Case No: C1/2002/1741 PTA

Neutral Citation Number: [2003] EWCA Civ 265
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th March 2003

Before :

LORD JUSTICE SCHIEMANN
LORD JUSTICE RIX
and
LORD JUSTICE KEENE

- -

Between :

Nasreldin Mohammed Adam	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Melanie Plummer (instructed by **Browell Smith & Co Solicitors**) for the Appellant
Jenni Richards (instructed by **the Treasury Solicitor**) for the Respondent

Hearing dates : 13 February 2003

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Schiemann :

1. Before the Court was a renewed application for permission to appeal a determination of the Immigration Appeal Tribunal [2002] UKIAT 02099. We granted permission and heard the appeal straight away.

2. The background of the issue before us appears from the determination. The IAT said this:

> "1.The Appellant, who is a citizen of Sudan, was given leave on 10 January 2002 to appeal against the determination promulgated on 11 December 2001 of an Adjudicator, Miss J E Perrett, dismissing his appeal against the refusal of the Respondent to grant asylum.
>
> 3. The Appellant entered the country clandestinely and claimed asylum on 5 January 2001. The basis of his claim was that he did not want to serve in the army because he would be sent to the south of his country to fight against Christians. He was summoned to report for initial training with the Popular Defence Force in July 1998 but left Sudan in April 1999 and went to Syria. He left Syria at the end of 2000 and travelled overland to the United Kingdom. The Respondent dismissed the Appellant's claim on the basis that, in practice, army deserters and military service draft evaders are re-drafted into the army and the Appellant would not be at risk on return of persecution."

3. The adjudicator dismissed the appeal. The IAT decided that the adjudicator had failed to address the task before her correctly but that it was possible for the IAT itself to deal with the matter. No complaint is made as to that decision.

4. The IAT had before it both a claim to asylum pursuant to the Geneva Convention and also a claim under section 65 of the Immigration and Asylum Act 1999 suggesting a breach of Article 3 of the Human Rights Convention should the appellant be returned to Khartoum.

5. The IAT dealt first with the claim under the Refugee Convention and dismissed it. Miss Plimmer who appeared for the appellant before us concentrated on the claim under the Human Rights Convention. As will shortly appear, we are persuaded that the appeal should succeed on that ground. It was agreed before us that if the court should take that view then the whole matter should be remitted to the IAT. That being so, I spend no further time considering the claim under the Refugee Convention.

6. Having dealt with the claim under that Convention the IAT continued:

> "12. We now turn to the question of whether there is a real risk of breach of Article 3 of the Convention if he were to be removed. This requires us to consider whether there is a real risk that this Appellant will be apprehended on his return, be imprisoned in Sudan and subject to inhuman and degrading treatment."

7. It is common ground that the IAT thus correctly posed the question which it had to answer. The complaint of the appellant is that in coming to an answer the IAT failed to take into account relevant material which was before it, in particular the Sudan Country Assessment (October 2001) produced by the Home Office. In assessing the strength of the appellant's submissions it is important to bear in mind his assertion which was not challenged that he was from the Nuba region of Sudan. This is because there is some evidence that the Nuba people are treated oppressively in Sudan.

8. It is convenient to start by setting out the relevant parts of the IAT determination and then the parts of the Sudan Country Assessment upon which reliance is placed by the appellant.

9. The IAT said this:

> "13. As regards the risk of apprehension, we conclude that the evidence is not such as to show a real risk. There is a dearth of evidence on this subject. [The Appellant] has not been able to show us any evidence of the extent to which administrative procedures and records may be available at points of entry in the Sudan to enable the authorities to identify the Appellant on his return as a person who has failed to answer his call-up. She submitted, however, that Khartoum is a sophisticated capital and it was likely that such security checks would exist. We do not accept this submission. We cannot make such an assumption in the absence of any supporting evidence to indicate the nature of extent of security measures in place in Khartoum airport. We are unable to conclude that there is a real risk that the security measures in place in Khartoum Airport are such as to pose a real risk to the Appellant of being identified as a person who has not answered his call-up papers over three years ago.
>
> 14. However, even if the Appellant were to be detected as a draft evader on his return to Sudan, the evidence to which we have referred above with regard to the consequences for those who fail to report for military service after receiving their call-up papers, indicates to us that a comparatively lenient approach is taken to those who have not answered their call-up papers. Failure to report in this way does not result, at least in the first

> instance, in arrest and detention. Deserters from the army, on being arrested, will usually be re-conscripted into the armed forces. This suggests to us that, even for the offences of desertion, the authorities are more interested in getting the deserter into the army than imprisoning him. Additionally, evasion of military service is not uncommon, and at paragraph 5.74 it is stated it is possible to buy one's way out of military service.
>
> 16. …, even if the Appellant were to be identified on his return as a person who failed to answer his call-up papers, and were to find himself in the position of refusing to serve in the military, there is no evidence to show that the prescribed penalty of a fine and imprisonment is nowadays imposed upon persons in his position, or, if so, what level of fine and term of imprisonment are normally imposed. Evidence that a particular punishment is prescribed be law should be accompanied by evidence to show that there is a real risk that such penalty would be imposed upon the particular appellant. There is no such evidence in this appeal. In the light of this, the limited evidence that prison conditions in Sudan are harsh and overcrowded, and that a penalty of a fine and imprisonment of up to three years for refusal to do military service is prescribed, do [*sic*] not, in our view, constitute substantial grounds for believing that there is a real risk that this Appellant will suffer torture or inhuman or degrading treatment or punishment on his return. An appellant must show a real risk of breach of his Article 3 rights, not a theoretical one. This Appellant has not done so.
>
> 17. The Appellant might be questioned at Khartoum Airport, not as a draft evader but as a person who has been away from the country for some time, under the Decree we have already referred to. But as we have already set out above, there is insufficient evidence about what might happen thereafter."

10. The relevant parts of the Sudan Country Assessment are as follows:

> "4.11 In addition to the regular police and the armed forces, the government maintains an external security force, an internal security force … . The security forces enjoy immunity from prosecution and are free to act independently and do not need court orders or judicial authorisation to detain, arrest or question Sudanese citizens.
>
> 5.13 The Nuba Mountains are not in the war zone in the south where most of the civil war fighting is taking place but some Nuba people have joined the SPLA and have fought against government forces. The Government suspects that many Nuba people support the SPLA or have sympathies with the SPLA

even though they may not be SPLA members as the SPLA have been operating in the Nuba mountains. The Government, therefore, views the Nuba people as legitimate military targets. There have been recent reports of government forces attacking the Nuba people who live in the Nuba Mountains. Attacks by government forces on the Nuba people in 2001 include bombings of civilians and the burning down of villages and food stores. Government forces have also laid down landmines. As a result of government military offensives, the Nuba people have suffered from death and serious injury, food shortages, homelessness and internal displacement.

Prison Conditions

5.25 Conditions in government prisons are harsh, overcrowded and life-threatening. Built before the country's independence in 1956, most Sudanese prisons are poorly maintained and many lack basic facilities such as toilets or showers. Health care is primitive and food inadequate. …

5.26 The west wing of Khartoum's main Kober Prison remains under the supervision of the security services, having been removed from the Prison Services' control in 1995. While other prison wardens are accountable to courts of law for abuses they perpetrate, security forces are not. Despite the widespread use of torture, the Government has never publicly disciplined any security official for employing it. Treatment in the areas of Kober that remain under the control of the prison services was reportedly better than the area under the control of the security services.

Freedom of Travel

5.52 It is reportedly possible for army deserters and military draft evaders and men of conscription age to leave Sudan via official points of departure by obtaining passports and exit visas by bribing officials.

Arbitrary Arrest and Detention

5.56 … in practice arbitrary arrest and detention by the security forces is common in Sudan.

5.62 Persons arrested by security forces are often held for long periods of time in unknown locations without access to their lawyers or family members. …

5.63 … in practice the security forces torture and beat suspected opponents of the Government such as student leaders, lawyers and others. … There have been reports that security forces torture persons in "ghost houses". These are

> places where security forces detain government opponents incommunicado under harsh conditions for an indeterminate time with no supervision by the courts or other independent authorities with powers to release the detainees. …
>
> 5.64 Security forces beat and otherwise abuse youths and student leaders and others whom [*sic*] were deemed to be opponents of the Government. …
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> Freedom of Political Association & Assembly
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> 5.68 The law governing military service … makes national service compulsory for all males aged between 18 and 33. … Men who have completed their military service receive a certificate stating that their national service has been completed and are exempt from future national service Call-ups.
>
> 5.69 There is general conscription into the regular army and the Popular Defence Force. The Popular Defence Force (PDF) was created in 1990 and has its legal basis in the Popular Defence Forces Act 1989. The PDF is a militia force attached to the regular army. … The period served in the PDF is 45 days and national service in the regular army last for 2 years. … The penalty for refusing to perform military service is a fine and up to three years imprisonment. It is reportedly difficult to evade military service and a deserter from the army or PDF on being arrested by the authorities will usually be re-conscripted into the armed forces."

11. Miss Plimmer submits that the finding of the IAT in the last sentence of paragraph 13 of their determination that there was no real risk that the appellant would be identified at the airport as a person who has not answered his call up papers cannot be supported. He is of the appropriate age. He would have come from abroad. He would be asked for the certificate referred to in paragraph 5.68 of the Country Report and would not have it. This would lead to questioning possibly about the sort of bribery referred to in paragraph 5.52. There must be a real risk that the failure to do military service would be discovered. I agree.

12. Miss Plimmer submits that the approach of the IAT in paragraph 16 of their determination is not supportable. The Country Assessment states in paragraph 5.69 that "the penalty for refusing to perform military service is a fine and up to three years imprisonment…". This document was produced by the Home Office and placed before the adjudicator by their representative. In those circumstances to place a burden on the appellant to show that there is a real risk that this penalty would be imposed on him is unfair. I agree. It may well be that circumstances can arise when a law is shown to be never enforced in which case there would be no real risk to a citizen that he would be imprisoned pursuant to it. But, for my part, I do not consider that it was open to the IAT to conclude from the evidence before it that the present was such a case.

13. The appellant, relying largely on Home Office evidence, showed that:

    i) he was a member of a community suspected of supporting the opposition and regarded by the Government as legitimate targets for life threatening activities;

    ii) there was a real risk that he would be discovered as having evaded military service;

    iii) the penalty for refusing to perform military service is a fine and up to three years imprisonment;

    iv) arbitrary as well as justified arrest and detention by security forces was common;

    v) in practice the security forces torture and beat suspected opponents of the government;

    vi) conditions in prisons are life-threatening.

14. In the light of the Country Assessment it seems to me that the evidential burden passed to the Home Office. If it was going to be part of the Home Office case that there is no real risk that the penalties prescribed by law would be exacted then they should have produced the relevant evidence in advance so that the appellant might know what case he had to meet. The statement in paragraph 5.69 of the Assessment that a deserter will usually be re-conscripted does not meet the point – particularly when the appellant is a member of a persecuted minority and might thus be expected to be a candidate for the unusual. To expect him to do more than point to the law is in my judgment unfair and unrealistic – c.f. *Modinos v Republic of Cyprus* E.Ct H.R. 22/04/1993 16 EHRR 485.

15. Miss Richards for the Home Secretary resisted the appeal submitting that in substance this was an attempt to reargue assessments of fact which the IAT was peculiarly well placed to make. She was inclined to concede that the IAT might well have fallen into error in coming to the conclusion that there was no real risk that the Appellant would be identified at Khartoum airport. But she submitted that the IAT had applied a whole series of tests and the appellant had failed each one.

Conclusion

16. Although on paper I initially refused permission to appeal I have changed my mind. As I have indicated, in my judgment the IAT was not entitled to come to the conclusion from the material before it that the appellant would not be identified at the airport. Nor were they entitled on that material to come to the conclusion that there

was no real risk that he would be imprisoned. Nor do they show any sign of having appreciated that this black Nuban might be at greater risk of inhuman treatment than the normal Arab army deserter who was returned to the Sudan.

17. Miss Plimmer placed before us the report of an expert as to conditions in the Sudan and wished us to pay regard to it. It will be the rarest of cases when this court will admit evidence which could perfectly well have been produced before the Tribunal. In the present case, for the reasons I have given, if my Lords agree, there is no need to look at this evidence. I would decline to give leave to adduce it.

18. Miss Plimmer urged us in those circumstances to declare that if the appellant were now to be sent back to the Sudan the Home Secretary would be infringing the appellant's Article 3 rights. In my judgment we have not enough material to enable us to do that. The proper course is to allow the appeal, set aside the decision of the IAT and send the case back to a different constitution of the IAT to consider the matter in the light of the evidence then before it.

Lord Justice Rix :

19. I agree.

Lord Justice Keene :

20. I also agree.