AM ("Upgrade" appeals: Art 6?) Afghanistan * [2004] UKIAT 00186

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 4th November 2003
Date Determination notified:
9 July 2004

Before:

Mr C M G Ockelton (Deputy President)
Dr H H Storey (Vice President)
Mr A Jordan (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant, a citizen of Afghanistan, appeals, with permission, against the determination of an Adjudicator, Mr L D Sacks, dismissing his appeal against the decision of the Secretary of State on 1st March 2001 refusing him asylum, on the ground that he had abandoned that appeal.

The facts

2. The Appellant arrived in the United Kingdom clandestinely by lorry on 22nd January 2000. On 25th January, he claimed asylum. The decision of the Secretary of State was, as we have indicated, made on 1st March 2001. He refused asylum, but also told the Appellant that:

> "It has been decided, however, that because of the particular circumstances of your case, you should be granted exceptional leave to remain in the United Kingdom. The Secretary of State therefore grants you leave to remain until 27/02/2005."

3. The Notice of Decision set out the Appellant's right to appeal under section 69(3) of the 1999 Act. That subsection is in the following terms:

> "A person who-
> (a) has been refused leave to enter or remain in the United Kingdom on the basis of a claim for asylum made by him, but
> (b) has been granted (whether before or after the decision to refuse leave) limited leave to enter or remain,
> may, if that limited leave will not expire within 28 days of his being notified of the decision, appeal to an adjudicator against the refusal on the ground that requiring him to leave the United Kingdom after the time limited by that leave would be contrary to the Convention."

4. The Appellant exercised his right of appeal by notice dated 13th March 2001. In August 2002, the Appellant left the United Kingdom and went to Iran, to see members of his close family who are said to be living there illegally. The Adjudicator appears to have been told that he remained in Iran for four weeks.

5. Section 58(8) of the 1999 Act is in the following terms:

> "A pending appeal under this Part is to be treated as abandoned if the Appellant leaves the United Kingdom."

6. It was in reliance upon that provision that the Adjudicator dismissed the appeal as abandoned.

The proceedings before the Tribunal

7. Mr Henderson submitted to us that Article 6 of the European Convention on Human Rights applies to "upgrade" appeals of this sort. In that context, he submitted that s 58(8) of the 1999 Act infringed the Appellant's right of access to a court, and that it should therefore be "*read down*" by the insertion of words disapplying it from appeals under s 69(3). He accordingly submitted that the Adjudicator was wrong to treat the Appellant's appeal as abandoned merely by his having left the United Kingdom whilst it had been pending.

8. Having heard Mr Henderson say everything that could be said in support of those submissions, we found we did not need to call upon Mr Buckley to reply.

The legal background

(i) "Upgrade" appeals

9. The Appellant's experience in being refused asylum but granted limited leave to remain is by no means unique. Section 8(2) of the Asylum and Immigration Appeals Act 1993 provides as follows:

> "A person who has limited leave under the 1971 Act to enter or remain in the United Kingdom may appeal to a special adjudicator against any variation of, or refusal to vary, the leave on the ground that it would be contrary to the United Kingdom's obligations under the Convention for him to be required to leave the United Kingdom after the time limited by the leave."

10. Before the decision of the Court of Appeal in Saad, Diriye and Osorio v SSHD [2001] EWCA Civ 2008, [2002] INLR 34, it had been thought that in order to succeed in an appeal under that section, a claimant would need to demonstrate that it would be contrary to the United Kingdom's obligations under the Convention for him to be required to leave the United Kingdom after the time limited by his leave. The Court of Appeal held, however, that, on its true construction, s 8(2) of the 1993 Act enabled a claimant to pursue an appeal on the ground that, at the time of the appeal, he was entitled to the status of a refugee under the Refugee Convention. Thus s 8(2) gave him the opportunity to "*upgrade*" his status from that of a person granted exception leave to remain to that of a refugee. The jurisdiction was preserved by s 69(3) of the 1999 Act, under which this appeal is brought, and now appears, in substance, as s 83 of the 2002 Act. As will be appreciated, the claimant in an "upgrade" appeal is not at immediate risk of removal from the United Kingdom whether he wins his appeal or not. His appeal is concerned not with his irremovability, but with the reasons for his irremovability.

(ii) Article 6 of the ECHR

11. Article 6 is scheduled to the Human Rights Act 1998 and is thus a "*Convention right*" for the purposes of that Act. It is headed "*Right to a fair trial*", and we need set out only the first sentence of the first paragraph:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law."

12. The "*right of access to a court*" in human rights jurisprudence is founded upon that provision.

Article 6 and "upgrade" asylum appeals

13. In his efforts to demonstrate to us that Article 6 applies to upgrade appeals, Mr Henderson took us through some recent decisions, including MNM v SSHD [2000] INLR 576, Maaouia v France (ECtHR App No 39652/98) and Adams and Benn v UK, EComHR App Nos 28979/95 and 30343/96. Accepting of course that each of those decisions relates to matters of immigration and excludes Articles 6, he submitted that none of them was sufficient to show that Article 6 does not apply to a case such as the present where no exclusion is in prospect.

14. In our view, these submissions are misconceived. The judgments to which Mr Henderson referred are not the only bases upon which it could be said that Article 6 does not apply to a case such as the present. They are exemplifications of the general rule that Article 6 applies, in non-criminal causes, to matters of private law rather than of public law. So much is clear from the Commission's opinion in Adams and Benn v UK, where the Commission considers whether Article 6 applies to the Claimants' argument that they were entitled to free movement rights under the treaties constituting the European Union:

> "The Commission in any event is of the opinion that any right involved is of a public law nature, having regard to the origin and general nature of the provision, which lacks the personal, economic or individual aspects which are characteristic to the private law sphere … . Consequently, the matter falls outside the scope of the concept of '*civil rights and obligations*'."

15. It is right to say that, in a number of instances, the Court has held that Article 6 applies to some areas of law which would be regarded as public, rather than private law: for example social security payments (Feldbrugge v Netherlands (1991) 13 EHRR 571), judicial pensions (Lombardo v Italy (1996) 21 EHRR 188), and, within a very limited sphere, some matters relating to tax (Editions Périscope v France (1992) 14 EHRR 597). The inroads into the principle that Article 6 does not apply to public law rights, however, have been made only where it has been demonstrated that at the heart of the claim is a right to property or some allied matter, sounding typically in private law and rendered a matter of public law only by the particular circumstances of the individual case.

16. We appreciate that, for the Appellant, the advantage of an upgrade appeal may be an increased entitlement to social security benefits and other rights within the United Kingdom. These may be important matters for the Appellant, but they are not what is seen to be at issue in an "upgrade" appeal. The nature of such an appeal is authoritatively set out in the decision of the Court of Appeal in Saad, Diriye and Osorio v SSHD. At paragraph 16, Lord Phillips MR, giving the judgment of the Court, indicated that the background to such an appeal is the following:

> "… absent a clear parliamentary intention to the contrary, we would expect our primary and delegated legislation to provide a system whereby claimants may have it determined whether they are refugees. It is only that determination which gives them access to Convention rights. We therefore approach questions of construction on that basis."

Later in the judgment, at paragraph [37], section 8 of the 1993 Act is analysed as giving "*a right of appeal on grounds that directly raise the issue of the refugee status of the appellant*". At paragraph [68], the decision of the Court is that "*an appeal under section 8(2) will, just as in the case of appeals under the other three subsections, raise as the crucial issue the question of whether the appellant enjoys refugee status at the time of the hearing of the appeal*".

17. Nothing could be clearer. The issue in an upgrade appeal is whether the claimant is entitled to the status of refugee, a status which exists only in international and public law and is not a matter of private law. There is no basis for supposing that Article 6 of the European Convention on Human Rights applies to the determination of such a question.

18. That is sufficient to dispose of this appeal, but in deference to the complex arguments put by Mr Henderson we will indicate what our view would have been if we had been with him on the principal issue.

"*Access to a court*"

19. Mr Henderson submitted that the effect of s 58(8) was to deprive the Appellant of access to a court in a manner which was disproportionate. We do not accept that submission. In the first place, it is not suggested that the Appellant had any pressing need to leave the United Kingdom at the moment when he did, when his appeal was pending. To accede to the submission on the limited facts on which it is based would be accept that a claimant is entitled to access to a court whatever he may do to reduce the possibility of access by his own acts.

20. Secondly, and again on the limited facts of which we have been made aware, we do not accept that, in the Appellant's case, the restriction of access to a court would have been properly regarded as disproportionate. The essence of the Refugee Convention is that it protects a claimant by his presence in a "*safe*" country. It does not of itself entitle the claimant to reside in any particular country. Further, there is nothing in the Refugee Convention or in any associated jurisprudence which requires a country which the claimant has left to continue the determination of his claim, save where such a requirement is imposed on a country of first entry by some other independent agreement such as the Dublin Convention. In these circumstances, it appears to us entirely proper for the United Kingdom to provide by statute that a person's claim to be a refugee finding a safe haven in the United Kingdom effectively ceases, if not finally determined, before he leaves the United Kingdom. If at some later stage, he wishes to re-assert a claim to refugee status here, he can no doubt do so.

"*Reading Down*" Section 58(8)

21. Mr Henderson submitted that, if Article 6 applied to upgrade appeals, s 58(8) of the 1999 Act should be "*read down*", as a matter of interpretation in accordance with the Human Rights Act 1998, by the insertion of words, so that it reads as follows:

> "A pending appeal under this Part *other than section 69(3)* is to be treated as abandoned if the appellant leaves the United Kingdom."

We have some difficulty in accepting the general proposition that we would have power to insert those words and so change the meaning of the

statute. There does not appear to us to be any reason to do so, other than possibly recognising in an appropriate case that the statute was not entirely in conformity with the requirements of the 1998 Act. Even if we were persuaded otherwise, however, we should not accept that the statute should be read down in the sense suggested by Mr Henderson, which would disapply s 58(8) from all "upgrade" appeals but from no other appeals.

22. For the reasons we have given in the last section of this judgment, we would not accept the proposition that the impact of s 58(8) is to deprive every upgrade claimant from access to a court in circumstances which would be disproportionate. In our view, the justification of that result would vary from case to case and it would therefore not be right to suggest that leaving the United Kingdom ought never to cause automatic abandonment of the appeal.

23. Secondly, it is difficult to see why, if Mr Henderson's argument were to be accepted, it should not equally apply to non-asylum claimants who have an in-country right of appeal: for example, a student who, whilst appealing against the refusal of an extension of his student visa, goes, as part of his course, on a day trip to Paris. Thus the reading suggested by Mr Henderson goes too far in the case of upgrade appeals and not far enough in the case of other appeals.

24. For the reasons given earlier in this judgment, we find that there is no principle requiring s 58(8) to be interpreted in this way or altered on the basis of Article 6, for Article 6 does not apply to this appeal. For the reasons we have indicated, however, we should have rejected Mr Henderson's other arguments as well.

25. It is acknowledged that in the absence of success on these arguments, the Appellant's appeal stands as abandoned. We confirm that that is indeed the case and dismiss his appeal to the Tribunal.

C M G OCKELTON
DEPUTY PRESIDENT