Case No: C5/2009/2479

Neutral Citation Number: [2010] EWCA Civ 1457
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
ASYLUM AND IMMIGRATION TRIBUNAL JUDGE
[AIT No. AA/04304/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 17th November 2010

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE GROSS

- -

Between:

MM (Iran)

Appellant

- and -

The Secretary of State for the Home Department

Respondent

- and -

The United Nations High Commissioner for Refugees
Intervener

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Becket Bedford and Mr Enonchong (instructed by Messrs Sultan Lloyd) appeared on behalf of the **Appellant**.

Ms Eleanor Gray (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

Mr Hugh Southey QC and Ms Leonie Hurst (instructed by Baker& Mackenzie) appeared on behalf of UNHCR Intervener.

- -

Judgment

Lord Justice Sullivan:

Introduction

1. This is an appeal against the order promulgated on 16 July 2009 of the Asylum and Immigration Tribunal (Mr CMG Ockelton, Deputy President, and Senior Immigration Judge Renton) following a reconsideration hearing on 22 May 2009 ("the 2009 determination") that the tribunal's earlier determination promulgated on 30 August 2007 (Senior Immigration Judge Jordan and Immigration Judge Summerville) dismissing the appellant's appeal against the Secretary of State's refusal of his asylum claim ("the 2007 determination") should stand, because there was no error of law in the tribunal's conclusion in 2007 that the appellant had not established a well-founded fear of persecution in Iran.

Immigration History

2. For present purposes, the most convenient summary of the appellant's immigration history is to be found in paragraphs 2-5 of the 2009 determination:

> "2. The Appellant's history is as follows. He was born in Iran. His father was closely involved with a body called the KDPI and as a result thought it was advisable to leave Iran. He therefore moved to Iraq and the Appellant lived with him there for some sixteen or seventeen years. We were not told whether either father or son had any lawful immigration status in Iraq. Subsequently, the Appellant moved to Turkey, and from there he came to the United Kingdom. It is accepted that he entered the United Kingdom illegally. His claim to asylum in the United Kingdom was made 6 October 2006.
>
> 3. That was not the first claim for asylum that he has made. He had claimed asylum in Turkey. Turkey is a party to the 1951 Convention Relating to the Status of Refugees, but not to the 1967 Protocol. It therefore does not recognise as Convention refugees individuals whose claim arises after 1950, and, in addition, has made a declaration under Art 1B confining the application of the Convention to those whose fear arises from events occurring in Europe before 1 January 1951. But, as a party to the 1951 Convention, Turkey accepts the jurisdiction of the United Nations High Commissioner for Refugees, as set out in the Statute annexed to Resolution 428(V) adopted by the General Assembly on 14 December 1950. Refugee status determination in relation to those not falling within the Convention as it operates in Turkey is undertaken by the UNHCR. Those

> whose claims the UNHCR accepts are 'mandate refugees', and are issued with a document intended to evidence the identity of the claimant.
>
> 4. The Appellant's claim in Turkey was accepted by the UNHCR. He was issued with the relevant document, of which we have seen a copy, on 7 January 2004.
>
> 5. In assessing his claim under the 1951 Convention made in the United Kingdom, the Respondent appears to have taken no notice at all of the fact that the Appellant had established mandate refugee status in Turkey. The Respondent rejected the Appellant's claim because it was considered that he had not made out his case. When the Tribunal heard the appeal, there was argument relating to the decision-making process adopted by the Secretary of State and to the effect of the grant of mandate refugee status. The Tribunal did not ignore the grant. But it nevertheless considered, on the basis of the material before it as a whole, that the Appellant had not established his claim to have a well-founded fear of persecution in Iran. It therefore dismissed the appeal."

The 2007 determination

3. Having summarised the appellant's claim, the tribunal described the mandate refugee scheme then operated by the Home Office. In paragraph 15 of its determination the tribunal said:

> "An in country application will be examined on its merits under the Geneva Convention. In such cases the fact that UNHCR has recognised the applicant and any opinion or information that UNHCR provides will form part of the information available to the decision-maker. The scheme states that this material *can* be taken into consideration. We would say that it *must* be taken into consideration but the decision of the UNHCR is not binding on the United Kingdom authorities. The weight to be attached to both the fact of UNHCR recognition and any accompanying material will be for the decision-maker as part of his overall assessment of the application or a subsequent appeal."

4. In paragraph 18 the tribunal summarised the Secretary of State's decision letter. At paragraph 19 the tribunal said this:

> "In our judgment, that decision was flawed because it failed to take into account the fact that the appellant had been recognised by the UNHCR as a refugee. That fact, as we have set out above, should have gone into the assessment made by the Secretary of State but it did not. The letter, dated 13 December 2006, which the Secretary of State had before him, says:
>
> > 'We can confirm that [the appellant] was recognised as a refugee by the UNHCR on 7 January 2004'
>
> No further information was provided."

5. The tribunal considered whether the Secretary of State should be required to reconsider the appellant's application but decided that this was unnecessary because the tribunal was itself in a position to take the UNHCR decision into account in its overall assessment of the appellant's claim for asylum.

6. The tribunal then considered the factual basis of the claim in very great detail, concluding in paragraph 47:

> "It follows that the appellant has failed to establish he was ever perceived to be of any interest to the Iranian authorities when he was in Iran or would now be so perceived 17 years later. As an absent Kurd, we are not satisfied that this alone would place him at risk. Accordingly, we are not satisfied that the appellant is a Convention refugee or was ever a refugee. Similarly, his claim to be at risk of serious harm cannot be established. We find, therefore, that he is not in need of humanitarian protection or that his return involves violation of his Article 3 rights."

7. In paragraphs 48-51 the tribunal considered:

> "**The effect of the UNHCR's recognition that the appellant was a refugee**
>
> 48. We accept, however, that the UNHCR recognised the appellant as a refugee in 2004. My Lawther submitted that the process by which refugees are recognised by UNHCR differs from the process adopted by the United Kingdom government. He did not, however, provide any evidence to support that submission and we reject it. The UNHCR is the guardian of the Convention and must be expected to know the principles which lead

to the recognition of any refugee. Whilst it is clear the UNHCR has a humanitarian role to perform in certain parts of the world, there is no reason to assume decision-makers in mandate refugee cases fail to distinguish between their humanitarian function and their legal function as decision-makers. That said, the appellant has failed to adduce evidence about the material used by UNHCR in this case to support a decision that he was a refugee.

49. In his interview, the criteria by which UNHCR recognised the appellant as a refugee included confirmation that the appellant was a KDPI member in Iraq. See his answer to question 145. That does not address the issue of whatever the UNHCR found that the appellant was at risk in Iran and, if so, how.

50. Whilst the practice of the Secretary of State is to provide detailed reasons for refusing a claim, he provides no reasons for accepting one. The UNHCR appear to adopt a similar practice. Accordingly, it is not clear from the decision letter the basis upon which the decision-maker at UNHCR satisfied himself as to the claim. In the present case, all we have before us is the bare decision made by UNHCR that it has recognised the appellant as a refugee.

51. In contrast, the material before us has been extensive. It has included statements, interviews, letters, documents, photographs and background material. The appellant himself has given evidence and has been cross-examined over a significant part of the day. In our judgment, the assessment that we ourselves have been able to make on the substantial volume of material placed before us, including the appellant's own evidence, has satisfied us that we are in a position to form our own judgment as to the merits of the appellant's claim. We are able to express our conclusions in the reasons that we have given. If we balance on the one hand the process by which we have analysed the material and, on the other, the letter from UNHCR confirming its recognition of the appellant as a refugee, we are unable to attach significant weight to the decision made by UNHCR. We do not discount that material or give it no weight but, unfortunately, no information is available to us as to the basis upon which UNHCR reached its decision or the material it had before it in doing so or the findings of fact the decision maker reached."

8. Having dealt with the issue of legitimate expectation, which is no longer relevant, the tribunal dismissed the appellant's appeal. Reconsideration was ordered and the reconsideration hearing took place on 22 May 2009.

The 2009 determination

9. Before the tribunal Mr Bedford submitted that the tribunal had materially erred in law in its 2007 determination because a) the UNHCR's recognition of the appellant as a refugee was binding on the Secretary of State and the tribunal, and b) the appellant being a person with a well-founded fear of persecution in Iran is entitled to the benefits of the qualification directive 2004/83/EC. The tribunal rejected both of these submissions.

10. Having referred to the decision that the European Court of Human Rights in Y v Russia (application No. 20113/07), the tribunal said in paragraph 15:

> "The treaty obligation submitted by Mr Bedford to bind the Secretary of State and the Tribunal does not in our judgment exist. Art 37 of the Convention imposes an obligation of co-operation with the UNHCR, not of subjection to the UNHCR. Individual States Party to the Convention are entitled to reach their own assessments of refugee status, and are not bound by an assessment by the UNHCR"

11. The tribunal continued in paragraphs 16 and 17 as follows:

> "16. That conclusion is sufficient to determine this reconsideration, but we should note in addition that Mr Bedford's primary underlying submission that, in accepting that the Appellant was a mandate refugee who came under the jurisdiction of the UNHCR, the UNHCR was determining precisely the same issues as arose in a claim under the Refugee Convention, is, to say the least, extremely questionable. The jurisdiction *ad personam* of the UNHCR is set out in Art 6 of the Statute. The only paragraph of that article that could be relevant to the Appellant is Art 6B: -
>
> > 'Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reasons of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.'

> 17. Mr Bedford submitted to us that there was no material difference between those words and the words in Art 1A of the Refugee Convention. We pointed out the absence of reference to a particular social group, and he said there was no material difference for the purposes of this case; but that was a submission by which it is very difficult to see the force in view of his primary submission that a determination of mandate refugee status is in general sufficient for the purposes of the Convention. In any event, however, it is clear from the wording of Art 6, in particular the tenses, that the jurisdiction of the UNHCR extends over persons who would not be regarded as Convention refugees. A Convention refugee is a person who is outside his country of nationality and has a well founded fear of persecution. A person who left his country because he had such a fear may or may not be a Convention refugee now; but, whether or not he is a Convention refugee now, he is included within the words of Art 6B. It is obvious that there are many individuals within Art 6B who are not Convention refugees. That the UNHCR should have jurisdiction over them is entirely understandable in view of the UNHCR's general functions; but it is in our view entirely unarguable that every mandate refugee should be regarded as a Convention refugee. (See also R(Hoxha) v Special Adjudicator [2005] UK HL 19 at [85].)

12. The tribunal concluded in paragraph 20:

> "As we have indicated, the Tribunal after considering all the evidence before it, concluded that the Appellant had not established a well founded fear of persecution in Iran. We have rejected by Mr Bedford's only substantive attack on that conclusion, which was that the Tribunal was not entitled to consider the matter at all. There is no proper basis upon which it can be said that the Tribunal erred in law in reaching the conclusion it did. We accordingly order that its determination, dismissing this appeal, shall stand."

The grounds of appeal

13. In a supplementary skeleton argument on behalf of the appellant, Mr Bedford advanced three arguments which, for convenience, I will set out verbatim as they are set out in the supplementary skeleton argument:

> "[The appellant] says that unless the Court can be sure that there is no risk of conflict in the grant by UNHCR and the refusal by [the respondent] of refugee status to [the appellant], then by the principle of sincere cooperation with which the UK undertakes to facilitate the achievement of the Union's tasks under the Treaty on European Union, the UK is bound, in accordance with the mandatory provisions of the Common European Asylum System ('CEAS'), to grant [the appellant] refugee status unless CEAS provisions on cessation apply or the claim is inadmissible under CEAS."

14. The second argument is put in the alternative:

> "…without reference to EU law, [the appellant] says that [the respondent] is bound by the duty of cooperation, which the UK undertakes to UNHCR, under the 1951 Convention as amended by the 1967 New York Protocol ('the Geneva Convention'), not to reach a decision which conflicts with the grant by UNHCR of refugee status to [the appellant], and [the respondent] is bound instead to choose whether to grant him refugee status in the UK or whether to remove him to Turkey, where he acquired mandate status, if it is safe and the Turkish authorities will permit it, or to choose instead to decide whether the cessation provisions under Geneva Convention will permit [the appellant's] return to Iran."

15. The third argument is put in the further alternative:

> "[The appellant] says that [the respondent's] policy discriminating between so-called mandate refugees by treating them less favourably if they arrive in the UK irregularly rather than by treating them equally having regard to their protection needs as assessed by the UNHCR, is irrational "

16. On reading the supplementary skeleton argument of the appellant it seemed to me that the first and second arguments were simply alternative ways of putting the submission that had been rejected by the tribunal in the 2009 determination, namely that because of the principle of cooperation, whether under the Treaty or the Refugee Convention, the Secretary of State and the tribunal were bound by the UNHCR recognition of the appellant as a refugee. That impression was confirmed by Mr Bedford's oral submissions this morning.

17. Mr Bedford accepted that the third argument, which contends that the Secretary of State's policy in respect of mandate refugees is irrational, depends on the success of his first and second arguments. That is because the reason why it is said that the policy is irrational is that it places us in breach of our international obligations, namely those international obligations relied on in the first and second arguments. In these circumstances, it is unnecessary to consider Ms Gray's submission on behalf of the Secretary of State that this third argument was not raised before the tribunal in 2007 or 2009 and indeed was not included in the grounds of appeal in respect of which permission to appeal to this court was granted by Jackson LJ at the conclusion of a renewal hearing on 22 February 2010, [2010] EWCA Civ Division 294. Had a separate irrationality challenge been raised, I would not have granted permission to appeal on that ground at this late stage. It would not have been a pure point of law. A decision as to whether any particular aspect of the Secretary of State's policy is irrational would require consideration of the relevant evidence, which is simply not available.

18. Before considering the appellant's first and second arguments it is convenient to consider the position of the UNHCR.

The UNHCR's written submissions

19. The UNHCR was given permission to intervene in this appeal by way of written submissions. Mr Southey QC and Ms Hurst appeared on its behalf this morning. For my part, I would wish to express my gratitude to them for their written submissions and their brief oral submissions in answer to our questions. I found those submissions to be considerable assistance and, as will be seen, they were in large measure accepted by Ms Gray on behalf of the respondent.

20. For present purposes, the following three points made by the UNHCR in its submissions are of particular relevance:
(A) the UNHCR confirms the point made by the tribunal in paragraph 17 of the 2009 determination that there are differences between the definition of those who are entitled to mandate refugee status in paragraph 6B of the UNHCR Statute and those who are defined as refugees for the purposes of the Refugee Convention ("the 1951 Convention and the 1967 protocol"). Paragraph 8 of the UNHCR's submissions explains that:

> "The definition of the Statute is both narrower and wider than the definition contained in the 1951 Convention/1967 Protocol. It is narrower because it does not include reference to membership of a particular social group and it is wider because it includes persons who had a well-founded fear of persecution permission."

(B) the UNHCR does not contend that prior recognition by it of mandate refugee status is binding on the Secretary of State or the tribunal (see paragraph 14 of the submissions);

(C) The UNHCR does submit that in determining the asylum claim of a person whose refugee status has been recognised by the UNHCR the United Kingdom decision maker must give that prior recognition i) considerable weight, and ii) "must seriously take it into account" when determining the risk and assessing credibility (paragraph 18).

The respondent's submissions

21. With one limited exception, the respondent's position is consistent with that of the UNHCR. In particular the respondent submits that point (B) above is supported by the decisions of the European Court of Human Rights in Abdolkhani & Karimnia v Turkey (application number 30471/08, see paragraph 69) and Y v Russia cited by the AIT (see above) by academic commentators, and by domestic authority dealing with the grant of refugee status by another state under the OAU Convention: see, for example, SSHD v KK (Democratic Republic of Congo) [2005] UK AIT 00054 at paragraphs 16 to 19.

22. The respondent does not take issue with the proposition in point (C)(ii) above that a United Kingdom decision maker must take "serious account" of the UNHCR's recognition of a person as a refugee. The respondent accepts that:

> "this means giving careful and conscientious scrutiny to this factor as part of the assessment of the case"

Pausing there, it is plain in my judgment that the tribunal hearing the appellant's appeal in 2007 did take serious account of and/or give conscientious scrutiny to the UNHCR's recognition of the appellant as a mandate refugee. The tribunal said that the Secretary of State's decision was flawed because he had failed to take this factor into account, and then considered in some detail the effect of the UNHCR's recognition of the appellant as a refugee: see the passages from the 2007 determination cited in paragraph 7 above.

23. The only possible difference between the position of the UNHCR and that of the respondent relates to point C(i). The respondent submits that the weight to be given to a decision by the UNHCR to recognise a person as a refugee is, as with other material factors, a matter for the decision taker in any particular case: see Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 795.

24. The Secretary of State submits that the UNHCR may have difficulty in securing access to the relevant information needed to assess mandate status and the tribunal may not know the basis on which the claim was accepted by the UNHCR or what evidence was in its possession when it did so.

Discussion

25. It seems to me that point B above, if accepted, destroys the central if not the only plank in the appellant's case. The UNHCR's prior recognition of the appellant as a refugee was not binding on the tribunal in 2007, as the tribunal

concluded in the 2009 determination. The UNHCR's position in respect of point B is plainly correct. It accords with the jurisprudence in the European Court of Human Rights and with domestic and academic authority. Mr Bedford was unable to show us any authority in the contrary. He relied upon the cases of Crehan v Inntrepreneur [2007] 1 AC 333 and Delimitis v Henninger Brau [1992] 5 CMLR 210. Those decisions are concerned with avoiding conflict between decisions of the European Commission and domestic courts where both have concurrent jurisdiction in a particular field. For that reason those decisions are plainly distinguishable. The relationship between the UNHCR and individual states in the EU having to decide refugee status cannot sensibly be equated with the relationship between the European Commission and member states, where there is co-extensive jurisdiction which is shared by both the Commission and the individual member states.

26. As the tribunal said in the 2009 determination, the obligation imposed on the United Kingdom, whether the issue is considered under the Treaty or the Refugee Convention, is an obligation to cooperate either with fellow member states in the EU or with the UNHCR. It is not an obligation to be bound by the UNHCR's decisions. That conclusion disposes of both the first and the second of the appellant's arguments, and the third argument therefore also falls.

27. Although it was not raised as a ground of appeal, and indeed does not feature in the appellant's skeleton argument and supplementary skeleton argument, it is, in my judgment, appropriate to consider the apparent different between the UNHCR and the respondent in respect of point C(i): whether the Secretary of State and the tribunal must give "considerable weight" to a recognition by the UNHCR of an appellant's refugee status. I say “apparent” because on reading the parties’ written submissions it seemed to me that in reality there was likely to be very little difference between the position of the UNHCR and that of the respondent, and there was a danger that an abstract semantic discussion might divert attention from what is likely to happen in terms of practical decision-making by the Secretary of State and the tribunal. In response to our questions Ms Gray and Mr Southey confirmed that this was the case. In reality, a decision by the UNHCR as to refugee status will, given the UNHCR's particular expertise and responsibilities under the Refugee Convention, be given considerable weight by the Secretary of State and the tribunal unless in any particular case the decision taker concludes that there are cogent reasons not to do so on the facts of that individual case. It would be just as unrealistic to contend that a decision by the UNHCR as to refugee status must always be given considerable weight regardless of any indications to the contrary as it would be to contend that it could be given less than considerable weight for no good reason.

28. Both Ms Gray and Mr Southey accepted that this was a sensible way to reconcile the apparent difference between them. I should emphasise that these observations of mine are not to be treated as enactment binding either the Secretary of State or the tribunal to approach decision-making in any

particular order; they are merely intended to be a reflection of the practicalities of decision-making in this difficult and sensitive area.

29. Applying this approach to the facts of the present case. Although the tribunal in 2007 did not use the words "considerable weight", it is plain when the 2007 determination is read as a whole that the tribunal did approach this issue on the basis that there had to be, and that there were, cogent reasons why it was "unable to attach significant weight" to the decision made by UNHCR in respect of this particular appellant (see paragraphs 48 to 51 of the 2007 determination cited in para.7 above).

30. It follows that in respect of this point also there was no material error of law by the tribunal in 2007.

31. For these reasons I, for my part, would dismiss this appeal.

Lord Neuberger:

32. I agree.

Lord Justice Gross:

33. I also agree. Accordingly, the appeal will be dismissed.

Order: Appeal dismissed