Upper Tribunal
(Immigration and Asylum Chamber)

VN (Chicago Convention – s 86(4)) Iran [2010] UKUT 303 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2010

Before

Mr C M G Ockelton, Vice President
Senior Immigration Judge Roberts

Between

VN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss G Brown, instructed by IAS (London)
For the Respondent: Mr Nate, Home Office Presenting Officer

Removal stated in a reasons for refusal letter as under the provisions of the Chicago Convention but which would be lawful under paras 8-10 of Schedule 2 to the 1971 Act cannot be regarded as unlawful by reference either to that Convention or the relevant IDIs, because of the mandatory provisions of s.86(4) of the 2002 Act.

DETERMINATION AND REASONS

1. The Appellant is a national of Iran. He arrived in the United Kingdom in February 2007. He was carried by an aircraft from New Delhi in India. On arrival he presented a counterfeit Cypriot passport. It appears that the deception was detected. The Appellant claimed asylum by reference to his country of nationality, Iran. The Secretary of State refused his claim. The Appellant appealed, but the appeal was dismissed. The Secretary of State says, and the Appellant appears not to dispute this, that so far as that issue was concerned, his appeal rights were exhausted on 6 June 2007.

2. There was then a period during which the Secretary of State lost contact with the Appellant, and two incidents as a result of which the Secretary of State had contact with the Appellant again, but in the end, on 22 December 2009, the Secretary of State made a decision to give directions for removal of the Appellant to India, having refused him leave to enter as a result of the asylum decisions made some years previously. The Appellant appealed, as he was entitled to do, against the decision to give directions for his removal. The appeal was heard by Immigration Judge Devittie, who dismissed it. The Appellant then obtained permission to appeal to this Tribunal.

3. It is necessary to look at three documents in a little detail. The first is the letter of reasons accompanying the Notice of Decision, the latter being in standard form. The reasons for refusal of the Appellant's claim to remain in the United Kingdom is dated 15 December 2009. It specifically indicates that the Appellant's removal to India will take place under the provisions of the Chicago Convention, which is the main instrument governing international civil aviation, and founding the International Civil Aviation Authority. The letter goes on to deal in substance with the Appellant's claim under Article 8 of the European Convention on Human Rights, but there is no doubt that that letter, as distinct from the Notice of Decision, bases the decision to remove to India firmly on the provisions of the Chicago Convention, and indeed refers specifically to an indication given by India that the Appellant would be received by India under the provisions of that Convention.

4. The second document is the grounds of appeal to the Immigration Judge. There are five bullet points in the grounds, but it is fair to say that only two substantive issues are raised. One is that the decision to remove from the United Kingdom would breach the Appellant's rights under the European Convention on Human Rights. The second is that the decision to remove is "not in accordance with Immigration Rules or otherwise in accordance with the law".

5. The Immigration Judge's determination results from submissions made to him on the issues in the grounds. So far as the Chicago Convention is concerned, the Immigration Judge said this at paragraphs 11 and 12 of his determination:

> "11. As I understand the submissions by appellant's counsel they amount to the contention that the Appellant's removal to India in accordance with the Chicago Convention is a dereliction of the United Kingdom's obligations under the Refugee

Convention and the Convention of Human Rights. In developing this argument she began by pointing out that there were apparent procedural irregularities in the proceedings to invoke the Chicago Convention. She did not draw attention to the provisions of the Chicago Convention in support of this submission. I have reviewed the provisions of the Chicago Convention. It is a convention whose contracting parties aim to provide a framework for the regulation of international civil aviation. It does not concern itself directly with human rights issues. In the case of persons such as the appellant the section in the Convention that provides for his return would appear to be annex 9 paragraph 6.3. It obliges the contracting States "to accept for examination any person found inadmissible at the point of destination if that person previously stayed in their territory before embarkation other than in direct transit"

12. In considering the argument that the respondent's decision to invoke the Convention is fraught with procedural irregularities, one must look at the Convention itself. It is contended on appellant's behalf that respondent cannot properly invoke the Convention because it has not sought the assurance of the Indian authorities that he would be received; it has not confirmed that the appellant would be provided with an emergency travel document; it has not indicated whether the Indian authorities will be apprised fully of the appellant's circumstances and immigration history and whether they would still receive him if so informed. As appellant's counsel aptly put it "Chicago is not Dublin". Indeed that is so. The procedural matters she raises do not constitute an impediment to the respondent's decision to remove the appellant to India in accordance with the Chicago convention. In other words from my reading of it the Chicago convention does not require the respondent to carry out the inquiries and seek the assurances that that the appellant's counsel mentions."

6. The Immigration Judge dealt with the substantive claim that the Appellant's removal from the United Kingdom, and to India in particular, would breach his human rights. The Immigration Judge was not impressed by the Appellant's evidence on those issues, and took the view that the European Convention on Human Rights would not be breached by the Appellant's removal.

7. The Immigration Judge did not have before him the determination of the Appellant's asylum appeal. He referred to the fact, as it was before him, that although the Appellant relied on medical evidence to support his human rights claim, he raised no additional issues relating to asylum, and did not assert that circumstances had changed in that respect. At paragraph 16 of his determination, the Immigration Judge noted those facts. He said: "there is no suggestion at all by the Appellant that he relies on any fresh evidence. To the extent that he contends that there has been a worsening of conditions in Iran, the onus lies on him to show that he would be at risk because of the changed circumstances. This he has not done." The Immigration Judge then went on to deal with the possibility of the Appellant's removal to Iran, and concluded that it would not breach the United Kingdom's obligations under the Refugee Convention.

8. His final paragraph is as follows:

"DECISION

I dismiss the asylum appeal

I dismiss the claim for humanitarian protection

I dismiss the article 3 claim

I dismiss the article 8 claim"

9. The grounds of appeal to this Tribunal persuasively and concisely put by Miss Brown, who did not appear before the Immigration Judge, are on two discreet issues. We intend no disrespect to her if we take them in the reverse order to that in which they are put in the grounds.

10. The point which we take first is the Immigration Judge's approach to asylum. As we have indicated, the grounds of appeal to the Immigration Judge were based on Article 8 and on an assertion that the Secretary of State's decision was not in accordance with the Immigration Rules or otherwise not in accordance with the law. There was no asylum appeal before the Immigration Judge. It is not clear why the Immigration Judge raised the asylum issue himself, and it is certainly not clear why he purported to dismiss an asylum appeal. To that extent, it appears to us that that ground is clearly made out. It is fair to say that Miss Brown's ground is put on a more detailed basis. The ground argues that in the circumstances where an Immigration Judge has not had sight of an earlier determination in an asylum appeal, it would be wrong for the Immigration Judge even when it is accepted that there is no subsequent relevant information to dismiss any asylum appeal that is newly before him. We are far from confident that that argument ought to be accepted, but certainly for the purposes of this appeal, the position is that there was no asylum appeal before the Immigration Judge, and for that reason we find that he was wrong to purport to dismiss it.

11. The other ground of appeal to us relates to the application of the Chicago Convention. Miss Brown's submission is that the Chicago Convention, taken with the Respondent's Immigration Directorate's instructions on the application of it, prevented the Appellant's removal under that Convention. She submits that because the Appellant had been admitted to the United Kingdom (in the sense that he had physically passed through immigration for the purposes of his asylum claim), and had been, to the knowledge of the Respondent (if that is important), in the United Kingdom for a considerable period of time following it, that the Chicago Convention no longer applied: and that in any event if the Chicago Convention on its terms applied, removal under it, after that period of time, and after that process, was not what the IDIs provide.

12. In the course of her submissions, we drew Miss Brown's attention to section 86 s86(4) of the Nationality, Immigration and Asylum Act 2002, which, following subsection (3) which indicates the grounds on which the Tribunal is required to allow an appeal, reads as follows:

> "4. For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision."

13. As we have indicated, the Notice of Decision in the present case is in standard form. It itself makes no reference to the Chicago Convention. If it is to be read with the reasons for refusal letter which do make such reference, then it is arguable that the decision that the Appellant should be removed is a decision under the provisions of that Convention. But even if that is right, it is necessary to bear in mind that paragraphs 8 and 10 of Schedule 2 to the Immigration Act 1971 would have themselves allowed, and do allow, the Secretary of State to remove the Appellant from the United Kingdom to India, because that is within the terms of paragraph 8(1)(c)(iii): "a country or territory in which he embarked for the United Kingdom". The provisions of s.86(4) are mandatory. They would have prevented the Immigration Judge from regarding removal under the Chicago Convention as unlawful, because the removal could have lawfully been made by reference to Schedule 2 to the 1971 Act.

14. That resolves the Chicago Convention issue. It is not necessary to consider the provisions either of the Chicago Convention or of the IDIs, because the direction for removal could have been made in the same terms under the 1971 Act, and it therefore follows that an appeal cannot be allowed on the basis of non-compliance with the Chicago Convention or the IDIs in such a case.

15. The Immigration Judge dismissed the appeal on all grounds. He should not have dismissed an asylum appeal that was not before him. He was obliged to dismiss the appeal on the basis of the decision not being in accordance with the law. He did dismiss the Article 8 and Article 3 and Qualification Directive appeals, and those aspects of his decision are not challenged before us.

16. Our conclusion is that the Immigration Judge erred in law in dismissing an appeal that was not before him, and in failing to deal with s.86(4), but his errors were entirely immaterial. The appeal was properly dismissed and for those reasons the appeal to this Tribunal is dismissed.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL,
IMMIGRATION AND ASYLUM CHAMBER