OUTER HOUSE, COURT OF SESSION

[2007] CSOH 25

OPINION OF LORD BRACADALE

in the petition of

MAJID POURMINI ABARQUEY (AP)

Petitioner;

for

Judicial Review of a Determination of the Immigration Appeal Tribunal

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Petitioner: Devlin; Drummond Miller WS
Respondent: Lindsay; H Macdiarmid

9 February 2007

[1] The petitioner, who was born on 23 July 1970, is a citizen of Iran. The Respondent is The Secretary of State for The Home Department. After arriving in the United Kingdom without a valid passport or entry clearance he claimed asylum on 27 November 2000. By letter dated 16 February 2001 the respondent refused his claim. He appealed to the Special Adjudicator who refused the appeal by a determination dated 17 June 2002. By a determination dated 17 July 2002 leave to appeal was refused by the Immigration Appeal Tribunal ("IAT").

[2] The petitioner claimed that because of his involvement in a political organisation called the "Javannah Mobarez" he was at risk of persecution by the

military and security organisations in Iran. He claimed that sometime after becoming involved with this organisation the following events occurred. While he and another person were distributing leaflets they were chased by the Basjis (a security force). While some officers pursued the other person, the petitioner was caught by one of the Basjis who produced a gun and ordered the petitioner to place his hands in the air in order that he should be searched. A leaflet was recovered on his person and, as the officer was reading it, the petitioner turned round, seized the barrel of the gun with his left hand and punched the officer with his right hand. The gun went off, injuring the petitioner's hand. He escaped from the Basjis and went to the house of a friend. A doctor, who was a friend of the petitioner's brother, attended and carried out an operation on the petitioner's hand. Thereafter, he went into hiding and moved from place to place. He claimed that the friend was captured and under torture confessed and disclosed the petitioner's name to the authorities. He spent two years in hiding before leaving Iran for the United Kingdom.

[3] The Adjudicator rejected the account given by the petitioner as being incredible. He found both the petitioner's account of his involvement with the political organisation and his account of the medical operation incredible. The Adjudicator concluded that the petitioner was an economic migrant.

[4] The relevant rule governing appeals to the IAT from the Adjudicator which was in force at the time of the petitioner's hearing was Rule 18 of the Immigration and Asylum Procedure Rules 2000. Rule 18(7) provides:

> "Leave to appeal shall be granted only where -
>
> > (a) the Tribunal is satisfied that the appeal would have a real prospect of success; or

(b) there is some other compelling reason why the appeal should be heard.

[5] Mr Devlin, who appeared on behalf of the petitioner, submitted that the IAT erred in law in respect that they found that the appeal by the petitioner against the determination of the Adjudicator would have had no real prospect of success. In support of that submission Mr Devlin advanced two propositions. First, that the IAT erred in law in finding that grounds of appeal 1, 2, 3, 5 and 6 in the application for leave to appeal disclosed no real prospect of success; and second, that the IAT erred in law in that it failed to take several obvious points which had a real prospect of success.

[6] Mr Lindsay, who appeared on behalf of the respondent, submitted that the decision by the IAT to refuse leave to appeal was lawful and reasonable and could not be challenged by judicial review. The IAT did not err in law in the way that it treated the grounds of appeal before it, none of which had any real prospect of success. Secondly, there were not obvious points of convention law with strong prospects of success that the IAT had failed to take into account in favour of the petitioner. Mr Lindsay submitted that this was not a borderline case as far as the Adjudicator was concerned. The Adjudicator was in no doubt: he did not believe the petitioner's account. Mr Lindsay accepted that in a finely balanced case the asylum seeker should be given the benefit of the doubt but that did not apply in a clear cut case.

[7] The grounds of appeal were directed at the treatment of credibility by the Adjudicator. I did not understand there to be any significant dispute between the parties as to the principles to be applied in judging the assessment of credibility by the Adjudicator. The various considerations have conveniently been brought together by the Inner House in *Esen* v *Secretary of State for the Home Department*, unreported,

5 May 2006, ([2006] CSIH 23XA74). Lord Abernethy, delivering the opinion of the Court, said at paragraph 21:

> "Credibility is an issue to be handled with great care and with sensitivity to cultural differences and the very difficult position in which applicants for asylum escaping from persecution often find themselves. But our system of immigration control presupposes that the credibility of an applicant's account has to be judged (*Asif* v *Secretary of State for the Home Department* 2002 S.C. 182). Credibility is a question of fact which has been entrusted by Parliament to the adjudicator. The adjudicator is someone specially appointed to hear asylum appeals and has the benefit of training and experience in dealing with asylum-seekers from different societies and cultures. Of course an adjudicator must give his reasons for his assessment. A bare assertion that an applicant's account is implausible is not enough (W321/01 *A* v *Minister for Immigration & Multicultural Affairs* [2002] F.C.A. 210). But an adjudicator is entitled to draw an inference of implausibility if it is based on the evidence he has heard and in coming to his conclusion he is entitled to draw on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible (*Wani* v *Secretary of State for the Home Department* 2005 S.L.T. 875)."

In addition, parties were agreed that the Adjudicator's assessment of credibility could only be challenged on *Wednesbury* grounds.

Grounds of Appeal 1, 5 and 6

[8] Grounds of Appeal 1 and 5 direct criticism at the reasoning of the Adjudicator leading to the following conclusion at the end of paragraph 23 of his determination:

"I have difficulty then in accepting that the group claimed to exist by the appellant, in fact, existed or that he was a member of such a group."

[9] In my opinion, it is important to have regard to the structure of paragraph 23. The contents of the paragraph leading up to the conclusion comprise a number of elements of analysis of the account given by the petitioner which led the Adjudicator to the conclusion stated at the end of the paragraph. Certain of these elements are attacked in the grounds of appeal. The first ground of appeal is directed towards the following observation made by the Adjudicator:

"At C11, a document submitted by the appellant, he claims that, while working as a taxi driver, he was hired by a friend who was already involved in the Javanan Mobarez. This conflicts with his evidence in his statement that his primary source of income was from teaching."

Mr Devlin submitted that the contents of the two statements were not inconsistent. It was of the nature of these cases that the account given by an asylum seeker develops as he passes through the stages of the process. Applying the appropriate anxious scrutiny, this was not an inconsistency such as to allow the Adjudicator to make an adverse finding on credibility.

[10] In relation to this ground of appeal Mr Lindsay submitted that the Adjudicator was simply making an observation rather than a positive finding that he did not believe the petitioner on the matter of whether he was a school teacher or a taxi driver. This was a peripheral observation and not central to the question of the credibility of the petitioner with respects to the group. This was an immaterial, peripheral observation which did not play any material role in the finding at the end of paragraph 23.

[11] While I consider that there is force in the criticism of this passage made by Mr Devlin, I am inclined to the view that Mr Lindsay was correct to describe it as an immaterial, peripheral observation, not central to the question of credibility of the petitioner. It seems to me that it did not play any material role in the conclusion at the end of paragraph 23, particularly in the light of points made later in the paragraph. Such an error would constitute an error in law justifying the granting of leave to appeal only if it was in relation to a matter which was material to the outcome. Errors of which it can be said that they would have made no difference to the outcome do not matter (*R (Iran)* [2005] INLR 633 paragraph 9).

[12] In ground of appeal 5, the petitioner attacks the reasoning in paragraph 23 as amounting to guesswork and speculation rather than deduction from fact. Mr Devlin drew attention to three observations which the Adjudicator made. First, the following observation (observation (a)):

> "The existence of cells for such a group would have been important in a country such as Iran with a history of repression of free speech and of persecution of those perceived as dissenting from the orthodox line. The need to keep the formation of the cells secret and separate would be vital to the continued existence of the group. I do not find it credible that the appellant would have been able to be integrated so quickly and easily into a group which was well aware of the dangers and difficulties of its work in a country like Iran."

Next, the Adjudicator went on to say this (observation (b)):

> "The likelihood of infiltration by security agents on behalf of the State would have been high. The appellant nevertheless very quickly became aware not only of the existence of separate cells but also of the membership of those

cells. There was no suggestion of any security checks having been carried out. I do not consider that that it is likely to have happened in a country such as Iran."

The Adjudicator then went on to say (observation (c)):

"Furthermore, the appellant claimed that the group published and distributed leaflets setting out their claims and complaints. There is no suggestion that anyone else in any of the cells came to the notice of the authorities from 1995 until the appellant and his friend in July 1998. The likelihood of the appellant coming to the attention of the authorities within two months of his having joined the group while others with higher profiles and more onerous duties did not, is slim. Given the situation in Iran, I do not consider that is likely."

[13] In relation to observation (a) Mr Devlin submitted that there was no evidential basis for saying this. There was nothing to suggest that the Adjudicator had any knowledge of this particular group. He simply surmised as to how a reasonable person might behave. In relation to observation (b) Mr Devlin submitted that the Adjudicator appeared to be saying there that it was beyond human experience that this could happen. Again, in relation to observation (c) Mr Devlin submitted that there was no evidential basis for this finding.

[14] Mr Lindsay submitted that these observations made by the Adjudicator were based on the application of common sense and everyday human experience. The organisation of such bodies into cells was well known to be in order to prevent the danger of infiltration. It was implausible that the petitioner would have knowledge of the membership of other cells. It was implausible that he would be so readily accepted into a cell. So far as the comment about the likelihood of the appellant coming to the attention of the authorities within two months of having joined the group was

concerned, Mr Lindsay pointed out that all the Adjudicator said about that was that the likelihood was slim. Although another interpretation might be available in relation to that issue, the question was whether such a conclusion was open to a reasonable adjudicator or was it so unreasonable that no adjudicator could have adopted it. It was important to bear in mind that the application of commonsense had to be made in the context of the situation in Iran and in the light of the specialist knowledge of the Adjudicator. In paragraphs 19-22 the Adjudicator had set out the information available in relation to the state of affairs in Iran.

[15] In my opinion the submissions of Mr Lindsay in relation to these three passages which are criticised in ground of appeal 5 are well-founded. It is to be borne in mind that the Adjudicator is someone specially appointed to hear asylum appeals and has the benefit of training and experience in dealing with asylum seekers from different societies and cultures. The Adjudicator had before him information available in relation to the state of affairs in Iran. He was entitled in coming to his conclusion to draw on his common sense and his ability, as a practical and informed person, to identify what was not plausible. It seems to me that in these three elements of the analysis of the account given by the petitioner the Adjudicator was doing no more than applying these principles. It seems to me that in looking at paragraph 23 as a whole it can be said that the Adjudicator came to a reasoned conclusion.

[16] In the sixth ground of appeal Mr Devlin suggested that there was a contradiction between the approach taken by the Adjudicator in paragraph 23 and his conclusion in paragraph 30 that he did not accept that such a group existed or that the incident with the Basjis occurred as described by the petitioner. Mr Lindsay submitted that there was no such contradiction because in paragraph 23 the Adjudicator was testing the petitioner's account of the group and the incident whereas in paragraph 30

the Adjudicator was setting out his own conclusion. If one looked at the last sentence of paragraph 23 and the terms of paragraph 30, the same conclusion was reached. I agree that there is no contradiction between the paragraphs. In paragraph 23 the Adjudicator was analysing the petitioner's account while in paragraph 30 he was developing his own conclusion on the evidence.

Grounds 2 and 3

[17] Grounds of appeal 2 and 3 were directed against the conclusions of the Adjudicator in paragraphs 25 and 27 in relation to Dr Von Kaehne, an expert witness who submitted a report on behalf of the petitioner. In paragraph 25 it appeared that the Adjudicator had incorrectly understood the petitioner's position to be that he was under general anaesthetic for around one and a half hours of the operation and remained conscious for the rest of the time. The petitioner's position had been that he had a local anaesthetic and was awake throughout the entire operation. Mr Devlin submitted that even a minor flaw in the Adjudicator's reasoning should not be ignored when applying anxious scrutiny.

[18] Mr Devlin was critical of the Adjudicator's approach to the information given by Dr Kaehne about the details of the operation. The Adjudicator considered it highly unlikely that the petitioner would have been able to recount the treatment and regimen which was described in detail by the doctor. Mr Devlin submitted that this conclusion was not based on evidence. The petitioner was an educated man and would have been able to tell the doctor about his treatment. There was no evidence that he had no such knowledge in order to be able to describe the treatment and regimen.

[19] Mr Lindsay submitted that the Adjudicator's misunderstanding of the petitioner's position about the anaesthetic was a peripheral and immaterial matter. The reasons why the Adjudicator rejected the account of the operation were, first, that he

did not find it credible that a general practitioner would be able to conduct a complex operation lasting four hours; and, second, he did not find it credible that the petitioner would be conscious for such a long time while his hand was being repaired. He submitted that both these reasons were based on common sense everyday experience. These were decisions to which he was entitled to come.

[20] As to the details of the operation, Dr Kaehne had referred to the use of a local anaesthetic during the operation, to the use of prefabricated needles, to the administration of intravenous Cephalexin injections and after a few days the administration of Cephalexin capsules. Mr Lindsay submitted that it was simply the application of common sense to conclude that someone who had undergone a four hour operation to his hand would be unlikely to give that kind of detail of the medical treatment. In addition, the Adjudicator was entitled to comment on the oddness of the provenance of the information.

[21] When considering the conclusions of the Adjudicator with respect to the operation which the petitioner claimed was carried out on his hand it is in my opinion important to read the analysis of the medical matters as a whole. It is correct to say that it appears that the Adjudicator has misunderstood the account given by the petitioner about the anaesthetic. However, I agree with Mr Lindsay that this was a peripheral and immaterial matter and that the reasons why the Adjudicator rejected the account of the operation are correctly identified by Mr Lindsay and do reflect the application of common sense by the Adjudicator. I agree that the same applies to the detailed account given of the operation by Dr Kaehne.

Additional ground

[22] Under reference to *Regina* v *Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929 Mr Devlin submitted that there was an additional obvious ground which the IAT should have considered. It should have been obvious that the Adjudicator erred in paragraph 27 in so far as he declined to place any reliance on the report of Dr Kaehne on the grounds that (i) the doctor made no mention of the petitioner having to leave his friend's house within seven days of the shooting and remain in hiding for two years; (ii) there was no indication of where the information about the hand being bathed daily in Bethadine originated; (iii) Dr Kaehne used non-medical terms such as "bits of the hand"; and (iv) Dr Kaehne made reference to an assessment of the credibility of the petitioner. Mr Devlin submitted that the question of the petitioner remaining at a friend's house and going into hiding would have had nothing to do with the circumstances of the injury or the treatment and consequently nothing turned about the failure of Dr Kaehne to mention it. It was clear from Dr Kaehne's report that the information in relation to Bethadine had been derived from the petitioner. As to the use of language by Dr Kaehne, he had used appropriate medical terms in the course of his report. The doctor did not include any assessment of credibility. He simply commented that he had no reason to doubt the account given to him by the petitioner. A reasonable adjudicator would have placed no weight on that particular point.

[23] Mr Lindsay submitted that the test in *Robinson* had not been met. These were not obvious points of convention law with strong prospects of success. These were simply fair comments and could not be described as irrational and unreasonable observations. While there might be stateable arguments they were not obvious points.

[24] Rule 18(6) is in the following terms:

"The Tribunal shall not be required to consider any grounds other than those included in that application".

This must be read in the light of the decision in *Robinson* in which it was held that where there was a readily discernible and obvious point in his favour, which had not been taken on his behalf, the IAT should nevertheless consider the point. The Appeal Court was careful to place limits on this approach. At page 945G the Master of the Rolls, Lord Woolf, said this:

"It is now, however, necessary for us to identify the circumstances in which it might be appropriate for the tribunal to grant leave to appeal on the basis of an argument not advanced before the special adjudicator, or for a High Court judge to grant leave to apply for judicial review of a refusal of leave by the tribunal in relation to a point not taken in the notice of appeal to the tribunal. Because the Rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed

to 'obvious'. Similarly, if when the tribunal reads the special adjudicator's decision there is an obvious point of Convention law favourable to the asylum seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the grounds of appeal to the tribunal had a strong prospect of success if leave to appeal were to be granted".

[25] With respect to the matters said by Mr Devlin to be obvious matters falling within the test in *Robinson* it seems to me again to be important to look at paragraphs 26 and 27 of the Adjudicator's determination as a whole and to note their structure. The Adjudicator identifies a number of criticisms which led him to question Dr Kaehne's expertise. He then went on to identify a number of particular criticisms of his report. Some of these are of more force than others. Some may relate to matters of greater materiality than others. It seems to me, however, that even if some criticism can be directed against certain aspects of the comments made by the Adjudicator these are not material and on no view could they be said to meet the test in *Robinson*. Even if some of the points could be said to be arguable, they could not be described as points with a strong prospect of success if argued.

[26] Accordingly, the petitioner's attack on the determination of the Immigration Appeal Tribunal must fail. I shall sustain the second plea-in-law for the respondent and repel the petitioner's plea-in-law. I shall dismiss the petition.