C1/2002/2311

Neutral Citation Number: [2003] EWCA Civ 649
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, 4 April 2003

B E F O R E:

LORD JUSTICE CLARKE

MR JUSTICE MAURICE KAY

MR JUSTICE RICHARDS

- - - - - - -

KRAYEM

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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MR H SOUTHEY (instructed by Wilson & Co of London) appeared on behalf of the Appellant
MR T EICKE (instructed by Treasury Solicitor) appeared on behalf of the Respondent

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J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE RICHARDS: The appellant is a Palestinian, born in Kuwait but without Kuwaiti nationality. Before coming to the United Kingdom his place of habitual residence was Lebanon, where he was living in a refugee camp run by the United Nations Relief and Works Agency for Palestinian refugees (UNRWA). He arrived in this country in 1997 and claimed asylum on arrival. His claim was refused by the Secretary of State. An appeal to the adjudicator was dismissed and a further appeal to the Immigration Appeal Tribunal was dismissed in a decision notified on 3 October 2002. He now appeals against that decision.

2. Before the adjudicator the appellant put his case on three bases. First, he relied on Article 1D of the Refugee Convention. Secondly, he said that in the camp he had joined a group called El-Kifah El-Musalaah without realising it was an armed resistance group and that having fallen out with its aims he feared persecution by that group if he were returned to the same camp. The third basis was that discrimination and ill treatment of Palestinian refugees by the Lebanese authorities amounted to persecution.

3. The adjudicator rejected the case on Article 1D on the ground that it applied only to persons who were receiving protection or assistance from UNRWA on 28 July 1951. The point was maintained in the grounds of appeal to the tribunal but was conceded at the hearing of the appeal and is not now in issue. As to the appellant's claimed fear of persecution by the armed resistance group, the adjudicator made strong adverse findings on credibility, saying that he did not believe the appellant's account in any respect. The tribunal saw no reason to interfere with the adjudicator's judgment on that issue, and on the appeal to this court there is no challenge to that aspect of the tribunal's decision.

4. As to the wider question of the treatment of Palestinian refugees in Lebanon, the adjudicator found that there might be some local discrimination against them but that even if the appellant could establish fear of persecution in one part of Lebanon internal relocation would be possible.

5. In the grounds of appeal to the tribunal it was contended that the adjudicator had failed to engage with arguments that the appellant feared persecution at the hands of the Lebanese authorities. In support of the appeal the appellant obtained an expert report from Mr George Joffé, who is affiliated to the Centre of International Studies at Cambridge University and is a Research Fellow at the Royal United Services Institute. The tribunal also had before it a substantial amount of background material, including a Home Office Country Information Policy Unit (CIPU) report dated April 2002 giving a country assessment on Lebanon, a 1999 report by the US Committee for Refugees on the Marginalisation of Palestinian Refugees in Lebanon, a US State Department report on Lebanon dated 25 February 2002 and an article from a publication called "Middle East International" dated 2 June 2000.

6. In its determination the tribunal dealt with that issue as follows. It referred in paragraph 7 to Mr Joffé's report emphasising that it was written recently in relation to the appellant and for the hearing before the tribunal, but also observing that Mr Joffé did not appear to have visited any of the UNRWA camps and on one matter he did not appear to have read or appreciated the CIPU report. The tribunal stated in paragraph 8 that the first part of Mr Joffé's conclusions related to the situation if the appellant's story of having joined an armed resistance group was true. The second part set out the position in general, as the author saw it, for Palestinians in UNRWA camps. In paragraph 9 the tribunal quoted the following two paragraphs of the report relating to that second matter:

> "'Secondly, Mr Krayem's fear of persecution must also be related to the fact that Palestinians form a group that suffers discrimination as an ethnic group in

> Lebanon, as this report demonstrates. Palestinians in the camps in Lebanon labour under such restrictive conditions that they breach established human rights conventions. They have to resort to practices normally considered illegal by the Lebanese authorities just to survive, particularly since legal means of survival are barred to them. Palestinians are effectively forbidden to work (although the practice of refusing work permits officially ended in 1991, the reality is that permits are still not issued to Palestinians) - so they have to resort to the parallel economy in order to survive, in addition to the minimal support provided by UNRWA, or find work abroad. Security is non-existent, as the deaths of 2,000 Palestinians in Shabra and Chatila camps in late 1982, in massacres organised by the Lebanese Phalange-Lebanese Forces and tolerated by Israeli forces in Beirut then under the overall command of the current Israeli premier, Ariel Sharon, made clear. The Lebanese authorities provide no protection within the camps and refuse to offer it to Palestinians outside the camps. Indeed, nothing has occurred since 1984 to improve security for Palestinians in the camps, beyond the activities of their own militias, and, in many respects, the situation is even worse today. Mr Krayem would not, therefore, receive adequate and appropriate protection from the state if he is returned to Lebanon, given the attitudes of the Lebanese authorities towards Palestinians.
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> In these circumstances, it seems to me that Mr Krayem has reasonable grounds to fear that he will face discrimination as a member of El-Kifah El-Musalaah - he will have to return to Ain al Helwa camp as he will not be allowed by the Lebanese authorities to settle anywhere else if he is returned to Lebanon and thus will face persecution.'"

7. The tribunal commented as follows in paragraph 10 of its determination:

> "We see in those two paragraphs E G H Joffé's view of the situation of Palestinian refugees, whose former place of habitual residence is Lebanon, as a whole. The comments which he makes are related to the situation of Palestinians in general. He apparently takes the view that every Palestinian has a well-founded fear of persecution in the camps: that is because of the way the Lebanese authorities treat the Palestinians on their territory."

The tribunal noted three matters in particular. The first, in paragraph 11, was that although it was asserted that nothing had occurred since 1984 to improve security, and in many respects the situation was worse, there was no mention of any particular events since the early 1980s. The second, in paragraph 12, was that the assertion that the appellant had returned to the same camp was shown by the CIPU report to be wrong, though there were substantial practical difficulties in moving between camps. The third point, and the remainder of the tribunal's reasoning, were expressed as follows in paragraphs 13 to 15:

> "Thirdly, the opinion of the Joffé letter seems to indicate generally that those in the care of the United Nations are in fact all being treated in a way which breaches the International Conventions which are at the heart of the United Nation's constitution. We are entirely unable to accept that view.
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> It might have been a more moderate report could have shown that a particular individual might be at risk of persecution, but we have dealt with this matter at some length in order to make it clear that the views of E G H Joffé, who wrote the report which is submitted to us, go well beyond what can be accepted as a

matter of generality.

> The present appellant has failed to establish the history he claims. His case falls to be considered as that of a Palestinian who faces return to Lebanon where he will be living in an UNRWA camp. Conditions are not, to say the least, ideal and no doubt he will face discrimination. But, as a person who has established only those characteristics, he has not shown that he is at risk of persecution for a Convention reason."

8. The appellant sought the tribunal's permission to appeal to this court on the ground that the tribunal had failed to explain why the discrimination and ill treatment he would face on return to Lebanon did not amount to persecution. In refusing permission the deputy president gave the following reasons:

> "The tribunal considered the argument and materials before it and did not err in so doing. The point made in the grounds is new and comes perilously close to arguing a requirement, as a matter of law for reasons for reasons. It is not properly arguable that all discrimination amounts to persecution: the tribunal's evaluation of the evidence was that the treatment the applicant will receive on return would not amount to persecution. If this matter is to be pursued I venture to suggest that UNRWA should have an opportunity to say whether they accept that they, an organ of the UN, consider that they operate in general in breach of the UN's basic founding documents."

Permission to appeal was subsequently granted by Lord Justice Carnwath on the basis that there are reasonable grounds for arguing that the tribunal failed to explain adequately its conclusion on the issue of persecution, including its rejection of the evidence of Mr Joffé, by reference to the implications for UNRWA camps generally. That delineates the scope of the present appeal.

9. The appellant's substantive case is founded on the proposition that discrimination in relation to certain economic, social and cultural rights can, in certain circumstances, amount to persecution. The point was covered as follows in a submission by the UNHCR endorsed by the tribunal in Gashi v Secretary of State for the Home Department [1997] INLR 96 at 105E to 106C. I quote the material part:

> "In aid of this sometimes difficult assessment, UNHCR generally agrees with Professor Hathaway's formulation that persecution is usually the 'sustained and systemic denial of core human rights' (J Hathaway at p 112). Clearly, some human rights have greater pre-eminence than others and it may be necessary to identify them through a hierarchy of relative importance. This can be achieved by reference to the International Bill of Rights as the universal measure of appropriate standards.
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> .....
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> (c) The third category are rights which although binding upon States, reflect goals for social, economic or cultural development. Their realisation may be contingent upon the reasonable availability of adequate State resources. But the State must nonetheless act in good faith in the pursuit of these goals and otherwise in a manner which does not violate these customary norms of non-discrimination. This category would include, inter alia, the right to basic education and the right to earn a livelihood. In appropriate circumstances a

> systemic and systematic denial of these rights may lead to cumulative 'consequences of a substantially prejudicial nature for the person concerned' of such severity as would amount to persecution within the meaning and spirit of the Convention. This would be particularly so where the State has adequate means to implement the rights but applies them in a selective and discriminatory manner."

10. The various rights referred to include those in Articles 23 and 25 of the Universal Declaration of Human Rights and in provisions of the Refugee Convention governing the welfare of refugees. The reference to Professor Hathaway is to his work, The Law of Refugee Status, in which he examines the concept of persecution in depth. A brief summary of the key point was cited by Lord Justice Simon Brown in Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 at 107:

> "'In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include ..... a failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources.'"

11. Mr Southey submits that the material before the tribunal, namely Mr Joffé's report and other background material, showed that there was a significant risk that the appellant would be exposed to discrimination in a number of relevant areas - including employment, housing, health care, freedom of movement and protection from violence - and that the discrimination was such as to be capable of amounting to persecution. He cites in support detailed passages from each of the documents that was before the tribunal, which however I think it unnecessary to set out. The flavour of it is given in the passage from Mr Joffé's report cited by the tribunal which I have already read.

12. The submission made is that in paragraph 13 of the tribunal's decision the tribunal failed to give adequate reasons for its finding or assumption that people in the care of the UNRWA would not be treated in a way which breached the Conventions at the heart of the UN's constitution. There was objective evidence, not confined to Mr Joffé's report, of significant discrimination of that kind and that the UNRWA lacked the resources needed to protect against such discrimination. The appellant's case was not that the discrimination was the direct responsibility of UNRWA but that it was the responsibility of the Lebanese authorities and UNRWA was unable to protect against it.

13. Mr Southey further submits that the tribunal failed to give adequate reasons for its decision that discrimination would be experienced by the appellant in Lebanon but would not amount to persecution. In paragraph 15 the tribunal accepted that he would face discrimination but did not say what sort of discrimination or what degree of discrimination he would face. Nor did it say why that would not amount to persecution. It did not give, submits Mr Southey, sufficient reasons to enable the court to know whether it erred in its approach to that issue.

14. As to the duty to give reasons, Mr Southey refers in particular to R v Immigration Appeal Tribunal ex p Khan [1983] 2 WLR 759 at 762G to 763A where Lord Lane said:

> "The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence upon which they have come to

their conclusions.

> Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis upon which they have reached their determination upon that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed."

15. For the Secretary of State Mr Eicke submits that the tribunal has given sufficient reasons. He refers to a recent decision of the Court of Appeal in English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 and, in particular, to a passage at page 2419 paragraph 25, where it is stated in relation to an alleged failure by a trial judge to give adequate reasons for a decision:

> "Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course."

16. On that basis, submits Mr Eicke, it is permissible to look in this case not only at the reasons given in the substantive determination but also at what was said when leave to appeal was refused by the deputy president of the tribunal. He submits that the process of reasoning was as follows: a) the tribunal preferred the objective evidence contained in the CIPU report to that provided by Mr Joffé, (b) the evidence provided by Mr Joffé related only to the situation of Palestinians generally, (c) the appellant would no doubt face some discrimination on his return, (d) not all discrimination amounts to persecution, (e) on the evidence before the tribunal the discriminatory treatment the appellant would encounter on return would not amount to persecution. He says that (a) to (c) can be derived from the substantive determination and (d) and (e) can be derived from the reasons given when refusing leave to appeal.

17. It is right, in addition, to record a number of submissions made by Mr Eicke on the substance of the case, though it has not been necessary to hear oral argument on them. I take these points briefly from his skeleton argument. The starting point is that a refugee is defined as a person who, owing to a well founded fear of being persecuted for Convention reasons, is -

> "outside his country of nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

What is submitted is that the appellant's nationality has not been established, but equally he has not been shown to be stateless. All that has been established is that his former residence was in Lebanon. Thus, he cannot show that he is a person who is unable or, owing to fear of persecution, unwilling to avail himself of the protection of his country of nationality. Nor can he show that he is a person who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to fear of persecution, unwilling to return to it.

18. Mr Eicke makes a further submission to the effect that differential treatment between nationals and non-nationals in relation to access to such economic, social and cultural benefits as are referred to in Professor Hathaway's third category cannot amount to discrimination in the sense necessary to establish persecution, and that the same general principle applies in relation to the treatment of stateless persons. Thus he submits, for reasons I need not elaborate, that generalised evidence of a difference of treatment of nationals and of non-nationals in relation to access to economic, social and cultural benefits cannot establish that an individual applicant is being persecuted in his country of habitual residence. He submits further, and in the alternative, that discriminatory denial of access to such benefits can amount to persecution only if the measures involved - persistent and serious ill treatment - are of a substantially prejudicial nature and affect a significant part of the individual's existence in that it would make his life intolerable if he were to return. The individual, he says, must be able to point to something which has an exceptional impact on him personally. The tribunal in this case took the view that such differential treatment as the appellant had received would not have such an impact and would not amount to persecution.

19. I turn to my conclusions on those rival submissions.

20. It is not in dispute that the tribunal is required to give reasons for its substantive decision on the appeal before it. The basic requirement as to reasons was stated in ex p Khan although there has been later authority on the nature and extent of the requirement. In my view the reasons should be given as part of the determination sent to the parties. It its true that the tribunal, if asked for leave to appeal, must give reasons for its decision on that request, as it did in the present case (see Rule 27(7) of the Immigration and Asylum Appeals (Procedure) Rules 2000). But the reasons given at that stage are plainly intended to be directed to the question why an appeal is or is not appropriate, not to why the tribunal reached its substantive decision. Reasons relating to the grant or refusal of leave to appeal are not intended to supplement the reasons why the tribunal reached its substantive decision. Moreover, I note that such reasons are to be given by the legally qualified member of the tribunal rather than by the lay membership of the tribunal (see Rule 27(4)), and that if the tribunal considers that there is a deficiency in its reasons it may, instead of granting leave to appeal, set aside its decision and direct that the matter be re-heard (see Rule 27(5)). All those matters tend towards the view that the correct place to look for the reasons for the substantive decision is in the substantive determination itself rather than in the decision as to the grant or refusal of leave to appeal.

21. Nevertheless I would leave open the question whether the course suggested in English v Reimbold & Strick Ltd could properly be applied in this statutory context, and thus whether this court can properly look at the reasons given at the leave to appeal stage when deciding what were the reasons for the substantive decision. It is not necessary for the purposes of this case to reach a concluded view on that question.

22. In this case the tribunal had before it a serious submission that discrimination and ill treatment suffered by Palestinian refugees in UNRWA camps were such as to amount to persecution on the basis of Professor Hathaway's third category. It may well be that the points identified in Mr Eicke's skeleton argument, and to which I have briefly referred, have substance. Thus there may be substance in his points arising out of the appellant's status as neither a national of Lebanon nor a person who is without nationality but has Lebanon as his habitual residence. There may be substance in his submission that differential treatment between nationals and non-nationals or stateless persons in relation to economic, social and cultural benefits cannot amount to discrimination in the sense necessary to establish persecution. We have not heard argument on those matters because we do not need to decide them.

23. A real problem faced by Mr Eicke in advancing such submissions is that it is simply impossible to tell from the tribunal's decision whether those points were advanced before the tribunal or, if they were advanced, what view the tribunal took of them. Since the question for this court is not whether the points advanced by Mr Eicke are well founded but whether the tribunal's decision is adequately reasoned, the fact that he advanced them but cannot point to any consideration of them in the tribunal's decision works against him rather than in his favour.

24. The same problem exists in relation to the alternative argument he advances that even if there was discrimination of a kind capable of amounting to persecution it was not of a sufficient degree to amount to persecution. Again, that submission may well be a powerful one but one cannot tell from the tribunal's determination whether that was the basis upon which the tribunal reached its conclusion.

25. It seems to me, in truth, that the detailed submissions advanced by Mr Eicke serve to highlight the thinness of the tribunal's own reasons. So, too, does the fact that in order to explain two elements in the tribunal's reasoning Mr Eicke has had to draw on the reasons for the refusal of leave to appeal rather than what is set out in the substantive decision itself.

26. It is clear that the tribunal was not impressed by Mr Joffé's report. It made a number of criticisms of it and expressed the view that it went well beyond what could be accepted as a matter of generality. But it is not clear how far the tribunal was rejecting the evidence of discrimination againnst Palestinian refugees in UNRWA camps. If paragraph 13 of the decision is to be read as a finding that there was no general problem of discrimination then that does not fit easily with the objective evidence as a whole or with the further finding in paragraph 15 that the appellant would face discrimination on his return. Further, it seems to me that fuller reasoning was required to explain why the tribunal rejected what was said not only by Mr Joffé but elsewhere in the objective evidence about the general treatment of Palestinian refugees in the camps. Mr Eicke refers to the CIPU report and one sees that the tribunal has relied on that report in respect of one specific matter and, by reference to it, has rejected what Mr Joffé said about the appellant having to return to the same camp. There is no indication in the determination that the tribunal has relied on the CIPU report as justifying the rejection of the other evidence about the generality of treatment of refugees in camps.

27. As regards the finding in paragraph 15 that the appellant would face discrimination but had not established persecution, the decision does not reveal whether, for example, the conclusion was based on the view that discrimination of the kind referred to in the evidence was not capable of constituting persecution, or on the view that such discrimination, although capable of constituting persecution, was not sufficiently serious to amount to persecution. In either case I would have expected fuller reasoning than is to be found in the decision. The importance of this issue - the fact that the submissions advanced on behalf of the appellant apply, on their face, not simply to his own individual position but to the generality of Palestinian refugees in these camps - makes it, in my judgment, all the more important that the issue is grappled with more fully than in this case.

28. Accordingly, I would allow this appeal on the basis that the reasons given were deficient. I stress that I am not saying that very elaborate reasons were required, but only that what was given in this case fell short of the minimum required in order to make clear the true basis of the decision and why important evidence was being rejected or was thought not to lead to a conclusion that there would be persecution. I would remit the matter to a differently constituted tribunal. It may well be that that tribunal would wish to give effect to the suggestion by the deputy president, in giving his reasons for refusing leave to appeal, that

UNRWA should have an opportunity to express their views on the evidence concerning the state of affairs in their camps.

29. LORD JUSTICE KAY: I agree.

30. LORD JUSTICE CLARKE: I also agree. The appeal will be allowed. The decision of the Immigration Appeal Tribunal will be quashed and the appeal to the tribunal will be remitted to a differently constituted tribunal who will hear it.

Order: Appeal allowed with the costs subject to detailed assessment if not agreed