EM (Sufficiency of Protection - Article 8) Lithuania [2003] UKIAT 00185

IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
On: 6 August 2003
Prepared: 6 August 2003

Before

Mr Andrew Jordan
Professor DB Casson
Mr DR Bremmer

Between:

Claimant

and

The Secretary of State for the Home Department

Respondent

For the claimant: Ms J De Souza, counsel
For the Secretary of State: Mr J Gulvin, HOPO

DETERMINATION AND REASONS

1. The claimant is a national of Lithuania. The Secretary of State appeals against the decision of an adjudicator, Ms S Beg, following a hearing on 4 March 2003 dismissing the claimant's appeal against the decision of the Secretary of State to refuse his asylum claim but allowing his human rights appeal.

2. The claimant's case was that he worked for the police as a police dog trainer. The dogs were used to discover narcotics. In 1994 the Chief of Police was imprisoned and the Minister for Home Affairs of Lithuania was dismissed as a result of criminal activity within the illegal narcotics trade. The claimant said that he was forced to leave the police service and threats were made against him because he was to be a witness in the trial. In due course, the Chief of Police, Mr Lekevicius, was convicted and sentenced to four years imprisonment. He was released, having served two years. The claimant's case was that he is at risk from Mr Lekevicius because he gave evidence against him.

3. In paragraph 23 of the determination, the adjudicator considered the position of Mr Lekevicius who appears to be a thorough-going criminal with a record of past convictions. He is said to operate a security firm and the claimant alleged he had close links with the Mafia in Lithuania. The adjudicator, however, also considered the Home Office Country Assessment for Lithuania dated October 2002 and the Operational Guidance Notes on Lithuania. She relied on the information contained there that the Lithuanian government has a witness protection scheme that offers real protection against those persons who have given evidence, particularly evidence against the Mafia. She said:

> *"The witness protection scheme does protect witnesses who have given evidence in criminal cases particularly against the Mafia. It also protects victims of crime. The witness protection scheme is in place in Lithuania, Latvia and Estonia. I find that the appellant's involvement with Mr Lekevicius is now over five years ago. I find that if the appellant returns the Lithuania he could seek the protection of the witness protection scheme."*

4. The adjudicator also referred to the mechanisms by which an individual is able to complain about harassment. The adjudicator concluded that the claimant did not have a well-founded fear of persecution because the state offered a sufficiency of protection in accordance with the principles of *Horvath*. She concluded:

> *"Whilst I entirely accept that Mr Lekevicius may be a well-known figure and an unsavoury character, nevertheless I find that the appellant would receive a sufficiency of protection in Lithuania within the Horvath principles. There is a criminal law in force in Lithuania and perpetrators of criminal offences are regularly prosecuted and sentenced by the courts."*

5. In paragraph 24 of the determination, the adjudicator reached her conclusions that the claimant had not established his claim under the Refugee Convention. She then considered the claimant's Article 3 claim and, having reviewed the medical evidence, decided that the claimant had not reached the high threshold required to establish that his return to Lithuania would operate as a violation of his Article 3 rights.

6. The adjudicator then went on to consider the claimant's Article 8 rights. In doing so, she took into account the fact that he had arrived in the United Kingdom on 29 April 1996 as a visitor, that his son entered the United Kingdom on 27 July 2000 claiming asylum as a dependant of the claimant, and that the claimant married a Lithuanian national in the United Kingdom whose daughter forms part of his current family. The adjudicator dealt with the claimant's domestic situation at considerable length in paragraphs 8 and 9 of the determination. It is apparent that he and his family are well-integrated into life in the United Kingdom. In paragraph 26 of the determination, the adjudicator considered the

claimant's family life and decided that there were no insurmountable obstacles in the way of the family returning to Lithuania and that, accordingly, the claimant's Article 8 rights to private and family life would not be violated. In paragraph 27 of the determination, the adjudicator expressly found that the claimant's return to Lithuania would be a proportionate response on behalf of the Secretary of State and that any interference in the claimant to private and family life would be in the legitimate pursuance of the Secretary of State's goal of maintaining firm and fair immigration control.

7. Had the determination stopped there, the result would have been a foregone conclusion. The adjudicator had already considered and dismissed the claimant's asylum appeal and his Article 3 claims. She had also considered family and private life and concluded that a return to Lithuania would not violate the claimant's Article 8 rights. In paragraph 28, however, the adjudicator considers the claimant's physical and moral integrity. The adjudicator states:

> *"Miss De Souza submitted on the appellant's behalf that he would be at risk of interference in his physical and moral integrity if he returns to Lithuania. I bear in mind that the threshold of Article 8 is much lower than that of Article 3. Whilst I entirely accept that the evidence given by the appellant in the criminal trial in Lithuania was now some time ago, nevertheless there is a distinct and real possibility that the appellant may be targeted for revenge by the former police officer against whom he gave evidence and who subsequently served two years of a four year prison sentence… whilst the witness protection scheme is available there is a real possibility that the appellant may not have the full protection from the scheme since he is no longer a witness and the trial in which he gave evidence was completed some years ago… for all these reasons and considering the evidence in the round I come to the conclusion that there is a real risk of interference in the appellant's physical and moral integrity."*

8. It was as a result of paragraph 28 that the adjudicator allowed the claimant's appeal on human rights grounds only.

9. It is this finding that forms the subject of the Secretary of State's appeal. There are two points that are immediately apparent.

    (a) The adjudicator's finding in paragraph 28 that there is a real possibility that the claimant may not have the full protection of the witness protection scheme is directly contrary to what the adjudicator had previously found in paragraph 23 of the determination (which we have set out above) that the witness protection scheme afforded protection to witnesses and that the scheme was available to the claimant. It was for this reason that

the adjudicator considered there was a sufficiency of protection in Lithuania within the principles of *Horvath*.

(b) The reference to Article 8 being much lower than the threshold of Article 3 clearly indicates that the adjudicator was applying a lower threshold than that necessary for Article 3. It is also apparent that it was his lower threshold by which the adjudicator was making her assessment of conditions in the receiving state, Lithuania. This is a clear error in law because it fails to pay regard to the decision of the Court of Appeal in *Ullah and Do [2002] EWCA Civ 1856*.

10. *Ullah and Do* was concerned with Article 9, that is, the right to Freedom of Thought, Conscience and Religion. In paragraph 65 of the judgment, Lord Phillips, MR, giving the judgment of the Court stated:

> *"Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other Article of the Convention is, or may be, engaged. Where such treatment falls outside Article 3, there may be cases which justify the grant of exceptional leave to remain on humanitarian grounds. The decision of the Secretary of State in such cases will be subject to the ordinary principles of judicial review but not to the constraints of the Convention."*

11. The Court of Appeal expressly considered the unusual position of Article 8 and, in particular, the distinction between the violation of Article 8 experienced by a claimant in the United Kingdom arising by the enforcement of his or her removal and the quite different situation where the claimant experiences the violation of her Article 8 rights in the receiving state. The distinction is obvious. The category of those entitled to the benefits of the ECHR is not confined to United Kingdom nationals but applies to everyone *"within [the] jurisdiction"*. Hence, in its simplest form, a visitor is entitled to the benefit of the Convention. The incorporation of the Convention into English domestic law does not, however, mean that the United Kingdom government guarantees that every visitor within the jurisdiction is to have the benefit of the Convention within the territory of his own nationality. The Convention is, after all, the high-water mark of human rights protection provided by the European signatories to the people within those countries. There would be little need to have the Convention at all if the standards were universal. The European jurisprudence also draws a firm distinction between Article 3, which is non-derogable, and the other Articles in the Convention. The Convention itself is often seen as a hierarchy of rights.

12. These considerations, doubtless, prompted the Court of Appeal's approach to Article 8 in *Ullah*. See paragraphs 43 to 47 of the judgment. In paragraph 47, the Court said:

> *"Part of the reasoning of the Court suggests that the treatment that any deportee is at risk of experiencing in the receiving state might so severely interfere with his Article 8 rights as to render his deportation contrary to the Convention. The more significant Article 8 factor was, however, the destruction of private life within this country. There is a difference in principle between the situation where Article 8 rights are engaged in whole or in part because of the effect of removal in disrupting and individuals established enjoyment of those rights within this jurisdiction and the situation where Article 8 rights are alleged to be engaged solely on the ground that treatment that the individual is likely to be subjected to in the receiving state. In Bensaid the Court considered that the right to control immigration constituted a valid ground under Article 8 (2) from derogating from the Article 8 rights of the applicant in that case."*

13. In *Berkhani [2002] UKIAT 01704*, the Immigration Appeal Tribunal presided over by its President, Collins J., decided that *"it is difficult to envisage a case where Article 8 would be breached absent persecution or Article 3 ill-treatment because, as we say, the need to control immigration would make the removal proportionate."*

14. In recent times, the jurisprudence has been enlarged. In *Soumahoro, Nadarajah and Razgar [2003]EWCA Civ 840* (a decision made on 19 June 2003), the Court of Appeal set out the principles in paragraph 22 of the judgment. Consideration of proportionality is itself a two-stage process. First, the claimant's case in relation to his private life in the United Kingdom should be considered. The second stage is to consider what treatment he can expect in the receiving state. In the present appeal, it was the treatment in the receiving state that adjudicator was considering in paragraph 28 and by applying Article 8, she was in error.

15. At the commencement of this appeal, we drew the attention of the parties to these matters. We had understood Ms De Souza, who appeared on behalf of the claimant, to concede that the Secretary of state was correct in his grounds of appeal and had noted it accordingly. During the course of the hearing, however, Ms De Souza appeared to withdraw from that concession. In our judgment, however, the adjudicator was plainly in error in paragraph 28 of the determination. Having found that there was a sufficiency of protection in the form of the witness protection scheme, it was not then open to the adjudicator to find that the claimant's return to Lithuania would be a breach of his human rights. Furthermore, by adopting a threshold that was clearly lower than the threshold for a claim under Article 3, the adjudicator reached the wrong conclusion. It is apparent that, had she applied the

high threshold (as she described it) of Article 3, she would have dismissed the appeal.

16. At the hearing before us, anticipating these difficulties, Ms De Souza sought to introduce a cross-appeal. Although we did not have the bundle before us, she told us that on the day before, that is 5 August 2003, her instructing solicitors had sought permission to appeal by serving a draft Grounds of Cross-Appeal, out of time. Those draft Grounds seek to argue that the adjudicator was in error in deciding that there was a sufficiency of protection in Lithuania for this claimant.

17. The adjudicator's determination was promulgated on 18 March 2003, before the introduction of the Immigration and Asylum Appeals (Procedure) Rules 2003, which came into force on 1 April 2003. The claimant's appeal was, therefore, governed by the Immigration and Asylum Appeals (Procedure) Rules 2000 which did not expressly contain provisions in relation to cross-appeals. Where, however, an appeal was in being, it was open to the respondent to the appeal to raise matters that might have been raised in a cross-appeal.

18. We approached the claimant's application to raise these matters on the basis that the claimant should be no worse off than if an application had been made under the 2003 Procedure Rules. In particular, in considering the application, we considered the overall merits of the grounds that were being put forward.

19. The substance of the Grounds of Appeal is found in paragraphs 3 and 4. It is argued that the Article 8 was correctly decided by the adjudicator but that the adjudicator failed to apply the reasoning of the Court of Appeal in *Svazas [2002] EWCA Civ 74* in considering sufficiency of protection. In paragraph 4 of the grounds it is said that the adjudicator did not take into account the risk posed by the former Chief of Police against whom the appellant gave evidence because of his position within the authorities. It is said that *Svazas* rather than *Horvath* should have been applied.

20. This ground of appeal is misconceived. The adjudicator expressly considered the risk posed by the former Chief of Police and concluded in paragraph 23 of the determination that the claimant was not at risk. She did so by reference to the witness protection scheme and the other background material. If the ground of appeal is construed to be a criticism of that finding of fact, the criticism has no arguable prospect of success for the reasons that we will later give. Furthermore, to suggest that *Svazas* rather than *Horvath* should have been applied is to misunderstand the principles settled by these two cases, which are not mutually inconsistent.

21. In *Svazas*, the Court of Appeal considered the case of a claimant who had been repeatedly detained and ill-treated by the Lithuanian police because of his political activity. The background material established

there was a degree of police brutality against Lithuanians associated with the previous Soviet regime. Both the adjudicator and the Tribunal found that there was a reasonable likelihood this would re-occur in future were he to be return to Lithuania. The Court of Appeal decided that the degree of ill-treatment was sufficient to establish persecution. In cases of ill-treatment by state officials, it was necessary that an adjudicator consider whether a practical standard of protection existed.

22. It is apparent from the foregoing that *Svazas* is concerned with ill-treatment by state officials and not, as in the instant appeal, the adequacy of protection afforded by the police or state authorities to persons who are at risk by non-state agents such as Mr Lekevicius. The adjudicator was not, therefore, at fault in failing to apply the principles set out in *Svazas* which were not applicable.

23. We have considered whether the claimant is at risk from Mr Lekevicius. The background material is contained in the October 2002 CIPU Report and the Operational Guidance Note. In the CIPU Report, witness protection is considered in the following paragraph:

> ***Witness Protection***
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> *4.48 On 17 March 2000, the Interior ministers of Lithuania, Latvia and Estonia signed an agreement on the protection of witnesses and victims of crime. The agreement allows for cross-border protection of witnesses and victims, either for a limited period of time or permanently. The individual's property and legal interests are protected and all housing, medical and other re-settlement costs are covered by the country of origin. This arrangement is unique in Europe.*

24. The general position of internal security is considered in paragraph 4.35:

> ***Internal Security***
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> *4.35 The Constitution specifically forbids torture; however, according to the US State Department Report for 2001: 'at times police beat or otherwise physically mistreated detainees'. Press reports in 2001 indicated that incidents of police brutality had decreased, and that victims were more willing to bring charges against police officers. The Office of Inspector General (established in 1999) and the Internal Investigation Division at the Police Department investigate, on the orders of the Minister of Interior, abuses committed by the police. Prosecutors and the Parliament controller carry out independent investigations. During the first half of the year, the controllers investigated 86 complaints (37 of them deemed justified) about the activities of Interior Ministry personnel and the police (63 such complaints were found to have merit during the first half of 2000). In five*

cases of alleged police brutality, criminal charges were filed against police officers (compared with four such cases in 2000), and in a number of other cases, the controllers proposed to relevant institutions that they take action or amend laws. However, according to the Ministry of Interior, from January 2000 to July 2001, no police officers were convicted for abuse of power. A total of 79 officers were dismissed for illegal or fraudulent activities in the first 6 months of 1998 for a variety of offences, compared with 182 for all 1997. During the first six months of 1999 four police officers were charged with abuse of power and one officer was sentenced.

25. This is not directly applicable in the claimant's case because he does not face a risk of ill-treatment from the police. Mr Lekevicius is no longer a serving officer. The passage does, however, indicate that the Lithuanian state does not permit its officers to act with impunity. Indeed, in the context of the present appeal, it is the claimant's own case that Mr Lekevicius was prosecuted and imprisoned for misconduct in the course of his duties.

26. For these reasons, we are in no doubt that the grounds of appeal cannot succeed.

27. In these circumstances, it hardly seems necessary to deal with the application for permission to appeal at such a late stage in the proceedings. The application was made under cover of a letter dated yesterday, 5 August 2003. Justification for the delay is referred to in the fourth paragraph of the letter in which it is stated that on 4 August 2003, two days before the hearing, Ms De Souza (who appeared before the adjudicator as long ago as 4 March 2003), advised that a cross-appeal should be attempted. There is no explanation why this was not done before. It does not begin to justify or explain the delay.

28. In support of the application, we have been provided with an undated and unsigned statement from the claimant. In paragraphs 2 and 3, events that happened "a few months ago" are described but without identifying the time and whether or not it occurred after the adjudicator's decision. It is said that three young men from the claimant's village in Lithuania attempted to blackmail the claimant and told him they were aware the Mafia was in pursuit of him. This information should, of course, have been immediately acted upon. We are not prepared to attach weight to it in its present form. It does not persuade us that the conclusions we have reached and expressed above require a further hearing before an adjudicator.

29. For these reasons, we refuse the claimant's application for permission to pursue his cross-appeal. As a result of what we have found, it goes without saying that, had we permitted the cross-appeal to be pursued, there is nothing further that the claimant could have submitted in support of it and we would have rejected it on its merits.

Decision: The appeal at the Secretary of State is allowed. The finding that the claimant had established that his return to Lithuania would be a violation of his human rights is set aside. Permission to cross-appeal is refused.

Andrew Jordan
Vice President
6 August 2003