C5/2005/0977

Neutral Citation Number: [2006] EWCA Civ 57
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
(MS J GRIMMETT)

Royal Courts of Justice
Strand
London, WC2

Friday, 20th January 2006

B E F O R E:

LORD JUSTICE BUXTON

LORD JUSTICE GAGE

LORD JUSTICE LLOYD

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RG (COLOMBIA)

Appellant/Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Respondent

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(Computer-Aided Transcript of the Palantype Notes of
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MR S CHELVAN (instructed by Messrs Birnberg Peirce and Partners, 14 Inverness Street, London NW1 7HJ) appeared on behalf of the Appellant
MR S KOVATS (instructed by The Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1) LORD JUSTICE BUXTON: This is in effect an appeal from a determination from an adjudicator, promulgated as long ago as 4th November 2003. The appellant, who I will refer to simply as RG, is a national of Colombia. He was born in 1969, arrived in this country in 2001 and claimed asylum on arrival. His initial application was refused in August 2001. He appealed and, during that appeal, it was agreed that he should abandon that appeal and submit a fresh application. That is the application with which the Adjudicator was concerned.

2) RG is homosexual by sexual orientation and has the misfortune to be HIV positive. He lived in Colombia in a homosexual relationship with another man but, so far as his HIV state is concerned, he could not afford the cost of antiretroviral treatment. Since coming to this country, he has met another gentleman, a national of a different country from his own, who is also homosexual and HIV positive. That person is currently making an application for renewal of his present leave to remain in the United Kingdom. RG fears to return to Colombia because of the treatment, as his evidence said, that he feared to return to Colombia because of the treatment meted out there to homosexuals. They ran a risk at the hands of death squads from the fact that he was a person with HIV who was readily known to be gay. He also said, importantly, in connection with this application, that since he had been in the United Kingdom his mannerisms had changed so much that they were more open and overt through living in a society where homosexuality is better accepted than in Colombia and for that reason also he would be identified as a gay person were he to be returned to Colombia. He reinforced that by saying that he is not same as he was in Colombia because now he does not need to hide his nature. He thought and claimed that he would not be able, on return to Colombia, to suppress his new mannerisms, as he had done before.

3) The Adjudicator heard evidence from RG and made a series of findings that it is necessary to set out, using principally the Adjudicator's own words. In paragraph 19, he said this:

> "I accept the appellant is a homosexual and that he is HIV positive. I accept that the evidence which is not disputed by the respondent that homosexuals in Colombia are as a group at risk and have been the target of paramilitaries along with prostitutes, drug users, vagrants and people with mental disabilities, who are often murdered by extremist elements in what is described as a social cleansing."

4) Then later in that paragraph he said this:

> "The appellant, however, despite living a homosexual life from the age of 18 until he left at the age of 31 and for the United Kingdom - some thirteen years - has himself not experienced any violence, hatred or trouble on account of his homosexuality. This is no doubt because he says he kept it secret."

I interpose to say that that is an important passage, to which I shall have to return. The Adjudicator then went on to describe the unwanted attentions that RG had alleged that he had received from a man called Lopez, whom he said might disclose the fact that RG

was HIV positive. But the Adjudicator pointed out that Mr Lopez had not in fact done that between mid-1999, when he first found out about RG's condition, until RG left the country in 2001.

5) The Adjudicator then made the following two findings, both of which are of importance. In paragraph 19 he said this:

> "I do not find therefore that the appellant left Colombia as a result of any persecution due to his homosexuality. I find that the reason why he left was because he was unable to pay for any treatment whatsoever, including the intial viral load and CD 4 count tests in Colombia and had learned from his sister that in the United Kingdom such treatment was available free on the National Health Service."

6) Secondly, dealing with the appellant's alleged change of behaviour and presentation as a result of his being in the United Kingdom, the Adjudicator said this, at the end of his paragraph 20:

> "I do not find therefore that simply because the appellant is able to express himself more openly in what he describes as a freer society such as the United Kingdom that he will necessarily do so if he finds himself in less open surroundings either here, or indeed in another county such as Colombia. I am sure that he would regulate his behaviour accordingly so as not to draw unwelcome attention to himself no matter where he is if by failure to to so he would place himself in danger."

7) And then, so far as his conclusion is concerned, the Adjudicator said this at the end of his paragraph 22:

> "However, I must assess the risk to the appellant on return that he will be targeted as a homosexual. Such risk must be a real risk to this appellant and not merely a probability. Simply because he is a member of a social group, it does not mean that he will necessarily be ill-treated or persecuted. The appellant is not suffering from AIDS and he does not have to draw attention to himself and his lifestyle as a gay man, consequently I find that whilst a possibility exists that he may be ill-treated there is no real risk that it is likley to happen if he takes one or two elementary precautions."

8) I should add that the Adjudicator further considered that some protection from the authorities, as he put it, could not be entirely ruled out, he having found that the position as to persecution of homosexuals in Colombia was not as severe as had been presented. However, he did not base his determination on that and he realistically recognised that there was in countries such as Colombia a possibility of there being a gap between ostensible protection provided by the law and that which was actually forthcoming.

9) Those conclusions are challenged as being wrong in law on the ground that the Adjudicator had reached his conclusion by holding that RG could avoid significant or Convention-relevant persecution in Colombia by living discretely. That, it is contended, would be to impose on him a breach of a recognised human right, the right to live as a homosexual in order to avoid persecution. That is said to be inconsistent with the guidance given by this court in the case of Z v Secretary of State for the Home Department [2004] EWCA Civ 1578, in particular, at paragraph 16, where this court says:

> "It necessarily follows from that analysis [I interpose that is the analysis of Simon Brown LJ, as he then was, in the case of Danian v Secretary of State for the Home Department [1999] INLR 533] that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would otherwise engage in, at least if that modification was sufficiently significant in itself to place him in a situation of persecution. If the IAT in our case refused Mr Z asylum on the basis that he was required to avoid persecution they did not respect the jurisprudence of Ahmed."

10) The persecution alleged in this case is the threat of death, which, it is agreed, is or may be present for openly practising homosexuals in Colombia. But the question that the Tribunal, at whatever level, has to ask itself is, as Simon LJ said in Ahmed v Secretary of State for the Home Department [2000] INLR 1 at pages 7G and 8C-D, as cited, of course with approval, by this court in Z:

> "In all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant will be persecuted for a Convention reason ... The critical question: if returned, would the asylum-seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum."

11) The questions are: what will this applicant in fact do when he returns and what will be the effect on him of that behaviour? That was expressed in paragraph 16 of the judgment in this court in Z as two questions: (1) is he being required, I emphasise that word, to modify his behaviour; (2) will that modification of behaviour put him in a situation of persecution. On the Adjudicator's findings, even question one was not answered in RG's favour. Mr Chelvan, who has argued this appeal for RG and has made every argument that could be made on his behalf, sought to challenge that conclusion on the basis that RG in his statements had claimed that he acted as he did, that is to say he lived quietly with his partner and had not incurred difficulty for 13 years because of, and it would seem to imply only because of, his fear of persecutory behaviour and that claim, it was said, was not challenged by the Secretary of State, at least in his refusal letter. But the case has to be decided on the basis of what the Adjudicator found and it is not suggested that the Adjudicator's findings, even if they could be challenged, ought to be challenged as a matter of law.

12) The reason why I say that question (1) was not answered in RG's favour is to be found in paragraph 19 of the Adjudicator's determination, the passages I have already read. First, the Adjudicator pointed out that Mr RG had lived as a homosexual in Colombia for 13 years from the age of 18 until the age of 31 and without in fact experiencing any hostility or trouble on account of his homosexuality. The Adjudicator went on:

> "This is no doubt because he sas he kept it secret."

But that is not a finding that the secrecy that Mr RG adopted, as the Adjudicator put it, was and was only because of the threats from death quads in Colombia. In other words, the Adjudicator did not find and Mr RG was not, in my judgment, specific in his evidence that that, that is to say the threat externally, was the reason that the pattern of behaviour forced on him was different from that which otherwise he would have adopted.

13) That was also the view of the Immigration Appeal Tribunal, when it heard the appeal from the Adjudicator's determination. In paragraph 25 of its determination, the Tribunal said this:

> "There is no error of law in the finding that the appellant can return and live as a gay man. It was submitted in the grounds that the appellant has immersed himself in the gay scene but that is not what he claims in the witness statement. He says he lives quietly with a partner as neither of them is well and they go to a gay disco for people from Latin America once every two months. He has gay friends in the United Kingdom. In Colombia he lived with a gay man, whom the appellant recognised to be gay when he first met him, who had gay friends although they were not 'out'. He then had a relationshp with another man who was bisexual. The appellant says he has developed gay mannerism which would put him at risk and he cannot now change his behaviour. The adjudicator did not make a finding that required the appellant to change his behaviour but found rather that the appellant would moderate his behaviour if he felt it necessary, as he had done while living in Colombia when he had other partners. That finding is not perverse of unlawful."

14) However, I turn to question two. As was emphasised in paragraph 12 of the judgment of this court in Z, the outcome of RG's return to Columbia, which is the issue identified by Simon Brown LJ in the passage from Ahmed that I have already cited, that outcome must be serious enough to amount to persecution in the Convention sense and this court emphasised in Z, at paragraph 12, that that was a strong and serious finding. This court quoted what was said by Lord Bingham of Cornhill in Sepet v Secretary of State for the Home Department [2003] 1 WLR 856 ,at paragraph 7:

> "Persecution is a strong word. Its dictionary definitions ... accord with popular usage: 'the infliction of death, torture or penalties for adherence to a religious belief or an opinion as such, with a view to repression or extirpation of it.'"

Here the Adjudicator found as a fact, and was entitled to find, that RG would not behave, on return, significantly differently from his behaviour during his 13 years in Colombia, when as a matter of fact it was not established that he behaved in the way that he did only to avoid persecution or that his conduct denying his sexuality was so serious in its effect upon him as to put him in a situation of persecution.

15) Two other factors identified by the Adjudicator point in that same direction. First, RG's case was based on a change in his behaviour in the United Kingdom, which it was said would lead to a difficulty that he had not had previously in concealing his homosexuality. That in itself suggests that his situation when he left Colombia had not imposed significant or sufficiently serious difficulties or behaviour upon him. But the Adjudicator did not accept that such a change of behaviour had taken place to the effect that it would render his situation when returned to Colombia impossible. That was the finding that the Adjudicator made at paragraph 20 of his determination, which I have already read. Secondly, as we have seen, the Adjudicator found that the reason that he left Colombia was not because of the persecution due to his homosexuality but because he was unable to pay for treatment and heard that such treatment was available free of charge under the National Health Service. That strongly militates against his being in a situation of persecution in Colombia or that he would be in such a situation if he returned there. Indeed, it would be something of a paradox if he were to be found to have the right to stay in the United Kingdom in order to avoid persecution in his home state when that situation in his home state was not the reason for his leaving it and where the Adjudicator had found that the circumstances had not significantly changed since he left that home state.

16) We were also pressed with the decision of this court in Amare v Secretary of State for the Home Department [2005] EWCA Civ 1600. That case did not directly address the present issue but rather the issue that was also present in Z of whether any denial at all of basic human rights in that case, as in this sexual orientation case, would necessarily amount to persecution. The Court of Appeal held that it did not but the case is illuminating in the present context for its confirmation of the high level of distress that must be reached before a denial of freedom can be said to be persecutory, both in the passages at the end of the judgment of Laws LJ in that case and in the passages that he cites from the speech of Baroness Hale of Richmond in the House of Lords in EX p. Hoxha [2005] UKHL 19 and in paragraph 27 of Laws LJ's judgment, when he quotes from the judgments of Justices McHugh and Kirby in the case of S in the High Court of Australia:

> "Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

17) On the findings of the Adjudicator there was no such threat if RG returned to Colombia but in reaching those findings it is said that he made a further error of law in not referring to the medical report from a Dr Bell that was before the court. The relevant passages which were the passages that persuaded a single Lord Justice to give permission to appeal to this court were towards the end of the report where Dr Bell said two things. First:

> "If he is returned to Columbia, it is likely to be highly traumatic for him. Firstly, he would have to immediately try to repress his sexuality and live a double life, living as if he is not homosexual (when I asked him how he would be affected by this, he said: 'For me, it would be to die.') Suppression of his sexual identity is likely to have traumatic effects."

Secondly:

> "Given the history of childhood sexual abuse, having to live again in a world in which he is physically ill and declining, whilst feeling menaced and threatened by those around him, would be something that he would not manage psychologically and would result in a serious deterioration or break down."

18) The first of those paragraphs showed in particular that return to Colombia would indeed have traumatic effects of the sort envisaged in the authorities just cited. Mr Kovats, for the Secretary of State said, that the Adjudicator did not refer to this part of Dr Bell's report because it was RG's case throughout that what he feared was the actual persecution of the death squads, not the consequence to his psychology of trying to avoid them.

19) That, in my view, is borne out by the document on which Mr Chelvan relied to rebut that argument in the 17-page grounds of appeal to the IAT. Paragraph 74 of that document does indeed set out the passage from Dr Bell that I have just referred to but in connection with and in support of RG's case that a forced change of sexuality would be a breach of his rights under the European Convention on Human Rights and not that it would amount to persecution under the Refugee Convention. The teaching of Amare and Z, as we have seen, is that breach of Convention rights cannot in itself amount to persecution. In my judgment therefore, the Adjudicator is not to be criticised and certainly did not make an error of law, in the light of the way in which the case was presented to him, in not referring to this part of the medical report when dealing with the Refugee Convention.

20) Further, and in any event, even if that were an error sufficient to equal an error of law, the only remedy could be one of remission. I would find that very difficult on two grounds. First of all, the doctor's report, although it speaks of traumatic effects, did not of course have the benefit of addressing the question that has to be addressed; that is to say that specified in Z and in the judgment of the High Court of Australia. Secondly, the basis upon which the doctor's report proceeded, in particular that an unwelcome repression of sexuality would be required in Colombia, was different from the findings of the Adjudicator that I have already set out. Mr Kovats very fairly said that he did not rely on that point because it would have been open to the Adjudicator to reach that conclusion had he addressed his mind to Dr Bell. Nor do I rely on it but I am bound to note that even if the appeal did not fail in any event, the remedy of remission would be difficult in this case.

21) That said, however, for the reasons set out earlier the appeal must fail.

22) LORD JUSTICE GAGE: I agree.

23) LORD JUSTICE LLOYD: I also agree.

24) LORD JUSTICE BUXTON: Are there any applications?

25) MR KOVATS: My Lord, the Secretary of State applies for an order that the appellant pay the respondent's costs of the appeal. We apply for the order in that form. In practical purposes, we are not seeking that. We want to make an application to the Legal Services Commission.

26) MR CHELVAN: My Lords, sorry, I am instructed to resist that order, upon instructions, in relation to the point that the hearing before this court today is based on the permission granted by --

27) LORD JUSTICE BUXTON: I have not said anything about the permission and I would not invite you to go any further with that application. In fact, if you apply for permission you take a risk as to whether permission is granted by this court. All it does it let you into the door of this court.

28) MR CHELVAN: Well, my Lord, I am in your hands.

29) LORD JUSTICE BUXTON: Yes, you are. Well, the order will be – if the Associate will be good enough to draft the normal order in these circumstances. Your client is very unlikely to have to pay anything. The focus of attention is the Legal Aid.

30) MR CHELVAN: My Lord –-

31) LORD JUSTICE BUXTON: And you need your taxation, or whatever it is called now.

32) Thank you both very much.

Order: Appeal dismissed. The appellant is to pay the respondent's costs.