Heard at Field House

SL (Article 14 – Non - Jewish -Special needs) Israel [2005] UKIAT 00071

On 23 November 2004

IMMIGRATION APPEAL TRIBUNAL

Date heard: 23 November 2004
Determination signed: 9 March 2005
Determination notified: 15th March 2005

Before:
Mrs J A J C Gleeson, Vice-President
Mr M L James
Mr R Hamilton

Between

APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation
For the Appellant: Mr P Lewis, of counsel instructed by ARMB Solicitors
For the Respondent: Ms F Ahmed, a Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of an Adjudicator, Mr L D Sacks, who dismissed her appeal against the Secretary of State's decision to refuse to recognise her as a refugee or to allow her to remain in the United Kingdom on humanitarian grounds.

2. The appellant, Mrs SL, is an Israeli national of Ukrainian origin. She is not Jewish, but she married a Jewish man whilst in the Ukraine, and the family repatriated to Israel, where they were all granted Israeli nationality on the basis of Mr L's Jewish ethnicity. Their son BL does not count as Jewish because Judaism passes through the female line, and the family experienced discrimination in Israel in consequence of two of its members not being Jewish. BL also has special educational needs in the autistic spectrum (although he is not, strictly speaking, autistic). Since the family came to the United Kingdom, the marriage has foundered, and the appellant relies on the risk for her and for BL if returned as a completely non-Jewish family unit, as her ex-husband would not intend to return with them.

Evidence

3. The burden of proving her case is on the claimant. Her core allegation is that, returning with a special needs child, and without her Jewish husband, she risks treatment which would breach Article 3 ECHR or the Refugee Convention. We note that the bundle of documents filed for the hearing deals with the position of trafficked women and Palestinians and appears to bear very little relation to the account of this appellant. The statement of the appellant's former husband which was tendered is unsigned, and has never been tested by cross-examination. The Secretary of State has made no decision in his case as yet, we were told; he remains in the United Kingdom as an asylum seeker and if his appeal were to fail, would also be obliged to return to Israel.

4. There is no expert evidence before us on special needs education in Israel, or the position of non-Jewish Israeli nationals returned there now. Mr Lewis' and his instructing solicitors did not appear before the Adjudicator, but Mr Lewis told us that they endeavoured to obtain expert evidence in relation to Article 3 and 8 violations in Israel for people in this appellant's current circumstances. No appropriate expert had been identified by the date of hearing before the Tribunal. Mr Lewis sought an adjournment to enable them to search for an expert. The Tribunal considered that four years (the period this family has been in the United Kingdom) was sufficient time to identify necessary evidence, and refused that application. We also considered that the appeal could be disposed of justly without the necessity for an adjournment.

The grant of leave

5. Permission to appeal was granted by Vice-President Allen, who considered it arguable that the Adjudicator had not properly assessed the risk to this appellant on return to Israeli as a non-Jewish Russian with a non-Jewish son, BL, (Jewish ethnicity being considered to pass through the female line). Further, since coming to the United Kingdom the appellant has contracted a relationship with a Mr Patterson, which was not argued before the Adjudicator. Mr Allen considered that taken with the special educational needs of her son, BL, the Article 8 point was, just, arguable.

The Adjudicator's determination

6. The Adjudicator dismissed the appellant's appeal because he did not believe her account of discrimination amounting to persecution from Orthodox Jews in Israel, nor that the Israeli police force would have merely ignored her complaints. He observed that both the appellant and her husband had been able to obtain employment in Israel despite their Russian language difficulties. The appellant worked in a dress shop and the appellant's former husband got employment as a security guard. Their son, BL, obtained a place at a nursery school and later, medical intervention was available for his needs.

7. During their stay in Israel, the family had no difficulty in finding accommodation, nor any financial problems, and were able to fund flights to the United Kingdom after only 15 months in Israel. The Adjudicator considered that the prime reason for the appellant and her then husband leaving Israel was day to day fear of terrorist attacks as a result of the Arab Israeli conflict which was not a refugee convention reason, (*Adan*). He

accepted that the appellant had a genuine subjective fear of being injured as a result of a random bombing.

8. The human rights claim failed for similar reasons, the only incident relied upon being a stone throwing incident as a result of which her head was injured. As regards Article 8, the Adjudicator says as follows:

> *"31. I now turn to Article 8 of the Human Rights Convention. I entitled to take into account when considering the Article 8 position, not only the position of the appellant but also the position of her son, BL. The appellant does not have any family in the United Kingdom, she being separated from her husband. There is in my opinion no family life of the appellant that would be disturbed or affected, if she was returned to Israel. Further, whilst I note that the appellant's son, BL, has made progress whilst he has been in the United Kingdom educational system, I can see no reason, why this progress will be interfered with should he be returned to Israel.*
>
> *He is of the age where I am satisfied that he would be able to adapt to a new language and in any event, there is within Israel I am convinced educational facilities to assist those that are not fluent in the Israeli language, Israel being well-used to immigration from person s from non-Israeli-speaking countries, indeed, such immigration being encouraged by the Israeli Government who have in pl facilities to enable those entering the country to become fluent in the language as soon as possible. The appellant's son, BL, is of an age where this adaptation would not present a difficulty to him. I am therefore not satisfied, having balanced all the requirements as to considering an Article 8 claim, that the appellant or her son, BL's Article 8 rights would be prejudiced by returning to Israel."*

9. The Adjudicator also considered that Article 14 would not be breached since 'the treatment that the appellant has received at the hands of the Orthodox sect does not reach the standard where I can consider it to be discrimination within Article 14 of the European Convention on Human Rights and Fundamental Freedoms 1950'. That is a plain error of law; Article 14 has no separate life and must be considered only to the extent that it enhances the operation of one of the other Articles. Finally, the Adjudicator considered that internal relocation to a less-Orthodox area of Israel would solve the problem.

Submissions

10. For the appellant, Mr Lewis submitted that on return the appellant would fall to be treated as a non-Jewish Russian and that the case was appropriate for remittal. There had been considerable delay in dealing with this appeal on the Tribunal's behalf and there were new facts, the breakdown of the marriage and the subsequent divorce, and the close bond with her new partner.

11. Mr Lewis argued that there was private and family life at the date of decision between the appellant, her son BL, and his father; Mr L had regular contact with his son several times a week although he no longer lives with the appellant. They do not live far apart; their Newcastle postcode areas are NE6 and NE4. Mr L he sees the child at weekends and holidays, for staying access.

12. As already mentioned, Mr Lewis could not assist the Tribunal with objective evidence of the treatment of non-Jewish Russian immigrants in Israel; he reminded the Tribunal of the attempts to break into the appellant's apartment in Russia which he insisted were based on her ethnicity. He relied on a paragraph in the current US State Department report which appears at page 17 of the appellant's rather confusingly numbered bundle. We were also referred to pages 1 and 3-4 of the appellant's bundle. The Adjudicator had failed to apply anxious scrutiny (*Musisi* [1997] Imm AR 250) to the appellant's situation and in particular to the relationships of her special needs son, BL.

13. The appellant had been in the United Kingdom for almost four years and the family were only 26 days outside the concession period. The appellant's son, BL, had clear special needs, as he needed help with language. He could not speak easily in any language, still less in Israeli. He referred us to page 27 of the bundle. The Adjudicator's conclusions at paragraphs 30-33 were inadequately reasoned and made no reference to the likely consequences of returning the child to Israel today. It was a serious error of law to make no reference to the particular needs of this child in the determination.

14. For the Secretary of State, Ms Ahmed pointed out that the appellant's new relationship with Mr Patterson, who hopes to marry her and who is British, had not been disclosed to the Adjudicator. Mr Lewis disputed that, but his submission did not accord with the Adjudicator's record of proceedings (Mr Lewis and his instructing solicitors were not instructed below).

BL's special needs

15. As at 8 November 2004, the report of Dr Paul Brown, SUSHO for Children with a Learning Disability, at the Purdhoe Hospital in Northumberland, describes 'both parents' as speaking Russian at home. It does not sound as though he were describing the appellant's new relationship with an Englishman. The doctor records that the parents have divorced. The report is copied to both parents, who respectively live in Byker and Elswick, both in the Newcastle upon Tyne area.

16. BL is not autistic; he has had a diagnostic autism assessment which was negative, though his behaviour shows autistic features. He has no history of epilepsy, and no ongoing chronic medical conditions. He is in good physical health and has no problems with mobility, hearing, or vision. He is at a special school where he is making good progress. His teachers are pleased with him. He causes few, if any, problems in class. There is no family history of psychiatric or medical conditions or of learning disability. The appellant's husband is attending college, working towards a qualification as a personal trainer, and is in good health. His mother is working towards a qualification in tourism. The doctor anticipated seeing the parents again in 6-8 weeks (early 2005) and discharging BL from the Child Adolescent and Autism Service.

17. BL was 8 when the medical report was written. He has significantly delayed language development, and did not speak until he was six and a half years old. He has now developed some useful language (four or five-word sentences) and can understand relatively complex commands and questions in English, and in Russian which his parents speak. He has rigid behaviours and a preference for

a structured routine, with 'significant problems' socialising with other children (although these have 'significantly improved' since 2002).

18. The developmental problems were apparent before BL was 2 years old (that is, before the family come to the United Kingdom). His mother and father have found that encouragement to engage in social activities and have more flexibility in his routine has brought positive results. He shows good levels of attention and concentration and there are no current problems with instability in his mood. He sleeps and eats well and has an appropriate level of overall activity.

The appellant's mental health

19. The appellant had a depressive episode in May 2003 (which was not disclosed to Dr Brown who assessed BL); she locked herself in the bathroom at home and threatened to harm herself. She was assessed by the deliberate self harm team, who concluded that she was suffering from 'dysthymia with an adjustment disorder or depressive episode with co-morbid dysthymia'[1]. The divorce was made absolute on 30 September 2003. She also had an ovarian cyst, which was dealt with in 2001. There is no indication of any further problems since the divorce became final.

Objective materials

20. At page 1 in the objective bundle, we see a passage which may be from a US State Department Report. Only one paragraph is extracted, and no reference is given. It relates to the difficulties of getting married to a non-Jewish person, but indicates that overseas marriages are recognised. Similar difficulties arise in relation to burial of non-Jewish persons. We note that there are portions of cemeteries for persons whose Jewish identity is in doubt. There is no suggestion that this appellant or her son require burial at present, and by the time that she does, she may have remarried, or, since there is apparently controversy on this issue, the Israeli Government's position may have softened.

21. Another document, again a partial extract, appears to come from the Banner of Truth, and relate to Discrimination in Israel. Without the whole document, it is difficult to assess this document correctly. Much of it relates to the burial and marriage issues (see above). It is undated. An internet search reveals Banner of Truth as an aggressively anti-Jewish American website. We are unable to give much weight to the anecdotes in these excerpts.

22. Amnesty International documents (page 7 onwards in the bundle) relate to trafficking of women for sex. This woman is not a trafficked teenager but a

[1] Dysthymia is "a disorder with similar but longer-lasting and milder symptoms than clinical depression. By the standard psychiatric definition, this disorder lasts for at least two years, but is less disabling than major depression; for example, victims are usually able to go on working and do not need to be hospitalized.
About three percent of the population will suffer from dysthymia at some time - a rate slightly lower than the rate of major depression. Like major depression, dysthymia occurs twice as often in women as it does in men. It is also more common among the poor and the unmarried. The symptoms usually appear in adolescence or young adulthood but in some cases do not emerge until middle age."

(National Mental Health Association of America website)

mature, intelligent and adaptable mother. It is difficult to see how that material is relevant.

23. Other materials in the bundle relate to family segregation of Arabs in the Occupied Territories. This appellant is not an Arab and the family has already split up. There is no suggestion that segregation relates to Russians outside the Occupied Territories.

24. We have not derived much assistance from the appellant's objective evidence.

Country Information and Policy Unit Report

25. There is no Country Information and Policy Unit Report for Israel. It is not one of the top 20 countries from which the United Kingdom receives refugees. Having regard to the error of law on Article 14, we have examined the latest US State Department Report for Israel (2004) which records some difficulties in marriage, burial, and obtaining citizenship or residence for non-Jews.

26. 18% of the population are non-Jews (but that of course includes Arabs). There are difficulties in obtaining access to state-owned land (but the appellant did have a home in Israel and reports no difficulty in that regard). The most apposite passage is this –

"Residency restrictions affected family reunification. Palestinians who were abroad during the 1967 War, or who subsequently lost their residence permits, were not permitted to reside permanently with their families in the occupied territories. Foreign-born spouses and children of Palestinian residents experienced difficulty in obtaining residency. Palestinian spouses of Jerusalem residents must obtain a permit to reside there. Palestinians reported delays of several years or more before spouses were granted residency permits. The Government of Israel occasionally issued limited-duration permits, but renewing the permits could take up to 8 months, which resulted in many Palestinians falling out of status. Palestinians also reported extensive delays in registering newborn children with Israeli authorities. "

27. There are no recorded difficulties for Russians except in relation to detention, which is not relevant here.

28. Although there is no formal disability protection, there is also no record of difficulties for autistic-spectrum children such as BL. The US State Department Report gives some assistance on the provision for children, in particular disabled children, in Israel today –

"The PA provides for compulsory education through the ninth grade. However, girls who married before the ninth grade left at the behest of husbands and, in rural areas and refugee camps, boys left school to help support their families.

Internal closures, checkpoints, and the separation barrier significantly impeded the ability of both students and teachers to reach educational facilities (see Sections 2.a. and 2.d.).

In areas under curfew, all classes were cancelled. UNRWA reported that more than 35,000 teacher workdays were lost in the 2002-03 academic year. Enrolment of students from Gaza at Birzeit University in the West Bank declined from 370 in 2000 to 39 at year's end.

Education and health care professionals judged that the violence produced lack of focus, nightmares, incontinence, and other behavioral problems. UNRWA reported

that elementary school exam pass rates in Arabic, mathematics, and science declined dramatically between 2000-01 and 2003-04.

...The law provides that no one under 14 can work. Those between 15 and 18 can be employed under limited conditions (see Section 6.d.). There was no juvenile court system, but certain judges specialized in juvenile cases.

…In 2001, the Israeli High Court ordered the construction of new infant care clinics in East Jerusalem. The Association for Civil Rights in Israel stated that six centers now existed in East Jerusalem and the surrounding areas and that there was sufficient coverage for the local East Jerusalem population. East Jerusalem schools remained under-funded and overcrowded, and many students were denied enrolment due to lack of space. In 2001, the Israeli High Court ordered the municipality to build 245 new classrooms within the next 4 years, but, at year's end, only 2 new classrooms were finished and 28 were under construction

*International and domestic NGOs, including UNICEF, Save the Children, and Defense for Children International, promoted educational, medical, and cultural services for children, and other groups specialized in the needs of children with disabilities.***"**

29. We note that there are facilities for disabled children, and we remind ourselves of the dramatic improvement by BL since he came to the United Kingdom.

Conclusions on this appeal

30. The Tribunal retired to consider its decision, and dismissed the appeal at the hearing, for the reasons we now set out.

31. We note that the Adjudicator disbelieved the appellant for the reasons he set out at paragraph 27: he considered that the appellant could resettle in a less-orthodox area of Israel; that the Israeli Government was supportive of resettlement by Russian Jews; that the appellant and her ex-husband had found work easily (he as a security guard and she in a dress shop); that the appellant had been given a place on a college course and a nursery placement for her son, BL. In particular, he disbelieved their account of lack of domestic support and considered that had the family approached the police, assistance would have been available.

32. They had no financial problems during their stay in Israel and had funded a flight to the United Kingdom after only 15 months in Israel. Fears of the suicide bombing campaign did not amount to persecution or reach the high standard necessary to engage Article 3 (although the Adjudicator accepted that the appellant had a genuine subjective fear of being injured in a random bombing in the Arab-Israeli conflict).

33. We remind ourselves that, following *CA [2004] EWCA 01165,* per Laws LJ, unless the Adjudicator has made an arguable error of law which would have made a material difference to the outcome of the appeal, the Tribunal is debarred from reopening his findings of fact. The Adjudicator's factual findings are carefully reasoned and the appellant has not relied upon any evidence which would displace them.

34. The appellant contends that failing to deal with BL's special needs is an error of law. The Adjudicator did deal with them (paragraph 31). There is accordingly no error of law in his approach to that issue.

35. The only error of law established is the Adjudicator's faulty approach to Article 14, which has no independent life and cannot do more than strengthen the operation of another Article. We have two observations in that respect; first, by considering the Article as though it were a separate head of claim, the Adjudicator did not prejudice the appellant's case but rather give to her a right which in fact she does not have; and second, if Article 14 is not, as the Adjudicator found, strong enough to stand alone, the weight which it adds to Articles 3 or 8 will not be sufficient to enable her claim to succeed.

36. We remind ourselves that the burden of proof is on the appellant, and that her documentary evidence before us was not impressive; her husband did not appear or provide a signed statement, her bundle of documents was unhelpful and she has not chosen to obtain and file expert evidence to support her claim of discrimination at the level of persecution (or Article 3 ECHR) for Israeli national non-Jews throughout Israel, nor of inadequate treatment for BL if they were to be returned. Given the shortage of educational places, it is again to the appellant's credit that she managed to obtain a nursery place for BL. It appears that assistance would be available from NGOs with knowledge of disabled children's issues. We note also that the Autism service has discharged him and that his progress at school is very good, particularly behaviourally. There is no evidence before us which satisfies the Tribunal BL would not continue to improve on return.

37. The appellant has already surmounted all of the principal difficulties set out in the US State Department Report; in particular, if there proves to be a difficulty in her returning to reside in Israel, then she will not be at any risk at all, as she will not be able to be removed.

38. On the basis of the evidence we have, this appeal cannot succeed; that the appellant has not discharged the burden of proof upon her.

General conclusions

39. The evidence before us indicates some discrimination against non-Jews in Israel, at the level of civil rights (marriage, burial, Government land rights), although principally for Arabs in mixed Arab-Jewish marriages, rather than for Russians such as this appellant. The discrimination is not at a level which could engage either Article 3 or the Refugee Convention; the marriage question is dealt with pragmatically, with Israeli citizens being expected to travel abroad to make mixed-religion marriages, and the resultant unions recognised as legal marriages on return. Overseas marriages undertaken before entry are also recognised. The obligation to travel abroad to marry 'out' may not be entirely desirable, but we bear in mind that Israel is not a secular state and that this approach is used by many Israeli nationals.

40. Similarly, non-Jews are not denied burial. They are not buried in the consecrated area of synagogue burial grounds. A similar approach would be taken to a non-Christian seeking burial in a Christian cemetery here. Overall, although we accept that there is discrimination, we consider that its effect falls well below the complete denial of rights required to advance an Article 8 difficulty to a level where it has extra-territorial effect.

41. There is no evidence of anti-Russian discrimination at a level which could engage either Convention. Indeed, Israel promotes the repatriation of Russian

Jews and their families. There are difficulties for Arabs in the Occupied Territories, but we have not heard argument on that issue, and they are not relevant to the present appeal.

42. Unless there is a significant change in the objective evidence, we consider that it is most unlikely that a returning non-Jewish spouse and family will be able to establish a risk engaging either Convention, on the basis of this evidence.

43. As regards the special needs of BL, we have not seen any evidence as to the provisions for autistic-spectrum children in the Israeli educational system, but there is provision for disabled children from NGOs with experience in those areas. There are clearly difficulties in educating children in a situation of conflict, but the treatment of students reaches basic international norms, on the evidence available to us. Again, absent evidence of a change in circumstances, we consider that educational provision in Israel for all children, including disabled children, is at a level which does not engage the Refugee Convention or Article 3 ECHR. It may be that this question needs further consideration in relation to Arab children in the Occupied Territories, but we have not heard argument on that issue.

Decision

44. The appellant's appeal was dismissed at the hearing.

J A J C Gleeson
Vice President

Date: 9 March 2005