IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 9th May 2002
Date Determination notified:

28.05.2002.

Before:

Mr Justice Collins (President)
Mr J Barnes
Mr C A N Edinboro

Between:

MOHAMED BERKANI

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant is a citizen of Algeria. He arrived in the United Kingdom on 25th August 1999 and claimed asylum. That application was refused on 30th November 1999. His appeal against that decision was dismissed on 17th January 2000. That was therefore the end of his asylum claim. However, the Human Rights Act came into force on 2nd October and he made a human rights application. That was refused on 13th November and on 23rd November, he alleged that if he was returned to Algeria this would constitute a breach of his human rights. That claim was rejected. He appealed and his appeal was heard by an Adjudicator, Mark Davies, on 26th July 2001. It is the appeal against that determination, which dismissed his appeal, which now comes before us.

2. Before the Adjudicator, the Appellant raised arguments based on Articles 2, 3 and 9 of the European Convention. He relied on a substantial body of evidence to show that there were considerable difficulties created in Algeria for those such as him who had converted to Christianity. We should say that there was no dispute that he had indeed so converted. In addition, he was a Berber and thus, for both reasons, would attract the hostility of the GIA. In addition to the concerns that there was state antipathy to converts such as himself, he relied upon the evidence that the GIA would target such as him and thus he would suffer possible death, and certainly treatment contrary to Article 3 and the state would not be able, or possible willing, to provide him with the necessary protection.

3. The asylum claim was, of course, and inevitably, based on much the same material. As we have said, it was rejected. The Adjudicator rejected the claims based on Articles 2, 3 and 9. He had doubts about some aspects of the Appellant's credibility and indeed he rejected some of the evidence that the Appellant had given which was intended to support the claim that he had a fear and that there was a real risk that he would be treated contrary to Article 3. The Adjudicator did not accept that there was an inability, or an unwillingness, to provide the necessary protection. What the Adjudicator decided is set out in paragraph 30 of his determination. He said that he was prepared to accept the findings made by the previous Adjudicator, but that he believed that the Appellant had not given truthful evidence and had exaggerated the position (that is the matter to which we have already referred). He went on thus:

> "Clearly from the evidence before me, the Appellant suffered no difficulties whilst he was in Algeria from any Islamic Fundamentalist group or from his cousin who he claims was in the GIA. I do not accept from the evidence before me that there are substantial grounds for believing if the Appellant is returned to Algeria that there is a real risk either that he would be killed and therefore Article 2 of the Human Rights Convention would be breached, that he would be treated in a way in breach of Article 3 or that Article 9 would be breached in that he would not be allowed to practice his Christian beliefs. In relation to Articles 2 and 3, I take into account that nothing happened to the Appellant for a considerable period of time whilst he was in Algeria because he practiced Christian beliefs. If an Islamic Fundamentalist group wished to kill him or treat him in a manner which would be in breach of Article 3 of the European Convention on Human Rights they had plenty of opportunity to do so. If his cousin was a member of the GIA and wished to cause harm to the Appellant because of his Christian beliefs, he had plenty of opportunity to do so. It is significant (if the Appellant's evidence is to be believed) that the Appellant did not suffer any difficulties from his cousin even though his cousin moved back to the Appellant's area in 1995."

4. The grounds of appeal did not challenge the Adjudicator's findings in relation to Articles 2 and 3. They sought to raise the argument that Article 9 would be breached and that the Adjudicator's conclusion that it would not was erroneous. The Tribunal granted leave to appeal, but on the basis that this was a matter which needed to be considered in the terms of paragraph 18(7)(b) of the Procedure Rules 2000. That is to say, not on the basis that there was any real prospect of success necessarily, but that there was another compelling reason why it was desirable that the matter should be considered.

5. Mr Jorro, who has helpfully put before us a skeleton argument and has said everything that could be said in support of this appeal, has recognised, inevitably, the difficulty that he faces as a result of the findings of the first Adjudicator that the asylum claim failed, and of the second Adjudicator that there was no breach of Articles 2 or 3. As we say, there has been no appeal against those findings.

6. Article 9 is the Article which deals with freedom of thought, conscience and religion. It has two parts to it. Paragraph 1 reads:

> "Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom either alone or in community with others and in public or private to manifest his religion or belief in worship, teaching, practice and observance."

Paragraph 2:

> "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

7. The first argument deployed by Mr Jorro is based on the first part of Article 9(1). He submits that the right to freedom of religion is a right which is not derogable. It is only the manifestation that can be breached provided that breach is proportionate within the terms of Article 9(2). Thus, the right to freedom of religion is, submits Mr Jorro, an absolute right. That may well be so but, in our judgement, it does not get the Appellant anywhere. It is clear that there is no bar to the private belief that the Appellant may have, or indeed that anyone may have, in Algeria. A Christian is entitled to be a Christian. The problem may arise, if it does at all, in relation to manifestation and we would have thought that that was the position in any situation where a breach of Article 9 is in issue. Anyone can think what he or she likes. If he or she does not say or do anything to manifest that belief, then there is no reason why anyone should do anything adverse to him or her. It is only if there is a manifestation that problems can arise, and that is recognised by Article 9. We suppose that if a signatory to the European Convention passed a law which in terms prohibited freedom of religion, that would manifestly be a breach of Article 9, but that situation is not the situation which we face here.

8. We are concerned with the obligations of the United Kingdom, not the obligations of Algeria and it must be borne in mind that it is no part of the purpose behind the European Convention that it should seek to impose its requirements upon the whole of the world. We note that that was referred to in terms by the Tribunal in the starred decision of Devaseelan which was decided on 13th March this year. That was a case which concerned the application of Articles 5 and 6, but the principle is applicable also to Article 9. In paragraph 110 of that determination, the Tribunal said this:

> "It is clear that the court does not attempt to impose the duties of the Convention on states that are not party to it. It is also clear that the fact that a person may be treated in a manner that would in a signatory state be a breach of the Convention, does not,

> in itself, render his expulsion to another country unlawful, unless either the breach will be of Article 3 or the consequences of return will be so extreme a breach of another Article that the returning state, as one of its obligations under the Convention, is obliged to have regard to them."

That, in our judgement, is of general application when considering Articles other than Articles 2 or 3 or indeed any Article that is truly absolute. Another example, perhaps, might be Article 4. The need to maintain an immigration control and the right of a state to maintain such control is, and has been, recognised by the European Court of Human Rights in a number of cases. Provided that the operation of such control is proportionate to any breach of an Article that might be occasioned by such control, that is to say any breach of an Article which is not absolute, has equally been recognised.

9. The problem, as we see it, that Mr Jorro faces is that, if there is any sanction against the manifestation of religion, that sanction will inevitably result in something unpleasant happening to the individual who seeks to exercise his freedom of religion. That something will, if the state imposes it, be a form of detention or a form of penalty. In circumstances such as are relied on here, it will be treatment by the GIA or by those who believe that it is wrong for a Muslim to convert to Christianity which also will amount to something thoroughly unpleasant happening to the individual in question.

10. Once, as here, persecution or ill-treatment contrary to Article 3 has been negated, it is in our view, difficult, if not impossible, to envisage circumstances where the immigration control would be disproportionate. There may be difficulties, there may be a degree of hardship in manifesting the beliefs, but there would not be any prevention of that manifestation, or at least no prevention which would be effective because, unless there is some sanction such as penalty or detention or ill-treatment, there can be no effective sanction against the manifestation of that belief. In those circumstances it is, as we say, in our judgement, almost impossible to see that there could be breach of Article 9 unless there was persecution or Article 3 ill-treatment.

11. That is entirely consistent with what the Tribunal said in Kacaj. That case recognised that, in theory at least, there was the possibility of relying on the breach of any of the Articles of the European Convention, but that that possibility is in relation to an Article such as Article 9 more theoretical than real. That was recognised by the Tribunal in Kacaj in relation to treatment which was said to contravene Article 8 where such treatment would occur when the individual was removed. Of course, Article 8 has a further and different application where there may be a breach, for example, of family life by the fact of removing the individual from this country. He may have a wife, a child, or whatever in this country, but where it is alleged that the treatment will occur in the country to which he is removed, it is difficult to envisage a case where Article 8 would be breached absent, persecution or Article 3 ill-treatment because, as we say, the need to control immigration would make the removal proportionate.

12. We are reluctant, in this jurisdiction, to use the word *never* because one finds, sometimes, that there is a case which, on its peculiar facts, shows that that word should not have been used but, although, as we say, we do not use that word, this case comes as close as one could imagine to that situation.

13. In those circumstances, this appeal must be dismissed.

Mr Justice Collins
President