R v Immigration Appeal Tribunal ex parte Miller

Queen's Bench Division

[1988] Imm AR

Hearing Date: 2 July 1987

2 July 1987

Index Terms:

Political asylum -- rejection of application on the basis that the applicant could apply to another country with which he had a close connection -- no necessity to return to the country where he asserted he would be persecuted -- whether the Secretary of State is obliged in these circumstances to decide whether the applicant is a refugee -- when the Secretary of State may take into account "all relevant circumstances" in considering an application for asylum. HC 169 para 134.

Held:

The applicant for judicial review was a citizen of South Africa, of Jewish descent, albeit he asserted he was not a practising Jew. He had spent some four years in Israel taking advantage of the opportunity offered by that state to any Jew to attend university in Israel. On completion of his course he returned to South Africa and very soon thereafter, being liable for military service, came to the United Kingdom. He was admitted as a visitor; he then claimed political asylum. The Secretary of State refused the application on the grounds that the applicant could apply for asylum in Israel, a country with which he had a close connection. The applicant did not wish to settle in Israel.
An adjudicator and the Immigration Appeal Tribunal dismissed his appeals. The Tribunal in reaching its conclusion derived assistance from, but acknowledged it was not bound by, recommendations by the Executive Committee of the United Nations Commission for Refugees. Before the Court it was argued that following Bugdaycay the Tribunal was wrong to consider those recommendations by the Executive Committee; it was incorrect to consider the paragraphs in the immigration rules relating to political asylum in isolation from the law relating to deportation: the Secretary of State and the Tribunal had been incorrect in looking at "all relevant circumstances": that phrase in paragraph 134 of HC 169 related solely to the question of whether or not an individual was a refugee: the Tribunal had asked the wrong questions.
Held:
1. The phrase "all relevant circumstances" in paragraph 134 of HC 169 was not restricted in application to the question whether or not a person was a refugee. The Secretary of State had been entitled to consider all the facts, as he had, in coming to the conclusion he reached as to where the applicant could apply for asylum.
2. Following Bugdaycay, the recommendations of the Executive Committee had no force in English law: the Tribunal however had made it clear that they did not consider themselves bound by them: they had not erred in simply taking them into consideration as an aid.
3. There was, at present, no question of the expulsion of the applicant from the United Kingdom: the law relating to deportation and related matters was irrelevant.
4. The Tribunal had asked the right questions and had not misdirected itself in law.

Cases referred to in the Judgment:

Bugdaycay and ors v Secretary of State for the Home Department [1987] Imm AR 250; [1987] 1 All ER 940.

Counsel:

Ian Macdonald for the applicant; D Pannick for the respondent
PANEL: Watkins LJ, Mann J

Judgment One:

WATKINS LJ: On 26 November 1985, the Immigration Appeal Tribunal dismissed the applicant's appeal from the decision of May 1985 of the Chief Adjudicator, to dismiss the applicant's appeal against the decision of 31 October 1983, of the Secretary of State to refuse the applicant's asylum application because he, the Secretary of State, was not satisfied that, if the applicant was required to leave the United Kingdom, he would have to go to South Africa. The applicant moves, with the leave of the Court of Appeal, following refusals by single judges, to apply for judicial review of the Tribunal's decision, which he seeks to have removed into this court and quashed.
I begin the recital of the background to this application for asylum with some details of the applicant, without which it will not be possible to comprehend his claim to be a refugee and his assered right to live in this country.
The applicant was born in South Africa on 10 November 1958. He retains his South African nationality. He is a single man. He completed his education in school in South Africa in December 1977. He began soon after a degree course at the University of Witwatersrand. At the end of his first year there, he went to Israel on holiday and stayed in a kibbutz. He is a Jew by birth. He is, he says, now an atheist. In February 1979, he returned to South Africa. He decided not to return to the Witwatersrand University. Instead, he returned to Israel, which he did in May 1979. He remained in that country until March 1983. He went to university there until he obtained a degree, a Bachelor of Arts. His university fees were borne by the Israeli Government, save as to a small part. Whilst he was undergoing education at the university in Israel, he occasionally visited his family in South Africa. His mother is alive. His father is not.
In March 1983, his education in Israel completed, he returned to his native South Africa. He was in danger -- I use that word from his point of view -- having returned there, of being called up for military service. He did not relish the prospect. He is opposed to the apartheid system in South Africa. He has involved himself there in anti-apartheid activities. When he went to
Israel, he thought at first that he would be happy there, and for sometime that turned out to be so. With, however, according to him, the Israeli invasion of Lebanon he was out of sympathy with that and his attitude and feelings towards Israel changed.
In March 1983, having been in South Africa for a very short time, he decided to leave. He came to this country. He was given leave to enter and to remain here as a visitor for six months. Shortly after his arrival he consulted the United Kingdom Immigrants' Advisory Service. As a result, on 25 May 1983 (only 12 days after his arrival), UKIAS applied on his behalf to the Secretary of State for leave to remain here as a refugee from his own country. In other words, he applied for asylum.
The applicant was aware before he went to Israel of the Israeli Law of Return. That makes provision for the granting of visas to Jews and for the settlement of Jews in Israel. I quote from the material part of it:
"1. Every Jew has the right to come to this country as an oleh (immigrant).
2. (a) Aliyah (immigration) shall be by oleh's visa.
(b) An oleh visa shall be granted to very Jew who has expressed his desire to settle in Israel unless the Minister of the Interior is satisfied that the applicant:
(i) is engaged in an activity directed against the Jewish people, or
(ii) is likely to endanger public health or the security of the State, or
(iii) has a criminal past likely to endanger public welfare.
3. (a) A Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in Israel may while still in Israel receive an oleh certificate.

(b) The restrictions specified in 2(b) shall apply also to the grant of an oleh certificate but a person shall not be regarded as endangering public health on account of an illness contracted after his arrival in Israel.
4. Every Jew who has immigrated into this country before the coming into force of this law and every Jew who is born in this country whether before or after the coming into force of this law shall be deemed to be a person who has come to this country as an oleh under this law.
5. The Minister of Interior is charged with the implementation of this law and may make regulations as to any matter relating to such implementation and also as to the grant of oleh's visa and oleh's certificates of minors up to the age of 18 years."
The Law of Return was signed by, among others, Mr David Ben-Gurion the then Prime Minister. The applicant was well-acquainted particularly with that part I have quoted from the Law of Return. It is published in the Israeli Law Book, no 51 of 6 July 1950. It is still in force.
When the applicant was in Israel, he had visitor status. When he returned to Israel after one of his visits to his family in 1980 he was given temporary residence status. A temporary resident has the right to stay in Israel for no more than three years. To stay there longer, he must apply for permanent resident status, or of course leave the country. It is also possible to go to Israel upon the basis of temporary residence for any time up to the expiration of a period of 12 months. According to the applicant, the application of the Law of Return was subject to an express desire to settle in Israel and he does not have that desire. Moreover, he says that, if he were to return to Israel on the basis of permanent residence, he would have to serve in the Israeli Defence Forces. He is as opposed to that force as he is to the defence forces in his own country. So, he contends that, although he is not really a pacifist, it would be against his principles to serve in either the armed forces of South Africa or those of Israel.
The applicant's opposition to apartheid and his activities to give expression to that opposition include his refusal to co-operate in any way with the defence forces in his country. He informed the Tribunal that, if he did not answer the call-up, he could be imprisoned in a military detention barracks for upwards of three months and, if he failed to co-operate after that with the armed forces, he fears, because of his experience and knowledge of what has happened to others, he would, whilst in detention, be subjected to humiliation, harassment and general victimisation. Some persons, like-minded to him and who have been treated in that way, have committed suicide and there hae been deaths due to beatings received whilst in detention. Although he has not been politically active in South Africa to any outstanding extent up to now, there seems to be no doubt whatever that he would like to be a political activist in opposition to apartheid in one form or another wherever he is.
That brings me to return to his application for asylum. It was made, as I have said, 12 days after his entry to this country, he having received permission to stay here as a visitor for six months. The Secretary of State dealt with that in correspondence with a Member of Parliament. Eventually, that correspondence ended with a letter from the Secretary of State, addressed to Mr Fraser, the Member of Parliament who took up the interests of this applicant. It was dated 14 October 1983 and was couched in these terms:
"When interviewed on 26th July, Mr Miller said that he was of the Jewish faith and that after completing the first year of a BA Social Services course at a university in South Africa he went to Israel where he had spent four years studying Hebrew and computer programming. During this time he travelled frequently between Israel and South Africa. He left Israel on 1st March, returning to South Africa, where he stayed until leaving for the United Kingdom on 12th May."
There may be some mistake about the dates, but that is, I believe, of no account.
"I have looked carefully at Mr Miller's application and your representations on his behalf but, in the light of the information available, I am not satisfied that if he were required to leave the United Kingdom he would have to go to South Africa since it appears that he can go to Israel, a country with which he has both residential and religious ties and is both his first and natural country of asylum. Mr Miller's application for asylum will therefore be refused."
Formal notification of that was sent to the applicant with a document, which is dated 31 October and in which is included this statement:
"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."
The applicant was dissatisfied with that intimation. He appealed to an adjudicator. The adjudicator heard much evidence and, as the record before us shows, he examined the situation of the applicant very thoroughly. The law applicable to the circumstances was gone into. In the end, the adjudicator came to the conclusion that the appeal should be dismissed.
Being dissatisfied with that decision, the applicant, as he was entitled to, appealed to the Tribunal. He advanced a number of grounds, the only material one for present purposes being that the adjudicator erred in his finding that the applicant was entitled to settle in Israel and that he does, in effect, hold Israeli citizenship.
In the record of proceedings before the Tribunal, headed: "Determinations and Reasons", reference is made to Conclusion Number 15 of the Executive Committee of UNHCR of 1979. The Tribunal found them to provide useful guidance. Israel, it was noted, is a Member of that body, the full title of which is the United Nations High Commission for Refugees. It considered that Conclusion Number 15 and sub-paragraph (h) of it was relevant to their conclusion. I quote not only those parts of it, but the preceding part, which has been referred to in argument:
"(h) (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."
The decision of the Tribunal was expressed in this way:
"It is in our view questionable how far the personal desires of an individual when they relate to an expressed interest to pursue a particular political activity, are to be persuasive in the context of seeking political asylum. In this case however, the matter seems to us to be of less importance than Mr Choudhury would have us believe. The Law of Return, on which much of the argument about desire was based, is a law relating to settlement in Israel. We are not concerned, in this case with settlement per se, either in Israel or in the United Kingdom. We are concerned with the more limited issue of sanctuary accorded to one seeking political asylum. Whether, if he fails to express a desire to settle in Israel, the appellant is thus out with the Law of Return is neither here nor there. The question is whether the appellant could reasonably be expected to apply to Israel for political asylum and whether within the context of paragraph 134 the Secretary of State could reasonably expect the appellant to apply in Israel rather than in the United Kingdom."
"Israel is both a signatory to the 1951 Convention and a member of the Executive Committee whence came the 1979 Conclusions we set out above. There is no evidence to suggest that Israel has resiled from its international responsibilities for refugees which it has accepted or endorsed under those agreements. On that basis we look at the Conclusions as a whole and bear in mind the principle that signatories to the Convention are accepting responsibilities which they share as international obligations."
Later, they stated:
"We think that that connexion is a more important factor than the intentions of the appellant in this case, because his intentions, so far expressed relate merely to the opportunity to engage in activities which appeal to him. Thus, taking full account of the Conclusions, we are of the view that it was reasonable, in the light of 15(h)(iv) for the Secretary of State to call upon the appellant to seek asylum first in Israel, even taking 15(h)(iii) into account."
Further on still, they stated:
"Thus the appellant was not the victim of any sudden crisis brought about by events beyond his control. His movements were not precipitate because of sudden danger. He had the time to apply to Israel as well as a good basis for doing so. Paragraph 134 requires one who claims political asylum to show that he would have to go to a country where he would be persecuted. The appellant has not shown that because prima facie on the basis of the UNHCR Conclusions he has a connexion with Israel. He has taken no steps during his evaluation on his position, to

claim asylum in the country with which he has that connexion: a country whose obligations under the Convention would suggest strongly, in our view, that his application for asylum would be granted."
Lastly, they said:
"We therefore conclude that the Secretary of State was entitled to take the limited decision which he took and which is recorded in the Notice of Refusal. We conclude further that the decision he took was, in substance correct in law, and in so far as it involved the exercise of a discretion was reasonable. In view of the line of reasoning we have found it proper to follow, we do not think we need deal further with the third and fourth grounds of appeal."
They dismissed that appeal.
The grounds as amended relief upon by the applicant, and argued before us by Mr Macdonald, can, I think, be summarised as follows. It is contended that the Tribunal misdirected themselves as to the proper meaning of paragraph 134 of HC 169 and failed to take into account or to give proper weight to the provisions of the Convention and Protocol Relating to the Status of Refugees, and to the Immigration Act, 1971. Further, the Tribunal erred in law in that paragraph 134 is one of a number of immigration rules which, to be properly understood and applied, must be read in the light of many other of the rules; for example, paragraph 16 of the rules is relevant in this context, as is article I of the Convention and likewise article 32. So is schedule 3 of the Immigration Act,
1971, paragraph 1 especially.
hen it is contended that on its proper interpretation paragraph 134 only enables the Secretary of State to refuse an application by a refugee for asylum if there is reason to believe that, on removal from the United Kingdom, the refugee would be admitted to a country other than that of which he is a national or citizen. On the undisputed evidence, the applicant has no current entitlement to go to Israel. He has no visa for one thing. He has no desire to go there for another. Reference is also made to Conclusion Number 15. That is for the purpose of contending that the Tribunal should not have been influenced into reaching its decision by what I shall call hereafter paragraph (iv). It was wrong of them, that is to say, to have done so.
That brings me to look at the law to which we have been referred. I turn, first of all, to the Act and to section 3. That contains the general provision for regulating and exercising control over immigration matters and provides that a person who is not a patrial shall not enter the United Kingdom unless given leave to do so in accordance with the Act. It also states, in the case of a person who has been given limited leave to enter or remain in the United Kingdom, by section 3(a) that:
"a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply."
Section 5 deals with the procedure for deportation and allows of rules to be made for that purpose.
Section 14 contains provisions for appeals to be made to an adjudicator against any variation of leave or an application or a refusal therefor.
Schedule 3 (already referred to), paragraph 1 provides:
"(1) Where a deportation order is in force against any person, the Secretary of State may give directions for his removal to a country or territory specified in the directions being either:
(a) a country of which he is a national or citizen; or
(b) a country or territory to which there is reason to believe that he will be admitted."
The regulations which are in point are all contained in HC 169 Statement of Changes in Immigration Rules, which came into force in 1983. They are divided into self-contained parts (in most respects anyway). There is a part dealing with entry control. Refugees are referred to in paragraph 16 of that part. Refugees are also referred to in other parts, to those I shall turn in a moment or so.
In Part VII paragraph 73 one finds a reference to asylum, the effect of which is to cause an immigration officer, when confronted with a person who maintains that he has a well-founded fear of being persecuted if returned to his own country, for reasons of race, religion, nationality,

membership of a particular group or political opinion, to refer that matter forthwith to the Home Office for decision.
Part IX deals with variation of leave to enter or to remain. In that part, one finds paragraph 34, which is of importance in this appeal. That provides:
"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."
In part XII, which deals with deportation, paragraph 165 appears. That provides:
"In accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one 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 group or political opinion."
The requirement that the Secretary of State shall pay heed to the Convention appears in other paragraphs too, to which Mr Macdonald drew our attention. That leaves the Convention to be looked at, so far as needs be.
The Convention is the Convention and Protocol relating to the Status of Refugees, 1951, a convention which of course this country signed and is, therefore, a party to.
Article 1 contains a definition of the term "refugee".
Article 32 appears under the heading "expulsion", and it states:
"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."
I interpose to say here that, at the moment, during the appellate and application processes, the applicant is deemed to be lawfully here. There is no suggestion that he is a threat to national security or public order.
"2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."
Article 33 makes provisions dealing with expulsion and return, refoulement.
Mr Macdonald concedes that if the test which I have already recited from the record of Determination and Reasons be a correct test, then he cannot challenge the findings of the Tribunal. But, he submits, the Tribunal asked itself the wrong question.
I deal with his main submissions, not in the order in which they were made, but in the order in which I think they can most conveniently be dealt with. Upon it being suggested by the court that the Tribunal, in considering paragraph 134, were entitled to have regard to all relevant circumstances in deciding whether, under the first part of that paragraph, there was a country to which the applicant could go (other than of course the country of his nationality), Mr Madonald submitted that relevant circumstances, as referred to in the paragraph, could only apply to the question of whether or not the applicant was in fact a refugee. That question, it will be recalled, has never been resolved by the Secretary of State. Whether it will need to be at some future time is not our concern. I see no reason whatsoever to impose so restricted an application upon "relevant circumstances" as that. It seems to me to be beyond doubt that, upon a proper construction of the paragraph, the reference to consideration of relevant circumstances allows the Secretary of State to have regard to those circumstances, not only in asking himself whether it be established that an applicant is a refugee, but also to the essential question as to whether or not the applicant has another country, other than his own, to go to. To conclude otherwise would, it seems to me, distort the proper construction of that paragraph.
I now look at the submissions which were made by Mr Macdonald in criticism of the Tribunal's reliance upon paragraph (iv) for assistance in coming to its conclusion as to whether the applicant had another country to go to. He referred us, in the course of his argument on that

point, to Bugdaycay v Secretary of State for the Home Department [1987] 1 All ER 940 at 946H, where Lord Bridge stated:
"My Lords, there was some discussion in the courts below of the question whether the practice of the Home Office complied with recommendation
(vi). I express no opinion on that question, since it is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force in either municipal or international law."
Lord Bridge was there referring to the handbook on Procedures and criteria for determining refugee status, but to a different part of it than that already referred to by me. It is the handbook, as I have already said, which emanates from the Office of the United Nations High Commission for Refugees.
I do not see how any assistance can be derived from what was there said by Lord Bridge in his speech in that case to further the attack made upon the Tribunal for seeking to make use of the recommendation in paragraph (iv). The Tribunal did not claim, at any part of its Determination and Reasons, that it was bound to take account of the recommendation of the committee. Far from it, it was careful to observe, so it seems to me, that it be an aid (and no more) to coming to a proper conclusion in any case where appropriate to consider the question, namely, whether an applicant has another country apart from his own to go to.
The next submission by Mr Macdonald I deal with is that which involved the proposition that paragraph 134 could not properly be regarded in isolation from other paragraphs, to which I have already referred, and which appear in other parts of HC 169. I reject that argument. Each of the parts, so it seems to me as I have already said, of the Changes in Immigration Rules are self-contained. They refer to utterly different situations; for example, as I have mentioned, there is a part which deals with entry and what may or may not occur at that time. There is another part which deals with the various applications to come into this country and to remain and there are the two parts which deal with an application to vary a permission to enter and to remain for a temporary period in this country. Finally, there is that all-important part which deals with deportation.
The Secretary of State has not arrived at a point where he has to make up his mind whether it be necessary to deport this applicant. It may be, one cannot tell, that that time will never arrive. The applicant hereafter may leave of his own accord, to go wherever he will outside this country. It is quite insensible and an irrelevance to call upon the Secretary of State to have regard to the rules as to deportation when considering whether he will or will not allow a variation of the permission given to the applicant to remain in this country. His conclusions as to that must be, so it seems to me, governed (and strictly governed) by the rules contained in the relevant part, namely, part XI.
That means, of course, that not only is it irrelevant for the Home Secretary to have regard to the rules which govern deportation, but equally, he would be inhibited from considering the provisions in the Convention contained in article 32 as to expulsion. The plain fact of the matter is that there has been no move towards expulsion of this applicant from this country. When that time arrives (if it does), then the Secretary of State will have to make up his mind whether it be right to expel the applicant, having regard, not only to article 1 of the Convention, but to others which he will need to pay attention to before expelling a person who is lawfully here. As a footnote to that, I should add that, when the applicant has completed the appellate and other processes in the courts and assuming that he be unsuccessful in those endeavours, he will not be lawfully here. Then article 32 will not be relevant. To complete the series of irrelevant considerations (as I find them) in contrast to the submissions of Mr Macdonald, I refer finally to schedule 3 of the Act.
Schedule 3, as I have already made plain, refers to the removal of persons liable to deportation. At the present time, the applicant is lawfully here. He is not exposed to deportation. He can only become so liable from the moment when he has failed, having exhausted the appellate and other processes, to accomplish his objective, namely, to establish that the Secretary of State was wrong in refusing to vary the condition which allows him to be here.
I turn finally to the contention that the Tribunal applied the wrong test.

It may be that some other test would have served the purpose of meeting the demands made upon the Tribunal equally well. The question is, however, does this one, namely, "Whether the appellant could reasonably be expected to apply to Israel for political asylum and whether, in the context of paragraph 134, the Secretary of State could reasonably expect the appellant to apply in Israel rather than the United Kingdom" serve the purpose. Whether that is a right test is the question. Whilst the latter part of it poses I think a question which it was necessary for the Tribunal to ask itself and to answer, I am in no doubt that the foremost part of the test contained the right and only question for the Tribunal to ask itself, and answer as in effect they did. They could equally reasonably have come to the conclusion that the applicant did not have to return to South Africa.
Mr Macdonald asserted that a Jew who comes to this country in the future, contending that he is a refugee and who has never been to Israel and had no connection with it, although he might be able to avail himself of the Law of Return but says that he has no desire to, would inevitably be declared to be a person who has another country to go to, if the decision of this Tribunal, supporting the Secretary of State, is correct. I profoundly disagree. What the Secretary of State is bidden by the regulations to do is to have regard, according to paragraph 134, to "all the relevant circumstances". Thus, if a Jew unlike this applicant makes an application, his relevant circumstances would have to be considered and it may be that the Secretary of State would come to the conclusion that, the Law of Return notwithstanding, he had no other country to go to other than his own, where he fears persecution. But the circumstances here are vastly different. This applicant has had very close ties and associations with Israel, each of which he can restore if he wishes to. The fact that he may not wish to is, so far as the Secretary of State is concerned, neither here nor there. The opportunity for him to do so is clearly present. For those reasons, I would dismiss this application.

Judgment Two:

MANN J: I agree.

DISPOSITION:

Application dismissed.

SOLICITORS:

Winstanley Burgess, London EC1; Treasury Solicitor.