Case No: C5/2008/0613

Neutral Citation Number: [2008] EWCA Civ 1110
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/033808/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 6th August 2008

Before:

LORD JUSTICE RICHARDS

- -

Between:

AR (AFGHANISTAN) **Appellant**

- and -

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

- -

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THE APPELLANT APPEARED IN PERSON.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved)

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Lord Justice Richards:

1. This is a renewed application for permission to appeal against a decision of Immigration Judge Rush on a redetermination in the Asylum and Immigration Tribunal.

2. The applicant is a 19-year-old Afghan national of the Shia religion and Hazara ethnicity, who arrived in the United Kingdom in August 2005 and claimed asylum. He has appeared in person before me today in order to present his renewed application. He speaks English well and very articulately, and I commend him on the way in which he has dealt with what must be a very difficult experience in appearing in the strange environment of this court.

3. The factual basis of his claim was that he was from Baghlan province, to the northwest of Kabul. In about 2000 the Taliban forced his father to sign away ownership of the father's land; they then killed both his father and his mother. The applicant went to live with a family friend by the name of Mohammed. In 2005, about four months before he left the country, he decided he was old enough to try to reclaim his father's land. He approached the local authorities but was informed that he had no right to the land, as all property previously held by the Taliban had been confiscated by the authorities. He made several attempts to reclaim it but his requests were refused and he was threatened by armed men. He said the land was held by a man called Commander Alamjan, who was a Pashtun and a very influential and powerful figure in the government. Then three days before he left the country he was told that the authorities had raided Mohammed's house looking for him; he was advised not to return there. He was told his life was in danger and he should find somewhere safe to stay; that was why he made arrangements to leave Afghanistan and come to this country.

4. The immigration judge who first heard the case made favourable credibility findings and allowed the appeal. Reconsideration was then ordered on an application by the Secretary of State. The reconsideration proceeded on the basis of the first immigration judge's acceptance of the applicant's factual account. The two central issues for decision on the reconsideration were whether he had demonstrated a Convention reason entitling him to international protection, and whether he would be at risk on return to Kabul. The Grounds of Appeal to this court which, together with a skeleton argument, were settled by counsel, relate to the immigration judge's reasoning on the second issue. That reasoning is very brief and is set out in paragraphs 28 and 29 of the decision, in which the immigration judge refers to the case of PM & Ors (Kabul, Hizb-i-Islami) Afghanistan CG, a country guidance case with neutral citation number [2007] UKAIT 0089. I will quote the two paragraphs:

> "28. I therefore need to move on to consider the risk facing the appellant on his return. The proposed removal directions would be to Afghanistan and he would be returned to Kabul. The country guidance

> case of PM and Others previously referred to sets out at paragraph 140 a summary of the general conclusions relating to Kabul. The skeleton argument asks me to find that there are risks facing the appellant in the context of returning the appellant to Kabul: see paragraph 140(iii). That I have to say with regret does not go anywhere near identifying risk on return. It states that the past of an individual seeking accommodation or work in Kabul or elsewhere may be discovered and mentioned to the authorities. Similarly, the authorities may become aware of someone newly arrived in an area. That may result in a person being detained for questioning but there is no satisfactory evidence such questioning gives rise to a real risk of serious harm. (iv) goes on to say that, subject to an individual's personal circumstances it is unlikely to be unduly harsh or unreasonable to expect the appellant to relocate to Kabul if they have established a real risk of serious harm in areas outside Kabul.
>
> 29. In these circumstances I find that there was a material error of law as already indicated in the reconsideration findings. I do find that there is a Convention reason. However I find no credible evidence to satisfy me that there is no real risk of serious harm in the event of the appellant being returned to Kabul…"

It is plain that the immigration judge meant that he found no credible evidence to satisfy him that there was a real risk of serious harm in the event of return.

5. The submission made in the written documentation submitted on the applicant's behalf is that the immigration judge's determination is flawed by an almost complete lack of reasoning about the risk that the applicant would face if removed to Kabul. The immigration judge relied on the case of PM, but in that case the Tribunal was assessing the risk that former fighters and suspected insurgents would face from the authorities. Here the risk was of a different kind, from a specified military commander. There was expert evidence to which the immigration judge did refer, that it would be easy for the commander to track him down because he would be asked to give references about his origins and family background, and that information would be checked in his home area of Baghlan. It is submitted that the kind of risk faced by the applicant was closer to that considered in the case of AF ("Warlords/commanders"- evidence expected) Afghanistan CG [2004] UKIAT 00284.

6. The immigration judge, it is said, failed to give reasons why, contrary to the expert evidence, the commander would not be able to track the applicant down

or why he would not be interested in doing so and why, therefore, the applicant would not be at risk. It is submitted that merely to refer to the generality set out in paragraphs 140 (iii) and (iv) of PM was not sufficient.

7. Senior Immigration Judge Batiste, in refusing permission to appeal, dealt with the matter robustly, stating that in the context of the determination as a whole the reasoning in paragraphs 28 to 29 is adequate and the conclusion is in line with country guidance. He said there was no good reason why the identification of the applicant by the authorities in Kabul would result in his identity being disclosed to those in Baghlan who might seek him, given that they would not be aware of his return. There is no reason why the applicant himself should return to Baghlan and alert people there of his return unless he himself chose to do so.

8. Sir Henry Brooke, when refusing permission to appeal on the papers, following an application made to this court, expressed himself in somewhat different terms. He said:

> "The central issue here is whether it would be unduly harsh to return the appellant to Kabul. The House of Lords have recently re-affirmed that this is a tough test, and also that the Court of Appeal should be slow to interfere with the determinations of an expert tribunal on issues like this. A desire to reclaim family land is not a matter of conscience; it is obviously dangerous to attempt to do so. There is no reason why another country should provide surrogate protection if it is safe to return to one's own capital city and to defer the quest to recover family land until the political situation alters, if it does. The Immigration Judge clearly assessed the risk to the appellant from this rural warlord should he be returned to Kabul and considered that the risk was not such that it would be unduly harsh to send him there. This was a judgment he was entitled to make."

9. I confess that I have had greater concerns about the adequacy of the immigration judge's reasoning than either Senior Immigration Judge Batiste or Sir Henry Brooke. I have asked myself whether, in refusing permission hitherto, they have been unduly generous to the immigration judge in attributing to him the reasons they have given, reasons which are not altogether apparent on the face of the immigration judge's determination. I am therefore inclined to concede more force than they did to the submissions advanced on the applicant's behalf. I also note that the issue in relation to return to Kabul is in this case one of safety, not whether conditions there are otherwise such as to make it unduly harsh for the applicant to relocate.

10. In the end, however, after careful consideration of the papers I have come to the view that an appeal has no real prospect of success. The immigration judge plainly had in mind the argument that the commander might learn of the applicant's presence in Kabul and be able to track him down, and would be sufficiently interested still to take action against him there. It seems to me that the immigration judge clearly rejected that line of argument when concluding that the applicant would not be at risk. That was a conclusion reasonably open to him on the evidence.

11. There was also a suggestion that the applicant would go back to his home area of Baghlan and make further attempts to recover his father's land. I see nothing to show that such an argument was advanced on the reconsideration itself and it seems to me to be too late to raise it now, but in any event I agree with Sir Henry Brooke that an asylum claim cannot succeed on the basis that the person concerned would, if returned, choose deliberately to expose himself to danger in relation to a civil dispute, which is not a matter of faith or conscience.

12. In his further submissions to me today the applicant has understandably stressed his concerns about his safety in Kabul and about conditions in Kabul. He has emphasised the importance of land in Afghanistan and the value of it and has said that he is known because of his and his family's association with a substantial area of land and he fears that he would be killed because of that association and the possibility of a further attempt by him to reclaim the land. He has also referred to other matters, such as the existence of racism within Afghanistan, and he has cited the example of an unsuccessful asylum seeker who, it is said, was returned to Kabul last year and yet was immediately killed by his enemies. Let him be in no doubt that I sympathise with his concerns in relation to return to Kabul. I would sympathise with anyone faced with return there, because conditions are plainly unpleasant and are very different from those that he would enjoy if he were allowed to remain in this country. What has to be stressed, however, is that this court is not forming a primary judgment on the merits of the claim to asylum or the claim to protection under the human rights convention: the function of this court is to determine whether the lower court, which does have that function, has erred in law. The question for me is to decide whether there is a case with a real prospect of success that the immigration judge's decision was flawed by an error of law.

13. The immigration judge, having considered the matter, concluded that the case did not meet the criteria that warrant upholding an asylum or human rights claim; that is to say he did not consider there to be a sufficient risk to the applicant to warrant international protection. Having considered the written material as well as the oral submissions made by the applicant himself, I am not satisfied that there is here an arguable ground of appeal on a point of law. For that reason I agree with the decision reached on the papers by Sir Henry Brooke and must refuse the renewed application.

Order: Application refused