SA (No Risk in Removal Country) Ethiopia [2003] UKIAT 00113

IMMIGRATION APPEAL TRIBUNAL

Date heard: 16 October 2003
Date notified:.29 October 2003

Before

DR H H STOREY (CHAIR)
HIS HONOUR JUDGE N HUSKINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Respondent

DETERMINATION AND REASONS

1. The appellant, the Secretary of State, has appealed with leave of the Tribunal against a determination of Adjudicator, Mr R J Pooler, allowing the appeal of the respondent, whom he found to be a national of Ethiopia, against the decision to refuse to grant leave to enter on asylum grounds. Mr D Ekagha appeared for the appellant. Miss J Onalo of IAS (Tribunal Unit) appeared for the respondent. To avoid confusion the respondent is hereafter referred to as the "claimant".

2. We have decided to allow this appeal.

3. Certain matters are usefully set out at this point.

4. Firstly, this was a s.69(1) appeal and one in which the Secretary of State had issued a notice which included the following:

REMOVAL DIRECTIONS

I have given/propose to give directions for your removal by a scheduled service at a time and date to be notified to (country/territory) ERITREA.

RIGHT OF APPEAL (ON ASYLUM GROUNDS)

You are entitled to appeal [under s. 69(1)] to the independent appellate authorities against the decision to refuse you leave to enter on the ground that your removal in pursuance of these directions would be contrary to the United Kingdom's obligations under the 1951…Convention".

5. Section 69(1) states that:

> "A person who is refused leave to enter the United Kingdom under the 1971 Act may appeal against the refusal to an adjudicator on the ground that his removal in consequence of the refusal would be contrary to the Convention."

6. Secondly it is important to record basic facts about the adjudicator's determination. The adjudicator in this case allowed the appeal on asylum grounds but refused it on human rights grounds. In allowing it on asylum grounds he gave as his reason his finding that:

> "if the appellant were to be returned to Ethiopia, she would have a well founded fear of persecution. It follows that removal of the appellant would place the United Kingdom in breach of its obligations under the 1951 Refugee Convention and her asylum appeal must succeed".

7. In dismissing the appeal on human rights grounds he noted that whilst the United Kingdom would be in breach of its obligations under Art 3 of the Human Rights Convention to return the claimant to Ethiopia, "[t] he respondent however proposes to return the appellant to Eritrea. He is entitled to do so if Eritrea is a country to which there is reason to believe that the appellant will be admitted".

8. Having gone on to find that there was "reason to believe" that the claimant would be admitted to Eritrea, the adjudicator concluded that:

> "…while she is likely to end up in a condition of serious humanitarian need, I find (applying the reasoning in *Ngandu*) that the treatment which the appellant would receive in Ethiopia would not be so harsh as to engage Art 3. Miss Walker did not pursue the grounds of appeal which argued that other Articles of the European Convention were engaged and in the light of the decision in *Ullah*…, I am satisfied that she was correct not to do so. It follows that the appellant's appeal on human rights grounds fails."

9. We should note before going further that in this last passage it was accepted by both parties that the reference to Ethiopia was a mistake: the adjudicator was plainly referring at this point to Eritrea.

10. Thirdly, the grounds of appeal lodged by the Secretary of State were essentially confined to the point that the adjudicator had erred in allowing the claimant's appeal despite having found that in Eritrea the claimant would not face a real risk of treatment contrary to Art 3. As Mr Ekagha explained in his submissions, the

underlying point made rested on the principle set out by the Tribunal in *Kacaj* (00/TH/ 00634) that, subject to very limited exceptions, if there is no serious harm under Art 3, there will be no persecution under the Refugee Convention.

11. We note that these grounds contained no challenge as such to the adjudicator`s finding that the claimant was a national of Ethiopia. Arguably they should have, since the claimant herself had stated in various documents, including the statement of additional grounds document, that her nationality was Eritrean. Be that as it may, this finding was not challenged and we do not intend to go behind it at this stage.

12. We would next observe that there was no attempt at a cross-appeal. Nor was there any filing of a Respondent`s notice. Rule 19 of the Immigration and Asylum Appeals (Procedure) Rules 2003 (in force from 1 April 2003) states:

> "19(1) A respondent who wishes to –
>
> (a) apply for permission to appeal to the Tribunal against the adjudicator's determination; or
>
> (b) ask the Tribunal to uphold the adjudicator's determination for reasons different from or additional to those given by the adjudicator,
>
> must file a respondent's notice with the appellate authority."

13. Rule 19(2) stipulates that the notice must be filed within 10 day "after the respondent is served with notice that the appellant has been granted permission to appeal."

14. How do these matters impact on this appeal?

15. In our view the adjudicator fell into clear error in concluding that because he had found the appellant to be a national of Ethiopia he was obliged to allow the appeal on Refugee Convention grounds. By s. 69(1) he was only entitled to allow the appeal if he was satisfied that removal *in consequence of the refusal* would be contrary to the United Kingdon`s obligations under the Refugee Convention. However, the refusal in this case included a notice that the removal directions given or proposed were in respect of Eritrea. The refusal plainly put the claimant on notice that it was in respect of removal to Eritrea that she had to establish a breach of the United Kingdom's obligations.

16. The point was not raised by Miss Onalo, but we would observe that in reaching this decision we have taken into account the argument that the adjudicator's findings in effect amounted to a conclusion that the claimant satisfied the requirements of Art 1A(2) of the Refugee Convention which defines who is a refugee in respect of a person who is "outside the country of his nationality". However, even if the claimant did satisfy Art 1A(2) by virtue of being outside the country found by the adjudicator to be her country of nationality, the obligations of the contracting state (the United Kingdom in this case) are created and governed by Art 33(1) which states:

> "No contracting state shall expel or return (`refouler`) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

17. Plainly the Secretary of State has never indicated any intention of returning this claimant to *Ethiopia*. Accordingly there is nothing in this case to indicate any potential violation of Art 33. Since it is only by reference to Art 33 that a finding under Art1A (2) that someone is a refugee gives rise to any obligation on the contracting state to do something in consequence, this is fatal to Miss Onalo`s attempts to argue that the adjudicator's approach offended s.69 (1).

18. The only basis, therefore, on which the adjudicator was entitled to allow the appeal on asylum grounds under s. 69(1) would have been if he had considered she would face a real risk of persecution for a Convention reason in *Eritrea.* Miss Onalo did not seek to submit to the contrary.

19. The adjudicator did not address that issue as such. However, he did address the closely-related issue of whether in Eritrea the claimant would face a real risk of treatment contrary to Art 3. He made plain that he did not consider the difficulties she would face there reached that level. We agree with Mr Ekagha that the principle set out in *Kacaj* applies here. The adjudicator, having found there was no serious harm in Eritrea, could not logically have concluded that was persecution (defined in *Horvath* as "serious harm + lack of state protection) in Eritrea.

20. Miss Onalo sought to argue that even if we considered the adjudicator was inconsistent in his treatment of the asylum and human rights grounds, we should go behind his findings on Art 3 and consider, particularly since he gave scant reasons, that on the evidence the claimant would face a real risk of serious harm in Eritrea.

21. We are not prepared to do this. The claimant had an opportunity to seek to cross-appeal or to otherwise make known his concerns about the terms in which his appeal had been allowed. Once the Vice President had granted leave in early April 2003, there was also an opportunity under Rule 19(b) of the 2003 Procedure Rules to ask the Tribunal to uphold the adjudicator's determination for reasons different from or additional to those given by the adjudicator. The claimant would have had 10 days after being served with notice that the appellant had been granted permission to appeal in which to do so (Rule 19(2). None of these opportunities were taken. There must be finality in litigation. We would add that although the adjudicator's assessment of risk in Eritrea was not extensive, he took care to base it on a more detailed assessment of objective country materials as set out in the case of *Ngandu* (01/TH/1994). Since that decision the Tribunal has looked at the general situation in Eritrea for returnees in [2003] UKIAT 00091 *G (Ethiopia)* and in [2003] UKIAT *L (Ethiopia)* 00016. Like the panels in those two cases, we see nothing to indicate significant difficulties for returnees in general.

22. Miss Onalo initially sought to argue that it was not open to the adjudicator to assess risk on return to Eritrea since the claimant would not be admitted into Eritrea. Once again, we are not prepared to consider this argument, since there was no cross appeal or respondent's notice challenging the adjudicator`s findings that the claimant would be admitted to Eritrea. Also Miss Onalo ultimately accepted that (as mentioned in paragraph above) the adjudicator was obliged for the purposes of s.69

(1) to consider whether the claimant's removal to Eritrea would be contrary to the Convention. Thus whether there might or might not be difficulties in obtaining entry into Eritrea, it was necessary, by virtue of the Statute, to assess risk on return to Eritrea. We would observe in any event that the adjudicator`s findings were based on the objective evidence.

The Art 8 issue

23. In a letter received several days before the Tribunal hearing, Miss Onalo sought permission to adduce further documentary evidence in the form of a social report and a statement prepared by a social worker. She renewed her application to adduce this evidence at the hearing. Mr Ekagha opposed this application, pointing out that he had only had sight of it on the day of the hearing. We decided not to rule on the matter during the hearing, but to consider it during our own deliberations. In case we were minded to admit these documents we had also heard submissions from both parties based on this documentary evidence. Miss Onalo argued that it demonstrated that there was an Art 8 issue and that the claimant's was a case which came under the "mixed case" category described in *Razgar* [2003] EWCA Civ 840. In the light of the claimant's psychological and social difficulties, return as a young woman on her own with a child to a country where she had no known relatives or any means of social or medical support would, she argued, expose her to a real risk of serious detriment to her physical and moral integrity. Mr Ekagha argued that in fact she would be able to locate relatives in Asmara and, whilst she might face hardships, would not face a real risk of serious detriment.

24. Having considered the matter, we have decided to exclude this documentary evidence. It was not submitted in accordance with directions. Furthermore, despite references in the social worker's report to the claimant's psychological difficulties existing for some time, no mention was made of Art 8 in the grounds of appeal to the adjudicator nor in the statement of additional grounds. Miss Onalo sought to excuse that on the basis that when the matter came before the adjudicator the claimant's representatives had understood the effect of the Court of Appeal judgment in *Ullah* [2002] EWCA Civ 1856, [2003] 1 WLR 770 to exclude any consideration of Art 8. She pointed out (correctly) that it was by reference to *Ullah* that the adjudicator had justified his decision not to consider the Art 8 issues. However, it remains that so far as the Secretary of State was concerned, this Art 8 argument was a point raised at the hearing before the Tribunal for the first time on the basis of entirely new evidence (in documentary form from a social worker) which the Secretary of State's representative at the hearing before the adjudicator had therefore had no opportunity of challenging either. Leaving to one side the fact that Art 8 could have been raised before the Court of Appeal judgment in *Ullah* was delivered, the claimant and her representatives have known since the date in April 2003, when leave to appeal to the Tribunal was granted, the limited ambit of the appeal before the Tribunal. In the absence of any formal steps to extend that ambit, we are not prepared to do so now.

25. We would add that we would not have found a breach of Art 8 even if we had decided to consider Art 8 and even if we had concluded, in view of the support and counselling the claimant has been receiving from her social worker, that her case was a "mixed case" raising an issue of the right to respect for her physical and moral integrity as an aspect of her right to respect for private life. We acknowledge that in addition to her own medical problems there have been child protection concerns,

albeit happily limited. However, we do not consider that the evidence placed before us establishes that return to Eritrea would cause serious detriment to her physical and moral integrity. The claimant is not receiving medical treatment as such although she is on medication. At her asylum interview she was adamant that she had relatives in Asmara. Although she has said that she has had no contact, we do not consider it reasonably likely that upon return she would not be able to locate relatives and receive support from them.

26. For the above reasons, the appeal of the Secretary of State is allowed.

DR H H STOREY
VICE-PRESIDENT