

Neutral Citation Number: [2009] EWCA Civ 470
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/02060/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 7th April 2009

Before:

LORD JUSTICE RIMER
and
LORD JUSTICE SULLIVAN

Between:

ZH (AFGHANISTAN)

Appellant

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

(DAR Transcript of
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Mr S Vokes (instructed by Messrs Blakemores) appeared on behalf of the **Appellant**.

Mr R Kellar (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

Judgment

Lord Justice Sullivan:

1. This is an oral hearing, pursuant to the order of Mummery LJ dated 10 February 2009, of the applicant's application for permission to appeal against the decision of Senior Immigration Judge Jordan on reconsideration dismissing the applicant's appeal under the Refugee Convention.
2. The facts can be stated very shortly. The applicant is a citizen of Afghanistan who was born on 1 January 1992. He arrived in the United Kingdom on 26 October 2007 and claimed asylum. He gave an account of his father and brother being killed in Afghanistan and of he and his mother leaving Afghanistan but being separated en route to the United Kingdom.
3. The Secretary of State rejected the entirety of the applicant's account save for his age and nationality, but nevertheless granted him discretionary leave to enter and remain until he was 17 ½ years old in accordance with the Secretary of State's policy "because you are an unaccompanied child for whom we are not satisfied that adequate reception arrangements in your own country are available."
4. The applicant, as he was entitled to do, appealed against the refusal of his refugee claim. His appeal was heard by Immigration Judge Pirotta. In a determination dated 23 April 2008 she rejected the entirety of the applicant's account but said this in paragraphs 36 and 37 of her determination:

"36. The appellant is a minor and professes to be an orphan. There is no material challenge to these as facts, it is not possible to return him to Afghanistan to family or make arrangements for his reception there. The Secretary of State has decided to give him exceptional leave to remain..."

37. The appellant is a member of a particular social group, as a child without family in Afghanistan, and is at risk of persecution as a member of that demographic. The caselaw directs that he is at risk of persecution for Convention reason and that there is no sufficiency of protection though there are agencies charged with looking after street children in Afghanistan."

5. She therefore allowed his appeal under the Refugee Convention. Reconsideration was ordered by Senior Immigration Judge Jordan because, while the authorities do indeed establish the proposition that Afghani minors who are orphans may fall into the category of a particular social group for the purposes of the Refugee Convention (see LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005), the Secretary of State had

comprehensively rejected the applicant's account, and on the Immigration Judge's own findings the applicant was not an orphan or a child "without family in Afghanistan" because she had rejected the applicant's account of his father being killed and of him having lost touch with his mother.

6. Senior Immigration Judge Jordan reconsidered the appeal and dismissed it in a determination promulgated on 17 October 2008. This application is for permission to appeal against that determination. In paragraph 17 of his determination Senior Immigration Judge Jordan said:

"For these reasons, I am satisfied that the Immigration Judge made a material error of law in approaching this appeal on the basis that the appellant was an orphan. The correct basis upon which she should have assessed the risk to this appellant was on the basis that the appellant's account as to the true circumstances in which he left Afghanistan had not been told to her and, in particular, that his father died in the circumstances he claimed or that his brother died in those same circumstances. Nor was there credible evidence that his mother had died or could no longer traced."

Having referred to the case of LQ and pointed out that in that case there had been a specific finding of fact that the appellant was an orphan, Senior Immigration Judge Jordan said in paragraph 20:

"It seems to me that there are overwhelming difficulties in an appellant whose account has been comprehensively rejected from succeeding in a claim for international protection. The recognition that a person is a refugee is established on a case-by-case basis, paying close regard to the individual circumstances of each claimant. As a result of the adverse credibility findings made by the Immigration Judge, there was no credible evidence as to the appellant's true circumstances, including the circumstances in which the appellant came to leave Afghanistan. It does not seem unreasonable to infer that if the claimant based his claim upon a series of untruths, he did so because, had the truth been told, this would have prejudiced the success of his claim. When a claim such as this has been dismissed by the Judge, it is difficult to see on what factual basis a claim for asylum can be advanced. It is entirely the responsibility of the appellant that his history remains in the dark. It is simply speculation to advance a claim which arises, phoenix-like, out of the ashes of his discredited account."

7. Mr Vokes on behalf of the appellant submits that this paragraph in the determination discloses an error of law in that, even if an appellant's case is comprehensively rejected, there may well be circumstances in which he will nevertheless qualify as a refugee. In principle that is clearly correct but it is equally correct, as the Senior Immigration Judge said, that it is difficult to see on what factual basis a claim can be advanced in those circumstances -- difficult but not impossible. Had the determination stopped there, Mr Vokes might have had a point. But since Senior Immigration Judge Jordan then went on to consider the only basis on which it was argued that this appellant might be entitled to refugee status, this criticism of the determination goes nowhere. Having referred to Mr Vokes's submissions on the basis that the appellant was a minor, Senior Immigration Judge Jordan said this in paragraph 24:

“The appellant in the present appeal has not overcome the first hurdle of establishing that he is a refugee because he has not established that he would be at risk. Mr Vokes submitted that it would be entirely speculative to assume that the appellant would be able to find his parents, or that his parents (or either of them) were in Kabul (the destination of his return) and that the evidence establishes he will be on his own in Kabul. I disagree [that] the appellant has established such a risk. It would have been open to the appellant at any stage to have disavowed his earlier untruthful account and to provide the Secretary of State with full details of his parents' whereabouts, as he knew them to be and explain why he could then not then be returned. His failure to do so means there is an evidential lacuna which only the appellant himself can fill. He has not established that his father is dead. He has not established he has no contact with him or that his father cannot travel to Kabul to collect him. He has not established his mother's whereabouts or that he is unable to contact her. No proper inferences can be drawn in relation to any of these matters. Accordingly, the appellant has failed to establish that he is at risk of serious harm or any risk of harm were he to return to Afghanistan. Were he to have done so, the issue would then arise as to whether the risk of harm may properly be classified as a Convention reason by reference to principles of his membership of a particular social group.”

8. Mr Vokes submitted to us, as he had submitted to Senior Immigration Judge Jordan, that it was sufficient for the applicant to prove that he fell within the Secretary of State's policy in respect of minors from Afghanistan, that is to

say, he was an unaccompanied child for whom the Secretary of State was not satisfied that adequate reception facilities were available in Afghanistan.

9. Mr Kellar points out in his written submissions on behalf of the Secretary of State that the short answer to that submission is contained in paragraph 22 of Senior Immigration Judge Jordan's determination. In that paragraph Senior Immigration Judge Jordan said this:

“The Secretary of State cannot force a minor appellant to disclose the presence of his parents and may have no means himself of identifying them. Further, the Secretary of State cannot deposit a child at a distant airport without making arrangements for the child's care. The child himself may well obstruct those arrangements by not revealing his domestic circumstances. That does not mean that by reason of the minor's failure to reveal his true circumstances, he has rendered himself a Convention refugee.”

10. The mere fact that a child applicant for asylum falls within the policy of the Secretary of State is not in my judgment of itself sufficient to discharge the burden on the child applicant to demonstrate that he is at real risk, or there is a serious possibility that he will be persecuted if returned. The threshold for what amounts to persecution is relatively high, the policy sidesteps that difficulty by being broader in scope. The unaccompanied child does not have to demonstrate that he would be at real risk of persecution if returned to fall within the Secretary of State's policy. All he has to demonstrate is that he is unaccompanied, that his parents cannot be traced and that adequate reception arrangements cannot be made for him. Thus the policy is plainly broader in scope for perfectly understandable policy reasons than the narrower definition of what amounts to refugee status. Thus it does not follow automatically, simply from the fact that a child falls within the Secretary of State's broader policy, that there is a real risk or a serious possibility that that particular child's basic human rights will be so severely violated that he will suffer what amounts to persecution.
11. Mr Vokes referred to the particular circumstances that this applicant would face in Afghanistan, but, in order to reach a conclusion as to whether there would be a real risk or a serious possibility of persecution there, one would need to know more about the circumstances in which this particular child left Afghanistan and the circumstances in which he would find himself if he was returned there, in terms of whether there might be other members of his family, his father, his mother or other family members, who would be able to look after him. There is, as Senior Immigration Judge Jordan said in the light of Immigration Judge Pirotta's findings, a huge evidential lacuna in the applicant's case in respect of those matters.

12. It is for that simple reason that this particular applicant was unable to discharge the burden of establishing that he was a refugee, despite the fact that he fell within the Secretary of State's broader policy.

13. For those reasons I would refuse this application for permission to appeal.

Lord Justice Rimer:

14. I agree. So the application will be refused.

Order: Application refused