SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk **[2009] CSIH 25**
Lord Hodge **XA89/06**
Lord Philip

OPINION OF THE LORD JUSTICE CLERK

in the application for leave to appeal under section 103B of the Nationality Immigration and Asylum Act 2002 against a decision of the Asylum and Immigration Tribunal dated 3 April 2006 and communicated to the Appellant on 6 April 2006

HG

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Applicant: Forrest; Drummond Miller WS
Respondent: Webster; Office of the Advocate General for Scotland

27 February 2009

[1] I agree with the Opinion of Lord Hodge.

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by

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Applicant: Forrest; Drummond Miller WS
Respondent: Webster; Solicitor to the Advocate General for Scotland

27 February 2009

[2] The applicant is an Iranian national who applied for asylum and claimed that his return to Iran would be contrary to the obligations of the United Kingdom under the European Convention on Human Rights. His claims were refused and after procedures which are not relevant to this application Mr J G MacDonald, an immigration judge, heard his appeal on 6 March 2006 and made the determination against which the

applicant seeks to appeal. As the application for leave overlapped with the merits of the appeal the court granted leave and heard his counsel on his appeal.

HG's claim

[3] As the substance of the appeal was a challenge to the immigration judge's finding that HG's account in support of his claim that he had been persecuted was not credible, it is necessary to summarise his account in order to place the challenge in its context.

[4] HG claimed that he was related by marriage to a person who was a bodyguard of the spiritual leader of Iran and who thus had influence. In 1999 that person obtained for him a job as a driver in Pasdaran (a branch of Iran's military also known as the Iranian Revolutionary Guards). In 2003, when working as a driver delivering parcels and letters for the internal post system of Pasdaran, his car was rammed on the passenger side at a junction by a Nissan four-wheeled drive vehicle. The collision caused his passenger, who was a member of Etelat (the security forces), to lose consciousness. Armed men from the Nissan vehicle tied HG's hands to the steering wheel and then took some letters and parcels from the car before driving off in a waiting vehicle. An ambulance took the injured passenger to hospital and the police took HG to the Pasdaran headquarters.

[5] On the following day HG was interviewed by his superior and it was suggested that he was involved in the incident. Thereafter he was kept in a cellar or room for about three weeks and was threatened and beaten. He lost fifty per cent of his vision as a result of being punched on the face. He woke up in hospital and, having observed that he had a guard in his room, pretended to be unconscious for eight hours until the guard fell asleep. Then he rose and hit the guard over the head with a crystal vase which he found on a table nearby. The blow knocked the guard unconscious and HG

escaped. When in the hospital car park he pushed aside an old lady as she got out of her car, seized her car keys and drove off. He found a mobile phone inside her car and used it to phone his friend. The friend met him and warned him that Etelat were harassing his family. He advised HG to leave the country. Fearing for his life, HG did so. He came to the United Kingdom. He said that his wife had informed him that the Iranian authorities were still interested in him and that he was on a wanted list. He feared that he would be killed if he were returned to Iran as Etelat suspected that he had collaborated with those who stole the parcels and letters.

The Immigration Judge's determination

[6] Mr MacDonald in his determination narrated HG's written evidence in his statement and also his evidence in the hearing. He recorded the submissions for the Home Office and for HG before setting out his conclusions. He stated (para 53) that the case turned on HG's credibility; if he were credible, then there was a real risk of persecution on his return; but if his account were not credible in its material respects, then his appeal must fail. He concluded that the account was fabricated and set out his reasons for that conclusion. Between paragraphs 57 and 63 he set out his reasons for not accepting the account of the collision. Between paragraphs 64 and 66 he questioned why the Iranian authorities should have persecuted HG without any factual basis for the suggestion that he was involved in the attack on the car. Thereafter he pointed out several material discrepancies between HG's Statement of Evidence form and his later evidence on the circumstances and duration of his detention. In particular, he referred to the contradictory evidence on when, during his period of detention, he had been assaulted, found himself in hospital and escaped. In one account HG asserted that he was in hospital after about twenty two days in detention and in another that he had been detained for about eight months before he escaped

from the hospital. In paragraphs 68 to 70 the immigration judge considered the account of his escape from hospital and held that that was implausible. In paragraphs 71 and 72 he explained that he thought it was unlikely that the authorities would continue to target HG's family and recorded that he had been shown no objective evidence that they behaved that way. There had been no explanation why his influential relative should have been cross with him when he was innocent. Finally he pointed out in paragraph 72 that the medical evidence of glaucoma did not assist HG as that condition has many causes not linked to trauma.

[7] The immigration judge concluded in paragraph 73 in these terms:

> "It seems to me that there are very considerable doubts about every stage of the Appellant's account from his appointment (without security checks) to his position as a driver, to the somewhat unclear account of the collision, to the lengthy detention and ill treatment for no clear reason by the authorities, culminating in an unlikely escape and early departure from Iran. Against that background I conclude that there is no reasonable degree of likelihood that the Appellant's account is true. I would go further and say that I regard the Appellant's account as entirely fabricated. Accordingly he does not require international protection. The appeal must be dismissed."

The legal challenges to the determination

[8] Mr Forrest made three submissions in support of the contention that the immigration judge had erred in law in holding that HG was not a credible witness. The first two related to the circumstances of the alleged collision and the third related to the immigration judge's observation that there was no rational basis for the Iranian authorities to have treated HG as he asserted they had. In his written application for leave Mr Forrest submitted that each of the alleged errors involved irrationality, but during the appeal hearing he reformulated the second and third grounds as a failure to take account of relevant evidence in the Iran Country Report which was before the immigration judge.

Discussion

[9] In my opinion, counsel for HG has not demonstrated that the immigration judge erred in law in his discussion of the evidence about the collision. The first submission amounted to an assertion that such an attack on a marked car of the Pasdaran was within the bounds of possibility and that therefore a rejection of the account of the collision involved irrationality. Mr Forrest submitted that HG had given a clear account of the incident which was a relatively straightforward collision at a junction. There was, he submitted, no basis for the immigration judge's statement in paragraph 57 that it was unexplained how the offending vehicle would have known that HG's car was going through the junction at the material time. I do not accept that submission. While the immigration judge recorded that the car had the Pasdaran emblem on it, there is nothing in the recorded evidence to suggest how those said to have ambushed it were aware (a) of its approach to the junction which it crossed on a green light or (b) of the facts that it was being driven by HG and that it was carrying the particular documents or parcels which they wished to obtain. I see no irrationality

in the immigration judge's pointing out of what was unexplained and his founding on the absence of explanation as part of his assessment of credibility and plausibility.

[10] In my opinion it is well established that the credibility of an asylum-seeker's account is a question of fact and that Parliament has entrusted the determination of that question to the immigration judge (*HA* v *Secretary of State for the Home Department* 2008 SC 59, para 17). The immigration judge has to decide whether facts are proved to the required standard. In doing so he looks at the evidence in the round (*Mungu v Secretary of State for the Home Department* [2003] EWCA Civ 360, paras 16-18). The Extra Division in *HA* (at para 17) referred to *Esen* v *Secretary of State for the Home Department* (2006 SC 555), *Wani* v *Secretary of State for the Home Department* (2005 SLT 875) and *HK* v *Secretary of State for the Home Department* ([2006] EWCA Civ 1037) for the propositions (a) that an immigration judge must give reasons for his decisions on credibility and that a bare assertion of incredibility might disclose an error of law, (b) that in reaching conclusions on credibility and plausibility the immigration judge may draw on his common sense and his ability, as a practical and informed person, to identify what is, and what is not, plausible and (c) that the immigration judge in assessing credibility or implausibility must take great care and be sensitive to the asylum-seeker's social and cultural background which might make actions, which were implausible when judged by the standards of the United Kingdom, less unlikely in the context of that background. An immigration judge's decision on credibility or implausibility which was based on an assessment of inherent improbability and failed to consider the cultural context, when relevant, or which was based on conjecture or speculation might involve a material error of law. These propositions apply in the context of the duty of the immigration judge and the court to give most anxious scrutiny to the basis of the Secretary of State's decision

where fundamental human rights are involved (*R v Secretary of State for the Home Department ex p Bugdaycay* [1987] 1 AC 514, at 531G).

[11] In deciding whether an immigration judge's view on credibility is based on speculation or conjecture, it is necessary to look at his consideration of all the evidence and his reasoning as a whole, because he is enjoined to look at the evidence in the round. It is not appropriate for counsel or an appeal court to assess a particular part of an account in isolation from the rest of the evidence and assert, either explicitly or by implication, that a finding of lack of credibility cannot be sustained on consideration of that part alone when the immigration judge's finding on credibility rested on a wider consideration of the whole account, including the discrepancies to which he referred. In this case it may be that an ambush could have been carried out as HG asserted. But the mere possibility of such an attack does not prevent the immigration judge, when deciding whether to accept the account of the collision, from commenting properly on matters relating to the ambush which were not explained and on matters which could have been explained more clearly, nor from using the lack of explanation as a component of his assessment of credibility or implausibility. The immigration judge had to draw evidence of the circumstances of the alleged attack from various parts of HG's evidence in order to present his understanding of what HG was asserting and I see no basis for criticising either his comment that he was not presented with a clear picture of the incident or his reliance on that lack of clarity in support of his conclusion in paragraph 73 of his determination (quoted in para [6] above).

[12] The second submission, once clarified in discussion, amounted to an assertion that because there was in the Iran Country Report (October 2005) evidence of the existence of dissident groups in that country who might wish to attack vehicles

belonging to the security services, the immigration judge must be taken to have overlooked that material evidence when he observed in paragraph 60 of his determination that he had not been shown any objective evidence that there was any dissident group in Iran capable of undertaking such a mission. The answer to that submission, as Mr Webster for the Secretary of State pithily observed, was that there was a difference between wishing to do something and being able to do so. Thus the existence of dissident groups which is vouched in the extract (paras 6.212- 6.234) of the Iran Country Report told the immigration judge nothing about their capability. I agree.

[13] The third submission was that the immigration judge erred in finding in paragraph 64 of his determination that there was no rational basis for the Iranian authorities to have concluded that HG was involved in the ambush because the Iran Country Report (in paras 5.41-5.47) recorded instances of arbitrary behaviour. There is no substance in this challenge. The impugned finding was merely an observation, which was justified on the findings of fact in the determination. Mr Forrest's point would perhaps have been more appropriately directed to the finding in paragraph 65, in which the immigration judge stated that he considered it likely that if the Iranian authorities were going to torture HG they would have had some basis for suggesting that he was involved in the incident. But even there, in the assessment of probability, the existence of any evidence of occasional irrationality in the behaviour of the Iranian authorities would affect only the weight to be attached to an expectation of rationality in such an assessment. And, as Mr Webster pointed out, the passages in the Iran Country Report, on which Mr Forrest relied, demonstrated arbitrary behaviour by an authoritarian regime and not irrational behaviour.

[14] In *R (Iran)* ([2005] EWCA Civ 982) Brooke LJ (at paras 11-12) reminded practitioners to avoid inappropriate assertions that a decision-maker had been irrational or perverse. In my opinion, there was no basis for such assertions in this case.

Conclusion

[15] I am satisfied that counsel for HG has not demonstrated that the immigration judge was irrational or that he otherwise erred in law. In my opinion, we should refuse the appeal and affirm the Tribunal's determination.

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