the Tribunal in relation to a point not taken in the Notice of Appeal to the Tribunal.

Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the Tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed to 'obvious'. *Similarly, if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do.* It follows that leave to apply for judicial review of a refusal by the Tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the Grounds of Appeal to the Tribunal had a strong prospect of success if leave to appeal were to be granted." (p 945G-946D, emphasis added)

1. 22. In *R v Immigration Appeal Tribunal ex p Shen* [2001] INLR 389, Dyson J applied the *Robinson* principle, on an application for judicial review of the refusal of leave to appeal to the IAT. It was argued in the High Court, for the first time, that the Adjudicator had made a fundamental error of law in relation to the burden of proof in deciding whether certain documents relied on by the claimant were forgeries. Dyson J rejected the Secretary of State's argument that, because the point had not apparently occurred to the experienced QC representing the claimant at the earlier stage, it could not be said to have been "obvious". He said:

"That submission has a superficial attraction. But the word 'obvious', used by the Court of Appeal in *ex parte Robinson* is used in a rather special sense. It means a point which has a strong prospect of success, as opposed to a point which is merely arguable. Usually a point which had a strong prospect of success, will be a point which jumps out of the pages, which competent and experienced counsel would be expected to identify and at least incorporate in a skeleton argument prepared for a hearing, but it is not impossible for a point not to be spotted even by experienced counsel but which, once identified and considered, it is clear as a strong prospect of success". (para 59)

1. 23. In *Gurung* the issue arose in a different way. The case concerned a member of the Nepalese Communist Party who was claiming asylum, following a history of detention and ill-treatment by the authorities in Nepal arising from his involvement in political activities. The Secretary of State rejected the claim; he did not accept credibility of the claimant's account of the detentions, and he considered in the event that the risk was at the most of "prosecution not persecution". The Adjudicator upheld the decision, raising for the first time the point that the appellant was excluded by Article 1F, because of the criminal activities of the party with which he was associated. This point had not been relied on by the Secretary of State, and one of the issues for the IAT was whether the Adjudicator had been entitled to take this course.

2. 24. The appeal was heard by a panel led by the President, Collins J. It had been "starred" for the purpose of–

> "… giving guidance to Adjudicators on the proper approach to the Refugee Convention's Exclusion Clauses at Article 1F"

and the Tribunal commented -

> "The events of September 11th, 2001 have made the need for clarity of approach as regards Article 1F imperative." (para 2)

The Tribunal considered a large body of authoritative material from international sources, including reports of UNHCR and Amnesty International, and court and tribunal decisions cases from a number of jurisdictions (listed in paragraph 3 of the decision). Reference was made to the rationale of the article, as stated in the Canadian Supreme Court:

> "The rationale is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees…
>
> … 'When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status'." (*Pushpanathan v MCI* [1998] 1 SCR 982, per Bastarache J)

The Tribunal also referred to the "mandatory" terms of Article 1F:

> "… The mandatory wording admits of no discretion. The question of whether or not a person falls under the Exclusion Clauses is not an optional one: it is an integral part of the refugee determination assessment." (para 38)

1. 25. The Tribunal went on to consider what the approach of the Adjudicator should be when the point had not been raised by the parties. Having referred to the reasoning of this court in *Robinson*, the Tribunal continued:

> "Although the Court of Appeal was here discussing the duty of the appellate authorities to consider points which, although not raised by the asylum-seeker, were in his favour, the same logic, submitted Mrs Grey, should apply with equal force to points which are not so favourable. Thus if an adjudicator considers that on the facts that have emerged (whether on the papers or at the hearing) there is a 'strong prospect' that one of the three limbs of the exclusion clause might apply, he should raise the issue.
>
> We find ourselves in agreement with Mrs Grey's submissions on this point. Because Art 1F is in mandatory terms, the answer an adjudicator must give to the overall question of whether someone is a refugee can only be made by reference to the elements of the definitions variously set out in Articles 1A - 1F. So long as the Art 1F issues are 'obvious' they can, indeed must, be raised." (paras 46-7)

1. 26. Later in the decision the Tribunal gave practical guidance as to how the Adjudicator should handle such an issue, in order to ensure fairness to the claimant. It was emphasised that the allegation needed to be put precisely to the claimant, identifying the paragraph relied on (para 92). Finally in its conclusions, it summarised its view as follows:

> "It would be wrong for adjudicators to adopt an 'exclusion culture' and go searching in every case for exclusion issues under Art 1F. Pragmatism is called for. However, the Exclusion Clauses are in mandatory terms and where obvious issues arise under them these must be addressed by an adjudicator, even if the Secretary of State has not raised them expressly or by implication in the Reasons for Refusal letter. That may happen prior to the hearing, at the outset of the hearing or during it. This approach is subject only to the need to ensure procedural fairness." (para 151.4)

Discussion

1. 27. I will comment only briefly on these authorities. A more detailed analysis is in my view unnecessary given the narrow way in which Miss Chan puts her case. She confines her argument, as I understand it, to a case where there is, on the face of the decision, a clear error of law in the application of the statutory definition of "refugee". The issue as to whether the *Robinson* principle (or any variant of it) can be invoked by the Secretary of State in other circumstances does not arise for decision.

2. 28. In this context, I would respectfully emphasise and adopt two points from the passages already quoted:

> "… it is the duty of the appellant authorities to apply their knowledge of Convention jurisprudence to the facts as established by them" (*Robinson*)
>
> "The question of whether or not a person falls under the Exclusion Clauses is not an optional one: it is an integral part of the refugee determination assessment." (*Gurung*)

At first sight, therefore, if the facts found by the Adjudicator lead in law to the opposite conclusion to that found by the Adjudicator, it is the duty of the appellate authorities to correct it.

1. 29. There is nothing in the statutory scheme to limit the duty of the IAT in this respect. It has jurisdiction to correct errors of law, properly identified in the grounds of appeal, as has been done in this case. I accept that account also needs

to be taken of another important principle, that of "finality". Consistently with that principle, it is well-established that an appellate court will not permit a point to be taken for the first time at the appeal stage unless all the relevant facts are before it "as completely as would have been the case if the controversy had arisen at the trial" (*The Tasmania* [1890] 15 App Cas 225, per Lord Herschell).

2. 30. The jurisdiction of the IAT is more flexible than that of the appellate courts, in that, having found an error of law, it has power to hear evidence and make its own findings of fact. However, I would accept that, at least in relation to an appeal by the Secretary of State, even if an "obvious" point has been missed, it would be wrong to allow it to be taken for the first time on appeal if it depends on the finding of further facts which are left uncertain by the decision. But if the facts are clear, then in my view it is the duty of the IAT to ensure that the correct legal test is applied.

3. 31. The essential question therefore is whether the Adjudicator's decision does disclose such an error of law. In my view, it clearly does. On the basis of the claimant's written statement of 16th August, 2003, and his oral evidence to the Adjudicator (both incorporated into the decision), the only rational conclusion was that Article 1F applied. The facts as found showed that he had committed at the very least "serious non-political crimes" within the meaning of paragraph (b), such as to disentitle him to the protection of the Convention.

4. 32. The Tribunal proceeded on the basis that the claimant's case was that he had been "forced to participate in the Fedayeen", and that therefore there was a live issue as to whether he was a voluntary participant. Had that been the state of the evidence before them, I would not have thought it right to interfere with their conclusion. There would have been a factual issue which required further investigation. However, that was not the state of the evidence. The most recent statement of the claimant not merely admitted, but relied on, the fact that he had been a voluntary participant in the Fedayeen, and indeed had "held an elite position" in it. (It is not clear from the Tribunal's decision whether they were in fact shown the statement itself, although it was quoted in the Notice of Appeal to the IAT.) Furthermore, as I have already observed, the Tribunal was clearly wrong in law to think it arguable that such activity was "political" in terms of the Convention.

5. 33. For those reasons, I would allow this appeal on the grounds that the Adjudicator's decision, on the facts found by him, was clearly erroneous in law, and that the Tribunal should have so found. As already noted, Miss Chan accepts that in these circumstances the matter should be remitted to the AIT.

Lord Justice Dyson

1. 34. I agree.

Lord Justice Brooke

1. 35. I also agree.