EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Osborne
Lord Wheatley
Lord Reed

[2009] CSIH 38
XA164/07

OPINION OF THE COURT

delivered by LORD OSBORNE

in

Application for Leave to Appeal under Section 103B of the Nationality Immigration and Asylum Act 2002 against a decision of the Asylum and Immigration Tribunal

by

A.A.H.

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Forrest, Advocate; Drummond Miller, Edinburgh
Alt: Lindsay, Advocate, Solicitor to the Advocate General

23 April 2009

[1] This is an application for leave to appeal under Section 103(b) of the Nationality Immigration and Asylum Act 2002 against a decision of the Asylum and Immigration

Tribunal, dated 17 September 2007, which refused leave to appeal against a decision of the Tribunal dated 4 July 2007. In a matter such as this it is necessary for the applicant to show that there has been arguably an error of law in the determination of the Tribunal which is the only basis upon which an appeal can be brought to this Court. The background circumstances are set out in the application. Briefly the applicant is a national of the Sudan; he fled from that country to the United Kingdom on or around 21 November 2005. He applied for asylum in the United Kingdom. He also submitted that removal to the Sudan would constitute an infringement of his protective rights under the European Convention on Human Rights. The Secretary of State for the Home Department rejected his application. He then appealed to an Immigration Judge. A hearing took place on 24 May and 8 June 2006. The Judge rejected his appeal by a decision dated 27 June 2006. The applicant requested reconsideration of this decision and, in terms of a Notice of Reconsideration, a Senior Immigration Judge indicated that he agreed there had been a material error in law. He invited parties to agree to a full reconsideration of the case and that was indeed agreed. The case was accordingly remitted for a full reconsideration hearing before the Tribunal presided over by two designated Immigration Judges, which took place on 13 June 2007. Their decision was issued on 4 July 2007; they have dismissed the applicant's appeal.

[2] The grounds on which leave to appeal against the decision of 17 September 2007 is sought are that the Tribunal erred in law in stating that, in its decision dated 4 July 2007, the Tribunal did not materially err in law. The grounds of appeal which were commended to us are set forth in paragraph 6 of the application. There are three distinct parts to the grounds. Paragraph 6.1 avers that the Judges erred in law because their reasons for concluding that evidence in regard to a list of detainees published by

Amnesty International was an aspect of the evidence which they found to be adverse to the applicant's credibility. In the ground 6.2 it is claimed that the Judges erred in law because it was not open to them to conclude from evidence in regard to the circumstances in which the applicant was detained that the submissions of the applicant were confused and contradictory and no reliance could be placed upon them. In ground 6.3 it is contended that the effect of the error of law identified in the two foregoing parts to the grounds of appeal render the conclusions reached in the other chapters of the Tribunal's consideration evidence unsafe. These were the grounds which were supported on behalf of the applicant by Mr Forrest. Against this background it is necessary to see how the Tribunal approached these matters in their decision of 4 July 2007. In paragraph 7 of their decision the factual basis of the applicant's claim for asylum is outlined; prominently it involves the claim that the applicant was a member of the Beja people and joined the Beja Congress in 1990, which is a political organisation. In paragraph 17 of the decision of the Tribunal on 4 July 2007, as regards the basis of the claim, the Tribunal said this:

> "The respondent's refusal letter accepted in paragraph 10 that the Sudanese authorities can deal harshly with high profile activists or officials of the Beja Congress. It was not disputed before us that there could be a risk of state persecution arising from Beja Congress activities. Having considered the background evidence regarding the Beja Congress and the nature of the Sudanese regime, we find that some, but not all individuals associated with the Beja Congress are at risk. There must be an individual assessment of each case. The risk must be higher for those who have helped the armed struggle against the government. The appellant alleges that although an ordinary member, he was active, engaged in military recruitment, was persecuted in the

past and was subject to ongoing attention. We take as our starting point that if he proves those allegations he establishes a risk of persecution."

Having regard to that conclusion, which was not in any way criticised, the Tribunal came to consider the applicant's credibility, which was plainly crucial. In paragraph 22 of their decision they said this:

"On our findings so far the question is whether the appellant engaged in Beja Congress activities to a level which brought upon him past persecution and might bring upon him future persecution if he returns. We therefore deal in turn with the points arising in respect of credibility."

We regard the approach which is described in these parts of the Tribunal's decision as entirely proper.

[3] The Tribunal then went on to consider several areas, or chapters of factual material in connection with their evaluation of the credibility of the applicant. The first of these chapters related to the applicant's knowledge of what the Tribunal describes as Beja Origins. This is dealt with in paragraphs 23 to 31 of the decision. In paragraph 31 the conclusion reached is this:

"For these various reasons we find some substance in the point made by the respondent that the appellant has not shown the knowledge of the Beja one would expect from the rest of his claim. We also find the appellant's efforts to meet the point are rather adverse to the credibility of his position."

The second chapter of material considered by the Tribunal related to the applicant's knowledge of the leadership of the Beja Congress. That is subject to consideration in paragraphs 32-38 of the decision. The conclusion reached in paragraph 38 is as follows:

"We would have expected the appellant to identify the overall leader in Sudan. We do not see scope for confusion in the question as put at interview and it is surprising that he answered incorrectly, however he did identify other members of the leadership and more widely we think there does exist scope for confusion, even for a party activist. The appellant gained some support from the evidence of Mr Derar. We cannot draw a conclusion under this heading which is significantly adverse to credibility."

[4] The third area of consideration related to the applicant's knowledge of the Beja Congress, the National Democratic Alliance, Peace Talks and Agreement, which is all dealt with in paragraphs 39-40 of the Tribunal's decision. In paragraph 40 the Tribunal concluded:

"We find that the appellant's reply at interview, 'yes they always attend the main thing with the Democratic Alliance' suggests a lack of knowledge of important developments. We do not see how this could be explained by a confused recollection of Beja Congress withdrawal from some other grouping or meeting. We find this somewhat, although far from decisively adverse, to credibility."

[5] The next chapter of the Tribunal's consideration related to the applicant's knowledge of a ceasefire. This is the subject of consideration in paragraphs 41-45 of the decision. In paragraph 45 the Tribunal's conclusion was as follows:

"We do not see how an active military recruiter could not have been aware that a ceasefire was called. The ceasefire was instigated by the Beja Congress, not by the Government, contrary to the appellant's evidence at the hearing. We find that his attempts to explain this detracted from rather than added to his credibility, which is adversely affected by this chapter of evidence."

It should be explained in this context that, in cross-examination, the applicant accepted that he had been involved in recruiting to the military wing for fighting on two fronts.

In our view the conclusion reached in paragraph 45 is a powerful basis for an adverse conclusion regarding the applicant's credibility.

[6] The fifth chapter of the Tribunal's considerations related to an Amnesty International list of detainees, which list did not include the name of the applicant. This is dealt with in paragraphs 46-52 of the Tribunal's decision; this part of their decision is expressly the focus of ground of appeal 6.1. The outcome of this conclusion is set out in paragraph 52 of the decision which is as follows:

> "We find it incredible that the appellant, throughout the progress of these proceedings, has never referred to this list, a central feature of the respondent's attempt to rebuke his case. Indeed, contrary to part of what he said at the hearing the appellant's statement implies that he has read the names on the list. We find that to be a contradiction which shows that the appellant is not always frank. This is another aspect of the evidence which we find adverse to credibility."

We have reached the conclusion that this particular part of the Tribunal's reasoning lacks clarity as to how the conclusion is reached. However, it has to be recognised that the conclusion was to the effect that the applicant is not always frank. However in view of the criticisms that can be made of this part of the Tribunal's decision, for the purposes of reaching a view as to the main issue in this case we are prepared to proceed upon the basis that the conclusion reached in paragraph 52 should be ignored.

[7] The sixth area of the Tribunal's consideration related to the circumstances of the appellant's first detention in the Sudan, paragraphs 53-67 relate to that matter. It may

be thought that the main issues which arose were as to first, the locus of the arrest of the applicant, but also whether the applicant was arrested alone or with other persons. The conclusion reached by the Tribunal is set out in paragraph 67 of their decision. There the Tribunal say:

> "We take into account that the most honest of witnesses do not give evidence before courts or Tribunals which corresponds exactly with statements noted by them in advance. There are variations in recollection and many other good reasons why discrepancies arise. Evidence given repeatedly at intervals will often differ. Even conscientious professionals noting statements, particularly through interpreters, may omit or confuse details. Making all allowances however we find that the appellant has given such contradictory and confused versions of an important and central event that we cannot rely on any version he has provided and that his attempts to explain away discrepancies have only made matters worse. We do not see how this could come about if based on honest recollection."

Once again we cannot but regard that as a serious and cogent criticism of the appellant's credibility.

[8] The seventh area of consideration by the Tribunal was Beja Congress involvement in arranging and financing the appellant's travel which is referred to in paragraphs 68-73. The conclusion reached in paragraph 73 was to the effect the Tribunal found the appellant's evidence about this matter inconsistent, unreliable and adverse to credibility.

[9] The eighth area of consideration related to a letter from the Beja Congress which is the subject of consideration in paragraph 74-77 of the Tribunal's decision. The Tribunal conclude that the letter concerned was a wholly unreliable document. They

then say the production of this was significantly adverse to credibility. We find ourselves unable to follow the logic of that particular part of the decision. The letter was one thing, but the applicant's credibility appears to us to have been another.

[10] The final area of the Tribunal's consideration related to a medical report, but they drew no conclusion adverse to the applicant's credibility on the basis of it and it therefore does not possess any significance in the present context.

[11] The Tribunal reached its overall conclusion on credibility and findings in fact in paragraph 79 of the decision, which is of importance. There the Tribunal says this:

> "Looking at the evidence in the round, for all the reasons above we find the appellant a witness who fails to meet even the lowest standard of reliability in the essential aspects of his claim. He may be a Beja and he may be a sympathiser of the Beja Congress, but we can go no further. He has failed to satisfy us that he was ever active on behalf of the Beja Congress; that the Sudanese government ever detained or ill treated him; or that the government would have an adverse interest in him on return to the Sudan. Having reached that conclusion the Tribunal dismissed his appeal."

Looking at the foregoing conclusions of the Tribunal on the various chapters of evidence that they considered, in the hearing before us only two were the subject of specific criticism in grounds 6.1 and 6.2. If we ignore the conclusion reached in paragraph 52, because the reasoning is less than satisfactory, the question for this Court is whether the Tribunal was entitled to reach the conclusion that they did in paragraph 79 on the credibility of the applicant, or alternatively, putting the matter in another way, whether that conclusion was perverse, or a conclusion which no reasonable Tribunal could reach in the circumstances. It is only if that conclusion can be so categorised that it could be said that an error of law had been committed. Our

conclusion is that leaving out of account paragraph 52 of the Tribunal's decision and those parts of its conclusions which were not critical of the applicant's credibility, there was ample basis entitling the Tribunal to reach the conclusion which they did. In that situation we can identify no error of law. The application is therefore refused.