

IN THE IMMIGRATION APPEAL TRIBUNAL

LA (Section 83(2) appeals – human rights) Eritrea [2004]
UKIAT 00113

Heard at: Field House Decision number: **[2003] UKIAT**
Heard on: 5th May 2004 Appeal number: **HX / 39141 / 2003**
Date typed: 5th May 2004
Date promulgated: 25 May 2004

Before:

MR. K. DRABU (VICE PRESIDENT)
MS. D. K. GILL (VICE PRESIDENT)
MR. R. HAMILTON

Between:

The Secretary of State for the Home Department

Appellant

And

Respondent

DETERMINATION AND REASONS

Representation:

For the Secretary of State: Ms. K. Evans, Senior Home Office Presenting Officer.

For the Respondent: Miss J. Ndeti, of Victor Evans & Co. Solicitors.

1. The Secretary of State has appealed, with permission, against the Determination of Ms. J. Balloch, an Adjudicator, who (following a hearing on 17th October 2003 at Hatton Cross) purportedly allowed on human rights grounds (Article 3 of the ECHR) the appeal of Miss Abraha (who is a national of Eritrea and whose date of birth is given as 1st January 1987) against the Secretary of State's decision of 10th April 2003 to grant limited leave to enter and to refuse her asylum claim.
2. It is important to note that the appeal of Miss Abraha (who we shall hereafter refer to as the Claimant) was brought under Section 83(2) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). As will be apparent, the Claimant is a minor. She was granted limited leave to enter until 31st December 2004 – that is, a period of leave exceeding one year. This fact brought her within the terms of Section 83(1) of

the 2002 Act. Section 83(2) gives a person who falls within the terms of Section 83(1) a right of appeal to an Adjudicator against the rejection of his (or her) asylum claim.

3. This Determination is reported in order to give Adjudicators some general guidance on the ambit of an appeal brought under Section 83(2). We deal with whether, in such an appeal, an Adjudicator has jurisdiction to consider human rights issues.
4. In the grounds of application for permission to appeal to the Tribunal, the Secretary of State asserts that the Adjudicator had erred in allowing the appeal under Article 3 because she did not have jurisdiction to consider human rights issues. Reliance is placed on the Tribunal's Determination in [2003] UKIAT 00017 P (Yugoslavia).
5. At paragraphs 13 to 17 of the Determination, the Adjudicator gave her reasons for concluding that she had jurisdiction to consider human rights issues in this appeal. Her reasons can be summarised as follows:
 - (a) that the Claimant had raised human rights issues in the "Statement of Additional Grounds";
 - (b) that the Notice of the decision states that there is a right of appeal and also lists the grounds of appeal. This list includes the following:

that the decision is lawful because it is incompatible with [the Claimant's] rights under the European Convention on Human Rights.
 - (c) that the fact that the Claimant had raised human rights issues in the "Statement of Additional Grounds" means that human rights issues were a "matter" which the Adjudicator was entitled, or was required, to consider under Section 85(4) and Section 86.
6. At the hearing before us, Miss Ndeti made brief submissions. The substance of her submissions were to the effect that the situation in Eritrea is now worse than that found to be the case by the Adjudicator. In responding to our enquiry as to whether the Adjudicator had jurisdiction to consider human rights issues, Miss Ndeti reiterated the same point - i.e. that the objective evidence about Eritrea shows that the general situation in Eritrea has deteriorated. Miss Ndeti subsequently accepted that the Adjudicator did not have jurisdiction to consider any human rights issues.
7. We announced that we allowed the Secretary of State's appeal against the Adjudicator's decision to allow the Claimant's appeal on human rights grounds. We give our reasons below.
8. The Adjudicator correctly recognised that the Claimant's appeal was brought under Section 83(2) of the 2002 Act. This section is the only statutory provision which confers on a person who has been refused asylum but who has been granted limited leave a right of appeal to an Adjudicator for a determination of his or her asylum claim. We would draw the attention of Adjudicators to the fact that the right of appeal is only given to persons who are granted a period, or periods in aggregate, exceeding one year.
9. It is clear, from Section 83(2) that such appeal is brought "against the rejection of the asylum claim". This is important, because it sets out the scope of the jurisdiction before the Adjudicator on an appeal under Section 83(2) – i.e. the substantive issue in the appeal is limited to the asylum claim.

10. This is reinforced by the provisions of Section 84(3), which states:

An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

11. In the instant appeal, the Adjudicator erred in construing Section 85(4) as conferring on her a human rights jurisdiction. Section 85(4) and (5) state:

(4) On an appeal under section 82(1) or 83(2) against a decision an adjudicator may consider evidence about any matter which he thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10-

(a) subsection (4) shall not apply, and

(b) the adjudicator may consider only the circumstances appertaining at the time of the decision to refuse.

(our emphasis)

12. When read together, it is clear that sub-sections (4) and (5) of Section 85 are intended to deal with the evidence which an Adjudicator may take into account in dealing with the appeal. In the case of appeals which fall within sub-section (5), an Adjudicator may only consider "the circumstances appertaining at the time of the decision to refuse". In all other appeals brought under section 82(1) or 83(2), sub-section (4) of Section 85 provides that the evidence may include evidence which arises after the date of the decision, provided that the evidence is about a matter which the Adjudicator considers is "relevant to the substance of the decision". In the case of appeals brought under Section 83(2), the words "relevant to the substance of the decision" mean that such matters have to be relevant to the asylum claim. This is the limitation imposed by virtue of sub-section (2) of Section 83.

13. As we have stated, the statutory provisions make it clear that the ambit of an appeal brought under Section 83(2) is limited to asylum grounds. Additionally, the Tribunal made it clear in [2003] UKIAT 00017 P (Yugoslavia) that, where removal is not imminent, a claim on human rights grounds cannot succeed. In this case, the Claimant has been granted leave to enter until 31st December 2004. Before the expiry of that leave, she would be entitled to apply for an extension of her leave. If the Secretary of State refuses that application, she would have a right of appeal against that decision – that is to say, she has available a further effective remedy. Accordingly, as at the date of hearing before the Adjudicator (and indeed, as at the date of the hearing before us), there is no meaningful sense in which it could be said that there was an imminent threat of removal. This means that her human rights claim could not succeed before the Adjudicator in any event, irrespective of the jurisdiction issue.

14. As the Adjudicator correctly noted, the Notice of the decision does list, under the heading "Right of appeal", that there is a right of appeal on the following ground:

that the decision is lawful because it is incompatible with [the Claimant's] rights under the European Convention on Human Rights.

15. This is an error in the Notice of the decision. Such a error cannot confer jurisdiction, where none is provided for by legislation. There is no question of any legitimate expectation arising on account of such an error, as we believe it to be settled law that a right of appeal to an Adjudicator must be conferred by statute and cannot be acquired by arguments as to legitimate expectation. The Secretary of State may wish

to take steps to correct the standard form of the Notice of the decision which is used in cases where there is a right of appeal under Section 83(2). It seems to us clear that the list of the various grounds set out in the notice is entirely inappropriate and should be deleted, in order to avoid similar misunderstandings in the future.

16. For the reasons we have given above, we are satisfied that the Adjudicator's decision to allow the appeal on human rights grounds cannot be allowed to stand.
17. It only remains for us to deal briefly with Miss Ndeti's submissions. As we have said, they were to the effect that the situation in Eritrea is worse than the Adjudicator had found. This goes towards the substance of the asylum claim. However, the Adjudicator's decision to dismiss the appeal on asylum grounds was not been challenged by the Claimant. Accordingly, the asylum claim was not before us.
18. It follows that we must allow the Secretary of State's appeal.

Decision:

The Secretary of State's appeal is ALLOWED.

Ms. D. K. GILL
Vice President

Date: 17th May 2004