



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**Lord Eassie
Lord Wheatley
Sheriff Principal Bowen**

**XA114/06
[2007] CSIH 69**

OPINION OF THE COURT

delivered by LORD EASSIE

in

APPEAL

under section 103B of the Nationality,
Immigration and Asylum Act 2002

by

N.A.K.

Appellant;

against

A decision of the Asylum and
Immigration Tribunal

**Act: Forrest; Drummond Miller
Alt: Miss Carmichael; Solicitor to the Advocate General for Scotland**

5 September 2007

[1] This is an appeal under section 103B of the Nationality Immigration and Asylum Act 2002 as amended by the Asylum and Immigration (Treatment etc) Act 2004 which proceeds with leave of the Asylum and Immigration Tribunal.

[2] The appellant is a Pushtu speaking Afghan. He arrived in the United Kingdom with his 12 year old son, who unfortunately is blind, on 12 October 2004 and immediately claimed asylum. On 28 November 2004 the Secretary of State refused the appellant's claim for asylum and also decided that his removal to Afghanistan

would not be contrary to the United Kingdom's obligations under the European Convention on Human Rights. That decision was appealed and on 23 February 2005 an adjudicator upheld the appellant's claim to asylum and also his contention that his removal to Afghanistan would involve a breach of the United Kingdom's obligations under the Human Rights Convention. Thereafter the Secretary of State appealed the adjudicator's decision to the Tribunal. That appeal was successful principally on the procedural ground that the adjudicator had refused a Home Office request for an adjournment. The matter was remitted for full reconsideration by an Immigration Judge. The re-hearing took place on 3 April 2006, the decision of the Immigration Judge being notified on 13 April 2006. The Immigration Judge rejected both the request for asylum and the human rights contention. The present appeal proceedings are against that decision of the Immigration Judge.

[3] For present purposes we do not need to rehearse the appellant's account in full detail. But a brief summary is as follows.

[4] In 1998, when the Taliban were largely in control of Afghanistan, the appellant joined the Hizbi-Islami (the Party of Islam) which was under the leadership of Gulbuddin Hekmatyar. Under that leadership the party or faction of Hizbi-Islami was opposed to the Taliban. It sought a more moderate Islamic system. Initially the appellant's role was to guard secret meetings of the Hizbi-Islami at which usually about 10 or 12 people might be present. However, in the year 2000 the appellant was promoted to the position of a commander within the organisation with some 60 or so militants or guards under his command. During that year, on the occasion of a larger gathering of Hizbi-Islami members, the meeting was attacked by the Taliban and in the ensuing battle between the factions some members of the Hizbi-Islami were killed and wounded were sustained on both sides.

[5] Following that episode the appellant and some others of the Hizbi-Islami went into hiding from the Taliban. After the removal of the Taliban from power following the invasion of Afghanistan by USA forces in late 2001 the Hizbi-Islami opposed those forces and the new government installed under their aegis. The Hizbi-Islami began a struggle against the new government. In October or November 2003 the appellant's father and brother were killed, at his home, by "Government people" who had come to his home seeking the appellant's whereabouts. The appellant's father had been an active member of Hizbi-Islami and his brother an affiliate. Following that incident the appellant decided to leave his province and seek refuge, in hiding, in the house of a friend but at the beginning of 2004 a bomb was thrown into the house , wounding the friend's son. The appellant then decided that he should flee Afghanistan and made arrangements involving the payment of money to an agent.

[6] The appellant also explained that, in addition to what might be described as the wider politics, there is a land dispute in the background. Three named individuals in political opposition to the appellant and his father were in dispute over ownership of some of the appellant's family's land. These individuals obtained favour in the new Government by making allegations against the Hizbi-Islami and especially the appellant. In his absence they were successful in obtaining possession of the disputed land.

[7] To put that summarised account into a broader context, it is apparent from the background materials before the Immigration Judge, to various parts of which we were alerted in the "reading list" suggested by counsel for the appellant, that following the demise of the pro-Soviet regime (but prior to the appellant joining the Hizbi-Islami) the Hizbi-Islami was very active in the battle for power, its opponents including both the Taliban and also the grouping known as the Northern Alliance. (At

paragraph 75 of his decision the Immigration Judge refers, but in a different context, to *inter alia* an account in a report by the Afghan Justice Project of the part played by the Hizbi-Islami in the fighting for the control of Kabul and the indiscriminate rocket firing involved therein.) As is generally known, the Taliban were in the event ultimately successful, at least to some considerable degree, in obtaining control of Kabul and the rest of the country until the American bombardment and invasion in the autumn of 2001. Following the displacement of the Taliban from government in Kabul and the moves to establish a new government with occidental support, it appears that a split occurred in the Hizbi-Islami with some members going over to the new regime while others remained firmly loyal to Gulbuddin Hekmatyar, who is understood still to be in hiding. That remaining faction, under his guidance, is seen by the current regime under President Karzai as a militant opponent. The Immigration Judge notes in his decision (para. 24) that the appellant has not switched his allegiance from the section of the Party loyal to Gulbuddin Hekmatyar.

[8] Against that background the appellant considers that he is under threat were he to return to Afghanistan from both the Taliban, who, though no longer holding power, remain a significant force, and also from the forces of the new Government.

[9] The Immigration Judge expressed certain adverse views on the credibility of the appellant on the basis that in the course of his oral evidence (given *via* an interpreter) he had said that the Hizbi-Islami was not a violent group and had not attacked coalition forces in Afghanistan, whereas it was evident from the background materials that the Hizbi-Islami had been and was a violent organisation. However, despite those reservations, the Immigration Judge was well prepared to accept the appellant's evidence that he had been a commander in the Hizbi-Islami. Having made that acceptance, the Immigration Judge further concluded (paragraph 82) that given

the violent nature of the Hizbi-Islami and the appellant's prominence in its organisation there were serious grounds for considering that the appellant had committed a serious non-political crime outside the country of refuge. The Immigration Judge went further and inferred that the appellant had indeed committed such a crime. On that basis the Immigration Judge held that the appellant was excluded from the protection of the Refugee Convention by virtue of Article 1F(b).

[10] Before us counsel for the appellant made plain that the Immigration Judge's conclusion that the appellant was excluded from the protection of the Refugee Convention by Article 1F(b) was not under challenge. This appeal is directed towards the Immigration Judge's rejection of what might be termed the Human Rights Convention claim.

[11] The Immigration Judge rejected the latter claim for protection on a basis which might be very shortly described as being the lack of evidence of a specific factual basis, apart from membership of Hizbi-Islami, for thinking that the appellant might be at real risk of ill-treatment from the new Government. As respects risk from the Taliban, the Immigration Judge recognised their presence in the south and east of Afghanistan but thought that there was no evidence to suggest any real risk to the appellant were he to be returned to, and at least by inference, remain in Kabul.

[12] Counsel for the appellant advanced a number of criticisms of the decision of the Immigration Judge on this aspect of the case before him. In particular, among those criticisms was a challenge to the soundness of the way in which the Immigration Judge had approached the decision of the Immigration Appeal Tribunal of 29 July 2004 in *RS (Hezebe Islami - expert evidence) Afghanistan* [2004] UKIAT 00278 which had been placed before the Immigration Judge by the appellant. In respect of

the submission based on that case which was advanced by the appellant, the Immigration Judge says, at paragraph 93 of his decision:

"In that case there was an expert opinion from Dr. Lau (who clearly impressed the Tribunal) that the particular Appellant was at real risk of serious ill harm. I note that the Appellant in **RS** had been arrested, interrogated and mistreated by the Northern Alliance. That is a very different factual matrix to the facts before me in the present case. I therefore do not find the case of **RS** particularly helpful in assisting me as to whether or not there is a real risk to the Appellant in this case."

The treatment by the Immigration Judge of the decision of the Immigration Appeal Tribunal in *RS* was the principal ground upon which the Asylum and Immigration Tribunal gave leave to appeal to this court.

[13] In *RS* the Immigration Appeal Tribunal had the benefit of both the written opinion of Dr. Lau and his oral evidence, which included cross-examination on its contents. At paragraph 11 of its decision the Immigration Appeal Tribunal says:-

"Having read his report, noted his qualifications and heard him give evidence we find Dr. Lau to be an impressive, authoritative and careful expert witness. We give considerable weight to his opinions."

The Immigration Appeal Tribunal thereafter set out the full terms of Dr. Lau's written opinion. While the opinion was of course instructed as respects the particular case of the appellant in *RS* it necessarily expresses general expert opinion evidence on the situation in Afghanistan with respect to present and past adherents of the Hizbi-Islami. The particular circumstances of *RS* were that the arrest and interrogation of *RS* and his brother in February 2003 occurred long after the brothers had ceased active involvement in the Hizbi-Islami and the plausibility of that account had been

questioned by the decision-taker in that case. We note however the terms of the following paragraphs from Dr. Lau's opinion:

"11) The war against terrorism in Afghanistan is being fought by numerous agencies and groups. It is fought largely in secret and has so far stayed clear of Afghanistan's legal system. The silence of the objective evidence on the trial of suspected terrorists, of the rate of those arrested as suspected terrorists, indeed the almost complete absence of any information in the public domain on the number of persons arrested because they are accused of being associated with Al Qaeda, the Taliban and Hezb-I-Islami is deceptive. Occasional newspaper reports reveal that arrests and interrogations of suspects take place on a very regular basis. They are carried [*sic*] by Afghan internal security and intelligence agencies, US agencies and even private mercenaries cooperating with members of the Northern Alliance. Last week an American mercenary was arrested in Kabul: five Afghans, strung up by their feet, were found hanging in the living room of his bungalow in Wazir Khan, a very up-market residential area of Kabul. It appeared that he was trying to get information from the five men about the whereabouts of Osama Bin Laden and other terrorists.

12) In my opinion, the timing of the arrests does not in any way indicate that the appellant has made it up and in my opinion, based on my knowledge of the events in Afghanistan, his account is plausible.

13) Secondly, I have been asked whether his continuing fear of return to Afghanistan for reasons given in his statement are well-founded. In my opinion the most serious risk arises from his association with the Hezb-I-Islami. The group is without doubt a very dangerous terrorist organization

determined to attack and destroy the current government and to turn Afghanistan into a 'pure' Islamic state. Its leader is believed to be hiding in Afghanistan and despite concerted efforts he has not been apprehended. His group continues to carry out terrorist attacks.

14) In my opinion it is difficult to discount the appellant's fear as irrational only because his own association with the Hezb-I-Islami ceased some time ago. It appears that members of the Northern Alliance think otherwise, as evidenced by his arrest, interrogation and mistreatment. I am not aware of any public trials of suspected terrorists and thus there is no judicial forum for him to protest his innocence. Given the substantial financial rewards for information leading to the arrest of suspected terrorists promised by the US there is ample motivation to 'test' the knowledge of anyone who is believed to have been close to the Hezb-I-Islami. In my opinion the appellant's fear in this regard is well-founded."

[14] In so far as the Immigration Judge dismissed the present appellant's fears that he would be at risk from the Taliban on the view that the appellant would be safe in Kabul, we note the terms of paragraph 16 of Dr. Lau's opinion which are thus:

"16) Thirdly, I have been asked to comment on the availability of the option of internal flight. In my opinion internal flight in Afghanistan is very problematic. The country's societal structure is very tribal in nature and it is most problematic for an outsider to fit into an area where he has no family and relatives. The economic problems, especially the scarcity of land, have made communities hostile to outsiders. Even returning refugees trying to reclaim land which used to be owned and occupied by them prior to leaving the country are finding it very difficult to settle in their areas of origin. A complete

outsider would find it almost impossible. Ethnic tensions would also work against him: recent country reports indicate that Pashtun minorities continue to be harassed and intimidated in the North."

Additionally, we note the terms of part of paragraph 17:

"17) Fourthly, I have been asked to comment on the ability of the government to protect him. I think that the current government has little interest in protecting suspected terrorist. In any event, the legal system is virtually non-existent and I very much doubt that it would be able to protect the appellant against threats from within the Northern Alliance."

[15] As was submitted by counsel for the appellant, it is not evident from the terms of the decision of the Immigration Judge whether the Immigration Judge gave consideration to what was said by Dr. Lau respecting the prevailing state of affairs in Afghanistan and the risks arising generally to members and former members of the Hizbi-Islami from *inter alios* agencies and parties such as those referred to in paragraph 11 of the opinion with the incentives to which reference is made in paragraph 14 of the opinion. The Immigration Judge appears to set apart the terms of the decision of the Immigration Appeal in *RS* on the basis of what he describes as its "different factual matrix", without making any reference to the expert views of Dr. Lau on matters more generally. For her part, counsel for the respondent stressed that there were factual differences between the situation of the appellant in *RS* and the appellant in the present case. Given those factual distinctions it was understandable, she said, that the Immigration Judge might discard *RS* as being of no assistance.

[16] For our part we note that the Immigration Appeal Tribunal (paragraph 2) stated that because they required to remit for reconsideration, the case of *RS* would not be a country guidance case but that it was reported "for the information relating to

Hezbe Islami and in particular the opinions of Dr. Lau" (para. 21). Reporting the case for that reason is consistent with our view that Dr. Lau's opinion is not wholly "fact specific" to the position of the appellant *RS* but contains expert guidance of general utility in considering the position of former members of the Hizbi-Islami. Self-evidently cases involving Hizbi-Islami applicants will have factual differences. In *RS* the appellant had been simply a member of Hizbi-Islami (although his brother had been a commander) and both had abandoned all political activity following the Taliban's assumption of power. By contrast, the present appellant's evidence of having been a commander, with the prominence which that involves, was accepted by the Immigration Judge. His flight was preceded by the death of his father and brother, who had also been members of the Hizbi-Islami, and the bomb attack on the house in which he had been staying. We have difficulty in seeing that these differences of factual detail can elide the need to give consideration to what is said by Dr. Lau as to the situation, in general, of members past and present of the Hizbi-Islami.

[17] In so far as the present appellant fears that he is at risk not only from agencies acting for the current regime, but also from the Taliban, we note that in dismissing the latter risk on the view that the present appellant might be safe in Kabul the Immigration Judge appears to make no reference to Dr. Lau's views on internal relocation.

[18] In these circumstances we have come to the conclusion that in apparently setting apart *RS* on the basis that there was a particular difference in factual matrix, the Immigration Judge erred, and that the error can be categorised as an error of law. The exercise of distinguishing *RS* on its particular facts was not, in our view, the appropriate exercise. Given particularly that the Immigration Appeal Tribunal decision was expressly reported for the general guidance which might be derived from

Dr. Lau's expert opinion evidence respecting membership of the Hizbi-Islami, which guidance we do not see to be irrelevant to the present case, we consider that the Immigration Judge ought to have addressed it on that basis. He does not appear to have done so. Put another way, it appears that the Immigration Judge may not have given proper consideration to a relevant factor, namely that general guidance. We consider that the appeal thus succeeds.

[19] Counsel for the appellant did not suggest other than that, if the appeal were successful, there should be a remit to the Asylum and Immigration Tribunal for a further reconsideration. Counsel for the respondent agreed that, on the hypothesis of the appeal being successful, such was the appropriate disposal. But since the rejection of the claim for asylum under the Refugee Convention by reason of Article 1F(b) was not challenged, the reconsideration should be limited accordingly.

[20] Given that we are persuaded that the appeal succeeds and that parties are agreed that reconsideration is the appropriate procedural outcome, it is unnecessary for us to consider such other criticisms as were advanced by counsel for the appellant respecting the decision of the Immigration Judge.

[21] We shall accordingly allow the appeal against the decision of the Immigration Judge in so far as the Immigration Judge dismissed the appeal on Human Rights grounds and we shall remit to the Asylum and Immigration Tribunal for reconsideration of the appellant's case respecting those grounds.