EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2006] CSIH 57
XA162/04

Lord Osborne
Lord Nimmo Smith
Lord Carloway

OPINION OF THE COURT

delivered by LORD CARLOWAY

in

APPEAL

by

ABEL SALAM HAMDEN (also known as ELTAYEB HAMDAN)
Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

Act: Caskie; Drummond Miller WS (Appellant)
Alt: Lindsay; C. Mullin, Solicitor for the Advocate General (Respondent)

1 December 2006

1. The Appellant's Accounts of his movements

[1] The appellant is a national of Sudan, born on 28 November 1958. He arrived in the United Kingdom on or about 21 January 1996. He claimed asylum the next day on the basis that he was a Nuban and, because of that, would be regarded as an opponent of the government. The application was refused by the respondent over five

years later on 24 April 2001. The refusal letter has not been lodged in process. The appellant appealed to an adjudicator. At the hearing before the Adjudicator on 5 February 2004, a statement of the appellant dated 29 January 2004 (No 6/2 of process) was presented. In it, the appellant says that, sometime after graduating from school in 1982, he assisted his father with his business in Lagawa. His father and a brother had been killed in 1994 when the government "had tried to take them forcibly". In late 1989 a group of militia called the Popular Defence Force (PDF) seized the appellant as part of a scheme of conscription. The PDF was described as a Muslim special forces branch of the government, which operates to fight the Southern Sudanese and the Nubans. The appellant was detained and kept for a year and a half in a mountain prison. He was mistreated but also forced to undertake military training. The statement continues that in mid 1991 the appellant escaped and went to a nearby town, where he heard of the death of his father and brother. There was a clear inconsistency in the body of the statement since earlier it states that the deaths occurred three years later. In cross-examination, the appellant said that the deaths had occurred in 1991 but he had not found out about them until 1994.

[2] Turning to the basis for what became an important aspect of the Adjudicator's reasoning, the appellant's 2004 statement continues that in 1993 the appellant went to a hospital because his mother became ill. He was detained by the hospital's security guards because he did not have any form of identification. He was handed over to the police who lodged him in another prison. He was there for another year and again mistreated by being struck with sticks by men in military uniform. He developed diarrhoea and was taken to hospital in mid 1994. The statement then records that he:

> "8 ... escaped from hospital with the help of a hospital worker. I went to visit what was left of my family ... From there I went to Wad Madani and then to Port Sudan from where I escaped from Sudan. My original statement says I

> went to Khartoum, this is not correct and there seems to have been an error made when the statement was prepared by my previous solicitor.
> ...
> 10 ... I did not have any papers and I do not hold a Sudanese passport. I had a secondary school certificate and a drivers license which I have given the Home Office. I left Sudan approximately 7 January 1996. I was smuggled onto [a] ship ... "

[3] The Adjudicator's determination refers to the content of the appellant's Statement of Evidence Form (SEF) in which he is recorded as saying that his escape had been assisted by a "friend from the same tribe who was a nurse". The SEF is also not produced but it may be the same document as a questionnaire quoted by the Tribunal as stating "I had help of a friend of the same tribe as me", even if his occupation as a nurse is not mentioned. Also not produced in process is an earlier statement dated 22 February 1996 and referred to by the Tribunal. From this statement, the Tribunal extract the following passage:

> "In the hospital I began to think to escape not only from the hospital but from the Sudan and this was in late 1995. A relative of mine who worked in the hospital helped me to escape to his home...and then to Khartoum...and then to Port Sudan where I met a smuggler...who took me to a ship that brought me to England."

The Tribunal also quote from the statement of 29 January 2004 (*supra*) and from a further statement, said to be dated 14 August 1998, which appears to be in similar terms.

[4] Finally, the Adjudicator's determination refers to the oral evidence of the appellant, which he says amounted to the appellant saying that a doctor assisted him to escape. The Tribunal rehearse the relevant passage of oral evidence before the Adjudicator as follows:

> "How many guarded you? Answer: One. Where was he when you escaped? Answer: Went to see the doctor and he was sitting outside. Doctor help him escape? Yes."

One further piece of evidence merits mention, namely a report from an expert on Sudanese affairs lodged by the appellant (No. 6/6 of process). This states:

> "72. Sub-categories of the PDF include:
> ...
> students seeking to enter university - obliged to join. High school graduates are not allowed to get their certificates, and therefore cannot apply for any university or college inside the country, unless they undergo PDF training."

2. The Decisions of the Adjudicator and the Immigration Appeal Tribunal

[5] The Adjudicator concludes:

> "29. To succeed, the appellant must show to the required standard that he was imprisoned and made to do military training for the PDF; that he escaped and was subsequently recaptured; and that he was again imprisoned and escaped. However, the question is not whether these things could have happened to someone, but whether they did happen to the appellant. I have concluded that he has failed to prove that they did. In his statement ... paragraph 10, the appellant states that he had a secondary school certificate that he gave to the Home Office. His own expert, whose evidence I accept on this point, states at ... paragraph 72, that "High school graduates are not allowed to get their certificates...unless they undergo PDF training." It also seems pointless to train him (including weapons training ...) yet never send him to the front. it is also inconsistent with the known discrimination against Nubans. The only reasonable inference is that, if the appellant was ever taken for PDF training, he completed it successfully and was allowed to get his school certificate. Although escapes from hospital are not unknown, I do not find it plausible that this individual would have been assisted to escape by a ... doctor, hospital worker, or friend from the same tribe who was a nurse, given the savage reprisals that might be taken. The inconsistency as to who helped him casts doubt on his credibility."

[6] In rejecting the appellant's account, the Adjudicator also had regard to the appellant's claim in evidence that there was an arrest warrant in relation to him. The Adjudicator was aware that this warrant, which had previously been produced, had been sent to an expert for authentication. Upon enquiry, the Adjudicator was told that the warrant was not to be founded upon. He concluded that there was no authentic warrant. The Adjudicator also founded upon the absence of medical evidence although the appellant displayed scarring on his shins which he attributed to ill treatment, notably kicks with boots and the butts of guns.

[7] Before the Immigration Appeal Tribunal, the agent for the respondent accepted that the Adjudicator had been wrong in founding upon the appellant's school certificate as demonstrating that he must have completed his PDF training, i.e. rather than escaping from custody where he had been placed for failing to do so. The agent accepted that the terms of the expert's report relative to school certificates would not apply to the appellant as he graduated long before the coming into existence of the PDF. It is not entirely clear whether this was simply a concession of fact made by the agent before the Tribunal or whether the concession was of an error on the part of the Adjudicator upon the evidence presented to him. It seems to have been the latter but, in any event, it was accepted that the Adjudicator's reasoning was incorrect in fact. Nevertheless, the Tribunal went on to dismiss the appeal because of the other factors relied upon by the Adjudicator in rejecting the appellant's evidence. These factors were: first, it was inconsistent with the evidence that Nubans would be given weapons training as the appellant claimed he had been given; and secondly, the inconsistencies in the appellant's account of his escape. The Tribunal conclude:

> "13. These accounts are very different and we take the view the Adjudicator was entitled to come to the conclusion that he did that those differences mattered.
> 14. This escape was one of the most important events in the whole of the claimant's life and yet he describes the person who helped him escape in completely different terms at different times. The Adjudicator did not consider that these differences could be explained away. We consider that is a view that the Adjudicator was entitled to come to. The Adjudicator was of course wrong in finding against the claimant in respect of the high school certificate but we are not of the view, in light of the completely inconsistent accounts given by the claimant of his escape, that had the Adjudicator accepted that the claimant could have had a high school certificate that would have any impact on his credibility finding in respect of the escape, and once that credibility finding was made against the claimant, the claimant's case essentially failed. In short we do not see how the Adjudicator's error in respect of the high school certificate is capable of having affected his general conclusions in the case."

Accordingly, on 23 July 2004, the Immigration Appeal Tribunal dismissed the appeal. On 27 September 2004 the Tribunal refused leave to appeal on the basis that the

findings of inconsistency were open to the Adjudicator and he had not erred in law. However, on 7 July 2005, in the absence of any opposition from the respondent, the Court granted that leave.

3. Submissions

[8] The appellant reminded the court of the guidance on the appropriate approach to evidence in immigration cases set out by the Court of Appeal in England in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, Brooke LJ at 469, Sedley LJ at 479 (see also *HK v Secretary of State for the Home Department*, unreported, [2006] EWCA Civ 1037, Neuberger LJ at para [27]). He relied upon the "examples of errors of law commonly encountered" described by the same Court in *R (Iran) & Others v Secretary of State for the Home Department* [2005] Imm AR 535, Brooke LJ at para [9]. The Adjudicator had made "perverse" findings, failed to take into account material matters, given weight to immaterial matters and made mistakes on material facts such that unfairness had arisen. There had been no inconsistencies in the appellant's accounts of his escape. All the accounts were capable of being reconciled. The Adjudicator and the Tribunal had failed to give adequate reasons for the conclusion that they were inconsistent (see on such reasons: *Singh v Secretary of State for the Home Department*, unreported, Lord Kingarth, 9 September 1997 at 12; *Asif v Secretary of State for the Home Department* 2002 SC 182 at 189; and *Alam v Secretary of State for the Home Department* 2004 SLT 839 at para [13]). The Tribunal held that the erroneous finding on the school certificate had not been material. In so holding they erred. The appeal should be allowed and remitted to the Asylum and Immigration Tribunal to proceed as accords.

[9] The respondent maintained that no error of law had been made. The Adjudicator had rejected the appellant's account not just because of the school

certificate issue but also on account of its inherent implausibility (*Esen v Secretary of State for the Home Department*, unreported, [2006] CSIH 23, Lord Abernethy at para [21]; *Y v Secretary of State for the Home Department*, unreported, [2006] EWCA Civ 1223, Keene LJ at para [26]) and the inconsistencies. It could not be said that no reasonable adjudicator would have reached the same conclusion in that situation. Where self-evident inconsistencies existed, it was not necessary to give further reasons. A similar argument to the contrary had been raised and rejected in *Singh v Secretary of State for the Home Department* 2000 SC 288, Lord Reed at 292). Equally, the Tribunal had been entitled to hold that the misunderstanding in relation to the school certificate had not been material. It would not be material if it was "very probable" that the Adjudicator would have come to the same conclusion in any event (*HK v Secretary of State for the Home Department*, unreported, [2006] EWCA Civ 1037, Neuberger LJ at para [61]). The reasons given by the Adjudicator relative to the inconsistencies were discrete from those concerning the school certificate. The Tribunal had been correct to conclude that these inconsistencies provided a "knock-out" blow to the appellant's credibility. That was a legitimate approach to take (*HH (Iraq) v Secretary of State for the Home Department*, unreported, [2006] EWCA Civ 1374, Richards LJ at paras [38-40]). The appeal ought accordingly to be refused.

4. Decision

[10] The issue is whether there has been an error on a point of law on the part of the Tribunal. That issue falls to be answered according to the well known tests which identify what such an error is in the context of an appellate jurisdiction. Before it would be entitled to interfere with the decision of the Tribunal, the Court requires to be satisfied that the Tribunal has misdirected itself in law, entertained the wrong issue, proceeded upon a misapprehension or misconstruction of the evidence, taken into

account matters which are irrelevant to its decision, failed to take into account relevant matters, or reached a decision which is so unreasonable that no reasonable tribunal could have reached it. The error must, of course, be a material one which goes to the root of the decision (see generally *Wordie Property Co. v Secretary of State of Scotland* 1984 SLT 345, LP (Emslie) at 347-8). The Tribunal must provide reasons for its decision which are sufficient to enable to Court to carry out its appellate function. Similar principles apply in relation to the appeal from an adjudicator to the Tribunal.

[11] It is a matter of concession that the Adjudicator did proceed upon a misapprehension of the evidence. It was accepted before the Tribunal that the Adjudicator's understanding that the appellant could not have obtained his school certificate without successfully completing PDF training was wrong. There is no doubt also that this factual misconception was taken into account by the Adjudicator in his ultimate decision to disbelieve the appellant's account. He regarded it as a material factor from which he could draw the inference that "if the appellant was ever taken for PDF training, he completed it successfully and was allowed to get his school certificate". Since the Adjudicator erred both in his understanding of the significance of the certificate and thus in taking an erroneous, and hence irrelevant, factor into account, the question becomes one of whether these errors went to the root of his decision to reject the appellant's version of events.

[12] In rejecting the appellant's evidence, the Adjudicator did take into account a number of factors. The first of these, in the order selected by the Adjudicator, was the existence of the school certificate. As he correctly reasoned, if the appellant could not have gained his certificate without successfully completing his PDF training, and in fact he had such a certificate, the inference was that he had so completed his training.

In that event, his account of escaping from custody, having been detained essentially because of his attempts to avoid the training, must be untrue. Put another way, if he had successfully completed his training, he would not have been in custody at all, or at least not for the reason he provided in his evidence. Secondly, the Adjudicator took into account what he regarded as the implausible nature of the appellant's narrative. He did not regard it as inherently likely that any member of the hospital staff would have assisted the appellant to escape, given the likely reprisals. The plausibility of the account was something to which he was entitled to have regard and, in a given case, could have been decisive on its own. Thirdly, he took into account what he regarded as inconsistencies in the appellant's description of the person who helped him escape from the hospital. It may conceivably be possible in theory to reconcile the various accounts given about whether the appellant was assisted by a "hospital worker", a "friend from the same tribe who was a nurse", or a "doctor". However, these accounts have an appearance of inconsistency at least in expression and probably also in fact. The Adjudicator was entitled to hold that these inconsistencies did cast doubt upon the appellant's credibility and, once more, in a given case, such inconsistencies could be decisive. His reasoning on this, and other aspects of the case, is clear.

[13] Leaving aside the issues of the warrant and the scarring, the Adjudicator thus took into account at least three material factors in reaching his conclusion to reject the appellant. One of these having been accepted as erroneous, the Tribunal nevertheless concluded that it was unable to see how the error was "capable of having affected his general conclusions in the case". It reached that conclusion without having regard to the Adjudicator's finding of implausibility. Rather it held that the inconsistencies themselves, including the timings of the incarceration, which the Adjudicator had not regarded as significant, entitled the Adjudicator "to come to the conclusion that he

did". The problem with that analysis is that it poses the wrong question. The issue at the appellate level was not whether the Adjudicator would have been entitled to regard the inconsistencies as decisive in rejecting the appellant. No doubt he would have been so entitled, had he done so. The issue was also not whether the Adjudicator would probably, or "very probably", have reached the same decision he did, if he had not taken the erroneous stance on the school certificate issue. The issue was whether, in spite of his error regarding the school certificate, the Adjudicator would nevertheless have reached the same conclusion on credibility and rejected the appellant's account.

[14] The Adjudicator did not come to his conclusion simply because of the inconsistency in the appellant's description of who had helped him at the hospital. He did say that the inconsistency "casts doubt on his credibility", but the reasons for his rejection of the appellant's account included, as a material element, the existence of the school certificate. That part of his reasoning having been determined as defective by concession, the Adjudicator must be taken to have erred in law. Having done so, his decision could only have been affirmed by the Tribunal if it had been able to say that the Adjudicator would nevertheless have reached the same decision despite the error.

[15] We are unable to agree with the Tribunal that the Adjudicator's erroneous conclusion on the school certificate was incapable of "having affected his general conclusion in the case". The inference to be drawn from the certificate was at the forefront of the Adjudicator's reasoning in the critical paragraph 29 of his determination. Where a factor such as this has plainly coloured the approach of an adjudicator on the credibility of an appellant to a material degree, it is highly likely to have played a significant part in his attachment of significance to other potential

inconsistencies in expression or fact arising at other points in the evidence. There is no reason to suppose that this has not happened here where the Adjudicator focuses first on the inference from the existence of the school certificate but uses the inconsistency in the descriptions of his assistant in the escape as a subsequent make-weight rather than as a central pillar in his thinking on credibility.

[16] For these reasons, the Tribunal has erred in law in posing and answering the wrong question. When the correct question is posed, it cannot be said with any confidence that the Adjudicator would have reached the same decision as he did, had he not erred on the school certificate issue. The appeal must therefore be allowed, the decisions of the Adjudicator and the Immigration Appeal Tribunal quashed and the case remitted to the Asylum and Immigration Tribunal for consideration *de novo*.