2006/05353/D4

Neutral Citation Number: [2007] EWCA Crim 380
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Monday 19th February, 2007

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(LORD PHILLIPS OF WORTH MATRAVERS)
MR JUSTICE BURTON
AND
MR JUSTICE DAVID CLARKE

– – – – – – –

R E G I N A

– v –

MASOUD TABNAK

– – – – – – – – –

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(Official Shorthand Writers to the Court)

MR J K BENSON QC and MR I SHAFI appeared on behalf of THE APPELLANT
MR A RIZA QC appeared on behalf of THE CROWN

J U D G M E N T

(As Approved by the Court)

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Monday 19 February 2007

THE LORD CHIEF JUSTICE:

1. On 26 September 2006, at the Crown Court at Manchester, before His HOnour Judge Kokhar, the appellant pleaded guilty to breach of section 35 of the Asylum and Immigration (Treatment of Claimants) Act 2004 ("the 2004 Act"). He was sentenced to twelve months' imprisonment. He pleaded guilty because the judgehad given an adverse ruling ont he interpretation of part of section 35 of the 2004 Act. This was the first prosecution to be brought under this section and the judge certified the case as fit for appeal to enable this court to give guidance on the construction of the section.

2. The Secretary of State frequently encounters practical difficulties in deporting those who have unsuccessfully sought leave to enter or remain in this country as refugees or for other reasons. These problems include preparing the documentation that is needed to arrange for the unsuccessful applicant to travel back to and enter the country from which he has come. Co−operation from that person that is needed to prepare the documents is sometimes not forthcoming. It was in an attempt to meet this problem that section 35 was included in the 2004 Act.

3. The relevant portions of section 35 provide as follows:

"Deportation or removal co−operation

(1) The Secretary of State may require a person to take specified action if the Secretary of State thinks that −−

(a)the action will or may enable a travel document to be obtrained by or for the person; and

(b)possession of the travel document will facilitate the person's deportation or removal from the United Kingdom.

(2) In particualr the Secretary of State may require a person to −−

(a)provide information or documents to the Secretary of State or to any other person;

(b)obtain information or documents;

(c)provide fingerprints, submit to the taking of a photograph, or provide information or submit to a process for the recording of infomration about external physical characteristics, including in particular features of the iris or any other part of the eye;

(d)make or consent to or co−operation with the making of an application to a person acting for the government of a State other than the United Kingdom;

(e)co−operate with a process designed to enable determination of an application;

(f)complete a form accurately and completely;

(g)attend an interview and answer questions accurately and completely;

(h)make an appointment.

(3) A person commits an offence if he fails without reasonable excuse to comply with a requirement of the Secretary of State under subsection (1)."

The Act then provides that, a person convicted on indictment of the offence will be subject to imprisonment for a term not exceeding two years, or to a fine or to both, and on summary conviction to imprisonment for a term not exceeding twelve months, to a fine not exceeding the statutory maximum, or to both.

4. This appeal raises two questions: (1) what is the ambit of the "reasonable excuse" that will absolve a defendant from liability under section 35? (2) is a defendant relying on a "reasonable excuse" under a legal burden to establish the excuse, or merely an evidential burden, so that once an issue is raised as to the existence of a reasonable excuse, the prosecution must prove beyond reasonable doubt that there was no such excuse.

5. The appellant is an Iranian. He has refused to comply with the Secretary of State's request for assistance in preparing his travel document becuase he fears that if he is returned to Iran his freedom and even his life will be at risk. The principal issue in this cae is whether such fears are capable in law of constituting a reaosnable excuse for failing to comply with a requirement of the Secretary of State under section 35(3).

The Facts

6. We shall give an account of the relevant facts in order to set this appeal in its context. The appellant was born on 11 August 1963. He arrived in the United Kingdom illegally and claimed asylum on 18 September 2000. He was refused asylum on 10 December 2001 on the ground that his fear of persecution was not well founded. The Secretary of State also considered a claim under Article 3 of the European Convention on Human Rights but was not satisfied that a breach of that article would occur if he were sent back to Iran.

7. The appellant appealed against the refusal, but his appeal was dismissed by an adjudicator on 14 May 2003 on the grounds that he was satisfied that it would be safe for the appellant to return at the present time to Iran and that there was no real risk of him being subjected to

persecution or ill−treatment amounting to a breach of Article 3 of the Convention. His application for permission to appeal to the Immigration Appeal Tribunal was refused on 2 July 2003. There has been no further appeal or review of the Tribunal's decision.

8. The appellant did not leave the United Kingdom following dismissal of his appeal. He was apprehended on 7 December 2005 and detained under Immigration Act powers.

9. On 8 December 2005 he was seen by an assistant immigration officer and asked to complete emergency travel documentation for his removal to Iran. He refused to fill in the documentation. He was released on temporary admission. On 16 January 2006 he was told by Immigration that he had no legal basis to remain and that he had to attend again on 26 January 2006, later re−arranged to 1 February 2006, when he was going to be interviewed in Farsi and that failure to comply with the documentatin process was a criminal offence punishable with up to two years' imprisonment. He was issued with a Form IS35 requiring him to attend an interview and answer questions accurately and completely and to make or consent to co−operate with the making of an application in relation to his re−patriation to Iran.

10. The appellant attended on 1 Feruary 2006, but refused to answer any questions in relation to the completion of the travel documentation. He said, "I would rather suffer the consequences of not completing a travel document than be sent home to Iran". On 25 April 2006 he was arrested for failing to comply with the travel documentation process and was given a further opportunity to fill in the form to enable the Secretary of State to apply to the Iranian Embassy for a travel document. He refused, saying in effect that it was not safe for him to return to Iran because his life and freedom would be at risk. He was charged with an offence contrary to section 35(3) of the 2004 Act.

11. The appellant's appeal began life as an appeal under section 69(5) of the Immigration and Asylum Act 1999, but was considered by an adjudicator as an appeal under the provisions of sections 81−96 of the Nationality Immigration and Asylum Act 2002, which came into force on 1 April 2003.

12. Those facts have been taken from the skeleton argument of Mr Alper Riza QC for the prosecution. We do not understand that they are in dispute, and certainly the essence of them is common ground. In his skeleton argument Mr Riza has provided a detailed summary of the complex legislative provisions that are designed to ensure that an asylum seeker or other person seeking a right to enter or remain in the United Kingdom is not deported if he has a well−founded fear of persecution or inhuman or degrading treatment in his own country. As we have stated, the appellant availed himself of the provisions applicable at the time up to the stage of an unsuccessful application to appeal to the Immigration Appeal Tribunal agianst the dismissal of his appeal to an Adjudicator.

Guidance

13. The Crown Prosecution Service has issued guidance to prosecutors in respect of section 35(3) and the Home Office has issued guidance to the Immigration Service. They are to very different effect. The relevant part of the Crown Prosecution Service Guidance is as follows:

"It is likely that any person proecuted for an offence under this section will

have had an application for leave or asylum already refused. This does not prevent them claiming that the reason that they do not provide information is that they fear for their own safety. This must be considered carefully in each case in accordance with the Code for Crown Prosecutors. As a general rule, the simple raising of a defence should not prevent a prosecution, particularly when evidence to contradict the claim is avialable. It may also be appropriate to obtain the reasons provided for the refusal of any leave or asylum application."

The Home Office Guidance is as follows:

"Guidance on reasonable excuse

6.1 When considering whether an individual has offered a reasonable excuse, the following guidance should be consulted. EPU guidance states that if a person claims to have an excuse for not complying with a requirement, then it will fall to the investigating officer to test the credibility of this excuse as part of a prosecution case. Should a prosecution proceed, it will have to be proved that they do not have an excuse or that it is not a reasonable one.

6.2 Examples of reasonable excuse

A reasonable excuse may include, for example, the person failing to attend an inteview due to them needing medical care or difficulties with transportation. Needing time for further information could be an excuse. Such claims would need to be substantiated. Lack of money to attend interviews may be raised as a reasonable excuse for non attendance.

6.3 Distinction between provision of information and fear of deportation

Cases where fear of persecution if removed or deported is raised should still be referred to the CIT [Criminal Investigation Team]. This is becauses a distinction should be made between the provision of information and the possible consequences of removal, ie waht is it about the act of providing information that is causing them problems? There is no guarantee that the provision of the information will result in removal. So fear of removal or deportation is not a reasonable excuse for refusing to provide information."

The Judge's Ruling

14. The judge held that the Home Office guidance reflected the typ of matters that were capable in law of constituting "reasonable excuses" for not complying with the requirements of the Secretary of State. He did not accept that the guidance of the Crown Prosecution Service accurately represented the position in law. He held that to allow a defendant to raise issues as to his safety if deported would be to permit him to drive a coach and horses through the object of Parliament in enacting section 35, namely to facilitate the process of deportation. He also held that, while there was an evidential burden on a defendant to raise an excuse, the burden then shifted to the proecution to prove beyond reasonable doubt that the matters relied on did not constitute a reasonable excuse for not complying with the Secretary of State's requirements.

The Rival Contentions

15. Mr Benson QC for the appellant understandably relied upon the guidance issued by the Crown Prosecution Service. He submitted that this demonstrated that a defendant could properly rely upon fears of what would happen to him if deported. He submitted that the fact that asylumand leave to remain had been refused did not preclude a defendant from raising such fears and, having raised them, the onus was on the prosecution to prove beyond reasonable doubt that they were not reasonable. In the skeleton argument prepared by Mr Safi, his junior, the point was made that it was not right to say taht the prosecution would not be in a position to discharge the burden of proof. The Home Office had a dedicated Country Information Policy Unit to which the prosecution could look for information.

16. Mr Benson invoked Pepper v Hart as entitling him to look for assistance to a statement by the Minister when section 35(3) was debated in Parliament. He referred us to a passage in Hansard for 27 April 2004, column 725, when Baroness Scotland of Asthall was dealing with a proposed amendment. She said:

> "Amendment number 36(d) seeks to specify what should normally be considered a reasonable excuse for failure to co−operate with an interview or other information gathering procedure. First and foremost, we do not consider this offence to be the type of offence for which it is appropriate to include a list of reasonable excuses of which people could avail themselves. It is for the prosecution to prove that the person did not take the step and does not have a reasonable excuse for failing to do so. It is something better left to the circumstances of each individual case, and eventually to the court, to decide whether or not it has been made out."

17. In Zoe Thet v Director of Public Prosecutions [2006] EWHC 2701 (Admin), when giving the judgment I said this:

"I would, however, question the use of Pepper v Hart in the context of a

> criminal prosecution. Mr Chalk was not able to refer the court to any case in which Pepper v Hart has been used in that context. If a criminal statute is ambiguous, I would questin whether it is appropriate by the use of Pepper v Hart to extend the ambit of the statute so as to impose criminal liability upon a defendant where in the absence of Parliamentary material the court would not do so. It seems to me at least arguable that if a criminal statute is ambiguous the defendant should have the benefit of the ambiguity."

In this case it is the defendant who seeks to apply Pepper v Hart in a criminal process and those comments may not have the same force. It does not seem to us that the statement made by Baroness Scotland carries the matter any further forward. All that statement amounted to was that it was for the court to resolve the question of what was or was not a reasonable excuse. Mr Benson sought to rely upon it as being a positive statement that there was no legal restriction of any kind as to the ambit of "reasonable excuse". It does not seem to us that that is a correct interpretation of her statement.

18. Mr Riza advanced as his primary case the submission that a fear of persecution or serious harm on repatriation was not capable in law of constituting an "excuse" within section 35(3) f the 2004 Act. By way of alternative case he submitted that if a defendant has appealed unsuccessfully against the finding of the Secretary of State that deporting a defendant will not expose him to the risk of persectuion or inhuman or degrading treatment, it is not then open to him to rely upon fear of such treatment as a reasonable excuse under section 35. He submitted that to do so would constitute an impermissible collateral challenge to the decision in the immigration proceedings. In his skeleton argument he also submitted that the judge's ruling on burden of proof was incorrect. He submitted that section 35(3) imposes on a defendant a legal burden to prove, on the balance of probabilities, that he had a reasonable excuse for not complying with the requirements of the Secretary of State. He told us, somewhat beguilingly, that his instructions were not to press that point; but equally he did not propose to withdraw it lest the court be tempted to express a view on it.

19. Section 35 is not the only section of the 2004 Act that makes provision for a defendant to be absolved from liability for a failure to comply with an obligation where he has a "reasonable excuse" for his failure to do so. Section 2 makes it an offence for a person not to have an immigration document with him unless he proves that he has a "reasonable excuse" for not being in possession of the document. The context in which the phrase "reasonable excuse" is used in each section provides, by necessary impication, clarification of the nature of the excuse. It is an explanation for the defendant's inability to comply with the statutory obligation.

20. The "reasonable excuse" thta the applicant sought to advance in the present case was not an explanation for his inability to comply with the Secretary of State's requirement. It was an explanation for his unwillingness to do so. As a matter of law, reasons why a defendnat is unwilling to comply with a section 35 requirement with which he is perfectly able to comply cannot constitute a reasonable excuse for non−compliance. When this proposition was put to

Mr Benson, he submitted that unwillingness could become inability. The consequences of complying with the requirement might be so dire as to overbear the will of the defendant so that he would be unable to comply and in such circumstances his inability would be a reasonable excuse. It is possible to envisage a situation in which a defendant would, because of apprehension for the consequences of deportation, suffer some psychiatric illness which would prevent compliance. That might be capable of constituting a reasonable excuse for non−compliance, but no such case has been made in this instance. It has been made quite plain that the defendant was exercising a power of choice when he refused to comply with the requirements of the Secretary of State.

21. The reason why the context in which the phrase "reasonable excuse" is used in section 35 has led us to the conclusion that we have just expressed hardly needs stating. Section 35 is concerned solely with the practical requirements of deportation. The object of the ection is to facilitate compliance with those requirements. Compliance with those requirements will not, of themselves, entitled the Secretary of State to deport a person. Section 35 does not provide the battleground for determining whether deportation is legitimate. The legislation makes ample provision for determining that question. To permit a defendant to raise, by way of a defence to section 35, issues that fall properly to e determined in accordance with the legislation by specialist adjudicators or judges, now the Asylum and Immigration Tribunal, would in practice mae a prosecution under that section unworkable.

22. For these reasons we have concluded that the decision of the trial judge on this issue was correct. We would commend the way in which he dealt with this difficult point. In these circumstances the issue of burden and standard of proof does not arise and we do not propose to venture any comment in relation to it.

23. For the reasons we have given, this appeal is dismissed.