H-TH15-ATS-V3

SJ (Article 8 – Proportionality – PTSD - Bosnian Muslim - Medical Facilities) Bosnia
CG [2002] UKIAT 02819
HX26715-2001

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 29th April 2002
Dictated : 29th April 2002

Determination Promulgated:
18 July 2002

Before:-

Mr D K Allen - Chairman
Mr M G Taylor CBE

between

The Secretary of State for the Home Department

Appellant

and

Samir JASAREVIC

Respondent

DETERMINATION AND REASONS

1. The Appellant has been granted leave to appeal to the Tribunal against the determination of an Adjudicator, Mr Andrew Wilson, who allowed the Respondent's appeal against the Appellant's decision directing his removal from the United Kingdom and refusing asylum.

2. The hearing before us took place on 29th April 2002. Mr J Jones of the Home Office Presenting Officers' Unit appeared on behalf of the Appellant, and Ms S Naik for Parker Bird appeared on behalf of the Respondent.

3. The Adjudicator found credible the claim of the Appellant before him (to whom we shall continue to refer as the Appellant) as set out in his initial statement to the Home Office. In that statement the Appellant, who is a Bosnian citizen, said that he was

living in Biajc, which was controlled by the Bosnian Muslims (he being a Muslim) and went to visit his family in Kljuc, which was Serbian controlled. He was there with his wife and children for fifteen days during which time the ethnic cleansing of the Muslim males began. His family and others were taken to the barracks by the Serbs and tortured there. His uncle and his uncle's two sons were killed on their doorstep, and also his wife's uncle was killed. He hid in the cellar to save his life. The Serbs asked his wife and mother where he was and his wife said that she had come on her own with the children and that he was still in Biajc. He said that the Serbs took the family out of the house and burnt it and also his uncle's house. They took his wife to a place where they kept Muslim women and raped them, and were about to rape his wife but a commander intervened so they let her go. She ran out and came back to get him out of the burning house, waited until the Serbs had left with all the goods and then took him out. Subsequently they hid for a few days in the woods with other survivors and paid a Serb some money and he took them in his tractor back to Biajc. The Serbs had now started to attack Biajc and he was recruited into the Bosnian Muslim Army. His wife had to go and live with a family they did not know. His wife was hit by a shell and no medical treatment was provided and this caused her still to suffer headaches. His cousin was shot and died but he himself managed to escape the front-line. During the war Biajc was totally isolated and conditions were very horrific and there was a severe shortage of food. They were forced to witness the constant shelling and a rising death toll everyday. He referred also at an incident when his daughter fell ill and they were taking her to a hospital and noticed that the Serbs were closing in to take over everything in the town and said they would torture and rape everyone and as a result he had a gun with bullets in it so that if necessary he would shoot himself and the family in preference to being caught and tortured by the Serbs. He referred also to the children's continuing fear, wetting the beds and fear of uniformed people and the fact that his daughter as a consequence of not having an injection at the hospital getting pains and infections in her left eye which swells up. He also referred to having illnesses as a result of all the sufferings in Bosnia. He referred to continuing deaths and land mines being planted and the fact that his wife's cousin was killed in the army last year and no-one knew how or why.

4. The Adjudicator experienced difficulty in assessing the reasons why the Appellant left Bosnia. It seems that the main reason why he left his flat was because it was repossessed by the Muslim authority and no reasons were said to have been given for this. As a consequence the Adjudicator found the exact reason why the Appellant left Bosnia to be unclear. He was satisfied that there was still a situation of some discord controversy and violence, from his assessment of the country material. He also noted a death certificate and photographs attached concerning a relative of the Appellant.

5. In his conclusions the Adjudicator did not consider the requirement to vacate the flat for some uncertain reason to amount to persecution. He found that the ill-treatment suggested by individuals feared by the Appellant was not of sufficient severity to cross the threshold of persecution and also found that there appeared to be a sufficiency of protection available to the Appellant from the state and that therefore such ill-treatment as there had been from individuals could not amount to persecution for the purposes of the 1951 Convention. As a consequence he stated at paragraph 25 that he found that the Appellant had not discharged the burden of proof of having

a well-founded fear of persecution for the narrow definition of Article 1 of the Geneva Convention.

6. Thereafter the Adjudicator, making passing reference to the Human Rights Convention, an issue to which we shall have to return in due course, concluded perhaps rather surprisingly in light of his findings at paragraph 25, that the appeal was allowed under the Refugee Convention. His reason for this is essentially set out in paragraphs 33 to 35 of his determination. In essence this arose from his application of Article 1C(5) of the Refugee Convention, and also paragraphs 135 and 136 of the UNHCR Handbook.

7. Article 1C provides that these Conventions shall cease to apply to any person falling under the terms of Section A if;

> (5) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality. Paragraphs 135 and 136 of the Handbook, which, as is recognised before us, do not form part of United Kingdom law, refer, in paragraph 135, to what is meant by "circumstances" in Article 1C(5) and, in paragraph 136, to the nature of the exception to the cessation provision contained in the second paragraph of Article 1C(5). This contains, among other things, a reference to Article 1A(1) which indicates that the exception applies to "statutory refugees". It is clearly set out at Article 1A(1) that the term refugee applies to a person who has been considered a refugee under the arrangements of 12th May 1926 and to 30th June 1928 or under the Conventions of 28th October 1933 and 10th February 1938, the Protocol of 14th September 1939 or the Constitution of the International Refugee Organisation. Clearly this does not apply to the Appellant, as we shall continue to refer to him, before us. The point is made in paragraph 136 of the Handbook that the exception reflects a more general humanitarian principle which could also be applied to refugees other than statutory refugees and that it is frequently recognised that a person who, or whose family, has suffered under atrocious forms of persecution should not be expected to repatriate. This is so even though there may have been a complete change of regime in his country. The Adjudicator based his conclusions on medical evidence concerning the Appellant as regards his own medical problems which in particular involves him suffering from Chronic Post Traumatic Stress Disorder as is made clear in the report from a Dr Booya, a Consultant Psychiatrist. It appeared from the Appellant's evidence that his wife was also receiving treatment from Dr Booya, apparently for depression, and that their children had been sufficiently disturbed that the GP considered referring them to a specialist but considered that with stability and treatment of their parents that they would respond and it appears that this was increasingly the case.

8. Mr Jones argued that the Adjudicator's conclusions could not be sustained. There was a clear contradiction between paragraph 25 and paragraph 36 of the determination. The Secretary of State had not been asked to exercise discretion in

the Appellant's favour. The issue of compassionate grounds was not an issue for the Adjudicator.

9. Ms Naik argued that the Adjudicator was right on the Article 1C(5) point. It would be necessary to determine that as a preliminary issue, since she argued that there were also human rights issues before the Tribunal. Though it was true that the Handbook was not part of United Kingdom law, the Tribunal had to consider whether removal of the Appellant and his family would breach the United Kingdom's obligations under the Convention as a whole. It was accepted that the Appellant had not been recognised as a refugee in the past, but his circumstances with regard to the Adjudicator's findings given the compelling and traumatic reasons referred to by the Adjudicator would have made him a de facto refugee in the past. The Adjudicator was correct to use the Handbook to seek to interpret the United Kingdom's obligations under the Convention. The Adjudicator found that there were compelling reasons for the Appellant to refuse to avail himself of the protection of his country. This was set out in the determination, and it was comprised in his particular mental health condition and especially the reasons for the PTSD. It was clear that he suffered because of his experiences at the time of the war and hence he sought refuge outside Bosnia Herzegovina. She put in a determination of the Tribunal in **M (01TH03623)**. This was of particular relevance to the human rights issues that would fall to be argued as part of the alternative submission.

10. Mr Jones took us to paragraph 6 in **M**. He argued that in the light of the points made by the Tribunal in that paragraph the argument that the Adjudicator in the appeal before the Tribunal was right in his application of Article 1C(5) was not sustainable.

11. We have already set out the provisions of Article 1C(5). As was clearly pointed out by the Tribunal in paragraph 6 in **M**, the cessation provision of Article 1C(5) had no application in that case since the Appellant there had not been recognised as a refugee and in fact her application had been rejected by the Secretary of State. The same point applies equally in the case before us. The Appellant has not been recognised as a refugee by the Secretary of State, and indeed was not found to be a refugee as regards risk of persecution on return to Bosnia, at paragraph 25 of the determination. The Tribunal went on at paragraph 6 in **M** to say that it might be that the Adjudicator had in mind the saving proviso to Article 1 C(5) but if so was also in error in that respect since it applies only to statutory refugees, that is those recognised under international law prior to the entry into force of the 1951 Convention. That is equally true in the case before us. As was agreed by the representatives before us, the Handbook provides guidance only and is not part of United Kingdom law. Applying the wording of the Convention, and bearing in mind the United Kingdom's obligations under that Convention, we consider that the Adjudicator was wrong to allow this appeal under Article 1C(5) of the Convention, making the use as he did of paragraphs 135 and 136 of the Handbook. The Appellant is not a statutory refugee and his claim under the Refugee Convention and, in the light of the Adjudicator's conclusions at paragraph 25, cannot be sustained.

12. We go on to consider firstly whether we have jurisdiction to consider his human rights issues in this case, and secondly if we do what conclusions we reach on them. There was no cross appeal brought on behalf of the Appellant before the Adjudicator against the Adjudicator's findings in any respect. As was pointed out by Mr Jones in

his submissions to us, the Adjudicator did not really come to clear findings on the human rights issues in this case. Paragraph 31 appears to deal with the Article 3 argument but it is inconclusive, and cannot be said to be at all a satisfactory determination of that issue. The same criticism can be made of paragraph 32 which purports to deal with the claim under Article 8. The fact that there was an absence of evidence should not have precluded the Adjudicator from making findings on this point.

13. We bear in mind our obligations as a public authority under the Human Rights Act. In our view it would not be proper for us to refuse to hear argument on the human rights issues in this case albeit that there is no cross appeal against the Adjudicator's conclusions, if they can be so described, on the human rights issues in this case. Accordingly we have taken full account of the arguments put before us concerning the Human Rights Act which were essentially as set out in Ms Naik's skeleton argument and amplified by her in her submissions to us, and in Mr Jones response to those points. In particular Ms Naik placed reliance upon the determination in **M** to which we have referred above. That appeal involved an Appellant from Kosovo who among other things had been subjected to torture and rape of a particularly brutal nature over a period of hours by Serbian youths which, not surprisingly, caused her to be in a severely traumatised state. The Tribunal did not consider that the Appellant was at risk of treatment which could be said to be sufficiently serious to amount to inhuman or degrading treatment, and therefore dismissed the appeal under Article 3. As regards Article 8, the Tribunal found at paragraph 26 that the Appellant had been subjected to treatment in Kosovo of such severity that she currently suffered from Post Traumatic Stress Disorder and severe depression as a direct result of that treatment. There was clear medical evidence that her return at the present time would adversely effect the therapeutic treatment which she was currently receiving but was also likely adversely to affect the progress which had been achieved by returning her to the country where associations with her past suffering would be intensified. Removal of itself would therefore be clinically regressive and there was no realistic prospect of her being able to receive treatment in Kosovo for her condition as it then existed, let alone as it was likely to be aggravated by her return. She would be expected to comply with tradition by going to live with her parents-in-law and if she did not do so she would go against the norms of her society. There was some evidence that it would not be easy for her to return to live with her own parents because they feared the stigma attaching to them as parents of a victim of Serb rape. The attitude of her parents-in-law was not reasonably likely to be more supportive than that of her natural parents. It could not be excluded that what had happened to her might become more widely known and it would be seen as a stigma generally in her society and that would substantially inhibit her from seeking help in Kosovo outside her immediate family in any event. In paragraph 28 the Tribunal expressed the view that whilst it would only be rarely that removal pursuant to maintenance of a consistent immigration policy would not be proportionate, in its view this was one of those rare cases where it would not be so. In reaching this conclusion the Tribunal took fully into account the horrific nature of the Appellant's experiences in Kosovo and that her torture and rape in September 1999 was only some two years previously and was particularly brutal and reprehensible. It took account of the UNHCR guidelines of March 2001. The Tribunal concluded that her removal would be inhumane and in breach of her human rights to respect for her physical and moral integrity under Article 8 and that it was not

proportionate to the legitimate aims of the United Kingdom. This was because of the degree of physical and moral detriment that would arise from her removal and return to Kosovo.

14. The medical evidence concerning the Appellant in the case before us can essentially be found in the report of Dr Booya of 6th August 2001. Dr Booya is a Consultant Psychiatrist to whom the Appellant was referred by his GP. The doctor had seen him on four occasions since his first consultation, and diagnosed him as suffering from severe and also Chronic Post Traumatic Stress Disorder. It had taken three sessions before the doctor could complete his assessment and he put the Appellant on anti-depressants. He would be assessed regarding suitability for cognitive behavioural therapy and steps had been taken to make a referral in this regard. The length of treatment was said to be very long and difficult to predict. The doctor said that he would expect the Appellant to require intensive psychiatric and psychotherapeutic input for at least the next twelve months and to continue to require psychiatric follow-up for a few years to come.

15. We have also the benefit of a report from Dr Booya concerning the Appellant's wife. This was obtained after the hearing before the Adjudicator, although it appears to have been sent to the Adjudicator, it was not taken into account in the Adjudicator's determination. It may well be that it never in fact reached the Adjudicator. The wife is diagnosed as presenting with multiple and severe symptoms of Post Traumatic Stress Disorder. She is said to suffer from severe PTSD. It is said that she would require treatment for several months, no less than one year. Prognosis was generally poor and at best it was expected to reduce the severity of the symptoms and help the patient to cope with them and try and build a new life. There was a possibility of relapse of symptoms when the patient was under stress or subjected to further trauma. This report is dated 7th November 2001.

16. We were referred to the UNHCR report on health care in Bosnia and Herzegovina which was referred to in paragraph 2.6 of the Grounds of Appeal. At paragraph 5.12.1 which is headed Post Traumatic Stress Disorder and Mental Health Care, it is said that the specific treatment and care of mentally traumatised people is unmanaged. It is maintained mainly by Non-governmental Organisations whose involvement is not guaranteed over time. It is said that stationary treatment for PTSD can only be found in CC Sarajevo, however psychiatric specialists recognise this group of patients and outpatient therapy is offered in many hospitals and DZs once or twice per week. None of the visited health care institutions had a specialised mental health care department for stationary therapy and attempts to create such departments or wards remained unsuccessful. There are general comments and two conclusion sections in this report. It is said that the conclusion which is prefixed by the number 10 that in order to ensure the continued treatment of persons suffering from chronic or potentially life threatening illnesses the possibility for repatriation of such individuals should be considered only on a case by case basis and with full consideration given to the possibilities for such persons of accessing satisfactory health care in their place of return. A thorough assessment of these possibilities should include not only whether the necessary drugs or treatment facilities are available in the persons place of origin but whether or not the person would be able to access these facilities. In the conclusions (by number 6) it is said to be undeniable that both the level of services provided for those who are insured is often well below

the levels guaranteed by law and that despite the legal semblance of universal health coverage there remains a significant number of persons who either do not have insurance or who experienced difficulty in accessing health care in Bosnia and Herzegovina. A number of obstacles to the proper functioning in the health system are set out and these are said to constitute significant deterrents to return. Ms Naik also took us to the decision of the European Court of Human Rights in **Bensaid [2001] INLR 325**, particularly at page 337, where it was said, at paragraph 47, that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. It is also said that the preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life. We also bear in mind the quotation from **Nhundu and Chiwera (01/TH/00613)** at paragraph 6 of Ms Naik's skeleton argument that even if the private and family life ties in the United Kingdom are not strong enough on their own to give rise to a violation of Article 8, a person could nevertheless succeed under that Article if removal would expose him to a real risk of significant harms or serious obstacles albeit harms falling below the Article 3 threshold.

17. As is very much emphasised in **M**, cases of this kind require to be determined on their own facts. The Tribunal in that case emphasised that it would only be rarely that removal pursuant to maintenance of a consistent immigration policy would not be proportionate. The Tribunal went on to consider carefully the particular facts of that case. In our view the proposed removal in the case before us would be proportionate, bearing in mind the need to maintain a consistent immigration policy. We have considered carefully the medical evidence, and the evidence generally of this family's circumstances while in the United Kingdom, in the light also of the objective evidence concerning the availability of appropriate medical care in Bosnia. The family would return as a unit, and we see the relevance, but attach no great weight to the fact that a number of the members of the wife's family have status in the United Kingdom. We do not think that it would be appropriate to seek to make comparisons between our conclusions and those in **M**, since as we have noted above, each case must be dealt with on the basis of its own facts. We consider that the conclusions in **M** are eminently sustainable, but in our view that was a highly exceptional case, and we do not consider that the same can be said of the case before us. In particular we note what appear to be more adequate medical facilities for the particular ailments of the Appellant and his wife in Bosnia, and, albeit there clearly are general problems with the health care system in Bosnia, it must be of particular relevance that there is stationary treatment for PTSD, albeit only in CC Sarajevo, but that psychiatric specialists recognise this group of patients and outpatient therapy is offered in many hospitals and DZs once or twice per week. We note that neither the Appellant nor his wife is or apparently ever has been an inpatient in the United Kingdom, and that the prognosis for the Appellant in August 2001 was that he would require intensive psychiatric and psychotherapeutic input for at least the next twelve months and to continue to require psychiatric follow-up for a few years to come.

18. We conclude therefore that the claim under Article 8 is not made out. We agree also with what was said by the Tribunal in M that as in that case so in this the Article 3 claim is not made out. If this Appellant is at risk of anything on return, it is not treatment that could give rise to a claim under Article 3 in our view, and as we have stated above, we do not consider that to return him and his family would give rise to

breach of his and their Article 8 rights either. In the light however of the helpful medical evidence from Dr Booya, we consider that it is appropriate that we make a recommendation in this case. We would ask the Secretary of State to give serious consideration to granting this family a period of twelve months exceptional leave to remain in order for the most intensive part of treatment of the Appellant and his wife to be concluded, after which time we would expect, in the light of the prognosis provided by the doctor in relation to both of them, that their treatment could be continued properly.

19. This appeal is allowed.

D K ALLEN
CHAIRMAN