

Appeal No. HX14126-2002
AS (Article 3- Kenyan Asian) Kenya CG
[2002] UKIAT05943

IMMIGRATION APPEAL TRIBUNAL

Date heard: 21 November 2002
Date notified: 8 January 2003

Before

DR H H STOREY (CHAIR)
MR P ROGERS JP
MR A SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellan

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And

MR ANJAM SAEED SOMRA (+3)

Respondent

DETERMINATION AND REASONS

1. The appellant, the Secretary of State, has appealed with leave of the Tribunal against a determination of Adjudicator, Mr I J French, allowing on human rights grounds the appeal of the respondent, who claimed to be a former national of Kenya who was now stateless, against the decision giving directions for removal following refusal to grant asylum. Mr J Jones appeared for the appellant. Mr I Ali, assistant solicitor of Harbans Singh & Co (Soho Road) appeared for the respondent. To avoid confusion the respondent is hereafter referred to as the "claimant".
2. The Tribunal has decided to allow this appeal.

3. We should clarify at the outset that we see no basis in this case for interfering with the adjudicator's principal findings of fact. He gave clear reasons based squarely on the evidence for those findings and there has been no challenge raised to them in the grounds or in any cross-appeal. The only question in this case is whether those findings entitled the adjudicator to allow the appeal under Article 3.

4. Among the reasons the adjudicator gave for rejecting the claimant's asylum claim was that he did not accept that attacks carried out on him and his family were aimed specifically at his family or were politically motivated. However, when it came to assessing the claimant's Art 3 claim, the adjudicator gave as one of his principal reasons "the risk of attack or robbery without assistance from the police". In our view the adjudicator forgot here that the test under Art 3, as under the Refugee Convention, was one of *real risk*, not mere risk. On the evidence as found by him he should have concluded that, as there was no real risk of the claimant having become the target for attacks and robberies, this was not a valid reason for allowing the appeal under Art 3.

5. What other reasons were mentioned by the adjudicator in support of his conclusion that Art 3 was breached? He mentioned only three others. One concerned the fact that the claimant lacked Kenyan citizenship and so would arrive as a stateless person. Another was that he had only one member of his family remaining in Kenya, a brother who was said to be in hiding and no longer working. The third reason was the likelihood that the claimant would not be able to work, as he had no appropriate documentation.

6. Even accepting each of these as relevant factors, we do not consider that they were individually or cumulatively sufficient to cross the high threshold of serious harm under Art 3. As regards the inability to work, there was evidence that the Kenyan authorities in September 1990 had informed the claimant that he was not a citizen of Kenya. But there was no satisfactory evidence that in the period up until he left his lack of citizenship prevented him from working. Nor was his claim that he would in practice be prevented from working supported by any objective country materials. From the CIPU Country Assessment of April 2002, paragraph 5. 30, it would appear that the Asian community in Kenya, whilst it faces a number of discriminations, is relatively affluent. Mention is made of its reluctance of its reluctance to employ blacks, but not of any reluctance to employ fellow-Asians. In the light of such evidence, it was not reasonably likely that such a community would not assist a fellow-Asian in trying to set up his own business or to find employment. There was no evidence that Asians in Kenya faced a significant problem of unemployment.

7. As regards the claimant's lack of family in Kenya, even accepting that all but one of his family have now left and even accepting that his brother is in hiding, the claimant was an adult in good health and would be able to return to live among fellow-Asians. This lack of family certainly did not demonstrate that return would expose him to serious harm. (Nor, given that he was now separated from his wife, can we see there would be any valid basis for saying that his right to respect for private and family life would be disproportionately interfered with as a result of the decision to remove him.)

8. That leaves the issue of the claimant's alleged statelessness. Since the appeal in this case is against removal directions to Kenya, the country from which he travelled to the United Kingdom there is no issue here of any invalidity of the removal directions. Nor is there any issue of the claimant not being able to return to Kenya. He has not produced any evidence to show the Kenyan authorities would refuse to admit him. However, even if let us suppose the Kenyan authorities refused to admit him, there would still be no breach of Art 3, since it is Home Office policy that where a person cannot be returned because a country to which removal is sought will not accept him, he is then returned to the United Kingdom. Such a result does not infringe Art 3: see Pavlov [2002] UKIAT 02544.

9. In any event, we do not consider that the claimant is stateless. Whilst we are satisfied that the claimant is not (and has never in law been a citizen of Kenya), it would appear he has a presumptive entitlement to Pakistan citizenship. The claimant has confirmed that he was told by the Kenyan authorities in 1990 to apply for Pakistan authorities and we have been shown evidence that he did in fact apply. Despite that application being lodged in 1998, the claimant has not produced any evidence to show either that he pursued this application in the intervening 4 years or that, if he did pursue it, it was refused. In our view it is reasonably likely that the Pakistan authorities would accept (if they had not in fact already done so) that he is a citizen of Pakistan by paternal descent. The claimant has failed to demonstrate that there have been or would be any significant obstacles to him obtaining Pakistan citizenship. Applying the principles set out by the Court of Appeal in the case of *Bradshaw* [1994] Imm AR 359 we consider it reasonably likely that he is a citizen of Pakistan.

10. For the above reasons this appeal is allowed. The adjudicator's principal findings did not justify his conclusion that return of this claimant to Kenya would expose him to a real risk of treatment contrary to his human rights.

**DR H H STOREY
VICE-PRESIDENT**