Appeal no. CC13640-2002
FK (Kabul) Afghanistan CG [2002] UKIAT 06054

IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
On: 14 November 2002
Determination promulgated:
Sent: 15.01.2003

Before:
Mr M W Rapinet
Ms S M Ward
Mr R Hamilton

Faraz Khan
Appellant

and

Secretary of State for the Home Department
Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of Afghanistan, was given leave on 24 September 2002 , to appeal against the decision of an Adjudicator, Mr C J Yelloly, promulgated on 29 July 2002, dismissing his appeal against the decision of the Respondent refusing asylum and human rights claims.

2. At the hearing before us the Appellant was represented by Ms Marks, and the Respondent was represented by Mr Blundell, Home Office Presenting Officer.

3. At the start of the hearing Mr Blundell sought leave to argue a preliminary point regarding the jurisdiction of the Tribunal to hear this particular appeal. Mr Blundell referred us the determination of the Tribunal in *Maria Mendes [2002] UKIAT 03922.* In that appeal the respondent had certified the claim as being one to which paragraph 9(3)

(b) of Schedule 4 to the 1998 Act applied. The respondent, in his refusal letter, made reference to both asylum and human rights issues. Neither the respondent nor the adjudicator on appeal, in dealing with the certificate, divided the "claim" into a claim under the Refugee Convention and a claim under the Human Rights Convention. The Adjudicator upheld the certificate without making reference to any particular claim. On appeal to the Tribunal it was contended that the Tribunal had no jurisdiction as the Adjudicator had upheld the certificate. The Tribunal concluded that, since paragraph 9(3) is expressed to apply to "a claim" (in contrast to paragraph 9(4) which is expressed to apply to "a claim under the Refugee Convention" and paragraph 9(5) which is expressed to refer to "a claim under the Human Rights Convention"), it was intended to apply to claims under both Conventions. The Tribunal took the view that because the adjudicator, in her determination, had dealt with the certificate in the penultimate paragraph of her determination, after having set out her conclusions on the substantive issues with regard to each Convention in turn, she was dealing with both claims, and that she intended her conclusion on the certificate to apply to both claims. The Tribunal concluded in that case that it had no jurisdiction to hear the appeal. Mr Blundell submitted that the same reasoning applied in this appeal and the Tribunal had no jurisdiction to hear Mr Khan's appeal. It was clear, he submitted, from the Refusal Letter and the Adjudicator's determination that both the Respondent and the Adjudicator had in mind that the whole of the Appellant's application (including both the claim under the Refugee Convention and that under the Human Rights Convention) was covered by the certificate.

4. Miss Marks submitted that the Respondent's certificate and the Adjudicator's view in respect of the certificate applied only to the Appellant's claim under the Refugee Convention. The Refusal Letter itself, she submitted, only referred to a "claim" instead of "claims". Had the Respondent intended to certify both claims the letter would have applied the certificate to the Appellant's "claims". It had not done so. Ms Marks further submitted that paragraph 3(b) can be applicable to a claim under the Human Rights Convention and to a claim under the Refugee Convention - unlike other parts of paragraph 9 which are applicable only to a claim under one Convention or the other. However, it was still necessary for the Respondent to make clear which claim he was referring to when certifying that claim. The case of Aleksejs *Zenovics [2002]EWCA Civ 273,* in the Court of Appeal, made it clear that an applicant can make two claims,

albeit in one appeal, and an adjudicator must address his or her mind to the matter of whether or not a certificate given under paragraph 9(b) is to be upheld in respect of either or both those claims. In this case, she argued, there was no certificate issued in respect of the Human Rights claim.

5. Clearly we must follow the conclusion of the Court of Appeal in *Zenovics* that an appeal may consist of two different "claims" – one under the Refugee Convention and another under the Human Rights convention – and that either or both may be the subject of a certificate. The wording of paragraph 9 makes it clear that the certificate of the Secretary of State relates to a claim and not to an appeal. The Secretary of State must in his certificate identify which sub-paragraph applies to his opinion. Thereafter, if the applicant lodges an appeal, that person must identify in his grounds of appeal the Convention or Conventions under which he claims. He may claim under both even if the original decision by the Secretary of State was primarily concerned with the Refugee convention. In order that his right of appeal to the Tribunal be wholly curtailed in respect of claims under both Conventions it must be clear that the certificate was given in respect of both claims and upheld by the adjudicator in respect of both.

6. Each refusal letter is different and it is necessary to go to the wording of the letter in this appeal in order to determine what was covered by the Respondent's certificate. Unfortunately there is a lack of consistency with regard to the use of the word "claim" in this letter. It is clear from paragraph 1 of the letter that the Appellant applied for asylum under the Refugee Convention. Thereafter, the word "claim" in paragraphs 2, 4, 6, and 9 is used , in our view, to refer to the Appellant's claim to asylum under the Refugee Convention.

7. However in paragraph 12 the word "claim" is used to mean something else. It is stated:

"….took into account your claim that you have been forced to leave Afghanistan".

It is clear that the word "claim" was being used in this context to mean "assertion" and not a claim under either Convention.

8. In paragraph 14, the word "claim" is used again – this time to refer to something else. Confusingly, paragraph 14 commences as follows:-

" In support of your claim you have sought to rely on Articles 3 and 5 of the ECHR…".

In light of the subject matter and content of the previous thirteen paragraphs of the letter (all centred on the asylum claim), one might be forgiven for assuming that the reference to "your Claim" should be taken as referring to the Appellant's claim under the Refugee Convention. However this interpretation would make no sense, as Articles 3 and 5 of the Human Rights Convention could not in themselves support a claim to refugee status under the Refugee Convention. The common sense interpretation is that in paragraph 14 the reference to "claim" was intended to be a reference to the Appellant's "claim to stay in the United Kingdom". Thus the word "Claim" is used here to mean something different. Nevertheless, we believe that the letter writer was noting in paragraph 14 that the Appellant had also made a claim that to remove him would result in a breach of Articles 3 and 5 of the Human Rights Convention, and setting out the Secretary of State's conclusions in respect thereof. That "claim" (a claim distinct from that under the Refugee Convention) was considered and refused - as is stated in the remainder of that paragraph.

9. The certificate itself appears in the paragraph immediately following this – namely paragraph 15. That paragraph starts with the following statement:

" In the light of all the evidence available to him, the Secretary of State has concluded that you have not established a well-founded fear of persecution and that you do not qualify for asylum".

This is clearly a reference to the Appellant's claim under the Refugee Convention. The letter writer then goes on, in the next sentence, to refuse "the application" under paragraph 336 of HC 395. The very next sentence is as follows:

" In addition, the Secretary of State certifies your claim as one to which paragraph 993) (b) of Schedule 4 to the 1999 Act applies owing to your failure to declare to the Immigration Officer on arrival that your travel documents were not valid."

The letter then makes the usual reference to paragraph 9(7).
The grammatical interpretation of paragraph 15 is that the reference to "your claim" in the context of the certificate, was a reference to "your claim" under the Refugee Convention – this having been the "claim" that was rejected immediately prior to the certificate.

10. Notwithstanding this, paragraphs 13 and 14 of the letter demonstrate that the Secretary of State did however, actually consider two claims by the Appellant - one under the Refugee Convention and the other under the Human Rights Convention, and rejected both. It is strongly arguable, therefore, (as Ms Marks submitted) that had he intended the certificate to apply to both of those claims, the letter would have stated that the "Secretary of State certifies that your *"claims*", and not simply "claim" in the singular. Ms Marks also argued that her view was supported by the use of the word "application" in the second sentence of paragraph 15 to refer to the Appellant's application to stay in the United Kingdom. The letter writer had used the word "application" in order to refer to something different from the asylum claim to which the certificate was attached. The certificate expressly referred only to " your claim" and it must be inferred, Ms Marks submitted, that this was a reference to the claim mentioned in that paragraph, namely that under the Refugee Convention.

11. We agree with Ms Marks's analysis of the wording of the Refusal Letter with the result that the critical paragraph (paragraph 15) sets out a certificate applicable only to the claim under the Refugee Convention. Whether this is the result of poor use of language and lack of attention to detail on the part of the letter writer we do not know. In the light of the differing meanings of the word "claim" as identified above, a reader of the letter might be forgiven for thinking that the letter writer had been somewhat relaxed about usage of this word. However, given that a certificate, if upheld by an adjudicator, can result in the denial of a right of appeal to the Tribunal, it is important that a claim only be regarded as the subject of a certificate when it is clearly so stated. We feel compelled to comment that a consistent usage of the word "claim" in a refusal letter, and a clear indication of which claim or claims are being certified would avoid any potential misunderstandings.

12. It is, nevertheless, our conclusion therefore that the Secretary of State's certificate applied only to the asylum claim and not to the Human Rights claim. The Adjudicator agreed with the opinion of the Secretary of State – this is set out in paragraph 121 of the determination. However, in stating as she did in paragraph 130 that "the certification is upheld and the appellant has no right of appeal to the Tribunal", the Adjudicator had assumed that the certificate had been given in respect of both claims of the Appellant. In making this assumption, she fell into error.

13. We indicated to both representatives at the hearing that we were not prepared to come to the same conclusion as the Tribunal had done in *Mendes.* Each case depends upon its own facts. Clearly the intention of the Secretary of State and the extent of the certificate in each case must be decided on the basis of the wording of the particular refusal letter in that case, and any other relevant evidence. Our conclusion in this appeal is based upon a detailed assessment of the refusal letter in this case. Our interpretation of the certificate in this appeal is based on what is set out in the paragraphs leading up to the certificate in the Refusal letter, and the context in which the certificate appears. We therefore conclude that we have jurisdiction to hear and determine the Human Rights appeal.

14. Following from our conclusion with regard to the certificate, we invited Ms Marks to address us on the substantive matters in issue in this appeal. The Tribunal noted that her bundle of supporting documents had been filed and served out of time. Ms Marks explained that her instructing solicitor had intended that the bundle be filed in time, some three weeks before the hearing. However that lady had gone on holiday, and another member of the firm, who was taking care of the file in her absence, did not file the bundle in accordance with instructions left by her. Initially we determined that this did not constitute an adequate reason for non compliance with the usual timetable for filing evidence, particularly when there was clearly at least one other person at the firm who could and should have ensured that the evidence was filed in time. However, Ms Marks then indicated to us that the lack of this bundle left her in some difficulty in arguing her appeal, as the bundle contained all the evidence on which she had intended to rely. In the circumstances we decided to give leave to Ms Marks to tender the bundle in order to ensure that the Appellant's case could be properly and fully presented.

15. Ms Marks submitted that the security situation in Afghanistan remained volatile. Ethnic tension in northern Afghanistan was still a matter of fact. That tension particularly affected Pashtuns, the ethnic group to which this Appellant belonged. We were referred to several documents in the bundle, particularly an Amnesty International report at page 17 of the bundle, a Human Rights Watch paper at page 25 , and other references at pages 5 and 9 thereof. As a result of the general level of ethnic tension and the general state of lawlessness and lack of security, the return of the Appellant would, she submitted, result in a real risk of a breach of Articles 3 of the Human Rights Convention. Ms Marks also submitted that the Appellant could neither return to his home village nor to Kabul. There was no internal flight option available to him as it would be unduly harsh to expect him to return to live in Kabul. He would be going back to a country where there was no industry, was war ravaged and without basic services. He had never lived in Kabul and was a stranger there. Humanitarian resources there were greatly strained.

16. Mr Blundell addressed us most succinctly. He acknowledged that there was still ethnic tension and concomitant risks for Pashtuns in the north. However, this Appellant, he submitted, could be safely returned to Kabul. He was a fit young man who could re-locate there without undue hardship.

Conclusions

17. The Appellant claims that his Article 3 rights would be violated by his removal. Article 3 of the European Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. It imposes an absolute bar on torture and inhuman or degrading treatment or punishment. It permits no exceptions. The relevant time for risk assessment is the time of this appeal *(Chahal v. UK (1997) 23 EHRR 413, Ahmed v. Austria (1996) 24 EHRR 278.).* Ill treatment must reach a minimum level of severity in order to fall within Article 3. That level is not fixed, however. It is relative and depends on all the circumstances of the case including the duration of the treatment, its physical or mental effects and in some cases the sex, age and state of health of the victim.

18. We have taken into consideration the meaning of “torture” as described by the Commission in the *Greek case (12 Y B 1)* as an aggravated form of inhuman treatment which has a purpose such as obtaining information or confessions, or the infliction of punishment. We conclude that the Appellant has not shown a real risk of torture on his return.

19. We note that “degrading treatment or punishment” is conduct that grossly humiliates although causing less suffering than torture. Inhuman treatment or punishment likewise may cause less suffering than torture and it need not be deliberate.

20. We have reviewed the evidence available to us. Following the fall of Kabul and the flight of the Taliban in November 2001, the deployment of the International Security Assistance Force (ISAF) (pursuant to the Bonn Agreement) has greatly contributed to the return and maintenance of security in and around Kabul. According to the CIPU Report of October 2002, , a Danish fact-finding mission in May 2002 reported that the security situation in Kabul was generally good, although in certain districts civilian safety was poor. Crime in these areas was mainly directed against the wealthy. The Director of the Danish Committee for Aid to Refugees did not believe that there was any politically ethnically motivated violence in Kabul. The ISAF monthly report to the end of July 2002 reported that the security situation in Kabul and the surrounding area was generally calm. The UMAMA report for the end of September also reported on stable or calm security situations in most of Afghanistan. However, we accept that the situation remains volatile away from the capital. Outside Kabul and its immediate area the various warlords and their forces continue to control the provinces and there have been continued reports of tension and fighting between rival warlords, particularly in the north. We note the evidence provided on behalf of the Appellant that coalition forces have continued to hunt for Taliban and Al Qaeda remnants in the eastern provinces. Kunar province was only recently considered to be a high risk zone. The Adjudicator found as a fact that the Appellant comes from that area.

21. We note the conclusion of Amnesty International in June 2002 that Afghanistan was far from stable with continuing fighting, crime and banditry and we accept that fighting continues in the eastern provinces from which the Appellant comes. The Human Rights

Watch documentation before us (September 2002) indicates that ethnic Pastuns (the ethnic group of this Appellant), a minority in the north, continued to flee targeted violence at the hands of certain commanders. It is not clear from the wording of this report whether that occurs throughout provincial Afghanistan or in certain areas. Nevertheless, while we conclude that there may be a real risk for the Appellant , as an ethnic Pashtun of being a target for such violence in certain parts of the country and that in Kunar province he may find himself caught up in the instability and fighting which continues to some extent there, we conclude that there is no real risk for the Appellant if he were to be returned to Kabul.

22. Kabul and its environs are generally calm under the watchful eye of ISAF (although we note reports of a recent explosion in September when 21 civilians were killed and 150 wounded). As regards services there, the CIPU report shows that there were 20 to 25 hospitals functioning in Kabul, and in June 2002 it was reported that a basic level of medical care was available there. The ITGA Afghan Assistance Co-ordination Authority and several other agencies and organizations working with UN agencies and NGOs are finalizing a strategy to provide humanitarian assistance during the coming inter. The strategy will address both urban issues affecting recently returned refugees as well as issues affecting rural peoples.

23. We do not believe that this man's ethnicity will cause him to be subject to harm in Kabul. Kabul is clearly a difficult place for the vast majority of its citizens to live in – ravaged as it has been by years of harsh Taliban authoritarian government and the recent war. We have no doubt that quality of life is far from good for many of its citizens and such services as are available are basic. However, the available evidence regarding the current situation there does not persuade us that there is a real risk of this Appellant being subject to torture or to inhuman or degrading treatment or punishment on his return there. Ms Marks has urged to find that the lack of social welfare and the circumstances in Kabul at present would constitute degrading treatment sufficient to breach Article 3. We do not accept her submission. As we noted above ill treatment must reach a minimum level of severity in order to fall within Article 3. We accept that social hardship, if extreme, may in some circumstances be degrading but we can find no case in Strasbourg where the European Court has found social hardship amounting to a breach of Article 3. We conclude that the evidence in this case falls short of that

required to show social hardship of such severity that to remove the Appellant to a risk of suffering such hardship would constitute a breach of Article 3. There is a high threshold to be crossed, particularly in cases where the allegation is one of lack of social welfare provision in the country to which a person is to be removed.

24. This Appellant is a young man aged 31. He is not educated, but there is no evidence that he in bad health or is unable to work to support himself. In his statement at C1 of the Home Office bundle, the Appellant stated that he used to help his father in his business as a carpenter and seller of building material. This experience could be advantageous to him on his return. Ms Marks submitted that it would be unduly harsh to return him to Kabul. We do not accept that this has been made out. Clearly the Appellant would be away from his home and family, but he has experience of living away from his home, having left his village well over a year ago. We do not presume to say that it would be easy for this man to establish himself in Kabul, and it would no doubt involve a degree of hardship, and discomfort, but it has not been shown that it would be unduly harsh to return him there. We note in this regard that, before leaving his home village he lived very modestly, without electricity or modern communications.

25. This appeal is dismissed.

Ms S Ward