MB (Removal Directions to Wrong Destination) Pakistan [2003] UKIAT 00192

IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
On: 5 November 2003
Prepared: 8 November 2003

Before

Mr Andrew Jordan
Mr R. Baines JP

Between:

Appellant

and

The Secretary of State for the Home Department

Respondent

For the appellant: Mr S. Cooper, counsel
For the Secretary of State: Mr M. Davidson, HOPO

DETERMINATION AND REASONS

1. The appellant had claimed to be a national of Pakistan. He appeals against the decision of an adjudicator, Mr N. Froom, following a hearing on 21 February 2003 dismissing his appeal against the decision of the Secretary of State to refuse both his asylum and his human rights claims.

2. The appellant was born on 1 January 1978. He is now 25 years old. He arrived in the United Kingdom on 8 October 2000 from Pakistan and claimed asylum on arrival. He had not then passed through Immigration Control. Accordingly, the Immigration Officer refused him leave to enter and his right to remain in the United Kingdom arose solely for the temporary purpose of determining his asylum and human rights claims.

3. In his application, the SEF, completed by the appellant on or before 9 November 2000, he stated that and he was a single Muslim Pakistani from Kashmir, see page A2. In the interview conducted at Croydon in

Urdu on 24 July 2002, the appellant repeated that he was a Kashmiri Pakistani. The Secretary of State made his decision on 31 July 2002, having previously prepared his Reasons for Refusal letter on 24 July 2002. Both the decision and the reasons underlying it were based upon the appellant's assertion that he was a national of Pakistan.

4. The Notice of Decision formally refused the appellant leave to enter the United Kingdom. The refusal gave rise to a right of appeal under section 69 (1) of the Immigration and Asylum Act 1999 which provides that a person who is refused leave to enter the United Kingdom may appeal to an adjudicator on the grounds that his removal in consequence of the refusal would be contrary to the Refugee Convention. The Notice contains an indication of the place to which the Secretary of State intends to return the appellant. On the basis that he was a Pakistani national who had travelled from Pakistan, the Secretary of State was entitled to indicate that it was intended that this was to be his place of destination.

5. The destination to which an appellant may be removed is limited by statute. Schedule 2 to the Immigration Act 1971, paragraph 8 (1) (c), *[Phelan pages 43-44]* requires the destination to be one of the following:

> *(i) a country of which he is a national or citizen; or*
> *(ii) a country or territory in which he has obtained passport or other document of identity; or*
> *(iii) a country or territory in which he embarked for the United Kingdom; or*
> *(iv) a country or territory to which there is reason to believe that he will be admitted.*

6. Unlike the situation where a person has entered the United Kingdom unlawfully, the Secretary of State is not obliged by statute to identify the place to which the appellant will be returned. This is the effect of Regulation 5(1)(b) of the Immigration and Asylum Appeals (Notices) Regulations 2000 *[Phelan page 510]* which provides that: *"A notice…if it relates to the giving of directions for the removal of the person from the United Kingdom, [is to] include a statement of the country to which he is to be removed."* An appeal under section 69 (5) arising out of the decision of the Secretary of State to make removal directions requires the destination to be identified. An appeal under section 69 (1) arising out of the decision of the Secretary of State to refuse leave to enter does not. As a matter of convention and no more, the Notice of Decision in cases involving a refusal of leave to enter (and a right of appeal under section 69 (1)), the Secretary of State inserts what are misleadingly called removal directions. The Tribunal has, however, sometimes referred to these directions as a *removal destination* to distinguish the situation from an appeal under section 69 (5).

7. About three weeks before the hearing in front of the adjudicator, the appellant signed a witness statement in which he made out a radically different claim to asylum. He denied that he was a Pakistani and claimed that he was an Indian national born in Rajouri in the Indian Kashmir. He claimed that the Indian army accused him and his family of being Mujahedin spies and freedom fighters. He claimed that he had been arrested by the Indian army and escaped to a refugee camp in the Pakistani part of Kashmir before becoming a labourer in Rawalpindi.

8. Importantly, he also stated that he was at risk in Pakistan because he had obtained a Pakistani identity card in order to enable him to study in Rawalpindi. He claimed that the Pakistani Army Intelligence Unit arrested him and that he would now be in danger because he would be perceived as an Indian spy by reason of his having purchased a fake identity card. In addition, he claimed he would be in danger in India because his father and mother had both gone missing in circumstances suggesting the Indian authorities would treat him as a Kashmiri mojahid.

9. The Secretary of State was not represented at the hearing. Consequently, we have no means of knowing what the Secretary of State would have done faced with this very different claim.

10. The adjudicator decided to hear and determine the appeal. In reaching this decision, we consider the adjudicator acted entirely properly. In paragraph 13 of the determination, he accepted the appellant's story that he was an Indian national and not a national of Pakistan. He had properly applied the *Surendran* guidelines and avoided cross-examining the appellant himself, although the fact that the appellant had recently altered the basis of his claim for asylum might well have raised credibility issues had the Secretary of State been represented at the hearing. He accepted that the appellant had obtained a forged identity card in Pakistan and that this had resulted in the Pakistani authorities showing a legitimate interest in him as a person making use of forged identity documents. The adjudicator rejected as implausible the appellant's allegation that he would be treated as an Indian spy. In paragraph 17 of the determination, he said:

> *"I accept the appellant fell into difficulties with the Pakistani authorities over his holding a forged ID. He might have faced prosecution or even deportation but I do not think there is any basis for his fearing persecution. This conclusion is based not only on what actually occurred when he was detained but also on the fact that I can find no support in the CIPU document for the idea that ill-treatment would be meted out on such a person."*

11. In paragraph 18 of the determination, the adjudicator also considered the separate issue as to the risk of ill-treatment on return to Pakistan as an Indian national. He said:

"Given he is Indian the Pakistani authorities are unlikely to admit him. There is nothing in the CIPU report to suggest that this scenario would lead to ill-treatment."

12. For these reasons, he rejected the appellant's allegation that he was at risk of persecution or a violation of his Article 3 rights on his return to Pakistan as an Indian national.

13. The grounds of appeal challenge the adjudicator's approach to the issues before him. In paragraphs 1, 4 and 5 of the grounds, the appellant makes essentially the same point. It is said that the adjudicator should have referred the case back to the Home Office so that fresh representations could be made on the basis that he is an Indian national and therefore could not be removed to Pakistan. In addition, it is said that the matter should have been referred back to the Home Office for further representations because the adjudicator had not addressed the consequences of the appellant's return to India. Indeed, in paragraph 5 of the grounds, it is submitted that the appellant should be allowed to make fresh representations to the Tribunal or the Home Office so that one or the other should determine the issue of the risk he faces on return to India.

14. We can deal with these submissions together. First, although there are no pleadings in asylum or human rights appeals, the issues are determined from the Notice of Decision and the Reasons for Refusal letter associated with it. In this case, the issue that the appellant himself asked to be determined in his application was the risk of adverse consequences on return to Pakistan. The Secretary of State accepted the appellant's invitation to deal with this issue. As a result of the appellant's claim to be a Pakistani national and to have travelled from Pakistan, the Secretary of State must have realised this was likely to be the only place to which he could be lawfully returned. The Secretary of State determined the application on the basis of the claim.

15. The adjudicator had a somewhat different function to perform. He was still required to consider the issue of whether this appellant was at risk on return to Pakistan. This issue remains unaltered so long as the Notice of Decision and the Refusal letter identified Pakistan as being the receiving state. The Secretary of State had never indicated he was intending to return the appellant to India. Indeed, since the appellant has travelled from Pakistan, the Secretary of State is still entitled to return him to Pakistan in spite of his Indian nationality. At the hearing before us, Mr Davidson who appeared on behalf of the Secretary of State was invited to indicate whether it was now the Secretary of State's intention to return the appellant to India. He declined to commit the Secretary of State to making a decision on that issue. We consider the Secretary of State is entitled to adopt and maintain that position because it is not an issue that arises in the present appeal proceedings.

16. There was a substantial difference, however, between the adjudicator and the Secretary of State as to the basis on which he performed the risk assessment. The adjudicator is required to consider the position on the facts presented to him at the hearing. He is expressly forbidden from limiting the inquiry to the facts as presented to the Secretary of State. Consequently, whilst the Secretary of State had to deal with the application on the basis that the appellant was a Pakistani national, the adjudicator had to make a finding on the appellant's assertion that he was an Indian national. If, as he did, he decided the appellant was a citizen of India, he nevertheless had to consider the risk on return to Pakistan, the removal destination identified in the Notice of Decision. He was not concerned to consider a return to India. This is the approach adopted by the adjudicator and we consider that it is the correct one.

17. In *Kojic [2002] UKIAT 05113* (Mr CMG Ockelton, deputy president), the Tribunal was concerned with a section 69 (1) appeal against the decision of the Secretary of State to refuse the appellant leave to enter. The asylum issues were concerned solely with Croatia. The removal destination was set for Hungary, whence the appellant had travelled. The Home Office was entitled to return the appellant to Hungary and intended this to be the destination because Hungary was *"a country of territory in which he embarked for the United Kingdom"* – see paragraph 8(1)(c). The Tribunal decided that the removal destination was not an essential feature of a notice of refusal of leave to enter. It was said that, if the Secretary of State wishes to alter the destination, he should issue a fresh Notice of Decision refusing leave to enter, naming the new destination. Since then, however, the Court of Appeal in *Zeqaj [2002] EWCA Civ 1919* has apparently reversed the decision of the Tribunal on this issue. The wrong country in Removal Directions does not vitiate the appeal requiring everybody to start again. Rather it is a mistake that can be rectified by amendment just like any other mistake.

18. In the present case, the Secretary of State did not seek to amend the removal destination. None of the cases cited by the appellant impose upon the Secretary of State an obligation requiring him to consider the risk faced by the appellant in India. If, in the exercise of his discretion, the Secretary of State decides to return the appellant to India, the consequences will have to be considered if and when that occurs. In particular, issues may arise as to whether such a decision will give rise to a fresh right of appeal. Those issues are of no concern to the Tribunal now since no such decision has been made.

19. If the Secretary of State seeks to return the appellant to Pakistan but the Pakistan authorities refuse to admit him because, like the adjudicator, they consider him to be an Indian national, the appellant will be returned to the United Kingdom. He will not, therefore, suffer a violation of his human rights by reason of his being an Indian national

returned to Pakistan. However, in the decision of the Court of Appeal in *Saad, Diriye and Osorio [2001] EWCA Civ 2008,* the Court decided that, in an asylum appeal, the appellant is entitled to a decision in relation to his refugee status at the time of the hearing, even if it is not intended that he should return. Accordingly, even if the authorities of the receiving state refuse to re-admit the appellant, the adjudicator is nevertheless required to give substantive consideration on the hypothetical basis of whether, if returned, an appellant would face a real risk of persecution. Accordingly, the adjudicator was required to consider whether the appellant had established a well-founded fear of persecution in Pakistan by reason of his being an Indian national who had unlawfully obtained and made use of false Pakistani identity papers. This is exactly the course adopted by the adjudicator. It is the approach adopted by the Tribunal in *Lemlen (CC/09693/2001) (Dr H. H. Storey, chairman)* - see paragraphs 62 and 63 of that determination. Neither the adjudicator's approach in the present appeal, nor his conclusion that the appellant was not at risk, can be faulted.

20. During the course of her submissions, Miss Cooper submitted that the appellant was at risk because the Pakistani authorities might admit him and then forcibly return him to India. Accordingly, it was necessary for the adjudicator to consider the risk faced by the appellant in India. This was not argued before the adjudicator. We have before us the skeleton argument placed before the adjudicator and nowhere is it asserted that the appellant is at risk of forcible repatriation from Pakistan to India. Similarly, the grounds of appeal to the Tribunal, in paragraphs 2 and 3, do not assert that the adjudicator was asked to consider this as an issue and refused to do so. As far as we are aware, there was no evidence placed before the adjudicator to make out the factual basis that Indian nationals are forcibly repatriated if they are returned as failed asylum-seekers to Pakistan. Furthermore, it is not an issue raised in the skeleton argument placed before the Tribunal and dated as recently as 29 October 2003. Accordingly, it is not open to the appellant to argue this issue before the Tribunal.

21. For these reasons, we are satisfied that the adjudicator approached this appeal correctly. He considered the material issues and reached a sustainable conclusion. He gave his reasons for rejecting the appellant's claim to be at risk in Pakistan. The reasons he gave were adequate and intelligible. Accordingly, the appellant's appeal must be dismissed.

Decision: The appellant's appeal is dismissed.

Andrew Jordan
Vice President
9 November 2003