ASYLUM AND IMMIGRATION TRIBUNAL

MA (Operational Guidance - prison conditions – significance) Sudan [2005] UKAIT 00149

THE IMMIGRATION ACTS

Heard at: Field House
On 28 September 2005

Determination Promulgated
21st October 2005
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Before

Dr H H Storey (Senior Immigration Judge)
Mr C P Mather (Senior Immigration Judge)
Ms S E Singer

Between

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the appellant : Mr J Collins, Counsel, instructed by Sheikh & Co.
For the respondent : Mr P Deller, Home Office Presenting Officer

So long as the IND Operational Guidance Note on Sudan continues to view prison conditions in Sudan as being "likely to reach the Article 3 threshold", the Tribunal will expect the Home Office to concede in all appeals based on Article 3 where it is accepted that the appellant has demonstrated a real risk of imprisonment on return to Sudan.

DETERMINATION AND REASONS

1. The appellant is a national of Sudan. On 23 July 2002 a decision was made by the Secretary of State to refuse to grant leave to enter and to refuse to grant asylum. The appeal made by the appellant against this decision was dismissed by an Adjudicator, Mr L. North, in a determination notified on 10 January 2003. Permission to appeal that determination was then granted by Mr S.L. Batiste, Vice President,

limited to the issue of whether any penalty likely to be imposed upon the appellant would be in breach of his Article 3 rights given the Adjudicator's findings that the appellant had left Sudan to avoid facing a military Tribunal or being sent to take part in military activity in the south of the country. In a decision of 9 October 2003 the Tribunal chaired by Mr A. Jordan, Vice President, dismissed the appellant's appeal.

2. An appeal was then made to the Court of Appeal. The grounds questioned the decision of the Tribunal to dismiss the appeal, despite accepting that the appellant would face prison conditions which were 'life threatening'. On 7 May 2004 Laws LJ allowed this appeal in the following terms:

> 'It is with consent but without determining the merits of the appeal ordered that the appeal be allowed to the extent only that the said decision of the court below dated 9 October 2003 be varied so as to provide:
>
> '1) that this matter should be remitted to the Immigration Appeal Tribunal for the issue of whether the prison conditions in Sudan will potentially breach the appellant's/applicant's Article 3 ECR rights to be reconsidered by a differently constituted Tribunal.'

3. When the matter came back before a differently constituted Tribunal, chaired by Ms D. Gill, Vice President, on 2 November 2004, it was adjourned to enable the respondent more time to consider the further materials and expert report from a Dr Johnson which had been adduced by the appellant's representatives. The Home Office representative stated that she needed to seek advice from CIPU (Country Information and Policy Unit) on the expert report. In deciding to adjourn Ms Gill emphasised that this case was being treated as a Country Guideline case. Presumably in order to further ensure that the respondent had the benefit of an up-to-date report, Ms Gill issued directions which went out on 23 November 2004 stating that within twenty-one days the appellant was to serve on the Secretary of State a revised report from Dr Johnson, giving the sources for his comments.

4. There was then a For Mention hearing on 12 July 2005 before myself (Dr Storey). It was confirmed that this case was being treated as a Country Guideline case. Both parties indicated they were ready to proceed. I directed that the issues the parties were to address at the full hearing were: the issue already identified by Laws, LJ – prison conditions; together with the issue of risk to persons liable for military service. I bore in mind that as this had been listed as a Country Guideline case and the case concerned an appellant found to have left Sudan to avoid facing a military tribunal or being sent to take part in military activity in the south of the country, it was appropriate that the issue of military service should also be dealt with, particularly given that there was a reported Tribal determination by a Tribunal chaired

by Mr M. Rapinet **UKIAT 00335 [2004]** on the latter issue which was possibly at odds with other Tribunal decisions.

5. We gather from Mr Deller that shortly after the 12 July 2005 hearing he decided to instruct Treasury Solicitors so that Counsel might represent the respondent. There was subsequent correspondence from Treasury Solicitors dated 8 September 2005 which led to reconfirmation by me in a Memorandum sent to the parties on 14 September 2005 that submissions were expected on both issues. On 22 September 2005 permission was given for the appellant's representatives to call their expert witness to give oral evidence.

6. As to what happened next, it is best that we set out Mr Deller's account as given in his letter of 27 September 2005 written the day before the hearing, which he prefaced by an admission that the situation which resulted was 'wholly unhelpful to the proper running of the system'.

> 'Following notification at a mention hearing on 12 July that this was to be listed for Country Guidance, we decided to instruct the Treasury Solicitors so that counsel might represent the Secretary of State at the hearing. After initial concern about the scope of the issues identified as at large (which did not appear to be within the limited basis on which the Court of Appeal had remitted the matter), counsel advised on 13 September that the case should not be fought. After internal discussion, delayed by other commitments – we decided to take this advice as the circumstances disclosed a real risk of a breach of Article 3.
>
> Accordingly, I wrote to the IAT and the solicitors on 23 September indicating concession on Article 3. In response, the solicitors opined that it remained highly arguable that their client had a claim to refugee status on what can be termed the *Krotov* point. They therefore indicated a wish to proceed, but in a letter of 23 September indicated that they would withdraw their appeal if the Secretary of State agreed to refugee status.
>
> I was in court on Monday, but in view of the shortness of time I asked Mr Ouseley [a fellow Senior Home Office Presenting Officer] to notify the solicitors that on further reflection we were prepared to granted refugee status. It was therefore somewhat surprising that the solicitors still indicated a wish to proceed as noted in a letter of 26 September (clearly misdated 23 September as it referred to a later letter).
>
> Now we have been informed that attendance is required tomorrow, I shall be in court to offer

> personal apologies for the problems caused. For avoidance of any doubt, however, I will be indicating that refugee status is to be granted to Mr Ali on acceptance of a real risk of ill-treatment amounting to persecution and a breach of Article 3. I will not be in a position to argue the matter substantively.
>
> I am copying this letter to Mr Sachdev of Sheikh & Co., to whom I have just spoken.'

7. The slightly earlier Home Office letter of 23 September from Mr Deller to which he makes reference above explained to the Tribunal that the Presenting Officer's Unit had now taken back the case from Treasury Solicitors and that he wished to inform us that :-

> 'after further consideration the Secretary of State has decided not to pursue this matter as he is satisfied that the circumstances demonstrate a real risk of a breach of Article 3. I shall shortly be sending our file for the implementation of this decision and have written to Messrs Sheikh & Co. to seek their views on the disposal of the appeal. It may be that they are instructed to withdraw the appeal but in the event that this is not so I would request that the hearing on Wednesday be reclassified as For Mention Only.'

8. Then followed the letter of 26 September (to which Mr Deller's 27 September makes reference). Addressed to Sheikh & Co., with a copy to the Tribunal, its relevant parts read:

> 'You spoke to my colleague Mr Deller and agreed to withdraw your appeal if we recognised your client as a refugee.
>
> The Home Office has reviewed the file and is prepared to recognise your client as a refugee. He will be granted five years Refugee Leave.'

9. We should mention at this point that although the two letters of 23 and 26 September referred to above were received at Field House on the same day, they were not brought to the attention of the Tribunal Chairman (Dr Storey) until the morning of 27 September, the day before the hearing.

<u>The Hearing</u>

10. At the hearing Mr Deller reiterated his apology for the lateness of the Home Office reconsideration of the appellant's position. He agreed that it had resulted in a great deal of wasted time and effort on all sides.

11. We then turned to the procedural issues. Mr Deller agreed with us that until such time as the appellant was formally granted refugee leave, the statutory abandonment provisions of the Immigration Acts, either

s.58(9) of the 1999 Immigration and Asylum Act or s.104(4) of the Nationality, Immigration and Asylum Act 2002, did not apply. They state:

> s.58(9) of the 1999 Act:
>
> > 'A pending appeal under any provision other than s.69(3) is to be treated as abandoned If the appellant is granted leave to enter or remain in the United Kingdom'
>
> s.104(4) the 2000 Act:
>
> > 'An appeal under s.82(1) shall be treated as abandoned if the appellant –
> >
> > (a) is granted leave to enter or remain in the United Kingdom, or
> >
> > (b) leaves the United Kingdom.'

12. Given the date of decision in this case (23 July 2002) it would seem that the relevant abandonment provision is s.58(9) of the 1999 Act: see ***ZA (s.58(9) – Abandonment – date of grant) Ethiopia [2004] UKIAT 00241***. But whichever provision is considered, no abandonment has yet taken place in this case.

13. We asked Mr Collins to clarify whether he was instructed to withdraw the appeal, bearing in mind an apparent indication to that effect being given in correspondence with the Home Office Presenting Officer's Unit. He clarified that he was not instructed to withdraw except at the point where the appellant had formally been granted refugee leave to remain.

14. Having considered the position we decided it would not be appropriate to adjourn this case. Since there had been no withdrawal or abandonment of the appeal, we asked the parties to address us on whether the decision we should substitute for that of the Adjudicator should be to allow or dismiss the appeal.

15. Mr Collins asked us to allow the appeal. Mr Deller said that in view of what had transpired he could not in fairness ask the Tribunal to dismiss the appeal.

16. We asked Mr Deller to clarify the basis on which the 23 September 2005 decision that the appellant's circumstances 'demonstrated a real risk of a breach of Article 3' had been taken. He said that it was based on the appellant's position when considered in the light of the Home Office IND CIPU Operational Guidance Note: Sudan, June 2005. The latter states that it is to be read in conjunction with the CIPU Sudan Country Report of April 2005 and any CIPU Sudan bulletins. As regards prison conditions it states as follows:

'3.9 Prison conditions

3.9.1 Applicants may claim that they cannot return to Sudan due to the fact that there is a serious risk that they will be imprisoned on return and that prison conditions in Sudan are so poor as to amount to torture or inhuman treatment or punishment.

3.9.2 Treatment Prison conditions have been described as harsh, life-threatening and lacking basic health and care facilities. At Freedom House [FH] a report entitled "The Worst of the Worst: The World's Most Repressive Societies 2004" stated that "Prison conditions do not meet international standards." FH's report also claimed that "Secret police have operated 'ghost houses - detention and torture centres in several cities.'

3.9.2 No independent domestic or international human rights observers have been allowed to regularly visit prisons. Sudan did have in place a Human Rights Committee whose responsibilities included the condition of prisons. The Inter-Parliamentary Union (IPU) website that recorded the existence of the Committee made no comment on its independence or effectiveness. Consequently, as there is no independent monitoring of Sudan's prisons by international or non-governmental organisations, very little information concerning the treatment and living conditions of ordinary prisoners is available.

3.9.4 Case law

IAT determination: UKIAT 00335 [2004] on draft evasion. As a result of the appellant being of Nuban ethnicity and a draft evader he will be imprisoned and that the conditions of imprisonment will reach the threshold of Article 3.

3.9.5 Conclusion. Prison conditions in Sudan are severe and taking into account life threatening conditions, lack of basic facilities and a virtually complete absence of external monitoring, conditions in prisons and detention facilities in [sic] are likely to reach the Article 3 threshold. Therefore a grant of HP will be appropriate where individual claimants are able to demonstrate a real risk of imprisonment on return to Sudan. Where the real risk of imprisonment is related to one of the five Refugee Convention grounds a grant of asylum will be appropriate.'

Decision

17. By reason of the fact that the case was pending before the Immigration Appeal Tribunal on 4 April 2005 we are required to deal with the appeal in the same manner as if we had originally decided the appeal and we were reconsidering our decision (Article 5 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Commencement No. 5 and Transitional Provisions) Order 2005.

18. We have been made aware of a decision taken by Mr Deller on 26 September 2005 that the respondent was 'prepared to grant refugee status' and that he 'will be granted five years Refugee Leave'. Mr Deller confirmed that the basis for that decision was that the appellant's situation fell squarely within the terms of the IND's June 2005 Operational Guidance Note regarding persons able to demonstrate a real risk of imprisonment on return to Sudan. It was not in dispute in this case that the appellant had been able to demonstrate such a risk. Accordingly he was entitled to succeed under Article 3 because (to quote from paragraph 3.9.5 of the OGN) '... conditions in prisons and detention facilities in (sic) are likely to reach the Article 3 threshold'. Mr Deller further confirmed that it was now accepted, on the facts of this case, that the ill-treatment the appellant would face would also amount to serious harm for a Refugee Convention reason, namely that of political opinion. (The appellant's representatives had submitted in correspondence with the HOPO Unit that the guidance given by the Court of Appeal in ***Krotov [2004] EWCA Civ 69*** strongly indicated that serving a sentence of imprisonment by a military tribunal following desertion would lead to serious harm in respect of which a political opinion would be imputed to the person concerned).

19. In the light of the above we have no hesitation in concluding that the appellant's appeal should be allowed. The respondent now accepts that the appellant qualifies as a refugee and he no longer wishes to defend the determination of the Adjudicator.

20. In view of the late reconsideration of the appellant's position by the respondent, we did not see fit to continue with this appeal as a Country Guideline case. Although we have a very considerable body of materials before us, we have not heard submissions regarding them, nor have we had an opportunity to examine the expert witness due to give oral testimony.

21. Equally, however, it would be quite wrong of us not to issue this as a reported decision of the Tribunal and to make plain in it the following:

22. It is clear that the current Operational Guidance of the Home Office relating to the Sudan considers prison conditions in that country to breach the Article 3 threshold.

23. So long as that executive guidance remains essentially the same, we take the view that at the judicial level it should be expected that the Home Office will likewise concede on Article 3 grounds all appeals in which it is accepted that the appellant has been able to demonstrate a

real risk of imprisonment on return to Sudan. Where such risk is related to one of the five Refugee Convention grounds, it will also be expected that the Home Office will normally concede on asylum grounds. In order to avoid unnecessary waste of judicial time and resources, any concessions made should not be left to the last minute.

24. We have not been able to address the further issue of risk to persons whose breach of Sudanese military law, arising through draft evasion or desertion, might expose them to a risk of adverse consequences other than imprisonment – e.g. being required to perform military service in the context of conflicts in the south of the country.

25. Before concluding we should make clear our very great concern at the way the Home Office has handled this case.

26. It has been known to the Home Office since 26 March 2004, when the Court of Appeal remitted the case to the Tribunal expressly to deal with the issue of prison conditions in Sudan, that this was to be treated as an important country guidance case. In the course of For Mention hearings in November 2004 and July 2005 the Home Office was kept aware that the case was being readied for country guidance. The date for the hearing of this reconsideration as a country guidance case was notified to the parties on 19 July 2005. They were also informed that a day had been set aside for hearing. It is clear from the concerns expressed by the HOPO at the November 2004 hearing about wishing to take steps to ensure the expert report was examined by CIPU and from the decision of Mr Deller in July 2005 to instruct Treasury Solicitors, that the Home Office have been fully aware of the potential importance of this case for some time.

27. In principle, of course, it is entirely a matter for the Home Office to decide at any stage of the appeal process whether it wishes to reconsider its position and make a grant of some sort of leave to remain. Nor is this something into which the judiciary can or should intrude. Equally, however, the Home Office is well aware of the importance attached by the courts and the Tribunal to the creation of county guidance. It is also well aware that the setting up of a case as a country guidance case can involve the Tribunal in a considerable amount of preparatory work, through For Mention hearings and the like, so as to ensure that the issues have been properly identified and that it has before it adequate materials and sources of evidence. As the body responsible for primary decision-making on asylum and asylum-related appeals, the Home Office must be taken to share the concern of the judiciary that like cases are treated alike and decisions are taken that are consistent. As representatives they also owe a duty to assist the Court.

28. It is obvious that if cases notified in advance as important Country Guideline cases are the subject of last-minute Home Office concession or reconsideration, the Tribunal country guidance system risks being undermined. There is also a risk (although we do not wish to suggest it arose in this case) of the executive being seen as seeking to evade a judicial decision on important country issues.

29. Mr Deller fully accepted that last-minute Home Office reconsideration threatened the integrity of the Tribunal's country guidance system and that it was highly undesirable that it should happen in the way it did in this case. Practically speaking, therefore, it is imperative that so far as possible any question of reconsideration should be addressed by the Home Office well before the date fixed for the full hearing. We can see no good reason why this should not be possible.

30. In the event we only learnt of the Home Office decision to set in train arrangement for the grant to the appellant of refugee leave the day before the hearing. Even if we had been shown the letters of 23 and 26 September 2005 instantly, the decision was still notified very late in the day.

31. We are encouraged by Mr Deller's assurance that he would do his best to ensure a system was put in place which would prevent future problems of this sort.

32. For the above reasons the decision we substitute for that of the Adjudicator is to allow the appeal on asylum and Article 3 grounds.

DR H H STOREY
SENIOR IMMIGRATION JUDGE