EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Philip

[2009] CSIH 79
XA120/08

OPINION OF THE COURT

delivered by LORD PHILIP

in an Application for Leave to Appeal

by

H.H.

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Forrest; Drummond Miller LLP (for Peter G Farrell, Solicitor, Glasgow)
Alt: Lindsay; Solicitor to the Advocate General

6 October 2009

[1] This is an application by H.H. for leave to appeal to this court following refusal by the Asylum and Immigration Tribunal of leave to appeal against a decision of the Tribunal dated 14 April 2008. That decision followed reconsideration by the Tribunal of the determination of a single immigration judge dated 24 August 2007 dismissing the applicant's appeal against the respondent's refusal to grant him asylum and

consequent decision to remove him to Iraq. In their decision of 14 April 2008 the Tribunal decided that the single immigration judge had not made a material error of law and ordered that her determination should stand. The applicant now seeks leave to appeal on the ground that, in refusing leave, the Tribunal erred in law in concluding that it had not erred in law in reaching its decision of 14 April 2008 and, in particular, failed properly to distinguish the facts that had to be proved by the applicant from the standard to which they required to be established. A second ground was not insisted in.

[2] The applicant is a Kurd and an Iraqi citizen who was born on 25 October 1985. He left Iraq on 3 May 2007 and travelled by foot and car to Turkey, where he paid a sum of money to an agent and travelled to the United Kingdom in two lorries. He entered the United Kingdom on 30 May 2007 and claimed asylum on arrival. He was subject to a screening interview on 30 May 2007 and underwent an asylum interview on 20 June 2007. A reasons for refusal letter and notice of the immigration decision were given to him on 28 June 2007. The reasons for refusal by the Secretary of State were that (i) the applicant's claim was not credible; and (ii) there were no substantial grounds for believing that his human rights would be breached if he were returned to Iraq.

[3] He appealed against that decision claiming to be a refugee whose removal from the United Kingdom would be a breach of the United Kingdom's obligations under the 1951 Geneva Convention and the European Convention of Human Rights. He also claimed international protection in terms of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006.

[4] The basis of his claim for asylum was that his father and brother were members of the Ba'ath Party. He claimed that his father was killed while working for the Ba'ath

Party in Tikrit in 2005, and that his brother was killed five months later. He did not know who was responsible for killing his father. In relation to his brother, he claimed that he had been kidnapped. His mother could not raise the ransom demanded by the kidnappers and his brother's body was later found in the desert. The applicant contended that Iraq was not safe for people like him who were associated with the Ba'ath Party, and that he qualified as a refugee due to political or imputed political opinion, ethnicity, and his religion as a Sunni Muslim.

[5] In his application the applicant argued that the Tribunal had failed to recognise that the single immigration judge had failed to make specific findings as to the credibility of the applicant's assertion that he would be at risk on return to Iraq because of his father's and brother's membership of the Ba'ath Party. Before us counsel for the applicant argued that the immigration judge had failed to make findings in fact as to whether the applicant's father and brother had been killed, where and by whom they had been killed, and the reason for the killings. In the course of his submissions counsel came to accept that sufficient findings in fact had been made in relation to the death of the father, but maintained his position in relation to the death of the applicant's brother. Counsel for the applicant criticised the Tribunal for describing the brother's death as an episode of criminality. In our view the Tribunal used that expression in order to distinguish the brother's murder from an act of persecution. In our view, on the evidence, they can not be criticised for doing so.

[6] Counsel for the respondent argued that the question which required to be decided had been correctly identified by both the immigration judge and the Tribunal on reconsideration. Both recognised that the applicant's claim was based on imputed political opinion arising from his relationship with his father and his brother. Having correctly identified the nature of the question for decision the immigration judge went

on to find that the circumstances of the applicant's father's death, the identity of his killers and the reason for his death had not been established. He did not find it established that the applicant's father had been working for the Ba'ath Party in 2005. In relation to the death of the applicant's brother the immigration judge found, that on the evidence, the only reason given for it related to a ransom demand, and that there was no further evidence to show that the brother had been an active member of the Ba'ath Party. Counsel for the respondent argued that the immigration judge had made all the findings in fact that could be made and had omitted nothing. She had not been satisfied on the evidence that the brother had been connected with the Ba'ath Party.

[7] In our opinion the immigration judge correctly recognised that the applicant's case was based upon imputed opinion, arising from his relationship with his father and brother. She found that there was no evidence that his father had been in the employment of the Ba'ath Party in 2005. That was consistent with the Country of Origin Report for Iraq dated April 2007 which indicated that the Ba'ath Party had ceased to exist in early April 2003. She accepted that the applicant was unaware of the whereabouts of his father or of what he was doing at the time of his death. She found that the only evidence before her was that the applicant's brother's death related to a ransom demand and that there was no evidence to show that he was an active member of the Ba'ath Party. Against that background she was not satisfied that the applicant would be recognised in Iraq as someone connected with the Ba'ath Party and on that basis concluded that he was not at risk. In our opinion the immigration judge made no error in law and the Tribunal likewise made no error of law in affirming her decision.

[8] The complaint that the immigration judge failed to make findings in fact which entitled her to find against the applicant, is misconceived. What she did was to make it clear what evidence was lacking, thus indicating that she was unable to make the

findings in fact which were necessary to enable the applicant to succeed. She cannot be criticised for failing to make findings in fact where there was no evidence.

[9] The application is refused.