Neutral Citation Number: [2010] EWCA Civ 749

Case No: C5/2009/1973

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
Senior Immigration Judge Mather
AA/10133/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2010

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE THOMAS
and
LORD JUSTICE JACKSON

- -

Between :

ZK (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Becket Bedford (instructed by **Sultan Lloyd Solicitors**) for the **Appellant**
Miss Julie Anderson (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates: 15th June 2010

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Judgment

Lord Justice Jackson :

1. This judgment is in four parts namely:

   Part 1 – Introduction

   Part 2 – The Facts

   Part 3 – The Appeal to the Court of Appeal

   Part 4 – The Senior Immigration Judge's Critique of the Immigration Judge's Decision

Part 1. Introduction

2. This is an appeal by an asylum seeker who seeks to restore a favourable decision which he obtained from an immigration judge, which decision was subsequently reversed on reconsideration by a senior immigration judge.

3. The respondent to this appeal is the Secretary of State for the Home Department to whom I shall refer as "the Secretary of State". In this judgment I shall refer to the Asylum and Immigration Tribunal as "the AIT".

4. One decision of the AIT has loomed large in the background to the present appeal. That decision is *LQ (Afghanistan) v Secretary of State for the Home Department* [2008] UKAIT 00005. In *LQ* the appellant was a citizen of Afghanistan aged fifteen who was present in this country. He applied for refugee status as well as leave to remain. The application for leave to remain was successful. The application for refugee status was unsuccessful. The immigration judge held that the appellant was not entitled to the status of refugee because he had leave to remain and had no need for such additional protection. On appeal Mr Ockleton, the deputy president of the AIT, sitting with Immigration Judge Sommerville, held that the approach of the immigration judge was wrong. It was necessary to consider separately whether or not the appellant was entitled to asylum. The tribunal noted that the appellant was an orphan. The tribunal also noted that, on the findings of fact made by the immigration judge, the appellant would be at risk of serious harm in the event of return to Afghanistan. This was because there were no adequate reception facilities at the airport. The appellant would be subject to the risks of exploitation and ill treatment, since he would have no adult members of his family to turn to for protection. The tribunal concluded that a person's age was an immutable characteristic so that children from Afghanistan constituted "a particular social group" for the purposes of Article 1A(2) of the Refugee Convention. The tribunal concluded that since the appellant was an orphan and in view of the conditions pertaining in Afghanistan, the appellant in that case would be exposed to the risk of persecution by reason of his membership of the "particular social group". We are not concerned with the question whether *LQ* was rightly decided. That may be an issue for another day. Both parties to this appeal invite us to assume for the purposes of this appeal that *LQ* was rightly decided.

5. After these introductory remarks, I must now turn to the facts of the present case.

Part 2. The Facts

6. The appellant is an Afghan national, who claims to have been born on 12th June 1992. On 26th November 2007 the appellant arrived in England, concealed inside a lorry. He immediately made a claim for asylum.

7. The basis of the appellants claim for asylum was as follows. His father was a commander serving under Gulbuddin, an anti government leader. The appellant's father joined the Taliban in about 2000 and the appellant did not see his father again after that. Subsequently American soldiers, with Afghan police, came to the appellant's village. They committed acts of violence and also made it clear that they were looking for the appellant, because of his father's involvement with Gulbuddin and the Taliban. In those circumstances the appellant, his mother and his siblings left their home village. The appellant then fled from Afghanistan, ultimately arriving in the UK in November 2007. The appellant had a well founded fear of persecution in the event of return to Afghanistan. That persecution would come from American soldiers and the Afghan police.

8. The Secretary of State did not accept that the appellant was as young as he claimed. In the light of an assessment made by social workers, the Secretary of State concluded that the appellant had been born four years earlier than claimed, namely on 12th June 1988. The Secretary of State disbelieved the account of events put forward by the appellant and rejected his application for asylum.

9. The appellant appealed to the AIT against the Secretary of State's decision. The appeal was heard by Immigration Judge Clarke. The appellant gave oral evidence. Both parties put in extensive written evidence, including dental and medical evidence relating to the appellant's age. The immigration judge gave his decision in writing on 15th January 2009. The immigration judge concluded, on the basis of the oral and written evidence which he had received and taking into account the various expert reports, that the appellant had been born on 16th June 1992. On the basis of that finding of fact, it follows that the hearing of the present appeal which took place on 16th June 2010 coincided with the appellant's 18th birthday.

10. The immigration judge then turned to the claim for asylum. He first considered the objective evidence concerning conditions in Afghanistan and he made the following findings of fact in paragraph 38 of his decision:

> "(i) The COI Report dated August 2008 (hereafter "COIR") (paragraphs 8.01 ff) states that insecurity is a key feature in Afghanistan. There has been an increasing amount of extremist activity; there has been an upsurge in violence. The position in Kabul has deteriorated; there are said to be 4 m people in Kabul, which previously had a population of 400,000. (COIR, paragraphs 8.17 ff).
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> (ii) The whole of Logar province, apart from the Kabul-Gardez highway, was also insecure. (UNHCR security update, 23rd June 2008, cited in COIR, paragraph 8.35)

> (iii) The Afghan government's human rights record is poor (USSD Report for 2008).
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> (iv) COIR contains at paragraphs 24.01 ff material about children. A child, in Afghanistan, is anyone under the age of 18 (paragraph 24.04). Children work in Afghanistan; and there is no enforcement of the relevant labour laws (paragraph 24.07 ff). There is evidence of kidnapping of children (paragraph 24.15). Many children (who are breadwinners as a result of the war) are in Kabul; many work for unscrupulous employers who subject the children to sexual exploitation and forced labour. Sexual abuse of children was pervasive; there were reports of sexual abuse on government-run orphanages. Living conditions in orphanages were unsatisfactory. (USSD Report, 2008). Further, boys over 15 are not admitted to orphanages (COIR paragraph 24.40).
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> (v) I have considered the Respondent's Operational Guidance Note, paragraph 4.3.1. This stated that minors claiming in their own right who have not been granted asylum or HP can only be returned where they have family to whom to return, or where there are adequate reception, care and support arrangements. There was not sufficient information to be satisfied that there were adequate reception, care and support arrangements in place.
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> (vi) The Appellant's claim rests of the fact that his father had first been a commander for Gulbuddin [Hekmatyar], and then joined the Taliban. The Appellant himself does not claim to be a member of the Taliban, or indeed a supporter; he is being targeted, he claims, because he is his father's son, and as such, someone who could give information to the authorities as to where his father is. I have no background information which suggests that such a person (if not being targeted by the families of victims who have been killed by someone in the position of the Appellant's father) is at particular risk."

11. The immigration judge then considered the appellant's account of events in Afghanistan. The immigration judge had some doubts about the truthfulness of that account. Nevertheless, assuming that the appellant's account was correct, the immigration judge concluded that the appellant did not have a well founded fear of persecution at the hands of either American soldiers or Afghan authorities by reason of the fact that his father was or had been a member of the Taliban. The immigration judge then turned to a different aspect of the asylum claim, namely that based upon the fact that the appellant was aged only 16 ½ yrs and had lost all contact with other members of his family in Afghanistan. At paragraph 47 the immigration judge stated as follows:

> "I have however found that the Appellant is aged about 16 ½ and has a date of birth of June 1992. Age is an immutable characteristic: LQ (Age: Immutable characteristic) Afghanistan

> [2008] UKAIT 00005 at [6]. I accept his statements that he does not know the whereabouts of his mother and his siblings in Afghanistan. There is no mention of any other relatives. Therefore, if the Appellant were returned to Kabul, I am not satisfied that anyone would be able to meet him, let alone care for him; and therefore, in view of my findings at above, I am satisfied that he would be at risk of severe harm on his return, as a minor who appears to have no relatives in Afghanistan who can be contacted or whose whereabouts are known, and will thus be regarded as an orphan. In that respect, I repeat the findings in LQ at [7]. I note, however, at [6] that the Tribunal in LQ emphasises that his refugee status would continue only whilst the risk to him as a child remained."

12. Thus it can be seen that the appellant in this case succeeded in his claim for asylum for broadly similar reasons to those on which the appellant succeeded in *LQ.*

13. The Secretary of State did not agree with the immigration judge's decision and applied for reconsideration. On the 24th January 2009 Senior Immigration Judge Nichols made an order for reconsideration. The reconsideration hearing took place on 16th April 2009 before Senior Immigration Judge Mather.

14. Senior Immigration Judge Mather ("the senior immigration judge") upheld the Secretary of State's challenge to the earlier decision and concluded that the immigration judge had erred materially in law. The senior immigration judge noted that the immigration judge had not relied upon any expert evidence concerning the conditions that the appellant would find upon arrival in Afghanistan. The senior immigration judge then referred to the respective submissions of counsel concerning the effect of the background evidence upon which the immigration judge had placed reliance. The senior immigration judge then set out his crucial conclusions in paragraph 12 of his decision as follows:

> "In paragraph 47 the Immigration Judge likened the appellant to an orphan because he does not know where his mother is, or his siblings. He concluded that, because LQ (an orphan), was at such risk, then the appellant would be also. The fundamental difference is that in LQ there was an express finding that LQ would be at real risk based on particular evidence. In this appeal there is no such finding. I am therefore persuaded that the Immigration Judge has wrongly interpreted the significance of LQ and thereby made a material error of law."

15. The senior immigration judge then went on to consider the question of what remedy was appropriate. He decided that the appeal of the Secretary of State should be allowed on asylum and human rights grounds to the extent that the decision would be remitted to the Secretary of State for a fresh decision, taking into account the relevant policies, in particular the Secretary of State's policy concerning unaccompanied minors.

16. The appellant was aggrieved by the decision of the senior immigration judge. Accordingly he appeals to the Court of Appeal.

Part 3. The Appeal to the Court of Appeal

17. By a notice of appeal issued on 9th September 2009 the appellant appealed to the Court of Appeal against the decision of the senior immigration judge, contending that the original decision of Immigration Judge Clarke should be restored. The grounds of appeal are, in essence, that the senior immigration judge misread the immigration judge's decision. Properly interpreted, the immigration judge's decision contains no error of law. Therefore the senior immigration judge was not entitled to overturn it. The Secretary of State has not served any respondent's notice. However, counsel for the Secretary of State, Miss Julie Anderson, has made it clear that the Secretary of State reserves the right to argue on a future occasion (but not in this case) that LQ was wrongly decided.

18. At the start of the hearing of this appeal we were inclined to wonder whether the appeal served any useful purpose, given that the appellant has now attained the age of 18. We were, however, persuaded by counsel's submissions that we should proceed to determine this appeal on the narrow issue of whether or not the senior immigration judge erred in law in overturning the immigration judge's decision. If the present appeal succeeds, the immigration judge's decision will be restored. The consequences of such restoration are not a matter for determination by this court.

19. I shall now turn, therefore, to the senior immigration judge's critique of the immigration judge's decision.

Part 4. The Senior Immigration Judge's Critique of the Immigration Judge's Decision

20. Mr Becket Bedford for the appellant attacks the reasoning in paragraphs 8 and 12 of the senior immigration judge's decision. Mr Bedford says that the immigration judge did make a finding on the evidence in the instant case that the appellant would be at real risk in the event of return to Afghanistan. The real risk was of serious mistreatment. There was evidence to support that finding. The immigration judge did not attach to *LQ* the wide significance of which the senior immigration judge complains in his paragraph 12.

21. Miss Anderson, for her part, rallies to the support of the senior immigration judge. She directs her fire towards the decision and the reasoning of the immigration judge.

22. A preliminary skirmish between counsel concerns how we should interpret what is obviously a typographical error in paragraph 47 of the immigration judge's decision. The error in question is to be found half way down that paragraph where the immigration judge says:

> "therefore, in view of my findings at above…"

It is quite clear that the immigration judge intended to insert a paragraph number between the words "at" and "above", but he or his typist failed to do so. Mr Bedford submits that the immigration judge clearly intended to refer to paragraph 38, that being the paragraph which sets out the judge's conclusions on the objective evidence, as quoted in Part 3 above. On the other hand, Miss Anderson submits that it is unclear what paragraph the immigration judge was referring back to and this is one of the unsatisfactory features of his decision.

23. On this point I accept the submissions of Mr Bedford. It seems to me abundantly clear that the immigration judge was intending to refer back to paragraph 38 of his decision. It is not unknown for the Secretary of State, when defending a decision of the AIT, to ask the court to correct what must be obvious typographical errors in such decision. In this case the boot is on the other foot, but I believe we should adopt the same approach.

24. The first task which I must undertake is to identify the reasoning process which led the immigration judge to his decision. Contrary to Miss Anderson's submission, I do not think that the immigration judge was treating *LQ* as constituting a country guidance decision. The immigration judge based his findings of fact on the evidence before him in the present case. Having done so he noted that his findings of fact coincided with the findings of fact in *LQ*.

25. The evidence before the immigration judge to which he attached particular significance is contained in paragraphs 24.39 and 24.40 of the COIR Report. These paragraphs read as follows:

> "24.39 A UNICEF paper dated 24 May 2006 stated that "An estimated 80 per cent of children living in orphanages are believed to have at least one living parent". [44a]
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> 24.40 A UNHCR paper dated May 2006 stated:
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> "The few existing orphanages in Kabul and marastoons in other main cities, mostly run by the government and the Afghan Red Crescent Society, are no durable solution for unaccompanied and separated children. They have very strict criteria for temporary admission. Boys 15 or over are not admitted.
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> "Children and adolescents under 18 years of age who do not have families, close relatives or extended family support in Afghanistan are therefore at risk of becoming homeless and risk further exploitation. Where family tracing and reunification efforts have not been successful and special and coordinated arrangements cannot be put in place to facilitate safe and orderly return, return for unaccompanied children to Afghanistan therefore exposes them to exploitation and risk." [11g] (p2)"

26. In this case the immigration judge found that the appellant had lost contact with all family members in Afghanistan. On the basis of the evidence in the COIR, the immigration judge was entitled to find that, by virtue of being a minor aged 16, the appellant would be at risk of severe harm upon return to Afghanistan. In other words, the appellant, on the evidence in this case, was exposed to risks comparable to the risks facing the appellant in *LQ*. I therefore reject the submission that the immigration judge made findings of fact about conditions in Afghanistan which were not supported by the evidence or which were based upon a misreading of *LQ*.

27. Miss Anderson also attacks the immigration judge's finding that the appellant had lost contact with all family members in Afghanistan. She says that it was for the appellant

to prove this fact and that he had not done so. There was no reason why the appellant could not have traced his family in Afghanistan through the agency of the Red Cross.

28. The first difficulty with this argument is that it does not form part of the senior immigration judge's reasons for reversing the decision of immigration judge. The second difficulty with this argument is that the Secretary of State is putting his case to this court in a different way to that in which he presented his case to the immigration judge. At the hearing before the immigration judge, the Border and Immigration Agency Presenting Officer let this point go by default. In the course of cross-examination, he did not challenge the appellant's evidence that he had lost contact with all family members in Afghanistan. Nor did the Presenting Officer suggest in cross-examination that the appellant could or should have traced his family through the Red Cross.

29. I am not prepared to uphold the senior immigration judge's decision on this new ground, which was not explored in evidence.

30. Miss Anderson has developed another new ground of attack upon the immigration judge's decision, which runs as follows. In paragraph 47 of his decision the immigration judge says:

> "I accept his statements that he does not know the whereabouts of his mother and his siblings in Afghanistan. There is no mention of any other relatives."

In this passage, says Miss Anderson, the immigration judge has forgotten about the maternal uncle whom he mentioned two paragraphs previously in paragraph 45. There is no finding that the appellant could not trace his maternal uncle.

31. The reference to a maternal uncle in paragraph 45, upon which Miss Anderson relies, is to be found in a sentence stating that the maternal uncle assisted the appellant's mother in arranging for the appellant's transport to the UK.

32. I am not persuaded by this argument. It seems to me that the reference by the immigration judge to a maternal uncle, which appears in paragraph 45 of the decision, was a slip. There is no reference to a maternal uncle in the appellant's witness statement, the appellant's screening interview, or in the Home Office refusal letter. Mr Bedford, who appeared at the hearing before the immigration judge, says that there was no reference to such a maternal uncle in the appellant's oral evidence. In short, I do not accept that there is any basis for the reference to a maternal uncle in paragraph 45 and this must have been an error. I do not think that there is any basis for saying that the immigration judge has erred by failing to consider in paragraph 47 whether or not the appellant would be able to make contact with such an uncle. The slip which occurred in paragraph 45 is unfortunate, but it does not undermine the validity of the immigration judge's decision.

33. The immigration judge's decision is not an impressive determination. It contains slips, as previously mentioned. Furthermore, it would have been helpful if the reasoning of the immigration judge had been set out more fully and more clearly. On the other hand I am not persuaded by the oral or written submissions of Miss Anderson that the immigration judge's decision contains a material error of law. Accordingly the senior

immigration judge was not entitled to overturn that decision at the reconsideration hearing.

34. In my view, therefore, the decision of the senior immigration judge should be reversed and the decision of the immigration judge should be restored. Accordingly, I would allow this appeal.

Lord Justice Thomas:

35. I agree with the judgment of Jackson LJ, but add a few words as we are differing from an expert tribunal on its reconsideration of a decision of the Immigration Judge. It is clear that the decision of the Immigration Judge was far from satisfactory in a number of respects; the reasoning was also unimpressive. No doubt it was this that led the Senior Immigration Judge to discern a material error of law. The analysis of Jackson LJ clearly demonstrates there was no such error. However unsatisfactory the decision of the Immigration Judge was, there was therefore no basis for the Senior Immigration Judge to overturn his decision. Some of the difficulty seems to have arisen from the Immigration Judge's treatment of the decision in *LQ (Afghanistan) v Secretary of State for the Home Department*. Although powerful arguments were presented to the court on behalf of the Secretary of State that the decision was either wrong or its implications misunderstood, it would not be appropriate to express any view, as the Secretary of State has reserved her position in relation to the correctness of that decision.

The Chancellor of the High Court:

36. I agree with both judgments and have nothing to add.