EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Philip
Lord Kingarth
Lord Wheatley

[2008] CSIH 13

OPINION OF THE COURT

delivered by LORD PHILIP

in

APPEAL

under section 103B of the Nationality, Immigration and Asylum Act 2002

by

J.R.J.

Appellant:

against

A determination of the Asylum and Immigration Tribunal

_____

Act: Devlin; Drummond Miller (for appellant)
Alt: Stewart; C. Mullin, Solicitor to the Advocate General (Respondent)

12 February 2008

[1] The appellant was born on 13 August 1972 and is a national of Iran. He arrived in the United Kingdom on 22 November 2000 and claimed asylum on the following day. His application for asylum was refused by the Secretary of State for the Home Department, the respondent, by letter dated 5 February 2001, and a Notice of Decision dated 12 February 2001 containing Removal Directions to Iran was

served on him. He appealed against that Notice claiming that any removal would be in breach of the 1951 Refugee Convention and the European Convention on Human Rights on the ground that he feared persecution in Iran because of his conversion to Christianity and his intention to proselytise and because of his political opinions. The appeal was heard by an adjudicator on 18 September 2003 and his determination refusing the appeal was promulgated on 8 October 2003. In his determination the adjudicator accepted that the appellant was a converted Christian but held that the evidence did not disclose a reasonable likelihood that he would be persecuted for being a Christian convert if he were returned to Iran. The appellant appealed to the Immigration Appeal Tribunal.

[2] Ground 3 of the appellant's grounds of appeal to the Immigration Appeal Tribunal was in the following terms:

> "3. At paragraph 59 (of his determination) the Adjudicator accepts the Appellant's conversion but rightly points out his obligation to consider whether or not on return he would be at risk. In this regard the Adjudicator has failed to consider the core aspect of Iranian conversions namely whether or not the person who has converted is of an Evangelical Proselytising persuasion and if so whether this would lead them (*sic*) to become at serious risk of harm. In this regard there appears to be no proper consideration of the background materials other than the suggestion that the authorities have adopted a more tolerant approach to Christianity. This ignores the US State Department Report and the CIPU report both of which point to the serious risk to Proselytising Evangelicals. It also ignores the recent IAT Determinations on the point and although the Adjudicator does go into some detail at paragraphs 52 and 53 in relation to the Belgian CEDOCA Report he does not indicate why he prefers

this to the CIPU report or the US State Department Report or the extent to which converts are 'able to practice their new faith up to a point' (paragraph 53). This failure to properly assess the risk for the appellant fatally flaws the determination."

[3] The Immigration Appeal Tribunal in a determination notified on 8 September 2004 dismissed the appeal giving the following reasons -

"19. In relation to the Christianity point, the Tribunal considered the evidence on the activities of the Glasgow Iranian Church. We note that it was formed from members attending a Glasgow Baptist Church and that its links to the Army of God are somewhat tenuous. We do not consider that the Adjudicator erred in law in his approach to the Church, and we note particularly that far from being an actively proselytising body, its leaders are reluctant to associate themselves publicly with the Army of God; the appellant was advised to act discreetly on return.

20. We also note that the Adjudicator recorded that the appellant only *might* join the Army of God on return. Although we accept that his conversion is genuine, we do not accept that he is an evangelical Christian and that distinction is fatal to what remains of his claim.

21. For all of the above reasons, this appeal is dismissed."

[4] Mr. Devlin for the appellant argued that his client had sought asylum on the basis that he was at risk of serious harm not only because he was a convert to Christianity but also because he was a proselytising evangelical Christian. The two factors had been highlighted in the argument before the adjudicator and in the grounds of appeal and argument to the Immigration Appeal Tribunal. In any event there was

sufficient in the background material and in the evidence to alert the adjudicator to the fact that he would have to consider whether the appellant was a proselytising evangelical Christian. The Adjudicator had made no finding in fact in relation to the question of proselytisation. Nor did he mention it in his conclusion. Accordingly he had failed to ask the question whether there was a reasonable likelihood of the appellant proselytising if he were returned to Iran and if so, whether he was at risk.

[5] In their determination, the Immigration Appeal Tribunal had failed to consider Ground 3 and had failed to identify the error of law made by the adjudicator. They appeared nevertheless to have gone on to make findings in fact of their own in relation to the Glasgow Iranian Church and the Assembly of God (which they wrongly called "the Army of God"). Accordingly, the Tribunal had made a decision of their own on the merits of the appeal without concluding that the adjudicator's decision had been marred by an error of law. In doing so they had erred in law.

[6] For the respondent Mr. Stewart accepted that there was sufficient in the background material and in the evidence to alert the adjudicator to the fact that he would have to consider whether the appellant was a proselytising evangelical Christian. In arriving at his conclusion, however, the adjudicator had implicitly considered the question of whether the appellant was a proselytising Christian.

[7] In our opinion the submissions of the appellant are well-founded. In his written statement the appellant said that he believed it was necessary for him to persuade others to join his faith as this was an important aspect of living a Christian life. When asked if he would join a Christian church if he were returned to Iran he said that he might join the Assembly of God. The Assembly of God is an evangelical church whose services are conducted in Persian. The CIPU Iran Country Assessment which was relied on by the appellant, drew a distinction between Christian converts in

general and those who engaged in proselytising activities, and reported that the authorities had become particularly vigilant in curbing what was perceived as increasing proselytising activities by evangelical Christians whose services were conducted in Persian. The CIPU Assessment also reported that, although there had been no deaths of evangelical Christians at the hands of the authorities since 1994, those who actively displayed their new faith in public, in particular by proselytising could expect to face severe repression. In his statement the Rev. Julyan Lidstone of the Glasgow Iranian Church said that he believed that if the appellant were returned to Iran he would naturally and spontaneously continue to talk about his faith to others.

[8] The need to distinguish between Christian converts in general and proselytising evangelical Christians in Iran was highlighted in the decision of the Immigration Appeal Tribunal in the Iran Country Guidelines Case of *SSHD* v *FS and Others*, remitted to the Tribunal by the Court of Appeal, ([2004] UKIAT 00303), in which, after a consideration of comprehensive up to date evidence as to the risk of persecution faced by Christian converts returned to Iran, the Tribunal found that the more active convert, pastor, church leader, proselytiser or evangelist, was at real risk of persecution. On the other hand, the ordinary convert who did not fall into these categories did not face a degree of risk sufficient to warrant protection under either Convention. Counsel for the respondent conceded, rightly in our view, that there was sufficient in the background material and in the evidence in the present case to alert the adjudicator, in considering whether the appellant would be at risk of persecution if he were returned to Iran, to the question of whether he was a proselytising evangelical Christian. In these circumstances a material consideration for the adjudicator in determining the appellant's appeal was whether he was a proselytising evangelical Christian. At paragraph 59 of his determination the adjudicator said

"The appellant also claims that he would be at risk because of his religious beliefs. As I have indicated, I had before me a Certificate of Baptism. I also heard evidence from Rev. Lidstone. Consequently I accept that, whilst in Iran the appellant became interested in Christianity and that he is now a converted Christian. However what I have to decide is whether or not the appellant would be at risk because of his religious beliefs. It is clear from the Background Reports that the Iranian Authorities have adopted a more tolerant approach to Christianity. I do not consider that the Background Reports support the proposition that the appellant would be at risk if returned. I do not consider that the evidence discloses a reasonable likelihood that the appellant will be persecuted for being a Christian convert.

60. In conclusion I do not consider that the appellant would be at risk of being persecuted because of his religion or his political opinion (or for any other reason under the Refugee Convention). I find that the appellant's claim does not engage the Refugee Convention."

In our opinion there is no indication in his determination that the adjudicator gave consideration to the question whether the appellant was a proselytising Christian. In failing to do so he erred in law. Nor does he explain why he preferred the CEDOCA Report to the CIPU Report which painted a blacker picture of the treatment of converts in Iran.

[9] The point was clearly focused in Ground of Appeal 3 before the Immigration Appeal Tribunal. Although the Tribunal say that counsel for the appellant indicated that he proposed to adopt a slightly different approach from that set out in the written grounds of appeal it was not suggested that the grounds of appeal had been departed from. It is clear (and counsel for the respondent did not seriously dispute) that Ground

3 was argued before the Tribunal as an error of law. In the event the Tribunal at paragraph 19 of their determination concluded that the adjudicator had not erred in law "in his approach to the church". In so concluding the Tribunal in our opinion erred in law.

[10] They then went on to make what appear to be findings in fact to the effect that the Glasgow Iranian Church was far from being an actively proselytising body, that its leaders were reluctant to associate themselves publicly with the Assembly of God and that the appellant was not an evangelical Christian. Those findings seem to us to go further than the findings made by the adjudicator. Under the statutory regime which was in force at the relevant time it was the adjudicator who was entrusted by Parliament with the task of primary fact finding. An appeal under section 101 of the Nationality Immigration and Asylum Act 2002 could be brought on a point of law: it was not a rehearing. As Laws LJ said in *CA v SSHD* [2004] EWCA Civ. 1165, cited in *R (Iran)* v *SSHD* [2005] Imm AR 535,

> "The jurisdiction under section 101 of the 2002 Act forbids in effect the Tribunal deciding the merits itself unless at least it first concludes that the adjudicator's decision cannot stand because it is marred by error of law."

It seems to us that in making these additional findings that the Tribunal were in fact deciding the merits of the appeal itself without first concluding that the adjudicator had made an error of law (and indeed without considering first whether, in that event, the matter should more appropriately be remitted to the adjudicator).

[11] For these reasons we shall allow the appeal and remit the case to the Asylum and Immigration Tribunal for reconsideration.