

LSH
Heard at: Field House
On 6 May 2004

OM (Cuba returning dissident)
Cuba CG [2004] UKIAT 00120

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

24 May 2004

Before:

His Honour Judge N Ainley (Vice President)
Mr D K Allen
Mr K Kinnell

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. This is a claimant's appeal from the determination of Mr Price sitting as an Adjudicator on 14 October 2003.
2. The claimant is a citizen of Cuba who arrived in the United Kingdom on 12 October 2002 on a valid Cuban passport with a valid visa. He had permission to stay in the United Kingdom until 25 October 2002 but remained longer and then claimed asylum on 2 April 2003.
3. Put very shortly his case was that he was a dissident from a dissident family in Cuba. The family had not been persecuted and neither had he but they had been subject throughout his life to discrimination and occasional harassment from the authorities. Despite this the claimant, who is now 31 years old had managed to obtain employment with two government departments during

his life. The first was with MINVEC which is a government organisation connected with industrial development and, after he had been sacked from that, he managed to obtain a job at Amistur which is a nationalised tourist organisation. That provides tour guides for foreigners visiting Cuba. He was employed as a tour guide.

4. Further, despite his background of disagreement with the government, he had been granted an exit permit and had been able to apply for a passport and a visa.
5. The Adjudicator found, contrary to what he said, that he was never of any interest to the authorities and could not have been, because if he had, the authorities would not have employed him as they did, and would certainly not have granted him an exit visa. Thus, the Adjudicator found that he was a mere overstayer and that there was no evidence that a person in his position would have any difficulties with the authorities on return; certainly no difficulties that would be capable of amounting to persecution. In those circumstances the claimant's claim was dismissed.
6. We have had the advantage of further material that the Adjudicator did not have which indicates that there is at least a possibility that someone even with the claimant's asserted past history could have lived as he did live in Cuba and could have obtained an exit permit. The report of Lawrence Whitehead of Nuffield College, Oxford came to the conclusion that it was possible for someone with the claimant's background and also with his academic qualifications as a graduate from Havana University and a fluent speaker of English to slip through the monitoring net that there is in Cuba and obtain the employment that he had there.
7. Further there is other material, including material from the Secretary of State's Department which tends to show that people who are thought to be something of a nuisance in Cuba are allowed to leave the country, quite possibly in the hope that they will not come back.
8. It seemed to us, on reading the material that had been provided to us and on hearing the submissions made before us that it was at least arguable that the Adjudicator took too sceptical view of the credibility of the claimant's account of his past. We stress that the Adjudicator is not to be blamed for this at all because he did not have much of the material that we have. This has left us with two options. One is to remit the matter to be reheard and the other is to consider it on the basis that the claimant's account of his past is true and see whether even on that basis he does not have a real risk of persecution on return to Cuba. We

considered it appropriate first of all to examine his case on the basis that it were true and see what conclusions that led to.

9. A summary of his history should begin with the protests that his father was engaged in during the 1970s. His family had never been supporters of the Castro regime. As a result his father was sacked in 1979 when the claimant was 6 years old. He was then unemployed for 18 months or so because in Cuba jobs are largely at the gift of the state and he was out of favour. Despite his father's opposition to the regime, however, he was allowed to visit his own mother in the United States on four occasions between 1982 and 1992. In the early 1980s the claimant's father did eventually obtain employment, but a low rate of pay as a driver on a building site.
10. When growing up at school the claimant himself made no secret of his dissident views and argued with his teachers about Cuban society. At the age of 14 it seems he wrote what was either a book or an article that was critical of the authorities and was suspended from school for a term.
11. By September 1989 he had graduated from school and began studying for an English degree at the University of Havana. He joined the Young Communist League; no doubt many who do not approve of the Cuban regime have done the same so as to assist them in the future. Whilst at University he kept his head down but nonetheless was only in the league for a period of about a year after which he was expelled without explanation.
12. From 1992 to 1994 he spoke against the regime, but at the time a large number of people did and there were demonstrations because of the dire economic situation so perhaps he did not come to particular attention.
13. At this point we should mention an organisation called the CDR. The CDR stands for Committee for the Defence of the Revolution which is a national governmental organisation which infiltrates every town and village throughout Cuba and has its representatives throughout the country. This organisation appears to exist to promote support for the government and all its actions, to check on people in their localities for their loyalty and also to report upon any opposition to the regime.
14. Where he lived there was of course a local CDR and they became well aware of his anti-governmental views.
15. In August 1994 a large number of Cubans attempted to leave the country on hand built rafts for the USA. The claimant's father was one of them. He was picked up by the US Coastguard, taken to Guantanamo Bay then, after several months, returned

home. The situation was very bad for his father on return. There was a search of the family home by the internal security department (DTI) although they found nothing, but his father was out of work for over a year.

16. These problems did not seem to affect the claimant who graduated in August of 1994 with a fluent knowledge of English.
17. After graduating he managed to get a job through his uncle as a translator at MINVEC (Ministry for Foreign Investment and Economic Co-Operation). This job was obtained entirely through family connections; it would have to be in view of the claimant's political past. The claimant also became involved with the Jose Marti Foundation which is a dissident organisation in Cuba. Due to his involvement with that he was questioned on two occasions by the DTI who arrested him without charge and detained him for about 5 hours on both occasions. They found nothing against him nor did he admit anything. They caused him no further problems. At or about this time he was dismissed from MINVEC in August 1996 because he refused to carry out 2 years social service as repayment for his further education. Under pressure from governmental bodies he decided that discretion was the better part of valour and in the end did his social service. He had no other employment and was unlikely to get any unless he did. He then worked at a school, teaching children, but was very unhappy with that, just as those who employed him were unhappy with him, and he was sacked at the end of May 1998.
18. He had had a friend from University days who was employed at Amistur as a tour guide and had a high reputation there. She managed to arrange things so that he obtained employment with Amistur in January 1999. He managed to get round the various checks that would have been made by his local CDR by claiming to have an address where the local CDR knew him but did not know about his past. He then began work for Amistur translating for and guiding foreigners visiting Cuba. He worked with Amistur without problems until early 2002. It seems from witness statements from American tourists that we have seen that the claimant took them to parts of Cuba and showed them things in Cuba that the authorities would very much rather had not been shown to foreigners. This certainly seems to back up his account of being a political opponent of the Castro regime. These witnesses, whom there is no reason to doubt, speak of his honesty and the outspokenness of his views in opposition to the Castro regime. We have little difficulty in accepting that if information of what he had been doing got back to the authorities he might have found himself in difficulty if not worse at work.

19. This is what seems to have happened, because around the end of March 2002 he suddenly found that he was not being asked to take tourists around any more. Other people were still getting work and he realised that it was his political opinions that had caused him to be a target. He approached his new boss and had an argument with him. His boss told him that he was doing business with the enemy and that he would not get any more work. He did not get any more work and it became clear to him that he never would, because he had obviously had a black mark against him that had been noticed. He decided that he had to leave Cuba.
20. He had the \$600 needed to obtain a visa and gave as a foreign address to go to, the address in Scotland of people whom he had taken around Cuba. He managed to get a letter from Mr Gutierrez his boss on 3 September 2002 stating that he was a reliable worker and had no knowledge of any sensitive information. He says that that letter would simply have been passed under Mr Gutierrez's nose and he would have signed it without reading it, but it may also be the case, as Mr Whitehead points out, that for a small bribe Mr Gutierrez would have been perfectly prepared to sign such a note.
21. Since arriving in the United Kingdom he has not registered with the Cuban authorities at the Embassy here, and as far as they are aware he has simply disappeared from view. It is said on his behalf that if with this history, which is assumed to be correct for the purposes of this appeal, he were to go back to Cuba he would be at real risk of persecution.
22. In order to assess the nature of any risk that he would run if returned to Cuba it seems to us necessary first of all to see what the Cuban rules and regulations are about persons who leave the country. At page 17 of the current 2003 US Secretary of State's report there is a passage that is of assistance to us:

"In 1994 the government eased restrictions on visits by and repatriations of Cuban immigrants. Citizens who establish residency abroad and who are in possession of government issued permits to reside abroad may travel to the country without visas although citizens who departed after 31 December 1970 must obtain a costly passport to re-enter the country. Persons who are at least 18 years of age are eligible to travel abroad and may remain outside their country for up to 11 months. In 1995 the government announced that emigrants who were considered not to have engaged in so called hostile actions against the government and who were not subject to criminal proceedings in their countries of residence could apply at Cuban Consulates for renewable 2 year multiple entry travel authorisations. However in 1999 the government announced that it would deny

entry permits for emigrants who had left the country illegally after September 1994. It remained unclear which policy the government actually was implementing."

23. The claimant had a permit to leave Cuba, which had a date of expiry of 6 October 2003 but presumably that is the date of expiry before which the claimant was required to exercise a permit if he was going to leave the country. On the basis of the passage from the Secretary of State's report it would seem that once he had that permit he was entitled to remain out of the country for up to 11 months without Cuban authorities being aware that anything was amiss. That period would have expired on or about the 10 September 2003 and so he has now been out of the country longer than the permit allows and longer than it would appear Cuban law allows. It has not been suggested to us that he has engaged in any acts which are hostile to the Cuban government whilst abroad. He still retains his Cuban passport which is valid until 15 May 2008. We asked what punishment he was likely to face for going back on a valid Cuban passport having stayed abroad for longer than he was supposed to do.

24. We were shown a letter from Amnesty International which contains Article 215 of the Cuban Penal Code and which suggested at first blush that he might be liable to imprisonment for 1 to 3 years with a fine. On closer reading, however, it was plain that this article of the penal code does not apply to the circumstances in which the claimant finds himself at all. The article reads as follows:

"Illegal entry into the national territory:

1. Any one who, without fulfilling the legal formalities or immigration requirements, enters the national territory, incurs a sanction of deprivation of liberty of 1 to 3 years or a fine of 3 to 1,000 Cuotas.
2. Anyone who carries out the above described act in search of asylum is exempt from criminal responsibility."

25. This article is plainly dealing with people who arrive in Cuba either clandestinely or on false papers or otherwise illegally. The article is of no application, as it seems to us, to a situation in this case where the claimant would be returning perfectly legally to Cuba on a proper Cuban passport with nothing in his documentation to suggest that he has done anything more than stay out of the country longer than his permit and the Cuban domestic law allowed him to do.

26. It was suggested in a letter written by a Cuban law expert Mr Wilfredo Allen, who is a practicing Attorney in Miami and who assists Cuban exiles, that the fact that the claimant has stayed in Britain without permission would lead the government of Cuba to assume that he claimed asylum and punish him accordingly.
27. We can see how that could be the case in circumstances where a person did not have proper papers in the United Kingdom or had conducted himself in such a way as to come to the Cuban authorities abroad. Neither of these factors applies to the claimant, and we cannot see why the authorities in Cuba should assume otherwise than that the claimant was abroad, perhaps seeking work and failing to find it or that he simply overstayed, taking an opportunity to travel which otherwise he might not have. His return to Cuba would have all the appearance of being voluntary and it is implausible, to put it no higher, that he would volunteer the information that in fact he was an unsuccessful asylum seeker. We do not follow the reasoning behind Mr Allen's suggestion.
28. It has been argued that if he were to return to Cuba he would have no employment and when his past was looked up it would be apparent that he was a dissident and the authorities might crack down on him.
29. There was undoubtedly a crackdown by the authorities on 18 March 2003 and a number of dissidents was arrested, many of whom remain in custody, but this was not a widespread round up of opposition elements, for only 90 people were arrested of whom 75 were tried, convicted and sent to prison. It is not easy to see how the claimant would be likely to be affected by a round-up of that nature on his return.
30. We do not wish to underestimate the difficulties that the claimant would have if he were to return to Cuba, because plainly life would be difficult and perhaps unpleasant for a while. He might be under government surveillance. He might very well find it difficult, if not almost impossible to obtain a job, but we have had no material placed before us that indicates that he would be likely to be arrested or persecuted. Mr Allen is of the view that the Cuban authorities would dismiss him from his employment as being politically unreliable and would assign him to a work battalion as a field hand, presumably for some particular period of time. They might place him in a detention facility until he could obtain housing and he would be monitored by the neighbourhood CDR once he returned to the community. Even if all this is true we cannot see that it amounts to persecution albeit it amounts to treatment by an oppressive state of the type that would be entirely unacceptable in Europe. The threshold for persecution is set very high and we cannot see that that

threshold is passed by the claimant in this case, even one takes what might happen to him as being what is likely to happen to him.

31. For all these reasons we have come to the conclusion that even if the Adjudicator had come to the findings of fact for which the claimant contended before him, he would have found that the claimant had never been persecuted in the past, albeit his life had been made difficult, that the most he was guilty of at present was staying out the country longer than he should have been, and that what might await him on his return would be a closer enquiry into his political past that might lead him at worst to being placed in a work battalion for a period of time after which he would be returned to his community and family area under supervision by the CDR.
32. Even if the Adjudicator found all this, it seems to us he would have been bound to find that it did not amount to a real risk of persecution.
33. Accordingly, we have come to the conclusion that this appeal must be dismissed.

**His Honour Judge N Ainley
Vice President**