Case No: C5/2007/1318

Neutral Citation Number: [2008] EWCA Civ 799
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
(AIT No: AA/11192/2005)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 10th June 2008

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE DYSON
and
LORD JUSTICE MAURICE KAY

- -

Between:

ZJ (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr B Hawkin (instructed by White Ryland) appeared on behalf of the **Appellant**.

Mr S Kovats (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Dyson:

1. ZJ was born on 11 September 1990. He is a citizen of Afghanistan. He arrived illegally in the United Kingdom on 11 August 2005 and applied for asylum on 16 August.

2. In short, the basis of his claim was that he had a well-founded fear of persecution on the grounds that he was at risk of serious harm if he were to be returned to Afghanistan because his father was a well-known commander of the Taliban and also involved in the Islamic movement. He was at risk because of his father's political activities, not because he was himself a member of any political party or organisation. He also claimed humanitarian protection for the same reasons, on the grounds that his removal would violate his rights under Articles 2, 3 and 8 of the European Convention on Human Rights, ("the ECHR"). By letter dated 12 October 2005 the Secretary of State refused his application for asylum and said that to return him to Afghanistan would not breach his ECHR rights. As ZJ was an unaccompanied minor the Secretary of State did, however, grant him discretionary leave to remain until his 18th birthday. Since this was a period in excess of one year, ZJ had a right of appeal (see section 83 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act")), which he duly exercised.

3. His appeal was dismissed by Immigration Judge Youngerwood on 23 November 2005. Reconsideration was ordered and an appeal was dismissed for a second time by a decision promulgated on 12 March 2007. ZJ appeals to this court against that decision with the permission of Buxton LJ. In summary the account that he gave in his Statement of Evidence form was as follows. His father was initially a member and later a commander in the Islamic movement during the Russian invasion of Afghanistan. When the Taliban gained power he became a commander for the Taliban. When the Taliban were defeated he retreated with his men to the mountains. Thereafter he made secret visits to his family every two or three months. ZJ said that the authorities visited the family home on several occasions asking questions as to his whereabouts. About three months before ZJ left Afghanistan to come to the United Kingdom, the authorities came to the family home. They said that they had found out about the father's activities with the Taliban. They became violent with ZJ's mother. They threatened that if they did not find his father they would kill each member of the family. They then kidnapped ZJ's eldest sister.

4. His father found out what had happened and two days later sent someone to the family home. This man took ZJ to the mountains where he met his father who had set up a base there. ZJ said that he remained in the mountains for three months. During this time he learned that one of his younger brothers had also been kidnapped by the authorities and that his mother and other siblings had left home and gone to stay with a relative. Approximately ten days before ZJ left the country there was a heavy attack on the Hizb-i-Islami in which more than 20 people were killed. ZJ's father did not have the back-

up to carry on fighting. His base had been destroyed. He contacted a friend, as he wanted to send ZJ away as soon as possible. The friend came to call for ZJ and organise his departure. ZJ said that he did not know what had happened to his father. In the United Kingdom he said he had been living with his uncle who looked after him.

5. As I have said, his appeal was heard by Immigration Judge Youngerwood on 23 November 2005. He was 15 years of age at the time. He gave evidence at that hearing substantially in accordance with his SEF and subsequent statements which he made to meet some of the points made by the Secretary of State in the refusal letter. He confirmed that he had a well-founded fear of persecution based on the affiliations of his father and that he would be deemed to support the Hizb-i-Islami even though he did not actually support them or the Taliban. The immigration judge found that ZJ was an "essentially truthful witness" (paragraph 14 of the determination). The immigration judge rejected the case based on imputed political opinion on the grounds of ZJ's age. He then considered an alternative case based on fear of persecution as a member of a particular social group, ie ZJ's immediate family.

6. At paragraph 17 the immigration judge accepted that in view of the kidnap of his sister and younger brother, ZJ was justified in fearing similar treatment were he to return at the current time but he dismissed the appeal based on that alternative case because there was no link between the alleged persecution and ZJ's membership of a family. He held that ZJ's family were not being targeted because they were the family of ZJ's father but because of the actions of the father and the wish of the authorities to apprehend him. The risk would apply to anyone who had knowledge of the father's whereabouts.

7. ZJ applied for a reconsideration on the grounds that the determination was inconsistently reasoned and failed to have regard to the decision in RS (Hizb-i-Islami) v SSHD [2004] UKIAT 00278 ("The RS case"). On 20 December 2006 an order for reconsideration was made. One of the terms of the order was:

> "2. We were asked to rule on whether some of the findings of fact made by the original Tribunal could be preserved. We have decided that it is not possible because the findings of the original tribunal are confused and unclear."

8. The hearing on reconsideration was held on 26 February 2007. Once again ZJ gave evidence. By now he was 16 years of age. He was represented by counsel. Having set out in detail the account given to them by ZJ, the AIT said:

> "26. In this appeal, the appellant claims that he would be at risk if returned to Afghanistan because of the fact that his father was a well-known

commander of the Taliban and also involved with the Hizb-e-Islami Movement. Had the appellant's father been the one seeking asylum in this country, we believe that he would have had a valid claim for asylum bearing in mind his political affiliation, his high profile, and the war currently being raged between the Northern Alliance and the Taliban members and supporters. However in this case we are dealing with a young man who came to this country just before his 15th birthday who had no political involvement whatsoever, who personally has never been involved in any fighting and who claims to be of interest to the authorities solely out of his father's past activities. We note that he has been granted exceptional leave to remain in the United Kingdom due to the fact that he arrived as an unaccompanied minor and this means that he would not be returned to Afghanistan before his 18th birthday in September 2008. Afghanistan is currently in a state of turmoil and anything could happen in that troubled country between now and the date when the appellant's exceptional leave is due to expire. However, at the moment we do not believe that if the appellant were to be returned to Afghanistan in the autumn of 2008, as things are at the moment, he would be at the slightest risk whatsoever. The appellant would be returned to Kabul and there is absolutely no evidence whatsoever to suggest that there would be any interest whatsoever in him arising out of his father's activities. In the first instance, there is no reason why his relationship to his father should come to light and furthermore, there is no evidence to suggest that teenage children of a Taliban commander are of the slightest interest to the current authorities who rule Kabul. Whilst the appellant claims that his sister and brother were abducted in 2005 when the authorities were trying to trace the appellant's father, we do not believe that there is any possibility of this happening in 2008 as things stand at present in Afghanistan, bearing in mind that on the appellant's own evidence the appellant's father has given up his struggle.

We would also mention, that whilst the appellant may have given us a true account of his father's involvement with the Taliban and Hizb-e-Islami, we do not believe that he left Afghanistan when 14 years old, because of his fear of persecution or

ill-treatment as a result of his father's involvement. We say that as we do not believe it plausible that the appellant's father would have arranged for only one of his children, albeit the oldest son, to escape and make his way to the United Kingdom at great expense, rather than to arrange to take all his family to a much nearer country, such as Pakistan. Furthermore, the appellant informed us that when he left Afghanistan, he had no idea as to which country he was travelling. We do not find this to be plausible. He was not a baby when he left Afghanistan, and it is inconceivable that he did not ask whoever was accompanying him as to where he was travelling. The appellant told us that for four days he sat in a car with a driver, in utter silence without knowing where he was heading. We cannot believe that he did not speak to the driver for such a long period of time and that he did not ask where he was going. Furthermore, the appellant informed us that on arrival in London, the driver gave him the mobile telephone number of his uncle. We cannot believe that the appellant travelled without having his own note of the uncle's mobile telephone number and it seems quite clear to us that this appellant left Afghanistan in the hope of building a better life for himself, by travelling to the United Kingdom to join an uncle. We are fortified in this view by the fact that the uncle with whom the appellant claims to be living, did not attend court either to give evidence himself, or to show support to his nephew, the appellant, for whom he now cares.

27. With regards to Miss O'Rourke's submission that it would be unduly harsh to expect this appellant to rebuild his life in Kabul, we note that the appellant would be 18 years of age and not a child, when returned there. The appellant did not give us the impression that he had made any serious efforts to trace his parents and siblings and it could very well be that in Kabul with a minimum of effort, he might be able to trace his family and be reunited with them. Whilst the situation in Kabul may not be ideal and as initially the appellant will not have a family network to support him, it could be that he might have to live in a camp in poor conditions, but there is no evidence whatsoever that those conditions would be unduly harsh. The appellant is a single man who would be in Kabul

> without any previous profile and we do not believe that those conditions would be unduly harsh.
>
> 28. We therefore conclude that whilst the appellant may have given us a true account as to his history in Afghanistan, we do not accept that he would be at any risk whatsoever on his return to the country and furthermore, we do not accept that he has given us a true account as to how and why he left Afghanistan. Accordingly, we do not accept that he has a well-founded fear of persecution in that country and his claim for asylum is therefore dismissed.
>
> 29. Given those conclusions, we also find that the appellant has not shown substantial grounds for believing that he will face a real risk of serious harm in Afghanistan and we therefore conclude that his removal would not cause the United Kingdom to be in breach of his obligations under paragraph 339C of the Immigration Rules.
>
> 30. With regards to the appellant's claim that his removal would be a breach of Articles 2 and 3 of the ECHR, the above conclusions do not support his claim and we do not accept that his removal would be in breach of either these two Articles.
>
> 31. With regards to the claim under Article 8, this was not forwarded by Miss O'Rourke at the hearing and we do not believe that there would be a breach of Article 8 of the ECHR to return the appellant to Afghanistan at this point in time for the same reason as given by the respondent in the refusal letter."

The grounds of appeal

9. There are six grounds of appeal. They are that the AIT erred in: (1) deciding the claim by reference to a date other than the date of the hearing;
(2) not deciding the appeal on the basis of the Immigration Judge's finding that ZJ was an essentially truthful witness;
(3) failing to follow the guidance in relation to unaccompanied children given in the Chief Adjudicator's Guidance Note No 8;
(4) failing to take into account and apply the guidance given in the RS case;
(5) failing to consider the objective evidence concerning the current situation in Afghanistan, including the COI report dated 16 October 2006; and
(6) in the light of ZJ's age and their finding that his father would have a valid claim to asylum, failing to consider whether ZJ's own claim engaged the Refugee Convention reasons of "Membership of a particular social group".

The first ground: the wrong date.

10. It is not in doubt that the tribunal must consider whether a hypothetical refoulement at the date of the hearing would give rise to a well-founded fear for one of more of the Refugee Convention reasons: see Sections 84(1)(g)(iii) and (3) and 85(4) of the 2002 Act. That also reflects the position as it was before the 2002 Act came into force: see Ravichandran v SSHD [1996] Imm AR 97, per Simon Brown LJ at pages 112 to 113.

11. Mr Hawkin submits that the AIT erred in considering whether ZJ had a well-founded fear of persecution in September 2008, when his exceptional leave to remain expired, and not as at the date of the hearing. I accept the submission of Mr Kovats in his skeleton argument that the AIT did not apply the wrong date. At the very beginning of the section of the determination in which they expressed their findings they said:

> "In this appeal, the onus is on the appellant to show that *as at the date hereof* there are substantial grounds for believing…[Emphasis added]"

12. In paragraph 25 they used the phrases "at the moment", "as things are at the moment", "as things stand at present." In the same paragraph they said that there was no evidence to suggest that teenage children of a Taliban commander "are of the slightest interest to the current authorities who rule Kabul [emphasis added]". These passages show that the tribunal were considering the situation as it was at the date of the hearing. As Mr Kovats says, the references to September 2008 were an acknowledgement that ZJ would not in fact be refouled before that date. They do not indicate that, contrary to the impeccable self-direction at the beginning of paragraph 24, the AIT applied the wrong date in the following paragraph. In any event, even if the AIT had applied the wrong date the error would not have been material. It is inevitable that they would have reached the same conclusion if they had assessed the claim as of the date of the hearing. The evidence before them related to the situation in Afghanistan no later than the date of the hearing. It was on the basis of that evidence that they reached their conclusion.

The second ground: ZJ's credibility

13. Although on the reconsideration the AIT found ZJ to be essentially credible as a witness, they said at paragraph 26 that they did not believe that he left Afghanistan because of his fear of persecution or ill-treatment as a result of his father's involvement. Mr Hawkin submits that the reconsideration should have taken place on the basis of the finding of the Immigration Judge that ZJ was an essentially truthful witness and the tribunal should not have made the finding at paragraph 26 to which I have just referred.

14. In support of his submission Mr Hawkin relies on HF (Algeria) v SSHD [2007] EWCA Civ 445, in particular paragraphs 14, 15,

17 and 18 of the judgment of Carnwath LJ. In the present case reconsideration was ordered on the explicit basis that none of the findings made by the Immigration Judge was to be preserved. Mr Hawkin submits that paragraph 2 of the order of 20 December 2006 was unreasoned and should not have been made. ZJ, he submits, should not have been deprived of the benefit of the credibility findings made by the Immigration Judge.

15. I do not find it necessary to express a conclusion on this ground of appeal because, even if there were substance in the criticism made by Mr Hawkin, it could make no difference to the outcome of this appeal. The AIT dismissed the appeal, not only because they rejected ZJ's case of subjective fear, but also because at paragraph 25 they found that there was no objective basis for such a fear. For reasons that I shall explain paragraph 25 is unassailable.

The third ground: the Chief Adjudicator's Guidance Note No. 8.

16. The Guidance Note No 8 gives guidance to adjudicators and now immigration judges as to how they should deal with appeals by unaccompanied children under the age of 18 seeking asylum. Paragraph 5 gives the following advice in relation to the assessment of evidence:

> "5.1 In assessing the evidence of a child, it should not be assumed that the child does not have a well-founded fear of persecution, merely because they do not have sufficient maturity to have formed a well-founded fear. (UNHCR Handbook on Procedures for Determining Refugee Status, Geneva, 1992, paragraphs 213-219).
>
> 5.2 It should be borne in mind that the younger a child is, the less likely they are to have full information about the reasons for leaving their country of origin, or the arrangements made for their travel.
>
> 5.3 Depending on the maturity of a child and the appropriate weight which can be attached to their evidence, the emphasis might be upon documentary and expert evidence, rather than the oral evidence or statement of the child.
>
> 5.4 The assessment of the well-foundedness of the child's fear 'may call for a liberal application of the benefit of the doubt' (UNHCR Handbook, paragraph 219, *Jatikay* (12658) 15 November 1995 (IAT))

17. Mr Hawkin submits that the AIT erred in failing to apply this guidance. They should have referred to it expressly but did not. Further they failed to comply with paragraph 5.1 of the guidance. This is demonstrated, he

submits, by the first sentence of paragraph 26 of the determination where the insertion of the words "when 14 years old" indicates that the AIT made the very assumption which is warned against by the guidance.

18. I do not accept that the inclusion of the words "when 14 years old" shows that the AIT were assuming that ZJ did not fear persecution because he was too young to have such a fear. The reference to his age is readily explicable by the fact that his age was unquestionably relevant to whether he had such a fear or not.

The fourth and fifth grounds: the RS case and other country material.

19. It is convenient to take these two grounds together as Mr Hawkin did. As appears from paragraph 7 in the RS case, permission to appeal was granted in that case:

> "so the Tribunal can consider generally the evidence relating to risk on return for members or former members of the Hezbe Islami. Since Dr Lau is to be called, the hearing will be listed in London."

20. The AIT in that case heard evidence from Dr Lau who had expert knowledge of the conditions in Afghanistan. They found Dr Lau to be "an impressive, authoritative and careful expert witness." They gave considerable weight to his opinions: see paragraph 11 of the determination. At paragraph 18 they said:

> "In a country where the rule of law has broken down and there is no realistic prospect of an individual establishing his innocence through due process, where there are incentives to detain and ill-treat those suspected of involvement with Hezbe Islami in the hope of obtaining information which may lead to senior wanted men and enormous rewards, there is a real risk that not only those who are genuinely active for Hezbe Islami but those suspected of such involvement, past and present, face similar risks"

21. The RS case was analysed by the Court of Appeal in R (Iran) & Ors v SSHD [2005] EWCA Civ 982; [2005] INLR 633. At paragraph 152 of the judgment of the court, the court said that, although the RS case was not formally treated as a Country Guidance decision, it informed all future decisions taken by the AIT about the risks facing those formerly associated with the Hezb-i-Islami if they were returned to Afghanistan.

22. Mr Hawkin also relies on the COI report dated 16 October 2006 which, so far as material, provides:

> "11.94 Notes on Afghanistan presented on 28 June 2006 at a Country of Origin Information Conference… stated that Hezb-i-Islami, like most Afghan political groups, were known to recruit by way of family connections.
>
> 'Current activists will approach former members, perhaps right up to the age of 45-50 years, with a view to asking them to collaborate with political or terrorist activities. The security services (NSD) are aware of this policy and try and keep track of this progress. The NSD have stated their ambition is to have an informant in every village but this remains an ambition due to budget constraints and to the difficulty of recruiting in areas of the country where the population is hostile.
>
> The security services in communist times enjoyed significant resources and strong intelligence, but now have to rely more exclusively on more basis methods. Physical beatings are common to try and obtain information both within the NSD and the police. Occasionally deaths in custody are reported. Those formerly associated with the Hezb are singled out for harassment, either to obtain intelligence or simply to intimidate them into avoiding future associations -- the message being sent is that: 'We are with the government, we can hurt you.'"

23. Mr Hawkin submits that the AIT failed to have regard to any of this guidance. If they had done so they would, or at least might, have arrived at a different conclusion. Mr Kovats submits that the RS case was not a Country Guidance case. Moreover it has been superseded by PM & Ors v SSHD (Kabul Hezb-i-Islami) Afghanistan [2007] UKAIT 00089: see paragraphs 140 and 146 of that decision.

24. The PM case was heard on 11 April 2007, that is to say a few weeks after the decision in the present case was promulgated. Strictly speaking, therefore, it did not represent the published Country Guidance extant at the time of the decision. I am content to proceed on the basis that the passage from the RS decision cited in R (Iran) was to be regarded as the relevant guidance to be applied by the AIT in the present case. It is important to note that the passage in paragraph 18 of the RS case speaks of those who are at risk as being not only those who are not genuinely active but also "those suspected of such involvement past and present". But ZJ did not claim to have been involved with Hezb-i-Islami or that he was suspected of such involvement. His claim was that he was of interest to the authorities "solely out of his father's past activities". There is nothing in the RS case which supports the

view that a person is at risk of harm at the hands of the authorities by reason only of the fact that he or she is a member of the same family as a person who is at risk of persecution for a Refugee Convention reason.

25. As Maurice Kay LJ pointed out in the course of argument, the opinion of Dr Lau which formed the basis of the decision in RS was concerned with the position of current and former members of Hezb-i-Islami. It was not concerned with the position of children of members of that organisation who might be at risk by reason only of their being the children of such members. The same applies to the Danish report which was considered by the AIT in the RS case. That explains the language in which paragraph 18 of the determination was expressed. In my view, the AIT in the RS case was not saying anything about the risks faced by children of current or former active members of Hezb-i-Islami. The same point can be made in relation to the COI report of 16 October 2006. The key passage in this report is:

> "Those formerly associated with Hezb are singled out for harassment…"

26. Here too there is nothing to suggest that the children of those currently or formerly associated with the organisation are at risk of persecution on that account. I would therefore reject Mr Hawkin's submission that the AIT were in error in failing to refer to the RS case or the COI report. There was nothing in either document which was sufficiently relevant to require analysis or comment. In my judgment, the central reason why this appeal must be dismissed is that the AIT's findings in paragraph 25 cannot be impugned. In that paragraph the AIT made a clear finding that there was no objective basis for a fear of persecution because if ZJ were returned to Kabul there was no evidence to suggest that there would be any interest in him arising out of his father's activities. The AIT gave two reasons for this conclusion. The first was that there was no reason why his relationship with his father should come to light. The second was that there was no evidence to suggest that teenage children of a Taliban commander were of interest to the current authorities. These were disjunctive reasons. Each was sufficient to justify the conclusion. There is no direct assault on either of them in the Grounds of Appeal or Mr Hawkin's skeleton argument. In his oral argument he sought to rely on the RS case as showing that these two reasons were not open to the AIT on the material that was before them. In my view, however, there is nothing in the RS which even begins to cast doubt on either of the two reasons given by the AIT for their central finding. As I said, RS is not a case about persons who are in the position of ZJ. The findings in paragraph 25 are fatal to this appeal.

The sixth ground

27. I confess that I did not fully understand this ground of appeal. Insofar as any criticism is made of the AIT on the basis that the appeal should have succeeded on the footing that ZJ was a member of his father's family and that the family was a social group, I would reject it. No such case was advanced before the AIT. It cannot now be raised as a ground of appeal to this court.

Conclusion

28. For the reasons that I have given, I would dismiss this appeal.

Lord Justice Mummery:

29. I agree.

Lord Justice Maurice Kay:

30. I agree.

Order: Appeal dismissed