Case No: C5/2008/1691

Neutral Citation Number: [2008] EWCA Civ 1362
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/04533/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 5th November 2008

Before:

LADY JUSTICE ARDEN

- -

Between:

SH (AFGHANISTAN) **Appellant**

- and -

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

- -

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Mr A Eaton (instructed by Lawrence Lupin) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

Lady Justice Arden:

1. This is a renewed application for permission to appeal against the order of the AIT of 10 April 2008 dismissing the appellant's appeal against an order of 17 May 2007 dismissing his asylum appeal, his application for humanitarian protection and his application under the Human Rights Act 1998.

2. The appellant came here from Afghanistan. His case is that he was an election monitor or official assisting in an election in Afghanistan in September 2005. There is evidence of attacks on election monitors at that point and other evidence about the situation in Afghanistan at the time. The appellant says that he was threatened by one of the candidates whom I will call "Q", because he spotted multiple voting by Q's supporters. He says that in consequence of this his two brothers were killed. He says that in the same incident a brother of the candidate, Q, was also killed. He relies on a video of the funeral of his two brothers as confirming the truth of their death. He accepts that the video does not actually confirm the cause of death but it shows that he was playing a leading role.

3. Before the Tribunal he produced the video and described its contents. The Tribunal clearly saw it, but the Tribunal did not have video facilities; and so it could not be shown to the Tribunal in the course of the hearing and so the appellant could not make his points by reference to it as it was played. The appellant's case is of course that if returned to Kabul the supporters of Q would follow him and kill him.

4. The appellant says that at the time of the incident about multiple voting he was shot in the hand on the instructions of Q in an effort to kill him. This had rendered him unconscious and he was subsequently given hospital treatment for his wound. He said that he had been wearing baggy Afghan clothing and that there had been a rain of other bullets which had gone through his clothing. The Tribunal dismissed that as implausible: see paragraph 165.

5. I now turn to the findings of the Tribunal in more detail. The Tribunal concluded that, even applying the lower standard of proof applicable to asylum and refugee claims, the appellant was neither credible nor honest, and the Tribunal gave extensive reasons for this at paragraph 191 of its decision. The Tribunal accepted that the appellant was an election official and that he suffered a bullet wound injury to his hand. However, the Tribunal did not accept his account as to how the injury had happened. He had said that there were some thirty rounds of bullets which were shot at him at relatively close range. The Tribunal said:

> "We can see how it would be regarded as a miracle that, in those circumstances, his clothing would be shot through but that he would escape uninjured in the body. Miraculous escapes do happen on occasion. We must however assess whether there

> was a reasonable likelihood that this occurred. We do not consider there was such a reasonable likelihood. Nor do we consider it plausible that these assassins, in this remote woodland area, would simply assume that he died."

The Tribunal also referred to a number of inconsistencies in his evidence: see paragraph 199.

6. The Tribunal went on to hold such hospital records as there were were not consistent with his account of the injury or the treatment given. At paragraph 194 the Tribunal said that on his account the shooting must have occurred on approximately 9 July. It continued:

> "[The appellant] claims that he was in hospital for some ten days undergoing numerous operations. He has produced a document allegedly from an outpatients department dated 12 July 2005. This refers to him being told to keep slab and sling for three weeks more. This suggested he must have had a slab and sling for some time before this. In any event, if he was hospitalised on 9 July for ten days it is impossible for him to be attending as an outpatient on 12 July."

The Tribunal went on to say there was no evidence in relation to the "supposed hospitalisation and operations". And the Tribunal noted:

> "There is no reference in the medical notes as to how the injury is said to have occurred. If the person that sent him these records was able to obtain these notes we find it implausible that he would not have been able to obtain the notes of the admission to hospital and the operating procedures that were allegedly undertaken."

7. The Tribunal also did not accept the explanation for his hospital records being in English. The appellant produced an expert, Dr Antonio Giustozzi, who said that hospital records were often sparse in Afghanistan and, where they existed, they were often in English because that was more helpful, as foreign aid workers were manning hospitals. The Tribunal rejected this evidence in relation to what appeared to have been physiotherapy treatment. Thus at [196] the Tribunal said:

> "We note that the notes are written in English. We note that the expert considers this is possible. Even, however, given the expert's evidence we consider it unlikely in the extreme that what purports to be a physiotherapy treatment sheet should be written in English."

8. The Tribunal accepted that the video which I have referred to appeared to show the appellant playing a fairly prominent role at the funeral. The Tribunal took the view that the video did not show who had died or how they had died and therefore did not find this video helpful. That appears from paragraph 167. On this basis the Tribunal rejected the appellant's account of the cause of the death of his brothers and of the incident in which he was shot. The Tribunal also rejected his evidence as to post-traumatic stress disorder, saying that this had not required treatment, but this is not a matter which has been advanced in witness submissions today.

9. In his submissions Mr Andrew Eaton, who appears for the appellant, submits that the Tribunal failed to take proper account of the evidence. He submits that the Tribunal left out various pieces of information, such as evidence emerging from the video, and failed to take proper account of the outpatient record and continuation note. He points out that the matter had been directed for re-hearing because Senior Immigration Judge Southern had on 6 February 2008 come to several conclusions, and I refer only to one of them (at paragraph 74 of the Tribunal's findings, page 39 of the bundle): that there was no clear finding as to whether or not the Immigration Judge at a previous decision had accepted that the appellant's brothers had been shot and killed.

10. Mr Eaton submits that the appellant's account is corroborated by evidence that there were election monitors; that there were attacks on election monitors; that he himself was clearly shot in the hand; and that his brothers were killed. He states that his account of what had happened is supported by a ballot paper referring to Q, and indeed also by his medical records. He also relies on the evidence of Dr Antonio Giustozzi that medical records would be sporadic in Afghanistan and he further submits that the Tribunal rejected his medical records because they were written in English and because further documentation had not been available, but he submits this was inconsistent with the evidence that those records would be sporadic -- the Tribunal should have given greater weight to the records which they were actually provided with.

11. The appellant submits that the Tribunal's findings are perverse, and that merely because the appellant could not produce further evidence from the same source did not mean that the evidence which he did produce was not credible, and he also relies on the fact that it was possible that a funeral would be videoed in Afghanistan.

12. I now turn to my conclusions. The first point of course to bear in mind is that the Tribunal took the view that the appellant was neither credible nor honest and that they could not place reliance on what he said to them, so they were obviously very concerned about what other evidence was before them. I will take the matters relied on in turn. The matters relied on are the gunshot wound, the medical records and the video.

13. In relation to the gunshot wound the position, as I see it, is that the Tribunal dealt with the matter on the basis that even if they were wrong in what they

had said at [196] and even if the medical records were therefore genuine documents and related to the gunshot wound which they accepted the appellant had probably sustained in the past, what they said at [197] was that the records did not support the claim to have been shot in the way he described and then the Tribunal went on to say that the account of the shooting was in their judgment completely implausible. At paragraph 198 the Tribunal said:

> "He has described how his clothes were full of holes where bullets passed through them and despite attempts by counsel to suggest that there was just one hole in his jersey and trousers this is not what he said in his witness statement. He has described it as a miracle that he was not injured other than in the hand".

The Tribunal then went on as in the passage which I have already quoted from paragraph 198.

14. Their ultimate conclusion was that, having considered whether there was a reasonable likelihood that the injury had occurred in the way the appellant contended, they did not consider that his account was plausible. In particular, they did not consider it was plausible that the assassins in a remote woodland area would simply assume that he had been killed when he fell down unconscious.

15. So, as I see it, the Tribunal did deal with the situation on the basis that the records were genuine, and so there cannot be a real prospect of success on appeal in arguing that the Tribunal did not give sufficient weight to the records. I should make it clear that nothing turns on the gunshot wound because the Tribunal had, as I have explained, accepted that he probably did receive a wound from gunshot in his hand, and that was supported by a report of Dr Michael Seear.

16. I now move to the video. The appellant, as I have explained, accepts very fairly that the video did not prove that his brothers were the two people being buried or how they died but the more important point, as it seems to me, is that the Tribunal considered the whole circumstances of the video and how it had been received. It certainly showed that two persons had died, and the fact there were two persons being buried at one occasion suggests that they both died in the same event; which means that the same event must have been unnatural but it does not tell one more about that event. The Tribunal also took into account clearly their findings on credibility and honesty. They also took into account their findings about how the video came to be provided. It appeared in a parcel marked "CD-Rom" from the appellant's father or father-in-law with whom, as I understand it, he was unable to have any contact, and further the fact that the appellant himself had said in evidence that it would be unusual for a video to be taken of a funeral in Afghanistan. Those matters went to the reliability of the video evidence and, for my part, I do not think that there is any prospect on appeal of showing that the Tribunal approached

this matter in the wrong way and failed to take account of all the aspects of evidence relating to the video.

17. There was a further point made that facilities should have been provided in court for watching this video. Of course that would have been the ideal situation, but the question is whether the proceedings were thereby rendered unfair. It is clear that the Tribunal must have watched the video themselves. The appellant had watched the video in the past. He had not done so recently because the video had been handed over to the Tribunal and the Secretary of State but there was nothing to stop him from watching it again and asking to have it, which he did not do. In any event the Tribunal held that it did show the appellant taking a prominent part in the funeral and that, in my judgment, is logically the maximum which the video of itself could tell. It was for the Tribunal to evaluate that evidence in the totality of the circumstances of the case which, as I see it, is what they did; and their decision is not open to a real prospect of challenge on appeal that they failed to take account of relevant features of the video or of the medical records.

18. In those circumstances I dismiss this application.

Order: Application refused