

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND
IMMIGRATION TRIBUNAL
Claim No AA/40479/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th April 2008

Before :

LORD JUSTICE WARD
LORD JUSTICE SEDLEY
and
LORD NEUBERGER of ABBOTSBURY

Between :

SS (IRAN)
- and -
**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Appellant

Respondent

Mr David Lemer (instructed by **Messrs Alster Kelly**) for the Appellant
Mr Steven Kovats (instructed by **Treasury Solicitor**) for the Respondent

Hearing date: 17th March 2008

JUDGMENT

Lord Neuberger of Abbotsbury:

1. This is an appeal by SS, whose claim for asylum in this country was refused by the Secretary of State in December 2005 in a decision which was upheld in the Asylum and Immigration Tribunal (“AIT”).
2. In summary terms, the relevant factual background of this appeal is as follows.
3. SS, who is of Kurdish ethnicity, was born in Iran in 1970. His father had been a peshmerge and had been killed in 1981. After his mother died of natural causes in 2001, SS went to live with his uncle. Although other members of his family had been politically active, his uncle kept him out of politics, and, according to SS, “used to keep a very close eye on me”. However, in July or August 2005, following the torture and killing of a Kurdish activist by the Iranian authorities, SS changed his attitude. On the urging of a friend, Karim Kadiri, he agreed to join Komala (a Kurdish political party, which had been formed in 1969, and had become part of the Iranian Communist party in 1982, but had broken away in 2000), and he attended a demonstration, which took place in Bokan over a period of six days.
4. His evidence was that he attended the demonstration (together with over five hundred other people) on each of the six days, and that they had distributed leaflets which they had stored at his father’s old home. On the fifth day, he said that he and several other demonstrators were chased, and then ambushed, by the police, but he had managed to escape. Consequently, he said, on the sixth day he “kept [his] distance from the main demonstration”. On that day, he says he learnt that Karim had been caught by the police; as a result, he said he felt at risk, and went to stay with a relative.
5. After a few days, SS said, his uncle came to see him and warned him that the authorities had visited the uncle’s house looking for SS, bringing Karim with them, and that they had been taken by Karim to SS’s father’s old home where they had found Komala leaflets. SS said that his uncle said he could not visit SS again as he was being watched and followed by the police, and that he advised SS that it was not safe to remain in Iran. The uncle then assisted him, financially and through his contacts, to leave the country, and, as a result, SS eventually arrived in the UK on 26 October 2005, and claimed asylum two days later.
6. SS set out his case for asylum in a statement dated 28 November 2005, in which he explained that he feared being tortured or even killed by the authorities if he was returned to Iran owing to his association with Komala and his attendance at the demonstration. SS was interviewed on 20 December, and his asylum claim was rejected by a letter sent two days later. The ground for rejecting his claim was disbelief in the central parts of his case, principally because of his lack of accurate knowledge about Komala.
7. His initial appeal to the AIT failed, but a reconsideration was ordered because of an error of law. Accordingly, his appeal came back before the AIT and was heard on 15 June 2007 by Senior Immigration Judge Khan (“the SIJ”). SS’s argument that he should not be returned to Iran had by then expanded to cover his activities in this country. He said that he had become much more involved in Komala in the UK over the preceding 18 months, and that his involvement would have come to the attention

of the Iranian authorities through a photograph which had been posted on the internet and a film of a demonstration he had attended in London, which was broadcast on Komala Television in Sweden.

8. SS's case before the SIJ was supported by evidence from a Mr Allahvaisi, the Komala representative in London, and a report from a Dr Fatah, who the SIJ described as "an expert on Middle East affairs". Mr Allahvaisi and Dr Fatah both confirmed that SS would be at risk if returned to Iran. Mr Allahvaisi also said that he had made contact with SS in London following a visit to Iraqi Kurdistan, when a Mr Kabi mentioned a well-known family some of whose members were martyrs, and that one of its members, namely SS, was in London. Mr Kabi gave Mr Allahvaisi SS's telephone number, and he made contact with him on his return.
9. In a decision promulgated on 9 July 2007 ("the Decision"), the SIJ rejected SS's appeal, under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, under paragraph 339C of the Immigration Rules and under the European Convention on Human Rights 1950. In very summary terms, although the SIJ was prepared to accept some of the evidence given by and on behalf of SS, he did not accept crucial parts of it. In particular, he was concerned by SS's lack of knowledge about Komala in December 2005, he did not accept what SS said he was told by his uncle about being sought by the authorities, he disbelieved Mr Allahvaisi's explanation as to how he made contact with SS, he thought essential aspects of Dr Fatah's evidence were partisan, and he did not think SS's activities in the UK would come to the attention of the Iranian authorities. Overall, he concluded that SS had not established any grounds for believing that he would be at risk of ill-treatment if he returned to Iran.
10. SS's application for permission to appeal was rejected by Senior Immigration Judge Batiste on 23 August 2007, essentially on the grounds that the Decision was based on the SIJ's findings of fact, which he had been entitled to make and which supported his ultimate conclusion. Longmore LJ refused permission to appeal to this court on the basis of a paper application, but, albeit with some hesitation, Laws LJ granted such permission, essentially because he was "troubled by the quality of the [SIJ's] reasoning supporting his dismissal of the appeal".
11. I turn now to the grounds upon which SS appeals against the Decision.
12. SS's appeal is essentially against findings of fact by the SIJ. This is often a particularly difficult area for an appellate court, and especially so in this jurisdiction. On the one hand, we should be very wary of interfering with the conclusions of the primary fact finding tribunal, and this can fairly be said to be particularly true where the fact-finding exercise is difficult, as it normally is in the AIT, in the light of the language and cultural differences, the paucity changeability and unreliability of evidence which corroborates or contradicts the applicant's case, the emotional and other pressures on applicants, and the administrative and time pressures on the Immigration Judges. On the other hand, not only can these factors be prayed in aid to justify a particularly thorough reading of any decision of the AIT, but, given the potentially severe, even catastrophic, consequences of a mistaken rejection of an appeal, where fear of ill-treatment (or worse) is alleged, it is plainly right to scrutinise any decision such as that in the present instance very carefully, albeit bearing in mind the difficulties under which the Immigration Judges labour.

13. The first ground of appeal raised on behalf of SS is that the SIJ wrongly proceeded on the basis that certain crucial aspects of SS's evidence should be rejected because they were not corroborated. Like Laws LJ, I consider that there is nothing in this point. It is true that, when considering what, if anything, Karim had told the Iranian authorities, and what his uncle had told SS, the SIJ made the point that there was only SS's uncorroborated evidence that his uncle told him that the police had come looking for SS accompanied by Karim, that Karim had made a full confession implicating SS, that the police had visited SS's father's old home, and that the uncle was being watched by the police. However, that was a perfectly proper point to make. If the uncle or Karim had given oral or written evidence (which obviously would have been very difficult), or if there had been some other corroborative evidence of these events, then a finding as to their occurrence would not have depended as much as it did on SS's own credibility. All the SIJ was saying in this connection was that, if (as was the case) he found SS to be an unreliable witness, then it was relatively easy to reject his evidence on these issues, as there was nothing to corroborate it.
14. That brings me to what is, at least in my opinion, the main issue on this appeal, namely whether the SIJ's grounds for finding SS and Mr Allahvaisy to be unreliable witnesses can withstand scrutiny. It is those grounds which, I think, Laws LJ had in mind when granting permission to appeal. The SIJ included in the Decision a number of reasons for rejecting much of SS's evidence as to the events of July to September 2005, and one particular reason for rejecting much of Mr Allahvaisy's evidence. It is therefore necessary to consider each of those reasons.
15. So far as Mr Allahvaisy's testimony was concerned, the SIJ rejected the evidence that "by sheer coincidence, he happened to meet somebody in Iraqi Kurdistan who knew [SS] and his family". If, as a result of his activities in August 2005, SS had been the only member of his family with any claim to fame, I could fairly readily have seen the force of this point. However, as already mentioned, the evidence was that SS's father had been killed for his activities in support of the Kurdish cause, and that other members of his family were politically active. It was therefore (at least in the absence of evidence to suggest otherwise) not particularly surprising that SS's family should be well known in Kurdish circles, or that his recent involvement and experiences, as the son of someone who could be regarded as a martyr to the cause, should have been mentioned by Mr Kabi. (It was perhaps more surprising that SS's telephone number was known to Mr Kabi, who passed it on to Mr Allahvaisy, but that was not commented on by the SIJ.) While I accept that the "sheer coincidence" is often a reason for disbelieving evidence with which an appellate court should not interfere, it seems to me that it was not a fair basis for rejecting Mr Allahvaisy's evidence in this case. Even if it had been a reason for doubting Mr Allahvaisy's evidence, I am unconvinced that it would have been a strong enough factor on its own for rejecting that evidence.
16. I turn to the reasons that the SIJ mentioned for rejecting some of the essential ingredients of SS's evidence as to his involvement with Komala and its activities in Iran. There appear to have been three reasons.
17. First, the SIJ said it was "incredible that if [SS] had run away on the fifth day of the demonstration, he would have returned the next day and placed himself in danger". I certainly would not have come to that conclusion myself. Protesters in a country such as Iran must frequently (indeed, I suspect, normally) know from the start of any

demonstration that they run the risk of arrest and consequent ill-treatment, but that does not prevent many of them from demonstrating. Further, it is clear from SS's evidence that the police were chasing demonstrators and trying to arrest them on all six days. More specifically in his case, the SIJ appears to have overlooked his evidence that, after he was nearly arrested on the fifth day, he kept himself to the sidelines when he attended on the sixth day. It is, of course, one thing for an appellate judge to say that he would not have adopted a particular view, but quite another to say that the fact-finding judge was not entitled to adopt a particular view, particularly in a difficult fact-finding exercise such as that involved here. Nonetheless, with all due respect to the SIJ, for the reasons just given, I do not consider that, at least without some special or supporting factor, this was a sustainable reason for disbelieving SS.

18. Secondly, the SIJ said that he could not accept the evidence that "the authorities were always watching [SS's] uncle". This was because, if SS was thought to be a Kurdish activist, "anyone connected with [him] is very likely to be arrested, detained and questioned by the authorities but there is no evidence that this has actually happened to the ... uncle", who appeared to be a reasonably prosperous farmer. The only evidential basis for the view that the uncle was likely to have been arrested, at least in the documentation put before us, was in Dr Fatah's report, where he dealt with "punishment by association". As Dr Fatah explained, it is not merely members of entities such as Komala who are "subject to punishment by the Iranian authorities", but also their "supporter[s and] relative[s]". However, this evidence cannot, to my mind, fairly be said to underwrite the SIJ's reasoning. First, Dr Fatah, while saying that such punishment by association did occur, did not say that it was likely, let alone "very likely", to occur; secondly, his evidence suggests that, when such punishment was meted out, it was normally (but not exclusively) in cases where the member of the entity was the "head of the family".
19. On the available evidence, I do not think that the SIJ could have gone further than to say that the absence of any evidence that the uncle had been punished was neutral so far as SS's case was concerned. (Of course, if the uncle had been punished in some way, that fact might well have been a point in favour of SS, but to say that that means that the absence of such evidence therefore positively tells against SS would be to commit a logical syllogism). Mr Steven Kovats, in his well presented case for the Secretary of State, suggested that there might well have been other evidence on which the SIJ may have been relying to justify his view on this point. So there might have been. But, if such other evidence is to be relied on in this court, it is for the SIJ to have mentioned that evidence in the Decision, or for the Secretary of State to show us the relevant evidence which was before the SIJ, and no such evidence has been identified.
20. Thirdly, the SIJ relied on SS's ignorance of the history and ideology of Komala, when he had his interview in December 2005. There is no doubt that, in principle, the SIJ was entitled to rely on this, but, on the facts of this case it appears to me that it can only have been of limited assistance, at best. It appears that there was no reason to doubt (and the SIJ does not appear to have doubted) SS's evidence that he had no involvement with Komala or any other political group before August (or, possibly, late July) 2005, or that his involvement was because of the Iranian authorities' treatment of the Kurds, rather than for any more ideological or historical reasons. Accordingly, as he left Iran about a month after he first became involved with

Komala, and that month was spent at the demonstration, in hiding or on the run, it is therefore not surprising that his knowledge of Komala's history and ideology was poor.

21. It can fairly be said that this is a point whose significance and weight were very much for the fact-finding tribunal, and that an appellate court should not interfere with the conclusion of the SIJ that this told against SS's reliability. I see the force of that, but, even if it means that this third of the grounds relied on by the SIJ cannot be ignored, it appears to me that, in the light of the invalidity of the first two grounds, the Decision cannot safely be allowed to rest on the third ground alone. Where a decision rests on three grounds, and it is not clear, in terms of logic or common sense, or from the way in which the decision is structured or expressed, that the decision would have been the same if only one of the grounds survives, then an appellate court which rejects two of the grounds cannot let the decision stand, unless it can safely form its own view that the decision should be upheld on the sole remaining ground (or, of course, on some other ground). That is plainly not possible here: indeed Mr Kovats, entirely sensibly and realistically, conceded in argument that if the second of the three grounds I have been discussing was rejected, then the Decision would have to be quashed.
22. I turn to consider the appeal insofar as it relates to the activities of SS in London since he arrived here. It appears clear that the SIJ accepted that SS had been involved, as he said in his evidence, in activities, meetings and demonstrations in support of Komala in the UK, although the SIJ found (as he was entitled to find) that involvement to have been "entirely self-serving". It is not quite so clear whether he also accepted that a photograph of the meeting in London, including SS, had been posted on the web, or that a film showing the demonstration in London, which also included SS, had been shown on Swedish television. It seems to me that, on a fair reading of the Decision, he did accept that evidence, or at least was prepared to assume that it was correct.
23. However, where SS failed on this part of his case was in the SIJ's finding that it was "fanciful" to claim that SS's "presence and activities [in London] would be known to the authorities", and that there was "no evidence to support such a claim". It is not entirely easy to decide whether this was a conclusion to which the SIJ was entitled to come. On the one hand, the burden of proof is on SS, albeit on the balance of probabilities, and he produced no evidence to show that the Iranian authorities would monitor the website or television station concerned (which seems, at least on the face of it, inherently likely) and (which appears to me more questionable) that those authorities would identify him as one of the people in the photograph or the film, make the connection if he returned to Iran, and consider his involvement sufficiently serious to justify arresting and ill-treating him. On the other hand, as the SIJ said in the Decision, SS simply had to show that there were "substantial grounds" for believing, or "a real risk", that he would suffer ill-treatment if he was returned to Iran.
24. On this point, I have reached the conclusion that, particularly bearing in mind where the burden of proof lay, and also because of practical common sense considerations, the SIJ was entitled to reach the decision that he arrived at on this, the second, aspect of SS's appeal. There must be a limit as to how far an applicant for asylum is entitled to rely upon publicity about his activities in the UK against the government of the country to which he is liable to be returned. It seems to me that it is not enough for such an applicant simply to establish, as here, that he was involved in activities which were relatively limited in duration and importance, without producing any evidence

that the authorities would be concerned about them, or even that they were or would be aware of them. As Longmore LJ put it, when refusing permission to appeal on paper, “Is every person present at Komala Party activities in the UK to be entitled to asylum by providing a photograph of himself during those activities?”

25. It is right to mention another point touched on, but not really developed, in the argument relating to SS’s activities in London. That point is whether, and to what extent, the SIJ found that SS engaged in those activities for the purpose of avoiding being sent back to Iran, and the effect of any such finding in the light of article 4(3)(d) of the Qualification Directive 2004/83/EC. Given my conclusion that, even if this aspect has no adverse effect on SS’s appeal insofar as it relates to his activities in London, the SIJ’s conclusion in relation to those activities should stand, it is unnecessary to consider that point further on this appeal
26. However, for the reasons already given, I consider that this appeal must be allowed and that the applicant’s appeal against the Secretary of State’s refusal of asylum must be remitted to the AIT to be heard by another Immigration Judge.

Lord Justice Sedley:

27. I agree.

Lord Justice Ward:

28. I also agree.