EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Bonomy

[2010] CSIH 72
XA131/08

OPINION OF LORD CARLOWAY

in the application for leave to appeal by

SS (AP)

Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Forrest; Drummond Miller LLP (for Livingstone Brown, Glasgow)
Alt: Lindsay; C. Mullin, solicitor to the Advocate General

30 July 2010

1. Facts

[1] The applicant is an Iranian citizen who entered the United Kingdom on a visitor's visa on 17 June 2007, ostensibly for a holiday and to visit a cousin, whom he had not seen for ten years. He claimed asylum on 22 August 2007. His claim was refused on appeal to an Immigration Judge after a hearing on 6 November 2007.

[2] The applicant's claim was that he was a filmmaker who had worked on short term contracts for the Islamic Republic of Iran Broadcasting Corporation (IRIB) from 1995. In 1996 he had been summoned before the IRIB's disciplinary committee, who

had cautioned him about engaging in political conversations at work. In the following year, he was seized by state agents, who had recorded his conversations, and tortured for referring to the Iranian Supreme Leader as a "bastard". He had cigarettes stubbed out on his chest and still bore the scars of that. The applicant had continued to work for the IRIB until about 2001, when he was told that his prospects of permanent employment were poor because of what had happened. He then went to work for a college lecturer before, in 2006, starting editing work for an agency. Because of the quality of his work, he was asked to travel to Mecca to make a documentary film for the Iranian government's Haj Organisation.

[3] The applicant returned from Mecca in January 2007 with around 40 unedited video tapes. He had made two short films for the Haj Organisation and was to make a longer one. But he had not completed that task before departing for the UK. As he was to be in the UK for four weeks, the Haj Organisation had asked him for the tapes, so that they could make alternative arrangements. On the day before he flew to the UK, the applicant had handed over the tapes. On 8 August 2997, he had received an e-mail from a friend saying that something had gone wrong. When he spoke to his wife on 13 August, she had told him that the friend had told her that, amongst the tapes he had handed over, there had been an unrelated political film. This was a compilation of three political films which had previously been created by the applicant.

[4] The applicant's home had been searched and "many things" had been taken away. The friend had been detained for several days. The applicant had then contacted another friend to go to his home and retrieve a shoe box containing back-up versions of some of the political films. This box had been hidden under a wardrobe. The friend did this and had sent the box to the UK by DHL couriers. Part of the material in the

box had been placed on a DVD for the Immigration Judge to view. This contained some of the material inadvertently handed over.

[5] In the assessment of the applicant's credibility, the respondent reasoned (refusal letter of 27 September 2007):

> "35. It is accepted that you were involved in the business of film production, and more generally in broadcasting. You have submitted a membership card, valid until 2008, for the Iranian Documentary Film Makers Society. You have also submitted your Iranian Photographers' Centre Press Card, issued in February of this year. It is also noted that you are listed as a member of the Iranian Documentary Film Makers Society at [the IDFMS website]. You have also demonstrated knowledge of software products relating to film editing and production... Considered together, it is credible that you have in the past been involved in film production, and your claim in this regard has been accepted".

However, the respondent did not believe that the applicant had remained working for the IRIB after the torture or that he would have made the error of accidentally handing over political films to the Haj Organisation. The claim for asylum was rejected and the applicant appealed.

[6] The Immigration Judge accepted that, if the applicant had been telling the truth, then he was entitled to asylum. He accepted that the applicant had been tortured by cigarette burns; this being supported by expert medical testimony. However, he concluded that:

> "26. However, in general terms, I have found it impossible to find the Appellant credible. I do not accept that he is a filmmaker or that any seditious material has fallen into the hands of the Authorities".

He summarised the reasons for his rejection of the applicant's credibility in nine separate paragraphs. These included that, if the appellant had been working at IRIB in 1997, he would not have continued to do so after the discovery of his political conversations. It was implausible that the applicant would have told his wife to put the compilation tape amongst those destined for the Haj Organisation. The Immigration Judge did not believe that the applicant had kept this and other material in a shoe box,

which had survived the search of his house, under a wardrobe. The applicant had been unable to give a consistent account of where the wardrobe was or to what use it was normally put. The applicant did not appear on the DVD played to the Immigration Judge, although he claimed to have done the voice-over for one of the films. Although he had planned to edit these films to make them "unrecognisable", he had not done this. Rather he had done the opposite, by adding his own voice to them. Although the applicant had said that he had come to the UK to visit a cousin, that cousin had returned to Iran by the time of the applicant's arrival. The applicant had also, the Immigration Judge found, effectively forged a letter from Azerbaijan Airlines to bolster his claim. The Immigration Judge did not consider that there was any reason why the applicant could not safely return to Iran, which he had left using his own passport.

[7] On 14 December 2007, a Senior Immigration Judge refused to order a reconsideration, holding that:

> "The error of the Immigration Judge in finding that the appellant was not a filmmaker was not a material error since he accepted that the appellant had been tortured in the past..."

The existence of the error had been accepted because of the content of the respondent's letter refusing the original asylum claim (*supra*).

[8] On 14 January 2008, the Lord Ordinary ordered a reconsideration on the basis that there may have been an error in law. It is unfortunate that parts of the Lord Ordinary's succinct Note do not make grammatical sense. There is, in particular, a passage which reads:

> "However, the Tribunal found that it was not a material error because the Immigration Judge, namely, whether the appellant had been tortured in the past; whether he was a filmmaker; and, whether seditious material belonging to him had fallen into the hands of the authorities".

The Court is unable to grasp what meaning this passage might have been intended to carry. However, the Lord Ordinary continued:

> "The Immigration Judge accepted that the appellant had been tortured in the past, which in light of the authorities, was a significant finding. His finding that the appellant was not a filmmaker, which is recognised as an error by the [Senior Immigration Judge], may have had an effect on his conclusion in relation to whether seditious material created by him had fallen into the hands of the authorities in Iran. The two issues were closely linked".

[9] The applicant's case was the subject of a stage one reconsideration, the Senior Immigration Judge reminding himself that he could only interfere with the Immigration Judge's decision if it actually disclosed a material error of law. He remarked that the Immigration Judge had had the advantage of hearing oral evidence from the applicant and seeing the DVD. The Senior Immigration Judge commented that the Immigration Judge's approach had not been criticised as unfair by the Lord Ordinary nor had the various elements, which had been taken into account in the assessment of credibility, been made the subject of adverse comment. The Immigration Judge had given ample reasons for holding that the applicant had not been credible. The Senior Immigration Judge found that no material error of law had occurred. He reasoned that it had not been made clear to the Immigration Judge that the respondent had conceded that the applicant had been a filmmaker. The Immigration Judge had been entitled to disbelieve that part of his testimony. In any event, it had not been established that any error had been material or that it had "infected" the other findings.

2. Submissions

[10] The applicant submitted first that the Immigration Judge had set out the issues for determination. These included whether the applicant was a filmmaker; whether the material produced was seditious; and whether the material had fallen into the hands of the authorities. The Lord Ordinary had held that these issues were closely linked. The

Senior Immigration Judge had not explained why the issue of whether the applicant was a filmmaker was not material. Secondly, it was submitted that the Immigration Judge's findings on credibility were not consistent with those relating to previous torture. Neither he nor the Senior Immigration Judge had explained why torture was not likely to occur in the future.

[11] The respondent argued that, in terms of the test desiderated by Lord Macfadyen, delivering the Opinion of the Court in *HA* v *Secretary of State for the Home Department* 2008 SC 58 (at para [17]), the credibility of an asylum seeker was primarily an issue of fact, destined by Parliament to be determined by a specialist immigration judge. The main difficulty with the applicant's account had not centred upon whether he had been a filmmaker but upon the plausibility of his account of making political films which had come to the attention of the authorities. The Immigration Judge had not found that the applicant had not been a filmmaker. He had merely found that he had not been a maker of seditious films. This was demonstrated by the Immigration Judge's reasoning, which had not focussed on whether he had the technical expertise to make films or similar considerations. In any event, the Immigration Judge had been entitled to reject the applicant's account of being a filmmaker, since he was not bound by any concession made by the respondent. There had been no procedural unfairness in that regard. Any error was not one of law (*HA and TD* v *Secretary of State for the Home Department* [2010] CSIH 28, Lord Reed, delivering the Opinion of the Court at paras [8] and [9]). Even if the Immigration Judge had found that the applicant was not a filmmaker, any error in that regard was not material. There was ample evidence upon which he would, in any event, have found that the applicant's account of political films falling into the hands of the authorities was implausible. As the Senior Immigration Judge had reasoned, it had not

been established that the Immigration Judge's error had "infected his other findings". The subsidiary point concerning the earlier torture had no bearing on the issue.

3. Decision

[12] Following the *dictum* of the Lord President (Cullen), delivering the Opinion of the Court, in *Hoseini* v *Secretary of State for the Home Department* 2005 SLT 550 (para [5]), the test for whether leave to appeal ought to be granted, in the absence of other compelling reasons, is whether the appeal has a real prospect of success. There can be no prospect of success unless a potential material error of law can be identified. It was accepted by the respondent that, since the application had been remitted to the Summar Roll, if a material error of law were to be identified, the appropriate course would be not only to grant leave to appeal but also to treat the application as the appeal, to allow that appeal and to remit to the Upper Tribunal.

[13] It is important to recognise, of course, that an appeal lies only upon a point of law. There is helpful guidance on what constitutes an error of law in the precise context of the assessment of credibility in asylum cases in *HA* v *Secretary of State for the Home Department* 2008 SC 58 (Lord Macfadyen, delivering the Opinion of the Court, at para [17], following *Reid* v *Secretary of State for Scotland* 1999 SC (HL) 17, Lord Clyde at p 41H). However, it is also useful to revert to the classic definition of what constitutes an error of law. An error of law will occur where a tribunal has: misdirected itself in law; entertained the wrong issue; proceeded upon a misapprehension or misconstruction of the evidence; taken into account irrelevant matters or failed to take account of relevant ones; or has reached a decision so extravagant that no reasonable tribunal, properly directing itself on the law, could have arrived at. An error of law cannot be said to have occurred simply where a tribunal has wrongly assessed the evidence in some way or weighed it in a manner

with which a party disagrees. But it will be seen to happen where a tribunal has misunderstood the evidential position. The issue is not one of fairness stemming from an obvious mistake of fact, as the Senior Immigration Judge appears to have categorised it. It is whether the Immigration Judge has proceeded to reach his decision on a misunderstanding or misconstruction of a material fact or facts or, alternatively, whether he has failed to take account of material evidence.

[14] The Immigration Judge had before him, as a starting point for the determination of the veracity of the applicant's account, an acceptance by the respondent that the applicant was a filmmaker. That acceptance had been based upon evidence produced to the respondent and referred to in the refusal letter, namely the membership card, valid until 2008, for the Iranian Documentary Film Makers Society, the Iranian Photographers' Centre Press Card, issued in February 2007, and his listing on the Society's website. The applicant had demonstrated to the respondent's satisfaction that he had knowledge of software products relating to film editing and production. All of that material was important if there had been an issue between the parties on whether the applicant was a filmmaker. It is correct to say that the Immigration Judge was not bound to accept the respondent's conclusion as binding upon him. However, if he were to depart from a position accepted as true by both parties, the Court would normally expect some explanation for doing so. In the absence of such an explanation, the only reasonable inference is that the Tribunal has either misunderstood that position or otherwise inexplicably left the evidence entirely out of account.

[15] The proposition that the Immigration Judge only held that the applicant was not a maker of seditious films is not tenable. The Immigration Judge states in clear terms that "I have found it impossible to find the Appellant credible I do not accept that he is a filmmaker or that any seditious material that may have belonged to him

has fallen into the hands of the Authorities. (para 26). The only interpretation of that sentence is that the Immigration Judge has rejected the position accepted by both parties that the applicant is a filmmaker. That finding is inconsistent with the evidence set out in the refusal letter and, in the absence of any explanation, the only conclusion that can be drawn is, as already noted, that the Immigration Judge has either misunderstood or misconstrued this evidence or left it entirely out of account. The error is therefore properly categorised as one of law. The next question is whether it is a material error.

[16] It is no doubt correct to say that there was ample evidence upon which the Immigration Judge could have reached a conclusion that, although the applicant was a filmmaker, nevertheless his account of making political films and allowing them to fall into the hands of the authorities should be rejected. That would have resulted in the failure of the applicant's appeal. However, that is not the point. An error of law having been identified, the question is whether there is a real prospect of the Tribunal reaching a different conclusion were it to take as its starting point that the applicant is a filmmaker. The answer to that must be in the affirmative. An acceptance that the applicant is a filmmaker lends significant strength to the applicant's account that he made seditious films and renders his account of such films falling into the wrong hands less implausible. Of course, it does not inevitably follow that, upon a reconsideration, it would be accepted that he was a filmmaker but, were it to be so accepted, that must be a material consideration to be taken into account when assessing credibility. Put a different way, the erroneous rejection of the applicant as a filmmaker must have had a material bearing on whether his account of making political films fell to be accepted.

[17] Finally, it should be noted that there was no error in relation to the treatment of the evidence of torture by the Immigration Judge. It was accepted that the applicant was tortured in 1997. But the applicant did not link that torture to any of his filmmaking activities. It appeared to have little significance in the determination of his claim.

[18] The Court should therefore grant leave to appeal, deem the application to be the appeal, allow the appeal and remit the case to the Upper Tribunal upon the basis that there will be a reconsideration which will have regard to the acceptance by both parties that the applicant is a filmmaker, based upon the evidence detailed in the refusal letter. This does not mean that the Tribunal requires to proceed on the basis that he is a filmmaker but, if the conclusion is to be otherwise, the Court will expect there to be adequate reasons proffered for that decision.

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OPINION OF LORD HARDIE

in the application for leave to appeal

by

SS (AP)

Appellant;

against

THE SECRETARY OF STATE FOR
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Respondent:

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Act: Forrest; Drummond Miller LLP (for Livingstone Brown, Glasgow)
Alt: Lindsay; C. Mullin, solicitor to the Advocate General

30 July 2010

[19] I am greatly indebted to you Lordship in the chair for setting out the factual background in this case and the basis upon which the applicant claimed asylum. I agree with your Lordship's observations about the terms of the Lord Ordinary's Note dated 14 January 2008. The Lord Ordinary also observed that "[t]he Immigration Judge accepted that the appellant had been tortured in the past, which in the light of

the authorities, was a significant finding." I agree with your Lordship in the chair that there was no error by the Immigration Judge in relation to his treatment of the evidence of the torture of the applicant in 1997. As your Lordship has observed the torture was related to an isolated incident in which the applicant had been recorded as having called the supreme leader, Ayatollah Khamaneie, a bastard. His ill treatment had occurred 10 years previously and was unrelated to any film making activities. Moreover, as your Lordship has observed the circumstances in which the applicant had been tortured had little significance in the determination of the applicant's claim. Insofar as the Lord Ordinary purported to rely upon the "significant finding" of the past torture of the applicant in ordering the Asylum and Immigration Tribunal to reconsider its decision, the Lord Ordinary was in error.

[20] I respectfully agree with your Lordship that the test to be applied in granting leave to appeal is whether the appeal has a real prospect of success, a prerequisite of which is the identification of a material error of law. I also agree with your Lordship that the passage quoted at paragraph 15 of your Lordship's Opinion cannot be construed as amounting to no more than a finding by the Immigration Judge that the applicant was not a maker of seditious films. To that extent I reject the submission made by counsel for the respondent. However, I disagree with your Lordship's interpretation of the passage as amounting to a rejection of the position accepted by both parties that the applicant is a film maker. In that respect it may be of assistance to consider the terms of the letter dated 27 September 2007 containing the reasons for refusal of the applicant's claim for asylum. That letter summarises the applicant's claims based upon the answers given by him at interview. In short, the applicant claimed to be a maker of documentary films. In 1995 he was employed by the Iranian Broadcasting Agency (IRIB) on a temporary basis. In 1996 he was warned to stop

discussing politics. In 1997 he was abducted and detained for less than one day during which a tape of a conversation with a colleague from IRIB was played in which the applicant had been highly critical of some of Iran's political and religious figures. During his detention he was subjected to torture with a lit cigarette. Following his release he continued to work for IRIB on a casual basis until 2000 or 2001 when he began to work for himself. His work from 2001 was primarily concerned with editing. In 2005 he began collating material for his own films following the election of President Ahmadinejad. By 2007 he had enough material for three separate documentary films. The footage he had collated was all critical of certain aspects of Mr Ahmadinejad, the Islamic Republic of Iran, certain interpretations of Islam and the way it had been used by some in Iran to further political agendas and it was also critical of the economic situation in Iran. He gave details of the storage of the material on his computer and on CDs and tapes which he kept in a shoe box concealed in a space under a wardrobe at his home. The respondent rejected the applicant's account as incredible and, insofar as it related to his involvement in film production, the respondent observed:

> "35. It is accepted that you were involved in the business of film production, and more generally in broadcasting. You have submitted a membership card, valid until 2008, for the Iranian Documentary Film Makers Society. You have also submitted your Iranian Photographers' Centre Press Card, issued in February of this year. It is also noted that you are listed as a member of the Iranian Documentary Film Makers Society at www.irandocfilmdoc.org. You have also demonstrated knowledge of software products relating to film editing and production...Considered together, it is credible that you have in the

past been involved in film production, and your claim in this regard has been accepted.

36. There are aspects of your account which are not considered credible, and are not accepted.

37. It is not considered credible that had you come to the authorities attention in 1997, to the extent that they deemed it necessary to detain and torture you, that you would be allowed to continue to work on any basis, for the IRIB. Article 175 of the Iranian Constitution states:

> 'The freedom of expression and dissemination of thoughts in the Radio and Television of the Islamic Republic of Iran must be guaranteed in keeping with the Islamic criteria and best interests of the country. The appointment and dismissal of the head of Radio and Television of the Islamic Republic of Iran rests with the Leader. A council consisting of two representatives each of the President, the head of the Judiciary branch and the Islamic Consultative Assembly shall supervise the functioning of this organisation'.

Clearly this is a state run organisation, closely bound to the political and religious leadership in Iran. As such it is not considered credible that someone who had criticised those authorities and had suffered the treatment you described, would then be allowed to work in any capacity for IRIB for a further 3 to 4 years. While it is accepted that not every employee of the IRIB shares exactly the same political and religious outlook as the Iranian leadership, it is not accepted that a person who had come to the adverse attention of the authorities in the manner you described would be allowed to

> continue to work for an organisation such as the IRIB. It is therefore concluded that the events did not occur as you described them."

That passage seems to suggest that the respondent acknowledged that the applicant had been involved in film production in the past. However, it does not amount to an acceptance by the respondent that the applicant is a film maker. Accordingly I do not accept that the statement by the Immigration Judge that "I have found it impossible to find the appellant credible. I do not accept that he is a filmmaker" is inconsistent with the respondent's position disclosed in the refusal letter. Accordingly I am not satisfied that there has been an error of law in this case.

[21] Even If I am wrong in that regard, I am not satisfied that the error played any material part in the overall assessment of the applicant's credibility. The critical issue for the Immigration Judge was not whether the applicant was a film maker but whether he had made seditious films and whether these had fallen into the hands of the Iranian authorities following the departure of the applicant for the United Kingdom. In the passage quoted by your Lordship the Immigration Judge considered whether he believed that the seditious material allegedly produced by the applicant had fallen into the hands of the authorities following the applicant's departure for the United Kingdom. He concluded that he could not and thereafter provided a summary of the reasons for that conclusion in nine numbered paragraphs. The first seven of these reasons relate to the applicant's account of working at IRIB following his abduction and torture in 1997 and to the downloading of the three films onto his computer and subsequent storage of the box with the tapes containing the film. The eighth reason was that the Immigration Judge did not accept that the applicant had given a credible account of the movements of his cousin, whom the applicant allegedly came to the United Kingdom to visit, and he concluded that the

applicant had always intended to seek asylum in the United Kingdom whenever he was able to travel. The ninth reason was that a letter from Azerbaijan Airlines had been produced with a view to misleading the Tribunal. The reasons individually are clear and cogent and cumulatively they are a sound basis for rejecting the applicant's account on the critical matter for the determination of the Immigration Judge. Although an attempt had been made on behalf of the applicant to review these issues of credibility when he sought reconsideration of his case, the Lord Ordinary rejected that part of his application for reconsideration. More significantly, before this court counsel for the applicant did not seek to impugn the Immigration Judge's reasoning in this regard. Standing the unchallenged reasons for rejecting the applicant's account it respectfully seems to me that this appeal has no real prospect of success.

[22] In the foregoing circumstances I would refuse leave to appeal in this case.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Bonomy

[2010] CSIH 72
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OPINION OF LORD BONOMY

in the application for leave to appeal by

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Appellant;

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THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

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Act: Forrest; Drummond Miller LLP (for Livingstone Brown, Glasgow)
Alt: Lindsay; C. Mullin, solicitor to the Advocate General

30 July 2010

[23] I agree with your Lordship in the chair that the Court should grant leave to appeal, deem the application to be the appeal, allow the appeal and remit the case to the Upper Tribunal for reconsideration. While, as Lord Hardie has pointed out, the Immigration Judge has set out clearly in nine separate paragraphs his various reasons for rejecting the appellant's account as incredible, it is not possible to say with conviction that he would have made the same findings, had his starting point been that the appellant was in fact a filmmaker. On a number of matters set out in these nine paragraphs he might well have formed a different view. While it was open to the

Immigration Judge to reject the notion that the appellant was a filmmaker, that would involve a conscious rejection of the factual position accepted by the respondent which in turn would demand an explanation. In the absence of such an explanation, the inevitable conclusion is that the Immigration Judge proceeded in his analysis of the appellant's credibility on a misunderstanding or misconstruction of a material fact or alternatively left that material fact out of account. That is an error in law. I consider that there is a real prospect that a different determination might be made by a judge approaching the assessment of the appellant's credibility from the point of view of an acceptance that he was a filmmaker.