Case No: C4/2003/2245

Neutral Citation Number: [2004] EWCA Civ 1578
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL
CC/10392/2001

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 02 December 2004

Before :

LORD JUSTICE PETER GIBSON
LORD JUSTICE BUXTON
and
LORD JUSTICE JACOB

- -

Between :

Z	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

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Mr Nicholas Blake QC and Mr Raza Husain (instructed by **the Refugee Legal Centre**) for the **appellant**
Mr Steven Kovats (instructed by the Treasury Solicitor) for the **respondent**

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Judgment

Lord Justice Buxton :

1. The structure of this appeal was not wholly satisfactory, and I fear that that may be reflected in the structure of this judgment.

History

2. Mr Z is a citizen of the Republic of Zimbabwe. He is homosexual by orientation. He claimed asylum immediately on arrival in this country, regrettably as long ago as 18 February 2001. His account was that there was general hostility to homosexuals in Zimbabwe, supported or condoned by the state, and more particularly that he feared persecution by his step father and, through him, by ZANU activists. Mr Z, by then aged 25, gave a history of ill treatment by the stepfather from an early age. He had realised his sexual orientation by the age of 21, and had met a homosexual lover, a Mr D. They did not live together, but met at work or in town, without however frequenting gay bars or other places. Mr Z told his step-father that he wished to "marry" Mr D: that is, to live permanently with him. The step-father threw him out of the family home, and gave him six months to reconsider his position. The step father, a former youth leader in ZANU, threatened that if Mr Z did not change his position he would set ZANU activists on to him. Mr Z decided to leave Zimbabwe before the deadline expired.

3. The adjudicator held that the evidence before him as to general persecution of homosexuals in Zimbabwe was very thin, and that there was no evidence that persons would be persecuted just because they were homosexual. He specifically disbelieved Mr Z's account of the attitudes of his step-father, and also that the step-father had, through ZANU, any connexion with the state or with a state-tolerated body. He was also plainly very sceptical, though he made no specific finding, about Mr Z's claim that he could not afford to bring Mr D with him to the United Kingdom, Mr Z having been in a well-paid job before leaving Zimbabwe. He therefore rejected Mr Z's asylum claim as unfounded in fact, and on the same factual grounds rejected all his claims under the ECHR.

4. The adjudicator's decision was reversed by the IAT, in a determination in November 2001. The IAT did not differ from any of the adjudicator's conclusions as set out above, but held that there had been inadequate consideration of article 8 of the ECHR That determination of the IAT was reversed by this court: [2002] Imm AR 560. The case was remitted to the IAT for rehearing on both Refugee Convention and ECHR grounds, with the possibility of the adduction of further evidence.

5. The case was reheard by the IAT in compliance with that order in April 2003: by then already more than two years from Mr Z's arrival in this country. The IAT declined to hear further evidence from the appellant, considering that he had already had ample opportunity to give evidence to the adjudicator, and had not indicated any desire to amplify, update or even amend that evidence. The Tribunal had before it a report from an expert witness, a Dr Oliver Phillips, which it admitted into evidence. It did not permit Dr Phillips to give oral evidence, as it did not appear that he had anything relevant to add to his report.

6. The IAT concluded that, even with the advantage of the new evidence that was before it, nothing led it to conclude that the adjudicator was wrong to find that "homosexuals per se are not at risk of serious harm in Zimbabwe". All must depend on the circumstances of the individual case. Counsel sought to persuade the IAT that the adjudicator's findings of fact, adverse to Mr Z, were unreliable. The IAT, in a careful and detailed analysis, rejected all of those submissions. That conclusion is not sought to be re-opened in this appeal, nor could it have been. The IAT then continued in a paragraph very important for this appeal:

> "In concluding that the appellant would not be at risk upon return to Zimbabwe because no-one except his partner and one gay friend would know he was a homosexual, we have taken account of his own evidence regarding his past history as a homosexual. He described realising he was gay when he was 21 and then embarking on his first gay relationship when he was 23, with his current partner. He said that they did not visit gay places. He said the couple used to meet in the town or at work. He said they conducted their relationship 'secretly, so it was not known'. This history is relevant because it demonstrates in our view that the appellant's chosen form of homosexual conduct did not and does not involve overt expression or the frequenting of gay bars or other collective homosexual settings, activities which may well increase the risk an appellant would run of hostile reaction from the police or public. This evidence adds to our reasons for concluding that in reality the appellant and his partner had been able to conduct their gay relationship without serious difficulties."

7. That led the IAT to the following conclusions. First, the appellant had not demonstrated a real risk of serious harm on return, so as to bring himself within the Refugee Convention. Second, and for the same reason, article 3 of the ECHR could not apply. Third, even if (a matter then unclear) article 8 could apply at all, "whilst the need to keep his personal relations secret [in Zimbabwe] might cause him some degree of difficulty, the evidence fell far short of establishing a degree of difficulty that would give rise to significant detriment to his right to respect for private and family life."

The present appeal

8. Permission to appeal to this court was refused on paper by a single Lord Justice. However, there then came to the attention of those advising Mr Z the decision of the High Court of Australia [HCA] in December 2003 in *Appellant S395/2002 v Minister for Immigration* [2003] HCA 71 [*S395*]. The appellant contended that that case threw new light on a situation such as that of Mr Z, a homosexual living without overt expression of his homosexuality in a country generally hostile to that form of orientation. The decision of the HCA supported the appellant's contention that if such a person were required to keep his homosexuality secret in order to avoid persecution, that in itself was a persecutory action, at least potentially sufficient to fulfil the requirements not only of the Refugee Convention but also of article 3 of the ECHR. This court was accordingly

prevailed upon to grant permission to appeal, Laws LJ when giving the leading judgment emphasising that the permission was essentially limited to a consideration of the impact, if any, of the observations in *S395* upon English law.

9. In the event, however, the appeal has ranged far more widely than that, and has concentrated not upon the ECHR, which was the main thrust of the grounds of appeal, but upon the Refugee Convention: to which, necessarily, *S395* solely related. Reliance on article 3, which formed the centre-piece of the grounds of appeal, was specifically disclaimed in oral argument. No application was made to amend the grounds, and it was not until Mr Nicholas Blake QC opened the appeal before us that its new basis became apparent. Out of consideration to Mr Z, however, we permitted the matter to be ventilated in the form that he desired. I can best explain the form that the case now takes by setting out the series of propositions on which the appeal was based.

Persecution as a discriminatory denial of core human rights

10. Mr Blake's principal contention was that it was now clear that "persecution" for the purposes of the Refugee Convention; and, as I understood it, also under article 8; existed where there was any discriminatory denial at all of a core human right. The right to respect for private life was such a core human right, and it therefore necessarily followed that any inability to live openly with one's (homosexual) partner was a discriminatory denial of such a right. The IAT should therefore have found that Mr Z would be persecuted on his return to Zimbabwe. On the logic of this argument, that necessarily followed from the IAT's finding that the need to keep his personal relationships secret might cause him some degree of difficulty.

11. Nothing of this can be drawn from *S395*. Rather, Mr Blake said that he relied on two sources. The first was a series of cases in which the House of Lords has adopted the view of Professor James Hathaway that

> "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community."

That statement, with reference to previous cases in their Lordships' House, is most conveniently to be found in the speech of Lord Steyn in *R(Ullah) v Special Adjudicator* [2004] 2 AC 323[32]. There, however, Lord Steyn was setting out the *kind* of conduct that might count as persecution. He was not addressing the nature and extent of such conduct that has to be established in any particular case before that case becomes in fact one of persecution.

12. That that was the limit of Lord Steyn's observation is shown by one of the sources that he cited being the speech of Lord Bingham of Cornhill in *Sepet v SSHD* [2003] 1 WLR 856, a speech with which Lord Steyn, at paragraph 24 of that report, said he was in complete agreement. At paragraph 7 Lord Bingham pointed out that 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".

That approach accords, as Lord Bingham said, with Professor Hathaway's definition in terms of "sustained or systemic failure" of state protection. Whatever are the limits of this analysis, they clearly do not embrace every interference, however minor, with core human rights.

13. Second, Mr Blake said that his submission was consistent with the decision of the Refugee Status Appeals Authority of New Zealand in Refugee Appeal No 74665/03, which concerned a homosexual refugee from Iran. I do not presume to determine what is the law of New Zealand in the light of the Authority's decision, but I have no hesitation in saying that that decision gives no support to Mr Blake's thesis. That is apparent from a passage specifically relied on by Mr Blake, at paragraph 114 of the decision:

> "If the right proposed to be exercised by the refugee claimant in the country of origin is at the core of the relevant entitlement *and serious harm is threatened*, it would be contrary to the language, context, object and purpose of the Refugee Convention to require the refugee to forfeit or forego that right and to be denied refugee status on that basis that he or she could engage in self-denial or discretion on return to the country of origin" (emphasis supplied)

The requirement is, in line with *Sepet*, the threat of serious harm. Simple deprivation of rights is not enough to constitute persecution in its international meaning.

A requirement of self-denial?

14. If his primary case failed, Mr Blake fell back on the issue ventilated at the end of the quotation in paragraph 13 above, and which is certainly an important feature of the decision of the HCA in *S395*: that if a subject's way of life would be subjected to persecution in his home country, he cannot be denied asylum on the basis of a conclusion that he could avoid that persecution by modifying that way of life. That consideration is to be found throughout the judgments in *S395*, for instance in the judgment, supporting the majority conclusion, of McHugh and Kirby JJ at paragraphs 40 and 43:

> "persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps-reasonable or otherwise-to avoid offending the wishes of the persecutors. Nor would it

> give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution…[43] In many-perhaps the majority of-cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct." (emphasis in the original)

15. Mr Kovats for the Secretary of State pointed out that where avoiding action is forced on the subject, that case only falls under the Refugee Convention if it results in a condition that can properly be called persecutory, in that imposes on the subject a state of mind or conscience that fits with the definition of persecution given by McHugh and Kirby JJ in paragraph 40 of their judgment, and in line with English authority already quoted:

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

That no doubt is the level of interference that McHugh and Kirby JJ had in mind when speaking of threats and menaces in the passage cited in paragraph 14 above.

16. Although *S395* was presented to the court that granted permission in this appeal as a new departure in refugee law, and for that reason justifying the attention of this court, in truth it is no such thing. McHugh and Kirby JJ, at their paragraph 41, specifically relied on English authority, *Ahmed v SSHD* [2000] INLR 1. It has been English law at least since that case, and the case that preceded it, *Danian v SSHD* [1999] INLR 533, that, in the words of the leading judgment of Simon Brown LJ at pp 7G and 8C-D:

> "in all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would 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"

It necessarily follows from that analysis 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*.

17. But the IAT did not make that error. It never suggested that Mr Z should be refused asylum because in his home country it was possible for him to behave differently from what, absent threats, he would wish to do. Rather, answering Simon Brown LJ's question, even though it does not seem to have been put to it, the IAT held, in the passage cited in paragraph 6 above, that on return to Zimbabwe Mr Z would continue in a chosen course of conduct that would not in the future, any more than it had in the past, be sufficiently likely to attract the adverse attention of the authorities.

18. That finding is necessarily destructive of Mr Blake's second way of putting the case. He responded by saying that the IAT's conclusion was not open to it as a matter of fact. It should have found that Mr Z adopted his mode of behaviour in Zimbabwe not out of choice, but in order to avoid state pressure; and in particular that if when he returned he adopted his stated intention of living openly and together with Mr D the evidence suggested that he would attract persecution.

19. The difficulty about these contentions is that they departed by a considerable distance from the way in which the case had previously been put. In particular the Grounds of Appeal, far from seeking to disturb the IAT's findings as to Mr Z's previous conduct with regard to his sexual identity, adopted those findings but said that they were irrelevant to the issue, wrongly thought to be raised by the IAT's determination, of whether that conduct could be *required* of Mr Z in the future. Here again however, granted that this is an asylum case, we permitted this third line of argument to be pursued.

The facts

20. Material to support this new case was hard to come by. The appellant complained in a skeleton supporting the application for permission to appeal based on *S395* that "neither the Tribunal nor the Secretary of State addressed the question of *why* the appellant had conducted his personal relations discreetly". That is hardly surprising, since the appellant himself had given no specific evidence directed to that question. To fill the gap, and most unsatisfactorily, reliance was sought to be placed on a paragraph in a submission made by the appellant's lawyers. Although some latitude is permitted in respect of evidence in this jurisdiction, that is mainly to accommodate difficulties in obtaining direct evidence as to conditions in foreign countries. That latitude does not extend to assertions about the views or behaviour of people who are available in England but who have, for whatever reason, chosen not to vouch for the evidence themselves. Even worse, much of this passage consisted of a repetition of the allegations about the step-father and his position in ZANU, which the adjudicator had rejected as untrue. Mr Blake eventually said that he could salvage a half-sentence, in which the solicitor said that Mr Z and Mr D met secretly for fear of reprisals if their sexuality was discovered. That did not prove anything.

21. Apart from that, Mr Blake relied on a statement by Mr Z, already recorded, that he wanted to live together with Mr D, and argued that the country evidence, including now the report of Dr Phillips, indicated that that public acknowledgment of their status would be very likely to attract persecution. It will be recalled that that was not the focus of the case as put by Mr Z: had it been, there would have been no need to descend into the allegations about the step-father. Further,

although Mr Z did refer to the hostility of the state and parts of the public to homosexuals, he gave no clear indication that that was why he and Mr D behaved as they did. And as to the country evidence, although the report of Dr Phillips does reveal, as the IAT put it, widespread societal hostility to homosexuals, it is not possible to spell out of it any specific view as to what might happen if Mr Z and Mr D simply lived together. That may be the reason why, as paragraph 20 of the IAT's determination indicates, that report was relied on before the IAT not principally in relation to that case, but rather to bolster the plausibility of the appellant's account of the hostility of his step-father.

22. In summary, therefore, there was inadequate evidence of any settled intention on the part of Mr Z to live with Mr D, to the extent that to deprive him of that opportunity would be persecutory; and, even if that had been established, no sufficient evidence that two men living together but otherwise not emphasising their homosexuality would attract persecution.

The ECHR

23. I have already indicated how article 3, originally the bedrock of the appeal, was abandoned before us. Although Mr Blake in form retained a case on article 8, that was not pressed. That was a correct judgement, in the light of the very high test that has to be met, for instance as set out in terms of a requirement of the most compelling humanitarian considerations in the speech of Baroness Hale of Richmond in *R(Razgar) v Home Secretary* [2004] 2 AC 368[59]. If, as I consider, Mr Z cannot succeed on the facts under the Refugee Convention, by the same token he cannot succeed under article 8.

Conclusion

24. This appeal comes down to the issues of fact just set out. Those issues were present in the case from the first, and relevant under the law of this jurisdiction as set out in *SSHD v Ahmed*, long before the judgment of the HCA in *S395*. There was no barrier to the adduction of evidence relevant to those issues if it was available. No sufficient evidence was given, and the IAT was accordingly justified in concluding as it did. I would dismiss this appeal.

Jacob LJ :

25. I agree with the judgment of Buxton LJ. I would add this: that Z's case for the grant of asylum in the UK contains at its heart an impossible contradiction. His case is that he specifically wants to live with D, not any homosexual partner. But D is in Zimbabwe and there is simply no evidence that D would, could or even wishes to leave Zimbabwe. So the grant of asylum here could not help Z – his rights (assuming he has them) to live with D cannot be protected or achieved by asylum. Mr Blake acknowledged this contradiction. His answer was to suggest that somehow D might also come here, presumably by way of also seeking asylum – but that is a mere unfounded speculation.

Peter Gibson LJ:

26. I agree with both judgments.

ORDER: Appeal dismissed with costs; leave to appeal to House of Lords refused.

(Order does not form part of approved Judgment)