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Heard at Field House

RA (Appeals Procedure - Immigration and Asylum Act 1999) Eritrea [2003] UKIAT 00063

On 29 July 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

5th September 2003

Before :

Mr J Barnes (Chairman)
Professor D B Casson

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Representation
The appellant was represented before us today by Mr A Hutton, Home Office Presenting Officer.
The respondent was represented by Mrs G Fama of Counsel, instructed by White Ryland

DETERMINATION AND REASONS

1. The respondent was said by the appellant in the statement accompanying the notice of appeal to be a citizen of Eritrea born on 27 March 1985 who had arrived in the United Kingdom on 12 October 2002 and claimed asylum on arrival. Following the submission of a statement her application was refused for the reasons set out in a letter dated 2 November 2002. On 5 November 2002 notice of refusal to grant asylum was issued and it is in the following terms.

> "You have applied for asylum in the United Kingdom but your application has been refused for the reasons stated in the reasons for refusal letter attached. It has been decided, however, that because of the particular circumstances of your case you should be granted exceptional leave to enter the United Kingdom. The Secretary of State therefore grants you leave to enter until 26 March 2003."

The form went on to state that the respondent had a right of appeal under Section 69(3) of the Immigration & Asylum Act 1999 and it appears that a one-stop notice under Section 77 of the same Act was served with that notice of refusal to grant asylum. The respondent appealed against that decision and the grounds of appeal are as follows:

> "The decision of the Secretary of State is contrary to UK's obligations under the Geneva Convention and is otherwise unreasonable. I also state that my removal from UK to Eritrea would be in breach of the European Convention on Human Rights."

It was accepted, both by the Secretary of State and by the Adjudicator before whom the appeal came, that the respondent had lived all her life in Ethiopia, although of mixed Ethiopian and Eritrean ethnicity. It was further found by the Adjudicator that the appellant's 18th birthday would in fact be on 5 April 2005 because she had been born on 5 April 1987 and not in 1985 as the Secretary of State had previously thought. This had arisen because of confusion in the transposition of dates, as we understand it, between the Ethiopian and the western calendars.

2. The appeal was heard on 26 March 2003 by Mr C C Wright, an Adjudicator. Purely by coincidence that happened to be the date on which the exceptional leave to remain which had been granted to the respondent expired. The asylum appeal was conceded by Mrs Fama who also appeared for the respondent before the Adjudicator and in consequence was dismissed. The Adjudicator then went on to allow the appeal on human rights grounds. The Secretary of State has appealed against that decision and his challenge is as follows:

> "It is submitted that the Adjudicator has erred in law by allowing this appeal under Article 3 and 8 when the appellant had been granted leave to remain. The Adjudicator has erred in law in allowing the appeal under Articles 3 and 8 when there are no current

directions to remove the appellant to Ethiopia or Eritrea and the appellant is effectively appealing against the decision to grant her limited leave rather than indefinite leave."

3. The proper situation in such cases where a Section 69(3) asylum appeal has been dismissed, as is the case here, and only human rights grounds remain possibly, as to which we shall deal later in this judgment, was considered by the Tribunal in the recorded decision of P (Yugoslavia) [2003] UKIAT 00017. In that case leave had been granted to the claimant to pursue a human rights claim before the Tribunal and the Tribunal said this at paragraph 6 of the determination:

> "In our view leave should not have been granted since at that time (3 September 2002) the appellant still had limited leave to remain which was not due to expire until 18 November 2002. Whilst by virtue of the Court of Appeal judgment in Saad, Diriye and Osorio [2002] INLR34 the claimant was entitled to have his asylum grounds of appeal determined on the hypothetical basis of whether he would face a real risk of persecution as at the date of hearing, the same considerations cannot apply in an appeal based on human rights grounds. In any asylum-related appeal based on human rights grounds there is no link to a status recognised at international law or indeed to any status established by UK domestic law. Furthermore, while Strasbourg has identified the proper test as being, like that under the Refugee Convention, one of current risk to be assessed as at the date of hearing, the obverse side of this recognition is that the risk has to be shown to be an imminent one. A risk cannot be imminent if the appellant has available a further effective remedy, see Vijayanathan and Pushparajah v France [1992] 15EHRR62. In the instant case, since it remained open to the appellant as at the date of hearing before the Adjudicator to have applied for an extension of limited leave to remain and to have appealed if refused, there was just such an effective remedy available."

That, in our view, correctly identifies the legal principles which are applicable in the present case. We should add, however, that the Tribunal in P then continued at paragraph 7 as follows:

> "However leave was granted and we are required to decide the appeal on the basis of the situation at the date of hearing. That is critical in this case because by

> the time of the hearing before us (4 February 2003) the appellant no longer had limited leave to remain and so was at imminent risk of removal. We are informed that the appellant had not been granted any extension of his exceptional leave to remain. It would appear that ELR was granted because the appellant was a minor and was not renewed once he reached 18 on 18 November 2002."

4. Not surprisingly, Mrs Fama has before us sought to rely on the position as recorded at paragraph 7 of P. It was conceded, however, that it is somewhat ambiguous because it cannot be ascertained from that passage whether the appellant in P had applied for and been refused an extension of his exceptional leave to remain, or whether he had simply taken no action but, having attained the age of 18, had become at imminent risk of removal. The present facts are somewhat different. There was a misapprehension on the part of the Secretary of State as to the respondent's correct date of birth. As a result of that misapprehension he granted leave exceptionally to remain until what he then believed to be her 18th birthday. It has now been decided as a fact that she will not attain the age of 18 until 5 April 2005, in just under two year's time. It is accepted that she is an unaccompanied minor to whom the stated policy of the Secretary of State will apply. That means that she would be removed only if there were adequate reception arrangements for her in her own country, a matter which must necessarily be in some doubt since she lived in Ethiopia all her life although she may have a right to claim Eritrean citizenship. For these reasons, in the present case it seems to us that there can be no question of imminent removal in any event, but we must question what approach should be taken in cases of this nature where the appeal is under Section 69(3) of the 1999 Act. Section 69(3) provides as follows:

> "The person who (a) has been refused leave to enter or remain in the United Kingdom on the basis of a claim for asylum made by him but (b) has been granted (whether before or after the decision to refuse leave) limited leave to enter or remain, may, if that limited leave will not expire within 28 days of his being notified of the decision, appeal to an Adjudicator against the refusal on the ground that requiring him to leave the United Kingdom after the time limited by that leave would be contrary to the Convention."

5. Section 69(6) provides that "contrary to the Convention" means contrary to the United Kingdom's obligations under the

Refugee Convention. It follows therefore that the compass of an appeal under Section 69(3) is necessarily limited to asylum issues and whether or not the Refugee Convention is arguably engaged.

6. The right to appeal on human rights grounds is provided by Section 65(1) of the same Act which provides:

> "A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, racially discriminated against him or acted in breach of his human rights, may appeal to an Adjudicator against the decision, unless he has grounds for bringing an appeal against the decision under the Special Immigration Appeals Commission Act 1997."

7. We have set out the terms of the decision made by the Secretary of State. We do not see any basis on which it can be suggested that anything in that decision can be said to have been in breach of the respondent's human rights, but this is a necessary prerequisite to ground the right to make an appeal under Section 65.

8. Mrs Fama drew our attention, in the course of her submissions, to the effect of the service of a one-stop notice and submitted that the result was that this meant that an Adjudicator had to deal with all issues raised by the claimant upon whom the one-stop notice had applied. That does not seem to us to be consistent with a proper reading of the provision in question. It is Section 77 of the 1999 Act and subsection 2 is as follows:

> "Subject to Section 72(2) the appellant is to be treated as also appealing on any additional grounds (a) which he may have for appealing against the refusal, variation decision or directions in question under any other provision of this Act, and (b) which he is not prevented (by any provision of Section 76) from relying on."

9. It is apparent from what we have said above that in our judgment the respondent had no grounds to appeal under Section 65 and therefore any issues under Section 65 are necessarily excluded from consideration by the provisions of the one-stop notice procedure under Section 77. In any event, the respondent could not be prejudiced in this respect because there is not inhibition on raising a human rights ground at any point, even though it may not have been raised in earlier proceedings. It does not seem to us therefore that

the submission made by Mrs Fama in this respect is sustainable. It may be that, in considering whether the risk of removal is an imminent one, nothing less than the issue of removal directions by the Secretary of State will suffice. That is not a matter which it is necessary for us to come to any concluded view on in having regard to the particular facts of this case where it is clear that on any basis there is no question of imminent removal, Mr Hutton having made it clear to us that the question of extension of exceptional leave to remain by reason of the factual finding as to the age of respondent has not yet been considered by the Secretary of State simply because these proceedings were pending and remained to be resolved.

10. For the above reasons the appeal of the Secretary of State is accordingly allowed on the basis that the findings in favour of the respondent on the basis of breaches of human rights were not justifiable before the Adjudicator.

J Barnes
Vice President