ASYLUM AND IMMIGRATION TRIBUNAL

AN and NN (s.83 – asylum grounds only) Albania [2007] UKAIT 00097

THE IMMIGRATION ACTS

Heard at: Field House on 8 November 2007

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellants: Mr N O'Brien of Counsel instructed by Barnes Harild & Dyer Solicitors
For the respondent: Mr J Gulvin, Home Office Presenting Officer

JM v Secretary of State for the Home Department [2007] EWCA Civ 1402 has no impact on the scope of s. 83. As is clear from the relevant legislation and Immigration Rules, in an appeal under s.83 of the 2002 Act the Tribunal has no jurisdiction to consider non-asylum grounds; and, if an appeal is allowed on asylum grounds, it cannot be allowed on humanitarian protection grounds.

DETERMINATION AND REASONS

1. The appellants, both nationals of Albania, are twins born on 9 May 1991. On 15 January 2007 the Secretary of State had refused to grant them asylum, although he had gone on to grant each of them limited leave to remain until 8

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May 2009 (when they turn 18). In determinations notified on 21 March 2007 Immigration Judge Entwhistle allowed their appeals, stating that:

> "**DECISION**
> I allow the appeal on asylum grounds
> I allow the appeal on Human Rights grounds
> I allow the appeal on Humanitarian Protection grounds"

2. The respondent was successful in obtaining an order for reconsideration and so the matter comes before me.

3. There are two obvious errors of law in the immigration judge's determinations. The first is that he wrongly considered that the appeals before him were capable of being brought on one or more of the grounds set out in s.84 (1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") so as to cover "[h]uman rights grounds" and "[h]umanitarian protection grounds". For that to have been the case they would have needed to be appeals against an immigration decision as defined by s.82(2) They were not. The decision in each case – to refuse to grant asylum – does not fall within the definition of "immigration decision" contained in s.82(2). The decisions not falling within s. 82(2), there could be no right of appeal against them under s.82(1). Their appeals could not be ones to which s.84(1) applied either, as the latter's list of grounds on which an appeal must be brought is confined to appeals under section 82(1). Nor could their appeals be ones in which any matter raised in a s.120 statement constituting a ground of appeal could be considered, as s.85(2) confines any such matter to grounds of appeal "of a kind listed in s.84(1)".

4. That is not to say the appellants possessed no right of appeal nor that their appeals could not be brought on any grounds. They each had, as the decision letter stated, a s.83 appeal. Section 83 is in the following terms:

> "(1) This section applies where a person has made an asylum claim and –
> (a) his claim has been rejected by the Secretary of State, but
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).
> (2) The person may appeal to the Tribunal against the rejection of his asylum claim."

5. Section 84(3) specifies that:

> "An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention".

6. The appellants' appeals fell squarely within s.83: they had made an asylum claim; it had been rejected by the Secretary of State; they had each been granted leave to remain for a period exceeding one year; and they had appealed against the rejection of their asylum claim on the grounds that removal would breach the United Kingdom's obligations under the Refugee Convention.

7. Since both representatives were agreed that in allowing the appeals on non-asylum (as well as on asylum grounds) the immigration judge went beyond his jurisdiction, I would not normally need to add anything further to what has

just been said. However, both asked that I clarify the correct position, as to their knowledge the approach taken by the immigration judge in considering he had jurisdiction to decide these "s. 83 appeals" on non-asylum as well as asylum grounds was not an isolated example. It was their understanding, they said, that a number of immigration judges were taking the view that they were indeed obliged in this type of appeal to deal with non-asylum grounds as a result of what had been decided in JM v Secretary of State for the Home Department [2007] EWCA Civ 1402.

8. JM has no impact on the scope of s.83. JM was solely concerned with the proper construction of s.82 and s.84(1)(g) of the 2002 Act. The Tribunal had concluded in JM (Rule 62(7); human rights unarguable) Liberia * [2006] UKAIT 00009 that a human rights claim was not justiciable on a variation of leave appeal because in such a case the appellant's removal was not imminent, and the case was not within section 84(1)(g) which conferred the relevant jurisdiction on the Tribunal. Overruling the Tribunal, Laws LJ held that the case was within s.84(1)(g) and that as a result the Tribunal should have concluded that it was obliged to determine the matter of the human rights claim which had been raised as a ground of appeal.

9. The Court of Appeal in JM was not concerned, therefore, with the situation where there is no immigration decision as defined by s.82(2) and where the only right of appeal conferred by statute is confined expressly to an appeal "against the rejection of his asylum claim". Nor was it concerned with an appeal outside the scope of s.84(1). Furthermore, as Laws LJ emphasised in JM, the Tribunal is a creature of statute and thus possesses only the jurisdiction which statute has conferred upon it.

10. The only possible argument for considering that an immigration judge in a s.83 case could or must determine non-asylum grounds rests on a particular reading of the wording of s. 86. So far as is relevant this section states:

> "This section applies on an appeal under section 82(1), 83 or 83A.
> (1) The Tribunal must determine –
> (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
> (b) any matter which s.85 requires it to consider…"

11. It might be argued that since s.86 expressly includes an appeal under s.83 as well as under s.82(1) within its scope, the Tribunal, even in a s.83 appeal, must determine "any matter raised as a ground of appeal (whether or not by virtue of s.85(1))", including human rights matters. But the inclusion of s.83 within the scope of s.86 cannot extend what can be determined in a s.83 appeal beyond the only grounds that the statute provides – i.e. asylum grounds.

12. The inclusion of a s.83 appeal within the scope of s.86(1) serves other purposes. It ensures, for example, that the Tribunal must allow the appeal if it thinks that a decision to refuse to grant asylum was not in accordance with the law (including immigration rules) (s.86(3)(a)), but must otherwise dismiss it (s.86(5)). It also obliges the Tribunal to determine matters that can be raised and to determine them in certain ways. There is an obligation on the Tribunal in such an appeal to determine any matter which s.85 requires it to consider (s.86(2)(b)). By this means the Tribunal may, in an appeal under s.83(2)

consider any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision (s.85(4)). By this means the "Ravichandran" principle is applied to a s.83 appeal (as well as to appeals raising asylum grounds brought under s.82).

13. The above reading of s.83 in no way offends the "one-stop" principle highlighted by the Court of Appeal in JM, since a person with limited leave to remain will have the ability to apply for a variation of leave on any grounds before expiry of that limited leave. If that application is refused, an appeal will lie under s.82.

14. I note at this point that as a result of an amendment introduced by the Immigration, Asylum and Nationality Act 2006 there is now a s.83A, which affects decisions made on or after 31 August 2006, but that amendment is solely concerned with persons who have been granted limited leave to remain as a refugee and who then receive a decision that they are not refugees. I am concerned here with s.83 only.

15. The second obvious error on the face of the immigration judge's determination is that despite allowing the appeal on asylum grounds, he also sought to allow it, not just on human rights grounds, but also "on Humanitarian Protection grounds". That was to try and square a circle. Paragraph 339C of HC395 (as amended) states in its first part that:

> "Grant of humanitarian protection
> 339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
> (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
> (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
> (iv) he is not excluded from a grant of humanitarian protection".
> ..."

16. Manifestly, therefore, a grant of humanitarian protection is only possible if a person "does not qualify as a refugee..." (339C(ii)).

17. Nevertheless the legal errors so far identified in the immigration judge's determinations were not material in relation to the only appeals he had jurisdiction to decide: the s. 83 asylum appeals. I can only find a material error of law if it is an error which "affected the Tribunal's decision upon the appeal" (Rule 31, Asylum and Immigration Tribunal (Procedure) Rules 2005.

18. The respondent's grounds base the contention that there was such an error of law on the following four arguments. The first is that the immigration judge failed to take into account all the matters identified by the Tribunal in Koci [2003] EWCA Civ 1507 as affirmed in TB (blood feuds-relevant risk) CG Albania [2004] UKIAT 00158 as follows:

> "35. In the light of the Court of Appeal judgment in *Koci*, the blanket 'negative' assessment in *Brozi* on the issue of the state protection in Albanian blood feuds must be seen to be as wrong as was the blanket 'positive' assessment in *Koci* at Tribunal

level. As the Court of Appeal emphasises 'Every case has to be considered on its merits'. Merely because a finding of fact has been made that a blood feud exists, it cannot automatically be assumed that the appellant will be at real risk if returned to Albania.

Building upon Longmore LJ's suggested list of important circumstances, the Tribunal finds that the following matters will be relevant in determining the nature of the risk on return:

> (a) whether the dispute can be characterised as a 'blood feud' at all;
>
> (b) even if it can, the extent to which its origins and development (if any) are to be regarded by Albanian society as falling within the classic principles of the Kanun;
>
> (c) the history of the feud, including the notoriety of the original killings and numbers killed;
>
> (d) the past and likely future attitude of the police and other authorities towards the feud;
>
> (e) the degree of commitment shown by the opposing family towards prosecuting the feud;
>
> (f) the time that has elapsed since the last killing;
>
> (g) the ability of the opposing family to locate the alleged potential victim anywhere in Albania;
>
> (h) that person's profile as a potential target for the blood feud; and
>
> (i) the prospects for eliminating the feud, whether by recourse to the payment of money, a reconciliation organisation or otherwise... "

19. Secondly, the grounds allege, he fell into error in failing to make any finding on whether the latest incident the appellants' family had faced demonstrated that they were among the actual targets of the killer and in this way he wrongly based himself on mere speculation about the risk the appellants would face on return. Thirdly, it is contended that when assessing the issue of sufficiency of protection, the immigration judge failed to take adequately into account that the police had agreed to investigate the latest incident when the appellants' brother was shot and he had wrongly failed to attach weight to the lack of evidence of the appellants' family attempting to approach an agency providing a reconciliation service. Finally it is submitted that the immigration judge failed to make any findings on the ability of the appellants' family to locate the appellants in parts of Albania other than their home area.

20. I remind myself that my task is not to decide whether the immigration judge made the correct decision but only whether his was one which contained a material error of law.

21. In my view the principal start point for deciding this case must be the fact that the respondent has accepted the appellants' account of their family having become involved in a blood feud with the K family since 1993 as true without qualification. That is clear from the reasons for refusal letter. Furthermore and in any event, the grounds for reconsideration raise no challenge to the immigration judge's finding that

the account they gave of the blood feud and its consequences for their family was correct.

22. As I will return to when addressing the issue of internal relocation, this acceptance of the appellants' story has considerable importance for my consideration of this case.

23. So far as the first argument is concerned, it is difficult to see that the immigration judge failed to take into account any of the factors specified in TB. As Mr Gulvin agreed, the only possible factor which TB identified which the immigration judge could be said to have overlooked was 37 (g). I shall deal with that when considering internal relocation.

24. As regards the second argument, which Mr Gulvin also accepted lacked cogency, I fail to see that the immigration judge did not consider the issue of whether the evidence showed that the appellants had been targeted. That assessment was not based on mere speculation but rather on inferences based on the evidence as a whole, including the appellants' own evidence, the newspaper article, other items of documentary evidence and the background country evidence. The immigration judge noted that since the blood feud between the two families had begun in 1993, five people had been killed: 3 members of the K family and 2 members of the appellants' family. The immigration judge properly noted that according to the background evidence concerning blood feuds in Albania, significant lapses of time between killings of family members was not unusual. It cannot seriously be suggested that the immigration judge could only reasonably have found that the attack on 3 May 2005 was merely a random shooting by a crazed killer. On the available evidence it was open to the immigration judge to conclude that the appellants' family had become and remained a target for adverse treatment from members of the K family.

25. That brings me to the issue of sufficiency of protection. The grounds are quite correct to emphasise the need for an immigration judge when considering this issue to examine what steps have been taken by those concerned to avail themselves of protection from the authorities and other agencies. However, the immigration judge plainly did give careful consideration to the evidence regarding this matter. I would accept that read in isolation the sentence in para 22(c) is capable of being read as suggesting that the immigration judge overlooked the onus on the appellants' family to take active steps to obtain protection ("The police officer said they would try and investigate the matter but they did not hear from the police again"). However, this observation has to be read in the context of the determination as a whole and the accepted factual matrix. Elsewhere (para 22(d)) the immigration judge noted that the police had failed effectively to investigate the first killing of the appellants' grandfather in 1997. In that context for the police to fail to contact the family after their initial response on the day of the killing in 2005 of another family member, the appellants' brother, was properly seen as of some significance. Furthermore, it was the appellants' unchallenged evidence that after this incident the appellant's father and uncles remained in hiding and only occasionally came back to the house because they considered that the police would not be able to prevent further

attacks against them. Clearly at the time of the killing of the appellants' brother the police would have had to consider whether to provide specific protection to the family. They had not provided such protection.

26. The immigration judge also noted, in relation to the related question of whether the appellants' family had taken steps to go to any of the agencies which provide reconciliation services, that the appellants were not quite 14 when their brother was killed and may not have been aware of any approaches to reconciliation agencies made by their elders. By the same token their age may well have meant they were not aware of efforts made by their elders to communicate with the police. I consider that the immigration judge was quite entitled to treat these surrounding circumstances as indicating that: "The evidence of this family's experience is that they have not received protection from the police since members of their family have been killed". As regards the issue of approaches to reconciliation agencies, I have just noted that the immigration judge addressed this and decided that this was something of which the appellants may not have had knowledge. In any event, as Mr O'Brien correctly observed, the police report indicated that the K family was hostile to any idea of reconciliation.

27. The immigration judge's assessment of what the police were willing and able to do and what had happened in relation to reconciliation was entirely sustainable.

28. The respondent's final argument was that the immigration judge had failed to address the issue of internal relocation. In my view that argument is somewhat weakened by the fact that the respondent had not raised it in the reasons for refusal, notwithstanding acceptance therein of the appellant's account. Nor, despite the appellant's representative at the hearing (Mr O'Brien, who represented there as well) raising the internal relocation issue expressly, did the respondent's representative raise it. Mr Gulvin contends that these failures did not excuse the immigration judge from having to address the matter. If what he meant by this argument was that the immigration judge was not entitled to find that the appellants faced a real risk of persecution unless satisfied also that there was no viable internal relocation option, I must agree. But the failure of the respondent to raise or pursue the matter does mean that the focus now has to be, not so much on whether the immigration judge expressly dealt with (non-existent) arguments based on internal relocation, but rather on whether his findings were consistent with the evidence and submissions which were before him. Mr O'Brien's submission at the hearing before the immigration judge was that (para 17 (c)) according to the country evidence internal flight was very often not an option, that the K family was a large one, that the Directorate of the Police themselves considered the feud to be an "aggressive and unpredictable one" and that therefore the appellants would not be safe anywhere in Albania.

29. It is at this point that the respondent's lack of challenge to the appellants' evidence becomes very significant. It was accepted that members of the appellant's family, including their father, were still in hiding. That was strong evidence that other members of the family had not been able to internally relocate: as Mr Gulvin properly accepted, if a

person has to live in hiding, that cannot be said to satisfy the safety requirement which forms one of the two necessary conditions for the existence of a viable internal relocation option: see para 339O(a) of HC395 as amended. Furthermore, in the appellants' case there was also evidence that the family had sought to move them out of harm's way by placing them in a boarding school. That had proved impossible as the school concerned had decided that it would be too risky. Mr O'Brien had submitted before the immigration judge that in these circumstances it was the appellants' "last resort" to be sent out of the country. That was clearly another factor which the immigration judge weighed in the balance: see para 22(b).

30. Hence, although I would agree that the immigration judge nowhere in his own "Conclusions" addressed the internal relocation issue in specific or express terms, I am satisfied that his assessment that there would be an insufficiency of protection for the appellants on return to Albania can be taken to incorporate a finding on this issue. His references to the fact that other members of the family were still in hiding and to the unsuccessful attempts to place the appellants in boarding school indicate that he did consider in substance the relevant factors. It must also be borne in mind that the immigration judge had before him two appellants who were minors and who had already witnessed a fatal attack on their older brother on their way to school and that, in the absence of having them placed in a boarding school, the evidence was they would have to remain in hiding, either in the family home (where they lived in fear of reprisal until they left Albania in October 2005) or with other relatives elsewhere.

31. For the above reasons I conclude that the immigration judge did not materially err in law in finding that the appellants faced a real risk on return of persecution. As was conceded by Mr Gulvin at the outset, if the immigration judge was entitled to find that there was real risk of persecution, it can be accepted, following the House of Lords judgment in K and Fornah [2007] UKHL 46, that there was, in addition, a Refugee Convention reason for this risk by reason of the appellant's family being a particular social group.

32. Having found that the immigration judge did not materially err in law I conclude that his decision to allow the appeal on asylum grounds must stand.

Signed:

DR H H Storey (Senior Immigration Judge)