IATRF 1999/0490/C

Neutral Citation Number: [1999] EWCA Civ 3003
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London WC2

Friday 5th November 1999

B e f o r e:

LORD JUSTICE SIMON BROWN

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BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant/Respondent

AND:
IFTIKHAR AHMED
Respondent/Appellant

- - - - - -

(Computer Aided Transcript of the Stenograph Notes of
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MR A McCullough (Instructed by Thornhill Ince, Site 3, 3rd Floor, Grampian House, 144 Deansgate, Manchester M3 3ED) appeared on behalf of the Appellant

MR C BLOOMER (Instructed by Treasury Solicitors, Queen Anne's Chambers, 28 Broadway, London) appeared on behalf of the Respondent

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J U D G M E N TFriday 5th November 1999

LORD JUSTICE SIMON BROWN: The appellant is a 30-year-old Pakistani Ahmadi who fled to this country on 6th October 1995, leaving behind his wife and two young children. He immediately claimed asylum but his application was refused by the Secretary of State on 4th December 1996. He appealed to the special adjudicator and on 3rd June 1997 his appeal was allowed. Then the Secretary of State appealed. The Secretary of State accepted the special adjudicator's finding that the appellant had indeed been persecuted in Pakistan on religious grounds, but he contended to the Immigration Appeal Tribunal that the special adjudicator had failed to address the issue of internal flight. On 11th December 1998 the IAT allowed the Secretary of State's appeal on that ground. The crucial paragraph of their determination reads as follows:

> "On the basis of the evidence before us, the respondent has not demonstrated to the required standard of proof that internal flight is not an option available to him. He has suffered at the hands of people from his own village. It appears to us that the difficulties he faced were localised and that it was not be impossible for him to live elsewhere in Pakistan. In our opinion, it would not be unreasonable for him to do so. Much was made by the respondent's representative of the respondent's urge to speak out and to spread the word of the Ahmadi faith. Such conduct, we were told, would render him liable to persecution wherever he goes in Pakistan. We do not consider it unreasonable for him, on his return to Pakistan, to make some allowances for the situation in Pakistan and the sensitivities of others and to exercise a measure of discretion in his conduct and in the profession of his faith. Any implication that it would be unreasonable for him to do so would be hard to reconcile with his decision to leave his wife and children in Pakistan and come to the United Kingdom some 4 years ago, and the fact that he has lived in the United Kingdom since that date."

Following refusal of leave to appeal by the IAT I myself granted it in these terms:

> "I give leave with some hesitation. You will have to meet the argument that it is reasonable for a man to curb his proselytising zeal so as to live in an Islamic country with his wife and children. However, the principles involved are clearly important."

With that brief introduction, let me at once flesh out the facts in somewhat greater detail. This can conveniently be done by quotation from the special adjudicator's determination, he having found the appellant to be an honest man whose evidence he entirely believed and the special adjudicator's findings having been accepted without qualification by the IAT. The express findings of fact made by the special adjudicator included these:

> "The appellant is an Ahmadi and whilst living in the village Khivewali which has about three thousand inhabitants he was on a daily basis subjected to harassment and a degree of physical violence including being spat at and stones being thrown at him.
>
> I accept his version of the events which took place in 1984 and the two events that took place in respectively June 1995 and September 1995.
>
> I find that he and his family were subjected to the most appalling treatment. His house was attacked and burned down on at least one if not two occasions.
>
> I am not surprised that on the occasion on 29 September 1995 that he and his family got out of the back door as fast as they could and managed to find sanctuary with Ghulam, a friend.
>
> They were extremely lucky in my view.
>
> I am satisfied that the appellant is telling the truth when he tells me that Ghulam told him, after enquiring, that the people who had attacked their house were going to kill the appellant if they got their hands on him.
>
> It is not surprising under those circumstances that he decided to flee the country on Ghulam's advice.
>
> He managed to do so.
>
> He left his wife and children in the safe care of his aunt Nazir. [That was some few kilometres away.]
>
> She is not an Ahmadi any longer and it seems quite clear to me that so long as his wife and children live with her they have nothing to fear. . .
>
> There are probably borderline cases but this is not one of them."

No less important for present purposes are certain further answers given by the appellant in the course of his evidence (the record of which occupies four pages of the special adjudicator's determination); evidence which, as stated, was accepted without reservation. The further evidence is recorded as follows:

> "He is an Ahmadi and vocal in propagating his religious beliefs . . .
>
> In his village he raised meetings for the Ahmadi religious sect and spent a good deal of time liaising with young people teaching them about it . . .
>
> He confirmed he was outspoken in his religious beliefs [all this in contrast to his father and two brothers who were able to live peaceably in the community] . . .
>
> The appellant maintained under cross-examination that his daily situation became worse and worse as time went by between 1984 and 1995 . . .
>
> If he returned to Pakistan and went to live in a different part of the country he would still follow the command of his spiritual leaders and would still be vocal in his proclamation of Ahmadi beliefs."

That last sentence, I should note, was the appellant's final answer in evidence. To my mind, I have to say, it throws some doubt on the IAT's conclusion that:

> "If the Special Adjudicator did consider the question of internal flight, that consideration is not apparent from the findings in fact nor from any other part of his determination."

It was, of course, on the basis that the special adjudicator had failed to consider the internal flight alternative that the IAT regarded the special adjudicator as having erred in law, a conclusion which in turn led them to deal with that issue themselves. They did so, as I have already indicated, on the basis of the special adjudicator's factual findings. Indeed, they said this:

> "The Special Adjudicator found that the respondent and his family had been subjected to the most appalling treatment and that, in the circumstances it was not surprising that the respondent had decided to flee the country. The Special adjudicator's findings in fact are unequivocal . . . it is clear that the Special Adjudicator considered that the respondent had demonstrated a well-founded fear of being persecuted for a Convention reason in the event of him being returned to Pakistan. . . . we see no reason to review the finding with respect to persecution. We shall therefore restrict our consideration of the appeal to the issue of internal flight."

Before turning to the rival arguments on the appeal, it is relevant to note that this is by no means the first Ahmadi case to come before the appellate authorities and the courts. Earlier cases have explored the nature of the Ahmadi movement. Judge Pearl's determination as chairman of the IAT in Ahmed [1995] (appeal number 12774) contains an invaluable exposition of the movement, not least by reference to Professor Friedmann's description of it in the Oxford Encyclopaedia of the Modern Islamic World (1995). Put at its very simplest, the Ahmadis have been in long-standing dispute with mainstream Sunni Islam on the question of religious authority. The majority of Islam regards Mohammed as the last prophet: the Ahmadis claim to have received divine revelation since. Professor Friedmann records that:

> "One of the essential differences between [the Ahmadis] and other contemporary Muslim movements is that the Ahmadis consider the peaceful propagation of their version of Islam among Muslims and non-Muslims alike to be an indispensable activity; in this they are persistent and unrelenting."

On 26th April 1984 the President of Pakistan published an Ordinance, No XX of 1984, imposing severe curbs on the practice of the Ahmadi religion. The most important prohibition reads as follows:

> "Any person of the Quadiani group or the Lagori group (who call themselves Ahmadis or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith by words, either spoken or written, or by visible representations, or in any manner whatsoever, outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which extend to three years and shall also be liable to fine."

A further paragraph prohibits the sect from using any title or form of address appropriate to the Muslim religion in any part of its hierarchy. The decree was obviously directed to preventing the sect either practising the Muslim religion, calling themselves Muslim, or seeking converts on the basis that they were themselves Muslims.

The effect of that ordinance was considered by this court in Ahmad v Secretary of State for the Home Department [1991] Imm AR 61. The argument there was that because of it and because the Ahmadis were determined to pursue their religion, the Secretary of State was bound to conclude that they had a well-founded fear of persecution. In dismissing the appeal, Farquharson LJ said this:

> "This argument - that is to say that the appellants had a well-founded fear of persecution, not so much because of acts which they had done but because of acts they proposed to do in the future - has been advanced before this court in the case of Mendis v Immigration Appeal Tribunal and the Secretary of State for the Home Department, [1989] Imm AR 6. In that case the court considered the proposition that a person who asserted that if he returned to his home country he would be obliged to speak up and give voice to unpopular opinions which would lead to persecution, could on that basis alone claim refugee status. Taken to its logical conclusion, that would enable a person, as Balcombe LJ pointed out in his judgment, to claim refugee status by deliberately inviting persecution. As counsel for the Secretary of State in that case submitted, the purpose of the convention is to protect people against the risk of persecution for political or religious reasons, and not to provide a world wide guarantee of freedom of speech. The court did not come to a concluded view in that case, Neill LJ in particular preferring to leave the question open. For my part, I would agree that a person cannot obtain refugee status on the basis that he has a fear of persecution if he returns to his national country and proceeds to break its laws. At the same time I do not consider that there are no circumstances in which a person could claim to be a refugee if he proposes to exercise what are widely regarded as fundamental human rights in the knowledge that persecution will result. In a religious context the position of a priest may be different from that of an ordinary member of the community or the offending statute itself may be so draconian that it would be impossible to practise the religion at all. It would depend to a very large extent on where, in the spectrum of religious observance, a particular applicant proposed to be active; somebody who merely attended his place of worship from time to time throughout the year would, as I have just indicated, be contrasted with an active clerical figure. However that may be, these matters should in my judgment be taken into account by the Secretary of State in relation to the particular individual whose application for asylum he is considering.
>
> In the present case I find that the submission is not a realistic one. The Secretary of State looked very carefully at all the affidavit evidence in this case, and it is right to say that there is no evidence from the appellants either that they have, or that they intended to, seek converts, or so to practise their religion as to invite the sanctions provided by the ordinance. . . in my judgment in a case of this kind, if the appellants are going to place themselves in conflict with the law by breaking the Ordinance - in this case Ordinance No XX of 1984 - it is incumbent upon them to be more specific as to the reasons why they are driven to do so."

Slade LJ said this:

> "It has been accepted by Mr Pannick, on behalf of the Secretary of State, that the Ordinance, by itself, was well capable being regarded as discrimination against all members of the Ahmadi sect; but in my judgment the proposition that it was by itself capable of making the appellants liable to persecution simply by virtue of being members of the sect is quite unsustainable. The only members of the sect potentially liable to persecution would be those who proposed to act in contravention of its provisions. Nothing in the Ordinance prevented persons from holding the beliefs of the sect, without engaging in any of the specified prohibited activities."

Then a little later this:

> "It was apparent to the Secretary of State. . . that most Ahmadis live ordinary lives, untroubled by the Government despite the existence of the Ordinance. In my judgment he would have been fully entitled to assume that if the appellants, on returning to Pakistan, would intend to disobey the Ordinance and such intention constituted the reason, or a predominant reason, for their stated fear, they would have said so, either to the immigration officer or to the Home Office."

It seems to me implicit in that final sentence that Slade LJ would have regarded such an assertion, had it been made, at the very least as highly relevant.

The third member of the court was Balcombe LJ, whose judgment in Mendis had, of course, been under consideration. He too agreed that the appeal should be dismissed.

Following Ahmad, it has always been accepted that there can be no blanket recognition of Ahmadis as refugees. Each case has to be considered on its own individual facts and merits.

Let me now finally come to the arguments on the present appeal. This is not, of course, a case like Ahmad where the persecution is said to consist in the appellant's risk of prosecution under Ordinance XX. As the appellant told the special adjudicator in evidence, he has never in fact been charged with an offence under that law. Rather his case is that on return he would face the self-same dangers as he has suffered in past years. His behaviour would attract the violent hostility of those amongst whom he lived and the authorities, so far from protecting him against such violence, would in all likelihood intervene (if they intervened at all) only so as to prosecute him under the Ordinance.

The respondent argues, on the contrary, that it was perfectly reasonable for the IAT to require of this appellant that he curb his proselytising zeal, "to make some allowances for the situation in Pakistan and the sensitivities of others and to exercise a measure of discretion in his conduct and in the profession of his faith." That approach, suggests Mr McCullough, represents the conventional wisdom on this question. As the authors of 'Macdonald's Immigration Law & Practice' (4th edn) state at paragraph 12.30:

> "Similarly in some earlier cases, it was intimated that a person cannot generally found a claim for asylum solely on future activity he or she might take part in on return to the country of origin, where this might infringe the law. The problem was considered by the Court of Appeal in Mendis v the IAT and the Secretary of State for the Home Department and Ahmad v the Secretary of State for the Home Department. *In both cases the applicant had not so far done any acts which might lead to prosecution in their own countries* [my emphasis], and the court rejected any claim to asylum on the basis that they would do in the future what they had not done in the past. The receiving state does not have to grant asylum if the full exercise of human rights cannot be permanently guaranteed in the country of origin and is entitled to expect some degree of prudence in the activities of the applicant if returned to his or her own country."

Indeed, as long ago as 1985 Nolan J had observed in R v Immigration Appeal Tribunal ex parte Jonah [1985] Imm AR 7 at 12:

> "Mr Blake [for the applicant], in my judgment, was right not to embrace the submission made by [counsel previously instructed] before the Immigration Appeal Tribunal to the effect that if a person has to refrain from political activity in order to avoid persecution he should qualify for political asylum. That is going much too far."

Helpful to the respondent's submissions though those references undoubtedly are, to my mind they take his argument only part of the way. It is one thing to say, as these said (and as, indeed, certain passages in the judgments in Mendis and Ahmad say) that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would not refrain from such activities - if, in other words, it is established that he would in fact act unreasonably - he is not entitled to refugee status. In my judgment the cases do not support the latter proposition and, indeed, were they to do so, they would clearly be inconsistent with the very recent decision of this court (consisting of Nourse, Brooke and Buxton LJJ) in Danian v Secretary of State for the Home Department (judgment dated 28th October 1999).

Essentially what Danian decides is that in all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable. It does not even

matter whether he has cynically sought to enhance his prospects of asylum by creating the very risk on which he then relies - cases sometimes characterised as involving bad faith. When I say that none of this matters, what I mean is that none of it forfeits the applicant's right to refugee status, provided only and always that he establishes a well-founded fear of persecution abroad. Any such conduct is, of course, highly relevant when it comes to evaluating the claim on its merits, ie to determining whether in truth the applicant is at risk of persecution abroad. An applicant who has behaved in this way may not readily be believed as to his future fears.

True it is that Danian was a decision about the effect of conduct in this country on an applicant's claim to be a refugee by reason of events which happened after his arrival here, a question which Buxton LJ in paragraph 12 of his judgment describes as "different and conceptually more difficult" than that considered by Balcombe LJ in Mendis. It is the latter question which now directly arises on this appeal, namely the effect of "a threat or inclination to speak out against the government of the applicant's native country were he to be returned there" (using again the language of Buxton LJ). To my mind, however, the same principle must apply equally in both cases. Of course, as Mr McCullough rightly points out, the conduct in question in Danian (a) will already have occurred and (b) (a related point) will have occurred in this country. Whoever, therefore, is having to decide the asylum claim will be presented with a *fait accompli*, however cynically the applicant may have acted. Here, by contrast, the conduct in question by definition will not have occurred and indeed will not occur if asylum is granted. But I cannot see how this consideration avoids the need to address the critical question: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum.

I would suggest, indeed, that this case is *a fortiori* to Danian. Danian postulates that refugee status may be won by someone creating for himself, by conduct in this country, a risk of persecution abroad. No such cynicism or bad faith is involved in this appellant's case. He says merely that he would not - perhaps could not - refrain from doing that for which he would suffer persecution wherever in Pakistan he was. Of course, in a case like this, no one will accept on trust an asylum seeker's assertion that he will if returned act so as to be persecuted rather than moderate his conduct, particularly in a case where most would think that such moderation could reasonably be expected of him. Rather, one is entitled to regard such an assertion as intrinsically self-serving and to examine it with a considerable degree of scepticism and if, as Macdonald noted to be the position in Mendis and Ahmad, applicants have not so far done any acts which might lead to prosecution in their own countries, then they can hardly be surprised if, as in those two cases, their claims are rejected.

The present case, however, seems to me strikingly different. This appellant, it is common ground, has suffered persecution in his own country, often daily, over a period of years. His religion requires him to proselytise, although it is true not all - indeed, perhaps few - Ahmadis carry that obligation to the lengths he does. His assertion that "If he returned to Pakistan and went to live in a different part of the country he would still follow the command of his spiritual leaders and still be vocal in his proclamation of Ahmadis beliefs" is in these circumstances highly likely to be true. After all, had he wished to avoid persecution in the past he could always simply have ceased his activities. Moreover, not only is his assertion inherently credible, but in any event his evidence was accepted by the special adjudicator and, as I understand it, was assumed to be truthful by the IAT.

I return finally to the IAT's determination, the critical paragraph of which I have already quoted. To my mind it simply never addresses the all-important question as to whether, if returned, the appellant would indeed act in such a way as to be persecuted. Either it supposes that this question is immaterial - as, indeed, Mr McCullough submits it is but as in my judgment Danian establishes it is not - or it assumes that the appellant will in fact behave on return in the restrained way that the tribunal think it reasonable he should behave. If the latter is the case, then in my judgment there was no evidential basis for that assumption. On the contrary, it flies in the face of the appellant's evidence, which has been accepted throughout. (Whatever may have been meant by the somewhat opaque final sentence of the tribunal's paragraph, the fact that the appellant left his wife and children in Pakistan and claimed asylum here cannot in my judgment negate his evidence as to how he would behave were he to return.)

Even assuming, therefore, that it would be unreasonable for this appellant on return to Pakistan to carry on where he left off, the IAT's view and one with which I myself have some sympathy - see, for example, article 9.2 of ECHR, which allows limitations on the freedom to manifest (albeit not, be it noted, the freedom to hold) one's religions or beliefs if that is necessary, among other things, for the protection of the rights and freedoms of others - that still does not defeat his claim to asylum.

As I suggested earlier in this judgment, I think it likely that the special adjudicator did consider and reject the internal flight option on the ground that this appellant would in fact proselytise and be persecuted wherever in Pakistan he returned to. Whether he did or not, however, in my judgment the tribunal was not entitled on the evidence to hold that the option is available here. I would accordingly allow the appeal and restore the special adjudicator's decision.

LORD JUSTICE ROBERT WALKER: I agree.

THE PRESIDENT: I also agree.

ORDER: Appeal allowed. The decision of the IAT set aside and the decision of the special adjudicator restored. Legal aid assessment. Leave to appeal to the House of Lords refused.

(Order not part of approved judgment)