IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 25 November 2004
Determination prepared: 3 December 2004
Date Determination notified:
27 January 2005

Before:

Mr Andrew Jordan (Vice President)
Mr R. Hamilton
Mr N. Kumar JP

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

For the Appellant: Mr M. Aslan, legal representative from Simmons, solicitors
For the Respondent: Mr P. Deller, Home Office Presenting Officer

1. The appellant is a citizen of Afghanistan who appeals against the determination of an Adjudicator, Ms S. Henderson, promulgated on 16 December 2003, following a hearing at Hatton Cross in which she dismissed the appellant's appeal against the decision of the Secretary of State to refuse both his asylum and human rights claims.

2. The appellant claimed to have been born on 1 September 1987. If so, he is now 17 years old and still a minor. He arrived in the United Kingdom on 2 March 2003 at which time he would have been fifteen years old. He claimed asylum on arrival. He was admitted for the purpose of examining his claim. On 20 May 2003, the Secretary of State refused his application and made a formal decision refusing him leave to enter the United Kingdom. This gave rise to a right of appeal under section 82 (1) of the Nationality, Immigration and Asylum Act 2002 which the appellant exercised, within time, on 6 June 2003.

3. In a statement that formed part of his application the appellant stated that he is of Pashtun ethnicity and a Sunni Muslim. He was born and bred in Jalalabad and remained there until he left the country on 5 March 2003. He claimed that his father was a brigadier in the army during the Najibullah government and that, after its fall, he became actively involved with the Hizb-e-Islami movement. In October 2001, the Taliban arrested the appellant's brother, whose body was returned to them some days later. They were told he was killed on the battlefield. Within a week, the appellant's other brother, , was also taken by the Taliban but escaped. The appellant did not see him again until he arrived in the United Kingdom.

4. On 1March 2003, after the fall of the Taliban regime, the appellant claimed that he and his father were arrested and accused of supporting the Taliban and Hizb-e-Islami. Although the appellant was at this time aged only 15, he claims that he was beaten whilst in detention. On 4 March 2003, the appellant stated that a guard entered his cell and assisted him to escape. After leaving the compound, he met up with an uncle who made arrangements for him to leave Jalalabad. The appellant travelled to the United Kingdom by bus and by air. On arrival he was re-united with his brothers (who has been granted 4 years exceptional leave to remain) and (who was granted one year's leave to remain). The appellant now lives with them in the United Kingdom.

5. The Adjudicator accepted that the appellant was a minor whose date of birth was probably 1 September 1987. This was not accepted by the Secretary of State because, on arrival, his date of birth had been recorded as 1 January 1978. If so, he would now be aged 26. The Adjudicator noted that the copy of the appellant's birth certificate produced by him appeared to have been altered. It was apparent that the evidence about the date of his birth was confused. Although the Adjudicator accepted the appellant's evidence as to his date of birth, ("However I am just persuaded on the basis of the documents, that the appellant is a minor as claimed…)", he also accepted that the Secretary of State genuinely formed the view that the appellant looked over 18.

6. In paragraph 22 of the determination the Adjudicator accepted that the appellant might have been detained with his father, mistreated in detention and then released by means of a bribe. He rejected the appellant's claim that his detention was for reasons of any actual, perceived or imputed political opinion. He also rejected the appellant's account of any personal involvement with Hizb-e-Islami. In paragraph 22 of the determination the Adjudicator rejected the appellant's claim that he was perceived to be an opponent by virtue of his father's involvement with the regime of Dr Najibullah. Accordingly, he rejected the claim that the appellant was at risk of persecution in Jalalabad. He dismissed the asylum claim.

7. The Adjudicator went on to consider the appellant's human rights claims under the ECHR notwithstanding the fact that she had found the appellant to be a minor. In considering the Article 3 claim the Adjudicator found that the appellant was at risk of ill-treatment at the hands of his cousin if he were to return to Jalalabad. That risk, however, did not arise on return to Kabul where the Secretary of State proposed to return him. Accordingly, she dismissed the Article 3 claim. On considering the position under Article 8, the Adjudicator decided that the appellant's brothers came to the United Kingdom before the fall of the Taliban and in circumstances that had radically altered in the intervening years. She was not satisfied they could not accompany the appellant back to Kabul if he were removed. For that reason, she found there was no interference with the appellant's right to respect for his family life. She did not then go on to consider the issue of proportionality.

8. The appellant has appealed to the Tribunal. The grounds of appeal are restricted to challenges made to the Adjudicator's treatment of the human rights issues, said to have arisen under Articles 3 and 8 of the ECHR. The Adjudicator had decided that there was no cogent evidence that his brothers could not accompany the appellant on return to Kabul. It is to be noted, of course, that when the Adjudicator considered the appeal, neither had settled status in the United Kingdom and each had only the remnant of his leave to remain. The grounds of appeal, however, asserted that the Adjudicator had failed to consider proportionality in making her assessment of whether the brothers could return with the appellant. It seems to us that in accordance with the decision of the Tribunal in **Nhundu & Chiwera (01/TH/0613)**, the Adjudicator is required to carry out a step by step approach and to consider whether family life exists and, if it does, whether the appellant's removal would result in an interference with that family life and, if it does, to consider whether that interference is proportionate when balancing the effect upon the appellant with the need to enforce effective immigration control. On this analysis, the interference with family life comes before the assessment of proportionality. The Adjudicator found that there was no bar to the appellant's brothers accompanying him on his return to Kabul. The Secretary of State had never recognised them as refugees. Their exceptional leave to remain could not be equated with such recognition. They had no settled status in the United Kingdom. The circumstances in which they had come to the United Kingdom alleging a fear of persecution at the hands of the Taliban, no longer afforded grounds for surrogate protection given the changed circumstances in Afghanistan. The Adjudicator was, therefore, entitled to make a finding that the brothers could accompany the appellant and that family life would not, therefore, suffer an interference.

9. The grounds go on to assert that the determination was perverse in that, having found that he was a minor, the Adjudicator went on to find that he was a "fit young man" and therefore able to return to Kabul. There is nothing in this ground of appeal. The reference to the appellant being a

"young man" did not mean that the Adjudicator had forgotten he was a minor or that a "young man" inevitably connotes an adult. It does not.

10. Notwithstanding the grounds of appeal, the Adjudicator's treatment of the appeal calls for comment. The appellant was found to have been born on 1 September 1987. When he arrived in United Kingdom on 2 March 2003, he was then aged 15. The Secretary of State made his decision on 2 May 2003 once again, when he was aged 15.

11. At the hearing, the Adjudicator found that the appellant was a minor and then aged 16. Nevertheless, she went on to consider whether the appellant was at risk of a violation of his human rights by reason of his return as a minor. An appellant will fail to establish a violation of his human rights if there is no imminent prospect of return. This will occur in a case where leave to remain is granted for a number of years. So much is clear from the decision of the Tribunal in **L (Ethiopia) [2003] UKIAT 00016** in which the Tribunal, chaired by Dr H.H. Storey said:

> "62…The judgment in [**Saad, Diriye and Osorio [2001] EWCA Civ 2008 [2002] INLR 34**] clearly holds that the existing appeal structure governing appeals against refusal of asylum entitles Appellants to a decision in relation to refugee status. In each case the decision facing the appellate authority is the hypothetical one of whether removal would be contrary to the Convention at the time of the hearing – i.e. on the basis of the refugee status of the Appellant at that time. Accordingly, even if there are practical obstacles in the form of a refusal by the authorities of the receiving state to re-admit an Appellant, the appeal on asylum grounds nevertheless requires substantive consideration on the hypothetical basis of whether – if returned – an Appellant would face a real risk of persecution.
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> 63. However, we cannot see that the same principle applies in respect of human rights grounds of appeal. The decision appealed against is one and the same but, in contrast the position under the Refugee Convention, success in a human rights appeal does not in itself result in any status at international law, nor indeed in domestic law. Furthermore Strasbourg jurisprudence considers that practicalities in relation to return are of central importance. If the threat of removal is not imminent then there can be no violation of the Convention: see *Vijayanathan and Pushparajah v France* (1993) 15 EHRR 62."

Where, however, the leave already granted has expired, or is about to expire, the Adjudicator will have to consider the effect of an imminent return upon the appellant.

12. The issue arises in this appeal whether the Adjudicator should have gone on to consider whether the appellant was at imminent risk of return as a minor, aged 16. When the Adjudicator considered this appeal in

November 2003, the appellant had about two years of his minority to run. It is true that the Secretary of State had not granted the appellant exceptional leave to remain until his eighteenth birthday but that was because the Secretary of State had not accepted that the appellant was a minor. Nevertheless, the Adjudicator had to consider the position as she had found the facts to be. In our judgment, she could not assume that the Secretary of State would fail to apply his own policies insofar as those policies dealt with the treatment of minors. Broadly speaking, the policy states that an unaccompanied minor will not be returned unless there are adequate reception facilities. Thus, the Adjudicator should have assumed there would be no return of an unaccompanied minor and therefore, in the context of this appeal, no imminent removal. Alternatively, if the appellant was to be returned with his brothers (or one of them), the problem of an unaccompanied minor without adequate reception facilities would not arise.

13. In our judgment, this is exactly what the Adjudicator did. She considered what prevented the appellant's brothers from accompanying him and decided there was nothing. It followed that the appellant was not at risk on return. Nor did the Adjudicator assume that the Secretary of State would breach his own policies. Had there been no family members in a position to accompany him, the Adjudicator could and should have assumed there would be no return unless other reception facilities were in place. The Secretary of State could not be expected at this stage to adduce evidence of reception facilities in the (hypothetical) event of an unaccompanied return of a minor.

14. We do not consider the position is any different because the Secretary of State did not accept that the appellant was 16. He was not obliged to do so. Indeed, it is apparent from the determination that the Adjudicator found the Secretary of State reasonably believed the appellant to be an adult. In the course of the hearing before the Tribunal, Mr Deller, who appeared on behalf of the Secretary of State, did not concede that the appellant was a minor or that the Secretary of State was bound by the Adjudicator's decision on that issue. The Secretary of State cannot be bound by an Adjudicator's decision as to the appellant's age in an appeal the appellant has lost because the Secretary of State, as the "successful" party, has no right of appeal on a finding with which he disagrees. Nor, if that appellant appeals, is the Secretary of State obliged to put in a respondent's notice if he does not accept a finding of the Adjudicator on any issue, such as a dispute as to the appellant's age. Nevertheless, Mr Deller accepted that the Secretary of State was obliged to pay due regard to the Adjudicator's reasoning. It seems to us that the Secretary of State was at least obliged to take into account the Adjudicator's determination as a material factor when reaching his own decision as to how to proceed following the determination. A failure to do so might lead to the decision being reviewed by the Administrative Court.

15. Thus, where there is no Presenting Officer before the Adjudicator or where (as in the present case) the Presenting Officer does not feel able to concede at the hearing that the appellant is a minor, the Adjudicator should not assume that the Secretary of State will disregard the Adjudicator's assessment of age and return the appellant to the country of his nationality in breach of his policy. We accept that the Secretary of State has the power to do so but, if he makes the attempt, the appellant is not without a remedy. If the appellant establishes that he is a minor, (and in this task he will be supported by the Adjudicator's findings and his underlying reasons), he will be able to challenge a decision by the Secretary of State to return him in breach of the Secretary of State's own policies. That challenge is before the Administrative Court and not the Adjudicator, but the existence of that right of challenge is sufficient to satisfy us that the appellant is not at risk of a violation of his human rights merely because the Secretary of State does not accept the appellant is a minor or is unable or unwilling to give an undertaking not to return the appellant before his eighteenth birthday.

16. In dismissing the appeal, the Adjudicator should make clear the basis on which he is doing so. He is, of course, obliged to do this pursuant to his duty to give adequate reasons. It will thus become clear that he is dismissing the human rights claim because there is no imminent risk of return or no risk of return in breach of the Secretary of State's policy on the return of minors. If there is no risk of imminent return, there will be no need to consider the potential risk to private or family life of a return at a future date. Such an exercise would be speculative.

17. For the reasons we have given, the appellant's appeal is dismissed.

ANDREW JORDAN
VICE PRESIDENT
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