Case No: C1/2003/0459

Neutral Citation Number: [2003] EWCA Civ 1562
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 6 November 2003

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE SEDLEY
and
MR. JUSTICE MUNBY

- -

Between :

FARSHID SHIRAZI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

MS F WEBBER (instructed by Switalski's, Wakefield) for the Appellant
MR S KOVATS (instructed by the Treasury Solicitor, London SW1H 9JS) for the Respondent

Hearing date : Monday 13 October 2003

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JUDGMENT

Lord Justice Sedley :

1. The appellant is an Iranian who belongs to a Muslim family. He reached this country on 25 July 2001 and claimed asylum nine days later. The single ground on which he claimed asylum was a well-founded fear of persecution by reason of his actual or perceived political opinions.

2. The factual basis of the claim was, in summary, this. The appellant's father had spent five years in the early 1980s as a political prisoner. His brother-in-law who, with the appellant's sister, has been a member of the Mojahedin, had spent six years in prison. His own home had been searched several times by the security or intelligence service, with whom his activities in a radical theatre group had earned him a file. He had been injured and arrested in a student demonstration in 1999. Released after a day, he was rearrested and menacingly interrogated for four days, and was made to sign a document professing repentance. On release he went into hiding. On learning that the authorities were again looking for him and had a warrant out for him, he fled the country.

3. While awaiting a decision on his claim the appellant became a member of the Church of England and on 30 December 2001 was baptised at Pontefract parish church. There was evidence which satisfied the Immigration Appeal Tribunal that his conversion was sincere.

4. The Home Office turned down his claim to be a political refugee. On appeal the adjudicator, Mrs N.A.Baird, treated the asylum and associated human rights claims as based both on political and on religious grounds. She concluded that on neither ground was there a well-founded fear of persecution within the meaning of the Refugee Convention, but that on both grounds there was a real risk of torture or inhuman treatment contrary to article 3 of the European Convention on Human Rights.

5. The Immigration Appeal Tribunal (Mr Spencer Batiste and Mrs A.J.F.Cross de Chavannes) allowed the Home Secretary's appeal. They pointed out, correctly, that the conclusions on asylum and on human rights were inconsistent with one another, at least in the absence of some sound explanation for the discrepancy. They adopted the IAT's decision in *Fazilat* [2002] UKIAT 00973 to the effect that prison conditions and trials in Iran do not in themselves at present violate article 3. This left the asylum claims. As the IAT pointed out, "if [Mr Shirazi] faced a real risk of breach of his article 3 rights in respect of his religious conversion this would also be sufficient to establish an asylum claim." This was true, but it did not of course follow that the failure of the human rights claim in relation to the religious conversion meant that the asylum claim based on it must also fail.

6. As to this, however, the IAT held that the adjudicator had made unwarranted assumptions. They set aside her decision and went on to make their own findings. These were that Mr Shirazi's conversion was genuine, but that as a non-evangelical he would not be at risk by reason of overt activity. On the therefore critical question whether he would be at risk as an apostate they concluded:

> (14) The issue which then arises is whether a convert from Islam to Christianity, who is not an evangelical or driven to proselytise, would be at any real risk on return to Iran and in living thereafter. This matter has been considered by the Tribunal in the cases of *Ahmadi* [2002] UKIAT 05079 and *Khoshkam* [2002] UKIAT 00876. In both decisions the Tribunal considered similar objective material to that which is before us and concluded that non-evangelical converts from Islam to Christianity do not per se face a real risk of persecution and/or breach of their human rights in Iran. Another report submitted to us by Mr Jones relates to a New Zealand case from 1999, which reaches a similar conclusion, though may now be somewhat out of date in terms of the material taken into account. We of course have to reach our own conclusions of the evidence before us.
>
> (15) We conclude, in the light of the objective material placed before us, that the problems in Iran are for evangelicals and others who seek to proselytise. The Respondent, who is not an evangelical or likely to proselytise, will be able to practice his new religion in Iran without running any real risk of persecution or ill-treatment either by the authorities or by individuals in that country. We agree with the conclusions of Tribunals in *Ahmadi* and *Khoshkam.* We also conclude that the existence of the arrest warrant referred to above, even taken into cumulative consideration with the Respondent's conversion, would not lead us to a different conclusion. We find that the Respondent's conversion to Christianity in the UK does not therefore create for him the right to international protection under either the 1950 or the 1951 Conventions.

7. The IAT's decision is impressive in its brevity and cogency. But it has been subjected by Ms Webber to a powerful critique, resisted by Mr Kovats for the Home Secretary on the ground that the decision is one of fact and discloses no issue of law.

8. But Mr Kovats first submits that this appeal has aborted by operation of law. On 30 March 2003 the appellant travelled (apparently on a false Iranian passport) from the United Kingdom to the Netherlands. He was refused entry and returned here the next day. Section 58(8) of the Asylum and Immigration Act 1999 provides:

> "A pending appeal under this Part is to be treated as abandoned if the appellant leaves the United Kingdom."

9. The episode hardly suggests migration or abandonment. But (subject to one issue of meaning) there is no doubt that, the appellant having ventured for 24 hours outside the jurisdiction, we are obliged to treat this appeal as abandoned if, but only if, it is in law an appeal under Part IV of the 1999 Act.

10. Pill LJ having adjourned the application for permission to appeal into open court so that the Home Secretary might be represented, Ward and Buxton LJJ granted permission, acknowledging that the question under s.58(8) would have to be dealt with. On the substantive issue, Ward LJ noted that there were apparently two contradictory lines of authority, or at least of decision-making, in the IAT on the question of the risk of persecution faced by what is elliptically referred to as an innate apostate - that is, a person born into the Muslim faith and abandoning it by choice. He and Buxton LJ considered that this court ought to consider the resulting problem.

Has the appeal to be treated as abandoned?

11. Logically this question comes first. It arises out of s.58 of the 1999 Act, which has now been repealed and replaced with effect from 1 April 2003 by similar provisions in the Nationality, Immigration and Asylum Act 2002 (s.161 and Sch.9; ss.81-117).

12. Section 58 in full provided:

> (1) The right of appeal given by a particular provision of this Part is to be read with any other provision of this Part which restricts or otherwise affects that right.
>
> (2) Part I of Schedule 4 makes provision with respect to the procedure applicable in relation to appeals under this Part.
>
> (3) Part II of Schedule 4 makes provision as to the effect of appeals.
>
> (4) Part III of Schedule 4 makes provision-
>
> (a) with respect to the determination of appeals under this Part; and
> (b) for the further appeals.
>
> (5) For the purposes of the Immigration Acts, an appeal under this Part is to be treated as pending during the period beginning when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned.
>
> (6) An appeal is not to be treated as finally determined while a further appeal may be brought.
>
> (7) If such further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned.

> (8) A pending appeal under this Part is to be treated as abandoned if the appellant leaves the United Kingdom.
>
> (9) A pending appeal under any provision of this Part other than section 69(3) is to be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom.
>
> (10) A pending appeal under section 61 is to be treated as abandoned if a deportation order is made against the appellant.

13. The true meaning of "leaves" in s.58(8) is an open question: see the concluding remarks of Waller and Chadwick LJJ in *Dupovac* [2000] Imm AR 265. I will assume for the purpose of this judgment, as Ms Webber has assumed for the purpose of her argument, that departure from the UK, provided it is voluntary, does not have to be with the intention of giving up residence here. But it is to be noted that s. 3(4) of the Immigration Act 1971 causes leave to enter or remain to lapse "on … going" to another country. The contrasting use of the verb "leave" in the 1999 Act may be significant, notwithstanding that in *Ghassemian and Mirza* [1989] Imm AR 42 (CA), to which Mr Kovats has rightly drawn our attention, it was assumed without argument to be synonymous with "going".

14. Mr Kovats accepts that the legislation on the face of it distinguishes between appeals under the part of the Act, Part IV, which contains s.58 and 'further appeals'. Ms Webber draws our attention to the origin of the concept of a 'further appeal' - namely to this court or the Court of Session - in s.9(1) of the Asylum and Immigration Appeals Act 1993. Nothing in the legislation says in terms that deemed abandonment touches such appeals. The Court of Appeal has always had its own system and its own principles for dealing with appeals which are either abandoned or become moot. It is in my judgment contrary to principle, except in obedience to an unequivocal statutory requirement, to introduce a rule which arbitrarily truncates access to justice in this court.

15. This is especially so when

- all pending appeals to this court have been the subject of a judicial grant of permission, cannot be struck out without a compelling reason (see now CPR 52.9), and have for long carried an automatic stay in immigration cases (RSC, O.59 r. 24(5), 13(1)(a); CPR 52.7);
- the s.58(8) provision only operates one way - it cannot cause an appeal by the Secretary of State or the IAT to abort;
- on no view can the provision apply to judicial review proceedings or to appeals to this court from the Administrative Court, which would create an odd asymmetry since this court has power (see *Dahir* [1995]

Imm AR 570) to treat an appeal as an application for judicial review;

- the Home Secretary's case that the statute does not mean what it appears to say is an argument not from clear words but from equivocation, and so erodes its own foundation.

16. In this situation Mr Kovats' ingenious endeavour to assimilate 'further appeals' to appeals within the immigration appellate system faces great difficulties. He suggests that the cumulative effect of s.58(1), (5), (6) and (7) is that a further appeal becomes or is treated as part of the original appeal, at least for the purpose of deciding whether it is pending within the meaning of s.58(8). The explicit distinction in s.58(4) between 'appeals under this Part' and 'further appeals' he explains as designed to recognise that different procedural and substantive rules apply before adjudicators, the IAT and the Court of Appeal or the Court of Session. But the submission that this recognition "does not impact on s.58(5)-(8)" is in my view unsustainable when s.58(4) goes to the trouble of asserting the very distinction which Mr Kovats is trying to collapse.

17. The one argument which gives pause, and which Ms Webber has therefore addressed in detail, is Mr Kovats' parting shot: if the distinction between appeals is to be maintained in this context, the provisions of Sch.4 Part II of the 1999 Act would mean that asylum-seekers were at risk of removal even though they had succeeded before the IAT. Ms Webber first argues for a differential meaning of 'further appeal', so that for Sch. 4 purposes an appeal to this court is a pending appeal which prevents removal. This is not an easy or an attractive submission; nor is it necessary. Her better argument is that the extension of Sch. 4 protection to parties before this court is not needed because either the appeal will operate as a stay by virtue of CPR 52.7 or the court's own powers will afford the necessary protection. The Civil Procedure Rules came into force while Sch 4 was waiting to be brought into effect; but the Rules of the Supreme Court had already made analogous provision. That seems to me to answer Mr Kovats' final point.

18. It follows in my judgment that this appeal is not to be treated under statute as abandoned by reason of the appellant's brief absence from the United Kingdom. No separate submission to the same effect has been, or could possibly have been, made on the merits.

Is the appellant a refugee by reason of his conversion?

19. As the IAT noted, if the appellant has become entitled to protection because of his conversion, it is as a refugee *sur place.* This is a status known to international law, but it has to fall within the 1951 Convention if it is to found an asylum claim. This requires it to be established that it is owing to a well-founded fear of persecution by reason of his religious beliefs that the applicant is outside the country of his nationality - in other words, in most cases, that this is why he has fled and cannot go back. But it can happen that a person who has not fled and is abroad for quite unrelated reasons finds that he cannot now go back for a Convention reason. That reason must, however, have *become* the reason (or at least *a* reason) why he is outside

the country of his nationality. If it has not - if he is here solely for other reasons - his case falls outside the Convention and he is not a refugee *sur place*. His claim to stay must succeed as a human rights claim or fail altogether.

20. The appellant applied for asylum, and appealed to the adjudicator, on grounds unconnected with his religious conversion. It was in the course of his evidence to the adjudicator that the latter emerged and became a ground of his claim. Neither the adjudicator nor the IAT seems to have considered whether his conversion has become - what initially it was not - a reason why he is outside Iran.

21. The in-country evidence originating with the Home Office established that, while religious minorities are given constitutional recognition, the Sharia law prescribes the death penalty for a Muslim man who becomes an apostate by conversion. There is no evidence as to the frequency with which the penalty is in practice imposed or carried out, if it is imposed or carried out at all.

22. Of the three IAT decisions referred to by the IAT in the present case, one (*Ahmadi*, 4 November 2002) concluded in general terms that the appellant was not at risk of persecution as a convert since the authorities' particular concern was with "the evangelical churches". In *Dorodian* (23 August 2001), by contrast, it was accepted that "converts to evangelical churches who are actively involved even in internal church life" might face a risk amounting to persecution. The decision in *Khoshkam* (26 March 2002) afforded no more than an obiter comment that the evidence did not support a bare assertion that the fact of conversion to Christianity meant that the appellant would be killed by the state authorities. That might have been right, but it was hardly the whole picture.

23. Ms Webber has now drawn our attention to a series of other IAT decisions, and to two significant appellate decisions from other jurisdictions, which take a markedly different view of the position of Christian converts in Iran. Two of the former deserve mention. In *Sarkohaki* (6 December 2002) the Tribunal concluded:

> "The US State Department report makes it quite clear that religious activity is monitored closely by the Ministry of Intelligence and Security. It says: 'Apostasy, specifically conversion from Islam, may be punishable by death'."

And in *Ghodratzadeh* (16 May 2002) the Tribunal held:

> "… it is not entirely clear whether the full rigour of the law against apostasy has been imposed. Be that as it may, the law is there, there is undoubted antipathy, to put it no higher, to those who reject Islam and convert to Christianity, and in those circumstances there is clearly a real risk that if the authorities discovered that a person was an apostate, he might find himself being persecuted."

24. Ms Webber reminds us that Lord Hoffmann in *Islam and Shah* [1999] 2 WLR 1015, 1032, instanced "an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear" as characterising a well-founded fear of persecution. She argues that the appellant's history of unwelcome attention on the part of the security police because of his and his family's political dissidence, although it has been held not to go the necessary distance to establish the original asylum claim, significantly enhances the risk that, if he is returned, his apostasy will come to the authorities' attention.

25. The United States 7th Circuit Court of Appeals in *Bastanipour v INS* 980 F.2d 1129 (1992) said (per Posner J):

> "We do not know what Iran does to ordinary apostates. [The appellant] is not quite an ordinary apostate. Apart from his drug conviction, which will not endear him to Iranian authorities but is not a relevant factor in deciding whether he has a well-founded fear of *persecution*, his brother has been active in the US in opposition to the Iranian regime. Nor is the death penalty the only sanction grave enough to be deemed persecution …"

So here, Ms Webber submits, the risks attending the appellant's conversion have to be gauged within his overall relationship with the Iranian state.

26. Even where the risks attending conversion are taken in isolation, the recent view expressed by the Federal Court of Australia (Lee J) in *A v Minister for Immigration and Multicultural Affairs* [2002] FCA 148 is persuasive:

> "… [F]or an apostate, the risk of extreme punishment will always exist…. [P]erhaps a person who has committed a capital offence of apostasy under Iranian law may be fortunate enough to escape the consequence of that conduct if returned to Iran, but … the risk of discovery, apprehension and punishment would continue and it may be sufficient to ground a well-founded fear of persecution. Furthermore, the persecution feared, of course, is not restricted to execution and may include the suffering of substantial harm or interference with life by way of deprivation of liberty, assaults and continuing harassment on account of the perceived apostasy."

27. This stands, however, in marked contrast to the decision of the Swedish Aliens Appeal Board, cited by the High Court of New Zealand in *Y v Refugee Status Appeals Authority* (M no. 1803/98; 19 August 1999), para. 20:

> "According to the Shari'a Law, applicable in Iran, conversion from Islam to Christianity is officially punishable by death. In one case during the 1990's has the conversion – beyond other criminal accusations – been the basis for the execution of the death penalty in accordance with Shari'a Law. In this case the

> death penalty was later revoked by the Supreme Court. In a few cases converts have been killed under unknown circumstances. All such cases concerned proselytising priests.
>
> It is rare that Iranian asylum seekers convert to Christianity in other countries but the Netherlands and Sweden. According to concerted information from Christian Churches in Iran, there is no real chance of persecution upon return to Iran of persons who have claimed conversion as ground for asylum in Sweden. Some 3-4 years ago converts would probably have been exposed to various kinds of punishment, in case the conversions had become to the knowledge of the authorities in Iran . … Today there are persons in Iran who have converted from Islam to Christianity there, and who participate in Christian activities there without the interference of Iranian authorities.
>
> Conversion from Islam to Christianity is according to Iranian authorities not possible, and a conversion abroad is considered by the authorities as a "technical" act, in the purpose of obtaining asylum, which therefore does not mean that the person in question risks any serious harassment on return. The concept of 'Taqieth', which is widely accepted in Iran, makes it legitimate to lie in order to achieve certain purposes. This means that there is a high level of acceptance in Iran of the lie as a means to obtain a purpose, such as seeking asylum in the west. Iranian nationals who have converted from Islam to another religion, and who keeps the conversion a personal matter, does not attract the attention of the authorities.

……..

> An Iranian national, who converts from Islam to another religion, normally does not risk the kind of prosecution prescribed in the Shari'a Law, whether the conversion takes place in the home country or abroad. There is also no significant chance that he or she would be the target of any actions from the authorities or of any serious harassment. This assessment is based on the assumption that the conversion has come to the knowledge of the Iranian authorities."

The passage is cited by the IAT in its decision in *Jalilian* (11 August 2003; no. HX 54749-01); but the IAT goes on to differ, on well-reasoned grounds, from the Swedish appraisal.

28. For the Home Secretary, Mr Kovats stresses that no two cases are the same, and that precedent relates to principle rather than to factual analogy. The present decision, he submits, asks and answers the right question. That is all that is required. It is not to the point that other constitutions of the IAT have reached different conclusions on similar facts. That is in the nature of adjudication.

29. I accept readily that it is not a ground of appeal that a different conclusion was open to the tribunal below on the same facts, nor therefore that another tribunal *has* reached a different conclusion on very similar facts. But it has to be a matter of concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different tribunals. The latter seems to me to be the case in relation to religious apostasy in Iran. The differentials we have seen are related less to the differences between individual asylum-seekers than to differences in the Tribunal's reading of the situation on the ground in Iran. This is understandable, but it is not satisfactory. In a system which is as much inquisitorial as it is adversarial, inconsistency on such questions works against legal certainty. That does not mean that the situation cannot change, or that an individual's relationship to it does not have to be distinctly gauged in each case. It means that in any one period a judicial policy (with the flexibility that the word implies) needs to be adopted on the effect of the in-country data in recurrent classes of case.

30. The jurisprudential implications of such an approach were considered in the judgment of the court delivered by Laws LJ in *S v Home Secretary* [2002] INLR 416:

> (26) However we have reached the view that the S determination cannot stand. We have so concluded because of its special nature, as it appears from the passages from paragraph [2] and [3] which we have cited (paragraph [3] above). The IAT intended this decision to be determinative: that is, it should thereafter be followed by special adjudicators, and the tribunal itself, absent evidence of a deterioration in the conditions in Croatia relevant to the circumstances of Serb asylum seekers. Now, the notion of a judicial decision which is binding as to *fact* is foreign to the common law, save for the limited range of circumstances where the principle of res judicata (and its variant, issue estoppel) applies. (There is also, of course, provision in Civil Procedure Rules 1998, r19.10-19.15 for the case management of group litigation, but we need not take time with that.) This principle has been evolved – we put the matter summarily – to avoid the vice of successive trials of the same cause or question between the same parties. By contrast, it is also a principle of our law that a party is free to invite the court to reach a different conclusion on a particular factual issue from that reached on the same issue in earlier litigation to which, however, he was a stranger. The first principle supports the public interest in finality in litigation. The second principle supports the ordinary call of justice, that a party have the opportunity to put his case: he is not to be bound by what others might have made of a like, or even identical case.
>
> (27) The stance taken by the IAT here, to lay out a determination intended in effect to be binding upon the appellate authorities as to the factual state of affairs in Croatia absent a demonstrable change for the worse vis-à-vis the plight of Serbs, to an extent sacrifices the second principle to the first.

By no means entirely: an applicant will of course be heard on any facts particular to his case, and (as the IAT made clear) evidence as to any deterioration in the state of affairs in Croatia would be listened to. Otherwise, however, the debate about the conditions in Croatia generally affecting Serbian returnees or potential returnees has been had and is not for the present to be had again.

(28) While in our general law this notion of a factual precedent is exotic, in the context of the IAT's responsibilities it seems to us in principle to be benign and practical. Refugee claims vis-à-vis any particular State are inevitably made against a political backdrop which over a period of time, however long or short, is, if not constant, at any rate identifiable. Of course the impact of the prevailing political reality may vary as between one claimant and another, and it is always the appellate authorities' duty to examine the facts of individual cases. But there is no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence.

(29) But if the conception of a factual precedent has utility in the context of the IAT's duty, there must be safeguards. A principal safeguard will lie in the application of the duty to give reasons with particular rigour. We do not mean to say that the IAT will have to deal literally with every point canvassed in evidence or argument; that would be artificial and disproportionate. But when it determines to produce an authoritative ruling upon the state of affairs in any given territory it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real as opposed to fanciful bearing on the result, and explain what it makes of the substantial evidence going to each such issue. In this field opinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists. We recognise of course that the IAT will often be faced with testimony which is trivial or repetitive. Plainly it is not only unnecessary but positively undesirable that it should plough through material of that kind on the face of its determination.

(30) It may be thought that this approach is not far distant from the way in which the IAT generally discharges its duty to give reasons, and not only in cases where it resolves to produce

> an authoritative determination as to the position in a particular country. Indeed we do not mean to suggest that in this latter class of case the IAT's duty is of an altogether different quality. The experienced members of the IAT, not least if we may say so its President and Deputy President, will we are sure have no difficulty in gauging the quality of the reasons given so as to ensure that these authoritative determinations will be, and will be seen to be, effectively comprehensive.

31. The undesirability of such factual disparities was recently reiterated by this court in *Gurung* [2003] EWCA Civ 654: see especially the judgment of Buxton LJ at paragraph 12. Mr Kovats has argued that, while it may be proper to insist that good reasons be given for departing from an otherwise consistent line of factual decisions of the present kind, there can be no such requirement where, as here, there is no consistent line. But this does not answer Ms Webber's point that it is the very inconsistency of the decisions which is inimical to justice.

32. I am conscious of the ever-present risk of creating a back door to asylum by allowing claims to apostasy on the part of nationals of theocratic states to establish without more a well-founded fear of persecution. It is especially so when many religious bodies in this country are very ready to welcome converts and may even be seeking them out. That, no doubt, makes great caution appropriate in deciding both on the genuineness of conversions (see the apposite guidance given by the IAT in this regard in *Dorodian* (23 August 2001; no. 01 TH 01537), paragraph 8, and in *Jalilian* (ante) paragraph 22), and on the question of causation which can arise in the case of refugees *sur place*. But it cannot properly affect the judicial reading of the data about the situation in the country of the applicant's nationality.

Conclusion

33. I would allow this appeal on the ground that the issues canvassed above have not been adequately addressed by the IAT. That this is so is, I hope, evident from a comparison of the passage of their reasons cited earlier in this judgment with the sometimes complex matters to which the argument has now drawn attention. I would remit the case to the IAT with an indication that the President should give directions for its rehearing in the light of this court's decision.

Mr. Justice Munby:

34. I agree entirely with my Lord.

35. I only add a few words on the meaning of the phrase "leaves the United Kingdom" in section 58(8) of the Asylum and Immigration Act 1999. This phrase, which appears also in section 33(4) of the Immigration Act 1971 and in the provisions of the Nationality, Immigration and Asylum Act 2002 which, as my Lord has observed, have since replaced section 58, is to be contrasted with the phrase "on his going to a country or territory outside the common travel area (whether or not he lands there)" in section 3(4) of the Immigration Act 1971. It is not obvious to me that the word "leave" is here being used in the same sense as the word "going" even if, as my Lord

has noted, in *Ghassemian and Mirza* (1980) [1989] Imm AR 42 this court without argument assumed the words to be synonymous.

36. Mr Kovats submits that "leaves" here means "physically departs from (of his own volition)". In support of this proposition he has referred us to the decisions of the Immigration Appeal Tribunal in *Szalacha* HX/71787/97 (16407), *Dupovac* HX/78703/98 (16537) and *Nongpar* TH/0448/97 (16611), in each of which the Tribunal treated "leave" as meaning simply "going" or "travelling" "beyond the common travel area". That may be so, but as my Lord has already mentioned, this court expressly left the question open in its later decision in *Dupovac* [2000] Imm AR 265. The subsequent decisions of the Tribunal in *Djuretic* HX/70037/97 (00TH001850) and *Anonymous* [2003] UKIAT00090J (Poland) to which Mr Kovats also helpfully took us do not seem to me to take the matter any further.

37. As was pointed out during the course of argument, the word "leave" takes its meaning from the context. The barrister's clerk who, in answer to a solicitor's inquiry, says that "Mr Smith has left chambers" means one thing if the solicitor is worried because Mr Smith has not yet arrived at court; he means something very different if he is having to tell the solicitor that he cannot accept instructions because Mr Smith has moved to other chambers. The father who says to his child "Look! We are now leaving England" means one thing if they are looking back at the White Cliffs of Dover as the cross–channel ferry sets out to take them on a day–trip to Calais; he means something very different if they are looking back at Tilbury as the P&O liner sets out to take them to a new life as emigrants to Australia.

38. It is by no means obvious to me that someone "leaves" the United Kingdom within the meaning of section 58(8) merely because in the course of an afternoon's yachting or fishing he briefly leaves territorial waters. (And if Mr Kovats is correct in his submission that this is a leaving, assuming only that it is volitional, what of knowledge and intention? Does it make a difference that our sailor knows that he has left territorial waters, because his plan was to go fishing 25 miles out, or that he has left territorial waters, albeit having steered to where he has got, only because of a navigational error?) Nor, coming closer to the facts of the present case, is it by any means obvious to me that someone "leaves" the United Kingdom if his plan to go to another country outside the common travel area is thwarted by that country's refusal to admit him and he is immediately put on the next plane back.

39. I express no concluded views on any of these questions. Mr Kovats may be right. But it may be that he is not. I draw attention to these matters only to emphasise, so far as I am concerned, that these are all still open questions, that they did not arise for decision in the present case because Ms Webber was content to assume for the purposes of her argument, although without conceding, that her client had indeed left the United Kingdom, and that nothing we have said should be taken as a determination, one way or the other, as to whether her client, in circumstances that were not fully explored before us, had indeed left the United Kingdom.

Lord Justice Mummery:

40. I agree with Sedley LJ that this appeal should be allowed.

41. I wish to add two comments on the abandonment argument raised by Mr Kovats on behalf of the Home Secretary.

(1) Both sides assume that the appellant "leaves the United Kingdom" for the purposes of s 58(8) by travelling from the United Kingdom to the Netherlands on 30 March 2003 for a short holiday, but is refused entry and returns to the United Kingdom on the following day. I doubt whether that assumption is correct. "Leaves" in relation to a country is capable of covering a wide range of situations ranging, at one end, from the mere fact of physical departure from a country, to, at the other end, emigration to another country. In the context of a stipulated consequence of being treated as abandoning a pending appeal, I seriously question whether the appellant "leaves the United Kingdom" within s 58(8) by travelling out one day for a short holiday and having to return the next day. In the absence of full argument it would not be right to express a concluded view on the point.

(2) Like Sedley LJ I conclude that the appeal of the appellant to this court, which was pending at the date of his journey to the Netherlands, is not a "pending appeal under this Part [i.e. Part IV]" within 58(8). It is true that Part IV relates to appeals and that this is an appeal which was pending at the relevant time. An appeal to the Court of Appeal is not, however, an appeal "under Part IV." The appellate authorities who hear appeals under Part IV are the IAT and the adjudicators, as mentioned in s 56 and s57. S 58, which contains general provisions in relation to appeals, expressly recognises, in its reference to the provisions of Part III of Schedule 4, a distinction between "..appeals under this Part" (s 58 (4)(a)) and "further appeals" (s58(4)(b). It is clear from paragraph 23 of Part III of Schedule 4 (Determination of Appeals) that whereas an appeal to the IAT is "an appeal brought under Part IV", an appeal from the final determination of the IAT to the Court of Appeal on a question of law material to that determination is a "further appeal" by a party. It is not an appeal under Part IV. The argument advanced by Mr Kovats fails on the clear language of s 58 and Part III of Schedule 4, when construed in the context of the appellate structure to which the provisions refer.