EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Abernethy
Lord Philip
Lord Carloway

[2007] CSIH 13
XA50/05

OPINION OF THE COURT

delivered by LORD CARLOWAY

in

APPEAL

by

MK

Appellant;

against

the decision of the IMMIGRATION APPEAL TRIBUNAL

Respondent:

_____

Appellant: Caskie; Drummond Miller WS
Respondent: Miss Drummond; C. Mullin, Solicitor for the Advocate General

15 February 2007

The Appellant's Evidence

[1] The appellant is a national of Pakistan. According to his written statement, he is aged twenty nine, a Sunni Muslim and comes from Gujranwala. In 1995 he joined the Seph-e-Sahaba, a Sunni political party. A letter confirming his membership was produced. On 6 May 1997, a Shia Muslim police superintendent was murdered by three gunmen. A First Information Report, also produced, provided the details of the

crime. The identity of the assassins was not initially known, but Sunni Muslims were suspected. Although he had no police record, the appellant was arrested in July 1997 and questioned about the murder. The police interest in the appellant was said to have been prompted by local Shia Muslims. The appellant was not being accused of the murder but was being asked to supply information on the assassins.

[2] Over a period of up to twelve days, the appellant was said to have been tortured by the police by, amongst other things, being burned on his back and chest by lighted cigarettes. The police also fractured his elbow, using sticks. He was in hospital for two weeks. A brief medical report dated 30 July 1997 was produced from a consultant orthopaedic surgeon in Gujranwala referring to the appellant complaining of police torture and confirming his in-patient treatment for a fractured right elbow. The surgery was also referred to in a report from a General Medical Practitioner in Glasgow, who saw the appellant on occasions in and after October 2000. This doctor confirmed that the appellant had a burn mark on his right chest wall, consistent with a cigarette burn.

[3] The appellant was released from this initial police custody because members of his family, who include relatively wealthy businessmen, paid a large bribe. The appellant ceased all political activity. However, in December 1997 he was arrested again, detained for two days and punched and kicked by the police. Another bribe was paid. Nevertheless, in March 1998 a third cycle of detention, torture and release by bribe occurred. The appellant determined that this should not recur and he "started to move around to avoid...detection". He moved to stay in Murre and Lahore, although he did return home periodically "when my family were sure it was safe". It was said that his absences made the police suspicious that the appellant had been involved in the murder itself. The appellant decided to leave Pakistan because his "life was

becoming seriously endangered". He obtained a passport in May 1998. He then set about obtaining a visa for entry into the United Kingdom. He bribed an agent to obtain this, but the agent disappeared. In mid August another agent was bribed, but failed to obtain the visa. This agent did return the money but a third one, bribed in the October, did not.

[4] By late 1999, the appellant's family thought that police interest in him had diminished. The appellant returned to the family home and married in January 2000. A few days later, the police came to the house looking for the appellant. He was not there. He fled back to Lahore and then Murre, although again intermittently returning home. During this time, the police continued to call at the house looking for him. On 12 April, a warrant for his arrest was left for him at the house. A copy of this document was produced. It is entirely handwritten, other than the stamp of the magistrate said to have issued it. It bears the FIR number and (in translation) reads:

> "Of the three unknown accused associated with this case, one of these accused, Mr [K] is being sought for arrest.
> During April 2000, on the 10/4/2000, as a result of the police investigation it appeared that the said Mr [K] had disappeared from Pakistan. Whenever the said person returns to Pakistan he is to be arrested and punished with the appropriate penalty. The said Mr [K] is the person to be punished."

It was this warrant which persuaded the appellant that "the persecution by the police authorities was never going to stop". Meantime, in July 2000, the appellant's mother, who had been staying with friends in the United Kingdom, had a heart attack and, three days later, died. Before she died, the appellant had applied for a UK entry visa in order to visit her. He secured a six month visitor's UK entry visa on 24 July 2000. He left Pakistan with his wife and child and arrived in the United Kingdom on the following day. The appellant did not claim asylum until very shortly before the expiry of the visa. He maintained that this was because he had been told by a solicitor that he did not require "to claim asylum immediately".

The Asylum Application

[5] The appellant's application was dated 1 January 2001. It was refused by the respondent in a letter of 7 December 2001. He appealed to an Adjudicator on both refugee and human rights grounds. The Adjudicator heard the appeal on 6 December 2002 and promulgated his decision on 2 January 2003. He addressed himself to the credibility of the appellant's account, acknowledging that he had to do so against the background of known conditions in Pakistan, provided in part by a United States State Department Report. The Adjudicator found a number of elements in the appellant's account to be incredible. These included that:

> "22. I find it incredible that having been allegedly detained on three separate occasions and released without charge that the appellant spent approximately two years at liberty [in] Pakistan without ever having any further enquiry made of him in respect of the alleged murder especially given the background of his alleged detention and torture on three previous occasions.
> 23. I find it incredible that the appellant allegedly paid agents on three separate occasions to assist him in gaining an exit visa from Pakistan when he had within his possession a valid passport which in addition to allowing him to move throughout any area of Pakistan would have facilitated his exit overland.
> 24. I find it incredible that an apprehension warrant dated the 10th April 2000 would be delivered to the appellant's house in his absence thereby forewarning the appellant of his intended apprehension..."

The Adjudicator analysed the content of the medical reports and the FIR and held that they did not provide substantiation of the appellant's accounts. He concluded that:

> "...no reliance can be placed on the impact [of] the documents he has produced in support of his account."

He dismissed the appeal.

[6] The appellant sought leave to appeal to the Immigration Appeal Tribunal. This was initially refused by the Tribunal but the appellant successfully challenged that refusal in a petition for judicial review. Leave was then granted and the case eventually came before the Tribunal on 21 January 2005. The Tribunal notified the

appellant of its decision on 17 February. The appellant was successful in persuading the Tribunal that the Adjudicator had erred in his approach to the evidence provided by the documents produced by the appellant. Under reference to the starred decision of the Tribunal in *Tanveer Ahmed v Secretary of State for the Home Department* [2002] UKIAT 00439, the Tribunal held that the Adjudicator had:

> "16. ... looked at the documentary evidence as if it was meant to prove the appellant's case. The Adjudicator should have...looked at the documentary evidence in the round in his assessment of the appellant's credibility."

The Tribunal continued:

> "17. Be that as it may, this does not mean that the Adjudicator's credibility findings are flawed.
> 18. We agree with [the respondent] that the medical reports provide a modicum of support for the appellant's claim. [The Hospital] report shows that he was injured during police detention in July 1997. [The GP] report only refers to one cigarette burn at his chest. That is inconsistent with the appellant's evidence that he was burnt on his chest and back with lit cigarettes. Nevertheless, the evidence provides support for the appellant's claim that he was arrested and detained in July following the murder of a police inspector. He may have been arrested on two further occasions in December 1997 and March 1998 by the police in the course of their investigation into the murder. Nevertheless we agree with the Adjudicator that it is not credible that the appellant would have remained at liberty in Pakistan without ever having any further enquiry made of him in respect of the alleged murder, but an arrest warrant would then be issued approximately three years after the alleged incident. Furthermore, that the arrest warrant would be left in his house in his absence thereby forewarning him of his intended apprehension. Like the Adjudicator we do not believe that he would have paid an agent on three separate occasions to assist him in gaining an exit visa from Pakistan when he was in possession of a valid passport. The fact that the appellant delayed claiming asylum until his visa had expired further undermined the credibility of his claim. We also agree with [the respondent] that it is almost seven years since the appellant was last detained in Pakistan. We have no evidence that the police have maintained an interest in him.
> 19. Accordingly, we find that the appellant has failed to discharge the burden of proof upon him..."

The Tribunal dismissed the appeal. The appellant was refused leave to appeal to the Court. However, on 11 January 2006 leave to appeal was granted unopposed by the Court. That appeal was brought under paragraph 23(1) of Schedule 4 to the

Immigration and Asylum Act 1999 (c 33) on the basis that there had been an error of law material to the determination.

Submissions

(a) APPELLANT

[7] Although the appellant's grounds of appeal contended that the Tribunal had erred in failing to reconsider the case after having decided that the Adjudicator's decision was flawed, that ground was not insisted upon. There was also no argument based upon the original refugee, as distinct from the human rights, claim. The focus was upon a potential breach of Article 3 of the European Convention on Human Rights and Fundamental Freedoms should the appellant be returned to Pakistan and find himself back in the custody of the Gujranwala police (see e.g. *Qamar v Immigration Appeal Tribunal*, unreported, Extra Division, 16 March 2004).

[8] The Tribunal had required to reach a conclusion on whether, in all the circumstances, there was a serious possibility of persecution using the process of reasoning described by the Court of Appeal in England (*Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, Brooke LJ at 469, Sedley LJ at 479). The dangers of finding an appellant's account implausible without evidence in support of that implausibility had to be guarded against (*HK v Secretary of State for the Home Department*, unreported, [2006] EWCA Civ 1037, Neuberger LJ at paras [27]-[30]; *Wani v Secretary of State for Scotland* 2005 SLT 875, Lord Brodie at 883). "Anxious scrutiny" was required because of the potential consequences of an erroneous decision (*Singh (Jaswinder) v Secretary of State for the Home Department* 1998 SLT 1370, Lord Macfadyen at 1374). An adequate description of the reasons for the decision required to be given (*Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, Lord President Emslie at 348; *Singh (Daljit) v Secretary of*

State for the Home Department 2000 SC 219 at 222). Failure to provide such reasons was an error of law (*Esen v Secretary of State for the Home Department* 2006 SC 555 at para [21]; *R (Iran) v Secretary of State for the Home Department* [2005] Imm AR 535, Brooke LJ at para [9]).

[9] In paragraph 18 of their determination, the Tribunal had failed to provide adequate reasons. It had failed to demonstrate, with sufficient clarity, that it had taken into account all the relevant evidence. In referring to the limited effect of the medical reports, the Tribunal had reduced the effect of these documents. In reaching a view on the plausibility of the appellant's account, the Tribunal had reached views on the likelihood of courses of action by the police in Pakistan without being qualified to do so. It was possible that the FIR had been re-activated (see the US State Department report) and the warrant could have been issued as a result of that. The Tribunal appears to have left out of account the fact that the police interest in the appellant had been revived as a result of the appellant's re-appearance in the local area. There was no reason to suppose that it was unusual for a copy of a warrant to be left at someone's house. Furthermore the Tribunal's views on the plausibility of the appellant's actions in attempting to exit Pakistan were not based on evidence. Although it was possible for a delay in making an asylum application to have a bearing on credibility, the appellant had given an explanation for this, namely bad advice from his lawyer. If any of the reasons given by the Tribunal for finding the appellant's account incredible were inadequate, the decision required to be quashed and the matter remitted to the Asylum and Immigration Tribunal for reconsideration (*Hamden v Secretary of State for the Home Department*, unreported, [2006] CSIH 57).

(b) RESPONDENT

[10] The well established test for determining the adequacy of reasons was set out in *Singh (Daljit) v Secretary of State for the Home Department* (*supra* at 222) under reference to the *dicta* in *Wordie Property Co v Secretary of State for Scotland* (*supra*) and subject to the observations of Lord Penrose in *Asif (Mohammed) v Secretary of State for the Home Department* 1999 SLT 890. An appellate court should be reluctant to interfere with the determination of a Tribunal on this ground unless it really could not understand what its thought processes were when making material findings (*R (Iran) v Secretary of State for the Home Department* (*supra*), Brooke LJ at para [15]). A Tribunal did not need to set out every factor which influenced its reasoning and the fact that the reasons given might be short did not imply that they were inadequate. The mere fact that some of the reasons given did not bear analysis was not enough to justify an appellate court in setting aside a decision (*HK v Secretary of State for the Home Department* (*supra*) Neuberger LJ at para [45]). The error had to be a material one. A Tribunal is entitled to rely upon its common sense and ability as a practical and informed body in identifying what was or was not plausible (*Wani v Secretary of State for Scotland* (*supra*), Lord Brodie at para [24]; *Esen v Secretary of State for the Home Department* (*supra*) at para [21]).

[11] In relation to the Tribunal's decision on credibility, the issue was whether the view it reached was one which a reasonable Tribunal could have reached on the material before it (*Asif* v *Secretary of State for the Home Department* 2000 SC 182 at para [17]). It decided that it was not credible that the appellant could have remained at liberty for some years without further enquiry before suddenly receiving a warrant. That was an intelligible reason for doubting his account. The reasoning in relation to the medical reports was plain and left the reader in no doubt about where the Tribunal

considered the consistencies and inconsistencies lay. The Tribunal's view that it was not credible that an arrest warrant would be left at the appellant's house was also intelligible. There had been no evidence that the FIR had been re-activated. The Tribunal was entitled to the view that it was not likely that the appellant would have applied for a visa through agents on three separate occasions when he already had a passport. It was accepted by the appellant that the Tribunal could take into account the delay in his application for asylum, and that is what the Tribunal had done. Ultimately the Tribunal concluded that the appellant had not discharged the burden of proof upon him and had given adequate reasons for that result. The appeal should be refused.

Decision

[12] The Tribunal determined that the Adjudicator had erred in his approach to the documentary evidence, which the appellant had produced. It therefore reconsidered the material before it and arrived at its own conclusion. This was done some four years after the appellant's original application and two years after the Adjudicator had made his findings based on the appellant's written statement and oral testimony. However, there was no request for the Tribunal to admit additional material or any apparent need for the Tribunal to seek out such material. The Tribunal's decision was based on the same material as had been before the Adjudicator. The only issue for the Court is whether the Tribunal erred in law in a manner material to its decision. If such a material error is identified, the Court has no residual power to refuse the appeal (cf (*HK v Secretary of State for the Home Department* (*supra*) Neuberger LJ at para [45]). The decision must, in that event, be quashed and the case remitted to the Asylum and Immigration Tribunal for consideration *de novo*.

[13] The first area of concern is whether the Tribunal has given adequate reasons for its decision. "The proper and well established test for assessing the adequacy and

sufficiency of reasons given by an administrative tribunal is summarised by Lord President Emslie in *Wordie Property Co. Ltd*. ...[A]ny additional judicial statements are merely a gloss on the basic test" (*Singh (Daljit) v Secretary of State for the Home Department* (*supra*) at 222). The precise terms of the test bear repetition. A tribunal:

> "must give proper and adequate reasons for [its] decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it" (*Wordie Property v Secretary of State for Scotland* (*supra*) Lord President Emslie at 348).

[14] The Tribunal's decision was that the appellant had failed to discharge the burden of proof upon him to demonstrate that there was a real risk of him suffering, either persecution for a convention reason or treatment contrary to his human rights, in the event of him returning to Pakistan. The Tribunal accepted that the appellant had been arrested and detained in July 1997 following the murder of the police officer. The Tribunal also accepted that he was injured during that police detention and "may have been arrested on two further occasions in December 1997 and March 1998 by the police in the course of their investigation into the murder" (Tribunal Determination para 18). Up until that point, the Tribunal's decision is broadly in favour of the appellant and takes into account the support which it had identified from the medical reports. But beyond this, the Tribunal's view diverges radically from the appellant's position.

[15] The Tribunal did not accept that the appellant had demonstrated that the police had any further interest in him after 1998, that interest being an essential element in proving, upon the low standard applicable, that he remained at risk of being arrested once more upon his return. The simple reason for this was that the Tribunal did not believe the account given by the petitioner of events occurring after 1998. The basis for their rejection of his testimony was that material parts of it were not regarded as

credible. In particular, the Tribunal did not regard it as credible first that he "would have remained at liberty in Pakistan without ever having any further enquiry made of him in respect of the alleged murder, but an arrest warrant would then be issued approximately three years after the alleged incident". Secondly, the Tribunal did not believe that that the police would leave an arrest warrant at his house in his absence thereby forewarning him of his intended apprehension. Thirdly, the Tribunal did not believe that the appellant would have paid an agent on three separate occasions to assist him in gaining an exit visa from Pakistan when he was in possession of a valid passport. Fourthly, the Tribunal regarded the appellant's delay in claiming asylum until his visa had expired as undermining the credibility of his claim.

[16] The Court has no real and substantial doubt as to what the reasons for the decision were or what the material considerations, which were taken into account in reaching it, were. The reasons and considerations are succinctly but clearly set out. Ultimately, the appellant's submission sought to persuade the court that the Tribunal required to give further specification of the reasons themselves. There is no requirement to do this since the reasons are plain and understandable. The test set out in *Wordie Property Co. v Secretary of State for Scotland* (*supra*) has been met and the appeal on this ground must fail.

[17] The appellant perilled his case upon his submission concerning the inadequacy of the Tribunal's reasons and did not seek to develop a separate ground based on the unreasonable nature of the reasons expressed. Nevertheless, the submissions came close to suggesting such unreasonableness. In particular, the appellant maintained at various points that the Tribunal's views on credibility were not adequately grounded in the evidence. Notably, it was said that the Tribunal was not entitled to form a view on what the police in Pakistan may or may not have done. This affected, in particular,

the first and second reasons given. It was also argued that the third and fourth reasons were not sufficient to reject the appellant's credibility, where he had given an explanation for his actions. It hardly bears repeating that an appeal to the Court lies only upon the basis of an error in law. The assessment of credibility is an exercise which is to be carried out by the specialist adjudicator or tribunal. The conclusions reached are matters of fact. The Court cannot overturn a tribunal's view on credibility simply because it might have reached a different decision upon its own review of the testimony and documents.

[18] There are, of course, many strictures concerning the assessment of the credibility of asylum applicants. As was said recently by Lord Abernethy, delivering the Opinion of the Court in *Esen v Secretary of State for the Home Department* (*supra* at 565):

> "Credibility is an issue to be handled with great care and with sensitivity to cultural differences and the very difficult position in which applicants for asylum escaping from persecution often find themselves. But our system of immigration control presupposes that the credibility of an applicant's account has to be judged...Credibility is a question of fact which has been entrusted by Parliament to the adjudicator. The adjudicator is someone specially appointed to hear asylum appeals and had the benefit of training and experience in dealing with asylum seekers from different societies and cultures. Of course an adjudicator must give his reasons for his assessment. A bare assertion that an applicant's account is implausible is not enough...But an adjudicator is entitled to draw an inference of implausibility if it is based on the evidence he has heard and in coming to his conclusion he is entitled to draw on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible..."

The references to an adjudicator apply equally to a specialist immigration tribunal.

[19] The Tribunal did not make a bare assertion of implausibility. It analysed the appellant's account against the background information and the documents produced. It reached its view that certain parts of that account were not capable of being believed by testing these parts against the evidential background and the other parts of the appellant's testimony. It considered, in that context, the inherent likelihood of the

version of events presented. The parts disbelieved essentially covered the period from March 1998 onwards. Once his account of that period came to be rejected, the only reasonable conclusion that could be reached was that there was no basis upon which it could be said that the police had any current interest in the appellant and therefore that the appellant had failed to discharge the burden on him. That decision was one which was open to the Tribunal on the evidence before it.

[20] In the circumstances, no error of law having been identified, the appeal must be refused.