Case No: C5/2008/0360
C5/2008/0334

Neutral Citation Number: [2008] EWCA Civ 1104
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No. HX/15626/2004; HX/12863/2004;
HX/02423/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 23rd July 2008

Before:

LORD JUSTICE RICHARDS

- -

SU & PM (AFGANISTAN) **Appellant**

- and -

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

- -

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Mr C Jacobs (instructed by Messrs White Ryland) appeared on behalf of the **Appellant PM**.
Mr B Lams (instructed by Messrs Lawrence & Co) appeared on behalf of the **Appellant SU**

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED

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Judgment

(As Approved)

Lord Justice Richards:

1. The court has before it two applications for permission to appeal against the Country Guidance decision of the AIT in PM & Others (Kabul - Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089. The applicants are two of the unsuccessful appellants in that case. I shall refer to them as "PM" and "SU". They have brought separate applications for permission and are separately represented, but the cases have been linked. Permission was refused in each case by the tribunal itself and by Dyson LJ on consideration of the papers. I have heard the oral renewals together, and I deal with them in a single judgment.

2. The tribunal's decision was reached in each case on a reconsideration which proceeded on the basis of the original adjudicator's or immigration judge's findings of primary fact, each of the appellants having been found to be a credible witness. The reconsiderations were heard together in order to enable the tribunal to give country guidance as to the level of risk that would be faced by persons who were either member of Hizb-i-Islami, the Islamic party, or associated in some way with such members.

3. PM, the first appellant in the proceedings before the tribunal, is 38 years old and a Pashtun born in Nangarhar. He became a member of Hizb-i-Islami when aged 9 or 10. On leaving school in 1989 he joined in fighting in opposition to the Communist regime. He claimed to have fought in Kunar, Parwan, Kabul and Jalalabad and to have commanded men in doing so. His eldest brother, who had joined Hizb-i-Islami before he did, was killed during this time when fighting the Russians. The appellant said that he was paid by Hizb-i-Islami in the early 1990s, though in 1996 he actually returned to his uncle's house to help him in his business. He was arrested in 1997 by the Taliban and fought reluctantly for them for about two years in Kunar. He told the adjudicator that he had fought constantly from leaving school until about 1999. He left Afghanistan because another brother was taken by members of the Northern Alliance around the beginning of 2002, and he became aware that the Northern Alliance were enquiring about his own whereabouts. He entered the United Kingdom in April 2002 and applied for asylum.

4. SU, the third appellant in the proceedings before the Tribunal, is 45 years old and also a Pashtun. He comes from Kandahar, where he was a nurse in a hospital between 1983 and 1989, during which time he treated Hizb-i-Islami members. It was said that he became a member of the party in 1988. Of the two immigration judges who originally considered his case, the second found that he had not been politically active, but SU did not accept this on the reconsideration and contended it did not accord with his evidence or with the first immigration judge's findings. In any event, between 1989 and 1999 he had been the owner of a pharmacy or medical store which had supplied the Taliban with free medication. He said that he left Afghanistan after his brother had been forcibly recruited to fight for the Taliban, and the Taliban

had raided his own house wanting him to fight for them. He arrived in the United Kingdom in September 1999 and claimed asylum.

5. In a lengthy decision, the Tribunal found that neither PM nor SU would be at risk of return. The Tribunal gave a summary of its general conclusions at paragraph 140, namely that:

> "(i) Those returned from the United Kingdom will not, without more, be at real risk at the airport or after arrival in Kabul.
>
> (ii) Those returned from the United Kingdom are not at real risk, without more, of being suspected by the authorities as insurgents.
>
> (iii) 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) Subject to an individual's personal circumstances, it is unlikely to be unduly harsh (or unreasonable) to expect them to relocate to Kabul if they have established a real risk of serious harm in (and restricted to) areas outside Kabul.
>
> (v) There is no satisfactory evidence that a person who has been associated in the past with Hizb-i Islami will always be regarded as such.
>
> (vi) There is no longer evidence of real risk to individuals said to have possible knowledge of the whereabouts of Gulbuddin Hekmatyar [leader of Hizb-i Islami] (RS Afghanistan [2004] UKAIT 00278 should no longer be followed)."

The Tribunal stressed that this was not an authoritative summary and that the determination should be read in full for its detailed reasoning. For my part, I shall refer to the detail only to the limited extent necessary for considering the specific grounds of appeal. In view of its length I shall simply take the Tribunal's determination otherwise as read.

6. Having given its general guidance, the Tribunal dealt with the individual appeals. In relation to PM, its primary finding was that he had not shown that he was at real risk of serious harm in his home area of Nangarhar, but that if he felt that he could not return to his home area he could safely relocate to

Kabul, where it would not be unduly harsh for him to live, and he would be able to live a reasonably normal life. In relation to SU, the Tribunal similarly made a primary finding that he would not be at risk of serious harm in his home area of Kandahar, but that in any event he too could safely relocate to Kabul.

7. For PM, Mr Jacobs has advanced six grounds of appeal, all of which he has maintained in his renewal statement following refusal of permission by Dyson LJ. I propose to deal with the individual grounds, even though Mr Jacobs has not tried to cover all of them orally but has concentrated on an examination of the progression in the tribunal's reasoning in support of an overall contention that the determination is contradictory and unsafe. To the extent that in the course of that examination he sought to make points not included in his grounds of appeal, he will recognize as well as anyone else that that is not an acceptable approach or one that is likely to be persuasive.

8. Ground 1 is a contention that the tribunal wrongly departed from the primary findings of fact made by the adjudicator. The relevant finding is said to have been that the authorities were interested in PM at the time of his departure because he was a commander and had fought against the Northern Alliance. It is submitted that the tribunal acted contrary to the guidance in DK (Serbia) v SSHD [2006] EWCA Civ 1747 in holding that he would not be suspected of involvement in the insurgency upon questioning in the event of return to Kabul.

9. There is in fact no such finding in the adjudicator's determination. The point is derived from answers from PM's answers to questions in interview, which are deployed on the basis that the adjudicator accepted his credibility as to his history and these aspects of his history must therefore also be taken to have been accepted by the adjudicator. In rejecting this ground, Dyson LJ stated:

> "The factual basis of the claim was not in dispute, i.e. the account given by A of his history etc was to be accepted as credible and was not to be disturbed by the AIT. The issue for the AIT was to determine the level of risk for A on the primary facts found by the Adjudicator. The conclusion of the Adjudicator on that issue was not binding on the AIT. It was because it was arguable that the Adjudicator had erred on that issue that reconsideration was ordered. The AIT understood this (see paragraph 1 of its determination). In it conclusions, the AIT did not enter forbidden territory."

10. In his renewal statement Mr Jacobs takes issue with this, asserting that a finding as to the level of interest by the authorities in PM at the time of his departure is a finding of primary fact by which the tribunal was bound. In my judgment, however, there was no finding of primary fact that the authorities were interested in PM; it was an inference that PM sought to draw from primary facts, and insofar as it is taken to have been accepted by the adjudicator, it is an inference that the adjudicator drew from the primary facts.

Whether it was a correct inference was part and parcel of the matters to be decided by the tribunal on the reconsideration. There was, in my view, no arguable error of approach or misdirection by the tribunal on this point.

11. Ground 2 is said to relate to the tribunal's treatment of the evidence of the expert witness, Dr Giustozzi, but focuses in particular on the tribunal's finding at paragraph 132 that:

> "…the background evidence does not establish that any of these appellants would be at any real risk of serious harm [in Kabul], although clearly there is a possibility that they would come to harm."

The primary criticism of that sentence is that a clear possibility amounts to a real risk on the relevant standard of proof, and that the tribunal fell into error in failing in those circumstances to find a real risk or in failing to set out any distinction between real risk and clear possibility.

12. Considering this submission, Dyson LJ looked more widely at the tribunal's decision, pointing *inter alia* to the finding in paragraph 136 that whilst it was possible that a person who fell into the hands of the authorities as a suspect might be seriously mistreated, that was not a real risk on the basis of the facts of the cases before it. For my part, it seems to me plain more generally that the tribunal had the standard of proof well in mind and that the sentence at paragraph 132 at which Mr Jacobs directs his criticism is to be read accordingly. The possibility to which the tribunal was there referring was, as Dyson LJ clearly thought to be the case, a remote possibility rather than a real possibility or real risk capable of engaging the protection of the Convention. I do not accept that the decision is liable to be misunderstood on this point.

13. There is a further contention that the expert evidence which the tribunal accepted does not support the view that the possibility of harm was only a remote one. I disagree; in my judgment it was reasonably open to the tribunal to reach the conclusion it did on the evidence before it.

14. Ground 3 is a contention that the tribunal erred in finding at paragraph 133 that:

> "…those returning from the United Kingdom, and who have been away for a considerable time, would not be suspected of being insurgents when they arrive back in Afghanistan."

It is submitted that the finding is contrary to the evidence accepted by the tribunal that the appellants would in any event come to the attention of the authorities on return, although not necessarily immediately on return. As Dyson LJ observed, however, in the sentence criticised the tribunal was doing no more than accepting the evidence of Dr Giustozzi. It is, moreover, clear in

my view that the tribunal was looking here at the position immediately on return, when it considered that, without more, no suspicion would be attached to those returning after a considerable absence. The tribunal went on in paragraphs 134 and following to consider a different point about the position that would arise later, when they tried to obtain work or accommodation, checks were made about their background and the authorities would come to hear about them. That these are different points is also apparent from subparagraphs 1-3 of the summary in paragraph 140 which I have already quoted.

15. Mr Jacobs submits that the tribunal's approach in paragraph 133 to the duration of absence in relation to risk is perverse; he submits that the authorities are equally likely to equate the reappearance of a Hizb-i-Islami commander with that individual having actively been involved in the insurgency during the period of his absence as with his having applied for asylum in the United Kingdom. It seems to me, however, that the tribunal was dealing in this passage not with an exceptional case of that kind but with the ordinary situation applicable to people such as the appellants. It added the words "without more" in the summary of paragraph 140, and I have used those words in considering its reasoning because in my view they are inherent in the point being made. In any event, I am not satisfied that this aspect of the tribunal's reasoning is even arguably perverse or that it is capable of undermining the overall validity of the tribunal's reasoning in its decision.

16. Ground 4 is directed at the passage in paragraph 135 where it is said that the appellants would be no different from those members of society who had been in Afghanistan all along. The thrust of that paragraph is that the general population are not at real risk simply by reason of some past involvement in conflict, and the same will apply to the appellants. Indeed, the fact that they have been outside the country for so long suggests on a common sense basis that their past conduct without more will not cause them serious difficulty. Mr Jacobs submits that this contradicts what was said in paragraph 134, in that there was a finding in paragraph 134 that a risk would arise upon contact with informal networks of friends and families and upon reintegration within Afghanistan.

17. In my view, there is no such contradiction. Paragraphs 134-136 contain a consistent thread of reasoning that leads to the conclusion in paragraph 136 that returnees such as the appellants would not be at real risk in Kabul. It was possible, but no more, that after they had been there for a period their existence would become known to the security forces. They would not be suspected of directly knowing anything about what was going on in the insurgency, though after a period, in common with all others, they might be asked questions about what they knew from relatives and friends and their own personal networks. But there was no satisfactory evidence establishing a reasonable likelihood that in those circumstances they would be subjected to serious mistreatment. It seems to me that this is a rational analysis and in my view the challenge to it could not succeed.

18. Ground 5 relates to the Tribunal's finding at paragraph 135 that there is no satisfactory evidence that someone who has been involved with Hizb-i-Islami will always be regarded as a member. It is submitted that this is an unreasoned departure from what was expressly accepted in the 2004 Country Guidance case of RS, and from the evidence of Dr Giustozzi, who stated that only those who publicly renounce the leader, Hekmatyar, such as the Faruq wing of Hizb-i-Islami, are deemed no longer to support the party.

19. I agree with Dyson LJ that the Tribunal was entitled to express the view it did and to refer to the fact that some former members of Hizb-i-Islami were MPs as illustrative evidence that someone who has been involved with the party will not necessarily always be regarded as a member. I do not read Dr Giustozzi's evidence as being inconsistent with the points made by the tribunal.

20. Ground 6 is a contention that in paragraph 136 the tribunal drew an erroneous distinction between a person who would be interrogated as a suspect, where there was a possibility of serious mistreatment, and persons such as the appellants who might be asked questions but would not be at real risk of mistreatment. Again I disagree, and again, like Dyson LJ, I take the view that the distinction drawn by the tribunal in paragraph 136 was a sufficiently reasoned and rational distinction. I do not accept that the line drawn is too fine a line to be workable. I also reject the contention that on the facts of PM's case he would be interrogated as a suspect and that the tribunal erred in finding that he would not be at real risk of mistreatment.

21. For all those reasons, I conclude that an appeal by PM against the tribunal's decision would have no real prospect of success.

22. I turn to the application on behalf of SU presented by Mr Lams. He adopted Mr Jacobs's general criticisms of the tribunal's reasoning and added submissions of his own as to why this is an unsatisfactory Country Guidance decision. In his case, too, I will consider the matter by reference to the actual grounds of appeal.

23. Ground 1 covers much the same territory as ground 5 of PM's grounds of appeal. It is submitted that the tribunal erred in holding there to be no satisfactory evidence that a person who has been associated with Hizb-i-Islami would always be regarded as such. Mr Lams's written skeleton argument refers to various items of evidence which it is contended the tribunal failed to take into account, as to which I agree with Dyson LJ that there is no reason to suppose that the tribunal did not consider all the evidence to which reference is made.

24. The focus of the case on the oral renewal is that past membership of Hizb-i-Islami raises at least a presumption of continued membership or allegiance to Hekmatyar. Members of the Faruqi faction, who included MPs, have a track record of having split with him, but SU would have the particularly difficult task of rebutting the presumption on his return. Reference is made in this connection to Dr Giustozzi's evidence that the risk to SU derives from his

Hizb-i-Islami background and his inability to prove that he has abandoned the party. It is submitted that the tribunal erred in not accepting that the task existed and in equating the position of the appellants with that of other members of the general population.

25. I am not persuaded that those submissions, any more than the case presented by Mr Jacobs on this topic, have a real prospect of success on an appeal. Dr Giustozzi's factual evidence was not in dispute, but a central issue for the tribunal was whether to accept his opinions as to the risk faced by the individual appellants. It seems to me that the tribunal did examine those opinions carefully and that it cannot be said to have erred in its approach. The conclusions reached were reasonably open to it, even though it differed from Dr Giustozzi's own assessment of risk.

26. Ground 2 is a contention that the tribunal failed to consider the specific characteristics of SU when examining his case and despite apparently accepting the relevance of such characteristics in the abstract. The point, in short, is that he had medical expertise as a former nurse and pharmacist, and there was evidence that because the Hizb-i-Islami recruited from the educated and more sophisticated members of society, there was greater pressure on families of former members and supporters of the party to become involved in the present insurgency in the hope that they could provide support in specialist fields such as medicine, which the Taliban are lacking. Accordingly, as Dr Giustozzi said, SU could well be targeted for pre-emptive arrest by the security forces to prevent him joining the insurgency, and it is submitted that pre-emptive arrest would involve prolonged detention in inhumane conditions and the other risks associated with such detention. It is contended that the tribunal failed to address this point in its decision, in which only a brief reference to the point was made at paragraph 113 in the context of Mr Lams's submissions. The point is distinct from the point about being picked up for questioning, which is addressed by the tribunal in its general conclusions and is mentioned specifically at paragraph 144 in relation to SU.

27. I can see that the point is distinct; but equally, it is apparent from paragraph 113 that it is a point that the tribunal had in mind when considering the case. It seems to me that the tribunal must have rejected the argument that there was a risk of pre-emptive arrest leading to inhumane treatment or serious harm in detention. That is inherent in the conclusions it expresses in the concluding section. In my view the tribunal was reasonably entitled to reject that line of argument and I do not think there is any real prospect of the decision being held to be vitiated by the absence of specific reasoning on the point in the concluding section.

28. Similarly, I do not accept that there is any real prospect of the tribunal's decision being held to be vitiated by a failure to address the risk of ill-treatment at the hands of the Taliban, related to their attempt forcibly to recruit a person in the position of SU. Again, I acknowledge that that particular aspect of the argument is not addressed in terms, in particular at the end of paragraph 143 where the tribunal finds that even in Kandahar there is no reason to suggest that SU would be a target for the insurgency. But the

conclusion is one that, in my view, the tribunal was entitled to reach in any event, and the failure to address the particular point in the reasons does not seem to me to be capable of causing the entire decision to fail. Moreover, it seems obvious, looking at the situation in Afghanistan as a whole, that the possibility of forcible recruitment of SU by the Taliban would be even more remote in Kabul -- where the tribunal held he could reasonably relocate -- than in his home area.

29. Ground 3 relates in part to the matters just considered. It is said that the threat of pre-emptive detention would arise in Kabul as well as in the home area of Kandahar, and that Kabul would therefore not be a safe area for SU. My rejection of that point is inherent in what I have said in relation to ground 2.

30. There is, I think, a wider point that there was no basis in the evidence for the distinction drawn by the tribunal between the treatment of those who fell into the hands of the authorities as suspects and those who would be subject to questioning but without mistreatment, and also no basis for the distinction drawn between the position in Kabul and the position in the provinces. To some extent, I have already dealt with this when considering Mr Jacobs's submissions. Again, I consider that the tribunal's reasoning on the issue of questioning, detention and mistreatment is adequate, and that the conclusion reached that the appellant would not be at real risk of mistreatment was a conclusion to which the tribunal was entitled to come on the evidence. Equally, the tribunal was entitled to conclude that the situation was better in Kabul than in the provinces.

31. Ground 4 is a contention that the tribunal erred in finding at paragraph 132 that SU would not be at real risk of serious harm; although there was a possibility that he would come to harm. This is very similar, if not identical, to the point advanced in ground 2 of PM's grounds of appeal, which I have already considered. I am satisfied that the passage in question in the tribunal's decision discloses no arguable error of law.

32. Ground 5, the first of two supplementary grounds advanced on behalf of SU, adopts Ground 3 of PM's grounds of appeal. I have already rejected that ground.

33. Ground 6, the second of SU's two supplementary grounds, is a submission that the tribunal erred in apparently adopting the view of the second immigration judge that SU had not been politically active, when this conflicted with SU's own evidence, found to be credible, and with the findings of the first immigration judge, who had found him to be politically active. I agree with the view expressed by Dyson LJ that it was not relevant to the decision reached by the tribunal whether SU had or had not been politically active during the period in question. The point was not capable of affecting the Tribunal's essential analysis or the conclusions it reached in relation to his position in the light of its general findings.

34. I therefore take the view that an appeal by SU has no real prospect of success.

35. Let me add, standing back from the detailed submissions, my general agreement with the concluding observation by Dyson LJ in his reasons for refusing permission in PM's case, that this is a thorough and carefully reasoned determination by the tribunal. Despite the well-presented submissions of Mr Jacobs and Mr Lams, I do not accept that the findings are contradictory or unsafe, or in effect that this is an unsatisfactory and even an unworkable piece of Country Guidance. The determination may not be perfectly expressed in places, but in my view it is capable of being properly understood and applied without undue difficulty. It is a determination of a kind with which, in my judgment, this court should be slow to interfere. I am satisfied that neither applicant has established arguable errors of law that could justify such interference.

36. Accordingly, the two renewed applications are dismissed.

Order: Applications refused.