Case No: C5/2008/0495

Neutral Citation Number: [2008] EWCA Civ 899
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/08751/2006]]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 1st July 2008

Before:
THE CHANCELLOR OF THE HIGH COURT
(SIR ANDREW MORRITT CVO)
LADY JUSTICE ARDEN DBE
and
LORD JUSTICE DYSON

- -

Between:

BM (IRAQ) **Appellant**

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr P Nathan (instructed by Duncan Lewis & Co) appeared on behalf of the **Appellant**.

Mr P Patel (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Dyson:

1. The appellant is an Iraqi national. He is now 30 years of age. He came to the United Kingdom in January 1994 and was granted exceptional leave to remain for one year. Following various extensions on 21 May 2001 he was granted indefinite leave to remain. On 25 September 2001 he was convicted of obtaining money by deception and sentenced to 18 months' imprisonment. On 9 August 2005 he was convicted of persistently using a public telecommunications system causing annoyance, inconvenience and needless anxiety. On 2 November 2005 he was convicted on three counts of domestic burglary, five counts of obtaining property by deception and one count of handling stolen goods. He was sentenced to three years' imprisonment.

2. On 6 July 2006 the Secretary of State served him with notice that he intended to deport him on the grounds that his presence was not conducive to the public good. At the release date, 27 November 2006, the appellant was detained pursuant to paragraph 2(2) of Schedule 3 to the Immigration Act 1971. We have been told that he has recently been released from detention. The reason why he has not yet been deported is that at all material times the Secretary of State considered that it was too dangerous to escort the appellant to Baghdad and, so far as I am aware, that continues to be the position.

3. He appealed against the decision to deport him. His appeal was dismissed by the AIT (Immigration Judge Ievins and Mrs Ravenscroft) by a decision published on 3 April 2007. On 26 April a senior immigration judge ordered the reconsideration. The decision was upheld on reconsideration by Senior Immigration Judge Chalkley, on 30 October 2007.

4. The appellant sought permission to appeal to this court on two grounds. Laws LJ granted permission to appeal on the first ground, which challenged the decision of the Senior Immigration Judge on reconsideration to reject the appellant's submission that the AIT's treatment of the expert evidence of a Julia Guest was unlawful.

5. The second ground of appeal was that the appellant should be allowed to raise a new point, the humanitarian protection point, based on paragraph 339C of the Immigration Rules and Article 15(c) of EU Directive 2004/83/EC. Laws LJ refused permission in relation to the humanitarian protection point on the grounds that it was new and should be put to the Secretary of State as a fresh claim. The appellant now seeks permission to raise as a third ground of appeal the argument that the Secretary of State's initial decision to deport him was "not in accordance with the law" because it was not in accordance with the Secretary of State's policy in force at the time the decision was made.

6. I shall start, however, with consideration of the ground of appeal for which permission had been granted. In support of his appeal to the AIT, the appellant relied on a report from Ms Guest. She was a journalist who had spent some time in Iraq. She produced a report entitled "Risk of Return to

Iraq for the Appellant". The following is a summary of the material parts of the report:

> "The appellant left Iraq at the age of 16 and claimed to have poor Arabic skills and a lack of local knowledge." (paragraph 1)
>
> "From the letters that his statements produced the appellant would appear to have no close family members remaining in Iraq. It was also evidence that he came from an extremely wealthy family which local people will recall. (paragraph 3)
>
> "Due to his lack of local knowledge and language skills the appellant will be treated with great suspicion by local people if they failed to identify his family name. It could result in his detention by the security forces for interrogation on the basis that he was a spy from another Shia group or a Sunni group or US or British forces." (paragraph 4 and 11)
>
> "He would also be at risk of attracting the attention of any number of kidnapping gangs who operated all over Baghdad for profit. His outside connections and poor Arabic would make people immediately aware that he may have relatively wealthy connections outside Iraq who would have to pay a large ransom to secure his release." (paragraph 12)
>
> "His brother had been released recently by kidnappers for a very large sum. This may have been due to local knowledge of the family wealth and would cause a precedent to be set for the value of kidnapping members of the appellant's family and lead to a very high ransom being set" (paragraph 13)

7. The appellant gave evidence before the AIT. In his Notice of Appeal to the AIT he had said that members of his family, including his mother, had been killed in Iraq. His mother was in fact alive and gave evidence on his behalf. The AIT said at paragraph 39 "that this significant lie caused them to have the gravest doubts about his credibility generally".

8. He told the AIT that he came from a wealthy family, which owned at least four houses: see paragraph 13. His mother's evidence (paragraph 28) was that when her husband had been alive the family had owned more than four houses as well as buildings and factories but at the present time she had only one house. The mother was accepted as a credible witness by the AIT: see paragraph 46.

9. The appeal was dismissed by the AIT under paragraphs 339 C and 364 of the Immigration Rules and on human rights grounds, Articles 3 and 8 of the European Convention on Human Rights. It was the appellant's case that he would be particularly at risk if returned to Iraq because his remaining family there were intending to leave. He would be a single young man being returned to Baghdad. Further he would be identifiable by his accent. He relied on the expert report of Ms Guest.

10. At paragraph 43 of the determination, the AIT rejected the evidence given by the appellant's brother that he had been kidnapped and tortured. It is not suggested that the AIT were not entitled to reject that evidence. They said:

> "The appellant's brother, who now calls himself Jal Makai, has made two statements. In those statements he said that he was kidnapped by persons unknown in 2003 and then, in the later statement, in 2004. He does not explain why he has changed the dates of his story and when the Home Office approached the British Embassy in Baghdad for corroboration the Embassy said they were unable to help. It has been open throughout to the appellant's solicitors to make their own enquiries of the British Embassy. Jal Makai, instead of giving evidence in support of his statements, has chosen to go to Dubai. He does not explain why he changes the year in which he says he was kidnapped. We do not believe what he says in his statements."

11. The AIT also said at paragraph 43 that they did not believe that the appellant's Arabic was rusty and that he would be identifiable from his speech as coming from the United Kingdom. The fact that it might be known, such as by people who remained in his locality, did not of itself place the appellant at any more risk than any other young Shia Muslim male in Iraq.

12. At paragraph 44 they concluded:

> "This appellant is no more at risk than anyone else. Were we to find that this appellant was at risk of Article 3 ill-treatment, that would be to say that any inhabitant of Iraq was at such risk. If it was the case that any inhabitant of Iraq who was fortunate enough to leave would be at risk of Article 3 ill-treatment if returned, then we should not flinch from such a wide ranging conclusion, but we have considered the objective evidence with care and we do not consider that that is the case. Article 3 has a high threshold. We do not find that the appellant has established that there is a real risk that he, who is not credible, and who cannot be distinguished in

> any significant way from any other inhabitant of Iraq, would face torture or inhuman or degrading treatment or punishment. He would live in a violent disordered country on the verge of civil war but, harsh though it is, that is not enough to engage Article 3."

13. In reaching the conclusion that the appellant was not at risk of Article 3 ill-treatment the AIT said that they had taken into account the report of Ms Guest. At paragraph 45 they said:

> "While the report is unsigned, we accept it to be her opinion and that she does have some qualifications as a journalist to express an opinion. She said that it appears the appellant has no close family members remaining in Iraq. That is not the case. Various family members have travelled back and forth in and out of Iraq in recent times and his mother still owns a house in Baghdad. He would therefore have up-to-date information about Iraq and how to live and behave there. The appellant we accept comes from the Al-Karada area of Baghdad which Ms Guest told us is patrolled by Shia Muslim groups. The appellant is himself Shia. The appellant from the knowledge of his family would know about these groups. He has family to support him in Iraq and, inasmuch as Ms Guest's opinion is based upon what the appellant had said, we find it to be of very little weight, the appellant, his sister Ban and his brother Jal not being credible."

14. The appellant applied for reconsideration of that decision. He contended that the AIT had erred in law in failing to take proper account of the Guest report:

> "through making a finding based on no evidence with regard to the appellant's use of Arabic and failing to take into account the mother's evidence that the family was wealthy."

15. Senior Immigration Judge Freeman ordered reconsideration on the ground that there might be an arguable point as to whether paragraph 45 was an adequate treatment of the Guest report on the specific question of risk to the appellant as someone evidently just returned from a western country. On the reconsideration, Senior Immigration Judge Chalkley decided that the AIT did not err in its treatment of the Guest report. The submissions made on behalf of the appellant were that the AIT had failed to give the Guest report the weight that it deserves. In particular:

    1) They failed to deal with the point made by Ms Guest that the appellant's outside connections and poor Arabic would make people immediately aware

that he might have relatively wealthy connections, thereby putting him at risk of being kidnapped; and

2) They failed to give proper reasons for rejecting his evidence that his Arabic was rusty.

The Senior Immigration Judge said at paragraph 17 that it appeared that Ms Guest had been influenced by the fact that the appellant's brother had been recently kidnapped but the extent of that influence was not clear. The AIT's rejection of the brother's evidence called into question the weight that could be attached to the Guest report.

16. The Senior Immigration Judge then said:

> "19. In making his submissions to me, Mr Naumann [the solicitor then representing the appellant] accepted that his challenge was really one of the panel not having given sufficient weight to the report. That, with respect, is simply not justified. The report itself failed to comply with AIT Practice Directions. It was not even signed by the author. The weight to be attached to the report was entirely a matter for the panel. They have explained that they have taken it into account, but have noted that Ms Guest has reported that the appellant has no close family members remaining in Iraq. That is not, in fact, the case.
>
> 20. I accept that Ms Guest was relying on false information provided by the appellant and offered her opinion in good faith. Nonetheless it is true, as the Tribunal pointed out, that various family members of the appellant had travelled back and forth, in and out of Iraq in recent times and the appellant's mother does still own a home in Baghdad. The Tribunal were perfectly entitled, in as much as Ms Guest's opinion was based on what the appellant had said, to attach very little weight to it. I have concluded for all these reasons that the Tribunal did not err in its treatment of this report. The decision of the panel will stand."

17. On behalf of the appellant, Mr Nathan submits first that the rejection by the AIT of the appellant's evidence that his Arabic was rusty was not reasonably open to it on the evidence. The AIT gave no reasons for this conclusion save that it did not find that the appellant a credible witness: see paragraph 43. Mr Nathan submits that it is a reasonable inference that someone who has spent more than half his life in the United Kingdom since leaving Iraq would, as a result, speak Arabic with a discernibly different accent from and/or less fluently than locals in Iraq.

18. Secondly he submits the AIT failed to take account of the appellant's mother's evidence that the family was wealthy so that, as indicated in the Guest report, the appellant would be at risk of being kidnapped. Thirdly the AIT failed to take account of the fact that someone who had been away from Iraq for about 14 years would not be able to insinuate himself back into the local population without being noticed.

19. I would reject these submissions. In my judgment the Guest report makes two main points. The first is that the appellant would be treated with great suspicion by local people by reason of his lack of local knowledge, lack of close family members within Iraq and lack of language skills and that, as a result, he would be at risk of ill-treatment at the hands of the security services and/or militia groups. The second point is that as a person who is or is perceived to be a member of a wealthy family, he is at risk of being kidnapped. At paragraph 12 of the report Ms Guest seems to make a link between the two points because she says that the appellant's outside connections and poor Arabic would make people immediately aware that he may have relatively wealthy connections.

20. In my view the AIT were entitled to reject the appellant's evidence that his Arabic was rusty. The only evidence to this effect came from the appellant himself. It could have been corroborated by other evidence, most notably from his mother. The AIT were entitled to regard the appellant, a man who was prepared to say that his mother was dead in order to further his case, as a dishonest and incredible witness. I do not read the AIT as saying that they disbelieved everything that he said. That would have been wrong, but it is not what they did. For example they accepted that he was a Shia Muslim, apparently from an Iranian background on his father's side. But they were entitled to disbelieve any controversial evidence that he gave unless there was good reason to believe it. They knew that the appellant had left Iraq when he was about 16 years of age. During the first 16 years of his life there, he had spoken Arabic as his mother tongue. They were entitled to find that he spoke Arabic with his family after coming to the United Kingdom. In these circumstances they were entitled to conclude that his Arabic would be sufficiently fluent and free from traces of a foreign accent for his absence abroad not to be detectable from his language alone. There is no error of law here and the Senior Immigration Judge was right so to conclude.

21. The other basis for Ms Guest's conclusion that the appellant would attract suspicion and would be targeted was that he had no close family members in Iraq. But the AIT found that:

> "45…Various family members have travelled back and forth in and out of Iraq in recent times and his mother still owns a house in Baghdad. He would therefore have up-to-date information about Iraq and how to live and behave there… [The appellant]… has family to support him in Iraq and, inasmuch as Ms Guest's opinion is based upon what

> the appellant had said, we find it to be of very little weight"

22. As regards the risk of kidnapping it is clear that Ms Guest was much influenced by the evidence that the appellant's brother had been kidnapped (see paragraph 13 of the report) as well as perhaps by her belief that the appellant came from "an extremely wealthy family": see paragraph 3. It is true, as pointed out by Mr Nathan, that at paragraph 12 of the report Ms Guest uses the phrase "relatively wealthy connections" rather than "an extremely wealthy family". But the AIT rejected the brother's account of kidnap and the mother's evidence could hardly be said to support that the family was extremely wealthy. In my view, once the prospect of the appellant attracting attention is put to one side, and I have given my reasons for saying that it should be, there is no reason to suppose that the appellant would be at risk of being kidnapped. In my view the AIT were fully entitled to reach the conclusion they did on this issue and no error of law has been identified in their reasoning.

23. For these reasons I would dismiss ground 1 of the Grounds of Appeal.

Lady Justice Arden:

24. I agree.

Sir Andrew Morritt:

25. I also agree

Order: Appeal dismissed