EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Abernethy
Lord Nimmo Smith
Lord Clarke

[2006] CSIH23
XA79/04

OPINION OF THE COURT

delivered by LORD ABERNETHY

in

APPEAL TO THE COURT OF SESSION

under section 103(2) of the Nationality, Immigration and Asylum Act 2002

by

MS. GULNAZ ESEN
Appellant;

against

REFUSAL OF LEAVE TO APPEAL BY THE IMMIGRATION APPEAL TRIBUNAL

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

_____

Act: Devlin; Allan McDougall (Appellant)
Alt: Drummond; Solicitor to the Advocate General for Scotland (Respondent)

5 May 2006

Introduction

[1] At the start of the hearing in this case it was necessary to deal with a procedural error. Although the case had earlier been appointed to the Summar Roll, it was not in fact an appeal since leave to appeal had not been granted. It remained an application for leave to appeal. Counsel for the applicant therefore moved the Court to allow the application to be treated as the appeal. Counsel for the respondent, the Secretary of State for the Home Department, did not oppose this and the motion was granted.

[2] The appellant is a national of Turkey. She was born on 3 May 1980. She has a dependent son Eren Esen, born on 13 October 1998. She made a claim for asylum on her arrival in the U.K. on 23 November 2001. The claim was refused by the respondent by letter dated 3 April 2002. On 10 April 2002 the appellant was served with a Notice of Refusal of Leave to Enter after Refusal of Asylum giving directions for her removal to Turkey. She appealed against these directions on the grounds that her removal in pursuance of the directions would be contrary to the U.K's obligations under the United Nations Convention relating to the Status of Refugees and the European Convention on Human Rights. By determination promulgated on 8 April 2003 the adjudicator dismissed the appeal both on asylum grounds and on human rights grounds.

[3] The appellant sought leave to appeal to the Immigration Appeal Tribunal. Seven grounds of appeal were put forward. Leave was granted in respect of ground 5 but refused in respect of the other grounds. Following a hearing the Tribunal, by determination notified on 10 February 2004, dismissed the appeal.

[4] The appellant then sought leave from the Tribunal to appeal to this Court. On 26 March 2004 that was refused. On 30 June 2004 the appellant applied to this Court

for leave to appeal. As narrated above, the Court agreed to treat the application as the appeal.

[5] The appellant's claim for asylum was, as her counsel put it, largely parasitic on the claim of her husband, Ali Esen, whom she married on 28 December 1998. He had claimed asylum on 22 May 2001. On 27 June 2001 the claim was refused. Mr. Esen appealed to an adjudicator. By determination promulgated on 14 May 2002 the appeal was dismissed. Mr. Esen sought leave to appeal to the Immigration Appeal Tribunal but that was refused. We were informed that his solicitors had thereafter sought legal aid in order to present a petition for judicial review of that decision but in or about September 2003 legal aid had been refused. The solicitors had not heard from Mr. Esen thereafter until the week of the hearing before us when he had sought advice as to whether he could renew his application for leave to appeal in light of the fact that a new Turkish warrant for his arrest had been issued. Apart from this the present position in relation to his asylum claim was not known. We were informed, however, by counsel for the respondent that it was Home Office policy not to remove a spouse from the U.K. pending the other spouse's appeal. Mr. Esen was therefore still in the U.K. and was living here with his wife, the present appellant, and their children (of whom there were now two).

The Ground of Appeal before the Immigration Appeal Tribunal

[6] Ground 5 of the appellant's grounds of appeal in her application for leave to appeal to the Immigration Appeal Tribunal was in the following terms:

> "Following on from his positive credibility findings in paragraph 24 the Adjudicator at paragraph 25 gives findings as to why he does not accept the

remainder of the Appellant's evidence. It is arguable that he has not given adequate reasoning for making said findings."

The scope of the appeal to the Immigration Appeal Tribunal and of the appeal to this Court

[7] The application for leave to appeal to this Court states that it is brought under section 103(2) of the Nationality, Immigration and Asylum Act 2002. For a considerable part of the hearing both counsel presented their submissions on that basis. It was only on the morning of the second day that we were informed that it was common ground between the parties that in fact the governing statutory provision was not section 103(2) of the 2002 Act but paragraph 23 of Schedule 4 to the Immigration and Asylum Act 1999. To say the least this confusion was unfortunate. The relevant part of paragraph 23 of Schedule 4 to the 1999 Act provides as follows:

"23(1) If the Immigration Appeal Tribunal has made a final determination of an appeal brought under Part IV, any party to the appeal may bring a further appeal to the appropriate appeal court on a question of law material to that determination. ...

(3) 'Appropriate appeal court' means -

(a) if the appeal is from the determination of an adjudicator made in Scotland, the Court of Session ... "

[8] The appeal from the adjudicator to the Immigration Appeal Tribunal was governed by paragraph 22(1) of Schedule 4 to the 1999 Act. This provides as follows:

"22(1) Subject to any requirement of rules made under paragraph 3 as to leave to appeal, any party to an appeal ... to an adjudicator may, if dissatisfied with his determination, appeal to the Immigration Appeal Tribunal."

It was common ground that the Immigration and Asylum Appeals (Procedure) Rules 2003 applied to such an appeal. Leave (or permission) to appeal is required by Rule 15(1) thereof and Rule 18, which is headed "Determining the permission application", provides as follows:

> "18. ...
>
> (2) The Tribunal is not required to consider any grounds of appeal other than those included in the application ...
>
> (4) The Tribunal may grant permission to appeal only if it is satisfied that -
>
> (a) the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard ...
>
> (5) Where the Tribunal grants permission to appeal it may limit the permission to one or more of the grounds of appeal specified in the application ... "

[9] In this case the appellant applied for permission to appeal to the Immigration Appeal Tribunal from the adjudicator's determination on seven grounds (numbered 1, 2, 3 (twice), 4, 5 and 6). As we have said, permission was granted on numbered ground 5 only.

[10] Counsel for the appellant submitted that the Immigration Appeal Tribunal had a discretion to take note of and deal with any points which arose out of the adjudicator's determination which appeared to it to be arguable, even although they had not been raised in the grounds of appeal to the Tribunal.

[11] Counsel for the respondent submitted that that was not correct given the statutory framework within which this case had to be decided. Formerly there was no appeal from a refusal of the Immigration Appeal Tribunal to grant permission to

appeal to it. The only remedy was by way of judicial review of its decision. In the context of such a review the court was not limited by the grounds of appeal if there was a readily discernible and obvious point in the appellant's favour: see *R* v *Secretary of State for the Home Department, ex parte Robinson* [1998] Q.B. 929. The position here was different. The Immigration Appeal Tribunal had granted permission to appeal, although on one ground only. The provisions of the 2003 Rules now applied. In terms of Rule 18(2) the Tribunal was not required to consider any grounds of appeal other than those included in the application for permission. It had granted permission on one ground only (ground 5) and refused permission on the other grounds. It was not possible now to consider those other grounds or, indeed, any other readily discernible and obvious points in the appellant's favour except in so far as they arose in the context of ground 5. What counsel for the respondent did accept, however, was that any errors of law in the Tribunal's determination in relation to ground 5 of the grounds of appeal to it, even if they were not focused in the appellant's grounds of appeal to this Court, could and should be noticed and dealt with by this Court. If, however, there were no such errors by the Tribunal in respect of ground 5, the appeal should be dismissed.

[12] In our opinion the submissions of counsel for the respondent are correct for the reasons she gave. The scope of the appeal to this Court is therefore limited to ground 5 of the grounds of appeal to the Immigration Appeal Tribunal.

[13] It was common ground, however, that the wording of ground 5 was such as in effect to allow discussion of some of the matters more specifically referred to in the other grounds of appeal to the Tribunal. But it is important to recognise and bear in mind how this comes to be.

The determination of the adjudicator

[14] Although this is an appeal from the Immigration Appeal Tribunal, it is necessary in order to give content to the appeal to record the essential findings of the adjudicator, which were as follows:

> "19 Within the bundle of evidence for the Appellant there is a copy of the Adjudicator's Determination of 14th May 2002 of the Appellant's husband's claim for asylum. The Adjudicator dismissed her husband's claim under the Refugee Convention and under Article 3 of the European Convention of Human Rights. The facts supplied by Mr Esen in his asylum claim, as stated in the relative determination, are generally consistent with the evidence which he has provided in support of the Appellant's claim for asylum but there are certain important differences. According to paragraph 29 of the determination of Mr Esen he stated in cross examination at the relative hearing that he was a supporter rather than a member of KAWA (a Kurdish organisation) whereas in paragraph 5 on page 2 of his statement Mr Ali stated that he was 'influenced to join' the party. In the said paragraph 29 of the said determination reference is made to paragraph 5 of Mr Esen's statement 'I was also influenced to join this party'. As stated above he was cross examined about this at this own asylum hearing but at the Appellant's hearing he was not asked about this either by Mr Winter nor by myself nor did Mr Esen give any oral evidence on his own in this issue. I have taken into consideration that the said determination of Mr Esen's asylum claim was submitted as evidence by the Appellant. On the basis that the information about Mr Esen being a

supporter rather than a member of KAWA arose from cross examination and is unequivocally referred to by the Adjudicator at the relative hearing I find that Mr Esen was a supporter rather than a member of KAWA. I make this finding taking into consideration that by his own evidence Mr Esen's activity in respect of KAWA related to distributing magazines.

20. In paragraphs 28 and 29 of the said determination of Mr Esen's asylum claim the magazines in question are referred to as 'legal'. In paragraph 12 of his statement Mr Esen states that the magazine was illegal and in his oral evidence at the hearing on behalf of the Appellant Mr Esen stated that the magazine was not legal. There is clearly a material difference in the evidence which was provided to the hearing in respect of Mr Esen's claim for asylum in this regard and the evidence which is provided by Mr Esen on behalf of the Appellant. When asked at the hearing by Mr Winter if the distribution of magazines was a main role or a minor role Mr Esen stated that not everyone does it because it is risky and stated that it was an important role because you are distributing a magazine which is not legal. I have to decide whether the magazine was a legal magazine or an illegal magazine and having heard Mr Esen give evidence at the hearing and taking into account the evidence in this regard as stated within Mr Esen's determination of his asylum claim I find that the magazine was legal. I make this finding also taking into consideration all the evidence together with my other findings in fact in relation to Mr Esen.

21. There is a further matter which is raised on behalf of the Appellant but

was not raised on behalf of Mr Esen at his asylum hearing on 24th April 2002 in Glasgow and this relates to the document headed 'defaulting warrant of arrest' for Mr Esen. As stated above Mr Esen's asylum hearing took place on 24th April 2002 and the date specified on the arrest warrant is 21st June 2001. It would be reasonable to expect that where an arrest warrant had been issued approximately eleven months prior to the date of an asylum hearing that the Appellant in question would produce as evidence on his behalf the relative arrest warrant. Clearly from the contents of the said determination of Mr Esen's asylum claim the alleged arrest warrant was not submitted on evidence on his behalf. Such an arrest warrant would be an important document and it would be reasonable to expect that every effort would be made by an Appellant to have such a document available for his asylum hearing. I have given full consideration to the explanation as to how the said document came in to the possession of Mr Esen via his father. I have also taken into account that no explanation was given to me at the hearing, on behalf of the Appellant, as to why the document was not available for Mr Esen's own hearing but is available for the hearing of the asylum claim for his spouse. Taking into consideration the fact that the Appellant lodged the said determination of her husband's asylum claim I believe it would be reasonable to expect that following upon the submission of the said document in the current hearing for the Appellant that some explanation of why the document was not lodged at Mr Esen's hearing would be expected. Looking at all the evidence in the round and taking into consideration my other

findings on credibility I do not accept that the said arrest warrant is genuine and I find that it has been fabricated to improve the chances of success of the Appellant's asylum claim. I also make this finding taking into account that in general the Appellant's claim for asylum is based upon the activities of her husband with respect to KAWA.

22. According to Mr Esen his last period of detention was on 21st March 2001 and lasted seven days. Although he was released he said that the authorities told him that they would send plain clothes police to his house to avoid suspicion and that when he got out of detention he went straight to his maternal uncle's house in Gebze before he went to Izmir and stayed mainly in a Kurdish part of the city called Yamanlar. He finally decided that he had to leave Turkey and stated that on 15th May 2001 he was taken in the back of a taxi with an agent and another person to an unknown location and this was the start of his fleeing Turkey. This was just over two months after his last release from detention. Mr Esen had a wife and child and in his oral evidence he stated that he had to escape immediately. He said that in his last detention of seven days he was extremely tortured and badly damaged and he could not think of anything else at the time. In her oral evidence at the hearing the Appellant was asked why she did not go with her husband when he left and she replied that her husband went into hiding for a week or two and she did not know his whereabouts and that the authorities kept an eye on her ever since her husband went into hiding. I have given careful consideration to Mr Esen fleeing his native land without his family. This was a man who had been arrested, according

to his own evidence on three occasions as a result of his activities. On the first occasion he was beaten and they put a large stick behind his back and passed it through his handcuffs, then he was hung from the ceiling and one the policemen pulled his leg downwards so as to make it more painful. He further stated that when he fainted they used a pressurised water hose to waken him up. On the following day he was beaten with sticks and a metal bar. In his second period of detention Mr Esen stated that he was pistol whipped by one of the policeman on the upper part of the body and his head and he suffered a deep cut above his left eyebrow as a result of this and bled heavily from the wound. He further stated that he did not receive treatment for this and when he was put into a cell the blood continued to pour out of his head and he could not stop the flow as he was handcuffed. He said that he had to put his head against the wall to stop it bleeding so much. He further said that he was beaten and interrogated on the second and third days of this detention. Despite these two periods of detention where Mr Esen stated that he was badly assaulted he continued to distribute the magazines eventually leading to a third period of detention according to his evidence. His position is that on his release after this third period of detention he was so badly treated that all he could think about was fleeing Turkey. Taking into consideration his own evidence about the previous treatment meted out to him I do not believe Mr Esen's evidence in this regard. In all the circumstances, particularly taking into account (if he is to be believed) the two periods of detention where he was so badly treated and continued to distribute the magazine I

conclude that Mr Esen would have done what most men in his circumstances would have done and that was to try to make arrangements for his wife and child to leave with him. The fact that he failed to do so, taking into account his two previous assault incidents (after which he went back for more so to speak), lead me to disbelieve Mr Esen's evidence in this regard.

23. I have further taken into account the negative findings of credibility against Mr Esen in his asylum determination, a copy of which determination was submitted by the Appellant as part of her evidence. In paragraph 29 of the said determination the Adjudicator found it completely implausible that the factory in question would be raided repeatedly in search of legal magazines distributed by someone who was not even a member of KAWA. In paragraph 31 of the said determination the Adjudicator refers to the statement of Mr Esen about being held for seven days and tortured, being forced to agree to become an informer against KAWA, immediately absconding thereafter, going elsewhere in Turkey and leaving the country. The Adjudicator stated that he did not believe it. With respect to the question of the police having any interest in Mr Esen as an informer the Adjudicator in the said determination stated that it was not plausible that the police would have waited until Mr Esen was randomly picked up for what the Adjudicator described as a 'public order offence'. The Adjudicator also stated that it was not plausible that the authorities would use someone who was not even a member of KAWA. The Adjudicator also stated in the said paragraph 31 of the

determination that he found Mr Esen unconvincing in saying that he did not seek the assistance of his doctor on release because he was frightened that the doctor would let the authorities know and they would call the police. In paragraph 32 of the said determination the Adjudicator did not consider it reasonably likely that the police elsewhere would have the slightest interest in someone whose previous activities were largely confined to the distribution of legal magazines. The Appellant gave evidence at the Hearing on behalf of her husband and the Adjudicator stated that she basically corroborated her husband's account. The Adjudicator stated that he did not consider that the level of interest in the Appellant's husband to be plausible. If Mr Esen was only a supporter of KAWA and not even a member then I do not find it reasonable that he would have the type of information about the organisation which the police would want. I do not believe it likely that the police would choose someone with such a low level of relationship to the organisation as an informer. I agree with the Adjudicator's view in the Determination of Mr Esen that if the police wanted someone to become an informer then they would not leave it to chance to use someone who just happened to be arrested because he was one of some twenty people who tried to stop the police from arresting a few of the Newroz (festival) revellers on 21st March 2001. I accordingly do not accept Mr Esen's evidence that he was arrested, detained for seven days and ill-treated on 21st March 2001.

24. The Appellant claims that her family had a history of being harassed

by Turkish gendarmerie since she was a child because of their Kurdish origins and the fact that her family supported the struggle of Kurdish rights. She stated that whilst she was still at school her parents were held for three days and released having been beaten because they had been accused of supporting the PKK (a Kurdish organisation) and that two weeks later her elder sister Derya was detained for two days at the gendarmes station and thereafter had been sent to Istanbul for her own safety by her father. The Appellant also stated that around 1991/1992 her parents were taken to the gendarmes station and held for one day again being beaten and accused of supporting the PKK. In or around 1996 the Appellant stated that her other sister Meryem was beaten and tortured by the gendarmes and her mother was badly beaten in front of her. The Appellant further stated that in 1997 (when she would have been around 16) she was taken to the gendarmes station and interrogated for two days about the whereabouts of PKK guerrillas and that she was slapped and kicked and verbally abused. They threatened to rape and kill her and a few days after her release her father sent her to Istanbul to live with her maternal aunt. I accept that the Appellant was being truthful in these matters and all these matters are consistent with the background evidence available to me. However, in relation to the treatment of the Appellant by the authorities based on her family's support for the struggle of Kurdish rights the matter ends here when her father sent her to Istanbul according to the evidence of the Appellant. As Mr Winter told me in his submission the Appellant's fear

is based on the imputed political opinions due to her husband's activities in relation to KAWA.

25. Taking into account my above findings in relation to the evidence of the Appellant's husband I do not accept her statement that after her husband left she was kept under surveillance by the authorities and that her home was raided and ransacked in April 2001 when she was slapped and her hair pulled and she suffered a miscarriage. I do not accept the police returned a few days later and detained her overnight at Umranye police station where she was beaten up and humiliated nor do I accept that the police again came to her home at the end of September 2001 and beat her up as she held her son in her arms. I do not accept that these incidents took place. Taking into account my finding that the Appellant's husband was only a supporter of KAWA that following the incident on 21st March 2001 when Newroz was being celebrated he was not held for seven days and forced to become an informer I find that there would be no plausible reason for the authorities to keep the Appellant's home under surveillance nor to come to her home to interrogate her about the whereabouts of her husband."

The determination of the Immigration Appeal Tribunal

[15] In its determination the Immigration Appeal Tribunal, after summarising the basis of the appellant's claim, noted that the adjudicator had accepted her account of events up to the time when her father sent her to Istanbul but did not accept her account of subsequent events. He did not believe she had been kept under surveillance

by the authorities nor that her home was raided and ransacked in April 2001. He rejected her account of being detained at Umranye police station and he did not accept the account of events in September 2001. He was not satisfied that the appellant would be of any adverse interest to the authorities on return. After noting the terms of ground of appeal 5 the Tribunal recorded that the solicitor for the appellant had argued that while the adjudicator had made some positive credibility findings, he rejected the evidence about the arrest warrants and did not accept the appellant's account of events after she had moved to Istanbul. He submitted that in relation to some of the negative credibility findings the adjudicator appeared to have based these findings on assumptions of how he believed the appellant would have acted in given circumstances. In response, it is recorded, the presenting officer for the respondent submitted that the adjudicator's findings were properly open to him. He had considered the evidence of both the appellant and her husband.

[16] The Tribunal then stated as follows:

> "9. The Tribunal are satisfied that the Adjudicator did give clear and adequate reasons for his findings of fact. It is clear from paragraphs 24 and 25 that he accepted the appellant's account of events until her father sent her to Istanbul. He rejected the account of subsequent events. Paragraphs 24 and 25 cannot be read in isolation from the rest of the determination. The Adjudicator's analysis of the evidence is set out in the paragraphs which precede paragraph 24. In paragraph 19 the Adjudicator referred to the determination in Mr Esen's appeal which had been adduced in evidence before him. He was entitled to take that evidence into account as part of the background although he was of course not bound by the findings. He came to the conclusion that

Mr Esen was a supporter rather than a member of Kawa. He noted Mr Esen's own evidence that his activities on behalf of Kawa related to distributing magazines. He also took into account that at the hearing before him a document headed 'Defaulting Warrant of Arrest' for Mr Esen was produced. No such document was produced at the hearing of his own appeal. The Adjudicator noted that the date specified on the arrest warrant was 21 June 2001 whereas Mr Esen's asylum hearing took place on 24 April 2002. He took into account the explanation as to how the document had come into Mr Esen's possession via his father and the fact that no explanation was given why the document was not available for Mr Esen's own asylum appeal. Looking at the evidence as a whole he did not believe that the arrest warrant was genuine and found that it had been fabricated to improve the chances of success in the appellant's appeal.

10. In paragraph 22 of his determination the Adjudicator went on to consider the assertion that Mr Esen had been detained on 21 March 2001. He had then decided to leave Turkey in May 2001 without his family. The Adjudicator commented that this was a man who had been arrested according to his own evidence on three occasions. On the first occasion he was beaten and hung from the ceiling and then beaten with sticks and a metal bar. In his second period of detention he had been pistol-whipped. Despite these two periods of detention he had continued to distribute magazines eventually leading to a third detention. He had said that after being released all he could think about was fleeing Turkey. It was the Adjudicator's view that if this sequence

of events was correct, Mr Esen would have tried to make arrangements for his wife and child to leave with him. In paragraph 23 the Adjudicator considered further aspects of Mr Esen's evidence. He did not believe it likely the police would choose someone with such a low level of relationship to Kawa to use as an informer. He did not accept his evidence that he had been arrested, detained and ill-treated on 21 March 2001.

11. In summary paragraphs 24 and 25 have to be read in the context of the Adjudicator's analysis of the evidence in paragraphs 19-23. The Tribunal are satisfied that the Adjudicator has given clear reasons why he disbelieved the appellant's account of events after she moved to Istanbul."

[17] The appeal was dismissed.

Counsel's submissions to this Court

[18] Before us counsel for the appellant stated that whether the adjudicator was entitled to make the assumptions referred to by the solicitor for the appellant before the Tribunal was pivotal to the appellant's case. Counsel pointed out that in paragraph 9 the Tribunal had concentrated on the adjudicator's reasons. Counsel accepted that his reasons were clear and, on the whole, adequate. But the issue raised in ground of appeal 5 was the adequacy of the adjudicator's reasoning for making his findings, which was a different thing. At no stage did the Tribunal address that issue. The adjudicator's reasoning, whereby he drew conclusions from his own apparent knowledge of how people would behave in certain circumstances, amounted to speculation with no proper basis in the evidence and was an error in law. Although it

was permissible for an adjudicator to speculate in favour of an asylum seeker - which was a consequence of the nature of the issues at stake and the low standard of proof in cases such as this - it was not permissible to speculate against an asylum seeker. It was not permissible for an adjudicator to make findings on the basis of what he thought a reasonable person would have done. It was also not permissible for an adjudicator to make findings based solely on how he thought the organs of a State might have behaved in the absence of objective evidence justifying that finding. It was not permissible for an adjudicator to make findings on the basis of implausibility unless it could be shown either that the evidence contradicted the claimed facts or that the claimed facts were so beyond human experience as to be inherently unlikely. For that reason, while there was a role for common sense, it was a limited one. Reference was made to Symes and Jorro on *Asylum Law and Practice*, paragraphs 2.31 and 2.46; *Lubana* v *Canada (Minister of Citizenship and Immigration*) 2003 F.C.T. 116; *W321/01A* v *Minister for Immigration & Multicultural Affairs* [2002] F.C.A. 210; *Wani* v *Secretary of State for the Home Department* 2005 S.L.T. 875; and *Kasolo* v *Secretary of State for the Home Department* I.A.T. Appeal No. 13190, 1 April 1996. Counsel submitted that the adjudicator in this case had erred in four respects. The first two were to be found in paragraph 22 of his determination. There he noted Mr. Esen's evidence that, although he had been detained and badly assaulted on two occasions, he continued to distribute magazines for KAWA, which had eventually led to a third period of detention. On release from that his evidence was that he had been so badly treated that all he could think about was fleeing Turkey. The adjudicator did not believe that evidence. In all the circumstances, particularly taking into account (if he is to be believed) the two periods of detention where he was so badly treated and continued to distribute the magazine, he concluded that Mr. Esen would have done

what, in the adjudicator's view, most men in his circumstances would have done and that was to try to make arrangements for his wife and child to leave with him. The fact that he failed to do so, taking into account his two previous assault incidents (after which he went back for more so to speak), led him to disbelieve Mr. Esen's evidence in this regard.

[19] The other two were to be found in paragraph 23 of his determination. There the adjudicator, having noted that Mr. Esen was not a member of KAWA, only a supporter of the organisation, said that he did not believe it likely that the police would choose someone with such a low level of relationship to the organisation as an informer. He agreed with the view expressed by the adjudicator in his determination of Mr. Esen's appeal that if the police wanted someone to become an informer, then they would not leave it to chance to use someone who just happened to be arrested because he was one of some 20 people who tried to stop the police from arresting a few of the Newroz revellers on 21 March 2001. Also in paragraph 23 the adjudicator had referred to, and apparently accepted, the finding of the adjudicator in Mr. Esen's appeal that Mr. Esen was unconvincing in saying that he did not seek the assistance of his doctor on release from police detention because he was frightened that the doctor would let the authorities know and they would call the police. These findings amounted to errors in law which justified reducing the adjudicator's decision. The appeal should therefore be allowed, the decision of the Immigration Appeal Tribunal reduced and the case remitted to the Asylum and Immigration Tribunal for reconsideration of the appeal from the adjudicator's determination.

[20] In reply counsel for the respondent submitted that the proper test for determining the adequacy and sufficiency of reasons given by an administrative

Tribunal in this context was that, in the words of Lord President Emslie in *Wordie Property Co. Ltd.* v *Secretary of State for Scotland* 1984 S.L.T. 345 at page 348:

> "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." (See also *Singh* v *Secretary of State for the Home Department* 2000 S.C. 219.)

With regard to credibility three points could be made. An adjudicator was entitled to judge an appellant's credibility by reference to the ordinary tests of consistency and inconsistency. The adjudicator was someone to whom questions of fact had been entrusted by Parliament and had particular experience in his field. It was not for the court to decide whether an adjudicator's judgment on an appellant's credibility was right or wrong. The question was whether the adjudicator arrived at a decision which was within the reasonable range of findings which he was entitled to reach on the material before him. Reference was made to *Asif* v *Secretary of State for the Home Department* 2002 S.C. 182 and *Singh* v *Secretary of State for the Home Department* 2000 S.C. 288. An adjudicator was entitled to make reasonable findings based on implausibility, common sense and rationality and could reject evidence if it was not consistent with the probabilities affecting the case as a whole. It was open to an adjudicator to take a view as to the internal coherence of an account and conclude that it did not make sense. An adjudicator could make findings on credibility on the basis of reasonably drawn inferences which had a basis in the evidence. Such inferences could concern the plausibility of the evidence (*Wani* v *Secretary of State for the Home Department* 2005 S.L.T. 875). In the present case the adjudicator had not made any bare assertions in either paragraph 22 or paragraph 23 of his determination. He had based his conclusions on the evidence. Where, in paragraph 23, he had narrated and

accepted the previous adjudicator's findings he had then gone on to make his own judgment on the matter. All the judgments he had made were ones that were open to an adjudicator acting reasonably. The criticisms, which counsel for the appellant had levelled at him, had no real prospect of success and were therefore not ones which the Immigration Appeal Tribunal ought to have recognised. It was clear that the Tribunal had found the adjudicator's reasoning adequate. The Tribunal had not erred in law. The appeal should be dismissed.

Discussion

[21] It seems to us that there was no material difference between the parties as to the law to be applied. We accept that in giving his decision the adjudicator must meet the basic test set out by Lord President Emslie in *Wordie Property Co Ltd.* v *Secretary of State for Scotland*, which we have quoted above (*Singh* v *Secretary of State for the Home Department* 2000 S.C. 219). 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 (*Asif* v *Secretary of State for the Home Department* 2002 S.C. 182). 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 has 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 (*W321/01A* v *Minister for Immigration & Multicultural Affairs* [2002] F.C.A. 210). 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 (*Wani* v *Secretary of State for the Home Department* 2005 S.L.T. 875).

[22] Turning to the present case, we are not persuaded that there is anything in the adjudicator's reasoning in the matters covered by ground 5 of the grounds of appeal to the Immigration Appeal Tribunal which is open to successful attack. In passing we should say that in the present context we do not consider that there is a material difference between considering the reasons that led to his conclusion and considering his reasoning. It seems to us that his reasoning is no more than the process by which his reasons led to his conclusion.

[23] In relation to the two matters relied on by counsel for the appellant in relation to paragraph 22 of the adjudicator's determination (which we consider are truly part and parcel of one and the same matter) the adjudicator's conclusion was in our opinion one which he was entitled to reach. His rejection of Mr. Esen's evidence was not a bare assertion of implausibility. On the contrary, it was a conclusion which he arrived at after considering the relevant evidence which had been placed before him.

[24] We are of the same view in relation to the two matters relied on by counsel for the appellants in relation to paragraph 23 of the adjudicator's determination. Again we consider that the two matters are truly part and parcel of one and the same matter. The rejection by the adjudicator in Mr. Esen's appeal of the evidence as to why Mr. Esen did not seek the assistance of his doctor was just a part of the material before the present adjudicator which led to his ultimate rejection of Mr. Esen's evidence that he was arrested, detained for seven days and ill-treated on 21 March 2001. That was a conclusion reasonably based on the material which had been placed before him. It is

true that that material consisted of the findings of the adjudicator in Mr. Esen's appeal but the present adjudicator was entitled to consider it and take it into account in coming to his own conclusion, which is what he did.

[25] Finally, we should say that in our view there is no other way in which it could be said that the Tribunal erred in law in dealing with ground of appeal 5.

Decision

[26] For these reasons we are not persuaded that the Immigration Appeal Tribunal erred in any way in dealing with the appellant's appeal to it. The appeal to this Court must therefore be dismissed.