EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Philip

[2009] CSIH 86
XA60/08

OPINION OF THE COURT

delivered by LORD PHILIP

in Application for Leave to Appeal

by

M.E.

Appellant;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Forrest; Drummond Miller LLP

Alt: Lindsay; Solicitor to the Advocate General

6 October 2009

[1] This is an application for leave to appeal against a decision of the Asylum and Immigration Tribunal refusing the applicant leave to appeal to the Court of Session against a decision of the Tribunal dated 15 October 2007.

[2] The applicant is a citizen of Iran. On about 10 November 2006 he fled from that country and entered the United Kingdom on about 20 November 2006. He claimed

asylum and breach of his protected rights under the European Convention on Human Rights. On 24 January 2007 the respondent refused his application. The applicant exercised his right of appeal. His appeal was rejected by the Asylum and Immigration Tribunal in a decision dated 21 June 2007. He successfully applied for reconsideration of that decision by the Tribunal. On 15 October 2007 a Senior Immigration Judge decided that the original Tribunal had made no material error of law in reaching its decision of 21 June 2007 and that there was no basis for interfering with it.

[3] The grounds of the applicant's claim were as follows. He said that prior to his departure from Iran he had lived with his parents. His father was a history teacher and was also an atheist. He expressed his views freely. He had disappeared without trace on 10 October 2002. The applicant was subsequently informed that his father had been executed as a dissident in April or May 2005. The applicant and his mother were then detained when the family home was raided by police on 24 January 2003, some three months after the father's disappearance. They were taken to an unknown location. The applicant was questioned repeatedly by the authorities about his father's contacts. He was subjected to repeated ill treatment during his questioning, and had to be taken to hospital for medical treatment as a consequence. He was released into the custody of his mother on 18 April 2003. The family home was raided again by the Iranian authorities some three and a half years later on 1 November 2006. The Appellant said that he did not know why his home was raided. He was not there at the time. He was told that the authorities were looking for him, but once again he did not know why. He left Iran with the assistance of a paid agent and claimed asylum on the basis that he would be at risk of being detained and ill treated by the authorities if he were to be returned.

[4] Before the original judge the applicant tendered a medical report by Dr Mark Sterrick of the Medical Foundation for the Care of Victims of Torture. In that report the doctor listed a number of injuries and scars which he found on the applicant's body and evaluated the degree of consistency between the appearance of each injury or scar and the applicant's explanation for it in terms of the Istanbul Protocol Guidance. The Guidance gives a definition of five phrases indicating degrees of consistency. The phrase "consistent with" is defined as follows, "The lesion could have been caused by the trauma described but it is a non-specific lesion and there are many other possible causes". At the end of his report in his opinion the doctor described twelve of the injuries listed as consistent with the allegations made by the applicant. At the end of his opinion at paragraph 35(q) the doctor concluded, "Overall, the examination findings are compatible with a history of torture as presented by Mr E."

[5] In his determination of 21 June 2007 the original Immigration Judge rejected the applicant's account in all material respects. He noted that there was medical evidence before him which confirmed that the applicant bore scars that were consistent with his account that he had been subject to serious ill treatment whilst he was in detention. However he concluded that the medical evidence did not provide any significant support for the applicant's claim, and that his account contained too many aspects in which his credibility had been compromised or which were implausible in the light of the objective evidence. He went on:

> "I have reservations about the weight to be given to Dr Sterrick's report. I do not accept, on the evidence as a whole that the appellant was subjected to the torture and ill treatment which he has described. The conclusions arrived at in Dr Sterrick's report do nothing more than say that the scarring seen is

consistent with the appellant's account. They cannot then be said to provide any significant support to his claim particularly in light of the observations I have made about his case as a whole."

At paragraph 38 of his determination he made this criticism of the doctor's comment on the compatibility of the examination findings with the applicant's allegations of torture:

"It is not the function of Dr Sterrick to give such an opinion; it is for the decision-maker to take the findings of any such report into account in the context of the evidence as a whole. Dr Sterrick has not heard or seen all of the evidence. He may have chosen to discard parts of the evidence. He is not therefore in a position to consider whether the claim is credible at any level".

[6] In relation to the original judge's criticism, the Senior Immigration Judge, in his determination following his reconsideration of the case said this:

"In this regard, I am bound to say, with all due respect to the Immigration Judge that his criticism of the doctor is misplaced. The issue of whether or not scarring observed on a patient's body is consistent with his or her account as to how the injuries concerned were caused is a matter on which a medical expert is properly entitled to express an opinion, if he considers that he has sufficient expertise to do so. Dr Sterrick would have been exceeding his duty, and encroaching on the Immigration Judge's function, if he had then gone on to express an opinion as to whether or not he believed the appellant's account itself to be true. That was a matter for the Immigration Judge to decide on the basis of the evidence considered as a whole. However, Dr Sterrick did *not* purport to do so. In consequence the criticism advanced by the Immigration Judge in relation to the doctor's report at paragraph 38 of his determination

was misplaced. To that extent, the Immigration Judge fell into error. However, I am satisfied that it was not a material error of law on his part in that it plainly did not have any affect on the overall outcome of the appeal."

Before this court counsel for the applicant submitted that the Senior Immigration Judge had erred in holding that the Immigration Judge's error was not material. The applicant had claimed that he was subjected to torture and physical ill treatment. The medical evidence was accordingly an important part of the evidence before him. The doctor had said that twelve of the applicant's individual injuries were consistent with his allegations. The Immigration Judge had failed to consider the medical evidence properly in respect that his approach to it had been coloured by his assessment of the applicant's credibility and his unfounded criticism of the doctor's methods and opinion. It could not be said that if the judge had considered the medical evidence properly he would inevitably have come to same decision. A second ground of appeal was not insisted in.

[7] On behalf of the respondent counsel argued that the original Immigration Judge had made no error of law in relation to the medical evidence. He drew attention to the fact that in considering each individual injury in the report the doctor had used the terminology of the Istanbul Protocol Guidance. He had described twelve injuries as "consistent with" the applicant's allegations. In his opinion however, at paragraph 35(q) of the report, he had found that overall, the examination findings were *compatible* with the history of torture as presented by the applicant. The judge did not reject the doctor's findings in relation to the injuries which he found to be "consistent with" the applicant's allegations. He had clearly considered them and taken them into account. He had taken issue only with the passage in paragraph 35(q) of the report and with the use of the words "compatible with". That was not a phrase defined in the

Istanbul Protocol Guidance. Having regard to the Guidance definition of "consistent with" he was entitled to hold that the doctor's report could not be said to provide any significant support for the applicant's claim.

[8] Counsel for the respondent went on to submit that even if the Senior Immigration Judge was right to hold that the original Immigration Judge had made an error of law, that error had no impact on his decision. He had considered the doctor's findings that certain injuries were consistent with the applicant's allegations and had dealt with them in a way in which he was entitled to do.

[9] We consider that the submissions of counsel for the respondent are well founded. In our opinion the original Immigration Judge made no error of law in relation to his treatment of the medical evidence. It is clear that he took proper account of the doctor's evaluation of the various scars and injuries as being consistent with the applicant's allegations. Having regard to the Protocol Guidance definition of "consistent with" he was entitled to conclude, as he did at paragraph 54 of his decision, that the conclusions arrived at in the medical report "do nothing more than say that the scarring seen is consistent with the appellant's account. It cannot then be said to provide any significant support to his claim particularly in light of the observations I have made about his case as a whole." This is a reference to his earlier conclusion that there were too many aspects on which the credibility of the appellant was compromised or implausible, in terms of the objective evidence, for his account to be genuine. In relation to the doctor's use of the phrase "compatible with" in paragraph 35(q) of the report he took the view that the doctor had gone further than assessing the consistency of the individual injuries with the applicant's allegations and was straying into making a comment on the credibility of the applicant's case. In our view, the judge having been entrusted by Parliament with the assessment of the

evidence, it was entirely within his power to take that view of the doctor's comments. Accordingly, since there was no error of law in the original Immigration Judge's decision the Application for leave to appeal fails.