Pardeepan (Pre-2000 decision: human rights?) Sri Lanka * [2000] UKIAT 00006

IMMIGRATION APPEAL TRIBUNAL

Date heard: 5/10/2000
Date notified: 12/10/2000

Before

Mr Justice Collins (President)
Mr C M G Ockelton
Mr G Warr

SELVARATNAM PARDEEPAN

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION OF PRELIMINARY ISSUE

1. Selvaratnam Pardeepan who, as his name suggests, is a Sri Lankan Tamil, appeals against the decision of an adjudicator given as long ago as September 1998 to refuse his asylum application. Before considering the merits of the appeal we have to deal with an issue which has been raised whether the Tribunal is entitled to take account of the Human Rights Act and to permit the appellant to raise the issue that to remove him would be not only a breach of the Geneva Convention but also a breach of the Human Rights Act.

2. The Human Rights Act came into force on 2 October, as did the Immigration & Asylum Act 1999. The relevant provision, for our purposes, of the 1999 Act is Section 65. That section gives a specific new right of appeal on human rights grounds to the Immigration Appellate Authority, that is to say, the adjudicators and the Tribunal. Section 65 has two parts to it. First, it permits an appeal under Section 65(1) if a person alleges that an authority has, in taking a decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights. Secondly, sub-section 3 enables what we may describe as the human rights point, to be raised in any existing appeal before an adjudicator or the Tribunal. On the face of it, once that came into effect, it should have enabled the adjudicator or the Tribunal to consider human rights in respect of

the appeal before him, no matter when the decision to remove, or to refuse leave to enter, the effect of which would be removal, had been made.

3. However, the order which brings into force the relevant part of the 1999 Act, which includes Section 65, provides otherwise. The order in question is the Immigration and Asylum Act 1999 (Commencement no. 6 Transitional and Consequential Provisions) Order 2000, no. 2444, which was made on 11 September of this year. It is a sad fact that there has been considerable difficulty in obtaining before this week copies of that order, and the Immigration Appellate Authority was wholly unaware of what was proposed by the Home Office and had been preparing itself for Human Rights day on the assumption that it would be applying human rights as from last Monday. However, Article 3 of the Order provides by paragraph 1(a), subject to Schedule 2, that the new appeal provisions (that includes Section 65) are not to have effect in relation to events which took place before 2 October 2000. Events are defined in Article 4.2 in this way:

> "For the purposes of Article 3 an event takes place when (a) a notice is served (b) a decision is made or taken, (c) directions are given, and (d) a certificate is issued."

In the circumstances of a case such as this it is (b), the making of a decision.

4. Notwithstanding that, Schedule 2 paragraph 1(7) provides:

> "Section 65 Human Rights Appeals is not to have effect where the decision under the Immigration Acts was taken before 2 October 2000."

We asked Mr Thompson who has appeared on behalf of the Secretary of State whether he could explain the need for those two provisions, and other than a reference to belt and braces he was unable to help us. We should say before going further that we are indeed most grateful both to him and to Mr Walsh who has appeared on behalf of the appellant for their assistance, given the short notice in respect of the point which we are considering now, which is by no means an easy one.

5. The result of the Commencement Order, and the provisions which we have just cited, seem to us to be clear beyond any doubt. They prevent the Tribunal from considering human rights issues in any existing appeal, because sub-section 3 of Section 65 cannot be relied on in relation to decisions made before 2 October 2000, and of course before adjudicators, and more particularly before the Tribunal there are at present, and are likely to be probably until about the end of the year, only decisions made before 2 October. We have, of course, a particular case in front of us, and as Mr Thompson has rightly reminded us, we are strictly concerned only with the circumstances of that case. However, we are well aware that the Immigration Appellate Authority in general, and I am referring more particularly here to adjudicators, have some doubts whether they should consider human rights issues at present and it seems therefore not only sensible but necessary that the Tribunal should seek to give guidance as to what is the correct approach. Accordingly, in

hearing argument on this point, we have considered the matter far more widely than merely the facts of this case. This decision is a starred decision. The result of that is that it must be followed by all adjudicators and should be regarded as binding by all Tribunal members. If we are wrong in what we decide the matter can only be corrected by the Court of Appeal. Otherwise, of course, there will not be consistency of approach which is clearly essential in the situation that arises.

6. It is, we are bound to say, perhaps somewhat ironic that this Tribunal of all Tribunals should be precluded from considering human rights issues from the inception of the Human Rights Act. We should say, as will be apparent when we go through the matter, that that does not mean that human rights will not be taken into account because we are assured by Mr Thompson, on behalf of the Secretary of State, that those whose appeals are refused, for example, on asylum grounds, will be given the opportunity to raise, if they think fit, human rights objections to removal, should the Secretary of State decide to remove them. We are equally assured that the Secretary of State will not seek to argue that they do not have a right of appeal under Section 65 in respect of such a subsequent decision to remove. We hope that we have correctly understood the extent of the assurances that we have been given by the Secretary of State.

7. Again, for reasons that will become apparent, in the absence of such assurances, we would have had grave doubts whether we were correct in the decision that we are reaching that the adjudicators and Tribunal should not consider human rights, but should apply the Commencement Order and defer consideration under Section 65 until faced with decisions made after 2 October of this year. We should say that Mr Walsh has left open the argument that the Commencement Order, insofar as it seeks to defer the application of Section 65, is ultra vires because it is in conflict with the Human Rights Act of 1998. In those circumstances, he argues, we would be entitled to disregard it pro tanto because it would not be in accordance with the law. Suffice it to say that we would need a very great deal of persuasion indeed that we had the power to disregard any legislative provision, be it primary or secondary legislation. That is a matter essentially for decision by the Administrative Court, as it now is, and not for a tribunal such as ourselves. We have therefore to consider whether, independently of the 1999 Act, the Human Rights Act of 1998 requires the Immigration Appeal Authority to consider the question of human rights.

8. The argument that it does stems from Section 6 of the 1998 Act, which provides by sub-section 1 that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Public authority includes not only the Secretary of State but also the Immigration Appellate Authority, be it adjudicators or Tribunal. It is said that Section 7(1) enables the appellant before the Authority to raise human rights issues. Section 7(1) provides:

> "A person who claims that a public authority has acted or proposes to act in a way which is made unlawful by Section 6(1) may rely on the Convention right or rights concerned in any legal proceedings , but only if he is or would be a victim of the unlawful act."

It is quite plain that the appellant, and indeed we would expect any appellant in a similar situation, is likely to be a victim of the unlawful act if there has been one. Legal proceedings include the proceedings before the Tribunal and specifically include by sub-section 6 of section 7 an appeal against the decision of a court or tribunal. That has led to a refinement of the argument that an appeal by the Secretary of State to this Tribunal could constitute proceedings instituted by the Secretary of State. The reason for that refinement is to be found in Section 22(4) of the 1998 Act which provides:

> "Paragraph (b) of sub-section 1 of Section 7 applies to proceedings brought by or at the instigation of a public authority whenever the Act in question took place, but otherwise that sub-section does not apply to an Act taking place before the coming into force of that section."

9. Subject to appeals by the Secretary of State, it is therefore submitted by Mr Thompson that Section 22(4) prevents human rights questions being considered in existing appeals in relation to acts which took place before 2 October, and therefore there is no breach of the 1998 Act by the Authority in applying the Order and therefore not applying Section 65.

10. In addition, we have to take account of Section 6 sub-section 2 which disapplies sub-section 1 if (a) as the result of one or more provisions of primary legislation the Authority could not have acted differently, or (b) in the case of one or more provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the Authority was acting so as to give effect to or in enforce those provisions. So far as Section 6(2)(a) is concerned, we note that Section 21(1) of the 1998 Act defines primary legislation as including an order made under primary legislation to the extent to which it operates to bring one or more provisions of that legislation into force, or amends any primary legislation.

11. It is argued that the Commencement Order, or rather the provisions with which we are concerned of the Commencement Order, is the bringing into force of a provision of the 1999 Act. In reality, as it seems to us, it is doing no such thing. It is declaring that it does not come into force in particular circumstances, although generally it is brought into force. So, if it is relevant to decide that issue, in our view it does not come within Section 6(2)(a). However, so far as the Authority is concerned, it seems to us that the Order in question is a provision made under primary legislation which cannot be given effect in a way which is compatible with Convention rights, that is if it would otherwise not be compatible with human rights to fail to consider the arguments raised under the Human Rights Act. However, in our view, it would not in any event be even arguably incompatible with human rights because the Tribunal is not making a decision which means that it is acting in a way incompatible with a Convention right. All it is doing is dismissing, if it does, the appeal which is in front of it. That in itself does not affect the human rights of the appellant. What is required to affect his human rights is for a subsequent action to be taken by the Secretary of State to effect the removal. It may be argued that when one is dealing with, for example, the refusal of an entry clearance in relation to a family reunion case, then

there may be an existing and continuing breach of Article 8 as a result of any delay in permitting the individual to join his family, and it may be said that in that sort of a case as opposed to a removal case, there is a breach. In our view that is not the correct analysis because still the matter is up to the Secretary of State or the relevant Entry Clearance Officer under the supervision of the the Secretary of State to reach the necessary decision so far as human rights are concerned. Accordingly, we take the view that the Tribunal itself would not be acting unlawfully under Section 6(1) if one was looking purely at the decision of the Tribunal

12. However, we have looked at the matter somewhat more widely. It seems to us that one must look at the reality of what the Secretary of State is doing. It is not enough merely to look at the decision and say that because the decision was made before 2 October, therefore it is not a matter that can be raised and is covered by Section 22(4). The reality is that the Secretary of State in making his decision indicates that he proposes to remove this appellant and the same would apply to any asylum seeker. That is the reality, that is what he is proposing to do and it is that action which allegedly is a breach of the individual's human rights.

13. If we were persuaded that the result of our decision not to consider human rights would mean that the Secretary of State was enabled to remove without the human rights question being considered, then, as it seems to us, we would be permitting the Secretary of State to act in a way which was unlawful under Section 6(1) and that would at least arguably mean that we ourselves were acting in a way which was in breach of Section 6(1) by aiding and abetting the Secretary of State in his unlawful act. We would not on that scenario be protected by Section 6(2) because it would be quite impossible for the Secretary of State to argue that he was obliged to remove because of the provisions of any primary or secondary legislation. That of course would be a nonsense. The Secretary of State is not, because we cannot consider Section 65, obliged himself to refuse to consider human rights. Indeed, he does not seek to argue, as we would expect, that the contrary is the case. That is why, in the course of argument, we were concerned to satisfy ourselves that, were we to dismiss an asylum appeal, a human rights appeal would exist in relation to any decision to remove an appellant in consequence, and that is why we have referred to the assurances which we were given earlier in this judgment.

14. We are satisfied from what we have been told, that the Secretary of State is not intending to act in such a way as does not give the proper opportunity to anyone whose appeal is before the Tribunal, or the adjudicator, who loses and who wishes to raise a free-standing human rights claim, to be able to do so. This is of vital importance, because we must be satisfied that the Secretary of State or his officials would not, for example, take someone to London Airport to be put on to a plane without being given notice of that intention, or at least a proper opportunity of being able to raise the human rights point.

15. We note that the Notices Regulations are so drafted as to avoid the need for any decision made by the Secretary of State to give notice of any appeal rights on human rights grounds. We do not need to consider, indeed we would have no jurisdiction to consider, whether those provisions were or were not ultra vires. But we note them and we are aware that as a result of this judgment the Secretary of State will be aware of

our concerns about them, and we would hope that the Secretary of State will appreciate that those who come before the IAA and are unable to raise human rights points, should be properly informed of the right to raise them when the decision is made, if it is, to remove. It is essential, so that the Tribunal can be satisfied that the IAA is not condoning any breach, that anyone to be removed is given proper information so that he knows what his rights are.

16. We are concerned, we emphasise, only with those who have already appealed whose appeals are being considered between now and whenever pre-October 2 decisions cease to be in issue, because they are those whom we are unable to assist on human rights grounds.

17. In those circumstances, and because of the assurances that we have been given, we take the view that having regard to the legislation to which we have referred, the adjudicators and the Tribunal are not able to consider human rights issues in relation to decisions made before 2 October 2000.

18. We have been asked to give some guidance as to what adjudicators do when faced with an application by an appellant for them to consider human rights issues. So far as asylum appeals or appeals relating to removal from this country are concerned, in our view the adjudicator should in general not adjourn the matter but should deal with the issues which are before him.

19. There are a number of reasons for this. First, the findings of fact that are made may lead him to allow the appeal that is before him, in which case of course the human rights issues will never need to be considered. Secondly, his findings of fact may be the other way. He may decide that the appellant's case is wholly incredible, that there is no question whatever of, for example, his being persecuted in any way were he to be returned, in which case the Secretary of State would no doubt be considerably assisted by those findings and would be able fairly easily if human rights were raised, to find that there was no conceivable breach because in such a case one would imagine that human rights other than Article 3 would be unlikely to arise. Of course we recognise that there may be arguments advanced other than on Article 3 which would have to be considered on their merits. Thirdly, and in any event, any findings of fact by the adjudicator upon the matters before him, would be able to be used by the Secretary of State in reaching his decision. Indeed, we would anticipate the Secretary of State would not be able to disregard those findings of fact or to make contrary findings unless of course he had good reason to do so. So much is implicit in the decision of the Court of Appeal in ex parte Danaie [1998] Imm AR 84.

20. What we would not consider correct is for an adjudicator to consider material which was relevant only to any human rights claim. That, it seems to us, is not a matter which the adjudicators should concern themselves with, because this is not a situation which is appropriate for a recommendation. Adjudicators, as we know, are frequently asked to consider matters outside the specific grounds of appeal with a view to making a recommendation.

21. Since we know that human rights applications can be made, we do not regard it as in

general appropriate for consideration to be given as to whether there was likely to have been a human rights breach and therefore a recommendation to be given. The matter might well not have been properly ventilated, there may be facts which are material to that which need to be gone into in greater detail, and we think that the Secretary of State would quite rightly take the view that he would be reluctant to be bound by any facts found which gave rise to such a recommendation. In any event, the adjudicator's time is precious and we think that if they were to go into the human rights issue in every case with a view to making a recommendation their time would in truth be wasted.

22. We emphasise, of course, that we are giving general guidance and that there may be special circumstances in special cases which lead to a different conclusion, but in general, in our view, the matters should not be adjourned, but should be dealt with in the way that we have described. If, of course, as may happen, an appellant indicates that he accepts that he has no asylum appeal, to take an example, but does have a human rights appeal, or he has no chance of success on, for example, an entry clearance appeal but he does have an Article 8 point alone, in those circumstances, in our view, in general the right course would probably be for the adjudicator to dismiss the appeal and leave it to the appellant to make a fresh application to the Secretary of State or
to the Entry Clearance Officer, as the case may be, that the decision should go in his favour on human rights grounds.

23. We think the Secretary of State should consider carefully in such circumstances whether it would be proper to require the payment of any further fee from such an applicant in the event, at least, that the decision is made, that it would now be contrary to his human rights to prevent him from coming to join his family, or whatever may be the situation, in this country.

24. What we say on that is subject to this. As is well known, the Secretary of State has directed himself in many such cases, that he has already had regard to Article 8. In those circumstances, as it seems to us, the adjudicator is entitled and indeed is bound to consider Article 8 because the Secretary of State himself has considered it. There is then nothing to be gained from a fresh application because, as we say, human rights have already been considered, and in such cases, as now, following the decision of the High Court in ex parte Ali [2000] INLR 89, we think that it is clearly appropriate for this issue to be decided. Subject to that, as we say, we think that the approach should be as we have indicated.

25. That being so, we decide so far as this appellant is concerned, that he is not entitled on this appeal before us to raise human rights issues because the decision was made as long ago as 1997. We should say that Mr Walsh accepts that his client is not in any way prejudiced because of the assurance that he will have a right to raise the matter should he lose before us and should the Secretary of State decide to remove him as a result of that decision. Accordingly that is our decision on the preliminary point that has been raised before us.

MR JUSTICE COLLINS
PRESIDENT