EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Phillip

[2009] CSIH 84
XA103/05

OPINION OF THE COURT

delivered by LORD HARDIE

in the Application for Leave to Appeal

by

F.H (A.P.)

Applicant;

against

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent;

_____

Act: Forrest; Drummond Miller LLP

Alt: Lindsay; Solicitor to the Advocate General

14 October 2009

Background

[1] The applicant, a citizen of Sudan, entered the United Kingdom clandestinely on 4 May 2004 and applied for asylum on that date. He was accompanied by one dependant. By letter dated 4 October 2004 the respondent refused the applicant asylum and concluded that the applicant's removal would not be contrary to the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[2] The basis of the applicant's claim for asylum was that he was from the Korma village in Sudan. His problems started in 2000 when the Arab militia, with the help of the Sudanese Government, attacked the villages of African people. By 2003 the attacks had intensified and on 7 September 2003 his village was attacked. The militia burnt down all of the houses and killed many innocent people and took away many of their animals. While this attack was taking place he and his wife were on their way back from the market in Tawela village. They met people running away and were told that the applicant's father and brother had been killed in the attack. He and his wife went to Malet town and found a lorry driver there to whom they paid 65,000 Dinars to take them to Kofra in Libya. From there they travelled to Tripoli and hid there for six months. A friend gave the applicant money in exchange for the animals he had left in Tawela and the applicant paid an agent $3,500 to take him and his wife to a safe country.

[3] The applicant appealed against the respondent's decision to refuse him asylum and his appeal was heard by an adjudicator on 20 January 2005. The adjudicator concluded that the applicant's account may well be true and that the evidence established that the applicant left Darfur "because he had a well founded fear of persecution from the Janjaweed Forces that are supported by the government". The adjudicator also concluded that the objective evidence "makes it clear that the Janjaweed attacks on the ground have often been supported by air strikes from the Sudanese air force". However the adjudicator rejected the proposition advanced on behalf of the applicant that "it would be wrong in law for someone to be asked to return to a place where the same government was in charge that had been responsible for his persecution in the first place." The adjudicator considered that it was a question of fact in every case whether the person fleeing to the place of relocation is likely to suffer a real risk that he will be persecuted in that area. The applicant's evidence before the adjudicator was that the applicant's wife had lived in Khartoum for a period of between one year and one and a half years and the applicant had lived there for a period of about fifteen days but neither of them had experienced any difficulties in that city. The applicant's reasons for not wishing to relocate to Khartoum related to his inability to be a shepherd there and no one from his tribe lived there. These reasons fell short of a fear of persecution in Khartoum. In these circumstances the adjudicator dismissed the applicant's appeal.

[4] The applicant sought and was granted permission to appeal against the adjudicator's decision to the Immigration Appeal Tribunal restricted to the second ground of appeal which was in the following terms:

> "That even if the Adjudicator were correct in considering the possibility of 'Internal Relocation', he has, nevertheless, erred in law by failing to apply consideration of the proper test in law that of "Undue Harshness".
> It is submitted that there is in law a strong presumption against Internal Relocation where the persecutor is the state, that the Adjudicator has overlooked the fears expressed by the Appellant, both in his written and oral evidence and, in so doing, has failed to properly evaluate the risks of discrimination/ persecution in Khartoum. Nor did the Adjudicator follow the various tests outlined in *Sayandan* in assessing whether it would be 'Unduly Harsh' to return the appellant to Khartoum."

Upon reconsideration of the applicant's case on this limited ground the Tribunal concluded that the adjudicator had taken into account the reasons advanced by the applicant in support of his claim that he could not relocate to Khartoum. These did not relate to fear of persecution. In addition, the applicant's wife had lived in Khartoum for more than a year and the applicant had lived there for fifteen days when neither of them had experienced any discrimination. The applicant speaks Arabic and it was those people who did not speak Arabic who experienced discrimination in education, employment and other areas. The conditions in displaced persons camps and squatters camps in Khartoum, though not easy, did not amount to a violation of Article 3 of ECHR. The adjudicator had taken into account the argument that the same government presided over Darfur and Khartoum but he did not accept that, on the facts of this case, there would be persecution in Khartoum. In all the circumstances the Tribunal concluded that there had been no material error of law and there was no basis for interfering with the decision of the adjudicator.

[5] The applicant sought leave from the Asylum and Immigration Tribunal to appeal to the Court of Session against the decision of the Tribunal. The grounds may be summarised as follows:

1. The Tribunal erred in concluding that it would not be unduly harsh to expect the applicant to relocate to Khartoum on return to Sudan.
2. The Tribunal misunderstood the applicant's evidence in stating that he had traded in Khartoum when he lived there previously.
3. The Tribunal erred in failing to admit fresh evidence which had come to light subsequent to the promulgation of the adjudicator's determination.

A Senior Immigration Judge refused leave to appeal to the Court of Session and the applicant thereafter submitted the present application on similar grounds.

Submissions on behalf of the applicant

[6] Counsel for the applicant made two submissions in support of the application for leave to appeal. The first was that the Tribunal had erred in law in concluding that it would not be unduly harsh to expect the applicant to relocate to Khartoum. In particular the Tribunal had failed to take into account, or had not properly taken into account, the fact that the agent of the applicant's persecution in Darfur was the state (Sudan). Moreover no, or insufficient, account had been taken of the applicant's personal circumstances. In this latter regard the test to be applied was whether it would be reasonable to expect the applicant to relocate. The second ground was that the Tribunal had erred in law in concluding that there was no basis on which fresh evidence was admissible. Counsel submitted that the Tribunal had erred procedurally and substantively. The alleged procedural irregularity lay in the failure by the Tribunal to acknowledge that evidence different from that presented to the adjudicator had been presented to the Tribunal. This evidence consisted of contrary evidence from which there emerged a possibility that it would be unduly harsh to expect the applicant to live in Khartoum. The Tribunal had also erred substantively. The Tribunal considered that it would have been legitimate to admit additional evidence only if an error in law in the original decision could be detected. The need for anxious scrutiny required the admission of additional evidence assuming that it met the

condition that the additional evidence might have led to a different result, had it been admitted.

Submissions on behalf of the respondent

[7] Counsel for the respondent submitted that, in considering the question of relocation, a distinction should be drawn between the test of whether there was a real risk that the applicant would be subject to persecution in the place where he relocated and the test of whether it would be unduly harsh to expect him to relocate there. The possible involvement of the state in his persecution was relevant to the assessment of risk. The mere fact that there has been persecution by the state in one part of the country does not exclude the possibility of identifying other parts of the country where there are no grounds for thinking that the state or its agents will persecute the applicant (*Januzi* v *Secretary of State for the Home Department* [2006] 2AC 426 para 49). In assessing questions of risk there was a spectrum of possible conclusions depending upon the circumstances of the particular case. Although the adjudicator and the Tribunal had both recognised the involvement of the Sudanese air force in attacking the applicant's village, the other evidence before them clearly indicated that the applicant's relocation to Khartoum would result in no risk of persecution of him. In considering the test of whether it would be unduly harsh to expect the applicant to relocate to Khartoum counsel for the respondent submitted that there had been no error of law. The adjudicator had made clear findings in fact even although he did not have that particular test in mind at that time. Subsequently in considering that matter the Tribunal applied the test in *AE and FE* v *Secretary of State for the Home Department* [2003] EWCA Civ 1032. The test in that case was subsequently approved in *Januzi*. The conclusion that it would not be unreasonably harsh to expect the applicant to relocate to Khartoum was reasonably open to the Tribunal having regard to the factual findings by the adjudicator.

[8] As far as the fresh evidence was concerned, it appears that no notice had been served prior to the hearing before the Tribunal and the Tribunal made no reference in its decision to any fresh evidence. In any event the reconsideration by the Tribunal was a first stage reconsideration and the Tribunal was concerned with whether there had been a material error of law in the adjudicator's decision. In these circumstances the applicant would require to show that the decision under appeal was based upon a mistake as to an established fact which was uncontentious and objectively verifiable (*E & R* v *Secretary of State for the Home Department* [2004] QB 1044). The document now relied upon by the applicant was an excerpt of an interview with a "well-informed Darfur African currently living in Sudan's capital." It was not uncontentious and was not instantly verifiable.

Decision

[9] In his determination the adjudicator accepted that the applicant's account may well be true and that his account that his village was attacked by the Janjaweed was consistent with the objective evidence. Moreover at paragraph 56 of his determination the adjudicator observed:

> "Accordingly, I find that the evidence establishes that this appellant left Darfur because he had well-founded (*sic*) fear of persecution from the Janjaweed

> forces that are supported by the government. The objective evidence makes it clear that the Janjaweed attacks on the ground have often been supported by air strikes from the Sudanese air force."

Thus the adjudicator accepted that the applicant had been persecuted in Darfur and that the state was involved in that persecution. While that is undoubtedly an important factor in considering whether the applicant could relocate to an area also governed by the same state, it is not determinative of that question. We respectfully agree with the observations of Lord Hope of Craighead in *Januzi, op. cit.*, to the following effect:

> "...The dangers of a return to a country where the state is in full control of events and its agents of persecution are active everywhere within its borders are obvious. It hardly needs to be said that in such a case internal relocation is not an option that is available. Remoteness of the suggested place of relocation from the place of origin will provide no answer to the claimant's assertion that he has a well-founded fear of persecution throughout the country of his nationality. (Para 48)
>
> On the other hand control of events by the State may be so fragmented, or its activities may be being conducted in such a way, that it will be possible to identify places within its territory where there are no grounds for thinking that persecution by the state or its agents of the claimant for a Convention reason will be resorted to. A civil war may take that pattern where the extent of it is localised. So too may the process of ethnic cleansing affecting people of the claimant's ethnicity which is in progress in one area but not in others. The state may be ruthless in its attempts to move people of a given ethnicity out of one area. But it may be benign in its treatment of them when they reach an area which it regards as appropriate for people of that ethnicity." (Para 49)

[10] In cases where there is state involvement in persecution and consideration is being given to relocation to another part of that state, it seems to us that it is appropriate for the tribunal of fact, as the adjudicator did in the present case, to assess the risk of persecution of an applicant for asylum in the place where he is to be relocated. Having undertaken that exercise the adjudicator concluded that there was no such risk for the applicant in this case, if he were to relocate to Khartoum with his wife. There was ample evidence before the adjudicator to enable him to reach that view and it cannot be said that he erred in law in doing so.

[11] When he was considering whether it would be unduly harsh to expect the applicant to relocate, we note that the adjudicator made clear factual findings relating to the applicant's personal circumstances, even although at that time the test to be applied had not been formulated as it now is. When the matter was reconsidered by the Tribunal, the Tribunal applied the test in *AE and FE, op.cit*. The Tribunal's summary, in paragraph 10 of its decision, of the guidance provided by that case is accurate. Neither *Januzi* nor *AH (Sudan)* v *Secretary of State for the Home Department* [2008] 1 AC 678 cast any doubt on that guidance. As the Tribunal records in paragraphs 12 to 14 inclusive, the adjudicator took into account the circumstances of the applicant and the reasons advanced by him for not relocating to Khartoum. In particular he considered the personal characteristics of the applicant, issues of employment and any language difficulties. The applicant and his wife had

previously lived in Khartoum, albeit for significantly different periods. They had experienced no difficulties in the past. The applicant speaks Arabic whereas the evidence before the adjudicator was that non-Arabic speakers might experience discrimination in education, employment and other areas. Moreover the applicant and his wife would have the mutual support of each other if living in Khartoum. This would be no different from their living in the United Kingdom, where they have no family, or living in Darfur as the applicant's father and brother had been killed in the attack on Korma village. In all the circumstances the conclusion reached by the Tribunal that it would not be unduly harsh to expect the applicant to relocate to Khartoum was one which was reasonably open to it having regard to the factual findings of the adjudicator. We are not satisfied that any material error of law has been identified.

[12] The final issue is whether there has been an error of law in the Tribunal failing to have regard to fresh evidence. In the context of a first stage reconsideration, the Tribunal was concerned with the question of a possible material error of law by the adjudicator. The only legitimate purpose in submitting fresh evidence could be to show that there had been an error in law arising from the absence of that evidence before the tribunal of fact. It is recognised that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law (*E & R* v *Secretary of State for the Home Department, op.*cit). In that case the court observed:

> "Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are...
> First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning." (para 66)

Assuming that the necessary procedural formalities had been observed by the applicant and his advisers in this case, which was not accepted by the respondent, we consider that the observations in that case are in point. The fresh evidence upon which the applicant seeks to rely is an excerpt of a translation of an interview with a Darfur African in Khartoum on 27 June 2005. The identity of the individual has been withheld but he contradicted other objective evidence available to the adjudicator. We consider this document fails to meet the test of "established" evidence. It is neither uncontentious nor objectively verifiable. More significantly, however, this document appears to contradict the guidance in the country guidance case of *AE (Relocation - Darfur - Khartoum - an option) Sudan* CG [2005] UKIAT 00101. Failure to follow a clear and apparently applicable country guidance case or to show why it does not apply to the case in question would justify grounds for review or an appeal on a point of law (*R (Iran) and Others* v S*ecretary State for the Home Department* 2005 Imm Ar 535 at paragraphs 18 and 27). An excerpt from an interview with an anonymous individual could hardly justify departure from the guidance contained in a country guidance case. We are not satisfied that any error of law has been established by the failure to admit the fresh evidence, even if the applicant had complied with the necessary procedural formalities.

[13] In all the circumstances we shall the refuse the application for leave to appeal.