

Court of Appeal

Secretary of State's appeals

A (Iraq) v SSHD [2005] EWCA Civ 1438, 1.12.05

A (Iraq) has the appearance of diluting the principles in *R v SSHD ex p Robinson* and *Miftari v SSHD* that asylum seekers were able to rely on obvious points on appeal to the former IAT not raised in grounds of appeal, whereas the SSHD could not. An Adjudicator had allowed Refugee and ECHR appeals on the basis that the Appellant had abused detainees' human rights in Iraq, and would get his comeuppance on return. No issues of exclusion under Article 1F were raised before the SA. The SSHD appealed to the IAT on the basis, *inter alia*, that there was an obvious 1F exclusion issue. The IAT dismissed the SSHD's appeal on the grounds that the evidence was that the Appellant had been forced to participate in such activities. The CA, hearing the SSHD's further appeal, held that the evidence was not of forced, but willing participation, and that the SA had erred in failing to apply Article 1F. The Court's reasoning at paragraph 28: "...if the facts found by the Adjudicator lead in law to the opposite conclusion to that found by the Adjudicator, it is the duty of the appellate authorities to correct it" may appear to allow any issue to be raised by the SSHD on appeal/reconsideration even if not raised in their grounds. However, it should be noted that this was not a Robinson scenario; the SSHD, as appellant, had clearly raised the Article 1F issue in its grounds of appeal, and the CA found at paragraph 27 that it was not deciding whether the Robinson principle (or any variant of it) can be invoked by the SSHD.

GH v SSHD [2005] EWCA Civ 1603, 21.12.05

An Adjudicator had allowed a human rights appeal of an Afghan Tajik on the grounds that the evidence available (dating from around April 2003) of the 'grim' humanitarian situation in or around Khabul was such that it would be in breach of the Appellant's rights under Article 3 ECHR to return him, his wife and five children, some of whom were very young, to live in a refugee camp, with no prospects of work and no wider family to support them. The SSHD appealed to the former IAT, arguing that the SA had failed to explain how a return to 'grim' circumstances amounts to a breach of ECHR Article 3. The IAT had allowed the Secretary of State's appeal.

The CA held that the SA had set out his reasons adequately, and that neither the purported error of law relied on by the IAT in overturning the Adjudicator's determination or the argument advanced before the CA by the SSHD were contained within the SSHD's grounds of appeal to the IAT; there was therefore no jurisdiction for the IAT to have entertained the appeal.

The practice in *Robinson*, of granting permission to appeal where an obvious point of Refugee Convention law favourable to the asylum seeker appears in the determination, even if the point is not taken by the Appellant, has very limited application to the Secretary of State, and has no application for the SSHD in ECHR cases; unlike the Refugee Convention, it is not contrary to the ECHR for a member state to grant protection under the ECHR where none is deserved. Any modest extension of the *Robinson* principle in *A(Iraq)* was due to the positive obligation under on the Refugee Convention not to accord asylum to a person whom the Convention expressly excludes under Article 1F.

Most helpfully, the CA stated (obiter) that it was by no means satisfied that the SSHD would have succeeded, even if the IAT did have jurisdiction to hear the appeal; noting that this was not a medical case, and it was not necessary (as in *N v SSHD*) for the SA to compare conditions in the UK and abroad; he merely had to look at conditions abroad and consider their probable impact on this particular family. This passage in particular may be helpful in Article 3 cases based on

humanitarian conditions; for instance, in the internal relocation point in Khartoum in Sudanese cases. The continued application of *Robinson* could be used to raise new points when renewing an application for an order for reconsideration to the High Court, or in a reconsideration hearing, if not raised before, notwithstanding rules 31(4) and 62(7) of the AIT Procedure Rules 2005.

Country Guidance

BA (military service - no risk) Sudan CG [2006] UKAIT 0006

Whilst the AIT found that the evidence of prison conditions in Sudan discloses that there is a consistent pattern of gross, frequent and mass abuses of the human rights of detainees, Appellant's Counsel was forced to admit that current evidence established that the Sudanese authorities do not impose imprisonment for draft evaders, and that instead they impose a requirement to perform military service under supervision. The AIT held that there since the end of the north-south civil war in January 2005, there was no longer a real risk of conscripts being required to fight in the south, and whilst the ongoing conflict in Darfur has been characterised by serious violations of international humanitarian law amounting to crimes under international law, it was not reasonably likely, on the available evidence, that conscripts would be required to fight there. The decision is therefore contrary to the earlier reported case of AM (Sudan Draft Evader) Sudan [2004] UKIAT 00335, which the Tribunal stated was now out of date, and provided no evidential basis for its conclusions, but the AIT seemed willing to revisit this issue if further evidence arose. A political element to the Appellant's claim had been disbelieved. It has therefore become even more important to ensure that evidence of distinguishing factors in Sudanese cases is properly set out.

Race Discrimination

CS (Race discrimination, proper approach, effect) Jamaica [2006] UKAIT 00004

An Adjudicator found that an ECO had, contrary to s.19B Race Relations Act 1976, unlawfully racially discriminated against an applicant for entry clearance as a spouse by using a negative stereotypical belief that 'marriage is not always the norm amongst Jamaican males'. However, the SA dismissed the appeal, as in her assessment, the Appellant failed the maintenance test. On reconsideration, the AIT gave useful guidance on the process of determining racial discrimination, but saw no error of law in the SA dismissing the appeal, if she was not satisfied that the immigration rules were not satisfied, finding: "It will be a matter for the judge to decide, in so far as the race discrimination finding casts doubt on the ultimate decision of the Entry Clearance Officer, as to whether that decision remains in accordance with the law." It is unclear whether the issue of maintenance was put in issue by the ECO's decision. If not, it is arguable that an IJ raising a new issue of their own motion is contrary to IO ("Points in Issue") Nigeria [2004]UKIAT00179, unless a proper opportunity (ie an adjournment) is given to an Appellant to deal with such issues.

Zimbabwe

Following the recent grant of permission to appeal to the CA to the SSHD in AA, the AIT appears to have decided to determine first instance Zimbabwean appeals on their merits, rather than determining them summarily on the basis of AA and the subsequent case of LK. However, even where a full hearing proceeds, advocates should still forcefully argue in the alternative to the merits of individual cases that any involuntary returnee remains at risk on the basis of AA and LK until such a time as either is overturned on appeal.