C4/2004/2069

Neutral Citation Number: [2005] EWCA Civ 518
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 24th February 2005

B E F O R E:

LORD JUSTICE MAY

LORD JUSTICE SCOTT BAKER

LORD JUSTICE THOMAS

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SAFET PAJAZITI

Claimant/Respondent

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Appellant

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

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MR R TAM (instructed by the Treasury Solicitor, London SW1 9JS) appeared on behalf of the Appellant
MR D CHIRICO (instructed by SA Carr and Company, London E8 1HP) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE MAY: Thomas LJ will give the first judgment.

2. LORD JUSTICE THOMAS: This is an appeal brought by the appellant from a decision of the Immigration Appeal Tribunal, given on 28th July 2004, in which the Tribunal allowed an appeal by the Secretary of State. That appeal had been brought against an adjudicator's determination, which allowed the appellant's asylum and human right appeals by a determination, dated 22nd August 2003, against the rejection of the Secretary of State's application to enter.

3. The facts can be briefly stated. The appellant was born in the Presevo Valley in Serbia, which is close to the Kosovo border, in 1981. He is an ethnic Albanian and a Muslim; he lived in that valley until 1998. His evidence was that his father had been a very active member of the LDK, which resisted Serbian pressure. As a result of this the family became known to the police. On one occasion in his childhood, when his father was arrested, his family was beaten up; his father held for 18 months. His father was, according to his evidence, made president of the LDK wing in Medvedja a town in the Presevo Valley, in 1997. He arranged demonstrations and became responsible for organising the KLA in that area.

4. The appellant acted as a courier for his father but was never detected by the authorities for that. In December 1998 the appellant was called up for military service but did not answer that call in common with many others. Also in that month, and this is the incident of greatest importance, his family's house was surrounded by the police in the early hours of the morning. His father helped him escape. He went to a friend’s house and was taken to Macedonia. He heard his father was arrested, that the house was burnt and destroyed by the police. He did not know what happened to his father or sisters.

5. He was helped to come to the United Kingdom by road and entered this country on 17th December 1998. He was then 17.

   The evidence that he gave to the adjudicator, as to his fear of return, was this:

> "’I fear the Serbs as there are no Albanians living there, as the area was ethnically cleansed as they wanted… People I was persecuted by are still there working for the authorities.' He explained to me that there was no family any more in Medvedja: there was no one and no home to which he could return. In 2003 he still feared being sent back. His name and family’s reputation would be known by the Serbian authorities. He had kept up-to-date with the situation in the Presheva valley from news reports. A contact in his own area who worked for the Serbian authorities informed him that some refugees had gone back but not those who were forced to leave or who had had problems with the authorities. He also as an ethnic Albanian because of events in Presheva feared the Serbian population: there was a hatred between Serbs and Albanians. He maintained that the Serbs wanted to destroy all Albanians. The interest in him specifically was because of his father's activities and background."

6. Thereafter the appellant was granted, on 6 August 1999, leave by the Secretary of State to stay until 6 August 2000. That was subsequently extended until 3 July 2002, the Secretary of State refused to grant further leave to remain. The appellant also made an asylum application and that was refused by the Secretary of State on 26 June 2002. During his time in the United Kingdom, the appellant learned to speak fluent English, attended a technical college and obtained various qualifications enabling him to do some forms of specialist cleaning and to drive certain types of machinery. He then spent, in the period of two-and-a-half years preceding the hearing before the adjudicator, working for a restaurant chain. The adjudicator found that if his immigration position had been certain he would most likely have been able to achieve management level. In the United Kingdom, he had established a home and a circle of friends.

7. The adjudicator's determination can be briefly summarised. He accepted the evidence of the appellant as credible about his fears of return and consequent persecution. He accepted these were sincere and genuine. He set out, in his adjudication, the expert evidence that was before him. First, there was an in-country report, dated April 2003, and also a report from a Mr Korovilas, a senior lecturer in economics, and faculty research fellow at the University of the West of England at Bristol.

8. In the light of the evidence of the appellant, and those two reports, the adjudicator came to a determination which is set out in paragraph 16 of the adjudication. It is necessary to set this out because the argument before us has turned upon this paragraph. He said this:

> "I found the appellant to be an impressive young man. I do not doubt his credibility. I believe the story he has told of the events that he has undergone and the experiences he has had. I find that his fears of return to Serbia and consequent persecution and/or ill-treatment are sincere and genuine. I have to consider the situation as it is at present in the light of the background information and material presented to me. I also have to take account of the appellant's sources of information. Whilst noting all that is said in the Country Assessment I regard this appellant as falling into an exceptional category not merely because he is an ethnic Albanian brought up in a still very ‘sensitive area’ because of Albanian aspiration but because ‘de facto’ the region continues to be dominated by a Serbian administration with Serbian police and security forces who I am satisfied would become aware of the appellant on his return and indeed of his father's reputation and standing in the LDK/KLA.
>
> It may be the changes have indeed been put in place and that the efforts under the Covic plan will produce in future generations a more harmonious mix of Serbs and ethnic Albanians, such that the fears entertained by the likes of the appellant will not be justified. I do not find having weighed matters carefully in the balance that that is the situation at present. I fear on the appellant's behalf that he would be singled out and that having come to the attention of the authorities there are substantial grounds for believing that he is at a real risk of either persecution or ill-

> treatment that would breach the Article 3 threshold. The Appellant is not on his own admission a conscientious objector. Bearing in mind the background information to which I have referred I find that it is not reasonably likely that this appellant would be arrested on account of the fact that he has failed to answer the draft on two occasions at time of war."

9. The adjudicator also found in respect of the argument under Article 8 that the deportation of the appellant would be in contravention of those rights as it would not be a proportionate response. In the light of the argument before us, I do not think it necessary to set out his precise reasoning for that conclusion.

10. The Secretary of State appealed to the Immigration Tribunal who allowed the appeal both as to the asylum and Article 3 claim, and in respect of the Article 8 claim. It is, I think, not necessary to set out, at length, the reasoning of the Tribunal. They proceeded to examine the report of Mr Korovilas and considered that the adjudicator had acted wrongly in attaching weight to that report in reaching his conclusion. Secondly, they came to the view that he had failed to address, in coming to his conclusion, the terms of the in-country report and, in particular, that part of it in relation to the Presevo Valley. Although they considered he had referred to it, he had not assessed it. At paragraph 60 of their determination they concluded that:

> "The Adjudicator was wrong to place reliance upon the report of Mr Korovilas before him and failed to take adequate account of the objective material available to him in wrongly concluding that the Appellant was in an exceptional category and at continued risk on return."

They concluded, therefore, on the asylum and Article 3 grounds, as follows, at paragraph 62:

> "We therefore conclude that the Appellant has failed to establish a well-founded fear of persecution for a Refugee Convention reason and that his removal would not cause the United Kingdom to be in breach of its obligations under the Refugee Convention."

11. In turning to the Article 8 grounds, they concluded that the adjudicator had not proceeded to consider the issues properly in accordance with the authorities. It is not necessary to lengthen this judgment by referring to the detail of that.

12. Leave was granted to appeal to this court because it was contended, on behalf of the appellant, that the Immigration Appeal Tribunal had erred in approaching its own jurisdiction, because it had failed in the material part of its reasons to identify an error of law. In CA v the Secretary of State for the Home Department [2004] EWCA Civ 1165 in the judgment of Laws LJ at paragraph 14:

> "Accordingly, and this is I apprehend no more than elementary, an appeal cannot be allowed unless the Tribunal distinctly holds that the adjudicator has perpetrated a mistake of law. No doubt it must be a material error of

law. If it could truly be shown that the result before the adjudicator must have been the same even if there had been no legal error, there would be scope for the Tribunal to dismiss the appeal despite the error."

13. That decision was given by this court on 20th July 2004, after the argument had taken place before the Tribunal, and only a very short time before the Tribunal gave its decision. In the light of that decision, and the further decision of this court in Mlauzi v the Secretary of State for the Home Department [2005] EWCA, Civ 128 (see in particular paragraph 13) the Secretary of State has accepted that there was a failure by the Tribunal to identify an error of law; that in consequence it had not approached the matter correctly. They concede, therefore, that the appeal should be allowed. For my part I accept the concession made. It is rightly made. The only question, therefore, is: what should happen?

14. The Secretary of State contends that the matter should be remitted to the Tribunal, or alternatively to the adjudicator. The appellant contends, however, that this court should uphold the decision of the adjudicator. It is accepted, however, on his behalf, that if it can be shown that there is an arguable material error of law, then the matter should be remitted to the Tribunal for the appeal of the Secretary of State to be determined. It is contended on the appellant's behalf that there is no material error of law.

15. The argument in this respect has centred entirely upon the asylum and Article 3 grounds. It is accepted that the adjudicator made an error of law in the way in which he determined the Article 8 issue. If, therefore, the appellant had succeeded in persuading this court that there was no arguable issue of law which arose on the Article 3 and asylum grounds, then the issue on Article 8 would be moot, as it was only the appellant's second ground for seeking to resist his removal. If, on the other hand, the Secretary of State shows that there is an arguable basis for remission to the Tribunal, then it will be for the Tribunal to consider the position under Article 8. It is not necessary for me, therefore, to set to deal any further with that part of the proceedings.

16. I turn, therefore, to consider the position under the Article 3 and the asylum grounds. The essential argument put before us, on the behalf of the Secretary of State, is that the reasoning in paragraph 16 of the adjudicator's determination was wholly insufficient in that it did not contain a proper analysis of the material before the adjudicator, and did not set out why the appeal had been determined against the Secretary of State. It was contended that if it could be shown to be correct, it amounted to an error of law. It was not disputed, on the part of the appellant, that if the reasoning could be shown to be as deficient, or arguably as deficient, as was contended on behalf of the Secretary of State, that that would not amount to an arguable error of law.

17. The question, therefore, that I consider, that arises for determination, is whether the way in which the adjudicator approached this matter, and the determination as reasoned in paragraph 16 of the determination was deficient.

18. There was, before the adjudicator a very clear incountry report and, in particular, at paragraphs 6.59 to 6.70, it set out, in detail, the position in the Presevo Valley in

chronological order and in clear terms. That report was clearly sourced with references to the source material.

19. That was before the adjudicator and it is clear, from the determination, and, in particular, at paragraph 13, that the adjudicator had regard to it. He recited certain paragraphs from it in the course of setting out the submissions made on behalf of the Secretary of State.

20. There was also before the adjudicator, as I have already stated, the report of Mr Korovilas. It is argued before us that these reports were of a materially different tenor, and that there was, therefore, a conflict in the evidence before the adjudicator.

21. Also it is clear that at that time there were two decisions of the Tribunal which dealt with the position in this particular part of the former Republic of Yugoslavia. The first of those decisions was Zejnullahu v The Secretary of State for the Home Department [2002] UKIAT05130, determined on 8th November 2002. In that decision the Tribunal set out, at paragraph 8, its conclusion in relation to the position of the Presevo Valley and summarised that at paragraph 17. It said:

> "In short, we consider that the most recent materials demonstrate that there is now a sufficiency of protection for ethnic Albanians in general in the Presevo Valley. For an asylum claim brought by an ethnic Albanian from southern Serbia to succeed now, there would need to be some exceptional circumstance justifying treatment of an appellant as still within a continuing risk category."

On 30th April 2003, that decision was followed in another decision to Tahiri v The Secretary of State for the Home Department [2002] UKIAT08386.

22. The way in which an adjudicator should approach the expert evidence before him, and the decision of the Tribunals, is set out in a further judgment of the Tribunal in The Secretary of State for the Home Department v Almalikuyu [2002] UKIAT00749. In paragraphs 8, 9 and 10, the Tribunal set out how they considered that the task of an adjudicator should be approached in circumstances such as this. First, it is the task of the adjudicator not to select a particular evaluation without placing it side by side with others in order to make a qualitative assessment and arrive at a balanced overview of those materials. Secondly, he should not, without more, simply to adopt a contrary view to that taken by the Tribunal of the courts. In that case he should, at least, have explained why he took a different view concerning the risk facing a returned national of Kurdish origin. The tribunal then went on at paragraph 10 to explain the importance of that.

23. It is argued, on behalf of the Secretary of State, that the general approach that should be taken by a person making a judicial determination, was to analyse properly the evidence, to set out the reason why one part of the evidence was preferred over the other, and to set out those reasons in such a way that both parties, and, in particular, the party that had failed to succeed, could understand why the decision had been made.

24. It is against that background that it is argued, on behalf of the Secretary of State, that there are three potential criticisms of the way in which the adjudicator's reasoning was set out, which taken either individually, or cumulatively, amount to an arguable error of law. I am satisfied that the points raised are arguable. I will indicate briefly why I consider them arguable, without expressing a view upon them.

25. The first argument is that, in paragraph 16 of the adjudication, the adjudicator proceeded to make a determination by reference not only to the fact that the appellant was at risk because of his father's reputation and standing in the LDK and KLA, but because of the view that the adjudicator had taken of the position in Serbia. In the passage, to which I have referred, it is, to my mind, clear that it is, at the very least arguable, that it was not merely the father's reputation and standing, but also the view formed of the position in the Presevo Valley that were an integral part of the decision-making.

26. On that basis it seems to me that it is again at least arguable that it was impermissible for the adjudicator to have reached the view he expressed in paragraph 16 in relation to the general situation, without placing the two areas of expert evidence side by side and analysing why he reached a different conclusion. The mere fact that the adjudicator recites the evidence is not a process of analysis. The analysis must contain reasons why the evidence of one is to be preferred over the other.

27. Amongst the matters that have to be taken into account in that analysis are matters such as the standing of the expert, the sourcing of his material and the logical cogency of the arguments. It seems to me that it is at least arguable that, when examining the report of Mr Korovilas and the detailed in-country report, if the adjudicator was to reach the conclusion he did in respect of the general situation, then he had to explain why he preferred the one part of the evidence over the other.

28. It seems to me again at least arguable that he did prefer one over the other. I have reached that view for two reasons: first, because it is clear from the terms of paragraph 16 itself, that there are phrases that can arguably be said to reflect the report of Mr Korovilas, and secondly, because there is at least an argument that the incompatibility between the reports was expressly recognised by the then counsel for the appellant to be a critical issue before the Tribunal. I stress that I consider that arguable because there may be an argument as to the status of the concession made. I attach, in my judgment, much greater force to the reflection in the terms of paragraph 16 of the report of Mr Korovilas as showing that there is an arguable basis for saying that the adjudicator preferred the one piece of evidence over the other.

29. That is, in my view, the first arguable ground. The second arguable ground is that, although the adjudicator clearly was entitled to take the view that the father's reputation and standing in the LDK/KLA may have amounted to an exceptional reason, he reached that result by taking into account two factors: first, was the fact that the area was de facto dominated by the Serbian administration, and secondly, that the situation had not improved.

30. He reached that conclusion on those latter points without, in any way, expressly having regard to the two decisions that the Tribunal, to which I referred, which deal with the situation in the Presevo Valley. It seems to me at least arguable that the reasoning should deal expressly with that position and arguable that, had the adjudicator set out that process of reasoning, he would have come to the view that the position, as he thought it was, might not have been materially different from that set out in those two decisions. If that had been the case, then the finding in respect of the position of the appellant's father, in relation to the LDK/KLA, would arguably be seen in a very different light.

31. The third matter that is argued before us, and said to be arguable, is that there is no evidence referred to, or reasoning referred to, in the adjudication to show that there was a particular risk in respect of this appellant in respect of his father's reputation and standing in the LDK/KLA. It seems again to me that that is arguable because if, as appears, the adjudicator considered that to be the most material factor, it is arguable that he should have explained more fully the basis for that conclusion.

32. It is for those reasons, therefore, that I consider that there are arguable reasons why the decision of the adjudicator contained an error of law. Therefore the proper course would be to remit this matter to the Tribunal so that the Secretary of State can have his appeal on those arguable errors of law determined.

33. LORD JUSTICE SCOTT BAKER: I agree.

34. LORD JUSTICE MAY: I also agree that this appeal should be allowed, but that, contrary to the submissions on behalf of the appellant, the Secretary of State's appeal should be remitted to a differently constituted Immigration Appeal Tribunal. I agree that Mr Tam, on behalf of the Secretary of State, has identified properly arguable errors of law in the Adjudicator's determination of the appellant's asylum appeal. I, like my Lord, emphasise that I go no further than suggesting that they are properly arguable.

35. I would not indicate any particular result of the remitted hearing. The adjudicator had to consider, in addition to the report of Mr Korovilas, the relevant CIPU incountry report and the approach of a number of other immigration appeal decisions relating to temporary conditions in southern Serbia. One such was the immigration appeal tribunal's decision, to which my Lord has referred, in Zejnullahu v the Secretary of State for the Home Department [2002]UKIAT05130, a decision of 8th November 2002, in which the Tribunal said at paragraph 17:

> "For an asylum claim brought by an ethnic Albanian from southern Serbia to succeed now, there would need to be some exceptional circumstance justifying treatment of an appellant as still within a continuing risk category."

36. I accept that this adjudicator set out to look for exceptional circumstances in the case of the appellant. He used the expression "exceptional category" in paragraph 16 of his determination. However, in concluding that the appellant's circumstances were exceptional, the adjudicator first, in my judgment, reached conclusions as to the

enduring conditions for ethnic Albanians in the Presheva area which were at odds with the tenor of the CIPU report, and at odds with the general situation described in Z and second, gave no analytical reasons for rejecting the tenor of the CIPU material.

37. He did not in terms accept the evidence of Mr Korovilas, but the appellant's own counsel accepted, before the Immigration Appeal Tribunal, admittedly with reference to a later report of Mr Korovilas, that without Mr Korovilas' material his argument would be, as he put it, 'torn from beneath his feet'. When there are, as I accept, serious arguments as to the applicability and persuasiveness of Mr Korovilas' report, it was the more necessary for the adjudicator to give a reasoned analysis for conclusions which arguably relied on it, in preference to other material.

38. For these brief reasons I agree that this appeal should be allowed, but that the matter should be remitted to the IAT.

Order appeal allowed matter to be remitted to the IAT