

Heard at Field House **MK (Risk-Political Opinion) Kyrgyzstan CG [2004] UKIAT 00063**
On 1 April 2004 (Risk- Political Opinion)
Written 1 April 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

06 April 2004

Before

Mr S L Batiste (Vice-President)
Mr J Perkins (Vice-President)
Mr A Smith

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of Kyrgyzstan, appeals, with leave, against the determination of an Adjudicator, Mrs C Bart-Stewart, dismissing his appeal against the decision of the Respondent on 16 May 2003 to refuse leave to enter and refuse asylum.
2. Ms S Osmond represented the Appellant. Mr C P Buckley, a Home Office Presenting Officer, represented the Respondent.
3. The Appellant claims to fear the authorities of his country because of his political opinions and activities. The facts as asserted by him may be summarised as follows. He became an active member of the opposition party, Ar-Namys, in August 2000. He attended party meetings and demonstrations, and distributed leaflets advertising the demonstrations, but did not hold any official position. On 13 March 2001 he was arrested at a demonstration in Bishkek Park. He was detained for seven days and beaten during detention. On 17 March 2002 he attended a demonstration in the south of the country during which the police opened fire on the demonstrators and the Appellant fled. On 19 March 2002 he was arrested, after the police searched his home. He was detained for one month and again beaten in detention. He was released after paying a bribe of \$1000. On 16 September 2002 he was arrested with seven other people at a protest meeting. He spent two weeks in detention and was beaten so badly that he suffered internal bleeding. The method of beating in all these detentions was such as not to leave any permanent scars.

4. On 10 March 2003 the secret police raided his home and searched it. They told the Appellant that he was now blacklisted. On 11 March 2003 shots were fired by a policeman at the Appellant and a friend, as they were walking in the park. His friend was killed but the Appellant managed to run away. The Appellant recognised the policeman as one who had attended his house the previous day. The Appellant left the country on 22 March 2003 and arrived in the UK five days later, when he claimed asylum.
5. The Adjudicator assessed the objective evidence and accepted that the government of Kyrgyzstan had a poor human rights record and continued to commit numerous abuses. She accepted that the objective evidence supported the Appellant's claim that even low-level members of Ar-Namys may be at risk. However, even given this context, the Adjudicator identified a number of inconsistencies and implausibilities in the Appellant's various accounts and concluded that his claim to have been detained and seriously ill treated on four occasions was a fabrication. She did not accept that he was an opposition political activist at all, because he was unable at the screening interview to name the ruling party. She concluded that his claim generally lacked credibility and that he had failed to discharge his burden of proof.
6. The grounds of appeal are not entirely clear. Ms Osborn in her submissions said that her understanding of the determination was that the Adjudicator had accepted that the Appellant was a member of Ar-Namys, and she intended to argue that given this finding the Adjudicator was wrong to dismiss the appeal notwithstanding her adverse credibility findings. She acknowledged that she had not challenged the reasoning for the adverse credibility findings as such. When we pointed out to her an alternative view of the Adjudicator's conclusions was that she had reached a comprehensive adverse credibility finding concerning all core aspects of the claim, Ms Osborne requested permission to challenge the adverse credibility findings. We asked her to be specific about the challenge she wished to make. She put it in the following terms
“At paragraph 35 of the determination, the Adjudicator found that the Appellant was unable to name the ruling party. At document A1 it is clear that interpretation at the screening interview was a problem and this was reinforced by the Appellant during his asylum interview at C16. In the circumstances the Adjudicator's conclusion was not open to her.”
7. Mr Buckley indicated that he was content for the Tribunal to grant permission to appeal on this ground and we so granted permission.
8. In her submissions to us, Ms Osmond indicated that she accepted the Adjudicator's analysis of the objective evidence. She explained the grounds of appeal by arguing that the Adjudicator had accepted that the Appellant was a member of Ar-Namys and accordingly he would face a real risk of persecution or a breach of Article 3 on return. Her adverse credibility finding in paragraph 29, based upon his inability to name the ruling party, was flawed by her refusal to accept the explanation given by the Appellant concerning interpretation at the screening interview. The findings in paragraphs 30 and 31 were unsound in the light of the objective evidence. She invited us to allow the appeal to the extent that it be remitted for rehearing afresh.
9. Mr Buckley pointed out in relation to the Adjudicator's adverse credibility findings that the Appellant had indicated in his screening interview that he was content to be

interviewed in Russia and in his appeal to the Adjudicator had requested a Russian interpreter. His history showed that he had been educated in Russian at the Russian University in Kyrgyzstan. The objective evidence showed that Russian is an official language of Kyrgyzstan. He submitted that there was no substance in the challenge to the validity of the Adjudicator's rejection of the claim by the Appellant that there were any difficulties relating to interpretation in his screening interview. He also submitted that no genuine political activist could be unaware of the name of the ruling party of his own country, especially when the President from that party had been in power for many years. He also observed that there was no extant challenge to the Adjudicator's other adverse credibility findings relating to the Appellant's alleged attendance at four demonstrations and detentions and ill-treatment arising from them. Nor is there any error in the Adjudicator's conclusion that the alleged targeted assassination attempt on the Appellant by the police was inconsistent with the objective evidence. Even if the Adjudicator's determination was interpreted to imply acceptance that the Appellant was even a member of Ar-Namys, he had not been engaged in any credible activities for it and there was no reason why the authorities should even be aware of his membership. He argued that the appeal should be dismissed.

10. We considered these submissions first in the context of the objective evidence. There is not before us an extensive body of objective evidence about Kyrgyzstan, concerning the treatment of opposition political activists. We have not been offered anything beyond that which was before the Adjudicator, save that Mr Buckley gave us the latest version of the US State Department report which covers 2003, though it does not offer anything materially different from the previous year's report that was considered by the Adjudicator.
11. We were concerned that Ms Osmond was unable to give us a reliable providence for some of the materials included in her bundle, but in the event this has not been the cause of any real difficulty because essentially everything of significance is contained or referred to in US State Department reports.
12. We have been able to form a realistic view from the information provided to us and come to similar conclusions to those reached by the Adjudicator. The US State Department Report reveals that, although the 1993 constitution defines the form of government as a democratic republic, the President, Askar Akayev, dominated government. He was elected to a third term in 2000, even though the constitution specifies a 2 term limit, thanks to the intervention of the Supreme Court, who ruled that his first term did not count against the limit. Nevertheless, despite constitutional limitations, Parliament has become more independent and sometimes modified or blocked presidential initiatives. Civil society is relatively strong. In October 2002 parliamentary by-elections took place in four electoral districts. The elections were generally orderly and competitive in three of those districts but serious voting irregularities were observed one district, where the race was strongly contested. In 2000, serious irregularities marred parliamentary and presidential elections. Non-governmental organisations and parliamentary deputies sometimes succeeded in blocking presidential initiatives through parliamentary action and grass root campaigns.
13. The Government's human rights record remained poor and members of the security forces at times beat and otherwise mistreated persons, including detained human rights and political activists. Prison conditions remain very poor, and there were many cases

of arbitrary arrest or detention. The law and the constitution prohibit arbitrary arrest and detention but police at times used ill-defined charges to arrest persons and could be bribed to release them. There was however neither in 2002 nor in 2003 any evidence of targeted political assassinations by the government, or of politically motivated disappearances. The only possible qualifications to this general assessment are an unexplained and suspicious death of a journalist who was investigating corruption, and what appears to be the kidnapping of several Moslem Uzbeks, which were attributed to the Government of Uzbekistan, not Kyrgyzstan.

14. The constitution provides for an independent judiciary; however the executive branch dominated the judiciary, and government used judicial proceedings against prominent political opposition and independent media figures in a number of instances. A very high profile example of this occurred on 5 January 2002, when the government detained the opposition parliamentarian and outspoken critic of the government, Azimbek Beknazarov, on charges related to his work as a criminal investigator in 1995. He was held on pre-trial review. On 17 March, the day before he was due to be sentenced, 2000 of his supporters marched to the city of Kerben to demand his release. Police attempted to disperse the crowd by shooting into the air and at least five demonstrators were killed and others were beaten. Several hours later, demonstrators stormed the police building and set several other buildings on fire. One more demonstrator was killed in this and five were wounded. On 19 March, Beknazarov was summarily released and was later given a one-year suspended sentence. In April, following the release of a videotape showing police firing on unarmed demonstrators, the President dismissed a number of local officials and appointed a state commission to investigate the shootings. The commission criticised the state media for biased reporting of the Beknazarov arrest and suggested that high level officials shared the blame for the shootings. The US State Department Report also identified demonstrations in May 2002 against the sentencing of the opposition leader, Feliks Kulov, to ten years imprisonment for corruption, as well as numerous other demonstrations and marches relating to political opposition that were disrupted, and several other examples of the court system being used against opposition politicians.
15. We have considered a paper dated 9 May 2003, from the international secretariat of OMCT stating that on 30 April 2003 Tynshtykbek Dulatov, a member of the Ar-Namys Party, disappeared on his way to a meeting with a state investigator to which he had been summoned, and his whereabouts remained unknown at least at the time of the report, which was a few days later. There is speculation that the disappearance was politically motivated and that the government was attempting to destroy this party, as it could pose a serious challenge to the President in an election. There was reference to other party members having been threatened and bullied into leaving the party and to 80 party members being detained during the demonstration in 2002 and only being released after international pressure, most notably from OSCE. There is also a press release from the Helsinki Committee, which appears to be protesting against the same detentions at that demonstration. A press release from Ar-Namys of 2004 refers to continuing persecution of the party by the authorities and the fabrication of criminal cases, intimidation and constant psychological pressure on party members. There are other documents that say much the same thing.
16. It is therefore plain from the objective evidence that the government of Kyrgyzstan does undertake repressive actions of various kinds against opposition politicians and activists

who it regards as a threat, and that includes the Ar-Namys Party. We have not however found any evidence that the government promotes or permits the targeted extrajudicial execution of its opponents, though excessive force has been used against demonstrators that has resulted in extrajudicial killings. The conclusion reached by the Adjudicator in paragraph 29 of the determination that low level members of Ar-Namys, and indeed other opposition parties, may be at risk is sound and sustainable. However whether there is a real risk in any individual case, and whether it would be sufficiently serious to cross the high threshold required to engage persecution or a breach of Article 3, must depend upon the facts of that case and whether the individual has been involved in activities that might attract corresponding risk.

17. We should add that the events summarised by us from the objective evidence are in the public domain. It is against this objective background that we have to assess the Adjudicator's conclusions and reasoning and her rejection of the Appellant's core credibility.

18. The Court of Appeal in **Subesh & Others [2004] EWCA Civ 56** has recently summarised the relevant jurisprudence and given guidance to the Tribunal concerning the proper approach to be taken by it to challenges against an Adjudicator's findings. In paragraph 43, Laws LJ stated it as follows.

“In every case the Appellant assumes the burden of showing that the judgment appealed from is wrong. The burden so assumed is not the burden of proof normally carried by a claimant in first instance proceedings where there are factual disputes. An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the supposed difference between a perceived error and a disagreement. In either case the appeal court disagrees with the court below, and indeed may express itself in such terms. The true distinction is between the case where the court of appeal might prefer different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category.”

19. The Adjudicator concluded in paragraph 35 of the determination that he was not an activist for the Ar-Namys party because at the time of his screening interview he was unable to name the ruling party. She rejected his explanation that there was a problem over interpretation at interview. Ms Osmond has repeated this explanation to us and argued that the Adjudicator was wrong to reach that conclusion. We do not agree. The objective evidence shows that university courses in Kyrgyzstan are taught in Russian and the Appellant attended a Russian university in Kyrgyzstan for some two years. He accepted at the beginning of his screening interview that he was content to proceed with a Russian interpreter and in his appeal to the Adjudicator requested a Russian interpreter. The Adjudicator was entitled to conclude that the Appellant at his screening interview properly understood questions put to him about the governing party (and there were three of them, not one) but simply did not know the answer. We also agree with her that it is wholly implausible that political activist, as the Appellant

claims to be, would not know the name of the ruling party in his country, against whom he worked.

20. The other reasoning given by the Adjudicator for her remaining adverse credibility findings have not been challenged by Ms Osmond to any specific or material extent. There is no objective evidence that the police arrested people participating in the demonstrations of 17 March other than at the demonstrations themselves. The Appellant claimed that the police arrested him at his own home 2 days later. The objective evidence shows that the demonstrators who were arrested, were then released on 19 March, which is the date that the Appellant claims he was arrested. The Appellant was even unable to identify correctly the purpose of the demonstration on 17 March, even though this is very clear in the objective evidence. Thus this aspect of the Appellant's claim is inconsistent with the objective evidence. Moreover, as the Adjudicator noted, the arrest of political activists is well monitored by the political parties and by NGO's, and it is implausible that the Appellant would have been arrested in circumstances in which his arrest escaped attention or would not have attracted attention after his release. His claim that he was the target of an assassination attempts by a policeman is contrary to the objective evidence. There is an inconsistency between the Appellant's accounts as to the date of one of his alleged arrests. All the Adjudicator's reasoning for her adverse credibility findings was properly open to her.
21. There remains the question of the extent of her adverse credibility findings. The Adjudicator stated in terms in paragraph 35 that she did not accept that the Appellant was arrested, detained and seriously ill treated on four occasions and she said that this was a fabrication. She did not accept that he was an activist for the party. She noted that he had previously attempted to enter the UK as a student but had been refused a visa. The fact that he was a few months later able to obtain a false passport with a visa for the UK was not a coincidence but reflected his desire to come to the UK for reasons unconnected with the need for international protection. All these findings properly flowed from the reasoning for her adverse credibility findings and were fully open to her. It is true that she did not also specifically state in terms that she did not accept that the Appellant was a member of the Ar-Namys Party. However in context it is plain from the range and extent of her adverse credibility findings and the conclusion she drew from them, that she rejected the entire account of political involvement as a fabrication, including the claim of party membership which was an integral part of his claimed political activism. The Appellant has failed to demonstrate any material error in the Adjudicator's thorough and properly reasoned determination.
22. Accordingly, this appeal is dismissed.

**Spencer Batiste
Vice-President**