IMMIGRATION APPEAL TRIBUNAL

Appeal No: [2002]UKIAT02245
HX-70443-1996

Date heard: 23/05/2002
Date notified: 28/06/2002

Before:
Mr Justice Collins
Dr H H Storey
Dr A U Chaudhry

JAMSHID MADJIDI
Appellant

The Secretary of State for the Home Department
Respondents

Determination and Reasons

Citation Number:[2002] UKIAT 02245

1. The appellant who was born in 1955 is a citizen of Iran. He came to this country as long ago as 1995 and claimed asylum. His application was refused in May 1996. He then appealed against that decision to an Adjudicator but it took until 5 October 1999 for his appeal to be heard. The decision was handed down on 20 October 1999 and the Adjudicator Mrs Bremner dismissed his appeal.

2. Essentially, (and we will come to the matter in slightly more detail shortly) she decided that he had not told the truth about his activities before he left Iran and that all that he had said about his sympathy for and his activities on behalf of the Mujahadeen was made up. Since he had come to this country he had appeared to join with the Mujahadeen and attended demonstrations organised by them, had had himself video taped as being involved in such a demonstration and had been shown carrying a banner on behalf of that organisation. In addition, he had broadcast and that broadcast would have been heard in Iran.

3. The Adjudicator decided that his activities in the United Kingdom were, as she put it, a cynical tailoring calculated to create a false claim for refugee status and that he had deliberately sought to undertaken activities to create a well-founded fear where there was none when he arrived in this country. Accordingly she concluded that he was not entitled to the protection of the Convention. That decision was before the case of Danian went to the Court of Appeal. The Court of Appeal decided that a so called bootstrap refugee, that is to say someone who was trying to create a refugee status to prevent his being returned albeit nothing that he had done in his country would have justified him being regarded as

a refugee, could even so be entitled to the protection of the Convention if in reality there was created a real risk that he would on return be persecuted because of his activities whilst he was in this country. He would in those circumstances be a refugee sur place. That being so the matter went on judicial review and inevitably the determination of the Tribunal which had refused leave to appeal was quashed. That happened on 12 October 2000.

4. There has been something of an unfortunate delay since then because it took a very long time for the Court Order which was promulgated on 6 February 2001 to be drawn to the attention of the Tribunal. We are not clear whose fault that was but it seems to have been a combination of the High Court and possibly the Treasury Solicitor in failing to notify the Tribunal of that determination. Be that as it may, on 22 January 2002 the Tribunal granted leave to appeal.

5. Before we come to the substance of the appeal we were faced with an application for an adjournment made by Mr Burnett who was instructed by Messrs Gill & Company who were at the relevant time believed to be representing the appellant. He had originally been represented before the Tribunal by the Refugee Legal Centre and for the purposes of the judicial review application he had instructed and been represented by Gill & Company of 37 Grays Inn Road. Neither Gill & Company nor the Refugee Legal Centre had notified the Tribunal that there had been a change of representation and the appellant himself had equally not notified the Tribunal. In the result following the grant of leave to appeal, notice of hearing was sent by the Tribunal to the appellant at the address which he had provided namely, Flat 16, The Croft, East Road, Edgware and to the Refugee Legal Centre. It was then made clear shortly before the hearing on 19 March that there had not been service on the proper representative and the matter came before the President on 19 March. It was then directed that the case be adjourned because Gill & Company had taken over from the RLC and that there should be a notification of a fresh hearing with notices sent to the correct representative. That was done and on 17 April this year notices were sent by first class post both to the appellant at the address we have already referred to and to Gill & Company , 37 Grays Inn Road.

6. The day before yesterday the Tribunal received a fax from Gill & Company stating, following a telephone conversation with someone in the Tribunal Listing Office, that they had received on 21 May a Home Office bundle for the appeal and that was the first that they appreciated that the date of hearing was 23 May 2002 and they said that they had not received a notice of hearing. They state

"according to the file we have not had contact with Mr Madjidi since this time that is to say October 2000 when the matter came before the Administrative Court and would obviously need to take instructions. In the circumstances, with an absence of activity on this matter since the Autumn of 2000 we must request an adjournment to seek contact with out client to gather instructions".

7. Mr Burnett was in the unfortunate position of attending before us with no representative from Gill & Company and with the appellant himself not bothering to

attend. He informed us that his instructions were that Gill & Company were in fact no longer representing the appellant. It seems that the solicitor at Gill & Company who had dealt with the appellant was a Miss or Mrs Rahami. She had decided to set up on her own and the appellant had decided that he wished to follow her and to be represented by her. This we were told had occurred in February 2002 which makes the two paragraphs from the Gill & Company letter to which we have just referred somewhat strange. If that had happened, neither Gill & Company nor the appellant nor Miss Rahami had notified the Tribunal of that change of representation. So we are faced today with a renewed application (because the application by letter was refused) to adjourn to enable Miss Rahami to take instructions and for the appellant's case to be properly presented.

8. We refused that application. We ourselves are of course constrained by the Procedure Rules which govern us. We note that Rule 31 which deals with adjournments provides in sub-paragraph 1

"where an adjournment of the appeal is requested the Appellate Authority shall not adjourn the hearing unless it is satisfied that refusing the adjournment would prevent the just disposal of the appeal".

There has here been a breach of a number of other rules. In particular, Rule 35(4) requires that where a representative ceases to act he and the party he was representing must forthwith notify the Appellate Authority and any other party of that fact and the name and address of any new representative. And it further provides that by sub-paragraph 5 that until the Appellate Authority is notified that the first representative has ceased to act any document served on the first representative shall be deemed to be properly served and by sub-paragraph 6 where a representative begins acting for a party to which these rules apply he shall forthwith notify the Appellate Authority of that fact. As is clear from the circumstances we have recounted, there was a breach by the appellant and by all those who have represented him of sub-paragraphs 4, 5, or 6 of Rule 35.

9. Rule 47(1) requires a party to inform the Appellate Authority of the address at which documents may be served on him and of any changes to that address and sub-paragraph 3 provides that a person representing parties should inform the Appellate Authority of his address and of any changes. Unless there has been a notification of any change, the address is to be deemed to be the proper one for the purpose of service. So far as the appellant is concerned, not only has there been no indication of a change of address but Mr Burnett has informed us that so far as his instructions go the address which was known to Gill & Company was the same address as the appellant has been living at throughout namely, Flat 16, The Croft, East Road, Edgware. We therefore not only have no reason to believe that the appellant was not served with notice of both the March and May hearings but there is some positive evidence to suggest that it would have been a coincidence beyond all credibility if both notices of hearing had not been served and we are bound to say that we are exceedingly sceptical of the suggestion that the notice to Gill and Company was not received by them: whether it was competently dealt with by them is of course a wholly different matter. We then have to consider Rule 33 which deals with what the Tribunal should do where there has been a failure to comply with a provision of

the rules. Rule 33(1) provides that if the Appellate Authority is satisfied in all the circumstances including the extent of the failure and any reasons for it that it is necessary to have regard to the overriding objective in Rule 30(2) the Appellate Authority may dispose of the appeal in accordance with paragraph 2 and Rule 30(2) provides that the overriding objective shall be to secure the just timely and effective disposal of appeals. One of the options given in Rule 33(2) is that we may dismiss the appeal in the case of a failure by the appellant without considering the merits or determine the appeal without a hearing in the alternative. We do not take either of those courses, but we do take as it were comfort from that rule in having decided that in the circumstances of this case it is not appropriate to grant an adjournment.

10. We are indeed satisfied that no injustice has resulted for the appellant. Mr Burnett has assisted us in arguing the merits of the appeal and he has put before us the relevant authorities and the relevant arguments because there is no possibility of going behind the Adjudicator's factual findings in relation to the credibility of the account given by the appellant. However many instructions he had been able to give it would have been quite impossible to have gone behind those findings. In those circumstances, the only arguments open are based upon the activities of the appellant in this country and whether they were sufficient despite having been carried out in bad faith in order to try to achieve a refugee status to justify a conclusion that he did run a real risk of persecution where he to be returned to Iran.

11. We turn back therefore to the merits. The appellant's story was that he had always been in sympathy with the Mujahadeen and had once they were regarded by the authorities as an organisation which was to be suppressed and dealt with harshly, acted in various ways to indicate that support. In particular he had involved himself in the possession of a weapon and must therefore have been drawn to the attention of the authorities and indeed it was that that had led him to decide to leave Iran. All that was rejected. There was called on the appellant's behalf a witness who supported his account of sympathy with the Mujahadeen during 1979 and 1980. The Adjudicator stated that she was more inclined to believe that witness than the appellant whose entire account relating to the years in Iran she found to be a tissue of lies. Accordingly, she found as fact that the appellant had had no involvement with the Mujahadeen in Iran certainly after the crackdown. The crackdown occurred some time in the very early 1980s. It would not be surprising that anyone in Iran who was against the Shah should have been in sympathy with the Mujahadeen in the early stages. One looks at the CIPU Report of April 2002 paragraph 5.146, and finds this

"during the 1970s the MEK [that is the Mujahadeen] was at the forefront of opposition to the Shah. During the early phase of the Islamic Revolution it was in an uneasy alliance with the clergy was responsible for several assassinations and supported the takeover of the US Embassy and the holding of American hostages. However, the clergy's drive to consolidate power led to a final break in 1981".

12. In paragraph 5.147, in a passage very much relied on by Mr Burnett, it is recorded that the Iranian regime's treatment of the Mujahadeen opposition had been extremely

severe with reports of large numbers of executions and torture and known or suspected members of MEK face either execution or long prison terms if caught in Iran. While that is derived from a source of 1996 the fact that it remains in the CIPU Report, submits Mr Burnett, means that there is no material which suggests that that position has changed and that seems to us to be a perfectly valid submission. We do not think that if there had been a change for the better the CIPU Report or those responsible for the CIPU Report would not have picked that up. Accordingly, we accept that anyone who is suspected by the regime of membership of the MEK might well face ill-treatment if returned to Iran and that that ill-treatment might well amount to persecution.

13. So far as what he had done in this country is concerned, the Adjudicator records those activities. In brief he had attended a number of demonstrations organised by the Mujahadeen, had been on many May Day demonstrations and had been video taped at one in 1997. He had been to a large meeting in June 1996 and he attended 5 or 6 political events a year. We are quite prepared to assume that he has continued those activities since 1999 when the matter came before the Adjudicator. He also said he had been a reporter for a radio station and responsible for two programmes and had been involved in an organisation called Iran said which had provided financial support for families of Mujahadeen supporters. The authorities would in those circumstances, he said, have his pictures from demonstrations and would have heard his voice on radio. He further told the Adjudicator that his brother had been arrested after he (the appellant) had been seen on a satellite programme in Iran about Iran said and that his brother had been detained for some 5 months before being released.

14. The Adjudicator did not in her determination in terms reject his account that his brother had been arrested but she made the point that it was a fair assumption that the broadcast would have gone out when it was made and not a number of months later and no explanation was given as to why the appellant's brother would have been arrested so many months after the broadcast went out. No one had shown any interest in him until then and the only evidence of his arrest was third hand from the appellant's sister. The appellant's sister did not give evidence before the Adjudicator and the appellant was reporting what he had been told. Accordingly, it is clear there was a high degree of scepticism as to whether the brother had been arrested at all, but more importantly, if he had whether it had had anything to do with the activities of the appellant. Nonetheless, the Adjudicator did find that he had made sure that the authorities in Iran knew about him and that he had done that in order to make it difficult if not impossible to remove him from the UK and in the penultimate sentence of her determination she stated that the activities had more likely than not come to the attention of the Iranian authorities.

15. Mr Burnett has of course relied upon he decision of the Court of Appeal in Danian which has been subsequently applied by the Court of Appeal in Iftikhar Ahmed v Secretary of State 2000 INLR at page 1. We find at page 7 letter G Lord Justice Simon Brown saying this:

"Essentially what Danian decides is that in all asylum cases there is ultimately but a single question to be asked. Is there a serious risk that on return the applicant would be

persecuted for a Convention reason? If there is then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country however unreasonable. It does not even matter whether he has cynically sought to enhance his prospects of asylum by creating the very risk on which he then relies-cases sometime characterised as involving bad faith. When I say that none of this matters, what I mean is that none of it forfeits the appellant's right to refugee status provided only and always that he establishes a well-founded fear of persecution abroad. Any such conduct is of course highly relevant when it comes to evaluating the claim on its merits ie. To determining whether in truth the applicant is at risk of persecution abroad. An applicant who has behaved in this way may not readily be believed as to his future fears".

16. The same approach has been adopted by this Tribunal in a previous decision Binyam and the Secretary of State [2002] UKIAT 00816. That was another case of someone who had in the view of the Adjudicator and of the Tribunal sought to manufacture an asylum claim by activities in this country, those activities being a suggestion that he was politically involved in an organisation which was regarded as hostile to the government in Ethiopia.

17. The Tribunal sought to analyse what had been decided in Danian and its conclusion in paragraphs 13 and 14 was as follows and we make no apology for repeating them:-

" We must confess that it seems to us there is a degree of mental gymnastics required in all this. There is at the same time a perceived need to construe the Convention so as not to exclude a person whose actions have in fact created a situation where he runs a real risk of persecution even though he has acted in bad faith but to try to ensure that such a person will only be able to establish his claim in what Lord Justice Brooke has called an extraordinary case. The way this is done is to require that a fear is shown to be genuine and not one that is manufactured by conduct designed to give plausibility. In this case the appellant has deliberately acted in such way as to give plausibility to a claim that in truth was and is not genuine. A careful reading of Danian shows in our judgement that it does not have the wide application that some have attributed to it and the reliance on the head note without consideration of the judgment may mislead. It is clear that the Court did not believe it was opening a door to bootstrap refugees and it is emphasised that it is not in its view giving a green light to bogus asylum seekers. Further, the need for stringent evaluation of claims such as that of this appellant entitles us to consider with care whether there is a real risk that he will have been photographed by the Ethiopian authorities and will if returned, be identified as someone whose political activities require investigation and detention. He has not in truth been active in AAPO either in Ethiopia or in London. This means that it is less likely that he will be of interest even if he was photographed and his photograph was sent to those in Ethiopia responsible for immigration control. There is of course no higher standard of proof required of him to establish his claim but the fact that he never was nor is an activist means that the risk to him is less."

18. That is taking up the approach of the UNHCR itself referred to with approval in Danian where we find in 1999 INLR 556G

"in this connection it should be borne in mind that opportunistic post-flight activities will not necessarily create a real risk of persecution in the claimant's home country either because they will not come to the attention of the authorities of that country or because the opportunistic nature of such activities will be apparent to all including to those authorities."

19. We accept (as indeed the Adjudicator has decided) that the activities will be likely to come to the attention of the authorities in Iran. But we do not accept that he will as a result be suspected by those authorities of involvement with the Mujahadeen so as to attract persecution. As far as the authorities in Iran are concerned, there was no reason whatever to regard him as politically suspect before he left Iran. He has been here of course now for a very considerable period of time. The Iranian authorities may well have seen that he was apparently flaunting his involvement with or his sympathy with the Mujahadeen and we do not regard the authorities in Iran as being likely to be stupid. They will in our view be able to see exactly what has been happening here and to appreciate that this appellant has indeed been acting in such a way as to give credence to a claim that in reality has none at all. Indeed, the opportunistic nature of his activities will in our judgement be apparent to the authorities in Iran. We bear in mind that Iran is not a country in which penalties are exacted for the mere fact of leaving and claiming asylum, although a person who leaves the country unlawfully may receive punishment for that, it being a criminal offence. But that has nothing to do with political activity and is in any event not something which can properly be regarded as persecution.

20. There are situations where even a bootstrap refugee may be able to achieve refugee status. As was suggested in argument, it may be that there is a continuum and one has to look at what was actually done by the would-be refugee and what was the general situation in the country in question with regard to those who sought asylum. For example, in some countries the mere fact of claiming asylum is enough to create persecution on return. Equally, if the individual had carried out actions which themselves not only drew him to the attention of the authorities but were positively offensive to the authorities, different considerations might apply. We gave the example of a case which had come before the Tribunal of someone who had in this country got himself to be part of delegation to a Minister of the country from which he had fled when the Minister was in this country. When he met the Minister he proceeded to be exceedingly offensive to him and thus draw himself clearly to the Minister's attention in such a way as would undoubtedly be likely to attract some sort of revenge were he to return. That is perhaps an example at one end of the continuum.

21. Mr Burnett has submitted that on the evidence this appellant's activities fall beyond whatever line one seeks to draw and that a real risk has been created.

22. For the reasons we have given we do not agree. We take the view that this is yet another example, as was Binyam, of a case where a bootstrap refugee has not succeeded in establishing his claim. We take the view that it is important that it is appreciated (as the Court of Appeal itself said) that Danian does not open the door to all who undertake activities in this country, which may be regarded as hostile to the regime if taken at face

value, to achieve a refugee status which they would not otherwise be able to achieve. While bad faith by itself cannot exclude from refugee status, it is undoubtedly a factor that can be taken into account in the stringent evaluation of such a claim.

23. In all the circumstances, therefore, we take the view that this appeal must be dismissed. This was a decision made a very long time ago and so human rights have not been and cannot be considered. The decision of the Tribunal in Pardeepan applies. If the Secretary of State as a result of this decision decides that he will remove the appellant, the appellant will then have a human rights appeal. If there really is extra material which could help him, then he will have the opportunity of putting that forward. Accordingly, this decision does not mean that he has to be returned nor does it mean that if he has any more of a case than appears on the material before us he will be unable to air it. All it does mean is that on the facts before us the claim to be protected by the Refugee Convention fails.

Justice Collins

President