EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Carloway
Lord Hardie

[2009] CSIH 53
XA5/08

OPINION OF THE COURT

delivered by LORD HARDIE

in the Application for Leave to Appeal under Section 103B of the Nationality Immigration and Asylum Act 2002

by

DKN

Applicant;

against

a decision of the Asylum and Immigration Tribunal dated 12 November 2007 refusing leave to appeal against a decision of a Senior Immigration Judge dated 22 August 2007

_____

Act: Forrest; Drummond Miller
Alt: Lindsay; Solicitor to the Advocate General

18 June 2009

Introduction

[1] In terms of section 103B of the Nationality Immigration and Asylum Act 2002 the applicant seeks leave to appeal against a decision of the Asylum and Immigration Tribunal ("AIT") dated 12 November 2007 refusing leave to appeal to the Court of

Session against a decision of a Senior Immigration Judge ("SIJ") dated 22 August 2007.

[2] The applicant, a citizen of Afghanistan, entered the United Kingdom illegally on 21 July 2006 and applied for asylum three days later on the grounds that he came from Nangarhar Province and had been involved since his childhood with Herzb-e-Islami Gulbuddin ("HIG"), a Mujahideen group founded by Gulbuddin Hekmatyar (otherwise Hikmatyar), which has close links to Osama bin Laden. It is a proscribed terrorist organization in the United Kingdom.

[3] The appellant was involved in military action on behalf of HIG and took over as commander when his father, who had been a close associate of Hikmatyar, was killed. The appellant had then used money belonging to HIG to fund his departure from Afghanistan. He claimed asylum on the basis that if he were to be returned to Afghanistan he would be at risk of persecution not only from the Afghan authorities because of his previous involvement with HIG but also from members of HIG itself because of his desertion and taking HIG's money as well as the many enemies of HIG, his father and himself.

[4] On 3 October 2006 the Secretary of State for the Home Department ("the respondent") rejected the applicant's asylum application and on 7 October notified the appellant of the respondent's decision to give directions for his removal from the United Kingdom as an illegal immigrant. The appellant appealed to an Immigration Judge ("IJ") and the appeal was heard on 17 November 2006. By decision received by the applicant on 4 January 2007 the IJ refused the applicant's appeal.

[5] The applicant applied for, and was granted, an order for reconsideration but reconsideration was to be restricted to one issue only, namely whether the IJ was entitled to conclude that the activities that the appellant had either committed

personally, or with which he was closely involved, were crimes of a non-political nature such as to engage Article 1F of the Convention relating to the Status of Refugees ("the Geneva Convention").

[6] By decision dated 22 August 2007 and notified to the applicant on 4 September 2007, following reconsideration of the appellant's appeal the SIJ dismissed it. The applicant sought leave to appeal to the Court of Session and by decision dated 12 November 2007 the SIJ refused that application, resulting in the present application.

The Geneva Convention

[7] The Geneva Convention relating to the Status of Refugees was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General assembly Resolution 429(v) of 14 December 1950 and entered into force on 22 April 1954. Article 1 of the Convention defines the extent of its application. In particular Article 1F is in the following terms:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that
>
> (a) ....
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

Section 54 of the Immigration Asylum and Nationality Act 2006 assists with the construction and application of Article 1F(c) and is in the following terms:

"54(1) In the construction and application of Article 1F(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular-

(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and

(b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

(2) In this section-

...

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000...."

Section 1 of the Terrorism Act 2000 provides *inter alia*:

"1(1). In this Act "terrorism" means the use or threat of action where-

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

2. Action falls within this subsection if it-

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the act,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) ...."

The decision of the Immigration Judge

[8] The decision of the IJ summarised the applicant's evidence to the effect that his father, who was a commander in HIG, was close to Hekmatyar and had been with him in all his campaigns. When his father was killed the applicant was injured and thereafter was persuaded to take his father's place as a commander. He fought in that capacity for two and a half months and in that role was responsible for making plans, sending out instructions or telling people to go and secure machine guns or pick up supplies. Sometimes they were attacked and sometimes they would attack. He had seen many people being killed in this way. He was aware of a BBC World service journalist who had been dragged from his truck and killed on the orders of Hekmatyar, despite the fact that he had been allowed to interview him. The reason for the killing was that Hekmatyar was unhappy about the reporting of a territorial victory of the Northern Alliance the day before. In cross examination the applicant confirmed that he had been active with HIG until he left Afghanistan. The IJ also had background evidence, a Country Information Report ("COIR") and internet documents.

[9] In considering the applicant's claim for protection under the Geneva Convention the IJ made the following factual findings:

> "21. In this case, the appellant has admitted his membership in HIG. He has clarified that, whilst in Afghanistan he supported Gulbuddin Hekmatyar and the aims and objectives of HIG. According to an internet article from BBC news, HIG is a Mujahideen fundamentalist faction. From a list of proscribed terrorist groups issued by our own Home Office, I note that HIG is one of them. From the Country Information Report I note that the entry for Hekmatyar Gulbuddin describes how the fighting between him and the Kabul

administration between 1992 and 1996 is said to have resulted in the death of more than 25,000 civilians. He has also been designated a terrorist by the US State Department for his participation in and support for terrorist acts committed by Al Qaeda and the Taliban.

22. This appellant admitted his participation in the actions of HIG in the company of his father and, following his father's death as a Commander in his own right....

Having acted as a Commander, he has determined his own responsibility and his liability for the acts in which he participated. His adoption of a command appointment has affirmed his complicity in and support of the HIG....

23. From the appellant's involvement with HIG, I find that I am satisfied that there are serious reasons for considering that the appellant committed a serious non-political crime outside the United Kingdom, prior to his admission. I also find that I am satisfied that there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations. It is clear to me that the appellant's participation in the acts of HIG is contrary to those purposes and principles. It follows that the appellant is excluded from the protection of the Refugee Convention by dint of Article 1F (b) and (c)."

Having rejected the applicant's claim for protection under the Geneva Convention the IJ then considered whether the applicant was otherwise protected from removal under the European Convention of Human Rights ("ECHR"). The IJ noted the improving situation in Kabul concerning the promotion and protection of human rights and concluded that there was a sufficiency of protection in the city in view of the presence in Kabul of the international security force. He also found as a fact that HIG is no

longer the integrated force that it once may have been and that the applicant would have protection available to him in Kabul. The IJ was not satisfied that the applicant would face any treatment contrary to Article 3 of ECHR. Nor was he satisfied that the applicant was unable to seek safety in Kabul, where sufficiency of protection was likely to be available to him.

The application for reconsideration

[10] In his application for reconsideration of the IJ's decision the applicant submitted that the IJ had erred in law in finding that the applicant was excluded from international protection by reason of the provisions of Article 1F (b) of the Geneva Convention. As a separate ground of challenge to the IJ's decision the applicant submitted that the IJ had erred in law in finding that the applicant was excluded from international protection by reason of the provisions of Article 1F (c) of the Geneva Convention "because there was no or insufficient evidence that the applicant participated in the acts of the HIG".

[11] By decision dated 22 January 2007 Senior Immigration Judge Lane ordered reconsideration for the following reasons:

> "1. The only matter in respect of which I consider the Immigration Judge may have erred in law in (*sic*) his finding that the activities of the appellant amounted to a non-political crime. On the face of it, those activities may well have a political character.
>
> 2. There is a real possibility that the Tribunal would decide the appeal differently on reconsideration.
>
> 3. Reconsideration is ordered on the above grounds."

The decision of the Senior Immigration Judge

[12] As a result of the order for reconsideration the SIJ (Senior Immigration Judge Waumsley) heard submissions on behalf of the applicant and the respondent and concluded that the IJ had made no material error of law on the basis that the IJ had "concluded that the appellant would be able to relocate safely to Kabul". His previous involvement with HIG would not prevent the applicant from doing so, provided he renounced support for Hekmatyar. The IJ had noted that a number of HIG members had done so previously and there was no reason why the applicant could not do likewise. He could then look to the Afghan authorities in Kabul for a sufficiency of protection against any other risk which might be posed to him there. The SIJ considered that the IJ's conclusions were open to him on the available evidence and the SIJ determined that in light of the IJ's "sustainable finding that the appellant would be able to relocate in safety to Kabul, the issue remitted to him for determination was irrelevant and did not require determination."

Submissions on behalf of the applicant

[13] In support of his appeal against the decision of the SIJ dated 22 August 2007 counsel for the applicant advanced two grounds. The first ground was that the SIJ had misunderstood the nature and effect of the finding by the IJ that was being challenged, namely whether the IJ was correct in concluding that the applicant was excluded from the protection of the Geneva Convention because his activities were not political. The issue of exclusion was a preliminary issue and in that regard questions of relocation and sufficiency of protection were incompetent, unnecessary and irrelevant. Moreover the SIJ had erred in concluding that the IJ's findings about adequacy of protection of the applicant's ECHR rights in Kabul equated to a finding that the applicant could relocate to Kabul. The IJ had not addressed the question in terms of internal

relocation. Counsel also submitted that if the SIJ was correct in his approach the decisions of the judge presiding at the case management hearing, the IJ and the senior immigration judge who ordered the reconsideration of the IJ's decision would all have been different. The second ground of appeal was that the SIJ failed to deal adequately with the issue remitted to him for reconsideration, namely whether the applicant's activities had been non-political crimes excluding the applicant from the protection of the Geneva Convention. In all the circumstances he invited us to grant leave to appeal and thereafter to allow the appeal to remit the case to the AIT in terms of section 103B(4)(c) of the Act.

Submissions on behalf of the respondent

[14] Counsel for the respondent relied upon the test adopted by the court in *Hoseini* v *Secretary of State for the Home Department* 2005 SLT 550 ("*Hoseini*"). In that case the court considered that it should apply the same considerations as the AIT faced with a similar question of whether to grant leave to appeal. We should only grant leave to appeal if we are satisfied that the appeal would have a real prospect of success or if there is some other compelling reason why the appeal should be heard. When that test was applied in the present case the application must fail. Counsel accepted that the SIJ had erred by applying the IJ's conclusions about the applicant's ability to seek safety in Kabul in the context of Article 3 of ECHR to Article 1F (b) of the Geneva Convention. Moreover even if the SIJ erred in failing to address the issue remitted to him, he would have reached the same decision on the merits of the appeal as the IJ because Article 1F (c) of the Geneva Convention applied whether Article 1F (b) was applicable or not.

Discussion

[15] In determining applications for leave to appeal against decisions of the AIT we consider it important to bear in mind the comments of Baroness Hale and Lord Hope of Craighead in *AH(Sudan)* v *Secretary of State for the Home Department* 2008 A.C. 678 and Lord Hope of Craighead in *RB(Algeria)* v *Secretary of State for the Home Department* 2009 2WLR 512 that we should not analyse the decision of an expert tribunal in an unduly critical way and that we should approach the appeal with an appropriate degree of caution. Of course, we should grant leave to appeal if we are satisfied that there is something of the nature of probable cause in relation to a genuine point of law which is of some practical consequence. In applications for leave to appeal the test to be applied by us is whether we are satisfied that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard (*Hoseini* v *Secretary of State for the Home Department* 2005 SLT 550). In the present case the sole issue is whether the appeal has a real prospect of success because there is no basis for concluding that there is any other compelling reason why the appeal should be heard.

[16] We have reached the conclusion that the SIJ erred in three respects. First we agree with counsel for the applicant that the SIJ failed to determine the sole issue remitted to him for reconsideration, namely whether the activities of the applicant as a member of and latterly as a commander in HIG were political or amounted to a serious non-political crime, resulting in his exclusion from the protection of the Geneva Convention. Even if the SIJ considered that Senior Immigration Judge Lane erred in ordering reconsideration, we consider that it was incumbent upon him to adjudicate upon the issue remitted to him. Representatives of the applicant and the respondent appeared before him and addressed him on that issue and they had a

reasonable expectation that he would determine it. Otherwise the appearance before him resulted in a waste of effort and resources. His determination of that issue would not have precluded him from refusing the appeal, even if he concluded that the applicant's activities had a political character. By adopting the approach that he did, the SIJ not only failed to decide the issue remitted to him and upon which he heard submissions but also provided the applicant with a basis for applying to this court and for delaying any attempts by the respondent to remove him from the United Kingdom. The second respect in which the SIJ erred is that he appears to have misunderstood the extent of the remit for his consideration. At paragraph 7 of his decision he properly identifies the sole issue remitted to him. However at paragraph 17 he refers to there being a sole issue for reconsideration and thereafter conjoins the issues specified in Article 1F (b) and (c) whereas the sole issue remitted to him was the exclusion by virtue of sub-paragraph (b). Having done so, he then failed to address either issue. The third respect in which the SIJ erred, as conceded by counsel for the respondent, was in applying to the case based upon Article 1F (b) of the Geneva Convention the IJ's conclusions about the applicant's ability to seek safety in Kabul in the context of Article 3 of ECHR. The exclusion clauses in Article 1F are concerned with the activities of an individual and in particular whether these activities can properly be described as "a crime against peace, a war crime or a crime against humanity" (Article 1F(a)), " a serious non-political crime" committed outside the United Kingdom (Article 1F(b)) or "acts contrary to the purposes and principles of the United Nations" (Article 1F(c)). Issues such as humanitarian protection and relocation are irrelevant when determining whether a claimant for asylum is excluded from the protection afforded by the Geneva Convention by reason of Article 1F. If an immigration judge requires to consider the applicability of Article 1F, he must also address questions of

humanitarian protection and protection under ECHR, as the IJ did in the present case. Issues of relocation and the availability of protection are, of course, relevant in determining these additional questions.

[17] Although we have concluded that the SIJ erred in law, the applicant can only succeed if we consider that an appeal would have a real prospect of success. There are a number of factors that appear to us to be relevant in seeking to determine that issue. The first is that the only matter upon which SIJ Lane ordered reconsideration of the IJ's decision was that the IJ "may have erred in law in finding that the activities of the appellant amounted to non-political crime" as they may well have had a political character. As a result of that possible error SIJ Lane considered that there was a real possibility that the Tribunal would decide the appeal differently on reconsideration. We note that the application for reconsideration contained two additional grounds but SIJ Lane did not order reconsideration in respect of either of them. The first of these also related to Article 1F (b) of the Geneva Convention and alleged an error of law by the IJ in failing to follow the guidelines in *Gurung* v *Secretary of State for the Home Department* [2002] UKIAT 04870. More significantly the second of the additional grounds was in the following terms:

> "...the judge erred in law in finding that the applicant is excluded from international protection by reason of the provisions of Article 1F(c)...because there was no or insufficient evidence that the applicant participated in the acts of the HIG....."

We recognize that the SIJ who reconsidered the case could have entertained either of these additional grounds if he considered that it properly fell "within the category of an obvious or manifest point of Convention jurisprudence, as described in *Robinson's* case [1998] QB 929" (*DK (Serbia)* v *Secretary of State for the Home Department*

[2008] 1 WLR 1246: Latham LJ at paragraph 21). However the applicant had admitted participation in the actions of the HIG in the company of his father and, following the death of his father, as a commander. In that latter capacity he had issued instructions to people to obtain guns and had attacked and been attacked. In light of the applicant's own evidence it is not difficult to understand the basis upon which the second additional ground for reconsideration was rejected by SIJ Lane. For the same reason in August 2007 the SIJ clearly did not consider that it raised an "obvious or manifest point of Convention Jurisprudence".

[18] The second factor, related to the first, is that the IJ concluded that the applicant was guilty of acts contrary to the purposes and principles of the United Nations by his participation in the acts of HIG and was therefore excluded from the protection of the Geneva Convention by reason of Article 1F (c). It is appropriate to apply the provisions of Article 1F restrictively but it is also relevant to consider the extent to which the applicant has violated the human rights of others (*Gurung*). The applicant has not disputed that the acts of the HIG were acts contrary to the purposes and principles of the United Nations but maintained that there was insufficient evidence of his participation in these acts. Even if the applicant had disputed that the acts of HIG properly fell to be regarded as being in contravention of Article 1F(c), there was ample evidence before the IJ to entitle him to reach such a conclusion. The International Security Assistance Force ("ISAF") is a NATO-led security and development mission in Afghanistan established by the United Nations Security Council ("UNSC") on 20 December 2001. Thereafter there have been subsequent resolutions of UNSC maintaining the presence of ISAF in Afghanistan. In the letter of refusal of asylum dated 3 October 2006 upon which the respondent relied before the IJ there is reference to the applicant's answers at his screening interview from which it

appears that his father was killed and he was injured at a time when the Americans (as part of ISAF) were engaged in overthrowing the Taliban. Moreover the SIJ observes in his decision that "the objective evidence showed quite clearly that HIG has been involved in serious human rights abuses" (paragraph 12). There is not, and could not be, any dispute that HIG as a group has been guilty of acts contrary to the purposes and principles of the United Nations.

[19] However it is not sufficient merely to establish that the applicant was a member of such a group. It is necessary that the applicant's complicity should be sufficient to bring him within the exclusion and that the applicant was a voluntary member of HIG, who understood its aims, methods and activities (*Gurung*). As was observed by Stanley Burnton LJ in *KJ (Sri Lan*ka) v *Secretary of State for the Home Department* 2009 EWCA Civ. 292 it is sufficient if there are serious grounds for considering that a person committed acts identified in Article 1F (c) and it is not necessary to establish that he actually did so (paragraph 35). Moreover while Stanley Burnton LJ acknowledged that mere membership of an organization might not be sufficient to result in a person's exclusion from the protection of the Geneva Convention, he expressed the opinion that "a person who knowingly participates in the planning or financing of a specified crime or act or is otherwise a party to it, as a conspirator or an aider and abettor, is as much guilty of that crime or act as the person who carries out the final deed". We agree with these observations and that the test applied in *Gurung* is the correct one for determining an individual's responsibility for the acts of a group. Applying that test to the actual involvement of the applicant in HIG we are satisfied that it was such as to amount to serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations. At the time of his father's death the applicant was actively participating in the acts of HIG, including

attacks against ISAF. He must have been aware at that time of the aims, methods and activities of HIG. Thereafter he became a commander in HIG and was involved in the planning of acts, including issuing orders to obtain guns. He also had access to the funds of HIG. As a result of his involvement with HIG the applicant is excluded from the protection of the Geneva Convention by virtue of Article 1F (c). There is accordingly no prospect of the applicant being successful in his appeal despite the errors of law by the SIJ.

[20] We would observe that SIJ Lane erred in allowing reconsideration of the IJ's decision. When he allowed reconsideration on the ground based upon Article 1F (b) of the Geneva Convention he ought to have appreciated that there was no possibility that the Tribunal would decide the case differently on reconsideration even if a different conclusion was reached on that ground because the applicant was, in any event, excluded from the protection of that Convention by reason of Article 1F (c). Ironically the SIJ who reconsidered the case reached the correct decision but for entirely the wrong reasons.

[21] For the foregoing reasons we shall refuse leave to appeal.