

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 20 September 2002
Dictated: 30 September 2002

Determination Promulgated
.....07.02.2003...

Before:

**Miss K Eshun - Chairman
Mr C Thursby**

between

The Secretary of State for the Home Department

Appellant

and

Abdenour KHALDOUN +3

Respondent

DETERMINATION AND REASONS

For the Appellant: Mr A Mullen, Home Office Presenting Officer
For the Respondent: Mr S Winter of H B M Sayers, Solicitors

1. The appellant appeals with leave of the Tribunal against the determination of an Adjudicator (Mrs F M Kempton) promulgated on 7 June 2002 in which she allowed the respondent's appeal against the decision of the appellant of 17 September 2001 refusing to grant him asylum.
2. In this case the respondent, together with his wife and two dependent children, arrived in the United Kingdom on 13 July 2001 on valid passports and visas. They claimed asylum on 2 August 2001. The claim was refused by letter from the respondent dated 17 September 2001.
3. The respondent's claim to asylum was on the basis that he was a farmer in Dellys in a village called Sobaoi. He was not a member any political party. He and his family moved to Algiers in about the end of November 2000 due to problems in Dellys. There were no problems before August 2000. In August 2000, terrorists, namely the

Salafi group who are Muslim fundamentalists, came to his village and asked him for 200,000 Dinars. He reported this to the police but they did not take it seriously. When the terrorists returned for payment a week later, his wife was so upset that she dropped the baby, the dependent child Omar, on the floor. Shortly thereafter, in September, the terrorists came to the respondent's house and took his father. On the following day, the respondent found his father dead, having died from injuries inflicted upon him. This was reported to the police who said this had happened to many others and that no money should be handed over as such support for them would be treated negatively. The terrorists then threatened the respondent that he would have the same fate and then received a threatening letter. Then all his land was burned in September. After that he moved his family to Algiers as he had other family members there.

4. In Algiers he operated a stall in the marketplace and sold vegetables. In May 2001 his problems began. The terrorists came to his stall and demanded 200,000 Dinars which he did not have. They took the day's takings of 1,500 Dinars. The respondent reported this to the police, who then detained him. They ill-treated him in detention by beating, kicking and punching him, depriving him of food and water and smothering him with a water-filled sponge. They did not inform his family of his whereabouts. His family believed him to have been taken by the terrorists. On release from the police, the respondent was accused by the police of helping the terrorists by giving them money. He was warned not to do so again. His family had been told by the police that they knew nothing of him or his whereabouts.
5. The respondent received threatening letters from the same terrorist group, the Salafi group, after he moved to Algiers. The respondent believes that the group has informers everywhere who informed them of his new address. After being detained by the police, the respondent decided to sell everything and buy a visa through unofficial channels in order to leave the country. He already had a passport which he renewed in September 2001 and he was given his passport with the visa in it on 10 June 2001. He and his family then left Algeria on 13 July 2001.
6. His wife gave evidence before the Adjudicator. She referred in her statement to her husband's problems with terrorists starting in about 1992, when they demanded money from her husband as they knew he owned land. They wanted 20,000,000 Dinars from him. She thought that some of the terrorists may have been from their community as they seemed to know a lot about the people who had lived there. She repeated much of what her husband had said in relation to his father having been taken away and shot and the family moving to Algiers and her husband setting up a market stall. She said that about a month later the terrorists began to threaten her husband again. They demanded money from him at the stall and he paid 15,000 Dinar. The respondent reported the matter to the police who jailed him for helping the terrorists. He was assaulted during questioning.
7. In her oral evidence, Mrs Khaldoun referred to the reasons for leaving as being, firstly, what happened to her husband in Algeria and secondly, her son Omar's health. She explained that Omar cannot walk although he is almost two years old. He suffers from asthma and gastric reflux. He receives treatment at a specialist child development centre. He explained that the treatment for her son to the same

standard would not be available in Algeria. If he does not receive the treatment, he will not be able to walk or function properly.

8. The Adjudicator accepted all of the respondent's evidence. Although she found that there were a few discrepancies in the evidence given by the respondent and his wife, she found that these were not significant.
9. The Adjudicator found that the respondent has been subjected to persecution. The terrorists are not State actors, but the authorities were quite clearly not able to control the situation at all. The respondent tried to exercise internal flight option but was clearly unable to do so as the terrorists caught up with him and started their extortion racket once again, coupled with death threats. When the respondent reported the matter to the police in Algiers, they not only refused to help him but tortured and persecuted him. Accordingly there was no State protection for the respondent in Algiers. The respondent had already been persecuted by the authorities for an imputed political opinion, namely that by implication because the terrorists had obtained money from him, he must have sympathised with them. The respondent therefore cannot expect protection from the authorities in Algeria as the authorities are unable and unwilling to offer him effective protection. She therefore allowed the respondent's claim under the Refugee Convention.
10. In relation to the claims under the European Convention on Human Rights, the Adjudicator considered the child Omar's medical difficulties. In relation to the medical help available in Algeria, the Adjudicator had regard to the Home Office Country Assessment which said that the upheavals of the last decade have had a negative effect upon public health, especially child health. Although some reports said that there are signs of recovery, and others said that there is a fall in standards, and medicines are provided free for children, the Adjudicator found that this would not assist Omar, who requires physiotherapy and other treatment. It was implicit in the background information that the care available in Algeria will not be comparable to that available in the United Kingdom and will be substandard and unlikely to meet Omar's specific needs. She therefore believed that there would be a breach of Article 3 of the European Convention on Human Rights to return Omar to Algeria and also allowed the appeal on this basis.
11. The grounds of appeal submitted by the appellant stated that the Adjudicator erred in law by ignoring the case of **Fadil, CA [2001] Imm AR 392 of November 2000**, in which the Tribunal found that fear of Islamic fundamentalists did not constitute a fear of persecution under the Convention. The respondent's claim, which is based on the criminal extortion of money, does not give rise to a claim under the Refugee Convention.
12. The grounds of appeal also submitted that the issue of sufficiency of protection must now also be addressed.
13. It was also submitted that the Adjudicator erred in her assessment of the ECHR. The Adjudicator says that "no mention is made in the medical reports of the availability of treatment in Algeria". It is for the respondent to show that medical treatment is not available in Algeria and cited the case of **Bensaid v United Kingdom ECHR 6 February 2001**. Bensaid was a serious schizophrenic in need of regular drug

treatment, and had spent 11 years in the UK and yet the European Court of Human Rights found that there was no breach of Articles 3 and 8 if Bensaid was returned to Algeria.

14. At the outset of the hearing, the Tribunal put to flagged the following issues:
15. In respect of the asylum appeal, if there is no Convention reason, should the issue of sufficiency of protection be considered at all, having regard to the Court of Appeal's decision in **Skenderaj**.
16. In respect of the human rights appeal, the Adjudicator appears to have allowed the appeal under Article 3 on issues relating to the health of Omar, a dependent child, without giving any consideration to Mr Khaldoun's own human rights claim. The question was whether the Adjudicator was legally right to do this, given that Mr Khaldoun is the only member of the family who has a right of appeal against the Secretary of State's decision.
17. Mr Mullen submitted that the respondent's main fear was from terrorists and therefore the fear did not engage the Refugee Convention. As regards the issue of sufficiency of protection, Mr Mullen submitted that there is no evidence to support the Adjudicator's finding that the police action of mistreating the respondent meant that they imputed a political opinion to him because he was seen as supporting the terrorists. He would submit that in general there is a sufficiency of protection in Algeria notwithstanding any allegation of mistreatment. The October 2001 Home Office CIPU Report was before the Adjudicator. In there it states that as a matter of policy disciplinary action is taken against members of security forces who are guilty of violating human rights. Several such cases have been reported. There was no attempt by the respondent to seek redress for alleged mistreatment when it was open to him to do so. Therefore, the Adjudicator's finding of insufficiency of protection was deficient. Mr. Mullen did not address us as to whether this issue should have been considered at all by the Adjudicator in the light of **Skenderaj**.
18. With regard to Article 3, Mr Mullen submitted that the Adjudicator's treatment of this issue was entirely wrong. The fact that the medical facilities in Algeria are not as good as those in the United Kingdom, does not go to support a breach of the child's Article 3 rights. The Adjudicator did not consider the Article 3 rights of the respondent or his wife. Mr Mullen asked that the Tribunal allow the Home Office's appeal outright because of the defects in the Adjudicator's determination. Alternatively, he would not be averse to a remittal.
19. Mr Winter relied on his written legal submissions. In respect of the argument that there is no Convention reason to the respondent's claim, Mr Winter referred to the Adjudicator's determination in paragraph 33, where she found that the respondent had already been persecuted by the authorities for the Convention reason of "an imputed political opinion". Mr Winter cited the case of **Mardi [2002] UK IAT 01327** at page 59 of the respondent's bundle. Mardi was an Algerian businessman who owned a garage in a suburb of Algiers. He was approached, threatened and assaulted by members of the GIA who were seeking extortion money from. The president of the IAT, Mr. Justice Collins, thought that this amounted to a Convention reason

20. As regards the issue of sufficiency of protection, Mr Winter said that he had lodged recent cases in which there has been found to be no sufficiency of protection in Algeria. In this case the respondent went to the authorities to report the matter to them and they rather persecuted him for his imputed political opinion for allegedly assisting terrorists.
21. As regards the respondent's human rights claim, Mr Winter submitted that it is implicit in the determination that the Adjudicator has decided that the respondent is entitled to refugee status and therefore she did not have to consider the human rights claim. If an asylum seeker is granted refugee status, there is no obligation on an Adjudicator to consider the human rights issue. Mr Winter accepted that he had no authority to support this argument.
22. As to whether the human rights of the child can support the respondent's claim, Mr Winter said that he could add nothing further to the Adjudicator's approach other than to rely on grounds 3 and 4 of his written submissions. He submitted that childcare facilities in Algeria have been severely affected by the civil war. It would be degrading for the child to be sent back to substandard medical care. The child was one year old when the family arrived in the United Kingdom. He did not really receive any treatment in Algeria.
23. Mr Winter said that if the Tribunal is of the view that a Convention reason exists, then there is no reason to remit the appeal. He would not oppose a remittal if the court feels that the human rights claim of the respondent should be dealt with.
24. Mr Mullen referred us to paragraph 4.10 of the October 2001 Home Office CIPU Assessment which reports on the medical system in Algeria and gives a list of regional and specialist hospitals. The report states that medicines are sold through the State monopoly at subsidised prices and are provided free to children and the elderly, although there have been some cutbacks. Mr Mullen also submitted that the report on Omar from York Hill Trust NHS hospital, gives no indication that the return of the child would result in the deterioration of his health or complete absence of medical treatment. Furthermore he would submit that even if they are not living in Algiers, they should be able to travel to Algiers for medical treatment for the child.
25. Mr Winter submitted that the respondent moved to Algiers to exercise an internal flight alternative. It would be unduly harsh to send him back to Algiers. The Adjudicator said that he will suffer persecution for his imputed political opinion.
26. The Tribunal is proposing to deal with this appeal in three stages. The first, is in respect of the asylum appeal; whether there is a Convention reason and whether the issue of sufficiency of protection should have been considered by the Adjudicator. Secondly, whether the Adjudicator should have considered the respondent's own human rights claim. Thirdly, whether the human rights of the dependent child can support the respondent's human rights claim.
27. Re: The asylum claim. The Tribunal is of the view that the respondent's fear of the Salafi terrorist group does not constitute a fear of persecution under the Convention. We rely on the Court of Appeal's decision in **Fadil** which was cited in the grounds of

appeal. In **Fadil** the appellant was a citizen of Algeria. He claimed that if he were to be conscripted into the Algerian army he would be persecuted by the Islamic fundamentalists. The Court of Appeal held therein that fear of Islamic fundamentalists did not constitute a fear of persecution under the Convention. Mr Winter referred to the Tribunal's decision in **Mardi**, where he thought that Mr Justice Collins thought that extortion of money from a businessman amounted to a Convention reason. On a closer reading of **Mardi** we do not find that this is what Mr Justice Collins decided. In paragraph 5 of **Mardi**, the Tribunal said that it was in their judgment fanciful to suggest that Mardi would be perceived as being an opponent of the GIA and thus there would be an imputed political opinion which would be the basis for a conclusion that the persecution was for a Convention reason. In a case such as this the suggestion that there is imputed political opinion simply will not run. In this appellant's case, the argument is that the authorities mistreated him because, having reported the extortion to the police, they then accused him of assisting the terrorists and thereby imputed a political opinion to him. Whilst we accept that the police mistreated the respondent, we are not of the opinion that the mistreatment was on account of his imputed political opinion. At paragraph 19 of the determination, it is recorded that the respondent said that he was accused by the police of helping the terrorists by giving them money. He was warned not to do so again. As far as we are concerned this evidence tells us the reason why the police mistreated him. It was not because they were of the view that the respondent sympathised with the cause of the terrorists, but simply because he had assisted them by giving them money. In the circumstances, and applying the judgment in **Mardi**, we do not support the Adjudicator's finding that the respondent was persecuted by the authorities by reason of his imputed political opinion. Accordingly, we find that the appellant's claim does not engage the Refugee Convention.

28. As regards the issue of sufficiency of protection, we rely on the Court of Appeal's decision in **Skenderaj [2000] INLR 232** in which it was held:

"On the issue of protection, as the Adjudicator had found and the Tribunal had accepted that, whatever the appellant's reason for not seeking protection, the State could not have provided it anyway, his claim fell within the first alternative in the refugee definition in Article 1A(2) of the United Nations Convention relating to the Status of Refugees 1951 and Protocol of 1967 of "inability" to provide protection. However, and notwithstanding the Tribunal's inadequate treatment of this issue, this did not assist him as he had failed to show a fear of persecution for a Convention reason."

It is our understanding of this decision that as the respondent had not established that he had a well-founded fear of persecution for a Convention reason, he could not take advantage of the second limb of the definition in Article 1A(2), by claiming that the authorities would be unwilling and unable to provide him with protection. If we are correct in our interpretation of that judgment, then it means that the issue of protection was not a matter that needed to be considered by the Adjudicator.

29. Re: Respondent's human rights claim. It is our considered opinion that the Adjudicator was under a legal obligation to make a finding on this aspect of the respondent's claim regardless of her finding in the asylum claim. Although Counsel argued that the Adjudicator did not have to because she had allowed the asylum

appeal, he could find no authority to support his argument. Considering that the respondent had also appealed on this ground, the Adjudicator erred in not considering it.

30. Re: Can the human rights of a dependent child support the respondent's human rights claim? In this case the child, Omar, does not have a human rights claim in his own right. He is a dependant of his father, the respondent. It is his father who has a right of appeal against the decision of the Secretary of State. As Omar is part of the respondent's family, his medical condition will have a bearing on the respondent's human rights appeal. As the Adjudicator did not consider the respondent's own human rights claim, allowing the appeal under Article 3 solely on consideration of Omar's medical condition was wrong in law.
31. Furthermore, the test with regard to Article 3 of the ECHR, does not lie with the comparability of the medical facilities in Algeria to the medical facilities in the UK. The test in Article 3 is whether there is a real risk of treatment amounting to inhuman and degrading treatment. The threshold in Article 3 is high. In Bensaid, his removal from the UK even though he was in need of regular drug treatment was found not to breach Article 3. While it may be that the medical treatment Omar will receive in Algeria may be substandard, in our opinion, that the treatment affects the quality of his life. There is no evidence to suggest that that treatment will pose a threat to Omar's life. Therefore, we disagree with the Adjudicator and overturn her decision on this issue.
32. We therefore allow the Home Office appeal.
33. We however, remit the appeal back to Mrs. F M Kempton to consider the respondent's Article 3 claim and any issues that may arise under Article 8 as a result of the child's medical condition.

Miss K. Eshun
Chairman