Case No: C5/2008/0554

Neutral Citation Number: [2008] EWCA Civ 1430
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/04674/06]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 29th October 2008

Before:

LORD JUSTICE PILL
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE JACOB

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Between:

KN (IRAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Ms C Kilroy (instructed by the Refugee Legal Centre) appeared on behalf of the **Appellant**.

Mr P Patel (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is an appeal by KN ("the appellant"), against a decision of the Asylum and Immigration Tribunal dated 9 January 2008. The Tribunal dismissed the appellant's appeal against the decision of the Secretary of State for the Home Department ("the respondent") on 27 February 2006 to refuse his claim for asylum and for protection under the European Convention on Human Rights ("the Convention"). The hearing was a reconsideration ordered on 9 October 2006 following a determination of 8 September 2006.

2. The appellant is a 47-year-old Iranian national who arrived in the United Kingdom and claimed asylum on 23 November 2001. He claimed that in 1982 Iranian revolutionary guards had raided his family's home in the south of Iran, arresting his father and his 18-year-old brother. The appellant and his mother were later told that his brother had been executed following the decision of the Revolutionary Court. The appellant's father was kept in custody and the family were told in 1983 that he had died of a heart attack.

3. The appellant claims that between 1982 and 1997 his home was raided several times a year and every time there was a terrorist incident in Iran. The family also received threatening letters. On one such occasion in 1997 the appellant tried to protect his sister and was savagely beaten with rubber truncheons. He awoke the following morning to find that an injury to his head had left him paralysed on the left side of his body due to a stroke. The raiding and threatening letters continued between 1997 and 2001.

4. The appellant claimed that in late 2001, while at a friend's house, he was told that his house had been raided following an anti-government demonstration and that the Pasdaran, the Iranian Revolutionary Guard, were looking for him. He went into hiding for about three weeks, staying with friends in villages, and then travelled to the United Kingdom with the help of an agent paid by money borrowed from the appellant's uncles. On arrival in the United Kingdom the appellant submitted a statement and a Statement of Evidence Form. He was not interviewed in relation to his claim until almost four years later.

5. At the hearing before the Tribunal the appellant gave evidence and submitted an expert report from Dr H Peimani. The Tribunal accepted that in 1982 the appellant's brother was arrested and later executed by the Iranian authorities as a result of his connection with MEK (Mojahedin-e-Khalq), also known as MKO. The Tribunal accepted that his father had been detained in 1982 and had died in custody. The Tribunal did not accept that the appellant's family home was raided between 1982 and 2001; did not accept that threatening letters were sent to the home; and did not accept that the appellant was assaulted during such a raid in 1997. It was not accepted that in 2001 the appellant was wanted by the authorities and that his house was raided.

6. Before making those findings the Tribunal considered and commented on the evidence. The appellant's claim was that he feared prosecution because of his

late brother's membership of MEK, which led to the authorities' close interest in him and his family over the following years. He did not himself belong to any political party but was against the regime. His family was the only anti-regime family in the neighbourhood. His mother had moved and he did not know where she or his elder brother were.

7. The Tribunal referred to discrepancies between the SEF and the answers given much later at interview. It noted that no-one else in the family had been physically harmed and that the appellant had been assaulted only on the single occasion in 1997. He had not been involved in any activities against the state.

8. The appellant has a series of medical problems. Evidence was called from Dr J Barrett, a consultant psychiatrist, who found that the appellant was suffering from a mild depressive episode on examination in 2002. The prognosis was guardedly good if the appellant remained in the United Kingdom but the outlook was very poor if he was returned to Iran. In a later report, heart disease was noted and a permanent limp which resulted from childhood polio.

9. A report was also available to the Tribunal from Dr H Peimani dated 1 October 2007, an expert on conditions in Iran. Dr Peimani stated, as recorded by the Tribunal, that:

> "Family members and friend or acquaintances [of MKO members] were arrested on suspicion of ties to MKO or for questioning to fill gaps in the knowledge of the Pasdaran about arrested members… such treatment can continue as long as those in charge of dealing with such cases see merit in its continuity. He cannot state whether it could last for nineteen years as claimed by the appellant although it is a possibility provided the mentioned condition existed."

10. The Tribunal stated that it had considered the oral and documentary evidence "including the medical and country reports and Dr Peimani's report". Some of the in-country reports were cited. It was accepted that MEK was a violent anti-government group which the authorities were ruthless in suppressing. Commenting on the expert evidence, the Tribunal noted the opinion that harassment of families of those arrested or executed was routine, though the opinion had been qualified by stating that the authorities would need to see merit in its continuity. The Tribunal added: "There was no activity of the appellant or any member of his family after the detentions in 1992". The Tribunal found that claims about threatening letters were "vague and contradictory".

11. Having considered the evidence the Tribunal made findings of fact set out at paragraph 20:

> "In the light of the above analysis I make the following findings of fact:
> (a) I accept that the appellant's brother was arrested and later executed by the Iranian authorities in 1982 as a result of his connection with MEK.
> (b) I accept that the appellant's father was detained in 1982 and died while detained
> (c) I do not accept that the appellant's family home was raided between 1982 and 2001
> (d) I do not accept that threatening letters were sent to the appellant's house
> (e) I do not accept that in 1997 the appellant was assaulted during a raid
> (f) I do not accept that in 2001 the appellant was wanted by the authorities and that his house was raided
> (g) I accept that the appellant is of Arab ethnicity."

12. The Tribunal went on to find in relation to future risk:

> "…the appellant had no political profile while in Iran and was never at any stage of any interest to the authorities. He was never arrested or detained. He was never a member of either political organisation nor a political activist in any way. As to his Arab ethnicity there is no evidence that he is, that he or any member of his family is or has been in any way associated with Khuzestan extremism".

The Tribunal concluded that there was no risk either of Convention persecution or of Article 3 ill treatment.

13. The Tribunal also rejected an Article 8 claim stating that interference with private life "would be lawful in pursuit of legitimate aim of an effective immigration policy and would be proportionate". Reference was made to N v SSHD [2005] UKHL 31. It was concluded:

> "Article 3 does not require a Contracting State to undertake a positive obligation to provide aliens permanently with medical treatment lacking in their own countries. Similar principles apply in relation to Article 8."

The Tribunal added:

> "Removal of the appellant to Iran would not interfere with his private life because medical treatment is available for such conditions as the appellant has albeit that it might have to be paid for [see generally the COIR at paragraphs 26.01 and 26.02]. Mental health provision information is

> limited [see paragraphs 26.18 to 20] but there is no evidence that the same or equivalent medication would not be available. If I am wrong and removal would interfere with his right to private life, it would be lawful in pursuit of the legitimate aim of an effective immigration policy and would be proportionate."

14. On behalf of the appellant Ms Kilroy submits that the conclusions of the Tribunal cannot be sustained and were erroneous in law. It is submitted that their conclusion at paragraph 20(c) was not consistent either with the expert evidence or with common sense. It was not a tenable finding, she submits, that the slate was "wiped clean" following the deaths of the appellant's brother and father.

15. The Tribunal did not make a finding that the slate had been wiped clean. What the Tribunal had to consider was whether the appellant's account of frequent raids on his home over a very long period was a credible account. That was the issue: had the appellant said that raids had gone on for several years following the deaths and had then ceased, it might have enhanced the appellant's credibility but would not of course have given him a case in 2001. Ms Kilroy refers to the finding of the Tribunal at paragraph 17. That is part of a sequence of paragraphs which, as Ms Kilroy acknowledged, deal with the various aspects of the claim: family position, the alleged raids, the alleged threatening letters and the circumstances of the alleged raid in 2001. Paragraph 17 deals with the alleged raids. The Tribunal found:

> "There was no activity of the appellant or any member of his family after the detentions in 1982 -- and the subsequent deaths thus removing those under suspicion -- that attracted the attention of the authorities or would have caused any suspicion and thus there was 'no merit' in the authorities searching the home and behaving as he claims"

16. Ms Kilroy is correct in saying that, in the light of the evidence, it does not necessarily follow from the death of the brother, who was actively involved, that there would be no continuing interest in the appellant and the rest of the family. Whether that possibility does exist in a particular case is a matter for assessment by the Tribunal as a matter of fact in the light of the evidence given about conditions in the country. The word "thus" in paragraph 17 may be unfortunate as suggesting that it necessarily followed that the deaths would have ended the adverse interest of the authorities. However, this statement appears in the sequence of paragraphs to which I have referred. In those paragraphs a whole series of comments is made, based under each of the headings which must be considered when assessing the reliability of the Tribunal's conclusions at paragraph 20, involving an adverse finding about the appellant's credibility.

17. At paragraph 13 it is noted that "the appellant has given no detail of his brother's activities nor any role he played nor position he held." Later,

> "The appellant himself was obviously not at that time suspected of any anti-state activity because he was not himself arrested, although his father was. Indeed the appellant's case is that he has never been arrested, detained or charged with any offence by the authorities".

At paragraph 15, the rest of the family are dealt with:

> "The appellant had family members living in the same town… namely an older brother and a paternal uncle. They were both employed. There is no evidence that they were at any stage involved with or suspected of involvement with the MEK nor that they had any problems with the authorities. There is no evidence that the appellant nor any member of the family at any stage encountered problems because of their Arab ethnicity".

18. At paragraph 17 there is reference to claimed inconsistencies in the appellant's accounts to which I will refer in a moment in a little more detail. It is also commented: "On his own account nothing was ever found and neither he nor any family member was ever detained…nor did he then seek to leave the country."

19. At paragraph 18 it was suggested that the evidence about the threatening letters was "vague and contradictory". We have been referred to the documents. The SEF statement made no mention of letters received before the 1997 attack whereas in the later statement it is claimed that letters were received over a very long period.

20. At paragraph 19 comment is made about the 2001 alleged raid:

> "Had the authorities wanted to detain him it is not reasonably likely that they would raid the house at the time when he was not there, thereby alerting him to their interest in him."

21. In my judgment those were all factors relevant to the central question the Tribunal had to decide, which was whether the appellant's account of sustained and frequent harassment, to put it no higher, over a period of almost 20 years was true. In my judgment the Tribunal was entitled to come to the conclusions it did at paragraph 20 and there is ample material in the narrative which precedes those conclusions to justify the conclusions stated.

22. The Tribunal may have been harsh on the appellant on one of those many points, that is, in finding an inconsistency between the statement on arrival and

the statement on interview about the number of political problems which occurred. Ms Kilroy fairly makes the point that a reference to three occasions by way of examples does not necessarily exclude the later claim that such occasions occurred far more frequently; similarly the distinction between "several times a year" and "every five or six months". In my judgment that potential harshness of that finding does not affect the overall conclusion or the reasons for which it was reached. It is inconceivable that had that factor been treated as not unfavourable to the appellant, the Tribunal would have reached a different conclusion. It was important for the Tribunal to consider not only the appellant's conduct but the perspective of the authorities: if the perception of the authorities was that he remained a risk, the fact that he was not engaged in political activity does not render the possibility of harassment impossible. However, the Tribunal was entitled to conclude, in my view, from the factors on which it relied, that the authorities had no continuing interest in the appellant.

23. The second ground of appeal relates to the evidence of Dr Barrett which I have summarised. The first point taken is that, in reaching its conclusions and in particular the conclusion that there had been no assault and raid in 1997, the Tribunal failed to have regard to medical evidence about a head injury which the appellant claimed to have sustained. In a report of 23 April 2002 his general practitioner noted:

> "symptoms consistent with a stroke on the left side of his body. I understand that this occurred as a result of a head injury sustained in a politically motivated assault."

24. In a report dated December 2002 a neurologist stated:

> "He then suffered a right-sided head injury about six to seven years ago probably due to assault and harassment, although it was difficult to ascertain the severity or extent of his possible head injury."

25. Reliance is also placed on a much more recent report from a general practitioner 8 October 2007:

> "Distonia of the left arm following an assault and right-sided head injury in the late 1990s due to assault and harassment."

Ms Kilroy submits that the conclusions are in error by reason of the failure, when considering credibility, to have regard to that evidence.

26. While it is surprising that no reference was made to that evidence in the series of paragraphs to which I have referred, I am unable to conclude that the decision reached by the Tribunal was in error. The doctors were clearly recording what they had been told by the appellant. There is no analysis of causation by them, no suggestion that in their medical opinion the symptoms

on the left side of the body were likely to have been caused in the manner claimed: that is by specific assault in 1997 leading to a stroke. Moreover there is no general evidence as to the likelihood or the possibility of an assault causing the type of symptoms which were present.

27. I have referred to the many factors which the Tribunal expressly had in mind when reaching the conclusion as to credibility. There is no firm evidence that the head injury, if there was one, was caused in the manner alleged, and there is no further evidence that the unfortunate symptoms on the left hand side of the body have resulted from that. In the context of the many factors which the Tribunal considered, I do not consider it a real possibility that the finding would have been different, or could have been different, upon a further analysis of the medical evidence. The Tribunal was aware of that evidence; their failure specifically to deal with it does not in context invalidate the conclusion reached.

28. The third ground is that the Tribunal has had no regard to the risk of suicide mentioned in one of the medical reports. There is no doubt that the appellant has suffered since his arrival in the United Kingdom from mental health problems, and these are described in the reports to which I have referred. Reliance is placed on the evidence of Dr James Barrett, consultant psychiatrist, which I mentioned in passing earlier. His report is dated 16 November 2002. It is a comprehensive report, referring to the general history and more specifically to the mental conditions believed to be present. The doctor's opinion was that the appellant was "suffering from a mild depressive episode with somatic symptoms". There was no post-traumatic stress disorder. The treatment he was receiving "seemed to suit him well". Under the heading "Prognosis" Dr Barrett stated:

> "I think that [Mr N]'s prognosis is guardedly good if he stays in the UK. I would expect him to achieve independent living and to become employable. He might well not ever sustain a relationship. Were [Mr N] to return to Iran I would expect the outlook to be very poor. The rather personal sort of help required in the form of cognitive behavioural therapy is not easily available in Iran and I would suspect that the practitioners would not see [Mr N] as a very desirable patient. I suspect he would not be taken on by anyone and would not be able to afford the fees even if he were to be accepted. With drug treatment alone he will be likely to remain unemployable and probably not capable of independent living. Without any treatment at all I would expect him to become much more depressed. I would not be surprised if he were to become suicidal and end his own life in such circumstances."

The appellant did not himself claim to be suicidal and referred to the help he had received from the doctors.

29. Ms Kilroy submits that, in the face of that evidence, the conclusion of the Tribunal on the Convention claim is not supportable. She submits that, in the light of that evidence, the United Kingdom would be in breach of its Article 3 and Article 8 duties if the appellant were to be returned to Iran. Reference has been made to the case of J v SSHD [2005] Imm AR 409. Giving the leading judgment in that case Dyson LJ stated at paragraph 42:

> "Cases concerning the risk of death resulting from non-availability of treatment in receiving state are not precisely analogous to those concerning the risk of suicide."

Setting out a series of propositions as to how suicide risk cases should be assessed, he stated at paragraph 30:

> "Fifthly, in deciding where there is a real risk of a breach of Article 3 in a suicide case the question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well founded that will tend to weigh against there being a real risk that the removal will be in breach of Article 3".

Dyson LJ had stated in the preceding paragraph that "An Article 3 claim can in principle succeed in a suicide case."

30. That proposition at paragraph 30 does not directly apply in this case. This is a case in which the Tribunal has found that the fear is not well-founded. That militates against the appellant's claim but the claim is put in a way independently of the asylum claim. It is suggested that the risk of suicide for health and social reasons is such that the appellant should not be removed. Ms Kilroy submits that the paragraph in Dr Barrett's report should be considered in the light of a known psychiatric history and amounts to such a risk of suicide that removal would be unlawful.

31. It is contended on behalf of the respondent that the suicide risk was not raised before the Tribunal at which the appellant was represented and, on a consideration of the detailed decision, that would appear to be correct. Nevertheless, submits Ms Kilroy, there was sufficient material before the Tribunal and the Tribunal should itself have addressed this point specifically, which it did not.

32. Reference has also been made to the judgment of Maurice Kay LJ in CN (Burundi) v SSHD [2007] EWCA Civ 587. It was held in this court that the analysis by the Tribunal of the suicide risk had been insufficient. Maurice Kay LJ, at paragraph 28, stated:

> "I do not underestimate the magnitude of the task that faces the appellant in the pursuit of his Article 3 claim."

Ms Kilroy accepts that the threshold is a high one. In that case the issue was remitted back to the Tribunal for a further consideration. However, Maurice Kay LJ considered the variety of cases which may arise in this context and held that the applicant in that case was "in a different category from some whose claims are vague and supported only by cursory expert opinions."

33. I have referred to the Tribunal's finding that medical facilities would be available in Iran. That was based on background material to which the Tribunal referred. In my judgment the threshold for an Article 3 claim based on the risk of suicide is not reached by reliance on the single paragraph in Dr Barrett's report I have read. It must of course be considered along with the more general principle I will mention when considering the Article 8 claim that the inferiority of medical facilities in the receiving country, as compared with those in the United Kingdom, is not in itself a ground for an appellant being able to require that he remain on Article 3 or Article 8 grounds.

34. There is a reference in Dr Barrett's report to his knowledge of many countries. If he has a specific knowledge of Iran the basis for it is not specified in the report. In my judgment the single sentence that the doctor "would not be surprised if he were to become suicidal" is insufficient to achieve the high threshold necessary if the United Kingdom is to be in breach of its obligations under the Convention. The Tribunal did comment, as it was entitled to do, on medical facilities and the comment is not entirely in accord with that of Dr Barrett, though the limitations of facilities in Iran are accepted. In the context of the evidence as a whole I am unable to come to the conclusion, however it is approached and if it were to be approached again by a tribunal, the Article 3 threshold is reached by virtue of that sentence in Dr Barrett's report.

35. The remaining question is whether there is a breach of Article 8. The Tribunal referred to the case of N and to the principle there enunciated. Ms Kilroy cited the speech of Baroness Hale at paragraph 69:

> "In my view therefore the test in this sort of case is whether the applicant's illness has reached such a critical stage -- ie he is dying -- that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity."

36. The case of N v SSHD [2005] UKHL 31 has in effect been approved by a majority decision of the European Court of Human Rights in 27 May 2008 (App No 26565/05) The court essentially confirmed the approach taken in N

to Article 3 in a case of medical treatment. Disparity between facilities available in the United Kingdom and those in the receiving state do not attract the operation of Article 3. The European Court of Human Rights resolved what was described in N by Lord Nicholls as the "cruel reality" in the same way as did the House of Lords. Given the medical treatment available in the United Kingdom, the condition of the appellant in the present case, like the appellant in N is favourable. With the benefit of that treatment he is likely to be in reasonable mental health, notwithstanding his several disabilities. He is not at the present time critically ill and unfit to travel; that being so, in my judgment it is an extremely difficult task for an appellant to allege that his medical condition entitles him to remain in the United Kingdom by virtue either of Article 3 or Article 8.

37. I have in mind that Dyson LJ's reference to the lack of a precise analogy between this type of case and a case depending wholly on physical disabilities: mental health is a factor to be considered, but I am unable to conclude that the threshold is or Article 8 is reached or even approached by reason of the mental and physical condition of the appellant and the inferior medical facilities available in Iran as compared with the United Kingdom. At paragraph 22 the Tribunal has correctly referred to the balance which needs to be struck between any interference with private life and the pursuit of the legitimate aim of an effective immigration policy. The mental health issue has clearly assumed a larger dimension at this hearing than it did at the hearing before the Tribunal. In my judgment the conclusion reached by the Tribunal betrayed no error of law, with the fuller submissions heard on the issue both in relation to suicide risk and to other health aspects in this court. In my judgment there is no real prospect, upon any remission, that the Tribunal would reach a different conclusion.

38. It follows that on each of the points persuasively argued by Ms Kilroy I fail to find any error of law in the Tribunal's conclusions or in its approach to the issues and I would dismiss this appeal.

Lord Justice Scott Baker:

39. I agree.

Lord Justice Jacob:

40. I also agree.

Order: Appeal dismissed