

Case No: C5/2008/1101

Neutral Citation Number: [2008] EWCA Civ 974
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/10834/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 23rd July 2008

Before:

LORD JUSTICE RICHARDS

Between:

AS (AFGHANISTAN)

**Respondent
/Appellant**

- and -

**SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

**Appellant/
Respondent**

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr J P Waite (instructed by the Treasury Solicitor) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

Judgment

(As Approved)

Crown Copyright©

Lord Justice Richards:

1. This is a renewed application by the Secretary of State for permission to appeal against a decision of the AIT which, on a reconsideration, allowed the respondent's appeal under Article 3 of the European Convention on Human Rights.
2. The stage 2 reconsideration, dealt with by a panel consisting of Immigration Judge Parker and Immigration Judge Braybrook, proceeded on the basis of the credibility findings in the original decision by Immigration Judge Tiffen. The facts were that the respondent was born in Afghanistan. His father had joined the Hizb-i-Islami many years previously and had been promoted to the rank of commander. When the Taliban came to the area in 1996 the father joined the Taliban and was allowed to remain as a commander. The respondent's brother joined the Taliban in 1999. At the beginning of 2001 the respondent, then aged 16, also joined the Taliban. All three of them fought for the Taliban in the period 2001 to 2006, though it appears that the father and brother were more active than the respondent himself. Around the beginning of 2006 the father and brother were killed in an attack on the family home while visiting it. The respondent believed that his father, who was well known locally as a commander and for opposing the government, had been seen there and had been reported to government soldiers. The respondent's mother then went to live with her brother, but when the respondent visited them she told him he must leave the country as she was afraid that he too would be attacked by government forces. She arranged for him to come to the United Kingdom, where he arrived in July 2006.
3. The original immigration judge found that as an active member of the Taliban who had knowingly committed acts against US and UK forces contrary to Article 1F of the Refugee Convention, the respondent did not qualify for refugee status. That finding was not challenged on the reconsideration. The remaining issue, which was the subject of the reconsideration, was whether he would be at risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights if he were returned to Afghanistan.
4. The panel considered that issue in some detail, expressly taking into account among other material the country guidance case of PM & Ors (Kabul -- Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089. The Secretary of State's representative before the panel conceded that there was a risk of ill-treatment contrary to Article 3 in the respondent's local area, where he would be known as a former Taliban fighter and his father's son. The panel endorsed that concession, stating that the authorities were reasonably likely to expect the respondent again to support the Taliban and were cracking down hard on suspected supporters of the insurgency. Country information confirmed a high incidence of mistreatment of detainees and arrest without trial in a climate of impunity.

5. The question therefore came down to the availability of internal relocation. The panel's view, having regard to the country guidance, was that the only potential place of internal relocation was Kabul. The respondent, as a stranger and a Pashtun, was likely to arouse suspicion. That was not enough by itself to place him at risk of detention and mistreatment, but his home area was not far from Kabul and country information suggested that inquiries would relatively quickly reveal his background, family connections and former Taliban involvement. His association with the Taliban and Hizb-i-Islami in the current climate of insurgency and terrorist attacks would be reasonably likely to result in his detention. The panel's reasoning, which I have only summarised, led to a conclusion expressed in these terms:

“44. We remind ourselves that the standard of proof in appeals under the Human Rights Act is low and we are not required to find, beyond reasonable doubt or even on the balance of probabilities that the appellant is likely to face detention and ill-treatment which will breach Article 3. We are required only to find that there are substantial grounds for believing that there is a real risk of this occurring and in the light of the heightened security situation and insurgency in Afghanistan taken together with the appellant's history, the facts that his activities in Afghanistan have been such as to exclude him from the protection of the Refugee Convention and that he left only some two years ago are all grounds, in our view, for finding that it would not be safe for the appellant to relocate to Kabul. Given our findings that it would not be safe for him to relocate there is no need for us to consider whether it would be unduly harsh.

45. We agree with Mr Hawkin [counsel for the then appellant] that this case can be distinguished from PM and we further note that almost a year has elapsed since that case was heard. According to Human Rights Watch, 2007 has been the bloodiest year in Afghanistan since 2001. On the face of it, this does not impact directly upon the appellant's situation but we believe that the increased insurgency and counter terrorism measures have some bearing as there is increased pressure upon the authorities to deal with persons perceived as a threat to security. In the light of his history and family connections we believe that the appellant is likely to be perceived as a security risk and someone who is likely to fight against the authorities.”

6. Permission to appeal against that decision was refused by the tribunal itself and also by Keene LJ on consideration of the papers, which included a lengthy

document containing the Secretary of State's amended grounds of appeal and skeleton argument.

7. In renewing the application orally before me today Mr Waite, who comes new to the case, has been more succinct in his grounds of challenge. He has raised four points, which are to some extent interrelated. First, it is submitted that the tribunal failed adequately or at all to explain why the respondent's case was distinguishable from those of the unsuccessful appellants in the country guidance case of PM, all of whom had a history of involvement with Hizb-i-Islami which, it is submitted, is comparable to that of the present respondent. Mr Waite referred me to the detailed factual circumstances of the three appellants in PM and compared them with those of the present respondent.
8. Secondly, it is submitted that the tribunal failed adequately or at all to explain why the respondent would be at risk notwithstanding the finding in PM that those returning from the United Kingdom and who have been away for a considerable time would not be suspected of being insurgents when they arrived back in Afghanistan. Thirdly, it is said that the tribunal irrationally relied at paragraphs 43 and 44 of its determination on the respondent's exclusion from the Refugee Convention as itself creating a risk upon return.
9. Finally, and most importantly, it is said that the tribunal failed to give any reason why the conditions of detention experienced by the respondent upon return would infringe Article 3. It is said that this was an essential part of the tribunal's function. A conclusion that conditions would breach Article 3 was by no means inevitable on the evidence, given what had been found by the tribunal in PM. The matter therefore needed careful consideration by the tribunal. The need for such careful consideration was reinforced by the fact that the respondent was a person excluded from protection under the Refugee Convention and, whilst Article 3 was still available in principle to him, it was incumbent on the tribunal to take care before finding that he qualified for protection under Article 3.
10. By way really of overview, Mr Waite submits that, given the acceptance in PM that the appellants in that case would be interrogated and that they had family links with Hizb-i-Islami but nevertheless they would not be at risk of mistreatment, there is insufficient to distinguish the position of the present respondent from that of the appellants in PM and to justify a different outcome. If a different conclusion was to be reached it was necessary for the tribunal to give careful and detailed reasons for that conclusion. It is submitted that the reasons given for a finding of risk in this case were not adequate or sufficiently clear.
11. Mr Waite has failed to persuade me that an appeal would have a real prospect of success in this case. It is clear that the panel not only took the guidance in PM carefully into account but, as it seems to me, properly treated it, as it was bound to do, as an authoritative finding upon the issues identified in it. In my judgment the reasons of the panel do show why they regarded the present respondent's position as distinguishable from that of the unsuccessful

appellants in PM. They looked not only at his own involvement in the Taliban -- an involvement sufficient to deny him protection under the Refugee Convention -- but also at his family links and the fact that his father and brother had both been killed, apparently by government forces, on a visit home. They took into account the fact that he himself had been absent from Afghanistan for only two years. They looked at the proximity to Kabul of his home area, where it was conceded by the Secretary of State that he would be at risk, and at the likelihood of his arousing suspicion and of information about it coming to light. They also took into account the increased insurgency since the decision in PM and the reaction of the authorities to this and the implications of all that for a person in the respondent's particular position.

12. In my judgment those were adequate reasons and it cannot be said that it was irrational to reach a different conclusion in relation to the respondent from that reached in relation to the appellants in PM. Further it was in no way irrational to take into account as part of the reasoning process the fact that the respondent had engaged in activities sufficient to deny him the protection of the Refugee Convention. That formed part of the reasons for the view that he would be at risk in his local area and it remained relevant to the question of risk on relocation. In my judgment this was, in substance, what the tribunal was doing in the passage criticised by Mr Waite.
13. As to the view that the respondent would be at risk of ill-treatment in detention, the panel referred in their decision to various passages in the background information relevant to the issue of mistreatment in detention. They also referred to paragraph 129 of the decision in PM where the tribunal mentioned risks of torture and serious mistreatment of detainees in the prison system and during interrogation, albeit I accept that in paragraph 131 of the same decision it was said that the situation in Kabul did not appear to be as bad as elsewhere. In my view the conclusion reached in relation to the risk of ill-treatment in detention was sufficiently reasoned and rational.
14. Overall I regard this as a careful decision and one with which the court should be slow to interfere on the application of the Secretary of State, just as it should be slow to interfere with decisions of this kind on applications brought by those who have unsuccessfully claimed asylum or protection under the Human Rights Convention.
15. Accordingly the renewed application is dismissed.

Order: Application refused