BE (Military service – Punishment – Landmines) Iran [2004] UKIAT 00183

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 26 February 2004

Date Determination notified:

8 July 2004

Before:

Dr H H Storey (Vice President)
Mr M W Rapinet
His Honour Judge N Huskinson

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
Miss S. Naik of Counsel, instructed by Newcastle Law Centre for the appellant;
Mr S. Halliday for the respondent.

DETERMINATION AND REASONS

1. This case is reported for the analysis it contains of the question of whether and in what circumstances punishment of a soldier for refusing to plant anti-personnel landmines gives rise to a real risk of persecution.

2. The appellant is a national of Iran. He appeals against a determination of an Adjudicator, David A.W.H. Chandler, refusing to grant leave to enter on asylum grounds.

3. The Adjudicator accepted that the appellant had given a credible account. In 1998 the appellant did his military service. After two years he joined the regular army, becoming a sergeant. His training was in the laying and removing of land mines. In September 1998 he was sent to Iranian Kurdistan based in Paveh and Baneh where he spent two weeks. He was ordered to plant landmines but he refused because he did not want to kill innocent people in Kurdistan. He escaped. After six months he was arrested and tried by a military tribunal. He was sentenced to three months imprisonment and demoted. In June 1999 he was sent back to Kurdistan as a driver. In September 1999 a colleague was killed by the army for refusing to plant landmines. A week later he was ordered to plant landmines again. After discussion with a friend he saw his choice as being either to plant landmines as ordered or to desert. Since he believed that to plant landmines would endanger civilians, he deserted. First he went into hiding and then came to the UK via Turkey.

4. The Adjudicator did not consider that the appellant's punishment of imprisonment for three months following the sentence of a military tribunal was persecutory. He pointed out that the appellant was a serving soldier and must have been aware of the possible consequences of his action. In relation to the appellant's desertion in June 1998, however, he did accept that he "understandably was very frightened of the consequences". He then wrote:

> "I accept he still has a well-founded fear of such consequences should he be returned to Iran. But that is not the end of the matter. The fear has to be persecution for a Convention reason."

5. He then went on to find, by reference to the Court of Appeal judgment in Sepet and Bulbul that the appellant could not show a Refugee Convention reason, whether of political opinion or any other. He concluded:

> "Having decided this I do not regard it as necessary to consider whether or not his fear is of persecution. A very similar issue arises in his human rights appeal and I will deal with it there."

6. When he turned to consider the human grounds of appeal, he accepted that as a deserter the appellant might well face a stiffer sentence than for his first offence when he went absent without leave. He did not accept, however, that either the length of the sentence or the conditions he would face in prison would cross the Article 3 threshold.

7. The Adjudicator also considered, in the light of Article 6, that whilst the trial the appellant could face before a military tribunal might be wanting in some respects, in particular he might not be afforded legal representation, it would not amount to a "flagrant denial" of a fair trial. He also rejected submissions based on Article 9.

8. Miss Naik conceded that in the light of the Court of Appeal judgment in Ullah [2003] Imm AR 304 any issues arising under Articles 6 and 9 only retained force insofar as they had a bearing on whether the appellant was at risk on return of treatment contrary to Article 3.

9. With this proviso, Miss Naik contended that the Adjudicator had erred in his assessment under both the Refugee and Human Rights Convention. She did not contend that upon return the appellant would once again be ordered to plant landmines in the same area of Iran or in the same circumstances. Given that the last incident occurred over five years ago, we think she was right not to maintain such an unduly speculative contention. She did, however, maintain that the Adjudicator should have accepted that the *sentencing and punishment* the appellant would face would be disproportionate, by virtue of the fact that his offence was one of refusal to obey orders which were illegal as a matter of international law. The illegality of the order would also, she submitted give rise to a Refugee Convention reason of imputed political opinion.

10. Miss Naik also submitted that since on the occasion of the appellant's previous detention in a military prison, he had been kept for a period of three months in solitary confinement, it was reasonably likely he would again face oppressive prison conditions. In assessing the length of his detention one had also to factor in likely sentence for his illegal exit from Iran. Also relevant was the fact that he had previously been held in Evin prison, which was notorious for ill-treatment of its inmates.

11. Mr Halliday urged the Tribunal to uphold the Adjudicator's determination. The appellant was a deserter. He had joined the regular army and must have known that his training as a landmines specialist would lead to him being asked to lay them in areas Iran wished to keep safe from illegal intrusions into its own territory. He had not explored or taken the option open to him earlier to buy himself out. He had made no real complaint against his detention on the first occasion and there was no reason to expect he would face any more arduous custodial treatment in the future. The Adjudicator did not find that the appellant's friend had been killed, only that he subjectively believed he had been killed.

Our Conclusions

12. We do not consider the Adjudicator erred in his treatment of the likely conditions the appellant would face in detention. Whilst prison conditions in Iran are poor, the Tribunal has not considered that they cross the threshold of serious harm: see Fazilat [2002] UKIAT 00973. Following the judgment of the Court of Appeal in Harari [2003] EWCA Civ 807 and Batayav [2003] EWCA Civ 1489, it is clear that in order to show prison conditions would give rise to a real risk of serious harm, it is necessary to show a consistent pattern of gross, flagrant or mass violations of the human rights of prisoners. In our view the objective country materials relating to Iran did not (and do not) establish such a pattern.

13. Furthermore, even assuming the appellant would be reasonably likely to once again face some period of solitary confinement, we do not understand solitary confinement per se to be contrary to Art 3, although depending on its extent and the conditions under which it occurs it may be: see the European Court of Human Rights judgment in GB v Bulgaria Appcln. No. 00042346/98, judgment 11 March 2004, paras 84-87. Also relevant in our view is that despite previously experiencing solitary confinement and doing so in Evin prison, the appellant on his own account had been fed and he did not state that he found the conditions inhuman or degrading. Certainly Evin prison has a record where torture and ill-treatment of inmates happens to a significant extent; but as the appellant's own experiences demonstrate, such treatment is not necessarily routine in respect of all prisoners, and his offence was one of desertion, not of being active in political organisations bent on subversion.

14. In relation to the likely period of imprisonment, Miss Naik was not able to identity any evidence to suggest that the length of sentence would in itself be disproportionate as a penalty for desertion.

15. Did the Adjudicator err nevertheless in his treatment of the military tribunal process of punishment which would precede the appellant's incarceration? He stated (when dealing with the Article 9 issue), that: "So far I have avoided having to make a decision on the correctness of the appellant's behaviour and will continue to do so." He decided, that is to say, not to evaluate the rights and wrongs of the conduct which was likely to lead to punishment under Iranian law.

16. In our view the Adjudicator was wrong to think he could avoid evaluation of the appellant's military misconduct entirely. The issue he had to decide was not, as he thought, solely one of "morality". Nor was it simply one of national law. It was also one of international law. The Adjudicator did not have the benefit of the House of Lords judgment

in Sepet and Bulbul [2003] 1 WLR 856; but he did have the earlier judgment of the Court of Appeal in this case [2000] ImmAR 445, which had made clear that although conscientious objection, partial or absolute, could not ground a claim to persecution, there remained three exceptions which could. These related to abusive conditions of military service, disproportionate punishment and participation in military actions contrary to the basic laws of human conduct. These exceptions - particularly the last-mentioned - have been analysed further in the Tribunal case of B (Russia) [2003] UKIAT 00020 and in the Court of Appeal judgment in Krotov [2004] EWCA Civ 69 which approved B. In Krotov the Court of Appeal stated:

> 'If a court or tribunal was satisfied:
>
> (a) that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, had reached a position where combatants were or might be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community'
>
> (b) that they would be punished for refusing to do so and
>
> (c) that disapproval of such methods and fear of such punishment was the genuine reason motivating the refusal of an asylum seeker to serve in the relevant conflict,
>
> then it should find that a Convention ground had been established.'

17. How do the principles clarified in these cases apply to the appellant's case?

18. Before we can answer this question it is necessary to establish whether the orders whose refusal in the form of desertion would lead to the appellant's actual or likely punishment were contrary to international law.

19. The Adjudicator found that the appellant had been ordered on two separate occasions to plant landmines in an area which he believed would put civilians in peril. Mr Halliday sought at one point to argue that the Adjudicator`s finding that the appellant believed he was being required to plant landmines in an area where civilians lived did not

equate to an acceptance that this was *objectively* the case. His argument is lent some support by the fact that at paragraph 22 the Adjudicator sought to limit his finding in respect to the appellant's claim that his colleague had been shot for refusing to plant landmines to the fact that this was only what the appellant believed. It is also lent some support by the lack of any specific objective evidence to show that at this particular time the Iranian authorities had planted anti-personnel land mines in this region with the deliberate intent of harming civilians or being reckless of harming them. Indeed we note that the Iran Landmine Monitor Report 2003 produced under the auspices of the UN Development Programme pursuant to an agreement with Iran in July 2002 to help develop a mine action strategy and provide training in various aspects of mine action, makes reference to a Ministry of Foreign Affairs official writing that the territories where landmines were used were "uninhabited territories …clearly known to the non-military populace, and those who take the risk of entering the minefields are none but the military personnel".

20. However, the Adjudicator did not seek to qualify his findings in the way Mr Halliday has suggested. At para 23 he made reference to the appellant having a "well-founded fear" of the consequences of disobeying the order given to him. It is also relevant in our view that the Adjudicator accepted that the appellant was trained to lay and remove landmines: it was not a case, therefore, of a soldier who refused to plant landmines per se. We also note that at paragraph 18 the Adjudicator said the appellant was "in a better position than I" to determine this matter.

21. Accordingly we consider that we can treat the Adjudicator`s finding of fact as being that the appellant had been ordered to plant landmines and had refused because he genuinely believed it might lead to the death of innocent civilians

22. Whether the Adjudicator intended further to find that the appellant had valid reasons for his genuine belief that he was being ordered to endanger civilian life is more difficult to say. Given the statement cited earlier from the Iranian Ministry of Foreign Affairs official, it is clear that the Iranian authorities at least would very likely dispute that there was any intention to harm civilians or even that civilians were harmed. However, we note that the same Landmines Monitor report does record a small but significant number of civilians killed by mines, stating at one point that "according to several media reports, every year dozens of shepherds and local residents are killed or injured by mines in the border regions". Furthermore, it is clear that both as a result of the Iran-Iraq war and of ongoing efforts to combat organised international drug smuggling rings and anti-government terrorist

groups along Iran's borders, there are plainly a very high number of landmines still uncleared in Iran and over 1.8 million hectares of Iran are still infested with landmines.

23. We may summarise the objective evidence yielded by the Landmines Monitor report as follows. During the relevant period: (i) the Iranian government, whilst condemning landmines as inhumane weapons, confirmed that it has used and would go on using them to protect its borders and to combat drug smugglers and terrorists; (ii) areas it had mined included the province of Kurdistan (the area referred to by the appellant); and (iii) there have been civilian casualties in Kurdistan.

24. Given the Adjudicator's acceptance of the appellant's credibility and in the light of these background facts, we are prepared to accept that, whatever the position generally, the appellant was asked on the particular occasion in question to obey an order whose carrying out he had valid reasons for considering would result in endangering civilian life.

25. However, it remains to consider the implications for the appellant of the punishment he would receive for refusing to obey such an order. The argument relied upon in the grounds is that the consequence would be the exposure of the appellant to serious harm/persecution, since such an order was contrary to international law.

26. Miss Naik, by reference to the Court of Appeal judgment in *Krotov* and the threefold requirements set out earlier, sought to argue first of all that it was self-evident the appellant met the requirements identified as (b) and (c). We agree. The appellant stood to be punished for refusing to obey the order and his refusal was motivated by genuine reasons.

27. The only remaining issue, therefore, is whether she was right to submit that the appellant also met the requirement set out in (a) to show that the conduct the appellant would have to undertake would be contrary to international law. To be more specific the test set out in Krotov is:

> 'that the level and nature of the conflict, and the attitude of the relevant governmental authority towards it, had reached a position where combatants were or might be required on a sufficiently widespread basis to act in breach of the basic rules of human conduct generally recognised by the international community'

28. After careful consideration we are unable to agree with Miss Naik that the order which the appellant refused to obey was one that was contrary to international law.

29. In examining this issue we have to bear in mind, of course, that international law comprises not just international treaty law but customary international law: see Roberts and Guelff, Documents on the Laws of War, 3RD Ed, 2000 p. 7ff. Also salient in identifying the global scale of the problem posed by landmines is what is said in this text at p.655:

> "In a report based on US and UN sources, Anti-personnel Landmines: Friend or Foe – A Study of the Military Use of Anti-personnel Mines, published by the ICRC in March 1996, it was estimated that there were about 100 million land-mines scattered throughout sixty-four countries, killing about thirty people a day and injuring over thirty-five, many of the casualties being civilians".

30. As regards the relevant international treaty law, there are two specific international instruments of recent origin which proscribe the planting of landmines so as to endanger civilian life, in particular: Protocol 2 (on Prohibitions or Restrictions on the use of Mines, Booby or Other Devices, in force since December 1998) of the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; and the 1997 Ottawa Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (in force since 1 March 1999): this is known as the Mine Ban Treaty. Unlike the principles set out in Protocol 2 of the 1980 Convention, which are not applicable in non-international armed conflicts, the 1997 Ottawa Convention or Mine Ban Treaty prohibitions apply in peacetime as well as in situations of armed conflict. Art 1 of the 1997 Convention prohibits the use "under any circumstances" of anti-personnel mines.

31. There is also Common Article 3 under the four 1949 Geneva Conventions. The most relevant of these is Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (IV). It states at Article 3:

> 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict

shall be bound to apply as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliation and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties in the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

32. As regards common Article 3, it is possible to say that this is now accepted to be a peremptory norm under customary international law: see the judgment of the International Criminal Tribunal in the Former Yugoslavia (ICTY): Prosecutor v Tadic, Appeal on Jurisdiction, No. IT-94-1-AR-72 (Oct 2 1995); Prosecutor v Tadic, Sentencing Judgment No. IT-94-1-T (Nov 11, 1999) 39 ILM 119 (2000).

33. However, insofar as the treaties, which specifically address the use of land mines, are concerned, the evidence before us is that Iran has not signed or ratified either of the treaties concerned. Indeed, the Landmines Monitor Report 2003 states that since Iran regards landmines as a "necessary evil", it has refused to accept a total ban on landmines and it has also abstained from voting on every pro-mine ban UN General Assembly resolution since 1996. Plainly through participation in the UN Development Programme it is now playing an active role in mine clearance and mine education in some areas of Iran, but its use of landmines, particularly in border regions, is ongoing.

34. As regards Common Art 3, however, Iran has ratified the 1949 Geneva Conventions (albeit not the two Additional Protocols to the 1949 Geneva Conventions) and, in any event, as already noted Common Art 3 is now to be regarded as part of customary international law and so of binding effect even in the absence of state ratification.

35. But the difficulty remains for this appellant that Common Art 3 does not apply to every situation in which landmines are used. It depends crucially on whether there is (or was) in existence an internal armed conflict.

36. At this point we need to clarify the current international humanitarian law (IHL) classification of armed conflicts. It is not straightforward. That partly reflects a concern that the characterisations given to armed conflicts takes sufficient cognisance of variations in the way such conflicts are fought on the ground: see e.g. Avril Macdonald, "Introduction to International Humanitarian Law and the Qualification of Armed Conflicts" in P J Van Krieken (ed), Refugee Law in Context: The Exclusion Clause (The Hague, 1999). Nevertheless it can be seen that conflicts fall into five categories:

    i) traditional international armed conflicts.
    These are defined in Common Art 2 as "all cases of declared war or any other armed conflict between two or more High Contracting Parties, even if the state of war is not recognised by one of them". This provision also applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".

The Fourth Geneva Convention deals in detail with occupation and the treatment of the inhabitants.

ii) armed conflicts in the context of racist and colonial regimes and alien occupation.
Art 1(4) of the Additional Protocol I of 1977 expanded the concept of international armed conflict described in common Art 2 of the 1949 Conventions to include "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

iii) armed conflicts between a State and organised armed groups under responsible command.
Additional Protocol II applies a limited range of international standards to situations of internal confrontation that reach a certain level of intensity. However, its obvious application to civil wars is limited by the requirement that it only covers conflicts where the organised armed groups meet the criteria of responsible command, control over territory and capacity to implement the Protocol.

iv) Common Article 3 conflicts under the 1949 Conventions (see paragraph 31 below).

v) internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

This final category marks as it were the threshold below which Common Art 3 does not apply, because the level of internal violence is insufficiently high.

37. Albeit this five-fold classification is not simple, it is possible for refugee law purposes to simplify its applicable provisions in the following way. *Whenever internal armed conflict is above the internal strife threshold, it is subject to the peremptory norms set out in Common Art 3. More extensive norms may apply in the case of conflicts falling within the first three categories. But where the internal armed conflict falls below the common Article 3 threshold, its peremptory norms do not apply.*

38. We draw from this background that the appellant in this case can only succeed if he can show that when the order was given to him in

September 1999 there was in existence in that part of Iran an internal armed conflict at least meeting the (relatively low) threshold requirements of Common Article 3.

39. However, in this regard none of the background evidence has identified the existence of any such level of conflict in Iran at the relevant time. Nor was there any evidence that the ICRC had qualified the circumstances at issue as a non-international armed conflict covered by Common Art 3. In our view these lacunae are fatal to the appellant's case. We find that during the relevant period, the order given to this appellant to plant landmines was not one which was illegal either under the law of Iran or under any applicable international law. Even though we earlier criticised the Adjudicator for his attempt to avoid any evaluation of the rights and wrongs of the order given to the appellant and his response to it, we must ultimately agree with him that, whilst it was one which offended basic morality, it was not one whose refusal to obey can bring the appellant within the protection of the Refugee Convention or the Human Rights Convention by virtue of being or order contrary to international law.

40. Since the order was not contrary to national or international law, it cannot be said either that punishment imposed in view of a refusal to obey it by way of desertion would be illegitimate or disproportionate.

41. Thus the punishment concerned would not involve the infliction of serious harm either under the Refugee Convention or Art 3. Nor would it involve flagrant denial of any other protected human right.

42. One matter which exercised us during our consideration of this case was its apparent similarity with an important Canadian case, Zolfarkharghani [1993] 3 FC 540 in which it was held that an Iranian paramedic who had deserted from the army because he did not want to be part of using chemical weapons against the Kurds contrary to the Hague Convention of 1879 and 1907 and customary international law. MacGuigin J held that use of chemical weapons "is clearly judged by the international community to be contrary to basic rules of human conduct, and consequently the ordinary Iranian conscription law of general application as applied to a conflict in which Iran intended to use chemical weapons, amounts to persecution for political opinion." However, we decided that irrespective of whether this judgment was entirely consonant with leading UK cases, there was a clear and important point of distinction. The situation in the Canadian case concerned adverse consequences resulting from a refusal to engage in conduct at a time when there was an international armed conflict taking place between two separate states: Iran and Iraq. Thus it was a situation in which there was a level of armed conflict (well) above the

minimum Common Art 3 threshold. That was not the situation with which we were faced in this case.

43. We should perhaps clarify further that had we accepted that the order given to the appellant to plant landmines was contrary to international law, we may also have had to consider the position the appellant would have been faced with had he chosen to obey the order: he would not necessarily have been relieved of international criminal responsibility by the fact that he had been ordered to plant these landmines. At international law the fact that a crime has been committed by a person pursuant to an order of a superior can relieve that person of criminal responsibility, but that exemption does not apply when the person knows that the order was unlawful. The appellant in this case was adamant that he knew the order would have the consequences of killing and harming civilians and that this was unlawful. The appellant would then have been in a wholly invidious position. However, since we have found that the order was not illegal, this dimension to the case did not come into play.

44. For the sake of completeness, we should also clarify that we have not considered we should attach any importance in this case to the possible fact that in the course of the military tribunal process the appellant would face, there would be a flagrant denial of his right to a fair trial. On his own account he had deserted as a result of a refusal to carry out an order and he did not at any stage suggest that he had not done what he would be charged with.

45. We should also clarify that in assessing the proportionality of punishment we have taken into account that the appellant might well face a fine and/or a short period of imprisonment for violation of Iranian exit regulations. However, in our view this further dimension to likely punishment he would face would not render his overall punishment disproportionate.

46. One final matter concerns what we noted at paragraph 8 in respect of Art 9 of the ECHR. Since the hearing the House of Lords has now delivered judgment in Ullah, R (Ullah) v Special Adjudicator and Do v SSHD [2004] UKHL 26. We are sure, had Miss Naik known the outcome of Ullah, she would not have conceded Art 9 without further ado. We are equally sure, however, that even under the "flagrant denial" test approved by their lordships (with reference to the starred determination in Devaseelan [2003] ImmAR 1), the appellant's case under Art 9 fails for very similar reasons as it has failed under Article 3.

47. For the above reasons we consider that although criticism can be made of some aspects of the Adjudicator's determination, his principal conclusions were sustainable.

Summary of Conclusions

48. In considering whether punishment a person would face for refusing to obey a military order whilst a serving soldier would be disproportionate, Adjudicators must follow the principles set out by the Court of Appeal in *Krotov* with some care. It is important to ascertain whether the order was or was not contrary to international law. However, it is equally important to bear in mind that the answer to this question must depend on whether or not relevant international law provisions are applicable to the armed conflict or military situation in question. In Iran during the relevant period, there was no armed conflict reaching the Common Article 3 threshold. Thus international law prohibitions on the use of landmines and on avoidance of harm to civilians were not applicable.

48. For the above reasons this appeal is dismissed.