EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Eassie
Lord Menzies
Lord Brodie

[2008] CSIH 46
XA65/06

OPINION OF THE COURT

delivered by LORD EASSIE

in

The Application for Leave to Appeal

by

A R

Appellant;

against

A Decision of the Asylum and Immigration Tribunal dated 7 January 2006

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Act: Devlin; Drummond Miller, W.S.
Alt: Lindsay; Solicitor to the Office of the Advocate General

23 July 2008

[1] This is an application under section 103B of the Nationality Immigration and Asylum Act 2002 for leave to appeal against a decision of the Asylum and Immigration Tribunal ("the Tribunal") written on 7 January 2006 following a hearing on the preceding day. (The date of "promulgation" is not stated but is left blank). The decision of the Tribunal was on an appeal by the appellant against a determination of an Adjudicator (Mrs S M Agnew) promulgated on 6 October 2004 in which she dismissed the appellant's appeal against a decision of the Secretary of State of

8 November 2002 in which he refused to make a grant of asylum to the appellant and in which he gave directions for the appellant's removal from the United Kingdom.

[2] The appellant is a citizen of Afghanistan. He is a Tajik, originally from Pansheer, but he and his family went to Kabul around 1976, when the appellant was around 5 years of age. He arrived in the United Kingdom on 23 March 2001 and immediately sought asylum. In accordance with the then prevailing administrative procedures, there was completed on his behalf a "Statement of Evidence Form" - "SEF". Put shortly, in the SEF the appellant sought asylum on the basis that as a Tajik, he feared persecution from the Taliban on the grounds of his ethnicity as a Tajik. He gave a history of having been abused and tortured by the Taliban and of his leaving Afghanistan on that account, all the details of which are more fully narrated in the Adjudicator's decision letter.

[3] At the time at which the appellant left Afghanistan and at which he claimed asylum and completed the SEF, the Taliban were in control not only of Kabul but most of Afghanistan. As is commonly known, following the terrorist attacks in New York and Washington on 11 September 2001, a United States led bombardment and invasion of Afghanistan occurred in late October 2001 and the Taliban government in Kabul was in due course replaced by a government under occidental tutelage, comprising *inter alios* members of a grouping of factions of the mujahideen known as the Northern Alliance.

[4] In October 2002, the situation in Afghanistan having thus radically altered with the Taliban regime having been displaced, the appellant attended for interview by a Home Office official. At that interview the appellant explained *inter alia* that he had had problems with the Northern Alliance. Prior to 1992 (when the Soviet backed Najibullah regime fell) he had been a member of the youth organisation of the

Communist Party and had campaigned against the mujahideen. His father had worked for the Communist Party. Following the fall of the Najibullah regime, a family house and land in Pansheer had been confiscated by a commander (whom the appellant named) on that account. The appellant said that he would be targeted by the Northern Alliance as a former communist. His two brothers had fled to Iran on account of that fear and his mother had been beaten by members of the Northern Alliance. In his evidence before the Adjudicator the appellant expanded on this by saying that after the land had been confiscated, his uncle had tried to intervene in the dispute and fighting had broken out in which two nephews of the named commander were killed. The commander was strongly connected with the then defence minister in the new government in Kabul and other figures in the Northern Alliance.

[5] The Adjudicator rejected the appellant's account of his and his family's having had difficulties with elements of the Northern Alliance, as summarised in the immediately preceding paragraph. The Adjudicator did so on a number of grounds. A major, if not indeed the principal, ground for rejecting that account was that the involvement of the appellant and his family in the Communist Party and the dispute with the commander in the relevant faction within the Northern Alliance had not been mentioned in the SEF completed in March 2001. A further adverse reflection on the appellant's credibility was found by the Adjudicator in the respect that the additional material respecting the intervention of the uncle and the fight resulting in the death of nephews of the commander in question had not been included in the Home Office interview responses but had been added by the written statement adopted by the appellant as his evidence-in-chief before the Adjudicator.

[6] In its decision the Tribunal largely endorsed the Adjudicator's reasoning in this matter. It said:

"22. ... We do not accept that it can be said that it is perverse of an adjudicator to take note of omissions in the SEF in considering credibility.

23. There may be cases where something was not mentioned at the time of the SEF because it had no relevance to the situation at that time and obviously then the omission would have no force in rebutting credibility.

24. But in this case it is clear that the appellant's supposed involvement with the Communist Party would be relevant both on the grounds that it would certainly have created an additional risk in regard to the Taliban (indeed probably a much greater risk than that arising from his Tajik ethnicity) and in regard to the internal flight alternative because contrary to [the appellant's representative's] assertion the Mujahadeen were still in control of substantial parts of Afghanistan at that time.

25. The appellant was assisted by a solicitor in preparing his SEF and we do not accept that any competent representative would not ask him about all his history and would have included political grounds if there were any."

[7] Counsel for the appellant in the first chapter of his argument submitted that in drawing an adverse inference from the absence of any mention in the SEF of the activity as members of the Communist Party of the appellant and his father and the consequence of difficulties with the Northern Alliance factions, the Adjudicator had fallen into material error. She had not properly taken into account that, at the time of completing the SEF, the Taliban were in control as the government of Afghanistan and that the basis upon which the appellant had been detained and maltreated by the Taliban authorities was his ethnicity as a Tajik. Since the Northern Alliance factions were not in power, there was no reason for the appellant, through his advisors, to mention any past difficulties with them. In completing the SEF the appellant required

to address the then current situation. Further, the Adjudicator had misread, or misunderstood, the structure of the SEF which the appellant completed. The questions in section C4 relating to political opinion which had been marked "n/a", only fell to be answered were the claim to be based on political views. But the appellant's claim - at that stage, when the Taliban were in effective power - was based on his ethnicity as a Tajik and his experience of his maltreatment on that account, and so the only relevant section for him was section C2, which had been fully completed.

[8] As respects the interview, counsel referred to what had been said by Brooke J. in *R.* v *Secretary of State for the Home Department ex parte Murat Akdogan* [1995] Imm. AR 176 at 178-80, respecting the obligations on the interviewer to elicit fully the relevant aspects of the account of the person being interviewed. Adverting to the terms of the interview in the present case, counsel pointed out that, notwithstanding the radical change of circumstances intervening between the time of the completion of the SEF and the interview, the latter was carried out in a limited, perfunctory way as respects the consequences of that change. The matter of membership of the Communist Party and difficulties with the commander having been raised by the appellant in answer to Question 4 - "Do you want to add anything further to your statement?" - the interviewer made no effort to pursue it. In his answers to questions 64-66, which were also non-specific and not addressed to the particular circumstances of the appellant and his family's difficulties with the Northern Alliance, the appellant made further efforts to explain matters. Although the appellant's representative was entitled to be present, he had no locus to ask any questions and was not invited to do so. The further information provided before the Adjudicator was simply an elaboration or supplement to what the appellant had sought to advance at the interview. The fact that more details of what the appellant had sought to advance at

interview were provided in the evidence before the Adjudicator could not properly reflect adversely on his credibility.

[9] Further the Tribunal was in error when it stated in paragraph 24 of its determination that the appellant's involvement with the Communist Party would be relevant both on the grounds that it would create an additional risk in regard to the Taliban and in regard to the internal flight alternative. Whereas the mujahideen from Pansheer knew of his, and his family's, allegiance to the Communist Party and the Najibullah regime, and in consequence had confiscated their property, there was nothing to suggest that the Taliban had information about the appellant and his family's Communist past. The basis upon which the appellant had been maltreated by the Taliban was solely his ethnicity as a Tajik. Furthermore, there was no evidential basis for the assertion of fact made by the Tribunal. The CIPU report, paragraph 6.246ff, indicated that only high ranking former communists were of any interest on that account to the Taliban. Moreover, the Tribunal's proposition had not been canvassed before the Adjudicator, or indeed before the Tribunal.

[10] In resisting this chapter of the argument for the appellant, counsel for the respondent pointed out that what had been said respecting the conduct of an interview in *Akdogan* was against the absence of an appellate structure equivalent to that prevailing for the appellant. Counsel referred to an unreported decision of the Immigration Appeal Tribunal in *YL (Rely on SEF) China* [2004] UK IAT 00145 in which a distinction was drawn between an "SEF screening" form and an "SEF self completion" form. As respects the latter, counsel referred in particular to what was said in paragraphs 20-22 of the decision.

[11] Assuming (though, as he recognised, not immediately evident from the documentation produced) that the SEF in the present case was a "SEF Self

Completion" form counsel stressed that it was the omission to mention the Communist Party involvement in the SEF which was fatal to the appellant's credibility. If that SEF (*scilicet* "SEF Self Completion") were not full and complete in every possible respect then full use could readily be made by the adjudicating authority of any omission from it and of any discrepancy between its terms and the appellant's later statements, whether at interview or in evidence, in drawing adverse inferences on an applicant's credibility. The interview was, said counsel, in a sense secondary but it was not unfairly conducted; and the appellant had an opportunity to provide further information; and he had not been cut off by the interviewer.

[12] Counsel for the respondent further submitted that the Tribunal were entitled to identify membership of the Communist Party as an additional risk factor as respects possible persecution by the Taliban; and as relevant to possible questions of internal relocation. However, counsel accepted that if it were not relevant in a material sense to the assessment of credibility, then he accepted that the Tribunal had fallen into error.

[13] While there was obviously scope for an account properly to evolve and develop, counsel for the respondent submitted that if something is said which could reasonably have been expected to have been said on a earlier occasion, failure to have made such a mention on that earlier occasion was capable of reflecting adversely on the credibility of the witness. Counsel referred in this respect to *Kulwinder Singh* v *The Secretary of State for the Home Department* 2000 SC 288, 292F-ff. Accordingly, it was submitted, the argument advanced by the appellant in this branch of his submission was unsound.

[14] We find it convenient to deal with this branch of the argument at this stage. It is unclear to us - and indeed appeared unclear to counsel for the respondent - that the

SEF completed on behalf of the appellant in this case was the same as the "SEF Self Completion" form, and occupied the same part of the same administrative procedures, as obtained in *YL*. Certainly, the copies of the documents with which we have been provided do not exhibit that nomenclature. Be that as it may, we must look at the document as it is framed and structured with a view to deciding whether - in light of the particular circumstance that it was completed on the appellant's behoof at a time when the Taliban were the effective government in most of Afghanistan and both the events of 11 September 2001 and the subsequent US led invasion of Afghanistan could not be foreseen - the omission of mention of the appellant's own and his father's membership of the Communist Party under the regime which had fallen in 1992 was a material matter which might properly be taken as reflecting adversely on his credibility.

[15] The SEF is divided into parts. Parts A and B are concerned with personal and family details. Part C is headed "The basis of your claim" and invites the addressee of the form to tick one or more of the four boxes to indicate the basis of the claim. According to the basis thus selected, a particular further section - and only that section - of Part C falls to be completed. The structure of the questionnaire thus directs the respondent to the questionnaire to the particular questions considered by its framer to be the relevant questions for each of the four "basis of claim" boxes by reference to particular parts of the questionnaire. There is nothing in the questionnaire to suggest that questions asked in sections appropriated to a basis of claim not selected should nonetheless be considered.

[16] The appellant in this case ticked the first box - "your race, ethnic origin or nationality". This accorded with the basis of his fear of the Taliban authorities and the reasons, as he understood them, for his maltreatment at their hands. He then

completed the obligatory Part C1, stressing his history and fear of maltreatment by the Taliban on account of his ethnicity. The relevant section (C2) for claims based on "race, ethnic group or nationality" is then fully completed. There was therefore no call upon the appellant to answer the questions in section C4. That whole section was appropriately marked as "N/A". However, the Adjudicator appears to have drawn a crucial adverse inference on the appellant's credibility from the omission to answer questions in a section of the questionnaire which, given the basis of the claim, the questionnaire did not invite completion. Since at that time, March 2001, the Taliban government was in control of most of Afghanistan, and, on a tenable view, in the ascendancy there was no reason for the appellant realistically to fear ill-treatment from members of the largely defeated Northern Alliance. Obviously, in completing the SEF one could not expect of him the prescience of anticipating the terrorist attacks on the USA in September 2001 and the US led reaction thereto. We have therefore come to the conclusion that there is force in the submission by counsel for the appellant that the Adjudicator committed an error of law in not having regard to the structure of the questionnaire and in drawing important adverse inferences on the appellant's credibility from his apparent failure to address questions which the questionnaire did not call upon him to address in the particular political circumstances prevailing at the time at which the form was completed given the basis upon which he was claiming protection against the Taliban. The Adjudicator's decision was in at least these respects seriously deficient.

[17] In its decision the Tribunal seeks, in a sense, to allay this deficiency in the Adjudicator's reasoning by what it says in paragraph 24, which for convenience we quote again.

> "24. But in this case it is clear that the appellant's supposed involvement with the Communist Party would be relevant both on the grounds that it would certainly have created an additional risk in regard to the Taliban (indeed probably a much greater risk than that arising from his Tajik ethnicity) and in regard to the internal flight alternative because contrary to [the appellant's representative's] assertion the Mujahideen were still in control of substantial parts of Afghanistan at that time."

We find the Tribunal's reasoning in this paragraph to be unsatisfactory. First, bearing in mind that the appeal to the Tribunal was on matters of law, there is no indication of any evidential basis upon which the Tribunal felt able to assert that the appellant's membership of the Communist Party constituted an additional risk "indeed a much greater risk than that arising from his Tajik ethnicity". Counsel for the appellant alerted us to the passage in the CIPU report to which we have already referred; no contrary passages were drawn to our attention by counsel for the Secretary of State. The appellant's account of mistreatment by the Taliban authorities was to the effect that he had been selected on account of his ethnicity. He was not a high ranking communist official in the terms of passages in the CIPU report to which we have been referred. And so the appellant's account, at the time at which he completed his SEF, is on one view consistent with the CIPU report and, more importantly, his personal experience.

[18] Secondly, as respects the Tribunal's reference to membership of the Communist Party being possibly relevant to the "internal flight alternative", it is to be observed that there is no question in the SEF completed by the appellant which is directed towards the possibility of internal flight. So there was no reason for the appellant, in completing the SEF to address that possibility. While the Secretary of

State might possibly have responded to the appellant's request for asylum in March 2001 by invoking internal flight, there was thus no compelling reason for the appellant or his advisors to anticipate that possible response (the validity of which, in March 2001, with the Taliban regime much in its ascendancy, is at least open to question) when completing the SEF. We recognise that the Adjudicator adverts to a sentence in the appellant's continuation statement in answer to question 1 in section C1 of the SEF which might be construed as touching on internal relocation but it is evident that in the context in which the statement is made it does not envisage re-location to such remaining areas in Afghanistan as might not be controlled by the Taliban; and the fact remains that the questionnaire which the appellant was invited to complete, and against which his credibility is being tested, contained no question respecting internal relocation.

[19] It will of course often be the case that, as was observed by Lord Reed in *Kulwinder Singh* v *Secretary of State for the Home Department* that a failure by a witness to mention a fact in a situation in which he could reasonably have been expected to make mention of that fact may justify drawing an adverse reflection on the credibility of the subsequent assertion of that fact. As a generality, that is not in dispute. But in the particularity of the present case, drawing an adverse inference on the credibility of the appellant's account, in the very altered circumstances in Afghanistan in October 2002, of fear of persecution by a different faction on account of his Communist Party membership, on the basis simply that such a fear had not been expressed in the SEF completed in March 2001 is, in our view, open to attack for the reasons already indicated. In summary, (i) the whole situation in Afghanistan in March 2001 was clearly different; (ii) in that different situation, the appellant's experience was of mistreatment on account of ethnicity as a Tajik and so there was no

reason for him to address questions of Taliban persecution on account of his low level involvement in the Communist Party; (iii) the SEF had no question directed towards internal flight; and (iv) there was no reason for the appellant to anticipate an internal flight response in the unsettled circumstances of that time. In these circumstances, while we recognise of course that questions of credibility and reliability are primarily for the trier of fact, we have come to the conclusion that, in the particular circumstances of this case, the Adjudicator was not entitled to draw an adverse inference on the credibility of the appellant's claim to fear of persecution from members of the Northern Alliance on the basis of his former membership of the Communist Party on the ground that this had not been mentioned in the SEF completed in March 2001 in such very different circumstances. For the reasons already given, we are unable to accept the reasoning of the Tribunal in support of that approach.

[20] As we understood matters, counsel for the respondent did not submit that, apart from the alleged failure to include in the SEF mention of the Communist Party involvement of the appellant and his family, there was any independent ground for justifying an attack on the appellant's credibility on the basis that, having given some information regarding his and his family's Communist Party involvement in the very different circumstances obtaining at the time of the interview in October 2002, the appellant had expanded on that in his evidence to the Adjudicator. Having considered the record of the October 2002 interview and the perfunctory terms in which that interview was conducted as respects the matters pertinent to this application for leave to appeal, we understand counsel's position, which was to the effect that this was arguably a legitimate development and supplement to an account which the appellant had sought to make after that interview. Counsel for the respondent accepted were this

court to reach the conclusion which we have reached in the preceding paragraph that conclusion would amount to the conclusion that the Tribunal's decision was vitiated by an error of law which would justify allowance of both the application for leave to appeal and the appeal itself.

[21] In these circumstances it is unnecessary for us to consider in detail the second branch of the argument of the appellant concerning certain letters from the appellant's brothers, discussed by the Adjudicator in paragraphs, 21 ff of her decision. In brief summary the submissions advanced under this branch were (i) that the Adjudicator approached these letters having previously formed an adverse view as respects the credibility of the appellant and failed to take them into the round in the whole assessment of the appellant's credibility; (ii) it was quite wrong to say that they were vague and added nothing; (iii) it was quite wrong to say that they were incapable of supporting the appellant; and (iv) importantly, it was unrealistic for the Adjudicator to have expected independent evidence to support the authenticity of the letters. In response counsel for the Home Secretary submitted, in short, that these criticisms did not constitute an error of law but were simply a matter of weight. Since parties were agreed that if the appellant's first branch of his submissions were to be upheld, the disposal would be one of remit for reconsideration, we think that all that need be said by us is that on that reconsideration of this application, the validity, significance of, and weight to be attached to, these letters will be a matter which will have to be given careful consideration *de novo*.

[22] In these circumstances, we (i) grant leave to appeal; (ii) allow the appeal; and (iii) remit to the Tribunal for reconsideration.