SHEIKH MOHAMMED IKHLAQ HAMIDA IKHLAQ
(Appellants)
v
SECRETARY OF STATE FOR THE HOME DEPARTMENT
(Respondent)

16 April 1997
Court of Appeal: Staughton, Waite, Waller LJJ
Asylum-internal flight-the meaning of "expect" and "reasonable" in the relevant immigration rule-whether rule ambiguous-whether Tribunal entitled to differ from special adjudicator after balancing evidence to determine whether internal flight reasonable. Asylum and Immigration Appeals Act 1993 s. 8(2): HC 395 para. 343: UNHCR Handbook on procedures and criteria for determining refugee status para. 91.
The appellants, husband and wife, were citizens of Pakistan. They claimed they feared persecution in Karachi. They had however moved to Rawalpindi before coming to the United Kingdom. Their application for asylum was refused by the Secretary of State who concluded that it would be reasonable for them to return to Rawalpindi. They appealed. Their appeal was allowed by a special adjudicator who, taking account especially of their medical conditions, concluded that it would not be reasonable for them to return to Rawalpindi. On appeal by the Secretary of State the Tribunal reversed the decision of the special adjudicator. They appealed to the Court of Appeal.

Held:

1. In HC 395 para. 343 concerning internal flight "expect" meant "require" and it was the decision-maker who was to be reasonable: it was not a matter of whether it was a reasonable course for the appellant to take.

2. There was nothing ambiguous in paragraph 343.

3. On the facts, the Tribunal was entitled to reverse the decision of the special adjudicator. There was nothing in the medical reports to suggest that the health of the appellants would be adversely affected if they returned to Rawalpindi.

D O'Dempsey for the appellants
Miss E Grey for the respondent

Cases referred to in the judgments:

Thirunavukkarasu v Minister of Employment and Immigration (1993) 109 DLR (4th) 682.
Dupovac (unreported) (11846).
Ahmed (unreported) (13371).

STAUGHTON LJ:

Mr. and Mr.s Ikhlaq are citizens of Pakistan; he is now aged 56, and she is 50. For a time they were living in Karachi, which is in the province of Sind. They say that they suffered persecution there and in October 1990 their house was burnt down. But they did not come here immediately; instead they went to Rawalpindi, in the Punjab where they had lived previously, to arrange their affairs. In particular they transferred to their children a business which they owned. Then in June 1991 they obtained visas for a single visit to the United Kingdom. It was on 13 September 1991 that they arrived in this country and were granted leave to enter for six months as visitors. On 24 September representatives acting on their behalf submitted an application for asylum.
That claim was rejected by the Secretary of State on 22 August 1994. On 22 April 1996 an appeal by Mr. and Mr.s Ikhlaq was allowed by a special adjudicator, who held that they were

entitled to asylum. His decision was reversed by the Immigration Appeal Tribunal on 15 July 1996. There is now an appeal by leave of this court. So the present state of affairs is that Mr. and Mr.s Ikhlaq are once again seeking the right of asylum here.
The special adjudicator found that:
"... it would not be safe for these appellants to return to Karachi and that they have a well-founded fear of persecution on the ground of their political affiliation, were they to be returned to that city."

He went further and found that they had a fear of persecution in respect of the whole of the territory of the Islamic Republic of Pakistan; but he added-
"In respect of the city of Rawalpindi and its environs ... that fear is not well-founded."

One further conclusion of the special adjudicator is of critical importance. He made this finding:
"In all the circumstances of the case including the fact that the first appellant is himself a refugee who was traumatised by violent events in his childhood, the post traumatic stress disorder from which he suffers, the history of persecution of the first appellant, the major depressive illness from which the second appellant suffers and the violence to which he was subjected by police officers in 1994, it would not be reasonable to expect them to exercise the option of internal flight to Rawalpindi."

The Question to be answered

We are all familiar with article 1 A(2) of the United Nations Convention relating to the status of refugees:
"the term refugee' shall apply to any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

Neither there nor anywhere else in the Convention do we find express provision for a person who has a well-founded fear of persecution on Convention grounds in *part* of the country of his nationality and not in some other part of it.
Nevertheless that situation was dealt with in the Statement of Changes in Immigration Rules (HC 725 para. 1801), now replaced in the same terms by HC 395 para. 343:
"If there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution, and to which it would be reasonable to expect him to go, the application may be refused."

That, as it seems to me, is the quasi-legislative provision which applies to this case.
The appeal to a special adjudicator was brought under section 8(2) of the Asylum and Immigration Appeals Act 1993:
"a person who has limited leave under the 1971 Act to enter or remain in the United Kingdom may appeal to a special adjudicator against any variation of, or refusal to vary, the leave on the ground that it would be contrary to the United Kingdom's obligations under the Convention for him to be required to leave the United Kingdom after the time limited by the leave."

That in terms limits the grounds of appeal to reliance on the Convention. Does that exclude consideration of what is called by some the "internal flight option?" (I would describe it as an "internal movement option," since anything resembling flight will not necessarily be involved.) It is, as I have said, not expressly mentioned in the Convention.
The parties to the present appeal are agreed as follows:
(1)the internal movement option forms part of the definition of a refugee in the Convention;

(2)therefore it falls to be considered in an appeal under section 8 of the 1993 Act;

(3)and the decision to the contrary of an Immigration Appeal Tribunal in *Secretary of State for the Home Department v Ahmed* should not be followed.

One has some qualms about proceeding on what may be a false assumption as to the powers of a special adjudicator on appeal. But in the particular circumstances of this case I cannot detect any harm in doing so, provided that this assumption is plainly stated. It has to be added that we are, as it seems to me, also to treat the case of *Secretary of State for the Home Department v Dupovac* as one that we should not follow.
The situation then is that Mr. and Mr.s Ikhlaq had a well-founded fear of persecution on Convention grounds while they were living in Karachi. Although they went from Karachi to Rawalpindi and stayed there for eleven months, they have by tacit agreement been treated as if they were refugees from Karachi to the United Kingdom. Or at all events that is how their case has been treated since it reached the special adjudicator. Once again I have misgivings about accepting an agreed assumption which appears to be contrary to the facts; but once again I am prepared to do so. Accordingly, Mr. mid Mr.s Ikhlaq have established that they are outside the country of their nationality owing to a well-founded fear of persecution for Convention reasons. They have still to show that they are unable, or unwilling owing to such fear, to avail themselves of the protection of that country. That requirement, according to Miss Grey for the Home Secretary, is what gave rise to rule 343: if there is another part of the country from which the refugee comes where he would not have a well-founded fear of persecution, and which it would be reasonable to expect him to go to, he does not satisfy the second part of the definition of a refugee.
Mr. O'Dempsey, who appeared for Mr. and Mr.s Ikhlaq and has like Miss Grey given us much assistance, did not, so far as I could tell, wholly accept that submission. However, in my judgment it is well-founded at least to this extent, that rule 343 does no more than describe one situation, possibly among many, where the second part of the definition of a refugee is not satisfied. That seems to accord with the view expressed in Hathaway's *The law of refugee statusl[1]* p 134*:*
"The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can genuinely access domestic protection, and for whom the reality of protection is meaningful. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."

The same sentiment is to be found in Goodwin-Gill, *The refugee in international law+[2] p 74,* although I would not accept without question his criteria:
"*Internal flight alternative*

There is also no reason in principle why the fear of persecution should relate to the whole of the asylum seeker's country of origin; for various reasons, it may be unreasonable to expect the asylum seeker to move internally, rather than to cross an international frontier. Different jurisdictions have thus held that the relevant criterion is the availability in fact of protect in another region, and the chance of maintaining some sort of social and economic existence. Canadian courts consider that an internal flight alternative (IFA) is part of the general question of whether the claimant is a refugee; consequently the burden of proof remains with the claimant, to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an EFA.' If there is an area in their own country in which asylum claimants would be safe from persecution, they will be expected to go there, unless they can show that it is objectively unreasonable for them to do so.' The claimant need not undergo great physical danger or hardship, cross battle lines or hide out in isolated areas, but he or she may be expected to put up with certain difficulties, for example, in finding suitable employment."

In *Thirunavukkarasu v Minister of Employment and Immigration* (1993) 109 DLR (4th) 682 at p. 684 Linden JA said:
"If claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country."

The view which I have formed on this point is confirmed by a passage in the *Handbook* of the United Nations High Commission for Refugees at paragraph 91, though I would need to be persuaded that it can properly be used as an aid to interpretation of the Convention:
"In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

That is reflected in paragraph 343 of HC 395, except that the express mention of "all the circumstances" is omitted.
Can one elucidate further the words "reasonable to expect him"? First one should note that the word "expect" does not here bear its primary meaning of regarding something as likely; it has nothing to do with prognosis. Rather it means something akin to require. That was not disputed before us.
Secondly, the enquiry is not as to what would be a reasonable course for the refugee to take. It is the decision-maker who is to be reasonable, the person who is doing the expecting (or requiring). So the question comes to this: would it be reasonable for the Secretary of State to expect (require) Mr. and Mr.s Ikhlaq to return to Rawalpindi, instead of claiming asylum in this country?
It is not disputed that their medical condition can and should be taken into account in this case. Nor is there any other circumstance which one of the parties wishes us to take account of and the other says should be ignored. So there is no need to enquire further as to what circumstances in theory may or may not be relevant. Mr. O'Dempsey argued that rule 343 was ambiguous, and that consequently we should look for guidance to what was said by Lord Ferrers, the Minister of State at the Home Office, in the House of Lords debate on the Asylum and Immigration Appeals Bill. I would reject that argument. There is in my opinion nothing equivocal about the word "reasonable" in rule 343; if there were, we ought to be looking to the Convention which fathered the rule, not the House of Lords; and if we do look at the speech of Lord Ferrers we find that he said little more than that an assessment will be made of all the circumstances of the case.

The facts

Crucial to the special adjudicator's decision was the state of health of both Mr. and Mr.s Ikhlaq. This was considered by Dr Stuart Turner MA MD MR.CP FRCPsych. His conclusions in respect of Mr. Ikhlaq were as follows:
"25.Based on this assessment it is my opinion that Mr. Ikhlaq has Post Traumatic Stress Disorder. This is a recognised psychiatric disorder and follows major traumatic events. In his case it seems quite possible that there was a sensitisation in childhood. He reports having problems watching blood or trauma since then. In Pakistan he appears to have suffered persecution and his current reaction would be entirely consistent with that. His symptoms are not severe. However the specific nature of a reaction tends to be supportive of him having experienced traumatic events such as he describes.

26. During the interview he appeared a little vague and although he scored three out of three on a cued recall test of memory at ten minutes this is a very gross assessment. It would not be appropriate to detect mild changes affecting memory. However given the difficulties of language and having to work at least in part through an interpreter in this interview I did not feel that it was possible for me to carry out more sophisticated tests. It is my opinion therefore that it is a real possibility that perhaps in conjunction with Post Traumatic Stress Disorder or following his injury as a child or for some other reason he has a mild problem with remembering and recalling."

Dr Turner's conclusions in respect of Mr.s Ikhlaq were as follows:
"10.It is my opinion that Mr.s Ikhlaq has a major depressive disorder. This is of clinical significance and merits more active treatment than she is currently receiving. She meets the full criteria for major depressive disorder as currently defined. In addition she has some feelings of persecution which may suggest that this problem has become more serious.

11. Her current situation is only standing to make things worse in terms of her clinical care. What she requires is effective treatment for depression and a re-assessment of her persecutory ideas. Her trouble is that given that some of her worries are realistic and it is possible that they may be deported this is standing to have a significant negative impact on the ability to offer effective treatment. During the interview she denied suicidal thoughts. Nonetheless it is my opinion that she still presents with an increased suicidal risk."

Thus far there does not appear to be any suggestion that the health of Mr. or Mr.s Ikhlaq would be made worse by a return to Rawalpindi, It seems unlikely that the omission was accidental. There were further relevant conclusions of the special adjudicator, as follows:
"The second appellant, Mr.s Hamida Ikhlaq, suffers from a major depressive disorder. Her enforced return to Pakistan would present an appreciable and material risk both to her mental and physical health.

It would be manifestly wrong in my view for either appellant to be removed forcibly to any part of the territory of Pakistan. In coming to that conclusion I have particular concern for the position of the second appellant. The first and second appellants have been married now for 30 years. They plainly are very close to each other and no-one could or should suggest that if either were returned to Pakistan that they should go alone. Plainly these appellants should be dealt with together.

I have come to the clearest possible conclusion that the second appellant could not safely be removed from this jurisdiction and I cannot envisage any circumstances under which it would be right to remove the first appellant were the second appellant to be allowed to remain."

It is not clear to me whether in those three passages the special adjudicator is making additional findings of primary fact, or stating his conclusions from the facts already found. Nor do I need to decide that.
The appeal from the special adjudicator to the Immigration Appeal Tribunal was not confined to questions of law. The Tribunal was entitled to review the special adjudicator's decisions on questions of fact.
The heart of the Tribunal's decision is in these three paragraphs:
"We have read carefully all that the adjudicator has set out in this case. At paragraph eight, he states that so far as Rawalpindi is concerned, applying objective criteria, the fear is not well-founded. Given that, it seems to us that to establish that relocation is nonetheless unreasonable, it is necessary to have clear and strong evidence.

Each case will depend on its own facts, and the Tribunal will not lightly interfere with a finding of an adjudicator who of course has had the benefit of seeing the parties and weighing up the evidence. In this case, however, it is our view that the finding of the adjudicator is perverse. He accepts evidence of links with Rawalpindi including that they were domiciled there shortly before they came to UK. He accepts evidence that their children and grandchildren live in the city. He accepts that they do not have a well-founded fear of persecution in the city.

It is the medical health of the parties which persuades the adjudicator to allow the appeals before him. We have reviewed this evidence. In the final analysis, we are not persuaded by this evidence that it would be unreasonable to expect Mr. and Mr.s Ikhlaq to relocate to Rawalpindi. In so far as the adjudicator fell into error, it is our view that he gave undue prominence to a subjective test when considering what was or was not unreasonable. It is our view that having taken account of all the subjective factors in an individual case one must step back and assess this evidence objectively. This we have done."

The thought process of the Tribunal seems clear enough to me: seeing that Mr. and Mr.s Ikhlaq were domiciled in Rawalpindi, had their own business there, had lived there for eleven months prior to their arrival in the United Kingdom and could continue to live there without a well-founded fear of persecution, near to their children and presumably grandchildren as well, there was much to be said for the view that it would not be unreasonable to require them to go there. Against that there was the medical evidence of Dr Turner, which may or may not have indicated

that there was a risk, in greater or lesser degree, of harm if they were required to return. The special adjudicator concluded that on balance it would be unreasonable of the Secretary of State to require them to return. The Tribunal disagreed. They found on balance that it would be reasonable for the Secretary of State to require them to do so.
It is true that the language of the Tribunal's decision can in one respect be criticised. Mr. O'Dempsey submitted that the requirement of clear and strong evidence betrayed an application of the wrong standard of proof. I do not accept that. It seems to me that, in the Tribunal's view, once it had been shown that Mr. and Mr.s Ikhlaq could safely return to and live in Rawalpindi, there was quite a burden on them to show why it would be unreasonable to require them to return there. I do, however, question the description of the special adjudicator's decision as "perverse". That to me means a decision which no reasonable special adjudicator could reach. I do not think that it was perverse in that sense. But it did not need to be before the Tribunal had the right to alter it. They were entitled to do that if the decision was in their opinion merely wrong, but not necessarily perverse.
There is also some difficulty with the Tribunal's conclusion that the special adjudicator "gave undue prominence to a subjective test." It was said that the task was to assess the evidence objectively. On reflection I do not consider that there is any material error in this part of the Tribunal's decision. They were saying that the special adjudicator gave too much weight to the subjective views of Mr. and Mr.s Ikhlaq that it would be unsafe for them to return to any part of Pakistan, and not enough to the objective fact that they could safely return to Rawalpindi. That was a view which they could lawfully take.
This court on appeal from the Immigration Appeal Tribunal can only act upon an error or errors of law: section 9(1), Asylum and Immigration Appeals Act 1993. There was none in the Tribunal's decision in this case. The appeal must be dismissed.

WAITE LJ:

I agree.

WALLER LJ:

I also agree.

DISPOSITION

Appeal dismissed

Solicitors:

Deighton Guedalla, London NW1; Treasury Solicitor

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[1]I J C Hathaway, *The law of refugee status* (Toronto) 1991.

[2]+ G S Goodwin-Gill, The refugee in international law (Oxford) 2nd ed 1996.