ASYLUM AND IMMIGRATION TRIBUNAL

JA (Practice on reconsideration: Wani applied) Ecuador [2006] UKAIT 00013

THE IMMIGRATION ACTS

Heard at: North Shields Hearing Centre Date of Hearing: 9 December 2005

Date of Promulgation: 22 February 2006

Before:

Mr C M G Ockelton (Deputy President)
Mr J R Aitken (Designated Immigration Judge)
Mr D G Zucker (Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F McCrae, instructed by Ben Hoare Bell
For the Respondent: Ms H Rackstraw, Home Office Presenting Officer

In the 'second stage' of a reconsideration, the Tribunal is to act on the decision made after the first stage and incorporate that decision in its determination as envisaged in the Practice Direction and Wani. Any difficulties are to be resolved by those responsible for the first stage: infelicity of expression of the decision after the first stage is not a reason for relitigating the issue of whether there was a material error of law.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ecuador. He arrived in the United Kingdom in 1997 and claimed asylum. He was refused. An appeal to an Adjudicator was dismissed on 18 January 1999. He was not removed. On 3 January 2003, when he was still in the United Kingdom, he made a new human rights and asylum claim. At the Respondent's request, he submitted his full papers on 4 April 2003. Further representations were

submitted on 12 December 2003. On 30 March 2004, his asylum and human rights claims were refused and the Respondent decided to remove him as an illegal entrant. He appealed to an Adjudicator and, following a hearing on 14 June 2004, the Adjudicator, Mrs N A Baird, allowed his appeal on asylum and human rights grounds. The Secretary of State sought and was granted permission to appeal to the Immigration Appeal Tribunal. Following the commencement of the appeals provisions of the 2004 Act, the grant takes effect as an order for reconsideration by this Tribunal.

2. The basis of the Appellant's original (1997) claim was that he feared persecution for his political opinion. His recent claim is quite different. In it he gives a detailed account of his homosexuality and his fear of persecution or ill-treatment as a homosexual if he is returned to Ecuador. Mrs Baird had before her a considerable amount of country evidence on this topic, as well as the Appellant's own statements and oral evidence, including his explanation for not having mentioned his homosexuality in the course of his previous claim. In the course of her review of the evidence, she wrote as follows:

> "50. It seems to me that the Appellant was credible. I accept that he is a homosexual and lives with his partner. I do find it difficult to understand why he did not mention this when he came to this country. I do however accept his explanation for this.
>
> 51. I accept that he had some difficulties in Ecuador, although I take the view that the treatment to which he was subjected does not amount to persecution. I accept that he was discriminated against by the general public and insulted and physically harmed but I do not think he was persecuted. He was not at that time living openly as a homosexual."

Then, after further reviewing the country evidence, there is this:

> "56. In these circumstances, I do not believe that the Appellant could openly have a homosexual relationship in Ecuador. I think if his sexual orientation became known he would not only be at risk of discrimination, prejudice and violence by the general population but would be at risk of arbitrary arrest, humiliation and ill-treatment at the hands of the police. I think such treatment constitutes persecution."

3. Those conclusions, we should make it clear, were based not only on the country information but on her findings as to the Appellant's particular circumstances now. Thus she allowed the appeal under the Refugee Convention and Articles 3 and 8 of the European Convention on Human Rights.

4. The grounds of appeal to the Immigration Appeal Tribunal were as follows:

> "1. It is respectfully submitted that the adjudicator has erred in allowing this appeal. The appeal before the adjudicator was Human Rights only, the adjudicator did not have jurisdiction to allow this appeal under the refugee convention.

2. The Respondent's asylum claim was dismissed at an earlier hearing. The Adjudicator has completely failed to address Deevaseelan, in particular para 40(2) and 42(7). The adjudicator has even stated at para 40 "I do find it difficult to understand why he did not mention this when he came to this country." It is respectfully submitted that given this the adjudicators next comment "I do however accept his explanation of this." Is totally insufficient in light of Para 40(2) Deevaseelan.
3. The adjudicator at para 51 has accepted that the Respondent has not been persecuted in Ecuador, as she believes that he did not openly live as a homosexual. The adjudicator has therefore failed to explain why the respondent should be persecuted now on return if he conducted his affairs privately.
4. It is respectfully submitted that given these facts the Adjudicators decision could have been different. It is therefore requested that permission to appeal be granted."

5. The grant of permission, by a Vice President, was supported by the following reasons:

> "1. The Appeal before the Adjudicator was in respect of Human rights and not asylum.
> 2. The grounds of appeal are arguable in all respects."

6. The reconsideration hearing began on 6 September 2005 by video-link from the hearing centre at Bradford before a panel consisting of a Senior Immigration Judge, an Immigration Judge and a non-legal member. The purpose of that hearing was, as required by Rules 31(2)(a) and 62(6) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, to determine whether the Adjudicator had made a material error of law. In the determination of that issue, and indeed in the reconsideration generally, the Tribunal was, by Rule 62(7), limited to the matters raised in the grounds of appeal to the Immigration Appeal Tribunal.

7. At or immediately following the hearing on 6 September 2005, the Tribunal as then constituted decided that the determination contained material errors of law and made arrangements for the adjournment and transfer of the hearing to North Shields to enable the appeal to be heard afresh, including the taking of oral evidence again.

8. The process under which that adjournment and transfer took place is set out the AIT's Practice Direction at paragraphs 14.1 to 14.4. We do not need to set them out in full. They were the subject of consideration by Collins J in R (Wani) v SSHD and AIT [2005] EWHC 2815 (Admin), in which judgment was handed down the day before we convened to continue the hearing of this reconsideration. We must, however, set out paragraph 14.4, which is in the following terms:

> "14.4 Where the Tribunal acting under paragraph 14.2 transfers the proceedings, it shall prepare written reasons for its finding that the original Tribunal made a material error of law and those written reasons

> shall be attached to, and form part of, the determination of the Tribunal which substitutes a fresh decision to allow or dismiss the appeal."

9. The two stages of a reconsideration are clearly envisaged by Rule 31. It is only if the Tribunal finds that there was a material error of law in the previous decision that it is to go on and decide whether the appeal should be allowed or dismissed. Numerous considerations of economy will frequently require arrangements to be made for the second stage of a reconsideration that are different from those relating to the first stage. The Practice Direction, and principles of judicial comity in the Tribunal, require that a reconsideration divided into stages be allowed to proceed seamlessly from the one to the other. Save in exceptional circumstances, the constitution of the Tribunal that is substantively considering whether the appeal should be allowed or dismissed is to follow the decision, albeit made by other members of the same Tribunal, that the material error of law existed. So much is clear from the Practice Direction itself; and Wani authoritatively declares that that practice and those arrangements are lawful.

10. What Wani also makes clear, however, is that the members of the Tribunal dealing with the first stage must express their decision that there was a material error of law, and the reasons for that decision, in a form that can properly be incorporated in a determination as envisaged by paragraph 14.4 of the Practice Direction. The next appellate stage after a reconsideration is the Court of Appeal, and the decision of the Tribunal at the end of the reconsideration must be one that properly incorporates this Tribunal's decision on each of the tasks set for it by Rule 31. In particular, it will be necessary to demonstrate the reasons for the Tribunal's view that it was entitled to proceed to decide whether the appeal should now be allowed or dismissed. It can do that only by giving proper reasons for the finding that there was a material error of law. Only if that is done by those dealing with the first stage can those with responsibility for the second stage incorporate those reasons in their determination, confident that the Tribunal as a whole has given to the parties and to any other reader a fully reasoned decision.

11. In the present case, the reasons were expressed by the panel that began the reconsideration on 6 December 2005 in the following words:

> "The appeal was on human rights grounds only; the Adjudicator had no basis upon which to allow the appeal on asylum grounds.
>
> The Adjudicator failed to give adequate reasons for her finding that the Appellant would be at risk on return."

12. We have to confess that a requirement to incorporate those words (or their burden) and no others in our determination of this reconsideration stretches judicial comity to its utmost. Neither of the grounds identified is supported by any reasoning. The first, although, as we have indicated, it featured both in the grounds of appeal to and the grant of permission by the Immigration Appeal Tribunal, is, with respect,

incomprehensible. The Appellant's claim at the beginning of 2003 was that his return to Ecuador would breach the Refugee Convention. His solicitors' letter of 12 December 2003 reminded the Secretary of State that the Appellant was making an asylum as well as a human rights claim. The letter of refusal, dated 30 March 2004, refers to the 1997 asylum claim and points out that there was no reference to homosexuality then. After giving further reasons, the letter continues as follows:

> "10. For the above reasons, it has been concluded that your client did not leave Ecuador because of a well-founded fear of persecution due to his sexual orientation. It is not accepted therefore that a special adjudicator might reasonably take a favourable view of this claim despite the rejection of the earlier one, which means that we can not accept your representations as a fresh claim for asylum. The previous decision as upheld by an independent adjudicator will not be reversed."

13. The letter goes on to deal with the Secretary of State's reasons for refusing the human rights claim. The notice of decision, dated 30 March 2004, is, in part, in the following terms:

> "You have made an asylum and/or human rights claim. The Secretary of State has decided to refuse your claim for asylum and/or human rights for the reasons stated on the attached notice.
>
> RIGHT OF APPEAL
>
> You are entitled to appeal to the independent appellate authorities against this decision on one or more of the following grounds:
>
> Before removal:
> …
>
> ▪ That your removal from the United Kingdom as a result of the decision would:
>
> - breach the United Kingdom's obligations under the 1951 Refugee Convention;
> - be incompatible with your rights under the European Convention on Human Rights."

14. The Appellant's appeal to the Adjudicator was expressly on grounds based on both Conventions.

15. It is in this context that we must read the bald statement that the Appellant did not have a Refugee Convention appeal before the Adjudicator. It is true that under paragraph 346 of the Immigration Rules the Secretary of State has power to decide whether to treat an application as a fresh claim. That appears to have been the process adopted in the letter of refusal, although the reference to Special Adjudicators is somewhat mystifying, since they were abolished on 2 October 2000. But paragraph 346 does not purport to remove a right of appeal in a case where an asylum claim has been refused. Under s96 of the Nationality, Immigration and Asylum Act 2002 (as it was in force at the time of the decision in this appeal: it has since been amended)

the Secretary of State, by himself or by an immigration officer, had power to certify that (if we may summarise) a ground relied on in an appeal had been or should have been dealt with in a previous appeal by the same individual. The effect of such certification was to remove a right of appeal or to terminate an appeal that had already been commenced. In this appeal, there was no such certification. That fact is, by itself, sufficient to give the Appellant the right to raise, in his appeal, grounds based on the Refugee Convention if he chose to do so. Further, despite the terms of the letter of refusal, the reference to Refugee Convention grounds in the notice of decision makes it clear that this was not a case where any certification under s96 was ever intended.

16. It would appear to follow that the Appellant did indeed have a right of appeal on Refugee Convention grounds, which he exercised. It is not remotely surprising that the Adjudicator considered them. We were told by the Appellant's representative before us that, when she appeared before the Tribunal as constituted to determine whether there was an error of law, she was told that it was clearly right that there was no appeal on Refugee Convention grounds and she felt constrained to accept what an apparently strong Tribunal was telling her.

17. The second part of the decision that there was a material error of law appears to be based on the second and third paragraphs of the Secretary of State's grounds of appeal. Unlike the first part, it may conceivably be correct: but it is not presented in a form which would enable any other member of the Tribunal to adopt it without expansion or explanation. The Adjudicator summarised the material before her and then gave nine paragraphs of reasons for her decision. It is therefore surprising to find a completely unreasoned assertion that her decision was unreasoned. Insofar as any finding of lack of reasons is to be based on Devaseelan, it is necessary of course to remember that paragraphs 37 to 42 of that case incorporate guidelines, not rigorous rules. If the decision is based on the allegation in paragraph 3 of the grounds, it is necessary to remember that the Adjudicator took into account the way that the Appellant has been living in this country for several years.

Best Practice

18. We emphasise that we would not invite other constitutions of the Tribunal to enter on considerations such as the foregoing. It is clear from the Practice Direction that, where a reconsideration takes place in two stages, it is for those who deal with the first stage to determine conclusively all matters relating to the existence of a material error of law, and for those dealing with the second stage simply to incorporate the decision on that issue into their determination. Similarly, as explained in Wani, it is (save in exceptional circumstances) not open to

the parties to re-argue issues going to the existence or otherwise of material errors of law at the second stage of the reconsideration.

19. On the other hand, and as this case shows, it may happen that the reasons given by the panel at the first stage are not such as can properly be incorporated as they stand into the decision of the Tribunal on the reconsideration as a whole. We hope that such examples will be infrequent: certainly, the ruling in Wani that the reasons given at the end of the first stage must be communicated to the parties will no doubt ensure that they are in future carefully and fully written. Even so, ambiguities and occasional incompleteness may occur. Neither the existence of any such ambiguities or incompleteness, nor a subsequent Immigration Judge's actual or potential disagreement with the first stage reasons, gives any basis for departing from the procedure set up by the Practice Direction. The parties' occasion for testing the validity of the reasons for finding that there was a material error of law is by appeal to the Court of Appeal when the Tribunal has finished its work. The task of those charged with the second stage of the reconsideration is simply to carry it out in accordance with the directions that have been given. If the directions are not clear, or if the reasons are too exiguous to form part of the Tribunal's determination, then those who were responsible for writing them should be asked to expand them into a form in which they can properly appear in the final determination. It is their task which has not yet been fully performed.

20. Thus the requirements of the Practice Direction and judicial comity in such a case are that the chairman of the Tribunal dealing with the first stage be contacted and asked to complete his or her task. Following the ruling in Wani, the result of that process will be communicated to the parties. It follows that, where possible, any such request should be made sufficiently in advance of the hearing of the second stage for the parties to be able to deal properly with the issues arising at that stage, as identified in the expanded reasons. A unified Tribunal, with its judges working with (rather than against) each other, can demand nothing less than the process of communication we suggest.

21. How fully the reasons need to be given will depend on the circumstances of the case. We expect, however, that where the Tribunal proceeds to a second stage of reconsideration on the basis that the parties have consented to a decision that it should do so, or conceded that there was a material error of law, it will rarely be necessary to do other than record the consent or concession.

This appeal

22. This appeal is wholly exceptional. The second stage of the reconsideration, coming so soon after the decision in Wani before a panel constituted with a Deputy President of the Tribunal gives us this opportunity to explore the consequences of Wani itself. Further, the

reasons given for proceeding from the first stage to the second are, as it happens, seriously defective, to such an extent that before us Ms Rackstraw did not seek to rely very firmly either on them or on the Secretary of State's original grounds of appeal to the Immigration Appeal Tribunal.

23. For that reason, we did not find it necessary to seek expansion of the reasons from those who constituted the Tribunal at the first stage of this reconsideration; the determination which we make is by consent of the parties.

24. The Tribunal sitting on 6 December 2005 identified material errors of law in the Adjudicator's determination as set out in paragraph 11 of this determination. By agreement of the parties, we substitute a determination allowing this appeal on asylum and human rights grounds for the reasons given by the Adjudicator in her decision of 14 June 2004.

C M G OCKELTON
DEPUTY PRESIDENT
Date: