

Heard at Field House

Appeal No: HX/47196/2001

On 8 October 2002

[2002] UKIAT 05410

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

..... 25/11/2002

Before:

Mrs J A J C Gleeson (Chairman)
Rt. Hon. the Countess of Mar

Between:

MR MOHAMMED SHAHADAT HUSSAIN

APPELLANT

and

The Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The appellant, Mr Mohammed Shahadat Hussain, appeals with leave against the determination of an Adjudicator (Mrs A. K. Simpson) dismissing his appeal against the decision of the respondent on this 12 September 2001, setting removal directions after refusal of asylum. He is a national of Bangladesh.
2. At the hearing, Mr F. Muhammad of Counsel appeared for the appellant. Ms M. Banwait, Home Office Presenting Officer, represented the respondent.
3. Leave to appeal was granted on the narrow ground that in paragraph 26 of the determination the adjudicator's assessment of the likelihood of a fair trial might be erroneous in the light of the April 2002 CIPU Report on Bangladesh. The Tribunal now has the benefit of the October 2002 Report and it was based on this report that the appeal was argued.

4. Mr Muhammad relied upon paragraphs 25 to 26 of the adjudicator's determination to support his contention that the Adjudicator had erred in her consideration of the appellant's risk of a breach of Article 6 (fair trial) of the European Convention on Human Rights on return-

"25. However, the Awami League is no longer in power in Bangladesh. From 20 December 1998 until 1 October 2001, the Jatiya Party was in alliance with the Bangladesh National Party and Jamaat-e-Islami. Although their objective has now been realised and their alliance dissolved, there is nothing in the background information before me to indicate that members of the Jatiya Party are presently at risk of persecution for political opinion at the hands of the BNP.

26. I acknowledge that the accusations made by the Awami League against the appellant are still to be resolved by the courts and as the appellant failed to answer to his bail, it is reasonably likely that the appellant will be arrested upon his return to Bangladesh. However, in light of the change in government and Bangladesh's independent judiciary, I am satisfied that the appellant will, in due course, receive a fair trial in Bangladesh."

5. The Adjudicator had found the appellant to be a credible witness in relation to two false murder charges filed against him by the Awami League before they lost the 2001 election. Under the European Convention on Human Rights and Fundamental Freedoms 1950, the burden of proof, he argued, was on the Secretary of State to show that the appellant was not in danger, once such danger had been asserted by the appellant. He was unable to produce any authority for this novel proposition.
6. He referred the Tribunal to the following passages in the October 2002 CIPU Report, which contrary to the Applicant's contention, paint a picture of properly run legal proceedings and rugged judicial independence in the High Court, of which on his own case the appellant has twice been the beneficiary -

"4.3 Judiciary¹

4.3.1. Under the Constitution all citizens are equal before the law and have a right to its protection.

4.3.2. The court system has two levels: The lower courts and the Supreme Court. Both hear civil and criminal cases.

4.3.3. The lower courts consist of magistrates, who are part of the executive branch of government, and session and district judges, who belong to the judicial branch.

4.3.4. The Supreme Court is divided into two sections, the High Court and the Appellate Court. The High Court hears original cases and reviews cases from the lower courts. The Appellate Court has jurisdiction to hear appeals of judgments, decrees, orders, or sentences of the High Court. Rulings of the Appellate Court are binding on all other courts.

4.3.5. Trials are public. The law provides the accused with the right to be represented by counsel, to review accusatory material, to call witnesses, and to appeal verdicts.

4.3.6. State-funded defense attorneys rarely are provided, and there are few legal aid programmes to offer financial assistance. In rural areas, individuals often do not receive legal representation. In urban areas, legal counsel generally is available if individuals can afford the expense. However, sometimes detainees and suspects on Police remand are denied access to legal counsel. Trials that are underway are typically marked by extended adjournments whilst many accused people remain in prison.

¹ Main source: US Department of State, Country Report on Human Rights Practices for Bangladesh in the year 2001 - published February 2002.

4.3.7. People may be tried in absentia, although this rarely is done. There is no automatic right to a retrial if a person convicted in absentia later returns. Absent defendants may be represented by state-appointed counsel, but may not choose their own attorneys, and, if convicted, may not file appeals until they return to the country.

...

4.3.11. In September 1996 the then Government established an "expert committee" within the law ministry to develop proposals to further separate the judiciary from the executive.

4.3.12. The US State Department reported in 2002, that on 21 June 2001, the Supreme Court reconfirmed an earlier 12-point ruling regarding the procedures for a 1997 High Court order to separate the judiciary from the executive. The 12-point ruling declared which elements of the 1997 order could be implemented without requiring a Constitutional amendment. The Supreme Court ordered the Government to implement those elements within 8 weeks.

4.3.13. On 5 August, Ishtiaq Ahmed, (law advisor to the caretaker Government that had been convened to oversee national elections) announced that the judiciary would be separated from the executive by promulgating an ordinance.

4.3.14. In January 2001 the High Court ruled illegal all fatwas, or expert opinions on Islamic law. The ruling resulted in violent public protests. The Supreme Court later stayed the High Court's decision.

4.4 Internal Security²

4.4.1. The Home Affairs Ministry controls the Police and paramilitary forces, which have primary responsibility for internal security. The Police are therefore accountable to the executive.

4.4.2. According to the US State Department, Governments frequently use the Police for political purposes. Police often appear reluctant to pursue investigations against people associated with the ruling Party.

4.4.3. The US State Department goes on to say that there is widespread Police corruption and lack of discipline, that Police officers commit serious Human Rights abuses for which they are seldom disciplined and they routinely employ torture and other abuse during arrests and interrogations. This may consist of threats, beatings and, occasionally, the use of electric shock.

4.4.4. The US State Department report on Human Rights for the year 2001 states that in 1998 the Deputy Commissioner of the Dhaka Police detective branch publicly defended the use of physical coercion against suspects, saying that the practice was necessary in order to obtain information."

7. Counsel accepted that nothing in these excerpts indicated that a fair trial could not be had in Bangladesh. The appellant had been arrested for murder, released and then re-arrested. Surprisingly he had no information about the progress of the case after he left the country, and had been able to apply for a British surgery qualification whilst in prison, and to obtain a passport in 24 hours whilst out on High Court bail on two murder charges, which apparently were not pursued after his departure.
8. The appellant did have lawyers in Bangladesh but had not asked them what the present position was. He was quite clear that the case would only begin again if the appellant were seen to arrive back in Bangladesh. He relied on paragraph 4.4.3 for its indication that the police were corrupt and that the police had invented charges against the appellant.
9. Mr Muhammad suggested that while the appellant was outside the country there was no reason for the murder trials to continue to be processed. The

² Main source: US Department of State, Country Report on Human Rights Practices for Bangladesh in the year 2001 - published February 2002.

Tribunal notes that at paragraph 4.3.7, it is indicated that trials in absentia are possible under Bangladeshi law, though infrequent.

10. Mr Muhammad further argued that there was nothing to suggest that with the change of government to the BNP, there had been any change in police hostility to the appellant, but equally, although the appellant has legal representatives in Bangladesh, there is not a shred of evidence before the Tribunal that it continues.
11. At 5.3.3 to 5.3.5, the CIPU Report indicated that the Jatiya Party had won very few seats and there was no real change. Leave had been given on a very narrow issue. The adjudicator had accepted that the appellant was credible. The whole point of the European Convention on Human Rights was that the international community should not return people to danger and the appellant was entitled to protection.
12. She confirmed that it was the appellant's case that the charges were false and that as a professional man and a doctor he had been humiliated and harassed and if returned would suffer further harassment but be unable to prove his innocence. Pursuing court proceedings cost time, money and harassment, although she did accept that his lawyers had previously been able to obtain bail on both charges.
13. The murder case had ruined the appellant's practice and he had had to go to the High Court get bail. If his financial resources ran out, the appellant would not be able to get bail again. The progress of the case was not consistent with normal process and it would be quite wrong to send the appellant back. He had clearly demonstrated a well-founded fear of persecution and the appeal should be allowed.
14. For the respondent, Ms Banwait said that the adjudicator had applied the objective evidence before her. The contents of paragraph 4.3.5 of the CIPU Report showed a transparent judicial process. The appellant had been able to give evidence in his own defence, which was consistent with the objective evidence.
15. Contrary to the appellant's submissions, the burden of proof to the lower standard lay on the appellant, and not on the Secretary of State. There were no details of current proceedings, of the statutory provision under which the appellant had been charged, or of any intervening interest by the authorities after the election. The adjudicator had reached the right conclusion.
16. There had been a significant change in the political circumstances in Bangladesh such that there would now be no risk on return either of persecution contrary to the United Nations Convention Relating to the Status of Refugees 1951, as amended by the New York Protocol of 1967, or of a breach of the Human Rights Act or the European Convention on Human Rights and Fundamental Freedoms 1950.

17. At paragraph 10 of the determination, it was a puzzle how the appellant had been able to leave Bangladesh if he was subject to bail at the time. On the totality of the evidence and following Devaseelan [2002] UKIAT 000702 paragraph 107-108 (the Tribunal's conclusions on Article 6), the adjudicator's conclusion should be upheld. The Tribunal has considered those passages, but on the particular facts of the present appeal is not assisted by them.
18. In reply, Mr Muhammad said that the appellant had a right to a Bangladeshi passport as a Bangladesh citizen and with bribes and so forth it would not have been difficult to obtain it, even though he was out on bail for murder. There was no restricted list at the airport. People with criminal cases pending were not prevented from leaving the jurisdiction, and the appellant instructed him that there had been no restriction on his bail conditions. For these latter submissions, he briefly took instructions. The Tribunal found the suggestion that any murder suspect was free to obtain a passport and leave Bangladesh without let or hindrance to be one of the more extraordinary features of this appeal, but it does appear that the appellant managed it.
19. Mr Muhammad then confirmed, again after taking instructions from the appellant, that the appellant had applied as early as the last week of February 2001 to sit Part I of his MRCP qualification here in the United Kingdom in the autumn of 2001, which in due course would entitle him to practise here. He saw no difficulty about the fact that this application was apparently submitted while the appellant was in detention for murder, having been arrested on 2nd January in that same year, on the basis that the appellant had not applied for entry clearance to the United Kingdom until May 2001.
20. The Tribunal reserved its determination for postal delivery which we now give.
21. We begin with the burden of proof. It is trite law that it is for the appellant to show (to the requisite standard) that he is at risk of a breach of his human rights if returned to his country of origin, and it follows that Mr Muhammad is wrong to say that the burden of proof is on the Secretary of State.
22. We noted the material facts as set out in the Adjudicator's determination, and which represent the appellant's best case: that the appellant was arrested on 7 January 2001 after an Awami League member was killed in fighting at an Awami League meeting attacked by members of the Jatiya Party. The appellant had been a member of the Jatiya Party for 13 years and was nowhere near the incident, but at his private nursing home in Dhaka that the time.
23. The charge was conspiracy to murder. He was bailed on 18 March 2001, but rearrested after another Awami League death at a demonstration in Comilla the next day. Again, the appellant's lawyer went to the High Court and he was released on bail on 23 April 2001. The same day, the

appellant's house was attacked, and his wife had no hesitation in reporting the attack to the police, though the family complained that not enough had been done about it.

24. The appellant acknowledged that the BNP were now in power but said that he would be just as vulnerable under a BNP government. He has not shown that the BNP have any interest in these false charges.
25. Given that the first charge was for conspiracy to murder, and that two murder charges appear to have been pending since March 2001, the Tribunal is astounded that no indication was given either to the adjudicator or us as to the outcome of the trials of others who were similarly charged.
26. Further, there is no indication from the appellant's evidence or documents that there has been any movement on the alleged claims against him since 27 April 2001, and we do have regard to the change of government in Bangladesh. The appellant's case throughout has been that these were false charges, and the behaviour of the authorities seems to support that contention. If these charges ever existed, they seem to have been dropped.
27. In order to succeed under Article 6 of the European Convention of Human Rights, the appellant must be able to show substantial grounds for believing that there is a real risk a breach of his right to a fair trial. His entitlement to a fair trial is defined in that Convention -

Article 6 – Right to a fair trial

1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

- (a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) To have adequate time and facilities for the preparation of his defence;
- (c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) To have the free assistance of an interpreter if he cannot understand or speak the language used."

28. The country information in the October 2002 CIPU Report meets all of those criteria. Further, this appellant has had the benefit of Counsel, knows what the charge is, and has had more than adequate time and facilities to prepare his defence.
29. The Tribunal considers that the adjudicator very properly found that the evidence which the appellant placed before her, and which he has not

sought to improve for the Tribunal hearing, did not reach even the lower standard applicable for a breach of Article 6. There is simply no evidence of any continuing interest or case against the appellant in Bangladesh today. For that reason, the question of whether this appellant would receive a fair trial on a non-existent charge is simply irrelevant.

30. It follows that the appellant has not demonstrated to the requisite standard that the United Kingdom would be committing any breach of Article 6 in returning him to Bangladesh today.
31. **This appeal is accordingly dismissed.**



J A J C Gleeson
Vice-President