THEVARAJAH AND OTHERS v SECRETARY OF STATE FOR THE HOME DEPARTMENT

Court of Appeal (Civil Division)

[1991] Imm AR 371

Hearing Date: 12 March 1991

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Index Terms:

Political asylum -- applications by citizens of Sri Lanka who had arrived in United Kingdom from France -- Secretary of State had declined to consider the applications on the merits -- decision to return applicants to France in accordance with publicly announced policy -- whether that approach was a breach of the 1951 Convention. HC 251 paras 21 and 75: United Nations Convention relating to the status of refugees, 1951: UNHCR Executive Committee, Conclusions (1980) para h(4).

Judicial review -- whether the court should regard itself as bound by reasoned judgments given on ex parte applications.

Held:

Renewed application for judicial review of Secretary of State's refusal to consider on the merits applications for political asylum made by a family from Sri Lanka who had arrived in the United Kingdom from France. In accordance with his publicly announced policy, the Secretary of State decided to remove the applicants to France, the first safe country they had reached, albeit inadvertently.
Counsel for the appellants argued that in the light of the Conclusions of the UNHCR Executive Committee and the provisions of the immigration rules, that approach by the Secretary of State was a breach of the 1951 Convention.
The court considered whether it was bound by the decisions in Karali and Bouzeid.
Held:
1. Although they had been ex parte applications, the court had given reasoned judgments in Karali and Bouzeid. The court could not properly depart from those judgments unless some distinguishing feature were shown.
2. It followed that the Secretary of State was entitled to adopt the policy he had adopted. The Conclusions of the UNHCR Executive Committee were not binding on the Secretary of State.

Cases referred to in the Judgment:

R v Secretary of State for the Home Department ex parte Khalil and ors [1990] Imm AR 354.
Karali and ors v Secretary of State for the Home Department [1991] Imm AR 199. Charles Bouzeid and ors v Secretary of State for the Home Department [1991] Imm AR 204.
R v Secretary of State for the Home Department ex parte David Thevarajah and ors (unreported, QBD, 6 March 1991).

Counsel:

E Cotran for the appellants; R Jay for the respondent.
PANEL: Glidewell, Ralph Gibson, Butler-Sloss LJJ

Judgment One:

GLIDEWELL LJ: This is a renewed application for leave to move for judicial review, namely an order of certiorari to quash a decision of the Home Secretary refusing these four applicants, David Thevarajah, his wife Judith and his daughters Gloria and Evangeline, leave to enter the United Kingdom, together with directions given on 28 February this year that they should be removed. The application was made in the first instance to Roch J and was refused by him. We have not had the advantage of having a transcript of his judgment, but we have been told in general terms what the position is.

This is yet another case which raises the potentially heart-rending issues which arise when persons are claiming to be refugees and claiming asylum in the United Kingdom.

The applicants are citizens of Sri Lanka and are Tamils by race. According to three affidavits sworn by Mr Thevarajah, as a result of experiences and contacts over the past ten years, the applicants claim that they had a genuine fear of persecution should they remain in Sri Lanka. According to Mr Thevarajah, therefore, and there is no reason to dispute whether their claim is genuine or not, they sold part of their property, including the wife's jewellery, for a sum of approximately @6,000. An agent made arrangements for them to be transported from Sri Lanka to the United Kingdom. They left Sri Lanka on 15 February of this year thinking, according to Mr Thevarajah, that they would be coming straight to England. In fact they landed in an African country; he says he still does not know which. They stayed there altogether for about ten days. On 25 February they flew off, again thinking they were coming to England. They arrived in another country and were told that the other country was France. They were indeed in Paris. The agent then said that they were to spend the night there and the following morning he put them on a plane to London declining to accompany them and apparently retaining their passports. Be that as it may, on 26 February all four applicants arrived at Heathrow with no passports. They gave the account of their movements to which I have referred, and claimed asylum. They were given temporary admission to stay with a friend. Mr Thevarajah says that he knew a few people in this country. He has now discovered that he has a substantial group of friends and relatives here. But that, as it transpires, is not a matter of significance.

They were not interviewed on 27 February but on 28 February in the late afternoon he and his wife were interviewed at Heathrow airport. It is quite clear from the documents, copies of which have been produced, that the immigration officer communicated with the Home Office by fax or telephone and received directions from the Home Secretary, as a result of which, at the end of that interview they were served with a notice refusing leave to enter the
United Kingdom and giving directions for their immediate removal; so immediate, indeed, that the plane on which they were to be removed was due to leave only 40 minutes after the time the notice was signed. Immediate steps must have been taken to apply for judicial review, because they still remain in this country. They were told in the usual way that they were entitled to appeal against the refusal of leave to enter, but only after they had left the United Kingdom.

Attached to the formal notice of refusal is a second sheet which deals with the claim for asylum. It reads as follows:

"You have applied for asylum in the United Kingdom on the grounds that you have a well-founded fear of persecution in Sri Lanka for reasons of race, religion, nationality, membership of a particular social group or political opinion.

However Sri Lanka is not the only country to which you can be removed. You arrived from France where you spent two days."

(According to Mr Thevarajah it was slightly more).

"You are under paragraph 8(1(c) of Schedule 2 of the Immigration Act 1971 properly returnable to France and I am satisfied on the information available that you will be re-admitted there."

I break off to remind myself that paragraph 8(1)(c) of schedule 2 of the Act (which has nothing to do with refugees) provides:

"8(1) Where the person arriving in the United Kingdom is refused leave to enter an immigration officer may, subject to sub-paragraph 2 below [which is not relevant] --

. . .

(c) give those owners or agents [that is to say the owners or agents of the ship or aircraft on which they arrived] directions requiring them to make arrangements for his removal from the United Kingdom . . ."

That was the power to give directions to Air France to remove them. The notice goes on.

"Moreover France is a signatory to the 1951 UN Convention Relating to the Status of Refugees and, on the basis of the information available to him about the policies and practice of France and having considered the individual circumstances of your case, the Secretary of State is satisfied that the French authorities would not further remove you to Sri Lanka without first considering in accordance with its obligations under the 1951 UN Convention, any application you may make, for asylum in that country".

In these circumstances your application for asylum here has not been considered."

Mr Cotran, for the applicants, contends that it is arguable that the Secretary of State is obliged to consider a claim for asylum and is not empowered or entitled to return claimants to asylum whence they came, even if the country from which they immediately came is a place from which they have no fear of persecution, without first determining whether they would or would not be entitled to asylum in the United Kingdom.

He derives that proposition, if I understand him correctly, from two paragraphs of House of Commons paper 251. Paragraph 21, dealing with refugees, provides:

"Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees . . . Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

Paragraph 75, dealing with asylum, provides.

"Special considerations apply where a person seeking entry claims asylum in the United Kingdom, or where it appears to the immigration officer as a result of information given by that person that he may be eligible for asylum in the United Kingdom. Every such case is to be referred by the immigration officer to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. The Home Office will then consider the case in accordance with the provisions of the Convention and Protocol relating to the Status of Refugees. Asylum will not be refused if the only country to which the person could be removed is one to which he is unwilling to go owing to a well-founded fear of being persecuted . . ."

Turning to the penultimate sentence -- "The Home Office will then consider the case in accordance with the provisions of the Convention", Mr Cotran submits that, where the Home Office say "In these circumstances your application for asylum has not been considered", they have not considered the case in accordance with the Convention.

There has in recent months been a history of policy making and, following that, of decisions of this court on applications similar to the present. The first matter to which we were referred was a decision of Schiemann J on a substantive application ex parte Yassine and ors a decision given on 6 March 1990 and reported in [1990] Imm AR 354. The circumstances of that case were quite different from those of the present applications and indeed, for my part, I do not think Schiemann J's decision of itself provides any material which assists us in our decision with the problem Mr Cotran has raised. Ex parte Yassine was a case in which the applicants, who were citizens of Lebanon, obtained visas entitling them to enter Brazil as visitors. They went to Cyprus, then came by air to the United Kingdom and arrived here ostensibly on passage to Brazil. When they arrived here they claimed asylum, making it quite clear that they had never had the slightest intention of going to Brazil. But they were refused asylum here and were ordered to go on to Brazil. The question was whether that was a proper course in the circumstances?

Shiemann J considered paragraph 8 of schedule 2 to the Act and decided that the Secretary of State had failed to consider whether there was reason to believe that they would be admitted to Brazil and, taking the view that it was likely that they would not be, he quashed the decision not to admit them to this country.

The points which were raised in that case are very different from the present. However the decision does usefully contain a passage, to which Mr
Cotran drew our attention, from certain conclusions which have been adopted by the executive committee of the United Nations High Commission for Refugees. One of those conclusions is that --
"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 connection or close links with another State he may if it appears fair and reasonable be called upon first to request asylum from that State."
Mr Cotran seeks to persuade us that that raises a consideration which the Secretary of State should take into account. But there is no suggestion that those conclusions have been adopted into United Kingdom legislation, or that, as a matter of policy, the Home Secretary has said that the Home Office will follow those principles, and although it may or may not be thought to be a sensible provision, nevertheless it is not binding upon the Home Secretary.
Following the decision of Schiemann J, the then Home Secretary, Mr Waddington, in answer to a Parliamentary question, on 25 July made a statement of Home Office policy. He said that the United Kingdom was committed to its obligation under the 1951 Convention, and then said this:
"It is an internationally accepted concept that a person fleeing persecution, who cannot avail himself of the protection of the authorities of a country of which he is a national, should normally seek refuge in the first safe country reached. I agree entirely with the concept. The Convention's primary function is to give refugees who cannot turn to their own authorities, the protection of the international community. It is an instrument of last resort -- not a licence for refugees to travel the world in search of an ideal place of residence. Where protection issues do not arise an application should therefore be dealt with in accordance with normal immigration criteria. Accordingly, an application for asylum from a passenger who has arrived in the United Kingdom from a country other than the country in which he fears persecution, will not normally be considered substantively. The passenger will be returned to the country from which he embarked, or to another country in which he has been since he left the country of feared persecution or, if appropriate, to his country of nationality . . .".
At the end of that paragraph he said:
"However, in considering any idividual case I shall take into account any evidence of substantial links with the United Kingdom which in my view would make it reasonable for the claim for asylum exceptionally to be considered here.
All Western European countries who are signatories to the UN Convention operate safe third-country procedures and the approach is consistent with the Convention Determining the State Responsible for Examining applications for Asylum Lodged in One of the Member States of the European Communities signed in Dublin on 15 June 1990 (but not as yet in force)."
It was in accordance with the policy therein announced that the Home Office made its decision in the present case. I should say that the exceptional situation which would arise where there was evidence of substantial links with the United Kingdom is not suggested by the applicants as having been raised in this case. It is true that the applicants now say that they find they have a considerable number of relatives and friends here, but they did not base their claim to asylum here upon such substantial links at the time they made them, nor indeed was it part of the grounds upon which the application was advanced.
What seems to me to be precisely the question in issue here, that is to say, whether the Home Secretary was, as a matter of law, entitled to adopt the policies set out in that statement, or whether it could be said that the policy was so absurd as to contravene ordinary Wednesbury principles, has been before this court on two similar renewed applications on 22 and 23 November last year. Neither has yet been reported. [1991] Imm AR 199 and 204. They are respectively ex parte Kemal Karali and ors on 22 November 1990 and ex parte Bouzeid and ors on 23 November 1990. I do not need to go into the details; they are as close as can be to the situation that arises here. In each case the applicants had come from their homelands, in the one case Turkey, they being Kurds; in the other case Lebanon; in each case they came via a Western European country, in one case Holland and in the other Austria. The decision that was made in each case was that their claim to asylum would not be considered and they should be

returned respectively to the Netherlands and Austria. In giving judgment in the first of those decisions, Dillon LJ emphasized that there was no danger at that moment of the applicants being returned to Turkey without their application for asylum having been considered either in this country or in Holland. He referred to a number of articles of the Dublin Convention, which has not yet been ratified and adopted as part of the law of the country either here or in Holland, and he pointed out that that Convention "seems to envisage that if a Member State considers that another Member State is responsible for examining the application, then the Member State will call on the other Member State to take charge of the applicant but will not transfer the applicant until after acceptance of the request to take charge". He then went on to say that "the Dublin Convention has not yet been ratified and adopted into the domestic law of the various Member States who have signed it, no procedures have yet been set up to provide for the acceptance of a request to take charge or for what is to happen if acceptance of the request is not forthcoming." He then referred to the Secretary of State's policy and said at page 6D of the transcript:
"I am, for my part, unable to say that the Secretary of State has erred in law in not applying, or inquiring further into the facts to enable him to apply, Article 7.2 of the Dublin Convention when that has not yet been ratified and made part of the law of this country.
Equally, I am unable to say that it is unreasonable of the Secretary of State, while Article 7.2 is not part of the law of this country, to rely on the Dutch giving consideration to the applicants' application for asylum when they are returned to Holland. The crucial factor is that they are in no threat of persecution in Holland. If the Dutch refuse to accept the return of the applicants and send them back here, a very different situation would arise if the Secretary of State yet again refused to consider their application for asylum."
Accordingly he refused the application. In that case Stocker LJ and Bingham LJ agreed with him and exactly the same result ensued in the Bouzeid case.
It may seem that a decision such as in those two cases and the present case may result in a situation where people who go back to France or Holland, or Austria but who are not then admitted there but returned to the United
Kingdom, will again claim asylum, in which case, as Dillon LJ said, it may well be that the Home Secretary will then have to consider their claim and deal with it on its merits. But that he is entitled to a policy which produces that situation has, as it seems to me, been established by those two decisions by which we regard ourselves as being bound. It is perfectly true that they were decisions on ex parte applications, but they were reasoned judgments. We do not see how we could properly depart from them, unless some distinguishing feature were shown.
For my part I cannot say that there is any distinctive feature in the present case which distinguishes it from those two decisions and for those reasons I would refuse this application.

Judgment Two:

RALPH GIBSON LJ: I agree.

Judgment Three:

BUTLER-SLOSS LJ: I also agree.

DISPOSITION:

Application refused

SOLICITORS:

Don & Co; Treasury Solicitor