



Neutral Citation Number: [2009] EWCA Civ 61

Case No: C5/2008/1220

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Asylum and Immigration Tribunal
AA/07690/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2009

Before:

THE CHANCELLOR OF THE HIGH COURT
(SIR ANDREW MORRITT)
LORD JUSTICE LONGMORE
and
LORD JUSTICE HOOPER

Between:

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

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Edward Nicholson (instructed by Wilson & Co Solicitors) for the Appellant
Ms Samantha Broadfoot (instructed by the Treasury Solicitor) for the Respondent

Hearing date: 29/01/2009

Judgment
As Approved by the Court

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LORD JUSTICE HOOPER:

1. This is an appeal from the decision of IJ McDade, on second stage reconsideration, dismissing the appellant's appeal from the decision of the respondent to refuse his application for refugee, human rights and humanitarian protection.
2. The application for permission to appeal was refused on the papers by Scott Baker LJ and granted after an oral hearing by Sedley LJ.
3. At the conclusion of the hearing the Chancellor announced that the appeal would be allowed and the case would be remitted to the Asylum and Immigration Tribunal. The Chancellor also said that we wished to consider and put into writing the basis on which the matter should be reconsidered.
4. The appellant was born on 1 February 1985 and is a citizen of Afghanistan. He arrived in the UK on 28 March 2007, having left Afghanistan two days before.
5. The original appeal had been heard by IJ Parker in July 2007. He also dismissed the appeal.
6. On 3 September SIJ Chalkley wrote that he believed that the decision of IJ Parker may be flawed and he ordered reconsideration.
7. Second stage reconsideration was then ordered by DIJ Olson who wrote on 18 December:

“It was agreed by the parties that [IJ Parker's decision] contained material errors of law in addition to the obvious typographical errors ... The IJ made no clear findings of who was responsible for the attack on the shop and the risks the Appellant might face as a target for revenge. As only one credibility issue was taken by the Respondent which the IJ found in the Appellant's favour the credibility findings shall stand but all other issues are to be decided.”

8. I start therefore with the decision of IJ Parker.
9. IJ Parker in paragraph 17 wrote “Essentially the relevant facts are as follows”. He continued (I have left the typographical errors uncorrected):

“18. The appellant is one of the three surviving children of Abdullah Shah, Who was executed by the current government of Afghanistan on 20th April 2004. His father joined the Mujahadeen group Itihad-e-Islami in 1979 and fought against the occupation of Afghanistan by the Soviet Union. The leader of the Itihad-e-Islami is and was Professor Ustad Abdul Rasual Sayyaf. In 1996, four years after the Soviet Army had been defeated by Mujahadeen forces, Abdullah Shah joined Hezb-e-Islami after its leader, Gulbuddin Hekmatyar, offered him a more senior position which he held under Ustad Abdul Rasual Sayyaf. Also in 1996 the Taliban successfully entered Kabul, forcing the various Mujahadeen factions including that of

Abdullah Shah to regroup of the north of Kabul as the Northern Alliance.

19. In August of 2001 the appellant's mother died. In April 2002 Abdullah Shah was arrested by the current government of Afghanistan. In October 2002 he was convicted of several murders and sentenced to 20 years imprisonment. However in September 2003 this sentence was reviewed and Abdullah Shah was sentenced to death.

20. During the two years of their father's detention the appellant and his brothers sold all of his properties. They needed cash to fight Abdullaj Shah's legal case and they also wished to live in rented accommodation rather than risk being easily located by their father's enemies. On 28th May 2004 the appellant and his younger brother travelled to the Cheltan area of Paghwan to commensurate their father on the fortieth day after his death. Their elder brother Nazir Ahmed remained at the family home in Kabul. While the appellant and his younger brother Ahmed Shah were in Cheltan they learnt that the house in Kabul had been raided by the security forces and that Nazir Ahmed had been shot dead. Various documents and photographs belonging to the appellant's father had been removed from the house, including photographs showing the appellant's father with Professor Usad Abdul Rasul Sayyaf. The security forces made enquiries of the neighbours about the whereabouts of the appellant and his younger brother. Upon hearing this news the appellant and his young brother fled to Kama in Nangarhar province where they stayed with an old friend of their father's Moallem Khudaidad.

21. There the appellant and his brother lived clandestinely for two years. In April 2006 the appellant was advised by Moallem Khudaidad that by that time it was safe for the appellant to set up a shop in Jalalabad selling mobile phone. The appellant ran the business in Moallem Khudaidad's son Abdul Sattar. Mindful of the risk which persisted from Professor Ustad Abdul Rasual Sayyaf and from his contacts within the Afghan security forces the appellant himself visited the shop infrequently staying only for short periods. However in approximately October last year the shop was raided by three men when the appellant was not there. Abdul Sattar was interrogated as to the appellant's whereabouts. He was severely beaten up when he refused to provide this information.

22. Upon discovering what had happened to Abdul Sattar the appellant and his brother left Kama and moved to the Behsod area of Nangarhar province. There they stayed with a friend of Moallem Khudaidad, Engineer Boyhood for three months. During this time the appellant decided that for safety he must

seek international protection. He returned to Kama and stayed there until leaving Afghanistan on 27th March 2007.

10. In the next paragraph, 23, the IJ said:

“No issue is taken with the appellant’s account of the raid on his home in Kabul after his father’s execution in which his elder brother was killed and potentially incriminating material seized.”

11. According to a report of a Dr Antonio Giustozzi, which the IJ appears to have accepted, the Itihad-e-islami Group were involved in large scale massacres during the civil war and could probably be described as the worst behaved militias of the civil war. In particular they carried out big massacres of Hazaras in West Kabul and, according to Dr Giustozzi, “Abdullah Shah is known as one of the commanders directly involved in the killing.”

12. A little later in his decision, IJ Parker had a heading: “My findings as to Fact and Credibility”. Under that heading he gave an uncontentious account of the recent history of Afghanistan. He then inserted a heading “Case Law” and after referring to two decisions of the IAT, he appears in paragraph 30 to have accepted the credibility of the appellant. He then continued:

“30. ... I ... find as a fact that the appellant’s father was Abdullah Shah and the reports regarding his life and circumstances are well set out. The appellant’s mother died in 2001 and I would also find as a fact that the appellant’s brother died. The appellant’s brother was killed in 2004 and the appellant did not leave until March 2007.”

13. The IJ did not accept that there was “a risk profile” for the appellant. He did say in, paragraph 31, that “the attack on the shop may have had no connection to the security forces” and, in paragraph 32, that “[t]he older brother may have been killed for actions of his own and resisting the security forces in the performance of their duties.”

14. There were no other findings of material facts. It is not, therefore, surprising that reconsideration was ordered.

15. I turn to the decision under appeal, that of IJ McDade. The appellant did not give evidence but relied upon the findings of IJ Parker.

16. IJ McDade summarised the appellant’s case:

“4. ... The Appellant asserts that he is at risk from the authorities at the behest of Abdul Rasul Sayyaf whom the Appellant’s father had fought under as a commander of a number of Mujahideen groups. The Appellant asserts that his father was executed quickly to prevent his father from implicating Sayyaf in murders in which the latter was also complicit. The Appellant states that Sayyaf is now targeting him as he did his brother who was killed in the family home in

May 2004. A second element to the Appellant's claim is that because of his father's actions he is at risk of revenge from the bereaved relative of the individuals his father had killed. ”

17. IJ McDade went on to say that he “finds the Appellant's evidence to be wholly speculative” and “it does not stand up to logical analysis”.
18. IJ McDade refused to accept that Sayyaf had any reason to fear that the appellant's father would implicate him. If Sayyaf had had such a fear, it is highly likely that the appellant's father would have been killed earlier. IJ McCade said:

“5. ... However it is notable that as far as the appellant's father was concerned he was not the victim of an assassin's bullet which would have removed him from being any risk to Sayyaf. Instead his father underwent a judicial process which culminated in his being executed some two years later although initially he was given a sentence of imprisonment. By the appellant's own account he and his brother sold property partly to obtain ‘the funds to fight our father's case in the court’. This appears to be indicative of a proper judicial process. In any event it does not appear to be disputed that the appellant's father was indeed guilty of the murders with which he had been charged. I hold that if there had been any issue about the appellant's father implicating Sayyaf and this was something Sayyaf was initially concerned about it is highly likely that the appellant's father would not have been given the opportunity of due process but instead would have been killed long before he was arrested.”

19. A little later the IJ said:

“5. ... In page 13 of the appellant's witness statement he says ‘I believe that my father was eliminated by powerful people like Ustad Sayyaf and members of the Shura-e-Nezar in order for my father not to be able to incriminate them. The execution of my father was a plot, organised by members of Shura-e-Nezar and Ustad Sayyaf and his men’. There is simply no evidence that these assertions of the appellant's have any foundation in fact. The more prosaic and far more likely explanation is that the appellant's father, having been responsible for a number of atrocities, was simply brought to justice by the authorities. No plot was necessary or I believe reasonably likely to allow justice to take its course.”

20. As to this finding Mr Nicholson for the Appellant refers us to an Amnesty International statement at the time of the execution, a statement to which the IJ's attention was specifically drawn in the appellant's written outline submissions. According to the contemporaneous Amnesty statement:

“Amnesty International fears that Abdullah Shah's execution may have been an attempt by powerful political players to

eliminate a key witness to human rights abuses. During his detention, Abdullah Shah reportedly revealed first hand evidence against several regional commanders currently in positions of power against whom no charges have been brought. They are among the scores of other Afghans implicated in serious crimes, including war crimes and crimes against humanity. The lack of a fair and independent mechanism to deal with such crimes means that most of the accused have not been brought to justice and remain in positions of power from which they continue to threaten the Afghan population. This is of particular concern in the context of upcoming elections due to be held in September 2004 when it is believed that several of these individuals will be standing for political office.”

21. Mr Nicholson also referred the IJ to a passage in the report of Dr Giustozzi:

“[Abdullah Shah] ...was quickly tried and sentenced to death. Karzai authorised the execution, which took place in secret in April 2004. The trial occurred without a defence lawyer, which is normal in Afghanistan, and as a result the witnesses were not cross-examined. The Chief Justice, Fazel Haq Shinwari, stated that Shah should be executed even before the end of the trial. This series of unusual circumstances led some observers and specialists to comment that powerful political players might have wanted to get rid of Abdullah Shah as quickly and as discreetly as possible in order to avoid the revelation of embarrassing secrets about the massacres of the 1990s. In prison Abdullah Shah was interviewed by Patricia Gossman, the leading transitional justice specialist on Afghanistan. He admitted to her his guilt in the massacres of which he was accused, but also stated that he had been acting under orders from Sayyaf. He might well have been trying to diminish his responsibilities, given that his penchant for brutality is demonstrated by his treatment of his wives, but Sayyaf’s role has often been alleged in the massacres, not least because several of his commanders were involved and other militias hardly at all. The fact that Shinwari is also a member of Ittehad and a close associate of Sayyaf also contributes to make the whole affair murkier. It is also worth noting that Sayyaf is one of the closest allies of President Karzai.”

22. Mr Nicholson submitted that the failure to consider these two passages which, on the face of them, offered considerable support for the appellant’s case constituted an error of law. Ms Broadfoot rightly accepted that argument. She did complain that the 33 pages entitled “Grounds of Appeal” did not make it clear that this was a ground on which the appellant relied. She was right so to complain (albeit that the ground could be detected in the appellant’s skeleton argument). I would also repeat what has been said on numerous occasions. Each ground of appeal should be numbered and consist of only a very short and succinct statement of the alleged error. Submissions in

support of a ground of appeal will be longer, but I do not believe that it was necessary to have a document as long as this one.

23. IJ McDade, having concluded that the appellant's father enjoyed a "proper judicial process" and "due process" and having concluded that Sayyaf had not had anything to do with the execution, went on to examine the appellant's argument that the appellant would be of any interest to Sayyaf or the authorities.

"5. ... I do not follow the Appellant's logic that he, who cannot possibly implicate Sayyaf as he was a child when most of the violence was being perpetrated, would be of any interest to Sayyaf or the authorities. It is difficult to see how Sayyaf who is undoubtedly a powerful figure in Afghani politics would have anything at all to fear from the appellant or would perceive that he would have anything to fear. Any information the appellant would have had about Sayyaf (and I do not believe that he had any) would logically have been in his possession at the time of his father's arrest in 2002. Why then at that stage and for two years thereafter were there no moves made against the appellant? I hold that the reason for this is clear. He was of absolutely no interest to Sayyaf or the authorities. I hold that the execution of the appellant's father would have made no difference to that situation."

24. If, as I find, there was a material error in law in the failure to examine the Amnesty statement and the report of Dr Giustozzi, then the error must also have an impact on this passage.

25. IJ McDade then turned to the killing of the appellant's brother.

26. In his Statement of Evidence form dated 3 May 2007 the appellant had said in answer to questions:

"While we were busy with these things [commemorating the 40th day after his father's death] we learnt that 10-18 government armed people had attacked our house in Kabul and killed my brother Nazir Ahmad who was looking after the house. They had asked the neighbours about the rest of us to know where we were."

27. He had earlier described his brother Nazir as "the victim of my father's hostilities." In response to a later question, the appellant had said:

"After killing my brother they took some documents belonging to my father and some photos which showed my father with Sayyaf the leader of Heyad-e-Islami ... and [sic] while he was receiving arms and the receipts that proved he got arms from Sayyaf. ..."

28. In his statement for the appeal, the appellant wrote:

“11. On 28th May 2004 my younger brother, Ahmad Shah and I had left the family home (Silow area of Kabul) and went to Cheltan area in Paghman in western Kabul to commemorate the death of our father on the next day. This occasion is known as the 40th day of death of the deceased, in which time the family and relatives of the deceased pray and donate charity. We decided that my elder brother, Nazir Ahmad should stay at the family home to look after the house. On the same day our family home was raided by armed men belonging to the current government. My brother was shot dead and our family home was ransacked by the armed men. They took away documents and photographs belonging to my father. The armed men approached our neighbours and enquired about me and my younger brother, Ahmad Shah’s whereabouts.”

29. IJ McDade said of this:

“6. Some 40 days after his father was executed the appellant’s brother was shot dead at the family home after it was raided by armed men ‘belonging to the current government’. The appellant and his younger brother were not at home at the time. It is simply impossible to know what the circumstances of that killing were. The appellant states. ‘The armed men approached our neighbours and enquired about me and my younger brother, Ahmad Shah’s whereabouts’. Whilst the appellant may believe that the raid was conducted by members of the current government he has no evidence to support this assertion. It is highly unlikely that armed men who are not said to be in uniform would have informed the appellant’s neighbours that they were “from the current government”. I therefore must conclude that the appellant’s assertion in this regard is mere speculation. Whilst I do not necessarily believe that the appellant is being less than truthful in terms of what he states the neighbours told him about the enquiry made of him and his younger brother I am not persuaded that there armed men actually made such enquiries. Why would these armed men make enquiries of the appellant’s neighbours particularly in relation to the appellant’s younger brother who was a mere schoolboy? If the overarching motivation for the raid was to protect Sayyaf from being implicated in war crimes what possible point would there be in trying to arrest a schoolboy? The fact remains that the appellant’s brother was killed in circumstances of which there is no evidence that agents of the government were involved.”

30. It seems to me that the failure to take into account the Amnesty statement and the Giustozzi report also undermines this conclusion. If the appellant’s father was or may well have been killed because he was now admitting what he had done but claiming to have acted under the instructions of Sayyaf, a close friend of the President, that could be important when considering the circumstances surrounding the brother’s killing.

31. Mr Nicholson submitted that in this passage the IJ impermissibly went outside the order made by DIJ Olson (paragraph 6 above). Mr Nicholson points to the words used by IJ McDade in this passage, “Whilst I do not necessarily believe that the appellant is being less than truthful in terms of what he states the neighbours told him about the enquiry made of him and his younger brother I am not persuaded that there armed men actually made such enquiries.” Mr Nicholson submits that the IJ was bound by the finding that the appellant was credible and yet, by using these words, the IJ is undermining the appellant’s credibility. Mr Nicholson also criticizes the passage, “Whilst the appellant may believe that the raid was conducted by members of the current government he has no evidence to support this assertion.” He submits that the IJ was bound to accept that the appellant had been told (albeit second hand) that the raid was carried out in the manner described and that, he submits, must provide some evidence to support the assertion. Mr Nicholson also points to the failure of the IJ to refer to the appellant’s account of what was taken and to the passage in paragraph 23 of IJ Parker’s decision:

“No issue is taken with the appellant’s account of the raid on his home in Kabul after his father’s execution in which his elder brother was killed and potentially incriminating material seized.”

32. Mr Nicholson also submitted that the IJ impermissibly went outside the findings of fact made by IJ Parker in paragraphs 18 and following of his decision. Mr Nicholson submits that IJ McDade was bound by the finding of fact in paragraph 20, for example, that the house had been raided by security forces and that enquiries had been made of the whereabouts of the appellant and his younger brother. Ms Broadfoot submits that paragraphs 18 and following were not findings of fact, albeit described as such. She submits that IJ Parker could not have intended to make these findings of fact because any such finding would be inconsistent with the later passage: “[t]he older brother may have been killed for actions of his own and resisting the security forces in the performance of their duties.” I see some force in this. I see much less force in her point that the passage in paragraph 23 (cited above) should not be read as a finding of fact that potentially incriminating material was seized.
33. It is most unsatisfactory that the second stage reconsideration was carried out without all these matters being clarified. The appellant was entitled, it could be said, to assume that there had been findings of fact in his favour and thus decide not to give evidence. In any event, it seems to me that IJ McDade could not so summarily dismiss the appellant’s account of what he had been told, an account which IJ McDade was required to accept as credible.
34. Mr Nicholson had a third ground which makes similar complaints about the manner in which IJ McDade approached the material concerning the attack on the shop. IJ McDade said that there was absolutely no evidence as to who was responsible for the raid. It may be that IJ McDade would have not have come to this conclusion if he had reached a different conclusion about the father’s execution and the elder son’s killing. Mr Nicholson submits that, although the appellant could not say who was behind the raid, his account that his partner had been beaten up had to be accepted as credible as also the appellant’s second hand account of why his partner had been beaten up, namely to disclose the appellant’s whereabouts. I agree.

35. For these reasons I would allow the appeal. The second stage reconsideration should be heard, in my view, by a Senior Immigration Judge. I take the view that the precise factual basis upon which the reconsideration will proceed ought to be determined in advance (or agreed) in accordance with *DK (Serbia) & Ors v Secretary of State for the Home Department* [2006] EWCA Civ 1747; [2007] 2 All ER 483 and consistently with the decision of DIJ Olson (see paragraph 7 above).

LORD JUSTICE LONGMORE

36. I agree

THE CHANCELLOR OF THE HIGH COURT

37. I also agree