Case No: C/2000.2682

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR. JUSTICE MUNBY

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 23rd November 2000

B e f o r e :

LORD JUSTICE SCHIEMANN
LORD JUSTICE TUCKEY
and
SIR SWINTON THOMAS

- -

FADLI'S APPLICATION FOR JUDICIAL REVIEW — **Appellant**

Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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MR.N. BLAKE Q.C. & MRS.M. PHELAN (instructed by Saleem Sheikh, London, SW1H 1QS for the Appellant)
MRS.E. GREY (instructed by Treasury Solicitors, London, SW1H 9JS for the Respondent)

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Judgment
As Approved by the Court

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LORD JUSTICE SCHIEMANN:

This is the judgment of the Court.

1. The Appellant is an Algerian who sought asylum in this country. His application was refused by the Secretary of State. His appeal to the Special Adjudicator was unsuccessful. The Immigration Appeal Tribunal refused leave to appeal. He sought to quash those decisions in the High Court. Munby J refused to do so but gave him permission to appeal to this court.

2. The claim for asylum was originally based on many grounds. Before this court only one has been pursued. The appellant points out that as an Algerian citizen he is under a legal obligation to do military service. If he refuses to do this he will be subjected to a term of imprisonment which he believes will be about 9 months. He submits that if he does his military service his life and that of his family will be at risk from the Groupe Islamique Arme (GIA). This, according to 1997 guidelines emanating from the UNHCR, is one of three factions of the militant wing of the Islamic movement in Algeria which is opposed to the government of the day and routinely and often successfully tries to kill those whom they perceive to support or to have supported that government. The appellant says that in this category fall all those who do military service in Algeria and that they are at risk from the GIA both whilst they are serving soldiers and thereafter. The case has been argued in front of us on the basis that this is indeed the case.

3. This is because of the way in which the Special Adjudicator dealt with this, at the time minor, aspect of the appellant's many headed asylum claim. He held:

> " The actual objection to military service raised by the appellant was the risk to himself. …. However, personal risk is an inevitable concomitant of active military service … and perceived support for the *status quo* is equally so for those engaged in internal security duties. Does that mean that military service on internal security duty always carries a Convention risk? If so, I rather think that UNHCR would have said something about that in their Handbook; ….. There is nothing there about the risk to oneself, on, off, before or after active service; …. In the view of the UNHCR, objection to military service is capable of amounting to a Convention reason only if either
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> a) this is on conscientious grounds, relating either to an objection in principle to military service as such, or to the internationally condemned nature of a particular conflict; or
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> b) punishment for refusal would itself, for some convention reason, be excessively severe."

4. He held that the appellant's objection could not be sustained on either basis. This is not challenged before us. However, it is submitted that the Special Adjudicator applied the wrong test.

5. The question which faced the Immigration Appeal Tribunal and the judge and which now faces us is whether the Special Adjudicator by his approach may have

failed to address the crucial question before him, namely, whether the appellant fell within the definition of Refugee in Article 1A(2) of the Geneva Convention, to wit

> "any person who owing to 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".

6. That is the crucial question because Article 33.1 provides that:

> No contracting state shall expel or return ..a refugee … 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".

7. The general purpose of the Convention is to enable a person who no longer has protection against persecution for a Convention reason in his own country ("the home state") to turn for protection to the international community[1]. The persecution may be directly by the agents of the home state or by third parties. So far as injury at the hands of third parties is concerned, the international refugee protection regime is meant to come into play only in situations when the home state fails to provide for the potential victim the degree of protection ("practical protection") which the international community expects a state to provide for its citizens[2]. A state is not obliged to provide complete protection against isolated and random attacks but it is under a duty to provide protection up to a practical standard[3].

> "The applicant [for refugee status] may have a well founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy."[4]

> ".. where a state of civil war exists it is not enough for an asylum seeker to show that he would be at risk if he were returned to his country. He must be able to show … a differential impact. In other words, he must be able to show risk of persecution for a Convention reason over and above the ordinary risks of clan warfare".[5]

8. The United Nations Handbook deals with the situation of persecution at the hands of third parties in paragraph 65

> Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution , in a country otherwise secular, but where sizeable sections of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as

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[1] Horvath v Home Secretary [2000] 3 W.L.R.379 at p.383 per Lord Hope of Craighead
[2] ibid
[3] Horvath at p.388 per Lord Hope of Craighead
[4] Horvath at p.387 per Lord Hope of Craighead
[5] Adan v Home Secretary [1999] 1 A.C. 293 at 311 per Lord Lloyd of Berwick

persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

9. The Handbook has a number of paragraphs dealing with the situation of soldiers. The only ones of present relevance are paragraphs 168 and 169.

> **168.** A person is clearly not a refugee if his only reason for draft evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution .
> **169**. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

10. The present case is concerned with the danger to life arising out of military service. There are international conventions which are concerned with protecting soldiers but none of them are relevant to the present case. It has long been accepted that the mere fact that a citizen is expected by his home state to risk his life whilst doing military service against an external enemy of the state does not entitle him to refugee status under the Geneva Convention and the consequent protection of the international community. Although he may have a well founded fear of being killed for reasons of nationality or religion he will not have a well founded fear of persecution as that term is used in the Geneva Convention. That is so however great the risk to life which is inherent in participating in the relevant military operations. This is not disputed by Mr Blake Q.C. counsel for the appellant.

11. The position in our judgment is no different if the enemy is an internal one. If the state is to fulfil its duty to provide protection for its citizens up to a practical standard it will, in a civil war situation, use its police and soldiers for that purpose. It will not be in breach of its duty to its citizen policemen and citizen soldiers not to persecute them if it requires them to run a high risk of losing their life fighting in a civil war. This proposition also is not challenged directly by Mr Blake.

12. He seeks however to do so indirectly. The argument ran on broadly similar lines in relation to two possible groups - serving soldiers and ex-soldiers.

Ex-soldiers

13. Mr Blake concentrated primarily on ex-soldiers - probably because he recognised that, in relation to serving soldiers the received law presents him with something of a hurdle. He relies on a number of cases in which ex-soldiers and ex-policemen have been regarded as refugees[6]. However, in relation to any claim based on being an ex-soldier, the appellant faces the problems that he is not presently an ex-soldier. The time when the appellant will be an ex-soldier, if it ever comes, is at least 18 months away. The degree of risk of harm to him from the GIA is manifestly higher in relation to the immediate future. He may never be an ex-soldier in Algeria exposed to the GIA. This can be for a number of reasons. He may refuse to serve and be

[6] Montecino v I.N.S. 915 F.2nd 518, a 1990 decision of the U.S.9th Circuit Court of Appeals; Lakhar Abdelouahad v SECRETARY OF STATEHD, a decision of the IAT this year reference HX/88716/97

imprisoned instead; he may die or be killed; he may leave Algeria at the conclusion of his military service and be welcomed by some other country; the GIA may have been subdued or have changed its policy by then; he may himself join the GIA and so on. In our judgment there are far too many uncertainties as to the future to entitle the appellant to rely on a situation which may appertain in 18 months time as a basis for his claim to be a refugee at present. This is enough to dispose of the refugee claim in so far as it is based on the appellant's possible future position as an ex-soldier. It is not necessary for us to decide now whether he might then be entitled to refugee status.

Serving soldiers

14. Turning to the more immediate future, we hope we do justice to the appellant's case by summarising it as follows: a) one of the duties of the home state is to provide practical protection against persecution by third parties such as the GIA; b) in threatening to kill soldiers who are off duty the GIA is persecuting them; c) soldiers can be regarded as a group and they are threatened because of their membership of that group and that therefore the persecution is for a Convention reason; d) soldiers are entitled to practical protection by the home state from persecution by third parties for a Convention reason; e) the Special Adjudicator did not investigate whether the home state gave soldiers that practical protection; f) if the home state does not do so then the international community must provide that protection by granting asylum; g) therefore the case ought to be remitted to the Adjudicator to consider whether the home state gives off-duty soldiers practical protection.

15. Mr Blake relies on Article 4(1) of the 1977 Geneva Convention relating to Non International Armed Conflicts which provides:-

> All persons who do not take direct part or who have ceased to take part in hostilities ... are entitled to respect for their persons, honour and convictions and religious practices. They shall in all circumstances be treated humanely without adverse distinctions."

16. He submits that those who commit war crimes or cruel acts inconsistent with the laws of war in their treatment of non-combatants are guilty of persecution. He submits that, whereas a soldier can be expected to put up with the normal hazards of the job, he should not be expected to put up with the GIA which, he submits and we are prepared for present purposes to accept, indulges in kidnap and torture. He submits that if a soldier is exposed to such risk it is properly described as persecution and it is the duty of the home state to protect him from it.

17. There will no doubt be a spectrum of situations in which an Algerian soldier may find himself. At one end he will, under the command of his superior be pointing a gun at someone who is pointing a gun at him. At the other end a soldier might well be given periods of leave when he would return to his village to see his family and be exposed to terrorist attacks by the GIA because he was a member of the army. Mr Blake submitted that if the evidence showed, as it might on examination, that the Algerian state was unable to give the appellant practical protection against that risk on leave then he could claim that he was exposed to persecution as a member of a particular social group, namely, serving soldiers. The argument, if right, must embrace times when a soldier is going out to a cinema in the evening. This will be in the middle of the spectrum. Perhaps precisely where it is will depend on whether the

soldier is on call or not. In substance his submission was that the soldier could not seek the surrogate protection of the international community if the hostile forces remained on the battlefield but could do so if the hostile forces moved off the battlefield and engaged in terrorist attacks against in the private houses of the soldiery.

18. In our judgment the Special Adjudicator was right to conclude that the Geneva Convention does not confer the status of refugee on someone who has a well founded fear of such things happening to him whilst he is a soldier. The life of a soldier is a hazardous one. We are not persuaded that the Convention draws a distinction between, on the one hand, the position of soldiers engaged on a battlefield in combat against other soldiers observing the rules of war and, on the other hand, soldiers engaged on internal security duties against terrorists. Breaches of the rules of war are regrettably common. To allow soldiers' claims for asylum based on the failure by a State to provide practical protection to its soldiers against such an eventuality would we consider hinder the home state in providing the very protection for the generality of its citizens which the definition of refugee in the Convention assumes that the home state should provide. It would give the GIA and those like them the power, by adopting terrorist tactics, to weaken the power of the home state to provide protection for its citizens.

19. We do not accept Mr Blake's submission, for which he cited no authority, that serving soldiers in the circumstances of Algeria either do or could constitute a "particular social group" who is at risk of being "persecuted" for the purposes of the definition of refugee in the Convention. We note that the 1997 guidelines in relation to Algeria from the UNHCR, while suggesting some categories of persons who would benefit from a presumption that they should be granted asylum status, do not suggest that those in the army fall into that category.

20. We therefore dismiss this appeal.

ORDER: Appeal dismissed no order / no costs Leave to Appeal to the House of Lords refused.

(Order does not form part of the approved judgment)