MO (Freedom of Religion) Eritrea [2003] UKIAT 00108

Heard at Field House
On 24 June 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

29.10.03

Before:

Mr P R LANE
Mr S S RAMSUMAIR JP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Appearances:

For the Appellant: Ms J Sigley, Home Office Presenting Officer
For the Respondent: Mr K. McGuire, Counsel, instructed by Messrs Ziadies Solicitors

DETERMINATION AND REASONS

1. The Appellant, who is the Secretary of State for the Home Department, appeals with leave against the determination of an Adjudicator, Mr C J Bourn, sitting at Mansfield, in which he allowed under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms the Respondent's appeal against the decision of the Secretary of State to give directions for his removal from the United Kingdom.

2. The Adjudicator dismissed the Respondent's appeal on asylum grounds. Having heard evidence from the Respondent, the Adjudicator found that

"there is a reasonable likelihood that the [Respondent] is a Jehovah's Witness" and "that that [Respondent] was arrested in Eritrea for refusing to undertake military service." (Determination, paragraph 21). However, at paragraph 22 the Adjudicator had this to say:-

> "There is no evidence that the [Respondent] was unable to live without problems in Eritrea between his expulsion from Ethiopia and his being arrested in his connection with his refusal to undertake military service, a period of two years. The civil disadvantages suffered by Jehovah's Witnesses in Eritrea are not grounds of persecution in themselves."

3. The Tribunal notes that, in making that finding, the Adjudicator had before him considerable material relating to Eritrea, in particular a bundle of documents submitted by the Respondent (as he now is), including the US State Department Report on Eritrea and the Home Office Country Assessment on that country, as well as the Human Rights Watch Report.

4. The Adjudicator went on to consider whether the Respondent's claim came within the Refugee Convention by reason of his refusal to undertake military service, and what the consequences of that might be. At paragraph 24 the Adjudicator noted that

> "the Court of Appeal in **Sepet and Bulbul** held that there is no Convention right to conscientious objection to military service. The penalty for avoidance of military service is not disproportionate and the objective evidence does not support the conclusion that there is discrimination against Jehovah's Witnesses in the application of that penalty. I conclude that the [Respondent] has not established a well-founded fear of persecution on grounds of religious belief in that he has been able to live peacefully for two years prior to his arrest for draft evasion."

5. Having dealt with the claim under the Refugee Convention, the Adjudicator turned to human rights. Before the Adjudicator, the Respondent's representative, Mr McGuire, submitted that the Respondent's rights under Articles 3 and 9 of the ECHR were engaged.

6. The Adjudicator considered Article 3. He noted that, as found in ***Ireland v United Kingdom (1979) 2 EHRR 25***, ill-treatment must reach a minimum level of severity in order to breach Article 3. The assessment of this is relative, depending on all the circumstances of the case including duration, physical and mental effects and the circumstances of the victim. Applying those standards to the present case, the Adjudicator stated as follows:-

> "I conclude that the ill-treatment consisted principally in the circumstances of [the Respondent's] confinement following his arrest for refusal of military service, that is to say, in his prison conditions. Such conditions are not to be judged by the standards of the European Convention. One has to have regard to what are the expected conditions in the individual country. No doubt the prison conditions are unpleasant, but that in itself is not a good reason for saying that return is impossible because the [Respondent] is likely to be prosecuted and possibly imprisoned."

7. The Adjudicator accordingly found that if the Respondent were now to be returned to his country of nationality "there is not a real risk he will suffer a breach of his protected rights under Article 3."

8. The Adjudicator turned finally to Article 9. He found that the 1994 Eritrean presidential decree restricting the rights of Jehovah's Witnesses "fails to pass the test of being necessary in a democratic society for any of the prescribed purposes. It follows that Jehovah's Witnesses in Eritrea are subject to discrimination under Article 14 in respect of their rights to manifest their belief under Article 9. The Appellant's rights under Article 9 would be infringed were he to be returned to Ethiopia [the Adjudicator clearly means Eritrea]." The Adjudicator accordingly allowed the appeal under Article 9 of the 1950 Convention and purported to direct that the Respondent be granted exceptional leave to remain.

9. The Vice-President who granted leave to appeal noted that "the grounds contend with arguable merit that the Adjudicator was wrong to allow the appeal on Article 9 grounds. They rely on part on the Court of Appeal judgment in ***Ullah***. Even on the Tribunal approach of considering whether there is a flagrant denial of qualified rights, the Adjudicator was arguably wrong"

10. At the commencement of the hearing, Mr McGuire applied for an adjournment. He said that the case of ***Ullah and Do [2002] EWCA Civ 1856*** was due to be heard in the House of Lords in the autumn of 2003. He was seeking an adjournment until after the House of Lords' decision had been made.

11. For the Appellant, Ms Sigley opposed the application. She said it was unlikely that a decision would be forthcoming before the end of the year. In any event, if the result were to favour the Respondent, then there were further avenues available to him.

12. The Tribunal considered the application. In the absence of any compelling reason in the circumstances of this particular case, the Tribunal did not consider that it would be appropriate to adjourn for what would clearly be a significant period, as a result of the fact that the decision of a higher court on an issue touching the present appeal was itself the subject of an appeal to the House of Lords. Accordingly, the application was refused.

13. Mr McGuire then sought the leave of the Tribunal to put forward a Respondent's notice, in effect cross-appealing against various findings of the Adjudicator.

14. The Tribunal asked Mr McGuire to explain how, even if it were minded to agree to the application, it was empowered to do so, having regard to the wording of Rule 19 of the Immigration and Asylum Appeals (Procedure) Rules 2003. Rule 19(2) provides that a Respondent's notice must be filed:-

    (a) within such period as the Tribunal may direct; or

    (b) where the Tribunal makes no such direction, within ten days,

after the Respondent is served with notice that the Appellant has been granted permission to appeal.

15. Mr McGuire submitted that an overriding discretion in the Tribunal, to permit a Respondent's notice to be filed outside the time limit laid down in rule 19(2) was to be derived from rule 37 of the 2003 Rules. This provides that the Appellate Authority "may, subject to these Rules and to any other enactment, decide the procedure to be followed in relation to any appeal or application."

16. With respect to Mr McGuire, the problem with this submission is, of course, that the words "subject to these Rules" in rule 37 clearly indicate that the discretion of the Appellate Authority is circumscribed by what is to be found in the other provisions of the Rules, including rule 19(2).

17. Leaving that point to one side, the Tribunal enquired of Mr McGuire whether there were any special circumstances to which he could point, which might make it appropriate to grant his application, assuming for this purpose that the Tribunal did have power to permit filing of a late Respondent's notice. Mr McGuire very fairly replied that there were not.

18. The Tribunal does not consider that there is power within the Procedure Rules to enable it to permit a Respondent's notice to be filed outside the time limit set by rule 19(2). In any event, even if such a power existed, it would only be appropriate to exercise it if good reason could be shown for the Respondent not to have filed a notice within the requisite timescale. In the present case, no such reason exists. ***Ullah and Do*** had been decided in December 2002. Indeed, the decision of the Court of Appeal in that case was a major reason why leave to appeal was granted.

19. For the Appellant, Ms Sigley submitted that the only basis upon which the Adjudicator had allowed the appeal was under Article 9. She referred the Tribunal to paragraph 64 of the judgment of the Master of the Rolls in ***Ullah***.

20. Mr McGuire submitted that it was clear from paragraphs 19-22 of the Adjudicator's determination that he found the Respondent to be credible. On this basis, he drew the Tribunal's attention to page B8 of the Respondent's statement, where it was said that the Respondent had been held in a container made of corrugated iron, after having been seized and transported to the camp at Sawa for National Service. The Respondent was held for two months in conditions that "were very difficult" (B9). Mr McGuire submitted that, having regard to the statement, there had in fact been a flagrant breach of Article 9. The case could, accordingly, be distinguished from that of ***Ullah*** where Mr Ullah had been subjected to general harassment but there was no credible evidence that he had in fact suffered from serious incidents of violence [paragraph 70, Annex A]. Mr McGuire submitted that the Article 3 threshold had, on the evidence, been crossed. There was a direct causal link between the refusal to carry out military service because of the Respondent's military beliefs and the treatment which he had received as a consequence.

21. Mr McGuire submitted that, had he been allowed to pursue what in substance was a cross-appeal, he would have submitted that the evidence showed that the Respondent ought to have succeeded in his asylum claim.

22. Mr McGuire referred the Tribunal to the US State Department Report, including the comment, at page 8 of the Respondent's bundle, that "prison conditions remained Spartan."

23. Finally, Mr McGuire submitted that, if the Respondent had been able to cross-appeal, he would have argued that the removal of the Respondent would constitute a breach of Article 8, insofar as his private life would suffer an interference. He submitted that the ratio of ***Ullah*** was confined to Article 9.

24. In reply, Ms Sigley reiterated that, in the absence of a Respondent's notice, and given the findings made by the Adjudicator, the only issue was whether the Adjudicator was right to have allowed the appeal under Article 9. In the light of ***Ullah***, he was not.

25. As has already been indicated, the absence of a Respondent's notice in the present case means that it is not open to the Respondent to challenge the findings of the Adjudicator. As has been stated, the Adjudicator found that the treatment which the Respondent received, in consequence of his refusal to perform military service, as set out at pages B8 to 10 of the Respondent's statement of 21 March 2002, did not cross the high threshold set in relation to Article 3.

26. The Tribunal would merely add that, even if those findings were to have been challenged, they are plainly ones which were open to the Adjudicator to make, on the evidence before him. They are not perverse, nor do they show any relevant error. In commenting, at paragraph 28 of his determination, that prison conditions in Eritrea are not to be judged by the standards of the European Convention, the Adjudicator was perhaps not expressing himself as clearly as he might. However, the fact that prison conditions in Eritrea fall below those which may reasonably be expected in European countries does not mean that such prison conditions automatically cross the Article 3 threshold. Prison conditions may indeed be "Spartan" and the Respondent may well have been "assigned to do the hard work at the prison," cutting wood for fires and cooking food for the military trainees (statement, B9). This does not lead to a finding that the Respondent would be subjected to Article 3 ill-treatment, were he to be returned to Eritrea.

27. Given these findings, the present case for all relevant purposes sits on all fours with the judgment of the Master of the Rolls in ***Ullah***.

28. Although not strictly relevant, in view of the Tribunal's findings and the issues before it, the Tribunal has difficulty with the submission of Mr McGuire that Article 8 could be invoked in a case such as the present. As the Tribunal understands it, the submission involves the Respondent's ability to follow his chosen religion as an aspect of his private life, as conducted in the United Kingdom. Removal of the Appellant to Eritrea would constitute an interference with that private life, as a result of the constraints imposed upon Jehovah's Witnesses by the Eritrean authorities.

29. As the Tribunal pointed out, such an approach would directly undermine the ratio in ***Ullah***, since Mr Ullah could make precisely the same point, in relation to his ability in the United Kingdom to follow the Ahmadi faith, in contrast with his ability to do so in Pakistan. Accordingly, even if the Respondent had been able to advance such an argument before the Tribunal, it would in our view have been doomed to failure, so long as the Court of Appeal judgment in ***Ullah*** remains good law.

30. Given that the Tribunal is allowing the Secretary of State's appeal, the Adjudicator's Direction falls.

31. The appeal is allowed.

P R Lane
Vice-President