SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Johnston
Lord Marnoch

[2007] CSIH 18
XA88/05

OPINION OF THE LORD JUSTICE CLERK

in

APPLICATION

by

HUSSAIN BARVI

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

for leave to appeal

For the applicant: Pirie; Anderson Strathern
For the respondent: Lindsay; Solicitor to the Scottish Executive

13 March 2007

Introduction

[1] In 2000 the applicant arrived in the United Kingdom from Iran and sought asylum on the ground that he had a well-founded fear of persecution there on account of his political principles. He claimed *inter alia* that his father was a supporter of the Shah of Iran; that after the revolution his family had been persecuted; that the Iranian

security forces had arrested, beaten and tortured him several times, and that when they last arrested him, they shot his father.

[2] On 25 June 2003 the respondent refused his application for asylum on the grounds that he had not established that he had a well-founded fear of persecution or that his removal would be contrary to the United Kingdom's obligations under the ECHR (the Convention).

[3] The applicant appealed to an adjudicator. On 3 November 2003 the adjudicator refused the appeal.

[4] On 14 January 2004 the Immigration Appeal Tribunal (IAT) granted leave to appeal against that decision; but only on the ground that the adjudicator had failed to deal in his determination with the applicant's claim under the Convention.

[5] On 14 March 2005 the IAT heard the appeal on that restricted ground. It considered as the only issue whether, in respect of the risk of suicide, the applicant's return to Iran would violate his rights under articles 3 and 8. On 23 March 2005 the IAT refused the appeal.

[6] On 14 July 2005 the IAT refused leave to appeal from that decision to this court. The applicant now applies to this court for leave.

[7] Since the application for leave raises the questions that would be raised in the appeal, counsel agreed that we should hear and dispose of the application as if it were the appeal itself.

The decision of the adjudicator

[8] The adjudicator heard evidence from the applicant and from members of his family. He also had before him reports from a general practitioner and from Mrs Mary Ross, a clinical psychologist. Mrs Ross' opinion was that the applicant was suffering from post-traumatic stress disorder and a major depressive disorder. She reported that

the applicant had told her that he had tried to kill himself about three months earlier by drinking three bottles of wine. She was of the opinion that to return to Iran would almost certainly increase the applicant's psychological difficulties rendering him unable to cope or increasing his hopelessness to the extent of increasing his risk of suicide.

[9] The applicant's representative invited the adjudicator to find the applicant credible. She referred on this point to "the medical evidence which shows that he is suffering from depression which would dull the memory" (para 10(a)).

[10] The applicant's credibility was the key issue. The adjudicator concluded that he was unable to find the applicant's version of events credible (para 13). He specified a number of particular inconsistencies arising from certain of the applicant's answers at his Home Office interview. He also took into account what he considered to be the substantial discrepancy between the evidence of the applicant and that of his brother regarding the circumstances in which they escaped from custody in Iran. The adjudicator's conclusions on the medical evidence, which he unfortunately failed to specify or summarise, were as follows:

> "15. I have been unable to put much weight on the medical evidence that was before me one way or the other. I cannot accept the bald assertion from the Secretary of State as contained in para 7 of the letter of refusal to the effect that the appellant would not have survived the type of detention and treatment that he alleges that he received therein. I would not be inclined to accept said assertion without medical evidence. The medical reports produced by the appellant does (*sic*) no more than show that the appellant's condition and that of his father are consistent with his account."

[11] The adjudicator also considered what assistance he could obtain from the background evidence. He was unable to make a finding that an individual such as the applicant, who was not politically active but whose family might have been supporters of the Shah, would be likely to be persecuted. Taking matters in the round, he did not find that the applicant was persecuted in the past or that he would be persecuted in the

future (para 16). He therefore concluded (1) that he did not believe that if the applicant were to be returned to Iran, there would be a breach of any of articles 2, 3, 5, 9 or 10 of the Convention (para 17) and (2) that the applicant had failed to satisfy him that he had (a) a well-founded fear of being persecuted if he were to return to Iran for a reason based on breach of the United Kingdom's obligations under the 1951 Geneva Convention or (b) that there had been a breach of articles 2, 3, 5, 9 or 10 of the Convention (para 18). He therefore dismissed the appeal on both asylum grounds and human rights grounds.

The decision of the IAT

[12] In dealing with the appeal on the narrow basis to which I have referred, the IAT heard the evidence of Mrs Ross and of Dr Euan Easton, a consultant psychiatrist. Both of them supported the applicant's claim. The applicant's credibility was undermined by Dr Easton, who said that the applicant had not told him of the alleged attempted suicide incident related by the applicant to Mrs Ross. The IAT said that the adjudicator had failed to address or consider Mrs Ross' report; but that it had had the benefit of hearing the evidence of Mrs Ross and Dr Easton and of seeing and hearing them being cross-examined (paras 8-9).

[13] The Tribunal concluded that the applicant had not established that there was any serious likelihood of his committing suicide if he were to be returned to Iran. These were its reasons.

> "28. However, we were concerned about a number of unsatisfactory features in the medical evidence that we will list here. Firstly, it was evident from the cross-examination of both witnesses [*sc* Mrs Ross and Dr Easton] that they had only become aware today of the adverse credibility findings of the Adjudicator. It follows that, as far as the witnesses were concerned, they were unaware that the appellant had not told the truth in the hearing before the Adjudicator. In other words, he had given details to the two doctors in particular as to his period in detention, which in our view undoubtedly influenced their opinion.

(See page 2 of the Ross Psychology Report dated 9 September 2003). We accept, however, that undoubtedly he saw his father shot and that was also a significant factor in his history described to the doctors.

29. Secondly, we were concerned that so much of the doctors' opinion had to be based upon what they were told by the appellant who had clearly lied before the Adjudicator. For example, at page 6 of the supplementary psychology report, under paragraph A headed 'In keeping with DSM/IV classification, the criteria for a major depressive episode are ... ' (there are then listed the nine criteria).

30. Mr Blundell elicited in cross-examination of Mary Ross that, although the appellant would not be asked one leading question, effectively he was being asked to choose from three leading questions. His answer would then become the basis for the opinion and criteria. The choice of the three questions would affect the varying degrees, for example, of depression.

31. We agree with the submission of Mr Blundell that if you wish to bluff or hoodwink a doctor or anybody else investigating your situation, a box ticking exercise renders that more helpful to you.

32. Thirdly, at page 2 of the psychology report dated 17 February 2005, Mary Ross says

> 'He lives in fear worrying about what is going to happen to him and convincing himself that he would be captured and murdered. He has no interest in life or activities and is actively suicidal.'

33. Mr Blundell cross-examined Mary Ross as to why she used the emotive phrase 'actively suicidal'. She was not, in our view, able to give a satisfactory answer. We had noted earlier that his attempt at suicide consisted of the consumption of three bottles of wine and punching himself.

34. Mary Ross also told us that there was evidence that the appellant had assaulted members of his family, although this information was not contained in any of her reports. We found such an omission rather odd.

35. The appellant arrived in the United Kingdom in March 2000. The first psychological report before us is dated 9 September 2003. There were no details before us of any other visits made by this appellant to doctors before that date. Dr Easton conceded in cross-examination that that must be because he had not seen anybody before then. Mr Blundell submits that it is no coincidence that the visits to the medical experts occurs at around about the time of his court hearing. The hearing before the Adjudicator at Glasgow was heard on 19 September 2003 and the determination promulgated on 3 November 2003. Mary Ross did not concede that she could have had the wool pulled over her eyes,

but Dr Easton conceded that it was possible that the appellant had pulled out all the stops to stay in this country.

36. Dr Easton revealed a further odd and unsatisfactory feature. He informed us that she [*sic*] was not aware of the appellant's suicide attempt. He was not aware that the appellant had attempted his own life by the consumption of three bottles of wine. He had spoken to the appellant and he had spoken to the appellant's family on two occasions but there had been no discussion of suicide. The appellant had told him that he would take his life but not that he had attempted to do so. Dr Easton had not seen the appellant's self-harm and had not seen any bruises. Such information came from the appellant's family.

37. The Secretary of State before us clearly accepted the integrity of the experts and the qualification of the experts as indeed so do we. However, the Secretary of State disputed the factual basis upon which the experts were enabled to reach their opinions. We were of opinion that when faced with the above-mentioned difficulties, the two witnesses became less convincing, particularly under the firm but proper pressure of cross-examination. Mr Blundell on behalf of the Secretary of State asked us to be suspicious of the timing of the visits of the appellant to the doctors. He submitted that here was a man who was capable of lying, as had been found by the Adjudicator, and in whose interest it was to lie to the doctors.

38. We hope that we have carefully listened to all the submissions in this case. The skeleton argument of the appellant was read and reread before this judgment. We accept the submissions of the Home Office as to the dispute in the factual basis for the doctors' opinions. We are not of opinion that 'a serious risk of suicide' could be demonstrated and that accordingly the severity threshold for Articles 3 and 8 ECHR would not be crossed. It follows that this appeal must be dismissed."

The grounds of appeal

[14] The applicant's grounds for seeking leave are (1) that the ground of appeal that was considered by the IAT in effect put before it the findings of the adjudicator as to the applicant's credibility and in any event that that question was properly before this court because it concerned an error of law arising in relation to, or in the context of, the decision of the IAT; (2) that the reasons given by the IAT for refusal of the appeal were perverse and unreasonable since they involved the rejection of the undisputed

expert evidence for the applicant; and (3) that the IAT had failed to give intelligible reasons for its decision to refuse the appeal.

The submissions for the applicant

Alleged error of law by IAT

[15] Counsel for the applicant submitted that the IAT erred in law by taking account of the adjudicator's adverse conclusion as to the applicant's credibility. That conclusion was reached on the basis of an error of law. The adjudicator had failed to take into account Mrs Ross' reports which had a significant bearing on the applicant's credibility. Since the adjudicator had erred in law in this way, the IAT had erred in law in taking his conclusion into account in making its own determination.

[16] In my opinion, this contrived submission is unfounded. In view of the submission made to him that he should take into account the "medical evidence which shows that he is suffering from depression ... " (Adjudicator's Decision, para 13), I see no reason why we should infer that the adjudicator overlooked Mrs Ross' reports.

[17] In any event, the adjudicator's conclusion that the applicant was not credible was based on his having seen and heard him give evidence and having identified the inconsistencies and discrepancies to which I have referred. I fail to see how a psychologist's opinion could properly lead the adjudicator to the opposite conclusion. In my opinion, the adjudicator's decision cannot be faulted in this respect.

[18] If there was any point in this submission, it ceased to matter once the IAT itself heard the evidence of Mrs Ross and Dr Easton. It is implicit in its conclusions that their evidence did not cause it to reconsider the adjudicator's verdict on the applicant's credibility. On the contrary, Dr Easton's evidence cast further doubt upon it. Moreover, in the context of an appeal that was restricted to the human rights point concerning the likelihood of suicide if the applicant were to be returned to Iran, the

issue before the IAT, unlike the asylum question that had been before the adjudicator, looked only to the future. At that stage, the adjudicator's conclusion on the applicant's credibility was no longer the key issue.

Inadequacy of the IAT's reasons

[19] Counsel submitted that the IAT failed adequately to consider the evidence that the applicant was at a real risk of committing suicide. It had rejected the evidence of both expert witnesses on that question because of the adjudicator's conclusion on the applicant's credibility. It therefore made irrational findings, and/or materially misdirected itself on law on material matters, and/or gave weight to immaterial matters. Counsel gave numerous reasons for this submission. I need not list them in detail. Each was a variation on the basic theme that in the absence of any contrary evidence, the IAT was not entitled to reject the evidence that it heard from the expert witnesses, who had a better knowledge of the applicant than the adjudicator or the IAT.

[20] In my opinion, this submission is ill-founded. The IAT was entitled not to accept the conclusions of either or both of the expert witnesses. A court or tribunal that hears uncontradicted evidence of an expert opinion is not bound as a matter of law to accept that that opinion is sound. In this case, the opinion evidence, although informed by professional knowledge and experience, was ultimately based on the self-reported account of the applicant himself. The IAT was entitled to take that into account together with the concessions elicited from both experts in cross-examination. It is apparent that the IAT was not persuaded that their evidence was sufficient to establish a genuine likelihood that the applicant would commit suicide if returned to Iran. In that part of its decision that I have quoted (paras 28-34), the IAT gives cogent reasons for not accepting Mrs Ross' conclusions. It also gives cogent reasons, based

on Dr Easton's own evidence, for not accepting Dr Easton's conclusions (paras 35-37). For example, before the adjudicator the applicant relied on an alleged incident of attempted suicide; but Dr Easton's evidence was that the applicant had not disclosed this incident to him. That undermined the credibility of the applicant. It also undermined the cogency of Dr Easton's conclusions. Overall, the IAT was entitled to conclude that the expert opinions were insufficient in the circumstances to establish a genuine likelihood that the applicant was at a serious risk of suicide. In my opinion, that conclusion was justified by the evidence, was understandable and was rational.

Failure of the IAT to give reasons

[21] Counsel for the applicant submitted that the IAT had failed to leave the informed reader in no real or substantial doubt as to what the reasons for the decision were and what the material considerations were that were taken into account in reaching it (*Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345, Lord President Emslie at p 348). Counsel supported that submission on three grounds. He said that it was implicit in the conclusion of the IAT (para 38, *supra*) that Mrs Ross could have pulled the wool over its eyes. The reasons for that conclusion were inadequate because they did not explain why Mrs Ross' evidence to the contrary was rejected (para 35). There was no proper foundation for the finding (para 38) that the factual basis for the experts' opinions was wrong. It did not explain the apparent inconsistency that the IAT accepted the adjudicator's finding that the applicant was not credible but accepted the applicant's evidence that he saw his father being shot. Finally, the finding that a serious risk of suicide had not been demonstrated was inadequate because the IAT did not explain why it rejected a part of the applicant's history that it considered to be true as being a sufficient basis to support the expert's conclusions.

[22] The question raised by counsel in this submission is whether it is clear what the reasons of the IAT are and on what considerations they are based. That question, I think, is logically prior to the question that counsel has raised in his second submission. In my opinion, there is no doubt as to what the Tribunal's reasons are. In the light of the applicant's own evidence and in the circumstances set out in paragraphs 28 to 38 of its decision (*supra*), it held that the expert witnesses had failed to demonstrate that there was a serious risk of suicide on the part of the applicant and therefore that he had failed to establish his case under articles 3 and 8 of the Convention.

Conclusion

[23] On the view that I have taken, I consider that this appeal is irrelevant, and is in any event without merit. I propose to your Lordships that we should pronounce an interlocutor treating the application for leave as being the appeal itself and refusing the appeal.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Johnston
Lord Marnoch

[2007] CSIH 18
XA88/05

OPINION OF LORD JOHNSTON

in

APPLICATION

by

HUSSAIN BARVI
Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

for leave to appeal

For the applicant: Pirie; Anderson Strathern
For the respondent: Lindsay; Solicitor to the Scottish Executive

13 March 2007

[24] I entirely agree with the Opinion of your Lordship in the chair and have nothing useful to add.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk
Lord Johnston
Lord Marnoch

[2007] CSIH 18
XA88/05

OPINION OF LORD MARNOCH

in

APPLICATION

by

HUSSAIN BARVI

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

for leave to appeal

For the applicant: Pirie; Anderson Strathern
For the respondent: Lindsay; Solicitor to the Scottish Executive

13 March 2007

[25] I also agree with the Opinion of your Lordship in the chair and have nothing to add.