AU (Identifying Issues - Article 8 - Procedure) Afghanistan [2003] UKIAT 00186

IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
On: 28 October 2003
Prepared: 28 October 2003

Before

Mr Andrew Jordan
Mr D.M. Froome

Between:

Appell

and

The Secretary of State for the Home Department

Respondent

For the appellant: Mr D Lemer, counsel
For the Secretary of State: Ms C Hanrahan, HOPO

DETERMINATION AND REASONS

1. The appellant is a national of Afghanistan who appeals against the decision of an adjudicator, Mr T.R. Cockrill, following a hearing on 17 April 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 1950 and is now aged 53. There are 9 dependants associated with his appeal. His wife was born on 2 May 1964 and is 39 years old. The couple have eight children. The eldest, Hayad, was present during the hearing before the Tribunal and told us that he was born on 2 May 1982 and is 21 years old. He and his brother, Khalid, have both left college and are not presently in employment. The other six children are all attending school. The youngest are still at primary school.

The permission to appeal

3. When His Honour Judge Ainley granted permission to appeal to the Tribunal, he did so on the limited grounds of Article 3 and Article 8 of the ECHR only in so far as they related to the difficulties that the family might face with eight children on arrival in Kabul.

4. At the commencement of the hearing, Mr Lemer, who appeared on behalf of the appellant, made an application to extend the grounds of appeal to those set out in paragraphs 1 to 12 of the grounds of appeal, Grounds 1,2 and 3. Under Rule 20 (2) of the Immigration and Asylum Appeals (Procedure) Rules 2003, where the Tribunal has refused permission to appeal on any ground, it must not grant permission to vary the grounds of appeal to include that ground unless it is satisfied that, because of special circumstances, it would be unjust not to allow the variation.

5. It was submitted on behalf of the appellant that there were special circumstances requiring us to reverse the decision of the Vice President granting permission. One of the matters relied upon was that the appellant does not now have available to him the right to seek statutory review of the Vice President's decision, although it was conceded such a right existed at the time. It does not seem to us that this amounts to a special circumstance, albeit there was some uncertainty when the Rules were first introduced as to the right of statutory review when limited permission to appeal was granted.

6. The more substantial ground was that the Vice President did not give any reasons for refusing leave in relation to Grounds 1,2 and 3. It was submitted that, pursuant to Rule 18 (6) of the 2003 Procedure Rules, the Tribunal's determination must include its reasons, albeit those reasons may be in summary form. It is common ground that the Vice President gave no reasons.

7. In order to deal with this objection, we considered the first three grounds of appeal in order to ascertain whether any of them had an arguable prospect of success. In Ground 1 it was said that, as a result of a single sentence in paragraph 5 of the appellant's witness statement of 3 April 2003, the adjudicator was wrong in limiting his consideration of the appellant's claim to a fear of the Taliban, thereby ignoring what the appellant said, namely:

> *"The warlords are still ruling and have got no respect for human rights."*

It was submitted that as a result of this single reference, the adjudicator failed to consider a *key part* of the appellant's case and thereby materially erred.

8. We do not consider that there is any substance to this point at all. The adjudicator referred to what the appellant himself identified as his fears in Afghanistan. In paragraph 20 of the determination, the adjudicator said:

> *"The appellant was asked specifically what he feared in Afghanistan and his reply was the Taliban. He added that the Taliban had taken over his land. He reasserted how the Taliban wanted to recruit his sons in order to fight on their behalf and they were demanding money from him. The appellant was a shopkeeper in Qandahar. The appellant feared the Taliban and those supporters of the Taliban in his village. Before the deadline was up which had been given by the Taliban the appellant left the area. The appellant's home area was a Taliban stronghold.. The appellant said that the Taliban were still in control of Qandahar."*

9. It is quite apparent to us that the adjudicator was dealing with the issues that were argued before him. He was not required to go through each line of the statements to check if the appellant had failed to identify the source of his fears. If the appellant was asked specifically what he feared in Afghanistan, the adjudicator was entitled to accept his response.

10. In Ground 2, it is argued that the adjudicator stated in paragraph 28 of the determination that there are have been outbursts of violence in Afghanistan since the end of the war and that there would inevitably be local pockets where there are supporters of the former Taliban regime. The adjudicator went on to conclude that, because the Taliban were no longer in power, the appellant's fear of the Taliban was no longer well founded. It is submitted that in failing to specify the objective evidence he relied upon, the adjudicator fell into error. The Tribunal reject this submission. There can be no doubt that there had been numerous outbursts of violence in Afghanistan since the conclusion of the war. It would be impossible for the adjudicator to list each and every source of that obvious statement of fact. Furthermore, we did not understand Mr Lemer to be saying that he disagreed with the adjudicator's statement of fact that there had been outbursts of such violence. Similarly, simple common sense, supported by the overwhelming evidence of the background material, reveals that the former Taliban supporters have not simply disappeared into the ether but exist as local pockets that may present a local risk. That, however, is a far cry from the saying that, with the removal of the Taliban regime, the appellant himself, or members of his family, are currently at risk for the reasons given when he made his claim.

11. Ground 3 explores what is essentially the same point, namely, that the adjudicator was in error in his conclusion that although and there are pockets of supporters of the Taliban still in Afghanistan, the appellant and his family were not at risk. In our judgment, there is no arguable prospect of this ground of appeal succeeding. The appellant's case

was that the Taliban had taken over his land and that the Taliban wanted to recruit his sons in order to fight on its behalf and was demanding money from him. The appellant feared the Taliban and those supporters of the Taliban in his village. It is apparent that the removal of the Taliban regime has removed the overall threat posed by them. In particular, if local individuals posed the threat, it could no longer be inferred that the threat existed throughout Afghanistan. Consequently, for example, Kabul would not present the appellant and his family with the same threat of harm from former Taliban supporters as may exist in his home village.

12. In the circumstances, we were satisfied that there were no special circumstances rendering it unjust to refuse permission to extend the grounds that the appellant was permitted to argue before us.

The application for an adjournment

13. Mr Lemer then applied to adjourn the hearing of the appeal following the announcement by the Secretary of State of the so-called "amnesty" on 24 October 2003. We were provided with the press release setting out a summary of the new policy, (or “exercise” to use the term adopted in the release). It is said that up to 15,000 families who sought asylum in the United Kingdom more than three years ago will be considered for permission to live and work here. The one-off exercise will apply to those who sought asylum before 2 October 2000, had children before that date and who have suffered from historical delays in the system. It is said that the exercise will apply to cases where the final appeal process has not been exhausted as well as to those whose final decisions have already been made but where removal has not been effected. The appellant and his family arrived in the United Kingdom on 16 February 1999 and applied for asylum on arrival. This is nearly some five years ago. A decision was made to refuse asylum on 11 March 2002, over three years later. On its face, therefore, the appellant's case is one that is eligible for consideration under the new policy. It is said that the Home Office will write to those who are eligible for leave to remain but is not encouraging people to enquire directly and that it is expected to take about six months to assess the bulk of those who may be eligible.

14. It was submitted that the proper course was to adjourn the hearing of the appeal for the Home Office to consider the application of the amnesty. So far, a few days after the announcement, there is no settled policy as to whether appeals should be adjourned where it is arguable that an appellant is eligible to benefit from the concession. However, it is apparent from the terms of the concession that the concession will apply whether this appeal is determined in favour of, or against, the appellant. Were the Tribunal to adjourn the appeal, a further hearing or hearings will be required, thereby increasing the strain on the Tribunal's workload. If the appeal is dismissed, this will not prejudice the operation of the concession in the appellant's case. If

the appeal is allowed, the appellant will have the benefit of a decision in his favour sooner than under the concession. Ms Hanrahan, who appeared on behalf of the Secretary of State, accepted that the appellant's appeal was a case that required consideration under the concession and that she would take steps to ensure that the case papers were forwarded to the relevant unit at the Home Office for consideration.

15. At one stage in his submissions to us, we wondered whether Mr Lemer was arguing that the Tribunal should itself consider the policy, albeit only in the form as it appears in the press release and apply it in accordance with the decision of the Court of Appeal in *Abdi [1996] Imm AR 148.* We do not consider that this is the appropriate course to take. It is for the Secretary of State to make his decision in the exercise of his discretion under the policy. If and when a decision is made which is adverse to the appellant, it will be for the appellant to consider the route available to him, if any, to challenge that decision. It is not for the Tribunal at this stage, and in the absence of providing the Secretary of State with an appropriate opportunity to consider the policy for himself, to second-guess what the Secretary of State may do. The point becomes clearer still when we are not provided with a copy of the policy itself.

16. We refused the application to adjourn.

The Article 3 and Article 8 claims

17. The adjudicator considered the claims in paragraph 31 of the determination. His consideration was limited to the following:

> *"I had taken account of the overall family situation. The appellant is a married man with eight children. Inevitably they will have settled in school and be pursuing lives in this country. There is bound to the disruption therefore when they go back to Afghanistan. Nevertheless, they will all travel as one family unit, and any interference is, in my judgment, proportionate. I have looked at this case in the round in order to assess whether or not there will be any breach of this appellant's human rights by return and concluded that there would not. That appeal is also dismissed."*

18. The Tribunal accepts that the adjudicator has failed to adopt the step-by-step approach suggested in *Nhundu*. In the absence of any disputed issues of fact in relation to this aspect of the claim, the Tribunal is in as good a position as the adjudicator to decide the matter. The difficulty faced by the appellant is the absence of any comprehensive statement of the factors relied upon by the appellant in support of his case. Mr Lemer referred to the fact that, before the adjudicator, counsel who then appeared for the appellant applied for an adjournment as no witness statements had been obtained from the

dependants of the appellant. This is it expressly referred to in paragraph 14 of the adjudicator' s determination. The adjudicator refused that application and this must have given the appellant's advisers the clearest alarm bell that, if the Tribunal were to consider the appellant's Article 8 claim, appropriate evidence would have to be placed before it. No application was made to adduce additional evidence. The witness statements clearly contemplated by the appellant in the hearing before the adjudicator have not been prepared for the benefit of the Tribunal. We permitted Mr Lemer an opportunity to take instructions and indicated that we were prepared to consider any matters he chose to argue before us. In the bundle that was prepared for the adjudicator, supporting documentation is limited to a medical report prepared in respect of the appellant's wife dated 2 June 2003 and various school reports prepared in relation to the six youngest children.

19. Mr Lemer submitted that the appellant enjoyed a normal family life with his wife and children in the United Kingdom. However, since it has never been suggested that the family will be split up, the family unit will return to Kabul intact. Mr Lemer also submitted that there is a nephew of the appellant who lives in Southall, relatively close to the appellant's family in Northolt. The nephew has a wife, children, mother, brother and sisters with whom the appellant's family enjoy close relations. The nephew and his family has a right to remain in the United Kingdom. In addition, the appellant has maintained contact with close friends in the United Kingdom whom the family had known in Afghanistan. Thus, he submitted, the family life enjoyed by the appellant extended beyond his immediate family and included close relatives. Mr Lemer told us that he had no instructions on whether there were other family members in the United Kingdom but the appellant has no remaining close family in Afghanistan.

20. Whilst it is clear that the appellant enjoys family life with his wife and children, it is not possible to determine on the information before us whether the nature of the relationship enjoyed by the appellant with his nephew and his wider family amounts to family life. Occasional or even regular visiting between relatives and telephone contact does not necessarily amount to family life in the sense envisaged by Article 8. Nevertheless, for the purposes of this appeal, the Tribunal is prepared to accept that in the appellant's case, his family life extends to having close ties with his nephew and family.

21. At page 15 of the bundle of documents prepared for the adjudicator the medical report in respect of the appellant's wife refers to her having multiple problems, including hypertension and arthralgia of her sacro iliac joints and her forearms. She has depression and has been seen by a psychiatrist. She has complained of pains in her gastric system and probably has gastric oesophageal disease. She receives standard medication for hypertension, depression and her gastric problems. The appellant and one of the sons suffer from severe psoriasis.

22. The information from the children's schools indicates that they are doing well in the United Kingdom.

23. We also invited Hayad, the eldest son, who speaks excellent English to provide us, informally, with some information about himself and his brother. Hayad was born on 2 May 1982 and finished a computing and English class at Hayes College following a period at Southall College. He does not currently have an apprenticeship or work and, indeed, is not currently permitted to work. He left college without GCSEs. His brother, Khallid, finished at college after completing a computer course. He is not in employment.

24. The information that we have set out above encapsulates the general position of this family in the United Kingdom. Each of the private lives of the members will suffer a substantial interference by a return to Afghanistan. They have been in the United Kingdom for nearly five years. They do not wish to return to Afghanistan. On the other hand, it is clear that the policy of the Secretary of State to return the appellant and his family is in pursuance of a legitimate aim of maintaining immigration control. Like many such cases, the issue is whether that interference is a proportionate response.

25. Mr Lemer referred us to the background information. We do not intend to set out in full the passages referred to by him. At page A7 of the bundle, he referred to us to an extract from the Human Rights Watch World Report, 2003, dealing with the return of refugees to a country that has been ravaged by decades of civil war and conflict, destruction from the US bombing campaign, insecure conditions in some parts of the country and the continuation of devastating drought in the south. It is said that basic infrastructure and services are essentially non-existent outside urban areas. The World Food Programme, which supplies food to returning refugees in many areas, warned of food shortages. We were also referred to page F4 and the UN Security Council report of the Secretary-General dated 27 March 2003. In this report, Afghanistan's peace process remains fragile. Insecurity and lack of law and order continue to have a negative impact on the lives of Afghan citizens. Substantial progress has to be made. Afghanistan will continue to need considerable political and financial engagement from the international community for some time to come. At page H1, there is an IRIN news report about rising crime in Kabul.

26. Mr Lemer conceded, however, that there was no evidence that large families like that of the appellant's are at greater risk than a small family but, inevitably, the larger the family the greater the resources required to service it in a country where availability of resources is limited.

27. We were referred to the CIPU Report for Afghanistan and, in particular, paragraphs 5.90 to 5.98 dealing with Medical Services. The health status of Afghan's ranks amongst the poorest in the world and health

infrastructure and human resources were grossly inadequate for a population of about 24 million. Nevertheless, there is basic medical care. In May 2002, a Danish Fact Finding mission reported there were 20 to 25 hospitals in Kabul which were functioning but charged fees. According to paragraph 5.98 of the CIPU Report, mental health resources are limited but some therapeutic drugs are available. There are very few trained psychiatrists.

28. In accordance with the decision of the Court of Appeal in *Razgar [2003] EWCA Civ 840*, we have considered the appellant's Article 8 case in relation to his private life in the United Kingdom. This includes consideration of the differential between the treatment available in the United Kingdom for the appellant's family and that in Afghanistan. We have already set out the treatment that is available in Afghanistan as mentioned in the CIPU Report. Having considered that differential, we do not consider that the appellant has established he or his family members will experience serious harm to their mental health caused, or materially contributed to, by the differential in treatment. See paragraph 22 of *Razgar*.

29. The CIPU Report also deals with accommodation available in Kabul. In paragraphs 6.162 to 6.164 it is stated that accommodation is available in Kabul although housing is increasingly limited as more families arrive. The huge influx of returning refugees has inevitably placed strains on the city's housing and infrastructure. During 2002, the population of Kabul has doubled in size. As a result, rents have soared and most residents face a difficult daily struggle to survive.

30. The removal of this family from the United Kingdom will deprive them of the benefits they presently enjoy. The contact that the appellant has with his nephew and his family and other friends is no more than one would expect from having spent five years or so in the United Kingdom. This is the inevitable consequence of removal.

31. In addition, the return of this family to Afghanistan will be difficult for them. In accordance with the decision of the Court of Appeal in *Ullah [2003] INLR 74*, the Tribunal has considered whether the treatment that this family will be subjected to in the receiving state, (that is, in Afghanistan), will be sufficiently severe to engage Article 3. We do not consider that it will be, see paragraph 64 of *Ullah*. Like the many other returning refugees, the background material makes it plain that there is a level of security sufficient for their needs. The background information does not state that there is no accommodation available for them. There is no evidence that a family as large as the appellant's will be substantially worse off. Indeed, with three male breadwinners, all of whom are apparently able to work, there are increased opportunities. Furthermore, it would not necessarily be unreasonable if the two adults sons form a separate household if this renders finding accommodation easier. Basic medical services are available and the medical report

prepared on behalf of the appellant's wife does not establish a return to Kabul will prevent adequate treatment for her problems.

32. For these reasons, we dismiss the appeal.

Decision: The appellant's appeal is dismissed.

Andrew Jordan
Vice President
28 October 2003