Appeal No: HX/ 37593-2001
[2002] UKIAT 01376
Starred

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 19 March 2002
Date Determination notified: 2 May 2002

Before:

The President, The Hon. Mr Justice Collins
Mr. C. M. G. Ockelton
Dr. H. H. Storey

Secretary of State for the Home Department
APPELLANT

And

Majid BEHRI CHAWISH
RESPONDENT

For the Appellant: Miss P. McMonagle, HOPO
For the Respondent: Mr. Ferrell, Solicitor

DETERMINATION AND REASONS

1. The respondent is an ethnic Kurd from the Kurdish Autonomous Area (KAA) in North Iraq. He apparently arrived in the United Kingdom on 17 February 2001 and claimed asylum. His claim was refused on 15 May 2001 and removal directions were set since he was an illegal entrant. The usual undertaking was given that no removal would take place until a safe means of getting the respondent to the KAA could be found. It was not safe to remove him to any part of Iraq over which Saddam Hussain exercised control.

2. He appealed to an adjudicator on the grounds that to remove him would be contrary to the Refugee Convention and would breach Article 3 of the European Convention on Human Rights. His claim to fear persecution was based on the issue of a fatwah against him for having taught children that men and women were equal. The adjudicator (Mr. F. Pieri) did not believe him. We need not go into any detail or consider his reasons since there is no appeal against those findings. Suffice it to say that the adjudicator's conclusions are clearly in accordance with the evidence and they could not be successfully attacked. Mr. Ferrell did not attempt to do so. It followed that the respondent failed to establish that there was a real risk that he would be persecuted or treated so as to breach his human rights on return to the KAA.

3. Despite this, the adjudicator allowed the respondent's appeal on the ground that his treatment in the United Kingdom which would result from a dismissal of his appeal would be such as to establish a real risk of a breach of Article 3 of the European Convention on Human Rights. In Paragraph 32 of his determination, the adjudicator said:-

> "The [respondent] has satisfied me that there is at least a real risk that the decision to issue removal directions which are not in the meantime to be enforced will result in his enduring treatment contrary to Article 3 of the Human Rights Convention".

4. This remarkable conclusion has been reached by other adjudicators and the argument is regularly raised. We have therefore decided to 'star' this decision so that the argument can be put to rest.

5. There were two claims in the appeal to the adjudicator. First, the respondent was asserting that his removal in pursuance of the directions would be contrary to the Refugee Convention: see s.69(5) of the 1999 Act. Secondly, he was raising a claim under s.65(1) of the 1999 Act which, so far as material, reads:-

> "A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to … remain in the United Kingdom … acted in breach of his human rights may appeal to an adjudicator against that decision …"

6. We have referred to two claims following the approach of the Court of Appeal in *Zenovics v Secretary of State for the Home Department*. The first claim has been rejected and, as we have said, there is no appeal to us against that. The adjudicator was persuaded that the second succeeded.

7. The adjudicator decided that the wording of s.65(1) was wide enough to cover the consequences within the United Kingdom to an appellant of a decision to remove him from the United Kingdom. This meant in his view that if the removal was to be deferred the situation in the meantime while removal could not take place was within s.65. If a real risk of a breach of art 3, or of any Article was established, that would mean that the appeal against the decision to remove would have to be allowed.

8. The decision in question is that the respondent should be removed. That is in the circumstances of this case the decision referred to in s.65(1). Indeed, the whole basis of immigration control rests on leave to enter or remain and the corollary that if leave is not granted removal will follow. The existence of any status appeal in terms of the Refugee Convention, which may be in issue under s.69(3) but, despite the Court of Appeal decision in *Saad v Secretary of State for the Home Department*, is difficult to apply to the other subsections, does not affect this point. If a person is a refugee he cannot be refouled; thus, if he is to be removed, it is necessary first to decide whether he is a refugee. This does not stop removal being the decision which is in issue for the purposes of s.65(1).

9. In those circumstances, it is somewhat strange to find it being said that removal would not constitute a breach of human rights but non-removal would. We are satisfied that s.65 was not intended and is not apt to enable the consequence of an inability to remove for a time to be considered by an adjudicator. There is a present inability to remove to the KAA. Furthermore, in many other cases it will be likely that no immediate removal will occur. If the adjudicator's approach is correct, in virtually all cases the point could be raised.

10. Having said that, we recognise that we have also to have regard to s.6 of the Human Rights Act 1998, since the adjudicator and we are both public authorities within the meaning of that Section: see s.6(3)(a). But our decision cannot itself be incompatible with a person's human rights. S.6 involves a direct breach of a human right by the decision maker. Merely to decide that an appeal under s.65 does not succeed because the Secretary of State's decision to refuse leave to remain and to direct removal cannot be incompatible with any human right of the appellant in question (once, of course, any breach falling within the scope of s.65 is negatived) does not itself breach any of the appellant's human rights.

11. However, all this may be somewhat academic because, even if we are entitled to consider the matter in the way the adjudicator suggests we should, there is no basis for deciding that to dismiss the appeal notwithstanding that removal will be deferred will result in a real risk of treatment contrary to any Article of the European Convention on Human Rights, let alone Article 3. The adjudicator was persuaded to decide as he did because dismissal of the appeal would mean that the respondent was no longer to be regarded as an 'asylum seeker' within the meaning of Part VI of the 1999 Act: see s.94(1) and (4). The consequence of that would be that he was not entitled to support under that Part.

12. In Paragraph 29 the adjudicator paints a picture of what would in his view happen to the respondent. We should set it out in full since it explains why the adjudicator reached his conclusion. He says:-

> "It appeared to me to be accepted that the [respondent] would not be allowed to work while waiting to be removed. At best therefore he would be resigned to living in bed and breakfast accommodation for an indefinite period with nothing other than his board being paid for. Unless he were to beg he would have no money to do anything. He would have no money to buy a change of clothing. He could not stop for a coffee when out for a walk. He would have to travel everywhere on foot. He would not even have the money for a book or a newspaper. There would be total uncertainty as to how long this state of affairs would continue. There seems to me to be a real danger that he would consider his dignity to be diminished. In my judgment these circumstances amount to treatment contrary to Article 3 of the Human Rights Convention. Matters would be quite different if the appellant were to be allowed to look for work. As I understand it however that option would not be open to him".

13. In the previous paragraph, he referred to the so-called 'Hard Case Criteria' issued by the appellant which recognise that those whose claims have been determined so that they are not

covered by Part VI of the 1999 Act may need to be provided with assistance because through no fault of their own they cannot for the time being be removed. The existence of a discretion led the adjudicator to conclude that the criteria offered little comfort and did not exclude the reality of the risk. But that was to look at the problem the wrong way round. It is incorrect to suggest that any of the difficulties imagined by the adjudicator would arise from the appellant's failure to remove the respondent. Such difficulties could only arise if the appellant, faced with the respondent's continued presence in this country, decided to act in a way that breached the respondent's human rights. Not only is there no evidence that the appellant proposes to act in such a way but the 'Hard Case Criteria' suggest the contrary.

14. What the adjudicator appears to have overlooked is that the Human Rights Act 1998 incorporates articles of the European Convention on Human Rights into the law of this country. It would therefore be unlawful for the appellant to act in such a way as breached the respondent's human rights or indeed those of anyone seeking to enter or to remain in the United Kingdom. If he did act in such a way, a legal challenge could be brought and the decision would be overturned. The law would not tolerate anyone being left destitute, as a number of decisions of the Court of Appeal have made clear: see for example *R v Secretary of State ex p. JCWI65* [1996]y 4 All ER 385. And it is pertinent to cite the observations of Lord Ellenborough CJ made as long ago as 1803 in *R v Eastbourne (Inhabitants)(1803) 4 East 103 at 107:-*

> "As to there being no obligation for maintaining poor fugitives before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief to save them from starving .."

The law of human rights is no less powerful.

15. It follows in our judgment that there can be no real risk that there will be any breach of the respondent's human rights if he has to remain in this country following the dismissal of his appeal. The picture painted by the adjudicator owes more to fancy than to reality.

16. This appeal must accordingly be allowed. We express the hope that the argument which appealed to this adjudicator will never again be raised. If it is, it should be rejected.

Sir Andrew Collins
President