C/2000/3646

Neutral Citation Number: [2001] EWCA Civ 1081

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE ADMINISTRATIVE COURT

(MR JUSTICE CRANE)

Royal Courts of Justice

Strand

London WC2

Wednesday, 16th May 2001

B e f o r e :

LORD JUSTICE SCHIEMANN

LORD JUSTICE ROBERT WALKER

-and-

MR JUSTICE LLOYD

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ON THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

THE QUEEN

(ON THE APPLICATION OF ABDULLA)

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(Computer Aided Transcript of the Stenograph Notes of

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MR Y ZAHED (instructed by Duncan Lewis & Co, London E8 2JS) appeared on behalf of the Appellant

MISS L GIOVANNETTI (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1) LORD JUSTICE SCHIEMANN: Before the court is an appeal with leave of Simon Brown LJ against a refusal by Crane J of judicial review. The decision which he had been asked to review was that of the Immigration Appeal Tribunal in which it refused to give permission to appeal from a decision of a special adjudicator. She had dismissed an appeal from the Secretary of State who had rejected the appellant's claim for political asylum. The appellant came here from Kenya in 1995 and claimed asylum immediately.

2) The case has resolved itself in discussion before us into what is in essence one point; a point moreover which does not appear to have been clearly, if at all, argued before the special adjudicator. She certainly makes no clear finding on it. Nor do the Immigration Appeal Tribunal or the judge, none of whom can sensibly be blamed for not having focused on it since it does not clearly appear in the grounds of appeal.

3) For the purpose of explaining the point the following will suffice. The appellant in early 1995 was a supporter of a Kenyan political party called Safina which was in opposition to the government in power. The general law apparently prevented anti-government political meetings and the distribution of anti-government pamphlets – in any event unless permission for such a meeting had been obtained. Such permissions were - we are told- in practice not available.

4) The appellant attended at least one such meeting for which permission had not been obtained and he distributed political pamphlets. As a result of this he was charged in June 1995 and was kept in custody for 14 days. He was granted bail to appear at a court hearing in September 1995. He then fled the country. As a result it seems that he now faces three charges – a charge for attending an illegal meeting, a charge for distributing political pamphlets and a charge for not surrendering to bail.

5) The point which arises is whether prosecution on those charges in those circumstances amounts to persecution for reasons of political opinion. The circumstances in which it has been sought to argue that persecution amounts to prosecution for reason of political opinion vary enormously. A person may have robbed a bank in order to finance a political party. A person may have murdered a dictator. In some circumstances tribunals considering these questions have held that the facts properly analysed do not show persecution but merely the execution of the normal criminal law. However, the point which separates pure prosecution from political persecution is not always obvious, and the difficulty is not limited to political persecution, it may be religious or racial. The matter is adverted to in the United Nations Handbook on Refugees paragraphs 56-60 and discussed at length in Professor Hathaway's well-known book, the Law of Refugee Status page 169 and following. What is quite clear in the present case is that the appellant's advisers have not clearly addressed the point. Nor have the respondents. Nor have the special adjudicator, the Immigration Appeal Tribunal or the judge. We do not consider that it would be helpful to lay down the law in the abstract without the relevant material having been before the special adjudicator or the Immigration Appeal Tribunal. Nonetheless we have concern that the present case <u>may</u> be one where there is a reasonable likelihood of persecution. We say “may” advisedly. Apart from anything else, the position in Kenya has apparently changed since 1995.

6) It appears that much weight was given by the special adjudicator to the fact that the appellant was allowed out of Kenya after having obtained his bail, and so he was. But, as Lloyd J pointed out, the fact that he was allowed out does not have as its logical consequence that he will not be persecuted if he returns. Hitler at first used to let the Jews out. However it appears that political

activities by members of Safina are now tolerated. The special adjudicator appears to have taken the view that this in itself showed that the appellant would be of no further interest to the authorities. That may be so but, because the point I have identified was not clearly addressed, one cannot be certain. There are outstanding charges. What we do not know is what the policy is in relation to outstanding charges. It may be that an amnesty has been declared in relation to charges for activities which are now illegal but which were committed at a time when they were not legal. But the material in front of us does not disclose this.

7) Miss Giovannetti, who appears for the Secretary of State, has submitted that while she accepts that the point which I have identified is a difficult one and was not clearly addressed in the courts below, nonetheless there is no apparent error of law on the part of the IAT in any event, and she says if that be right then this court should not interfere with the judgment of the IAT. She drew our attention to R v Secretary of State for the Home Department Ex Parte Arshad which was heard by Peter Gibson and Buxton LJJ on 14th July 2000, in which a principle was affirmed which had previously been adverted to by this court in Robinson v Secretary of State for the Home Department [1998] QB at 929. At page 945 in Robinson the following is said:

> "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 argument 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 discernable 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 the 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."

8) I would not wish to cast doubt on the general tenor of those observations. It is manifest that from case to case differences will appear as to whether a point is obvious or merely the result of the application of considerable ingenuity. In the present case the grounds of appeal to the Immigration Appeal Tribunal do not crisply identify the point which has been identified earlier in the judgment but are framed in terms which do as a matter of construction embrace the point. As I say, no blame is to be attached to anyone for not having concentrated on a point which appears not to have been clearly argued in front of them. It would be invidious to say the point was obvious. All I can say is it struck me after a fairly short perusal of the papers.

9) There is force in Miss Giovanneti's argument but it is one to which I would be reluctant to give weight unless the circumstances clearly point to the absence of danger.

10) In the present case a separate procedural point has arisen because of the provisions contained in section 65 and following of the Immigration and Asylum Act 1999. Miss Giovannetti accepts that the appellant in practice will be allowed because of those provisions to have a second bite at the cherry, so to speak. She tells us on instructions that this is not a case where the Secretary of State intends to certify under section 72 of the Act that the claim that sending the appellant back to Kenya would be in breach of his human rights would be manifestly ill-founded. In those circumstances it appears that the sort of points which I have identified will in any event be the subject of argument.

11) She submitted that this court should therefore adopt a strict Robinson approach and leave the resolution of the underlying question to the special adjudicator in new proceedings. While I understand that as a submission, in the circumstances of the present case there appears to be no disadvantages in quashing the Immigration Appeal Tribunal's decision and allowing this appeal. This has, we are told, the result that permission to appeal to the Immigration Appeal Tribunal will be deemed to have been granted. Both parties agree that procedurally the most sensible course if that is done is to carry on with the procedures under section 65, let the special adjudicator deal with them and then, if he finds against the appellant, then the Immigration Appeal Tribunal could be asked to deal with the present appeal and, if appropriate, any appeal against the new decision by the special adjudicator under the 1999 Act, which I have just postulated.

12) Looking at what is a sensible resolution to the problems of this man who claims that he will be persecuted if he is returned to Kenya, that seems to me to be the sensible solution and I would so propose.

13) LORD JUSTICE ROBERT WALKER: I agree.

14) MR JUSTICE LLOYD: I also agree.

(Appeal allowed with costs; decision of the Immigration Appeal Tribunal quashed).