Queen's Bench Division

[1990] Imm AR 354

Hearing Date: 6 March 1990

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Index Terms:

Political asylum -- visa nationals -- no United Kingdom visas -- arrival as transit passengers with visitor visas for third country -- applications made for political asylum -- admission that visas were obtained by deception -- whether Secretary of State entitled to decline to consider applications for political asylum -- whether he was entitled to rely on his conclusion that the applicants should be admitted to the third country for which they had visas -- whether he was obliged to be satisfied that they would be so admitted. Immigration Act 1971 sch 2 para 8: Immigration (Carrier's Liability) Act 1987: United Nations Convention relating to the status of refugees, 1951, (Protocol 1967) arts 31(1), 32, 33: HC 388 paras 14, 75.

Held:

The applicants were citizens of the Lebanon who arrived in the United Kingdom as passengers from Cyprus in transit to Brazil. They had no visas for the United Kingdom but were in possession of valid visitor visas for Brazil. On arrival in the United Kingdom they claimed political asylum. They admitted they had never had any intention of visiting Brazil. They had secured their visitor visas solely to circumvent the consequences of the Immigration (Carrier's Liability) Act 1987. The Secretary of State declined to consider the applications on the merits. He concluded that the applicants should be admitted to Brazil and considered that they should make application for asylum there: removal directions were issued to Brazil, pursuant to paragraph 8 of the second schedule to the 1971 Act.
Before the court it was argued by counsel for the applicants that the Secretary of State should have been satisfied not that the applicants should be admitted to Brazil, notwithstanding the deception practiced in obtaining their visas, but would be so admitted. There was evidence in any event that the Brazilian authorities would not admit them in those circumstances. For the Secretary of State it was argued that in the events which had happened Brazil ought to admit the applicants. If they were returned to the United Kingdom the Secretary of State could consider the matter afresh and his decision was not unreasonable.
Held:
1. On the wording of paragraph 8 of the second schedule to the 1971 Act, before issuing removal directions, the Secretary of State was obliged to be satisfied that they related to a country "to which there is reason to believe that the . . . [applicant] . . . will be admitted."
2. That the Secretary of State had failed to do. The removal directions and the refusals accordingly would be quashed.
3. The court declined to make a declaration, as a matter of discretion, that the applicant's connections with Brazil were not sufficient for it to be appropriate for them to make an application for political asylum in that country: the material before the court was insufficient and the court was not persuaded that it was "appropriate to make declarations in this field."

Cases referred to in the Judgment:

No cases are referred to in the judgment

Counsel:

N Blake for the applicants; GR Sankey for the respondent
PANEL: Schiemann J

Judgment One:

SCHIEMANN J: This case is concerned with the circumstances in which the Home Secretary can lawfully refuse even to consider applications for asylum by persons in this country who claim to be refugees.
Each of these six applicants comes from the Lebanon. They each claim to be political refugees, namely a person who:
". . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .".
-- see article 1 of the 1951 Convention relating to the status of refugees. They each obtained from the Brazilian Embassy in Beirut a tourist visa entitling them to enter Brazil during the next three months and to remain there for a relatively short period without being allowed to work and they each have the number of their return flight to the Lebanon endorsed on their visas. They arrived in Cyprus on 29 December 1989 and flew on to Gatwick, London, where they arrived on 30 December 1989. They had not applied for, still less obtained, United Kingdom visas. Rule 14 of the immigration rules contained in House of Commons Paper 388 provides that visa nationals must produce to the immigration officer a passport or other identity document endorsed with a United Kingdom visa issued for the purpose for which they seek entry and should be refused leave to enter if they have no such current visa. All these applicants are visa nationals and it follows that prima facie they would have been refused leave to enter. But they immediately claimed asylum. The Home Office was initially unwilling to consider the claim for asylum on the basis that it should have been made to Cyprus since that was where the applicants first touched ground after leaving the Lebanon. However, it was submitted to the Home Office that there was a risk that Cyprus might send them back to the Lebanon and that in consequence it was not appropriate to send them back to Cyprus. The Home Office saw force in this submission and considered the matter further and on 30 January 1990 issued in relation to each of them the two decisions which are under challenge in these proceedings:
1. A decision by the Home Secretary not to consider their applications 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 the Lebanon for reasons of race, religion, nationality, membership of a particular social group or political opinion. You arrived in possession of a visa for admission to Brazil and you hold tickets for travel to that country. You have no connection with the United Kingdom. The Secretary of State therefore considers that it is reasonable to expect you to apply for asylum in Brazil and on the basis of the information available to him about the policies and practice of the Brazilian authorities and having considered the individual circumstances of your case, he is satisfied that the Brazilian authorities will not further remove you to Lebanon without first considering any application for asylum that you may make.
In these circumstances your application for asylum in the United Kingdom has not been considered."
2. The second decision of that date: a refusal for leave to enter and directing their removal by aircraft to Brazil.
In short, the Home Secretary adopted the following position: you have nothing to do with this country, you must try to get asylum in Brazil who after all gave you the visa to go there which is more than this country has done. The position taken up by the applicants is that they only obtained the Brazilian visas by deception of the Brazilian authorities in Beirut, that they never intended to go to Brazil, that they wanted asylum in this country, that they have no connection

whatever with Brazil and that the moment they tell the Brazilians the truth about how they obtained their visas the Brazilians are bound to invalidate the visas and send them back to the United Kingdom as the first safe country reached by them after leaving the Lebanon. It is common ground that Cyprus can be ignored and that there is no risk of Brazil sending them back to the Lebanon.

This case is of importance because it is the first case in which the Home Office has refused to consider an application for asylum from someone who is in this country on the basis that he arrived here in transit to another country. Usually the Home Office finds itself in the position that the applicant has the United Kingdom as his last stop having stopped at various other countries on the way. In such cases the position of the Home Office has sometimes been that he should have sought refuge in the first country he reached after leaving his own. Faced with this the government of the first country sometimes adopts the position that the asylum seeker was only in transit and that, therefore, as it were, his presence in that first country is de minimis. This is, I was told, generally accepted as right when, for instance, a refugee is on a plane which stops merely to refuel and then goes on. But the basic principle, referred to by counsel as the First Asylum Principle, accepted by all parties to this dispute is set out in a Home Office submission to the Race Relations and Immigration Sub-Committee of the House of Commons which reads, so far as presently relevant:

"It is an internationally recognised priniple that those who claim to be refugees should seek refugee status in the first country they reach on leaving their own. It is only when the asylum seeker is within the territory of the receiving State that the State has a clear obligation under the Convention to assess his case and if appropriate grant refuge. Accordingly applicants in third countries applying at British posts overseas for asylum in the United Kingdom are advised that they should seek the protection of the country in which they currently find themselves and/or the protection of the local office of UNHCR."

It is useful to consider the background against which the Home Secretary took his decisions under attack. Rule 75 of the iImmigration rules reads:

"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 willing to go owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

If the Home Office decides to grant asylum in the United Kingdom, the Immigration Officer will grant leave to enter. If the Home Office decides to refuse asylum, the Immigration Officer will resume his examination of the person seeking entry for the purpose of determining whether or not to grant him leave to enter under any other provision of the rules."

The other relevant provision is contained in schedule 2, paragraph 8, of the Immigration Act 1971 which provides that where a person arriving in the United Kingdom is refused leave to enter an immigration officer may give directions requiring this removal to any country being:

"(i) a country of which he is a national or citizen; or

(ii) a country or territory in which he has obtained a passport or other document of identity; or

(iii) a country or territory in which he embarked for the United Kingdom; or

(iv) a country or territory to which there is reason to believe that he will be admitted."

The direction under challenge was made on the basis that Brazil was a country to which there was reason to believe that the applicants would be admitted: none of the other three heads are of any potential relevance.

The relevant parts of the Convention are article 1 defining a refugee, which I have already read, and three other articles. Article 3(1) provides:

"The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in

the sense of Article 1, enter or are present in that territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."
Article 32 provides:
"1. The contracting State shall not expel a refugee lawfully in their territory save on grounds of 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."
Article 33 provides:
"1. No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
Article 33 is background but does not arise in the present case. No submissions were made to me on article 32 and I did not look at this article until after I had reserved judgment. At first blush it might be argued that the applicants were lawfully in the United Kingdom -- since no visa is required for those who are in transit and remain airside -- and that, therefore, the Home Secretary before expelling them should have considered whether they were refugees. The contrary argument might be that, since the applicants intended to stay, they were not here lawfully. Since no arguments were addressed to me on this article and since a decision is required forthwith, I have ignored this article in coming to my conclusion. Since the parties are represented today by different counsel from those who appeared when the matter was argued I do not think it fair to ask them to address me on this point. Article 31 is important for two reasons:
1. It recognises that frequently a refugee will enter a country illegally and then seek asylum.
2. The prohibition on penalties applies only in the case of refugees coming "directly" from the territory where their lives or freedom were threatened.
The first of these reasons is of immense general importance since refugees frequently escape from oppressive circumstances to countries which may require entry formalities which have not been completed. They may have climbed under barbed wire, jumped ship or come by stolen or hijacked plane. Nevertheless Mr Sankey, appearing on behalf of the Home Secretary, submitted to me that it was a relevant consideration that Parliament had by enacting the Immigration (Carrier's Liability) Act 1987 imposed penalties on those who carried into this country visa nationals who do not have United Kingdom visas and that these applicants had sought to circumvent this by adopting the device of getting a through ticket to Brazil and a Brazilian tourist visa.
Mr Blake in his careful submissions on behalf of the applicants drew my attention to an interesting article by Erika Feller published in the International Journal of Refugee Law volume 1, page 48, which argues that this legislation involves the United Kingdom in a breach of its international obligations. However, I do not think it appropriate to express any views on that matter in the context of this case. I propose to decide this case on the basis that it is the fact that these applicants have adopted the method of getting into this country which they did adopt in order to get round the provisions of the 1987 Act but that this fact is not to be held to weaken the force of their challenge to the Secretary of State's action. That seems to me to be in accord with article 31 of the Convention in accordance with which the Home Secretary has agreed to act. Since I find no evidence that the Home Secretary took this circumvention point into account in coming to his decision I can ignore it altogether and propose to do so.
The point can, however, be made by way of background that the effect of the 1987 Act coupled with the Secretary of State's action in the present case is to pose substantial obstacles in the path of refugees wishing to come to this country. This is because:
1. Visa nationals require a prior visa before coming here.
2. You cannot get a visa on the basis of being a refugee in the country where you are being persecuted because at that stage you are usually not outside the country of your nationality and thus do not fall within the definition of refugee and there is no provision for such a situation in the immigration rules.
3. By reason of the 1987 Act carriers are disinclined to carry those without visas.

In those circumstances he who wishes to obtain asylum in this country, short of a prior contact with the Home Secretary offering him asylum, has the option of:
1. Lying to the United Kingdom authorities in his country in order to obtain a tourist or some other sort of visa.
2. Obtaining a credible forgery of a visa.
3. Obtaining an airline ticket to a third country with a stopover in the United Kingdom.
These applicants adopted the third of these courses.
The international community has many examples of similar obstacle courses placed in the way of would-be refugees and yet has affirmed in article 14(1) of the Universal Declaration of Human Rights:
"Everyone has the right to seek and enjoy in other countries asylum from persecution."
Because most States have agreed that refugees should not be sent back to the country from which they have escaped, and yet few states are anxious to receive refugees, there has evolved in international practice the first assylum principle to which reference was made earlier on in this judgment and which lies behind the word "directly" in article 31 of the Convention.
In a further endeavour to resolve problems which arise in a context where there are refugees without countries enthusiastic to take them, the Executive Committee of the United Nations High Commissioner for Refugees (which I understand includes someone from this country) has endorsed some "Conclusions"
to which I have been referred. The Executive Committee considers that states should be guided by a number of considerations including a principle that:
"States should use their best endeavours to grant asylum to bona fide asylum seekers . . ."
and in (h) of the conclusions:
"an effort should be made to resolve the problem of identifying the country responsible for examining asylum requests by the adoption of common criteria. In elaborating such criteria the following principles should be observed."
There are then set out four principles of which I need only refer to principles three and four. Principle three reads:
"(3) 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

. . .

(4) 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."
The criteria have not yet been elaborated. These principles have not been incorporated into our law and Mr Sankey, on instruction, indicated that the Home Secretary did not accept the principle stated in (h)(3). However, the principle in (h)(4) is accepted by the Home Secretary and it is that principle which, submitted Mr Sankey, has been applied in these cases and is reflected in the decision letters dated 30 January 1990, one of which I have already read.
Mr Sankey submitted that:
1. It appeared to the Home Secretary that the applicants already had a connection with Brazil -- that connection being the asking for and the obtaining of the Brazilian visas;
2. It appeared to the Home Secretary fair and reasonable ro call upon the applicants first to request asylum from Brazil;
3. The Home Secretary's views on this could not be challenged save on normal administrative law principles;
4. There had been no breach of any such principles;
5. The Home Secretary was apprised, before he took the decisions under challenge, of the opinion of the United Nations High Commissioner for Refugees expressed in the latter's letter of 23 January 1990:
". . . that these applications should be admitted to the asylum procedure in the UK, insofar as a visitors visa issued by a country to an individual is not sufficient to establish any meaningful

connection or link between them. Certainly this is not the kind of relationship which would be required in order to relieve another country from its obligation to consider an asylum request by the holder of such a visa."
But the Home Secretary did not share that opinion.
In the alternative, he submitted that the Home Secretary was entitled under English law to ask asylum seekers to seek asylum in another country, even if the asylum seekers have no connection at all with that other country, provided there was no risk of them being sent back to the country from which they were seeking to escape.
In my judgment the most sensible approach to the problems thrown up by these applications is to consider firstly the removal directions and ask whether the applicants have shown that these are invalid. Was the Home Secretary entitled to come to the view that Brazil was a country to which there was reason to believe the refugees would be admitted? -- see paragraph 8(1) of schedule 2 of the 1971 Act. The only reason that the Home Secretary had for believing that the applicants would be admitted, if indeed he had that belief, was that they had tourist visas.
Mr Blake submitted:
1. These tourist visas had been obtained by fraud from the Brazilian authorities in Beirut;
2. No country is likely to treat as effective a visa obtained by fraud. The United Kingdom does not, as one sees from the immigration rules. He put in an affidavit exhibiting a letter written on behalf of the Brazilian Consul stating that:
"Visas obtained by means of deception or under false pretences are subject to be cancelled or considered without effect."
3. There was no possible reason to believe that these applicants would be admitted as tourists.
I interpose to say that I did not understand Mr Sankey seriously to dispute any of the foregoing.
4. In those circumstances the alleged "connection or close links" between the applicants and Brazil were non-existent or at any rate were of such a tenuous kind that it was perverse to conclude that asylum should be sought from Brazil bearing in mind that the Home Secretary accepts that "asylum should not be refused solely on the grounds that it could be sought from another State".
5. The Home Secretary was perverse to conclude, if indeed he did so conclude, that there was reason to believe that the applicants would be admitted as refugees in Brazil since:
(a) Brazil had given him no such reason.
(b) The Home Secretary knew that the United Nations High Commissioner for Refugees considered that it was the UK's obligation to consider the request for asylum and this would no doubt be brought to the attention of the Brazilians.
(c) Brazil was likely to apply the first asylum principle bearing in mind that the applicants had spent several weeks here before the decisions under challenge were made.
6. It was perverse to set in train a process which would almost certainly result in these applicants being shuttled backwards and forwards in conditions which might well involve breach of article 3 of the European Convention on Human Rights.
Mr Sankey submitted:
1. That the court should not speculate on what Brazil would do. If Brazil sent the applicants back to the United Kingdom then the Home Secretary would be free to consider what to do next.
2. That the Brazilians had brought this problem on themselves by not being careful enough in vetting applicants before issuing tourist visas. This last submission, so far as the evidence before the court is concerned, was based entirely on the fact that tourist visas were issued to the applicants when in truth these applicants had no intention of touring.
While I accept that the Home Secretary believed that the Brazilians ought to take asylum responsibility for these applicants since the Brazilians had issued them with visas, and while it may even be (although I confess to substantial doubts) that such a belief was one to which the Home Secretary was entitled to come, no reason has been suggested for him to believe that the Brazilians would take the same view of the matter as he did. Indeed there is no evidence that he believed that the applicants would as opposed to should be admitted to Brazil. If he did believe that then so far as the evidence before me goes there was no reason for that belief.
In the absence of such a belief and of a reason for such a belief there was no power to give the removal directions and I, therefore, quash them. Since in making his decision not to consider the

asylum applications the Secretary of State clearly believed that valid removal directions would be given it seems to me that the decisions refusing to consider the asylum applications were ones which failed to take into account what ought to have been taken into account, namely that there was no reason to believe that the applicants would be admitted to Brazil. In those circumstances those decisions ought also to be quashed.
Each applicant asks for:
"A declaration that the applicant has no close connections with Brazil sufficient to make that country the appropriate country of asylum instead of the United Kingdom".
I have not been addressed on the appropriateness of such a declaration and I refuse as a matter of discretion to make them. The material in front of me is far too exiguous and I am not persuaded that it is appropriate to make declarations in this field in any event.

DISPOSITION:

Applications granted

SOLICITORS:

Winstanley-Burgess; Treasury Solicitor