That Heard at Field House

AL (Article 3 - Kabul) Afghanistan CG [2003] UKIAT 00076

On 11 June 2003
Written 11 June 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

. . . . . .21/08/2003 . . . . . .

Before

Mr S L Batiste (Chairman)
Ms D K Gill

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of Afghanistan, appeals, with leave, against the determination of an Adjudicator, Ms C J Wright, dismissing his appeal against the decision of the Respondent on 7 September 2002 to refuse leave to enter and refuse asylum

2. Before us, Ms L Turnbull, instructed by Stanley & Co, represented the Appellant and Mr G Saunders, a Home Office Presenting Officer, represented the Respondent.

3. The Appellant is a Shia Moslem from the S. Tribe, who lived in the S District of W Province. His father was a wealthy businessman who had troubles with the local Mojahedin after the fall of the government in 1992. A local Mojahedin Commander, confiscated his two lorries. When the Taliban took over, his father regained control of his lorries, and the Mojahedin Commander went elsewhere. In November 2001 when the Taliban were defeated, the Mojahedin Commander returned to the area and became a powerful person there. In December 2001 the Appellant went to Kabul to get money from a businessman. Whilst he was staying there with his sister, he was informed that his parents and brother had been killed and the Mojahedin were looking for him and others connected with his family. Apparently the Commander had taken the family property and the Appellant as the last surviving male in the family would be his father's heir, and hence a threat to the Commander. He therefore left Afghanistan and ultimately came to the United Kingdom where he claimed asylum.

4. The Adjudicator accepted that the Appellant account was credible but concluded that his fear of Commander Z related to a personal family dispute over the ownership of property and did not engage a 1951 Convention reason. She therefore dismissed his asylum claim. She then held that if he were returned to his home area of Afghanistan he would face a real risk of a breach of Articles 2 and 3 of the 1950 Connection and went on to consider the question of internal relocation. She discounted the credibility of a letter from a friend that Z was still seeking him and concluded that he could now return safely to Kabul, and that it would not be unduly harsh for him to live there. She therefore dismissed his claim under Articles 2 and 3 as well.

5. The grounds of appeal to the Tribunal, though somewhat inchoate, argue essentially that the Adjudicator did not give sufficient consideration to the human rights claim when the risks to the Appellant were from non-Refugee Convention reasons and that it would be unduly harsh to expect the Appellant to relocate to Kabul. Mackey V-P granted leave to enable the Tribunal to consider whether the Robinson tests on relocation, which are used in the refugee context, are applicable when relocation issues arise in a purely human rights context. In other words whether the Robinson tests or the normal Article 2 and Article 3 tests should apply wherever an Applicant relocates in his country of origin. Before us, these issues were argued in terms of whether the Adjudicator gave proper consideration to the Articles 2 and 3 claims and to the viability of internal relocation, including undue harshness and the close geographical proximity of the Appellant's home area to Kabul.

6. We turn first to the specific point of law arising from the grounds of appeal, as to whether the Robinson tests on internal relocation, which are used in the asylum context should be applied to consideration of internal relocation under Articles 2 and 3.

7. Brooke LJ, who delivered the judgment in **Robinson [1997] Imm AR 568** stated at the outset that the scope of the internal flight alternative was linked with the definition of a refugee in the 1951 Convention. He said

> "The 1951 Convention conferred special status on a person recognised as a refugee within the meaning of the Convention……. In particular, so long as they are recognised as refugees, they may not be expelled from the country in which they are lawfully present save on grounds of national security or public order and even then only after due process of law and in any event a refugee may not be expelled or returned "in any manner whatsoever" to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion……. It is therefore to Article 1 that we must turn to see who is entitled to the benefits conferred by the Convention. It provides so far as material that for the purposes of the Convention the term refugee is to apply to any person who
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> > "owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country."
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> The Convention does not deal in express terms with a situation in which a person may technically be able to live in a part of a country free of fear but for

one reason or another it is not reasonable to expect him to do so. Obvious examples are parts of countries, which are uninhabitable, and other examples have cropped up over the years in which the terms of the Convention have been worked out in practice…… There is no international court charged with the interpretation and implementation of the Convention and for this reason the Handbook published in 1979 by UNHCR is particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice……. When the authors of this Handbook came to explain the phrase "is outside the country of his nationality in Article 1A(2) of the Convention they said

> "The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality……. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

A similar concept is to be found in paragraph 8 of the Joint Position Paper of March 1996 defined by the Council of the European Union on the harmonised application of the definition of the term refugee in Article 1 of the Geneva Convention…… It appears to us that the 1996 Joint Position reflects a contemporary understanding of the obligations created by the Convention, which is not confined to the member states of the European Union…… It follows that if the home state can afford what has variously been described as a "safe haven", "relocation", "internal protection", or "an internal flight alternative" where the claimant would not have a well founded fear of persecution for a Convention reason, then international protection is not necessary, but it must be reasonable for him to go stay in that safe haven…….. As a majority of the Federal Court of Australia observed in Randhawa

> "If it is not reasonable in the circumstances to expect a person who has a well founded fear of persecution in relation to the part of the country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to the country as a whole is well founded."

In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested.

8. Brooke LJ went on to consider the various tests that have been formulated to assess reasonableness in asylum cases but it is clear from his judgement as a whole and in particular from the passage quoted from Randhawa, that the genesis and rationale of the reasonableness/undue harshness test in internal relocation is inherently bound up within the definition of a refugee in Article 1 of the 1951 Convention. The nature and extent of this reasonableness test has been defined in various Tribunal decisions such as Sayandan (16312) as being whether it would be unduly harsh to expect an applicant to relocate, having regard to the aggregate effect of a wide range of factors. These tests expressly relating to reasonableness or undue harshness, inherently refer to factors that are insufficient in themselves to cross the high severity threshold required to constitute

persecution. Otherwise, if the Applicant faced persecutory treatment in every part of his home country, there would be no viable internal relocation option open to him at all.

9. Clearly the concept of the viability of an internal relocation alternative to international protection has been extensively applied when considering claims under Articles 2 and 3. However we have to consider whether the refugee related considerations relating to reasonableness/undue harshness as described in Robinson, also apply.

10. It is worth first recording that Articles 2 and 3 provide that

> "2. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence by a court following his conviction of a crime for which this penalty is provided by law.
> 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

11. The ECHR in **Hilal v The UK (Application No. 45276/99)** when assessing the prospect of internal relocation within Tanzania, from Zanzibar to the mainland, set out the issues in the following terms

> "59. The Court recalls at the outset that Contracting States have the right, as a matter of well established international law and subject to the treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of democratic societies. The expulsion of an alien may give rise to an issue under this provision where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.

12. There is no suggestion here that any factors that do not attain the minimum level of severity required to engage Article 3 are material to the consideration of internal relocation. This approach is reflected and clarified in the approach taken by the Court of Appeal in **Ullah [2002] EWCA Civ 1856**.

> "22. The Convention was opened for signature in November 1950. Most signatories to that Convention also subscribed to the Refugee Convention. It is noticeable that Article 33 (2) of the latter Convention permitted a state to remove someone convicted of a particularly serious crime, or constituting a danger to the community, notwithstanding that removal would be to a country where that person's life would be threatened. We do not believe that the signatures to the Convention conceived that it would impact on their rights under international law to refuse entry to or to remove aliens from their territory.
> 23. Our belief receives support from the terms of the Convention itself. The right of immigration control is recognised by Article 5.1(f) which qualifies the right to liberty by permitting arrest or detention of a person "to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." Nowhere else in the qualifications to those Convention rights which are not absolute is any reference to the right of a state to control immigration. We do not believe that

> this was because the right would, or would arguably, be covered by express limitations, such as "the interests of national security, public safety or the economic well-being of the country," which justify derogation from Article 8 rights. We believe that it was because the Contracting States had no intention of restricting their rights of immigration control. The Convention was not designed to impact on the rights of States to refuse entry to aliens or to remove them. The Convention was designed to govern the treatment of those living within t 9 he territorial jurisdiction of the contracting States…..
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> 65. This appeal is concerned with Article 9. Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English Court is not required to recognise that any other Article of the Convention is, or maybe, engaged. Where such treatment falls outside Article 3, there may be cases, which justify the grant of exceptional leave to remain on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the Convention.

13. The clear intention of Ullah is to import the high severity threshold of Article 3 into the consideration of other, non-absolute Articles. It would be wholly contradictory therefore to conclude when considering any aspect of Article 3, that one should have regard, as per Robinson, to factors that effectively by definition do not cross the Article 3 severity threshold.

14. To put it another way, when one is considering the specific action of the UK Government being challenged by an applicant as being in breach of Article 3 (usually in our jurisdiction removal to his own country) we may only take into account matters which relate to that decision, and which individually or in aggregate are of sufficient severity to engage Article 3, (and also Article 2 which is also an absolute obligation that may for practical purposes be subsumed within this). Matters that do not constitute “torture or inhuman or degrading treatment or punishment” as defined in human rights jurisprudence are not material. The Robinson derived tests of reasonableness and undue harshness are part of the assessment of refugee status. They are inappropriate to Article 3 consideration, which should be assessed on the basis of whether there is a real risk that the decision or action of the UK government complained about, would result in a breach of the terms of that Article.

15. Against this background we turn to the specific facts of this appeal. The Adjudicator held that the Appellant face a real risk of breach of his Article 2 and Article 3 rights in his home area by Commander Z. However the removal directions set by the UK government when refusing leave to enter are to Afghanistan, and Appellant will in practice be returned to Kabul. If the Appellant, after return, chooses of his own volition to leave Kabul for another part of Afghanistan, that is a matter for him and does not relate to the Respondent's decision. We have to assess whether the conditions awaiting the Appellant on return create a real risk of a breach of Article 3

16. The Adjudicator came to the conclusion that the Appellant would not be at any real risk of a breach of his Articles 2 or 3 rights in Kabul. Unless this decision can be shown to be unsound, that is an end to this appeal.

17. Ms Turnbull first argued that return would be unduly harsh in the light of the situation in Kabul and the Appellant's religion and ethnicity. The Adjudicator in fact dismissed this aspect of the claim having undertaken a very thorough examination of the current situation in that city and the specific circumstances of the Appellant, and we can see no material error in her assessment, which fully accords with many recent decisions by the Tribunal. Ms Turnbull submitted some evidence of crime in Kabul, as reported by a Pakistani newspaper, but this does not in any material way undermine the validity of the Adjudicator's assessment In any event undue harshness is not relevant to consideration of Article 3 for the reasons we have described and none of the factors mentioned in this context, even taken in aggregate, would cross the high severity threshold of inhuman or degrading treatment for a fit and healthy young man. There is nothing of substance in this argument.

18. Ms Turnbull also submitted that return to Kabul would create a real risk of a breach of Articles 2 and 3 by Commander Z, and that the Adjudicator's assessment of this was wrong because she had not taken into account the proximity of the Appellant's home town and province to Kabul.

19. It is not surprising that the Adjudicator did not take this matter into account, as it does not appear either that it was raised with her specifically at the hearing, or that there was anything in the evidence placed before her, which might have alerted her to it. Indeed we note that the Appellant himself submitted a statement to her in response to paragraph 5 of the refusal letter dealing with internal flight in which he stated that

> "I am not from Kabul but from the S district, therefore I do not wish to be sent to Kabul, Afghanistan. As stated above there are very few people of my tribe living in Kabul and I do not know anyone in Kabul. It is clear from recent news reports that the security situation in the Afghanistan is still weak and that there are no authorities that one could go to seek protection. There is no effective police force anywhere in Afghanistan. Therefore my life will remain in danger. Wherever I go in Afghanistan, I would still be in a minority. The Mojahedin dominate every area of Pakistan so I would not be able to protect myself from them in their efforts to harass and persecute me on account of my ethnicity, and also on the orders of the Commander."

20. It is curious that if the Appellant's home was close to Kabul he did not say so in this statement. Indeed the implication of his statement that he was not from Kabul, is that he came from a quite different area. It is also surprising that he said he knew no one in Kabul when it is acknowledged that he has a sister living there, albeit that he has not spoken to her in some time. It is also rather inconsistent with his evidence that his father did business in Kabul and he himself or was there on business when he learned of the death of his parents and brother. We therefore expected Ms Turnbull to produce some evidence in support of this claim of proximity. The only evidence, if that is the right word for it, was an unsigned statement allegedly by the Appellant's nephew, dated 12 May 2003, prepared subsequent to the dismissal of the appeal by the Adjudicator. Curiously the signed statement by the Appellant dated 9 May 2003 makes no mention of this proximity point.

21. We therefore asked Ms Turnbull whether there was any explanation as to why this proximity point had not been raised before the Adjudicator and whether she had any

document to demonstrate to us where he actually lived. She was unable to offer any explanation as to why this issue was not raised with the Adjudicator but acknowledged that it should have been. She did not have any map or any alternative evidence beyond the unsigned statement. This is most unsatisfactory and after the hearing, in fairness to the Appellant, we consulted the very substantial Times World Atlas. We could find no reference in it either to his home town or his province, but there was a reference to the district near Kabul, mentioned by the Appellant's cousin.

22. We do not know from our own knowledge, nor does Mr Saunders or Ms Turnbull, whether the Appellant's home town is close to Kabul or not. Small towns and villages are often not included in international atlases. It is somewhat more surprising that his province is not mentioned either, but perhaps there is an error in transcription. The burden of proof is of course upon the Appellant to establish this point and our first observation is that even on the low standard of proof applicable, he would be struggling to discharge it. It should not be a difficult matter to produce conclusive evidence that his hometown and province actually exist and they are where he says they are, rather than relying on an unsigned statement by someone who has not previously given evidence, on a point that has never previously been raised. However Mr Saunders, with his customary fairness, was content to argue his case on the basis that the Appellant home was relatively close to Kabul, and we proceeded on that basis.

23. Mr Saunders submitted first that there was no evidence before us to show that the Commander is of any real authority within the Mojahedin outside his immediate area, or that his writ would run outside that area, still less in Kabul where the central government maintains effective control. Nor was there any reason why the Commander would even become aware of the Appellant's return to Kabul. The Appellant had not thought fit to raise the proximity point before the Adjudicator, or even in his subsequent statement. The evidence therefore before the Tribunal falls far short of establishing any real risk to the Appellant in Kabul of a breach of his Articles 2 and 3 rights and the Adjudicator's conclusion that there was no real risk to the Appellant in Kabul was correct. Ms Turnbull argued that because the Appellant's father had businesses in both his home town and Kabul, the Commander would seek him in both places and the proximity of the two meant he would be in danger in Kabul.

24. We agree with the thrust of Mr Saunder's submissions. There is no evidence that the Commander's power extends outside his local area to Kabul. It may be relatively near but it is in a different province, and Kabul is under the effective control of the central government. The evidence before the Adjudicator was that the Commander, when he killed the Appellant's parents, wanted also to kill not just the Appellant but others associated with his family. Yet the Appellant's sister still lives in Kabul. She may not be the legal heir but her continued presence shows that the Commander is not taking action against others associated with the family. If the Commander is in control in the Appellant's home area as claimed, and has control of the Appellant's family assets, he has no reason to fear the Appellant, who has no influence or power of his own and was not himself a witness to the murders. Moreover the Appellant has been in the UK for a year now and in Turkey for three months before that. Any threat from a search for him that there may have been in the aftermath of the murders, has passed. There is no reason why the Commander should become aware of the Appellant's return unless the Appellant seeks to recover his family land by legal process. However by leaving Afghanistan the Appellant has shown no inclination to do this, and such action would

run counter to the thrust of his claim that there is no protection available for him from the authorities in his home area. We therefore conclude that the Adjudicator was correct in her finding that the Appellant will be at no real risk of a breach of Articles 2 or 3 on return to Kabul.

25. We would add, though it is not necessary in the light of the above conclusion, that within Kabul and the effective area of control of the central government, there would be a sufficiency of protection for the Appellant were he to experience difficulties from the Commander or anyone else. Ms Turnbull argued to the contrary, firstly on the basis of the newspaper articles from a Peshawar newspaper in Pakistan about crime in Kabul. Unfortunately we do not know the political viewpoint of this paper, The Daily Sahaar. However crime occurs in all countries and that is not the yardstick by which we should measure sufficiency of protection within the terms defined by the Court of Appeal and House of Lords in Horvath. Ms Turnbull also relied upon a report by Amnesty International, which is opposed to forced returns to Afghanistan, but most of this related to the situation outside Kabul. Insofar as it referred to Kabul specifically it accepted on page A9 that the central government had effective control in Kabul.

26. We conclude that there is no material error in the Adjudicator's dismissal of the claim both for asylum and in respect of Articles 2 and 3. For the reasons given above this appeal is dismissed.

Spencer Batiste
Vice-President