EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Johnston
Lord Nimmo Smith
Lord MacLean

[2007] CSIH 73
XA48/06

OPINION OF THE COURT

delivered by LORD JOHNSTON

in

APPEAL

against a decision of the ASYLUM AND IMMIGRATION TRIBUNAL

by

AM

Appellant;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Devlin; Drummond Miller (Appellant)
Alt: Miss Carmichael; Office of the Advocate General (Respondent)

23 October 2007

[1] The appellant is a Sudanese national who entered this country by clandestine means and subsequently sought asylum. After sundry procedure his application was refused by a designated immigration judge, against which decision he appealed to the Asylum and Immigration Tribunal who in turn refused the appeal and refused to grant leave to appeal to this court.

[2] In these circumstances the appellant now seeks both leave to appeal and to submit the appeal which we conjoined as one application.

[3] The undisputed facts are that the appellant was both a university undergraduate and also served as a conscript in the Sudanese Army at the relevant times. Against that background the findings of the judge, which are relevant to this appeal, are as follows:

> "17. The Appellant said that as soon as he returned the head of his regiment orally ordered him to the south, telling him there was a written order to back this up. Others accepted the posting because they were official soldiers not students. He thought he was singled out because of his refusal to assist the intelligence services. He refused. He had a 'big argument' with the head of regiment in his office, in presence of members of the intelligence services, for over an hour, then he was taken to the base prison. He accepted that regimental chiefs did not normally enter into arguments with soldiers. He could not explain why he had been allowed to do so. When he escaped, the guard he pushed over was armed but he did not think the weapon was loaded because the guards had loaded guns only at night. The guard chased after him and four or five other uniformed guards joined in. He was pursued for about two or three minutes until he reached the university close by where he was able to shake his pursuers off among a lot of people and a lot of buildings. He was about 100 or 150 yards in front of his pursuers when he reached the university. No shot was fired nor did his pursuers threaten to shoot, although he was scared that they might do so.

...

27. Despite the Grounds of Appeal, it appears to me that the Adjudicator clearly enough rejected not any particular part but the Appellant's whole account in respect of his refusal to carry out the last two months service, arrest, torture, and escape. For the reasons below, I do not consider this rejection was speculative, but soundly based.

28. The Adjudicator did not say there was a need for corroboration. He was entitled to point to the absence of a fairly obvious piece of evidence. On the other hand, a description of scarring would have not taken matters very far on the appellant's behalf. I do not regard the absence of a medical report as a point of real significance. It was not taken in the refusal letter or by the Respondent at the hearing before me.

29. The refusal letter takes the point that the Appellant would not have been a particular target for refusing to inform on fellow students. That remains valid and unanswered. The Appellant says he was singled out with two months of his service remaining. There was no sensible reason for him to be selected at that time or among so many others in the same situation. There was no reason for the intelligence services to concentrate on an unwilling recruit of no obvious worth. This aspect is not fatal in itself, but it is adverse.

30. The Respondent raised clearly in the refusal letter the incredibility of the alleged escape from detention. This point has now been followed up through further statements and hearings. Significantly, the more the account is explored, the more unlikely it seems. It seemed to be made

up on the spot that soldiers on guard during the day in Sudan can safely be thought to have unloaded weapons. That seems a very dangerous assumption on which to run, but even on the Appellant's account, those who joined in the chase from the guardhouse might well have had ammunition. It did not appear to have occurred to him previously that they might have fired. The threat, or a warning shot, would have been enough to bring him to a halt. The Vice President acknowledged that the Adjudicator was entitled to come to the view he did about the claimant's escape. I share that view. It is a facile invention which does not stand up to scrutiny.

31. There is no sensible explanation of why the Appellant should have been issued with the order to serve on the south. His account of how that order is issued is also incredible. There are obvious discrepancies over the size of the unit and the military rank involved, but differences of military culture and translation might explain these. It is on the other hand quite beyond belief that the officer issuing the order would engage in discussion with a conscript over whether it was to be obeyed. The consequences of refusal would have been peremptory, not the subject of protracted debate.

32. I further find it incredible that the Appellant left by ship with no idea where he was going. He is intelligent and well educated and his family devoted substantial resources to his travel. I conclude that the Appellant is hiding the true details and any record of his arrival because these would contradict his claim. This deficiency also would

not have been on its own fatal to overall credibility, but it is another factor."

[4] As will be seen from those extracts the basis of the judgment of the designated judge was credibility, or rather lack of it, as far as the evidence of the appellant was concerned. It was submitted to the judge, both in proof form as regards evidence in chief and also verbally under cross examination.

[5] Mr. Devlin attacked the conclusions of the judge on five distinct heads, albeit they were to some extent, at least as far as the first two are concerned, intermingled.

[6] He submitted that the immigration judge had erred in respect of:-

1. Failure to take into account all the relevant factors and circumstances with regard to the activities of the appellant, as given in evidence, when a student, which brought him to the attention of the authorities.
2. A failure to assess properly against that background why the appellant was singled out by the army authorities for service in south Sudan.
3. Failed properly to consider the issue of whether or not he had been ordered to go to the south by the army authorities which order he had failed to obey or refused to accept.
4. There were inadequate findings as to the circumstances alleged to have taken place in the context of the appellant's escape from custody having been, according to his version, placed there consequent upon his refusal to go to the south.
5. Failure properly to consider circumstances under which the appellant left the country by ship.

[7] Under reference to certain well-known authorities Mr. Devlin urged upon us the need to treat issues of credibility in immigration cases with very great care, indeed

the word "anxious" is used in the authorities and, in any event, to look at the matter in the context of the relevant country, namely Sudan, and not against anything that might prevail in this country. It had, he submitted, to be recognised that Sudan was a totalitarian regime indifferent to the freedom of the individual and human rights, all of which he submitted had to form the background to any consideration of the appellant's case.

[8] With regard to the first submission and indeed linked with the second, Mr. Devlin pointed to evidence contained in the proof before us given by the appellant to the effect that he had been involved in student activities which could be described as opposed to the regime and indeed had been arrested in the course of a demonstration by students. This had led him to the attention of the authorities. In the relevant finding in this respect, and indeed in relation to the findings as regards being singled out for special treatment, he submitted that the judge had totally failed to take these matters into account or even mention them which both provided a reason and an answer to the question which, in terms of his findings, the judge held had not been answered.

[9] With regard to the third submission relating to the order given to him to serve in the south by the authorities Mr. Devlin simply submitted that the approach of the judge was irrational in as much that he gave no real reason, other than his own speculation, why this evidence was not acceptable to him. This was equally the case, he submitted, with regard to the issue of escape which it appears that the judge rejected completely thus implying he did not even accept the position that the appellant had been taken into custody. Again Mr. Devlin submitted that there was no rational basis for the conclusion reached by the judge which caused him to reject this evidence as incredible. Finally he submitted that the circumstances surrounding his

departure from the country and in particular the fact that he did not know where the ship he had boarded was bound was, he submitted, nothing to the point and in any event, once again, the judge had failed to give reasons to justify his reliance upon this position.

[10] Miss Carmichael, for the Minister, maintained that this was what she described as "a reasons" case and as such it was sufficient if, on the face of his conclusions, the judge had given reasons to support his position and, in particular, his findings of lack of credibility as far as the appellant was concerned in more or less every aspect of the relevant submissions made to him on behalf of the appellant and by him. The test was whether or not the judge was entitled to reach the conclusions that he did. He had assessed credibility with care and we should accordingly not interfere with his decision.

[11] We should record that we were referred to a number of authorities but we consider this case requires to be determined upon its own facts and circumstances. The most important cases referred to us were, respectively, *Wani* v *Secretary of State for Home Department* 2005 SLT 875; *W321/01A* v *Minister for Immigration and Multicultural Affairs*, a decision of the Federal Court of Australia reported at FCA210 (11 March 2002); *Regina* v *Ministry of Defence, ex parte Smith* 1996 QB 517 and *HK* v *The Secretary of State for the Home Department*, a decision of the Court of Appeal promulgated on 20 July 2006.

[12] In seeking to determine this matter we have to note that the decision of the immigration judge in relation to the issues of credibility is expressed in fairly trenchant terms and is all-embracing in as much that he does not accept the position of the appellant in any material respect as regards his credibility.

[13] Given that state of affairs it is in our view essential that the immigration judge gives clear reasons as to why he reached such a conclusion on credibility and we are of the opinion that he has totally failed to do so.

[14] For example he has left out of account, it would appear, the factors which Mr. Devlin prayed in aid as to why the appellant had been singled out by the authorities. He gives, in our opinion, no rational basis for the assertion that it was inherently unlikely that a soldier would remonstrate with a decision of an officer in the army and therefore it is our view that his conclusion as to the credibility of that issue cannot be sustained. We are further of the view that looking at the matter in the context of the findings which we have set out it would appear that the judge does not even embrace the notion that the appellant was ever in custody, but nevertheless also dismisses as incredible his explanation as to how he managed to escape.

[15] Although we are not seeking to substitute our own findings we have to comment that it does not seem to us to be inherently unlikely that a person who refused to accept an order given within the army confines might be sent to custody. Equally, we are of the view that the somewhat bizarre explanation from the appellant as to how he managed to escape would suggest that it was more likely to be true than not. Be that as it may, it is sufficient for us to point to the fact that the immigration judge does not appear to have approached the matter on the point of view of the authorities requirements of great care and anxiety.

[16] Finally, we are concerned as to what appears to us to be a wholly irrelevant statement in finding 32 where he states "I conclude the appellant is hiding the true details and any record of his arrival because this would contradict his claim". Miss Carmichael had to accept that that statement was neither helpful nor indeed remotely comprehensible.

[17] For these reasons we are satisfied that the immigration judge's approach to the issue of credibility or lack of it is totally unsustainable by reason of lack of adequate reasoning and in addition appears to have taken into account factors which he should have left out of account and *vice versa*. In all these circumstances we are of the view that this appeal must succeed.

[18] It follows from that conclusion that the matter requires to be remitted back to the Asylum and Immigration Tribunal for re-consideration.