MILLER v IMMIGRATION APPEAL TRIBUNAL

Court of Appeal (Civil Division)

[1988] Imm Ar 358

Hearing Date: 24 February 1988

24 February 1988

Index Terms:

Political asylum -- application rejected on basis that appellant had close connections with another country where he could apply -- Secretary of State never considered whether applicant had a well-founded fear of persecution in his country of origin -- whether in restricting himself to the preliminary question the Secretary of State was entitled to take into account "all relevant circumstances" -- the meaning in paragraph 134 of HC 169 of "would have to go" -- whether the wishes of the applicant were relevant. United Nations Convention relating to the status of Refugees (1951) art 1: Conclusions of the Executive Committee of the United Nations High Commission for Refugees, no 15: HC 169 para 134.

Held:

Appeal from Mann J. The appellant was a citizen of South Africa of Jewish descent. He had spent some years in Israel and had received a university education there. He applied for political asylum in the United Kingdom after arriving as a visitor from South Africa. The Secretary of State refused the application on the basis that he could apply for political asylum in Israel with which country he had a close connection. His appeals before an adjudicator and the Tribunal were dismissed: an application for judicial review was refused. On appeal counsel for the appellant argued inter alia that although the appellant could go to Israel, he did not wish to: that might affect the attitude of the Israeli authorities. The approach by the Tribunal had the effect of discriminating against Jews who would in effect be obliged to select Israel as a country of refuge.
Held:
1. The Secretary of State in considering the application was obliged to look at all relevant circumstances. Those included the connection, if any, that the appellant had with any third country. The Conclusions of the Executive Committee of United Nations High Commission for Refugees were not binding on the Secretary of State but it was not unreasoanble for him to have regard to them.
2. The wiishes of an applicant for political asylum, as to the country in which he would prefer to be given asylum, were not relevant.
3. The phrase "would have to go" in paragraph 134 in its ordinary English meaning, meant "would have no practical alternative but to . . ." It was not to be interpreted in relation to issues that might arise on deportation.
4. There was no discrimination against Jews in the way paragraph 134 had been applied to the appellant, on the facts of the case.

Cases referred to in the Judgment:

R v Immigration Appeal Tribunal ex parte Steven Miller [1988] Imm AR 1.

Counsel:

Ian Macdonald for the appellant; D Pannick for the repsondent
PANEL: Fox, Balcombe LJJ, Sir Frederick Lawton

Judgment One:

FOX LJ: This is an appeal by Mr Miller from a decision of the Queen's Bench Divisional Court dismissing his application for judicial review of a decision of the Immigration Appeal Tribunal, which had dismissed his appeal against a decision of the Secretary of State rejecting his application for asylum in the United Kingdom.

Mr Miller was born in South Africa in November 1958. He is a South African citizen and is unmarried. He went to school in South Africa. He completed his schooling there in December 1977 or thereabouts and he then attended the University of Witwatersrand for a degree course. At the end of his first year in December 1978 he went to Israel and lived on a kibbutz. He himself is a Jew by birth but does not adhere to the Jewish, or any other, religion. He says that he is an atheist. He spent two months in Israel on the kibbutz and then returned briefly to South Africa. He returned to Israel in May 1979 and spent four years at a university there, funded in the main by the Israeli Government. He paid very small fees and, as the Tribunal stated, thereby took advantage of the Israeli policy of providing free university education for Jews, whether Israelis or not, who wished to avail themselves of it.

In March 1983, after completion of that university course, he returned to South Africa. Very soon after returning to South Africa, however, he came to the United Kingdom in May 1983. In South Africa he was faced with the prospect of being called up for military service. He objected to that. He also objected to the apartheid system and being involved in it in any way as a member of the defence forces. He did not, he said, wish to go back to Israel because, although, when he first went there, he thought he would be happy there, he disapproved of the Israeli invasions of the Lebanon and was out of sympathy with Israel, and he feels that, if he settled in Israel, he could not pursue his anti-apartheid activities.

So he came to the United Kingdom in May 1983. He was given leave to enter for six months on a visitor's permit. Shortly after his arrival in the United Kingdom, the United Kingdom Immigrants Advisory Service applied in May 1983 to the Secretary of State on his behalf for leave to remain in the United Kingdom as a refugee. On 31 October 1983 the application for asylum was refused by the Secretary of State and the notice of refusal reads:

"The United Kingdom Immigrants Advisory Service has applied on your behalf for leave to remain in the United Kingdom on the grounds that if you are required to leave you would have to go to South Africa where you fear persecution for your political opinions but, on the basis of the evidence available the Secretary of State is not satisfied that you would have to go to South Africa."

Paragraph 134 of the relevant immigration regulations, which is House of Commons Paper 169, states the principle as follows:

"A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant circumstances."

Under paragraph 73 any claim for asylum must be referred by the immigration officer to the Home Office.

Paragraph 134 of the rules which I have read gives effect to the Convention on the status of Refugees which, so far as material, by article 1 defined a refugee inter alia as a person who, owing to well-founded fear of being persecuted for reasons of 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.

That brings me to conclusion 15 of the Conclusions of the United Nations High Commission on Refugees. It is headed "Situations involving individual asylum-seekers" and paragraph (h) states:

"An effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria. In elaborating such criteria the following principles should be observed:

(iii) The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;
(iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State".
These Conclusions of the United Nations High Commission on Refugees have no binding effect, but Mr MacDonald for the appellant, Mr Miller, accepts that they state matters to which the Secretary of State could reasonably have regard.
The Immigration Appeal Tribunal was of the opinion that the question was whether Mr Miller could reasonably be expected to apply to Israel for asylum and whether, within the context of paragraph 134, the Secretary of State could reasonably expect him to apply to Israel rather than the United Kingdom. After a review of the facts the Tribunal in effect answered those questions affirmatively and concluded that "the Secretary of State was entitled to take the limited decision which he took and which is recorded in the Notice of Refusal". The Divisional Court was of the opinion that no ground for interfering with the decision of the Tribunal was shown and dismissed the application for judicial review.
The case turns upon the provisions of paragraph 134. The issue, it would seem to me, is whether, if Mr Miller were required to leave the United
Kingdom, he "would have to go" to South Africa. I am not concerned with the question whether he is right or wrong in saying that he has well-founded fears of persecution if he returned to South Africa. That matter has not been investigated and it is not necessary for us to do so for the purpose of the present appeal.
I agree with Mr Pannick, who appears for the Tribunal, that in paragraph 134 the words "would have to go" mean that, if the applicant were required to leave the United Kingdom, he would have no practical alternative but to return to South Africa. If Mr Miller could, upon proper application to the Israeli authorities, obtain leave to go to Israel, it seems to me that it could not possibly be said that he would have to go to South Africa. Plainly he would not. In my view, the language in the ordinary use of English admits no other conclusion.
The first question, then, is whether the Secretary of State was entitled to conclude that Mr Miller could go to Israel. In considering Mr Miller's claim, the Secretary of State had to consider the matter in the light of all the relevant circumstances. The paragraph so requires. For present purposes, the relevant circumstances on this point are, in my view, the following:
1 Mr Miller is of the Jewish race, his parents are Jewish;
2 From early 1979 Mr Miller spent four years in Israel; he was educated at a university there, largely at the expense of the Jewish state;
3 Israel is itself a signatory to the Convention of Refugees;
4 Mr Miller himself in his evidence says that, if he returned to Israel, he might be allowed one year of temporary residence there.
I do not in fact understand Mr Macdonald to dispute that Mr Miller could indeed go to Israel if he wanted to. Looking at all the circumstances of the case, it seems to me the Secretary of State could reasonably conclude that Mr Miller could go to Israel. Moreover, Mr Macdonald did not in this court contend that persons are expected to seek asylum in the first safe country which they reach, that is to say the United Kingdom in the present case. As I have indicated, conclusion 15 of the United Nations High Commission document indicates the importance which a connection with another State may have in relation to a decision on this sort of case.
Mr Macdonald does, however, say that, while it may be true that Mr Miller could go to Israel if he wanted to, in fact he does not want to, and that, he says, is a fact which might affect the Israeli attitude to any question of admission. Accordingly, it is said that Mr Miller should not be required in effect to go to Israel.
I do not feel able to accept that contention. Paragraph 134 says nothing about the wishes of the applicant or the conferring upon him of any choice as to the place to which he might safely go. The question whether he would have to go to South Africa if asylum here is refued does not depend upon the wishes of the applicant. If the wishes of the applicant determine the matter, the Secretary of State would in effect have to give leave for asylum in every case where the

applicant did not wish to leave the United Kingdom even though he had substantial connection with another safe country, and where that connection was far more substantial than any connection which he had with the United Kingdom.
At this point I should refer to certain arguments by Mr Macdonald in his very well-presented submissions before us to the following effect: first, that the words "required to leave" in paragraph 134 are really referring to the Secretary of State's power of compulsory removal under the Immigration Act 1971 rather than voluntary departure by the applicant; secondly, that the words "he would have to go" also import an element of compulsion and refer only to the country to which the applicant would have to go if the Secretary of State exercised his compulsory powers of removal under schedule 3 of the 1971 Act. Reference is also made to paragraph 169 of the rules relating to removal upon deportation.
I do not think there is substance in these points. Paragraph 134 is not dealing with powers of removal at all, but whether the applicant would have to go back -- in this case to South Africa -- if asylum were refused here. Questions of removal may well arise at a later stage. They do not, in my view, affect the construction of paragraph 134 which I have adopted.
The Immigration Appeal Tribunal was of the opinion, after reviewing all the facts, that Mr Miller would be able to go to Israel. It follows that, on their view, the Secretary of State was entitled to conclude that he would not have to go to South Africa, for myself, I agree with that.
There is reference in the papers before us to the Israeli law of return under which Jews have rights to go to Israel as immigrants. I do not need to examine questions relating to the law of return. The Immigration Appeal Tribunal did not base itself on the law of return and it is the Tribunal's decision which it is sought to review in the present proceedings.
Lastly, I should refer to an argument by Mr Macdonald that the case for the Tribunal would involve discrimination against Jews in that in effect it limits the choice of a Jewish person in relation to a country of refuge. I reject that. The Tribunal, as was its duty, closely examined the facts of the case. Among those facts were the relevant circumstances that Mr Miller had a close prior connection with Israel and none with the United Kingdom. The approach of counsel for the Tribunal in its argument before this court was that the same test should be applicable across the board to any applicant. If some applicants cannot satisfy the test, that is simply because they cannot comply with the requirements of paragraph 134, which I have sought to explain. In my view, there is no question of discrimination arising from the Tribunal's case on this appeal.
The result, in my view, is that the Divisional Court were quite right in the conclusions to which they came and I would dismiss this appeal.

Judgment Two:

BALCOMBE LJ: Paragraph 134 of House of Commons Paper 169 is part of section 2 of that paper dealing with control after entry. In particular, it comes under Part XI under the heading "Variation of leave to enter or remain". Paragraph 73 is in section 1 of the paper dealing with control on entry generally and comes under Part VII under the heading "Asylum". Paragraph 165 is also in section 2 but in part XII dealing with deportation.
In my judgment, the decision in this case can be reached by looking at the wording of paragraph 134 alone, and on this matter I agree entirely with the judgment of Fox LJ. Mr Macdonald for the appellant argued that paragraph 134 should be construed together with paragraph 73 and paragraph 165, that "required to leave" means "ordered to leave", and that one should then turn to the provisions of the Immigration Act 1971 to see to which country he could be removed by directions given, whether by an immigration officer or the Secretary of State.
Even if this were an appropriate way of construing paragrpah 134, I am not satisfied that it would lead to a different conclusion than that reached by the reading of paragraph 134 alone. I agree that this appeal should be dismissed.

Judgment Three:

SIR FREDERICK LAWTON: When the applicant applied for asylum in the United Kingdom he was present here lawfully. It followed that at the date of his application, which was 25 May 1983, there was no question of his being refused leave to enter. If there had been such a question on 25 May, paragraph 8 of the second schedule to the Immigration Act 1971 would have applied. Nor was there on 25 May 1983 any question of his being deported. It follows, in my judgment, that no question arose therefore of the application of paragraph 1 of the third schedule to the 1971 Act. The matter had to be decided after the Secretary of State had carefully considered in the light of the relevant circumstances whether or not he had to go back to South Africa. Mr Macdonald, in a very frank and most helpful concession, told us earlier on in his submissions that he was conceding that the applicant could go back to Israel if he wanted to. His reasons for not going back were personal. In my judgment, the Secretary of State was entitled to take a broad view of the case. He seems to have taken into consideration the criteria set out in conclusion 15 of the United Nations High Commission for Refugees. In those circumstances, I can see nothing wrong and for those reasons and those given by my Lords I too would dismiss this appeal.

DISPOSITION:

Appeal dismissed. Leave to appeal to the House of Lords refused.

SOLICITORS:

Winstanley-Burgess & Co; Treasury Solicitor