Case No: C/2001/2002

Neutral Citation Number: [2002] EWCA Civ 314

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 14th March 2002

Before :

LORD JUSTICE SCHIEMANN
LORD JUSTICE MAY
and
LORD JUSTICE JONATHAN PARKER

- -

Between :

KLODIANA KACAJ
Appellant

- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mungo BOVEY and David JONES (instructed by **Irving & Co.**) for the Appellant
Robin TAM (instructed by **Treasury Solicitors**) for the Respondent

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Judgment
As Approved by the Court

Lord Justice Schiemann :

1. Before us is an immigrant's appeal from a decision of the Immigration Appeal Tribunal. In that starred decision the Tribunal considered a number of legal issues of some complexity. They concern the Human Rights Act 1998 and the Refugee Convention. As we announced at the hearing we have decided to allow the appeal and remit the case to the Tribunal. This is not by reason of anything said by the Tribunal in relation to any of the legal issues with which the first three quarters of the determination are concerned : both the immigrant and the Secretary of State challenge some of the reasoning and conclusions there adopted by the Tribunal but we have not heard submissions in depth upon them. We received careful and helpful written submissions on those issues not merely from the parties but also from Liberty and we are grateful to them all. For reasons which will appear we have not thought it appropriate to express a view on any of them. We note that the Administrative Court (Auld L.J., and Ouseley J.) in *Dhima v Immigration Appeal Tribunal* [2002] EWHC 80 (Admin) expressed its approval of what the Immigration Appeal Tribunal in the present case had said about threats by non-state actors in cases involving the Human Rights Convention.

2. The background to the case is as follows. The Tribunal proceeded on the basis that the immigrant was generally truthful. She did not give evidence either before the Tribunal or before the adjudicator. The Tribunal criticised the determination of the adjudicator for a number of reasons. It dismissed the appeal by the immigrant and allowed the appeal by the Secretary of State.

3. Our reasons for allowing the appeal are entirely peculiar to this particular case and of no general significance. In those circumstances we give them briefly. The decision below has been reported at [2001] INLR 354.

4. The immigrant's case was that her father was a member of the opposition Democratic Party (DP) in Kucove in Albania. In June 1997 three masked and armed men broke into his shop and assaulted her. Her father was told that if he did not hand over money he and the immigrant would be killed. Thereafter she and the father had received many threatening letters. He reported them to the police but they took no action. Her cousin was shot but no-one was arrested for the murder. Her father was frightened and paid some men money. The area round Kucove became controlled by criminal groups. It was no longer under police control. In the run up to the September 2000 elections her father had been active on behalf of the DP. On the 24th September 2000 she was abducted and then raped by the three abductors. They said to her " Your father did not want to please us so you are paying the bill for him, we are using you to hurt him." She reported the attack to the police. They said they could not do anything about it. She was terrified that something similar would happen to her again. Thereafter her father was told that they had not finished with his daughter yet. Her father was frightened that she might be taken out of Albania by the men to Italy to work as a prostitute. She was afraid that if she were returned to Albania worse things would happen to her than had already happened. She feared she would be treated the same way as before. She did not want them to take her to Italy.

5. The part of the decision which has led us to allow the appeal is paragraphs 33- 38.

> **33.** Here too the adjudicator's conclusions cannot stand. Although we are bound to record that have we a degree of scepticism about some of the account given by Ms Kacaj, we have decided that it would be fair to assume that her account is generally true and to decide the appeal on the basis that she is to be believed.
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> *Conclusions*
>
> **34.** There can be no doubt those Albania still faces serious problems of lawlessness and corruption. In 1997, when many criminals were released from prison, violent crime was rampant and it is by no means surprising that anyone who was perceived to have money should have been targeted by criminals. There was political violence and upheaval following the collapse of the pyramid schemes in early 1997. Those schemes had been, it was believed, promoted by the Government, then run by the DP, and had led to a disastrous loss of money which improvised many. The DP was ousted in 1997 and in November 1998 a new constitution was established. In 2000 the restructuring of the police began and there was a relatively successful crackdown on armed gangs. In October 2000 there were municipal elections (no doubt those referred to by Ms Kacaj). Only a few violent incidents were reported, leading the Human Rights Watch Report of 10 December 2000 to say that this was:
>
> > 'a tribute to the Governments' efforts, as well as to the restraint of the political parties themselves.'
>
> Nonetheless, criminal groups still exist and Albania is a major route for drug and people smuggling. Organised crime is a powerful force, assisted by corrupt police and weak and corrupt judiciary. None the less it is clear that real efforts are being made by the authorities to try to improve things and some success is being achieved.
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> **35.** Women are still regarded in some parts of Albania as no more than chattels. Domestic violence is widespread and violations of women's human rights is a serious problem. Trafficking in women for prostitution continues, as the Human Rights Watch Report confirms. But a fair reading shows that the major problems arise from women being lured with deceptive offers of lucrative work abroad. Other reports show that families sell daughters to those traffickers and that abduction and kidnapping of children occurs. In addition, there is widespread trafficking in women from the various countries which made up the old Soviet Union. We do not overlook the reports of abduction and kidnapping of women, but these do not suggest that such occurrences are as frequent as the

other means by which women may find themselves forced into prostitution. Furthermore, as we have said, there are no reports that suggest abductions are or have been used for political purposes. They are the actions of criminals out for gain. In addition, the abuse of women and the low regard in which they are held mean that rape is not treated as seriously as it should be.

36. We have, of course, read the material which has been put before us. We note that Ms Kacaj's family, including her sister and brother, remain in Albania, albeit her sister is married and no longer lives in Kucove. No evidence has been produced to suggest that any of them have recently been threatened or troubled, and we gather that her father has given up his political activities. The rapists told Ms Kacaj, according to her interview, that they were dealing with her because:

> 'Your father didn't want to please us so you are paying the bill for him. We will use you to hurt him.'

That is consistent with their failure to extort money and does not necessarily show any political motivation. The only evidence which could suggest a political motive is the observation on releasing Ms Kacaj that all democrats would suffer in the same manner. Even if that remark was made, in our view it was intended to make Ms Kacaj's father believe that he was being targeted for political reasons, perhaps because then he might be more reluctant to involve the police. The objective evidence persuades us that Ms Kacaj has suffered at the hands of criminals motivated by a desire to extort money and not because of a desire to dissuade Ms Kacaj's father from continuing his political activities on behalf of the DP.

37. The general lawlessness and position of women in Albania does not in our view mean that every Albanian woman can have a claim to remain under either Convention. Actions are being taken to stem such lawlessness and the police are undoubtedly willing to provide protection. It is said that such protection is not effective and that there is therefore a real risk that the feared abduction will take place. It is important to remember that the fear relied on is that of abduction and forced prostitution in Italy. As we have said, the threats were made by criminals to extort money. There is no reason to believe that they intended to put them into effect; indeed, it is in our view probable that they did not. The rape underlined their ruthlessness; the threats were to reinforce the blackmail.

38. There is in our view no real risk that what Ms Kacaj fears will occur. That finding, which we regard as inevitable upon the material before us, means that no claim can succeed under either Convention, since, in the absence of such a risk, there will be no persecution, no violation of Art. 3 and no violation of Art. 4. So far

> as Art. 8 is concerned, any breach of that (which of course falls well below Art. 3 in terms of seriousness) will be acceptable because of Art. 8 (2) and the need to maintain proper immigration control. We should say that we are far from saying that there is a real risk of a breach of Art. 8, but we do not need to reach a firm conclusion about it. Any such breach will be common to all women in Albania.

6. The main criticisms, although there were others, advanced on behalf of the appellant in relation to the factual part of the decision are as follows:

(i) The Tribunal made clear in paragraph 37 and 38 that they were concentrating on abduction followed by forced prostitution in Italy. There is a possibility that the Tribunal was not addressing the risk of rape which, on its own, can constitute torture.

(ii) The reference to probability in the penultimate sentence of paragraph 37 gave rise to fears that the Tribunal were not applying their mind to risk, as opposed to probability. A degree of risk of torture falling short of probability can suffice to make it unlawful to return an immigrant.

(iii) The Tribunal erred in saying that there was no reason to believe that the criminals intended to put their threats into effect : the fact that they had already put threats into effect in the past in relation to this very woman, as witness the kidnap and rape of 24 September, seems to have been overlooked by the Tribunal. At the lowest this point deserved explanation – see *Demirkaya v Secretary of State* [1999] Imm AR 498 at p.506.

(iv) The relative frequency of the causes of prostitution as examined by the Tribunal in paragraph 35 is nothing to the point. If there is a threat of abduction of this woman and her forced prostitution, it becomes no less a threat because other women resort to prostitution for other reasons.

(v) The finding at the beginning of paragraph 38 that it was "inevitable" on the material before the Tribunal that there was no real risk that what the immigrant feared would occur was untenable in the light of what that material contained.

7. Mr Tam, seeking to uphold the decision of the Tribunal, rightly stressed the great difficulties which are inherent in the fact finding process in these cases – many of the assertions made by immigrants are ones which it is impossible to check. There is no doubt that the task of the Tribunal is amongst the most challenging in the legal world. Moreover it works under huge pressures. We are conscious that criticism of wording adopted by the Tribunal may at time appear nit picking. One must not scrutinise its findings unfairly. However, in these cases it seems to us that the immigrant must not have legitimate grounds for fearing that a significant part of the case has been overlooked or approached on the basis of a misunderstanding. We fear that this may, and we stress "may", have happened here.

8. Mr Tam accepted for present purposes that rape could constitute torture. But he submitted that the Tribunal was addressing the question of rape on its own as well as kidnap and forced prostitution. We do not rule that out as a possibility but we do not regard it as appearing from the wording of the determination which seems to us to point in a different direction.

9. Mr Tam submitted that, while the word "inevitable" overstated the position if one looked at the material, this was merely an unfortunate word. We do not rule out that possibility but it understandably adds to the immigrant's fear that an injustice may have occurred.

10. Mr Tam submitted that the Tribunal was an expert Tribunal and in substance was finding that the level of risk was too low to engage responsibility under the Convention. We accept that the Tribunal is far better placed to reach a conclusion as to whether the level of risk is sufficiently high to engage responsibility under the Convention than we are. We therefore would not think it right to embark on that assessment ourselves. However when there is legitimate ground for doubt as to whether the Tribunal addressed its task properly this court can quash the decision.

11. Our conclusion is that there is in the present case such a legitimate doubt and that this is an appropriate case for the Tribunal to consider the matter again. We do not say that only one conclusion was open to the Tribunal. Still less do we opine as to what will be the proper conclusion on the facts as they appear at the rehearing.

12. We were pressed by Mr Bovey on behalf of the immigrant to restore the decision of the adjudicator who had found for the immigrant. This we decline to do. Both parties below had argued that the decision of the adjudicator was unsatisfactory in part. Those submissions were largely upheld by the Tribunal. The Tribunal was entitled to embark upon a rehearing. It clearly spent much more time on the matter than the adjudicator had.

13. We were pressed by Mr Bovey to express our views *obiter* on the various legal matters considered by the Tribunal - in particular the application of the case of *Horvath v Secretary of State for the Home Department* [2001] 1 A.C 489 to Human Rights Convention cases. This we decline to do. The Administrative Court has already addressed this point in *Dhima*. In our judgment this is an area of the law which it is best to develop in the light of specific findings of fact. While we see force in Mr Bovey's point that the Tribunal may find the facts in such a way that, on one view of the law, a distinction between the Refugee and Human Rights Conventions might be crucial, we are not persuaded that this is likely. In all the circumstances we prefer to express no opinion on the point.

14. The decision of the Tribunal will therefore be quashed and the matter remitted to it.

Lord Justice May:

15. I agree that the decision of the Immigration Appeal Tribunal should be quashed and the matter remitted to it for further consideration for the reasons given by Schiemann L.J. Without detracting from his full reasons, the first criticism of the Tribunal's decision which persuades me to this conclusion is that which Schiemann L.J. refers to in paragraph 6 (v) of his judgment.

16. I also agree that, since we are remitting the matter for further factual consideration, it is inappropriate for this Court to determine hypothetically the challenges to the legal questions considered by the Tribunal. The Tribunal's decision in the present case was considered and approved by the Administrative Court in Dhima v Immigration Appeal Tribunal [2002] EWHC 80 (Admin). A main ground on which the appellant challenges the Tribunal's decisions in law concerns the application of Horvath v Secretary of State for the Home Department [2001] 1 AC 489 to cases under the Human Rights Convention. Mr. Bovey's broad submission is that the correct legal approach to cases under the Human Rights Convention should not be the same as that articulated in Horvath for cases under the Refugee Convention. Mr. Tam suggests that many, perhaps most, cases are likely to reach the same conclusion on the facts, whichever approach to the law is correct. In my view, it is not appropriate in these circumstances to consider and decide Mr. Bovey's submission on what are at present hypothetical facts. We have not heard detailed argument on these and other submissions of law and I express no view on the merits of the submissions. In my judgment, however, in this case, as in most cases, the submissions and any court's decision need to be made in the light of the facts of a particular case in which a difference of legal approach contended for would or might make a difference to the result.

Lord Justice Jonathan Parker:

17. I also agree. I agree with the order proposed by Schiemann LJ, for the reasons which he has given. I add a few words of my own only because we are remitting the case to the Immigration Appeal Tribunal on an issue of fact, in circumstances where the Tribunal has plainly taken immense care in addressing important questions of law.

18. Like Schiemann LJ, I fully recognise the difficulties faced by the Immigration Appeal Tribunal in addressing the factual issues which arise in this case: difficulties which were increased by the fact that Ms Kacaj had elected not to give oral evidence before the Adjudicator.

19. At the same time, I am concerned that the Tribunal may have proceeded on a false assumption as to the extent of Ms Kacaj's fear of ill-treatment if returned to Albania. In paragraph 28 of its determination, the Tribunal accepted Ms Kacaj's evidence not only that she had been threatened with being taken to Italy to work as a prostitute, but also that on 24 September 2000 she was abducted by three masked men who raped her in turn.

20. In paragraph 27 of her statement, Ms Kacaj says this:

> "If I were forced to return to Albania I fear that worse things could happen to me than have already happened. I think they could take me again, and that I would be treated the same way as before. I am afraid they are going to do this. I don't want them to take me to Italy."

21. Mr Tam accepts that this paragraph is expressed in terms which are wide enough to include a fear of kidnap and rape, but he submits that the particular focus of the paragraph is on a fear of abduction to Italy to work as a prostitute. That may be so, but it does not follow that the latter fear was her only fear.

22. Mr Tam also referred us to part of the interview with Ms Kacaj, in which, when asked whether she had any "other" reasons for leaving Albania, Ms Kacaj replied:

> "The only reason is the fear they could find me again. If they could get hold of me I'm sure I would end up in or around Italian streets."

23. It is, however, important to place that answer in context. Ms Kacaj had earlier been asked about attempts which had been made to extort money from her father. When asked whether her father was safe in Albania, she replied:

> "No, I don't think so – anything could happen to him. However, I was the main target, and as a result I had to leave."

24. Asked whether she knew why her father had been targeted in this way, she replied:

> "Yes, they wanted to hurt my father. It was not enough for them just to beat him up and intimidate – they wanted to hurt him by abusing his child. To hurt his soul. The physical scars may heal, but the emotional ones will take time to heal."

25. In giving that answer, Ms Kacaj was clearly referring to the kidnap and rape which had occurred on 24 September 2000.

26. It was at that point that she was asked whether she had any *other* reasons for leaving Albania, to which she gave the reply quoted above.

27. The question whether Ms Kacaj's fear of ill-treatment if returned to Albania extended to fear of a repetition of the kidnap and rape becomes of significance when one turns to the Tribunal's conclusions on the facts. As I read paragraphs 30 to 38 of its determination, the Tribunal approached the factual issues on the footing that her only fear was of abduction to Italy to work as a prostitute. Thus, in paragraph 30 of its determination, when referring to the Adjudicator's determination, the Tribunal identifies the question at issue before the Adjudicator as being:

> "... whether there was a real risk that she would be abducted as she said she feared and sent to prostitution in order to extort money from or punish her father for his political activities."

28. Then, when expressing its own conclusions, the Tribunal says (in paragraph 37 of its determination):

> "It is important to remember that the fear relied on is that of abduction and forced prostitution in Italy."

29. To my mind, this sentence plainly raises the possibility that had the Tribunal proceeded on the footing that Ms Kacaj also feared a repetition of the kidnap and rape, its decision may have been different. I can see no other explanation as to why the Tribunal should have regarded it as "important to remember" that the fear was that of abduction and forced prostitution.

30. In all the circumstances, it is in my judgment inevitable that the case should be remitted to the Tribunal to reconsider the facts, and in particular the facts as to Ms Kacaj's fear of ill-treatment were she to be returned to Albania. Like Schiemann LJ, I disclaim any intention to indicate any view as to what the correct conclusion on the facts may be, on the evidence presented at the rehearing.

Order: Appeal allowed; matter be remitted back to the Immigration Appeal Tribunal but with a differently constituted panel; Defendant do pay the Appellant's costs of and incidental to the appeal, such costs to be assessed on the standard basis if not agreed; detailed assessment of the Appellant's costs for Legal Services Commission purposes.

(Order does not form part of the approved judgment)