

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)

Neutral Citation No.: [2005] EWCA Civ 886
Case Number: C4/2005/0110

Date: 29/06/2005

Before:
LORD JUSTICE BUXTON
LORD JUSTICE SEDLEY
LORD JUSTICE JONATHAN PARKER

T' (AppellantI)
Appellant

The Secretary of State for the Home Department
Respondents

JUDGEMENT

[HTML version of approved judgment]

MR M GILL QC (instructed by Messrs Harding Evans, Newport) appeared on behalf of the Applicant

MISS L GIOVANNETTI (instructed by Treasury Solicitor) appeared on behalf of the Respondent

1. LORD JUSTICE BUXTON: This is an appeal from a decision of the Immigration Appeal Tribunal entered on 25th November 2004, who were themselves hearing an appeal from a decision of an adjudicator, entered on 11 May 2004. I will return at the end of this judgment to the circumstances in which this appeal came before the Immigration Appeal Tribunal and comes before this court, and consider the question of whether the appeal should indeed have been before either of those Tribunals at all.

2. The appellant, Mrs Natela I, arrived in this country from Russia on 8th January 2004. She was accompanied by two children, her dependants, and she claimed asylum under the Refugee Convention. Put shortly for the moment (though I shall have to refer to it in somewhat more detail), she claimed that if she returned to her country she would face ill-treatment because of her Georgian race, and because of the fact that she had been persecuted by reason of her husband's religion, he being a member of the Muslim faith, and his political activities in support of the insurgency in Chechenia. She stated that each of her sons had been attacked because of objections to their mixed parentage and that she herself had been attacked by persons living in her home area, she said because of her husband's religion.

3. The adjudicator accepted Mrs I as a witness of truth. In more detail she said that she was beaten up in the middle of December 2001 because of her husband's religion and association with the Chechen insurgency, that this happened in public and was

verified, as the adjudicator found, by a medical report. She had not been able to identify the people that attacked her. She reported the matter to the police and they have been unable to identify those responsible. The adjudicator was prepared to assume in the favour of the local police force that there had been difficulties in tracing the assailants, owing to the only partial history that Mrs I was able to give them.

4. Her eldest son, Michael, was attacked in August 2003 by Russian youths and her son, Arsen, born in October 1989, had been beaten on two occasions: in December 2000 and April 2003. He then would have been a young boy aged, on the first occasion, 11 and, on the second occasion, 14. On the first occasion the police put the matter down to it being a dispute between children. On the second occasion, the police did not accept that the attack had been racially motivated, but thought it an attack by hooligans. That attack was undertaken by people who were neighbours, or former neighbours, of the family; and the medical report, which the adjudicator accepts is correct, showed quite serious injuries which the adjudicator said, in paragraph 16, demonstrated that this was:

"a nasty and frightening incident suffered by a young boy at hands of two men, one of whom was known to him."

5. In the case of Michael he has had hospital treatment for a neurotic condition caused by his having been beaten up by class mates; and then in August 2003, he was attacked by three unknown people, suffering lack of consciousness and vomiting. The adjudicator said this at paragraph 17 of his determination:

"Although his injuries were relatively superficial, this too was a nasty incident which would have been frightening for a young man of Michael's age who was already predisposed to a neurosis."

6. The adjudicator had to consider claims both under the Refugee Convention and under Article 3 of the European Convention of Human Rights. Having recorded, as I have set out, the nature of the attacks, he then went on to consider them principally in the context of the Refugee Convention. He said of the appellant's situation, in paragraph 15 of the determination:

"As the Appellant has been attacked only once, I find that she has failed to establish that she was the subject of a campaign of persecution. I therefore find that I am not satisfied on the information that has been adduced before me that the Appellant has a claim within the scope of the 1951 United Nations Convention Relating to the Status of Refugees."

7. In respect of the other attacks, the adjudicator found that despite Mrs I's claim that her problems were caused by hostility to her husband and to his political attitudes, the attacks had been random action by different people within the local community. He continued in paragraph 18:

"I am not satisfied that one assault of the Appellant, one assault of Michael, and two assaults of Arsen which were three years apart amounts to persecution. Even if taken cumulatively, unless there are particularly strong and credible elements, ill-treatment does not cross the threshold of severity into persecution. The test of persecution is and must be, kept at a high and demanding level."

He therefore rejected the claim under the Refugee Convention and in respect of the human rights claim he said this, in paragraph 27 of the determination:

"The Appellant's representative has submitted that the Appellant's rights under Articles 2 and 3 of the EHCR are engaged. I have considered this aspect of the appeal separately from the asylum claim. I do not need to and so will not repeat the facts. On the facts as established, I find that if the Appellant were returned to her country of nationality, there is not a real risk that she will suffer a breach of her protected rights under Article 3 of the ECHR or indeed any other of her Convention rights. Miss Hulse, Counsel for the Appellant, confirmed that the Appellant pursued her human rights appeal under Articles 2 and 3 only."

8. He therefore rejected the claim in its entirety. Mrs I appealed to the Immigration Appeal Tribunal with permission of that Tribunal which concluded that the adjudicator had been correct, or at least had been entitled, to come to the conclusions that she had reached both in regard to the Refugee Convention, but also in regard to Article 3. There was a further issue of internal relocation, which we are not concerned with, though it was regarded by the adjudicator as an additional reason why there would not be persecution in the Refugee Convention sense if this lady were returned to Russia.

9. Permission was refused to appeal to this court on paper by myself, considering that no error of law was demonstrated by either Tribunal. Permission was granted after an ex parte hearing by my Lord, Sedley LJ, on a limited ground, which I will venture to set out from his judgment because, if I may respectfully say so, it not only importantly limits the area of this appeal but also importantly sets out a consideration which has to be borne in mind when, as in this case, there is a claim equally under Article 3 and under the Refugee Convention. My Lord said regarding the treatment by both Tribunals of the Refugee Convention and Article 3:

"It is arguable, it seems to me, that the two do not hang entirely together, either so as to enable the adjudicator to rely entirely on his previous findings in order to dismiss any real risk of a breach of Article 3, or so as to enable the IAT to treat the two in the same breath. It is arguable, I say no more at this stage, that, first of all, there does not have to be shown persecution of a systematic nature which the Geneva Convention requires, and, secondly, that Article 3, while a question must arise about the acts of individuals as opposed to those of the state, does not pose the question of state protection in quite the same terms as Hogarth does.

In those circumstances, it seems to me that there is one issue and one issue only upon which Mrs I should have permission to appeal to this court, and that is whether the adjudicator and/or the IAT dealt adequately in law with her claim under Article 3 of the European Convention on Human Rights."

10. The potential criticism of the adjudicator is twofold. First, that he may have considered that the issues arising under Article 3 were identical to those that arise under the Refugee Convention. Secondly, that even if he did not so consider, he did not satisfactorily explain what the distinction was on the facts of this case.

11. Mr Gill says that the fault was the first of those: that the adjudicator had simply considered that the case went down under Article 3 because he had rejected it under the Refugee Convention. What the adjudicator should have done, in Mr Gill's submission, is to consider the two questions quite separately. If he had done it himself in that way he would have realised that there were elements in the case that were

relevant to Article 3 that had not been satisfactorily dealt with in his review of the facts and which gave rise to an arguable case; and Mr Gill says he puts his case squarely that Article 3 might be engaged here, in which case the matter should be remitted for it to be properly pursued.

12. I am not persuaded that the adjudicator in fact made the first of the errors that I have delineated, but it is the case that he did not set out the Article 3 issue in the more expansive manner that would have been required in order to meet the fear that Mr Gill expresses. It is, therefore, highly desirable, in a case like this, that adjudicators should approach the matter in that way, if for no other reason than to set aside any fear that they have not properly and separately considered the Article 3 issue.

13. That being the issue in this case, it may be appropriate to remind ourselves of the ways in which issues that arise under Article 3 may be different from those that arise under the Refugee Convention. The central feature of both claims is ill-treatment of the subject. I will revert to that point in due course. Once the appropriate level of ill-treatment is established, however, it is clear that there may be circumstances where the two claims do not run together.

14. Two obvious examples of this. First, that ill-treatment engaging an Article 3 does not necessarily have to be at the hands of the State or of the body for which the State is responsible. That is demonstrated quite clearly by cases that have regarded Article 3 as being engaged simply because of the medical condition, caused by natural causes, of the claimant. Secondly, although a person may be persecuted to a high degree they will not fall under the Convention unless they are being persecuted for a reason prohibited by the Refugee Convention. That would not necessarily be the case again under Article 3.

15. However, as to the level of interference that is required, it has generally been thought that if it cannot be shown that the treatment that the subject is likely to receive meets the level required for the Refugee Convention claim, then it is unlikely that that persecution will suffice to bring the claim within Article 3. That is the view, in my judgment, expressed recently in the speeches in their Lordships House in the case of *Secretary of State for the Home Department v Bagdanavicius* [2005] UKHL 38, when Lord Brown of Eaton-Under-Heywood said this in paragraph 30:

"Certainly your Lordships should state for the guidance of practitioners and tribunals generally that in the great majority of cases an article 3 claim to avoid expulsion will add little if anything to an asylum claim."

16. I would respectfully make, I think, three comments. First, that those observations, as it seems to me, are, and must be, directed to the question of the nature of the persecution in a particular case. They do not touch on the other aspects in which I venture to suggest that claims under the Refugee Convention and claims under Article 3 may be different. Secondly, Lord Brown left open the possibility of there being some cases in which the nature of the persecution required under the two conventions is different. One of those instances is that which my Lord referred to in his grant of permission, that is to say that it is not necessarily the case that persecution of a systematic nature needs to be shown in order to establish an Article 3 claim. Thirdly, I would respectfully suggest that Lord Brown's observation cannot have been intended to undermine, and does not undermine, the desirability that I have ventured to suggest,

earlier in this judgment, of an adjudicator dealing with the two claims separately and making clear what facts he regards as relevant to both of them.

17. I would accept that the adjudicator did not carry out that latter operation in this case. Is there, however, any ground for saying, in realistic terms, that he would have regarded the matter differently, or should have regarded the matter differently, had he treated the Article 3 claim more expansively? Despite Mr Gill's submissions I am quite satisfied that there is no reason for thinking that the outcome would have been different had it been approached in that somewhat different way.

18. I deal first with the implications in this case of the need for systematic persecution in the Refugee Convention sense. I have already said that may found a difference between the two conventions, but we have to remember, as my Lord pointed out in argument, that in both cases the Tribunals in this country are looking to the future. What happened in the holding country is relevant, and can only be relevant, to the question that the court in this country has to consider of whether persecutory conduct is going to occur when the person returns; it being of course axiomatic that past events are highly probative of what is going to happen in the future, but not conclusive.

19. I therefore have to say that I think Mr Gill is wrong to focus on that point in this case. He pointed out that the adjudicator had relied on the fact, in the passages that I have just read out, that the persecution here has not been systematic and been of a random nature as a reason why a refugee convention claim was not fulfilled. He said nothing in that respect under Article 3, but it would be impossible, in my judgment, to get an Article 3 claim on its feet, bearing in mind that the test is whether there is a high risk of Article 3 persecution if this lady returned to her native country, and that it is impossible to say that that can be established by the sort of random events (so described by the adjudicator) that occurred when she was last there.

20. Far from those events demonstrating that there is a real risk of Article 3 persecution, they really do not demonstrate that there is, in themselves, any significant risk at all nor; do they do that in the context of her fears about hostility on the part of her neighbours by reason of her husband's race or his association with forces in Chechnia.

21. The adjudicator was quite right in treating those matters as background considerations. What actually happened, found by him to be unpleasant and frightening, had been spread over a period of time and had occurred in a random way. None of that material could, in my judgement, even start to ground a claim that the very high level of interference with a person's personal autonomy and safety that is required by Article 3 could be fulfilled in this case. We have to remember that under Article 3 the test is a very high one, made the higher by the recent decision of their Lordships' house in the case of *M*.

22. That deals with the random nature of the interference. I then consider whether the treatment of the various incidents by the adjudicator, albeit with his eye principally on the Refugee Convention, gave any ground at all for thinking that, were he to revisit the matter under Article 3, his view would be different. Mr Gill listed a number of factors not expressly considered by the adjudicator that would be relevant to an

Article 3 question were this lady to return, including her husband's connection with the Chechnens, as already dealt with, the fact that she had lost her internal passport and that she had been visited by the authorities in connection with her husband's activities.

23. The adjudicator in two passages did deal with both of the questions in issue. He said of the assaults in paragraph 18, in a passage that I agree is not wholly lucid, but the effect of which I think is quite clear:

"I am not satisfied that one assault of the Appellant, one assault of Michael, and two assaults of Arsen which were three years apart amounts to persecution. Even if taken cumulatively, unless there are particularly strong and credible elements, ill-treatment does not cross the threshold of severity into persecution. The test of persecution is and must be, kept at a high and demanding level."

He said in paragraph 21:

"As I have already found above, I am not satisfied that the Appellant and dependants have suffered persecution in their home country. I do accept, however, that they have faced some unpleasant incidents from various members of the community due to their connection with the Appellant's husband/the boys' father who it is well-known in the local community has left home to support the Chechens in Chechnya. As a result of his support for that struggle, his wife and children have faced ill-treatment within the community falling short of persecution. Their treatment has been unpleasant."

Then he went on to deal with the question of internal flight, with which we are not concerned.

24. Although not specifically addressing the matters that Mr Gill listed, and not specifically addressing Article 3, I am afraid that I find it impossible to say that, first of all, the adjudicator did not have the issues in mind; and secondly, were he to apply to them the very high level of requirement for Article 3 persecution that is now in place, in the context of the guidance given by Lord Brown, there is any likelihood at all that either he, or any other adjudicator, would reach any different conclusion on Article 3.

25. That also was the view of the Immigration Appeal Tribunal. It said in paragraph 6 of its determination:

"Given that a high threshold is required in order to find persecution and, by the same token, treatment contrary to Article 3 of the ECHR, we do not consider that the adjudicator can be said to have erred in law in concluding that, however unpleasant the various attacks were, they did not reach the required threshold."

I respectfully agree. The Immigration Appeal Tribunal clearly thought, as I think, that the adjudicator did have Article 3 in mind, even though he did not address it as expansively as he should have done. They clearly thought, as I think, that his findings (a) were open to him and (b) exclude any possibility of any Article 3 claim being pursued.

26. I would therefore dismiss this appeal. In doing so, however, I have to revert to the matter that I addressed at the beginning of this judgment. In granting permission to

appeal to the Immigration Appeal Tribunal, the vice-president of that Tribunal set out various aspects of the case and then said this, having accepted the existence of ethnic discrimination in the Russian Federation:

"He found however, that the Claimant's problems were localised and did not amount to Refugee Convention persecution.

The grounds take arguable issue with those findings that merit the consideration of the Tribunal."

When the application for permission to appeal came before me I said:

"I very much doubt whether the IAT had jurisdiction to entertain an appeal. In particular, the issue of internal flight would appear to be a question of fact not of law. Once launched on the appeal the IAT made findings that were fully open to it. No error of law either by the IAT or by the adjudicator is demonstrated."

I continued to entertain those doubts as to whether the IAT had jurisdiction to consider this appeal at all. The basis upon which the vice-president gave leave appeared to address simply the adjudicator's findings of fact as to the localisation of the claimant's problems and the nature of the persecution which she suffered.

27. Having, however, failed to do what perhaps I should have done and acted on those doubts and refused permission on that ground, I accept that it was potentially open to the appellant to seek to pursue the appeal on the ground that we have considered. That, I have to say, appeared nowhere in the case as put to the Immigration Appeal Tribunal.

28. I make these points only to underline this warning. We have considered this case out of deference to the claimant, who clearly, whatever one says about her position in international law, is a lady in a very difficult and unenviable position, and out of deference to the devoted representation that she has received from Miss Hulse and Mr Gill. The fact that this court has entertained this case should not be used in the future as the basis of an argument which seeks to undermine recent rulings of this court about the limits of the jurisdiction of the Immigration Appeal Tribunal.

29. Counsel for the Secretary of State is quite aware that that is a matter of some interest in this jurisdiction at the moment. The fact that this appeal has been heard is not authority in respect of that pivotal dispute. I trust that an appropriate note will be made of that point. However, having discharged myself of that I would dismiss the appeal.

30. LORD JUSTICE SEDLEY: The paradigm case in which Article 3 may come to the aid of an applicant who has failed in a claim for an asylum is one in which the failure to establish refugee status has been because the persecution suffered and anticipated by the applicant, although real, was not based on a convention ground. Other instances can be constructed; but a case like the present falls, in my view, outside the paradigm. It concerns the quality and nature of acts of harassment and violence.

31. The argument is that, even though adjudged to fall short of persecution, such a history, projected as it has to be into the future, is still capable of being adjudged by the same decision-maker to establish a serious risk of inhuman or degrading

treatment. No doctrine or law, and no decided case, excludes this possibility. Its realism is limited by the parallelism of the two international obligations in question.

32. This is why both Mr Gill and Miss Giovannetti (in their written argument) accept that the present question is not whether the adjudicator or the IAT was entitled in principle to treat the two as co-extensive. The decision of the House in *R v the Secretary of State for the Home Department, ex parte Bagdanavicius* [2005] UKHL 38 confirms that they are not wrong, and in fairness to him, the adjudicator (unlike, I think, the IAT) did not so treat them.

33. The question is whether, on the facts found by the adjudicator, there is a realistic possibility that had he evaluated them separately under Article 3 he might have found for the appellant. It was to give her the opportunity of establishing this that I granted permission to appeal, as my Lord has indicated. Having now heard full and helpful argument on her behalf from Mr Gill, for the reasons given by my Lord I agree that a differential finding of this kind was not a realistic possibility on the facts found by the adjudicator in this case.

34. This is not to say that one has to be happy about the outcome. The adjudicator might have legitimately taken a considerably bleaker view of the treatment prospectively facing the wife and children of a Russian Muslim fighting for the Chechen separatists if returned to an area as scarred as North Ossetia is by this conflict. But he did not, and neither the IAT nor this court is entitled to second-guess him. I too would therefore dismiss this appeal.

35. LORD JUSTICE JONATHAN PARKER: I also agree that this appeal should be dismissed for the reasons which my Lords have given. As the adjudicator made clear in paragraph 27 of his Decision, he considered the claim under Article 3 of the ECHR separately from the claim under the Refugee Convention. He went on to find, on the facts as established, that if the appellant were returned to her home country there was no real risk that she would suffer a breach of her Article 3 rights.

36. In my judgment that was a finding which the adjudicator was clearly entitled to make on the evidence and I reject the submission of Mr Gill QC that in making that finding the adjudicator erred in law in failing to undertake some further investigation of the facts. In particular, it is clear from paragraph 27 of his decision that the adjudicator was not guilty of treating his rejection of the asylum claim as necessarily determinative of the Article 3 claim; although, as Lord Brown has said in the passage from the *Bagdanavicius* case already quoted by Buxton LJ (and I quote it again): "*... in the great majority of cases an article 3 claim to avoid expulsion will add little if anything to an asylum claim.*"

37. In my judgment the administrator was fully entitled to take the view that, in effect, the instant case fell within the great majority of cases referred to by Lord Brown in that passage from his speech.

38. I would, however, respectfully endorse Buxton's LJ observations as to the desirability of an adjudicator setting out, albeit briefly, the separate reasons for rejecting an Article 3 claim in such circumstances, if only to avoid any impression that rejection of the Article 3 claim follows necessarily from rejection of the asylum claim.