Neutral Citation Number: [2010] EWCA Civ 1135
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/01577/2009; AA/015778/2009]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 4th October 2010

Before:

LORD JUSTICE JACKSON

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Between:

SP (AFGHANISTAN)
and
DP (AFGHANISTAN) **Appellants**

- and -

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

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Mr Anthony Vaughan (instructed by Messrs Braitch) appeared on behalf of the **Appellants**.
The **Respondent** did not appear and was not represented.

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Judgment

Lord Justice Jackson:

1. This is an application for permission to appeal. The facts giving rise to this application are as follows. SP and DP are citizens of Afghanistan who arrived in the United Kingdom on 6 August 2008 and claimed asylum two days later. SP's age was originally in dispute, but he subsequently accepted an age assessment obtained by the Home Office which establishes that he was born on 1 September 1992, so SP is now aged 18. DP was born on 1 August 1997, so he is now aged 13.

2. Both applicants applied for asylum on the basis that they would face violence in the event of return to Afghanistan, because their older brother worked as an interpreter for the American soldiers. He had been in receipt of threatening letters. Revenge would be taken on SP and DP by the Taliban and by others because of their elder brother's activity.

3. The Secretary of State rejected both claims for asylum, essentially because he did not believe the account given by SP and DP. He also did not grant any humanitarian protection. He did, however, grant leave to remain until 1 March 2010, having regard to the age of SP and DP. It was envisaged that by the time they left the country SP, the elder of the two boys, would in practice have attained the age of 18.

4. SP and DP appealed against the Secretary of State's decision to the Asylum and Immigration Tribunal. A panel comprising Designated Immigration Judge Coates and Immigration Judge Coker heard the appeal on 1 June 2009. I shall refer to those two judges of the Asylum and Immigration Tribunal as "the panel".

5. The panel heard oral evidence from the elder of the two applicants, namely SP. The panel concluded that, having regard to section 83 of the Nationality, Immigration and Asylum Act 2002, the appeal was limited to asylum issues only. The panel then turned to the appeal which was put forward. It noted that the appellants claimed to have an older brother, to whom I shall refer as X, who worked as interpreter for the US military. The evidence given was that X had told SP that he had received a threatening letter from the Taliban. The letter said that the whole family would be killed because of X's involvement with the Americans. SP said that X said that a few days later he received a similar threat from another group, Hizb-I-Islami. SP asserted that X said it would no longer be safe for them to live in Afghanistan; therefore X made arrangements with a friend for SP and DP to be taken to the United Kingdom. X said that he intended to travel to the UK himself and claim asylum. It appears, however, that that did not happen.

6. The panel then went on to address issues concerning the age of SP. The panel noted that it was the appellant's case that when SP and DP left Afghanistan, their mother was taken by X to the home of a maternal uncle where she remains. SP said in evidence that he last had contact with his mother and his maternal uncle in April 2009, which was relatively recent at the time of the hearing before the panel. SP said in evidence that he had spoken a number of

times to his mother and uncle since arriving in the United Kingdom. SP said that his mother did not refer to having any problems or difficulties or to facing any threats or interrogation. SP said that his mother was all right. The panel then referred to a quantity of colour photographs sent by email to SP which SP asserted supported the assertion that X had been working as an interpreter for the American military.

7. For a number of reasons the panel rejected SP's evidence to the effect that X was working for the US military as an interpreter. The panel did not accept that the photographs supported the evidence given by SP. The panel noted a number of separate factors which drove them to the conclusion that there was no truth in the evidence given about the activities of X. It is not necessary for the purpose of this appeal for me to go into those multifarious factors.

8. The panel referred to the evidence given by the country expert, Mr Marsden. The panel noted that Mr Marsden had never met SP or DP. All that Mr Marsden was able to say was that the appellant's testimony was consistent with the country evidence.

9. The panel, having rejected the evidence given by SP, concluded that SP and DP were not of any interest to either the Taliban or to Hizb-I-Islami. The panel noted that the appellants were in contact with their mother and maternal uncle. The panel noted that the mother and uncle were living without difficulty in Afghanistan. The panel concluded that the appellants would not be returning to Afghanistan as unaccompanied minors and that they would not be facing any danger which would entitle them to claim asylum in this country. Accordingly, the panel dismissed the appellants' appeal.

10. The appellants then applied for reconsideration of that decision. An order for reconsideration was made by HHJ McKenna sitting as a judge of the High Court on 27 October 2009. The grounds of that order were that it was arguable that the AIT erred in failing to consider the risk to an unaccompanied minor of return to Afghanistan and, indeed, in its approach to assessing credibility in the light of the country expert's report.

11. The reconsideration duly took place on 11 January 2010 before Senior Immigration Judge Freeman. Senior Immigration Judge Freeman promulgated his decision on 12 January 2010. Taking matters shortly, the Senior Immigration Judge considered the matters identified by HHJ McKenna and concluded that in neither of the respects identified by the judge was there any error of law by the panel in its original decision. The Senior Immigration Judge noted that the appellants were in contact with their mother and uncle, who were living without difficulty in Afghanistan, and he concluded that the panel were justified in their conclusion that the appellants were not unaccompanied minors and that they would be safe upon return to Afghanistan, where they would be met by their mother and uncle.

12. The Senior Immigration Judge then considered in some detail the reasons why the panel rejected the credibility of the evidence given by SP. The Senior Immigration Judge concluded that there was no error of law in the panel's

approach. Accordingly, he upheld the original decision of the panel following his reconsideration.

13. The appellants are aggrieved by the decision of the Senior Immigration Judge and now seek permission to appeal to this court. The grounds of appeal as set out in the notice of appeal are threefold. The third of those grounds is no longer pursued. In its place Mr Vaughan, who appears as counsel for the applicants today, introduces a new Ground 1, so there are before me: new Ground 1, which if successful would require permission to amend; then old Ground 1, which now becomes Ground 2; and old Ground 2 which now becomes Ground 3.

14. Let me deal first with Ground 1. Mr Vaughan submits that although the panel cannot be criticised for this error, nevertheless in the light of the recent decision by the Court of Appeal in FA (Iraq) v SSHD [2010] EWCA Civ 696, the panel should not have treated the appeal as being limited to asylum only. The panel should also have gone on to consider the question of humanitarian protection. If the panel had considered that matter, the panel would have considered that there was an arguable case for humanitarian protection which needed to be addressed. That arguable case is founded upon Article 15C of the qualification directive (2004/83/EC), which provides:

> "Serious harm consists of ... serious individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

15. In order to support this argument Mr Vaughan takes me to the decision of the Asylum and Immigration Tribunal in GS (Afghanistan) [2009] UKAIT 00044. Mr Vaughan submits that, having regard to the terms of paragraph 134 of that decision, there is a properly arguable case which ought to be addressed to the effect that DP and SP fall into an enhanced risk category. Therefore, says Mr Vaughan, this is a matter which in fairness needs to be considered and the matter should now be considered by an appropriate tribunal, possibly the Upper Tribunal following the reorganisation of the tribunal system.

16. Mr Vaughan put this argument attractively to me, but I cannot accept it. On the findings of fact made by the panel, neither SP nor DP fall into a category which might be classified as an enhanced risk category in the light of the reasoning in GS. On the panel's findings, SP and DP are able to return to Afghanistan where their mother and maternal uncle are living in safety and where the mother and maternal uncle have not been in receipt of any threats from the Taliban or any similar organisation. The panel has rejected the assertions concerning activities of an elder brother in connection with the US military. Therefore I do not accept the first ground of appeal, which is the new ground.

17. I turn now to the second ground of appeal, which is Ground 1 in the Notice of Appeal. This is that the Senior Immigration Judge was wrong to find that the panel made lawful findings in relation to risk on return. In relation to this

ground it is necessary to look at what the Senior Immigration Judge held. In paragraphs 2 to 4 the Senior Immigration Judge noted the contact which the appellants have had with their mother and maternal uncle. He noted that those persons were living without difficulty. He noted that the younger appellant, although still a minor, would not be unaccompanied on return to Afghanistan and he concluded that there was no material risk to the appellants as unaccompanied minors returning to Afghanistan. Mr Vaughan submits that there was an error of law here because the Senior Immigration Judge ought to have held that the AIT erred in failing to consider the risk to the appellants of forcible recruitment by the Taliban. In his oral submissions this morning, Mr Vaughan limited this submission to DP only, bearing in mind that SP is now over the age of 18.

18. I have carefully considered Mr Marsden's report and the reasoning of the panel and the Senior Immigration Judge. It seems to me that both the panel and the Senior Immigration Judge were entitled to make the findings that they did, namely that there was no risk upon return having regard to the circumstances of the family in Afghanistan as found by the panel.

19. I now come to the third ground of appeal, which was formerly Ground 2. The essence of this ground is that the panel dealt in some detail with the assertion that X was working for the US military. The panel gave a series of reasons for rejecting that evidence. The panel did not then turn to consider the assertion that X had received a threatening letter from the Taliban and a threatening letter from Hizb-I-Islami. Alternatively, if the panel did consider this matter, then the panel gave no proper reasons for rejecting this piece of evidence. In relation to this ground, which in fairness to Mr Vaughan I must say was advanced at lesser length than the previous two grounds, it seems to me absolutely plain from the reasoning of the panel that the assertion of threats made to X by the Taliban and Hizb-I-Islami was rejected. It is quite clear that the panel did not accept the entire account given by SP in evidence concerning his brother's situation.

20. I turn now to the assertion that there were no proper reasons for that decision. It seems to me that there were proper reasons. The assertions about threats to the brother and the assertions about the brother's activities with the US military were inextricably linked. The reasoning which the panel gave for rejecting SP's account of his brother's activities inevitably leads to the conclusion that SP's assertions about threats received from the Taliban and Hizb-I-Islami were also rejected for the reasons stated.

21. Let me now draw the threads together. For the reasons given above, I am unable to find any error of law by the Senior Immigration Judge in his rejection of the appeal of SP and DP upon reconsideration.

22. For all of these reasons, this application for permission is refused.

Order: Applications refused