

Immigration Team Legal Bulletin

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Expert evidence – Syria

(1) IA (Syria) (2) SA (Syria) v SSHD (13/11/07) (CA Civ Div) [2007] All ER (D) 211 (Nov)

The Court of Appeal this week held that the Asylum and Immigration Tribunal had erred in law in its evaluation of expert evidence from Amnesty International, Ms Sheri Laizer and Dr Alan George, all of whom had provided detailed evidence of a real risk of persecution to stateless Kurds from Syria.

SSHD explicitly accepted the honesty, impartiality and expertise of Ms Laizer and Dr George and of Amnesty International.

The evidence given from those sources was that there was a real risk of torture in Syria for stateless Kurds who (1) had effected an illegal exit from Syria, (2) had failed in their asylum claims here, (3) required documentation from the Syrian Embassy for return to be practicable and (4) [in the case of IA only] had participated in anti-regime demonstrations in front of the Embassy in London and would therefore have been filmed and photographed by the authorities.

The Tribunal had rejected such evidence because it was contrary to its own conclusions in SY (Kurd, no political profile) Syria CG [2005] UKIAT 00039 and AR (Kurd: not risk per se) Syria CG [2006] UKAIT 00048 the latest country guidance cases.

The Court held that the experts' evidence could cast doubt on the conclusions of the CG cases and therefore required consideration but had here been rejected by the Tribunal for reasons which were unsustainable in law. The Tribunal was obliged in law, but had failed, to engage with the substance of the expert reports (outlined above).

Amnesty International was a body of high repute. Criticism by the Tribunal that its evidence was unsourced was unsatisfactory since AI would not be able to reveal its sources of information in detail.

See also report on Lawtel (LTL 13/11/2007 AC9601165)

[Nick Stanage](#) represented IA (instructed by Newcastle Law Centre) and [Melanie Plimmer](#) represented SA (instructed by Jackson & Canter).

Different appellants with closely related factual circumstances

AA (Somalia) v Secretary of State for the Home Department : AH (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 1040; [2007] All ER (D) 395 (Oct) [judgment](#)

The Court of Appeal reaffirmed the decision in Ocampo ([2006] EWCA 1276) that the 'Devaseelan principles' ([2002] UKIAT 702, [2003] Imm.

A.R.1) applied not only where a second appeal is brought by the same appellant, but also where an appeal is brought by another party and there is a material overlap of evidence with the first appeal. The decision may therefore be useful in cases where appellants seek to rely on, for instance, positive findings of fact made in other family members' appeals. There is also some commentary (see further below) as to the effect of earlier determinations which were adverse to the family member.

The SSHD had argued that there was no legal principle under which the findings of the tribunal in X's appeal could have any binding effect in Y's appeal, and that if two tribunals on the same material reached different, but rational decisions, so be it (6).

Carnwath LJ did not see how the court could, following Ocampo, accept that submission (65). The reasoning of Auld LJ in Ocampo at para 25 was in Carnwath LJ's opinion consistent with the well established principle of administrative law that persons should be uniformly treated unless there is some valid reason to treat them differently, and he also approved (66) the four reasons originally argued by the SSHD in Devaseelan itself as to why settled facts should not be relitigated ((i) fairness; (ii) consistency and finality in litigation; (iii) findings of fact should stand unless there is a good reason to displace them; and (iv) good administration). Now that the jump to apply the Devaseelan principles to appeals involving other parties had been made, his Lordship saw no reason to question it, or to regret it (66).

Carnwath LJ also noted (67) that in AS and AA (Effect of previous linked determination) Somalia [2006] UKAIT 00052, Deputy President Mr. Ockelton appeared to have second thoughts about the width of the application of the Devaseelan principles compared with his own opinion expressed in TK Georgia [2004] UKIAT 00149. However, Carnwath LJ pointed out that AA had been decided before Ocampo, and Mrs. Gleeson's guidance in SK Serbia & Montenegro [2004] UKIAT 00282, that the Devaseelan principles applied only where the same appellant brings a second appeal, was incorrect (71).

Carnwath LJ and Ward LJ's approval of Ocampo and TK arguably has the result that unless 'some very good reason' is advanced to the contrary, for example, 'compelling new evidence to show that X's evidence was mistakenly appraised by the original Adjudicator', a future Adjudicator is entitled to treat the determination in X's case as determinative as to X's account (see para 19 TK). Carnwath LJ also referred to 'significant' new evidence justifying a departure from the first determination (62).

Two qualifications to Ocampo were necessary, however, in Carnwath LJ and Ward LJ's view; for there to be a 'material overlap of evidence', the two applications must have arisen out of 'the same factual matrix', such as the same relationship or the same event or series of events (69, 76).

Further, and importantly, a valid distinction may be made (70, 78) depending on whether the previous determination was in favour of or

against the SSHD. The effect of paragraphs 70 and 78 of the CA's judgment appears to be that a second Tribunal should be more readily persuaded that the Deveseelan principles do not apply, and be more readily persuaded that there is a 'good reason' to revisit the earlier decision, where the first appeal was decided against the first appellant, ie in favour of the SSHD. This is in fact contrary to the view expressed by Mr. Ockelton at paragraph 69 of AS and AA.

In his minority judgment, Hooper LJ was of the view that in cases where the parties are different, the second tribunal should merely 'have regard to' the factual conclusions of the first tribunal, but must evaluate the evidence and submissions as it would in any other case. If, having considered the factual conclusions of the first tribunal, the second tribunal rationally reaches different factual conclusions, then it is those conclusions which it must apply and not those of the first tribunal. In Hooper LJ's view *Ocampo* and *LD* did not stand in the way of this simple approach.

On the facts, AA's appeal was dismissed, but AH's allowed, on the basis that IJ Aitken, hearing and allowing AH's appeal, had not in fact treat himself 'bound' as such by the determination in an earlier associated appeal of HRM, in which AH had given evidence, but rather, Mr. Aitken had faithfully applied the guidance in TK to the facts of the case (71). The subsequent reconsideration of Mr. Aitken's determination, and dismissal of AH's appeal by the Tribunal, should not have occurred, as there was no material error in law in Aitken's determination, which was reinstated.

Rick Scannell and [Rory O'Ryan](#) represented AH (instructed by Luqmani, Thompson and Partners)

AH (Sudan) - House of Lords

Secretary of State for the Home Department v. AH (Sudan) & Ors [2007] UKHL 49 [judgment](#)

Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood

On appeal from the CA (AH (Sudan) & Ors v SSHD [2007] EWCA Civ 297).

In three considered judgments, and two concurring judgments, their Lordships unanimously held that the AIT in HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 had not erred in law in dismissing asylum appeals from a number of Darfuri Sudanese on the basis that it was not unduly harsh to expect them to relocate within Sudan, and the House held that the CA had therefore not been entitled to interfere with the AIT's decision.

Lord Bingham, with whose opinion all the other judges agreed, thought (para 5) that it was not easy to see how the test to be applied when assessing the availability of internal flight under the Refugee Convention could be more simply or clearly expressed than as he himself had done (!) at paragraph 21 of his judgment in *Januzi v. SSHD & Ors* [2006] UKHL 5, in which he held:

"The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of

origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so . . . There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department*, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. . . . All must depend on a fair assessment of the relevant facts."

His Lordship further held in the present judgment:

"It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it."

The CA had held that the AIT had erred in wrongly equating the test of unreasonableness for IFA with Article 3 mistreatment, in particular at paragraph 150 of the AIT's determination, and further, that the AIT had wrongly required a comparison to be made between conditions in the country as a whole and those prevailing in the place of intended alternative relocation and not, as envisaged by *Januzi* and other authority, between conditions in the place of habitual residence and those in the safe haven.

Lord Bingham held that the CA's criticism of the AIT was not without substance, and it would have been plainly wrong to equate unreasonableness with Article 3 mistreatment (para 9) but ultimately held that the AIT had not made the error contended by the CA (para 11).

The AIT had advocated a comparison of conditions in an applicant's home country as a whole with those in the place of intended alternative relocation, whereas the CA had held that the starting point must be between conditions in the place of habitual residence prior to the persecution. The House held that *Januzi* contemplated both these comparisons, but that neither basis was to be preferred, nor was the starting point. Both were relevant, and the weight to be given to each was a matter to be judged by the decision-maker in the context of a claim for asylum by a particular applicant in a particular case (para 13). Had the AIT excluded from consideration the conditions in which the asylum seekers originated, it would have been wrong to do so, but the House did not think that the AIT had in fact made such an error (para 14).

Lord Bingham concluded (15) that the CA was not entitled to interfere with the AIT's conclusion on the evidence before it that internal flight was not unreasonable for these Appellants, the AIT not having erred in law as to the test to be applied.

Baroness Hale of Richmond suggested that there was no difference between the approach to internal flight set out at paragraph 21 of *Januzi*, and the approach recommended by UNCHR, which was:

" . . . the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual's case holistically and with specific reference to the individual's personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship."

Baroness Hale then expresses such serious concerns (paragraphs 22-29) as to whether the AIT had wrongly equated undue hardship with Article 3 mistreatment, and had appeared, incorrectly, to require the Darfuri Appellants to demonstrate that the conditions they may face in IDP camps to be worse than the conditions of 'the poorest of the poor' in Sudan (para 28), that it is difficult to understand how she was ultimately 'unable to believe' (para 30) that the eminent Tribunal had erred in law, and how she was thus able to concur with the judgments of the other Lords.

Baroness Hale was of the view, however, (obiter) that the AIT's finding that there was no real risk of persecution or Article 3 ill treatment for people in general, or non-Arab Darfuris in particular, if returned to Khartoum, may well be controversial, and there may now be further evidence which requires the issue to be reconsidered. This useful snippet leaves the door open to challenges to the HGMO CG case on the basis of updated evidence.

Lord Brown of Eaton-under-Heywood controversially suggested (para 32) that persons who are at risk of persecution but who managed to escape to a country of refuge are in some sense 'the lucky ones', who have managed to escape conditions of generalised poverty and ill-health.

His Lordship helpfully set out a concession made by The Secretary of State in argument before the House that it could, in principle be unduly harsh to require an asylum seeker to relocate in his or her home country if, for example, that would involve the sort of devastating consequences to health that were expected to follow the HIV sufferer N's return to Uganda (para 41). However, his Lordship provided somewhat mixed guidance, in this writer's view, as to the circumstances amounting to undue hardship, on the one hand reiterating the comments at paragraph 47 of *Januzi*:

"The question . . . is whether it would be unduly harsh to expect a claimant who is being persecuted for a Convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad. The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, . . . it will not be unreasonable to expect him to move there."

whilst also stating (para 42) that if there is a significant minority living at subsistence level suffering equivalent hardship to that likely to be

suffered by a claimant on relocation and if the claimant is as well able to bear it as most, it may well be appropriate to refuse him international protection. He concluded that for these respondents, persecution is no longer a risk, and given that they can now safely be returned home, only proof that their lives on return would be 'quite simply intolerable' compared even to the problems and deprivations of so many of their fellow countrymen would entitle them to refugee status. Compassion alone cannot justify the grant of asylum.

This apparent requirement of 'simply intolerable conditions' appears more stringent than the corollary of paragraph 47 of *Januzi*, i.e. an inability to lead a relatively normal life.

Lord Hoffmann agreed with Lord Bingham's judgment, and Lord Hope of Craighead agreed with Lord Bingham and Lord Brown of Eaton-under-Heywood's judgment, and also with certain observations of Baroness Hale regarding the caution with which the ordinary courts should approach the decision of an expert tribunal.

Lord Brown's reference to simply intolerable conditions is therefore a minority opinion, expressed or agreed with by only two of the five judges.

Conclusion: Whilst the House found no error of law in HGMO, there is arguably insufficient emphasis within HGMO that the personal characteristics of the Appellant are 'very relevant' considerations in the assessment of IFA, and that a comparison between the conditions in the place of habitual residence and place of internal relocation is also a relevant (albeit not determinative) factor (para 5). HGMO does not therefore permit a blanket finding that IFA is reasonable for all

returnees, and such suggestion should be forcefully resisted. [Plead the specifics of the Appellant's case.](#)

Commentary on AH (Sudan) by Rory O'Ryan

Forthcoming events

7th December 2007 - WASP (Women Asylum Seekers from Pakistan) Project National Conference – Manchester

The WASP project is a groundbreaking study conducted by South Manchester Law Centre and Manchester Metropolitan University focusing on the experience of Women Asylum Seekers from Pakistan who seek refugee protection in the UK as a result of fleeing domestic violence in Pakistan. Keynote speakers include [Melanie Plimmer](#).
> [click here for more details and booking form](#)

4th December 2007 - HJT Judicial Review Conference - London

Challenges to decisions of the immigration authorities by judicial review. Speakers include [Melanie Plimmer](#).
> [click here to go to HJT Training website for more details](#)