Case No: C5/2008/0812

Neutral Citation Number: [2008] EWCA Civ 1540
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/08388/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 11th November 2008

Before:

LORD JUSTICE LAWS
LORD JUSTICE RICHARDS
and
LORD JUSTICE LAWRENCE COLLINS

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Between:

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

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THE APPELLANT APPEARED IN PERSON.

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

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Judgment

(As Approved by the Court)

Lord Justice Laws:

1. This is an appeal, with permission granted by the tribunal below, against the determination of Immigration Judge Harmston, dated 19 February 2008, by which the immigration judge dismissed appeals brought on asylum, human rights and humanitarian protection grounds against the Secretary of State's refusal to grant the appellant asylum on 29 June 2007. Immigration Judge Harmston's decision was taken on a statutory reconsideration.

2. The immigration history is as follows. The appellant is an Iranian citizen of Kurdish ethnicity. He arrived in the United Kingdom hidden in a lorry on 1 March 2005 and claimed asylum the following day. His claim was refused, as I have said, on 29 June 2007. His appeal was heard by an immigration judge sitting at Newport on 14 August 2007 and dismissed on 17 August 2007. However, on 7 September 2007 a senior immigration judge granted his application for a reconsideration. On 29 October 2007 the AIT -- having concluded, in fact with the parties' consent, that the first immigration judge had made an error of law -- directed a second stage reconsideration. That led to the hearing before Immigration Judge Harmston on 12 February 2008 and his determination of 19 February 2008.

3. The appellant's case on the facts is described in very considerable detail by Immigration Judge Harmston at paragraphs 8 to 13 of his determination. I will offer a much shorter outline. The appellant claimed that his two elder brothers were involved with the KDPI, an illegal political party which is persecuted by the Iranian authorities. At length they became Peshmergas -- that is, armed fighters for the party. He himself was not involved in politics in any way. His brothers were arrested in 2000 but allowed home. A month later they were arrested again but released the next day. They decided to leave home. They needed money from the family farm, which was accordingly sold and the proceeds divided. The brothers left. The appellant and his sister remained living in the house. That was in 2000. A year later the appellant was himself arrested, detained for two days and questioned about his brothers. He told the authorities he did not know where they were. He was released, but a month later the authorities came back to the shop at the front of the house. The appellant's uncle was present. He told the authorities the appellant did not know anything. They left without detaining the appellant. Then, on 4 December 2004, the appellant was again arrested. This time he was kept imprisoned for two months. He was questioned about his brothers and frequently beaten with cables and sticks. He kept saying he did not know where the brothers were. At length, at the beginning of February 2005, he had had enough and told the authorities he would go and bring his brothers. On 2 February 2005 he signed an acknowledgment that he would be detained for ever if he did not bring his brothers back. So he was released. He met his uncle, who said that he had told the authorities the appellant was not responsible for his brothers and did not know where they were. The appellant explained to his uncle and sister that he had to leave Iran. His uncle arranged an agent who was paid with money from the shop. He left Iran on 4 February 2004, crossed into Turkey and made his way over land to the

United Kingdom. Since arriving here, on his account he has been in touch with his uncle by means of a telephone call in December 2005. His uncle phoned a mobile number which the appellant had left with a neighbour. He told the appellant that the authorities had been to the shop which they had closed down and were still looking for him.

4. Immigration Judge Harmston held that, effectively, the appellant's account was a concoction, a conclusion which he reached principally because of what he saw as a number of inconsistent statements made by the appellant. The grounds of appeal take issue with most or all of the individual points relied on by the immigration judge. However, on granting permission to appeal the AIT referred only to one such point; it concerns the phone call from the uncle after the appellant had arrived in the United Kingdom. The immigration judge said this:

> "In view of the nature of the appellant's asylum claim, perhaps one of the most significant changes in the appellant's account concerns his claim that he spoke to his uncle on the telephone in December 2005 and was then told that the Iranian authorities had raided the shop and closed it down. There is submitted an attendance file note of the Refugee Legal Council in the appellant's supplementary bundle and reliance is placed by the appellant's representatives on that document. Firstly, I accept that the record exists and is dated 24 January 2006. It relates to an interview by the Refugee Legal Centre with the appellant on that day and which appears to have lasted 77 minutes. It was therefore not just a short interview. Indeed, the reference to the uncle's telephone call is about the only significant fact recorded on that file note. However, despite the fact that the appellant apparently told the Refugee Legal Centre about that vital piece of information in January 2006 it was never subsequently mentioned until February 2008. It was not mentioned in the written statement prepared for the first hearing before an Immigration Judge on 14 August 2007 and Ms Rhind, who appeared at that hearing, confirmed to me that it was not mentioned at that hearing either. It was not a piece of information that came out in the Asylum Interview on 14 February 2006, and it was not information that was conveyed by the Refugee Legal Centre to the Home Office at any time after 24 January 2006. Whilst it is possible that the Refugee Legal Centre might have been responsible for the negligent act of failing to provide that information both to the Home Office and to the Tribunal, it is almost unbelievable that the appellant

> himself would not have picked up the fact that this vital piece of information was missing from his accounts and sought to correct the omission. His failure to do that casts some doubt upon the integrity of the information that he says that he passed to the Refugee Legal Centre."

The AIT, granting permission, stated:

> "Once the judge accepted, as he did, that the appellant had told the Refugee Legal Centre about the December 2005 phone call from his uncle in January 2006, it might reasonably be thought that their (grossly negligent) failure to make that part of his case before February 2008 was their responsibility, rather than his, and so of no real relevance to his credibility."

5. The point, however, as it seems to me, goes rather further than that. We have a statement from Melanie Rhind of the RLC who represented the appellant both at his first appeal and the second stage reconsideration. It seems to me that we can and should admit this statement, which was made on 7 March 2008, and so about three weeks after Immigration Judge Harmston's determination. It elucidates the procedural facts against which a judgment has to be made as to whether the immigration judge fell into error. Ms Rhind makes it clear (paragraph 2) that the appellant's statement prepared for the first appeal was not a complete account of events:

> "…but was rather supplemental to the initial statement and was primarily a response to the issues raised by the Respondent in the refusal letter."

6. It may fairly be said that the appellant's responses in interview and in evidence were, at any rate in large measure, prompted by the questions he was asked. It seems to be uncontentious that he is not an educated man and, though he has some English (he has little), he is being assisted by an interpreter in court before us this morning.

7. The fact is the appellant had given an account of a phone conversation with the uncle no later than 24 January 2006, hardly more than a month after the phone call was said to have taken place. The immigration judge accepted that he told the RLC about it in the January. It seems to me that it was not fair or reasonable to damn the appellant's credibility for failure to mention it on other occasions when he was not being asked about it. It is not the appellant's fault that the RLC failed to put it to the Home Office. The immigration judge described this (opening of paragraph 16) as "one of the most significant changes in the appellant's account". If, as I would hold, the immigration judge's criticisms on this point are very much less powerful than Mr Greatorex for the Secretary of State contends, it seems to me that the outcome arrived at

by the immigration judge is fatally undermined. I would not be inclined to conclude that the determination is sustainable because of the force of other points taken by the immigration judge.

8. It is to be noted, as my Lord Richards LJ pointed out in the course of argument, that the immigration judge placed heavy reliance on what he regarded as the inconsistencies in the appellant's account (see the penultimate sentence of paragraph 23). There were, however, other points, and I propose to deal with some of them. Before that, however, I should note Mr Greatorex's submission for which, for my part, I have considerable sympathy, that the grant of permission to appeal by Senior Immigration Judge Freeman on 31 March 2008 might be read as limited to the ground relating only to the uncle's phone call. That is the only factual matter referred to in the reasons for the decision. However, the grant of permission is not itself limited in scope on the face of the document of 31 March and I would read it as being unlimited, albeit the Senior Immigration Judge chose to refer only to one point in his reasons -- no doubt the point that impressed him most. It would be plainly helpful if, in deciding to grant permission to appeal to this court, judges of the AIT make clear whether the permission they grant is limited in scope or not. That is not effected merely by the fact that one, as opposed to all, potential reasons for grounds of appeal are referred to; the scope of the appeal should be delineated by the grant.

9. I turn then to such other points as need to be considered. In paragraph 17 of the determination the immigration judge finds a discrepancy between the note of what the appellant had said to the RLC which recorded the shop as having been raided "a few days before" the phone call with the uncle and, by contrast, the appellant's evidence in cross-examination on the reconsideration when he said he did not know how many days had passed between the shop being raided and the phone call. In her witness statement Ms Rhind says (paragraph 4):

> "Lastly, in order to clarify the contents of paragraphs 17 of the determination, the appellant was asked in cross-examination to clarify how many days had passed between the shop being raided and his telephone call with his uncle to which the appellant replied that he did not know."

10. I accept the submission made in writing on behalf of the appellant that he was simply indicating in evidence that he did not know exactly how many days had passed. On that basis, the inconsistency relied on by the immigration judge disappears. It is true, as Mr Greatorex was at pains to emphasise this morning, that the appellant denied to the immigration judge that he had told the RLC that the phone call took place a few days after the raid; but the substance of the point being taken by the immigration judge is as to the alleged inconsistency, and it seems to me that that is in the end insubstantial. There was next the point about the appellant's sister's wedding. The appellant said that his brothers had arranged his sister's marriage. The immigration judge had this to say:

> "He was asked if his sister had been married before the brothers had left the farm and he replied 'No, it was after the brothers had left because she was alone. When my brothers left I stayed with my sister in our house.' He was asked to explain how his brothers could have arranged his sister's marriage if they had had no contact with the brothers since 2001 and, after some thought, he said that they had arranged her marriage to one of their friends not in their village but in Sardashet. Again, it was put to him that he was saying that his brothers had sold the land and left but that they had remained in contact with the appellant and his sister and he denied it. When further cross-examined on this point he said 'They talked to my sister and their friend before they left and after they had left my sister married and took her'. It was quite clear to me that the appellant was unable to reconcile his account of having had no contact at all with his brothers after 2001 and the fact that they arranged his sister's wedding after that date when she was living with him at their home. Clearly, some aspects of this account were untrue and that damaged his general credibility."

11. This seems to me to be a less than fair representation of the position. The discrepancy was explained. The brothers, on the account being given by the appellant, had arranged a marriage before they left, but it took place after. It seems to me the only fair reading of the quotation from the appellant's evidence given by the immigration judge -- "they talked to my sister and their friend before they left, and after they had left my sister married and they took her" -- is to the effect that the marriage was being arranged by the brothers before they left.

12. There may very well be other difficulties with the appellant's account, as again Mr Greatorex has sought to emphasise. It is at the least mysterious that the appellant seems to be unaware of when his sister got married, and there may be other problems. But again, the point being taken by the immigration judge is that there is an inconsistency which the appellant could not explain. That is an erroneous conclusion. The inconsistency simply is not there.

13. The immigration judge also took a point against the appellant to the effect that, whereas the appellant had insisted that his brothers had sold the farmland and not the house, a passage in his second statement of 4 February 2008 refers to a decision to sell the house. Ms Rhind states (paragraph three) that the use of the word "house" in that statement was a mistake on her part and that the appellant's instructions were that it was the land that had been sold. There is no reason to doubt Ms Rhind's evidence on the point; although the mistake

was hers and not that of the immigration judge, the inconsistency being relied on by the immigration judge is undermined.

14. Mr Greatorex has other points to make. He submits that actually the main point on this part of the case was a different inconsistency. It arose between two accounts given by the appellant of where he lived: one, he lived in the house; two, he lived with his uncle. That may be a telling point, but it is not the point which is being emphasised by the immigration judge which, for the reasons I have given, is again undermined.

15. Those are the points which, it seems to me, have significance in the case. The appellant sought in writing to advance certain further arguments relating to what the immigration judge made of certain material in the expert's report but it does not seem to me that it is necessary to go into those matters, as to which two views might perhaps be taken.

16. This court has time and again been at pains to emphasise -- and I emphasise it now -- that the asylum appeal jurisdiction is bedevilled by repeated attempts to dress up facts as law. I should therefore make it clear that in my view this case is unusual. I have concluded that the immigration judge's decision to treat the individual points about the uncle's phone call, the timing of the raid, the sister's marriage and the sale of the property are not in the end rationally sustainable. In those circumstances the appeal is good and must be allowed. I repeat I consider the case to be an unusual one. It is certainly no basis for the repetition in the future of arguments which, in reality, do no more than dress up facts as law. For all those reasons I would allow the appeal. If my Lords agree, the matter must be remitted to the AIT.

Lord Justice Richards:

17. I agree.

Lord Justice Lawrence Collins:

18. I also agree.

Order: Appeal allowed