C4/2005/0694

Neutral Citation Number: [2006] EWCA Civ 1223
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL
[AIT NO. HX/03935/2004]

Royal Courts of Justice
Strand
London, WC2

Wednesday, 26th July 2006

B E F O R E:

LORD JUSTICE WARD

LORD JUSTICE KEENE

LORD JUSTICE CARNWATH

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Y

CLAIMANT/APPELLANT

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

DEFENDANT/RESPONDENT

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(DAR Transcript of
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MR R SINGH QC and MS A WESTON (instructed by Messrs Robert Lizar, 159 Princess Road, MANCHESTER, M14 4RE) appeared on behalf of the Appellant.

MR N GARNHAM QC and MR J SWIFT (instructed by Treasury Solicitor, LONDON, SW1H 9JS) appeared on behalf of the Respondent.

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J U D G M E N T

1. LORD JUSTICE KEENE: This is an appeal from a decision of the Immigration Appeal Tribunal ("IAT") notified on the 4th February 2005. By that decision the IAT dismissed an appeal from an adjudicator who had rejected the appellant's asylum and human rights claims. The adjudicator's decision was promulgated on 5th May 2004 with the consequence that an appeal to the IAT lay only on a point of law. Some of the basic facts were not in dispute. The appellant is a citizen of Iran, born in September 1980. He had worked as a motor mechanic in Tehran. He arrived in the United Kingdom on 23 October 2002 and subsequently applied for asylum, which was refused by the Secretary of State.

2. However, much of the account which he gave to the adjudicator of events leading to his departure from Iran was challenged and his credibility was undoubtedly central to the case. His account was that a lot of the work carried out at the garage where he was employed was on military vehicles. He had been wrongly accused of stealing a rifle from one such vehicle; the rifle, it was alleged, having been carelessly left there. This took place in late September 2002. He was arrested, he said, and detained for ten days, during which time he had been questioned about his politics and asked who he was going to assassinate. He claimed that he had been tortured while in detention, with his arm being broken as a result.

3. He said that he was released at the end of that 10-day period when a high-ranking member of the Etalaat, that is to say the Iranian intelligence services, who was a friend of his uncle, put up his house as security for the appellant to be granted bail. The appellant, having been released, then left Iran. The friend's home had been confiscated as a result. Subsequently, he said, his father sent him a number of documents dealing with charges against him and his trial in absentia. He was sentenced to 10 years' imprisonment and 150 lashes. The appellant only had faxed copies of these documents and was unable to produce originals.

4. The adjudicator noted that there was reference in the Home Office CIPU report to the widespread use of torture by the security forces in Iran. Nonetheless, he did not accept the appellant's account of events. He referred to a number of matters which rendered it, in his eyes, not credible. The first was that it was not credible that someone connected with the security forces would put himself forward as a surety for a person suspected of links with terrorism and anti-Iranian actions. Next, if the appellant were suspected of terrorism he would not have been released, regardless of the influence of an individual surety.

5. Next, given that individuals in Iran are not allowed to own weapons, it was inconceivable that a member of the armed forces would leave a rifle in a vehicle being repaired. It was also implausible, said the adjudicator, that someone would risk confiscation of his home by standing surety in these circumstances, when he would have been aware of the possibility of the appellant fleeing and seeking asylum.

6. In addition, the adjudicator noted that there was no medical evidence to support the claim of a broken arm and no evidence that documents produced were genuine. No originals had been produced and there was evidence in the CIPU report that documents were easily

forged in Iran. Consequently, the adjudicator found that the appellant's account of past persecution was not credible and that he had no well-founded fear of persecution in the future for a Convention reason, or at all, so that there would be no breach either of articles 2 or 3 of the European Convention on Human Rights ("ECHR") resulting from his return to Iran.

7. The adjudicator also considered the sentence allegedly imposed of 10 years' imprisonment and 150 lashes. He held that this came within the "structure of punishment" in Iran and was not disproportionate and therefore for that reason also article 3 was not engaged.

8. Permission to appeal to the IAT was given on two grounds. Those were:

> "1. The phraseology of some of this determination is obscure, as the grounds assert and it is arguable that the adjudicator has given insufficient reasons for some at least of his findings.
>
> 2. The alternative finding that being lashed as a punishment is not contrary to Article 3 of the ECHR is also arguably wrong in law."

9. The second of those grounds only arose of course if it were to be accepted, as the adjudicator had not, that the appellant was credible in his account of the facts relating to events in Iran. That was a point noted by the IAT in its decision on the appeal. The IAT rejected the appeal against the adjudicator's findings on credibility, and therefore did not deal with that second ground. No criticism is advanced of that course of action as such.

10. On credibility, the IAT reminded itself that it should not interfere with the adjudicator's findings of fact unless they could be regarded as perverse; that is to say, one which no reasonable adjudicator could have made. The IAT also had some fresh evidence put before it by the appellant in the shape of a medical report from a consultant radiologist at Manchester Royal Infirmary dated 15 December 2004. The report found that there was an indication of a fracture two years before of the left elbow. It went on to state:

> "Normal alignment … there has been remodelling since the previous fracture."

11. The IAT commented that this new evidence was not relevant unless there was an error of law in the adjudicator's approach, which was undoubtedly right, but even if there were the report did not greatly assist the appellant. At paragraph 9:

> "… his account was of a fracture which had not been treated, not an old fracture with subsequent 'remodelling' which implies treatment. A car mechanic, dealing with heavy machinery, may get a broken arm in a number of ways other than torture, and we note that the fracture site was not visible on the x-ray."

12. The IAT also noted that section 8 of the Asylum and Immigration (Treatment of Claimants, Etc) Act 2004 ("the 2004 Act") was now in force. The appellant, it recorded, had been convicted on a plea of guilty on November 2004 of a breach of his conditions of temporary admission, using a forged document, and obtaining a pecuniary advantage by deception. These offences arose out of him being found in possession of false Home Office grant of status letters which he had been using in order to work illegally.

13. The IAT set out its conclusions in the final three paragraphs of its decision, beginning at paragraph 14. That paragraph it is necessary to quote in full:

> "The Tribunal reserved its determination for postal delivery which we now give. We remind ourselves that we are debarred from interfering with an Adjudicator's finding of fact unless they are perverse or unsustainable at the level of error of law. In relation to this Adjudicator's determination, we consider the findings of fact to be sound and far from perverse. The documentary evidence was vague and did not support the appellant's account of the number of lashes to which he would be subject on return. The medical evidence is late, and indicates a *treated* fracture too old or slight to show clearly on the x-ray. The Adjudicator's consideration of credibility was sound and this appeal was therefore bound to fail. If the core account is rejected, then there is no question of Article 3 and the sentence to 99 or 120 lashes on return; there is no conviction and in consequence no risk engaging Article 3 or the Refugee Convention."

14. It then, and it should be noted only then, went on to consider in paragraphs 15 and 16 the effect of section 8 of the 2004 Act. Section 8, if I may seek to summarise its effect for present purposes, requires decision makers in such cases to take into account certain types of behaviour by an asylum claimant and to treat such behaviour as damaging to his credibility. I do not set out the terms of that section verbatim, for reasons which will become apparent in a moment. The section came into effect on 1 January 2005.

15. The IAT took the view that the behaviour of the appellant in using a number of false instruments to obtain work illegally while in the United Kingdom fell within section 8(2) because it was designed or likely to conceal information and designed or likely to mislead. The tribunal rejected an argument that the behaviour referred to in section 8(2) was limited to behaviour related to the asylum appeal, of the kind set out in section 8(3). It stated that it was required to regard his behaviour over the false documents as damaging to his credibility and it added that this supported the adjudicator's approach to the Iranian documents produced by the appellant; that is to say, its doubts as to their genuineness.

16. A number of interesting issues are raised by the appellant in his written skeleton argument about the meaning of section 8 and about its compatibility with articles 3 and 6 of the ECHR. In essence, it is argued that section 8 is incompatible with those articles or that it should be read down so as to make it compatible. I have no doubt that these are very interesting topics to be discussed and determined in an appropriate case. The

argument is that there could be circumstances where the behaviour of an asylum claimant falling within section 8(2) was done for a reason which is in fact consistent with a claimant's account and which should, if anything, enhance his credibility rather than damage it, as section 8(1) requires. One day, perhaps, such a case will arise for determination.

17. This, however, is not such a case. It seems to me that the arguments about section 8 do not really arise in the present case. It is clear from the wording and structure of the IAT's decision that it had already determined that there was no error of law in the adjudicator's determination of the credibility issue before the IAT turned to consider what it described as the "negative credibility presumption" arising under section 8. Its consideration of that statutory provision was not part of its basic determination. It was, in effect, an extra factor which it subsequently took into account. Even if it was wrong to do so, that would not undermine the validity of the decision it had already reached in paragraph 14, which I have set out earlier. The ultimate result of the appeal to the IAT would have still been a dismissal of the appeal if that tribunal had wholly ignored section 8.

18. Mr Singh QC, who appears for the appellant today, has very properly recognised this and has accepted that if the adjudicator's decision on credibility was a lawful one, then the section 8 issues do not arise. Consequently it is essential, first and foremost, to deal with the more conventional issue of whether the IAT was right to find that the adjudicator did not err in law in the way in which he dealt with the appellant's credibility. I turn to that topic.

19. On this, Mr Singh submits that the adjudicator can be seen to have adopted an improper approach, in that he relied on the inherent implausibility of the appellant's account of events. This is dangerous, because what may seem implausible to a decision maker in this country may nonetheless be true and may be much more plausible when seen in the context of the attitudes and conditions in the foreign state from which the asylum seeker has come. There may, it is argued, be cultural and linguistic differences between such a country and this country which could mislead the decision maker into regarding as implausible and incredible something which is explicable once those differences are taken into account.

20. Mr Singh supports these propositions by reference to the recent decision of this court in the case of HK v Secretary of State for the Home Department [2006] EWCA Civ 1037. The main judgment in that case was given by Neuberger LJ, who at paragraphs 28 and 29 said this:

> "28. Further, in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of a story, and the story as a whole, have to be considered against available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).
>
> 29. Inherent probability, which may be helpful in many domestic cases, can

be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in *Hathaway on Law of Refugee Status* (1991) at page 81:

> 'In assessing the general human rights information, decision-makers must constantly be on their guard to avoid implicitly recharacterising the nature of the risk based on their own perceptions of reasonability.'"

21. Neuberger LJ went on to refer to the Scottish decision of Lord Brodie in Awala [2005] CSOH 73, where it was emphasised that if a claimant's account is rejected, reasons must be given, it not being sufficient merely to say that a particular account is implausible; that is to state a conclusion.

22. Mr Singh also draws attention to Chadwick LJ's judgment in HK at paragraph 72, where it was said that it was unsafe to reject facts because they are so unusual when they are said to have occurred in an environment and culture wholly outside the experience of the decision maker. Mr Singh does not argue that a decision maker must accept an appellant's account, merely because it is uncontradicted and is free from inconsistencies, but he stresses the need for the decision maker to look at and assess the account in the context of conditions in the country in question.

23. The point is also made that his task is not to decide on the balance of probabilities what is true, but to look at the account given in the round and bear in mind the difficulties faced by an appellant in establishing the truth of his account; see Karanakaran v Secretary of State for the Home Department [2000] 3 AER at 449. One should only discard facts if there is no real doubt that they did not occur. On that last aspect, Mr Singh notes that at times the adjudicator in the present case used expressions such as "there is little truth" in the claim, rather than saying that he found no truth in that aspect of the account.

24. I am bound to say that I find this last point unpersuasive. It is quite clear on any fair reading of the decision that the adjudicator was rejecting as incredible and untrue the appellant's version of events. Particular passages in his decision should not be analysed as though they emanated from a Parliamentary draftsman. But Mr Singh's main point is that the adjudicator had failed to apply the legal principles requiring him to consider credibility in the context of Iranian society and conditions. He submits that it is not incredible that a soldier may, through carelessness, have left a rifle in a military vehicle. There is evidence in the CIPU report of corruption in the judiciary in Iran, so that it was not inconceivable that bail would be granted to someone in the appellant's position. The adjudicator rejected the documentary evidence after forming a view on credibility of the appellant's oral evidence, and overall it is submitted that the adjudicator was wrong to

have attached such weight to his views on implausibility.

25. There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator, now known as an immigration judge, should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society. It is therefore important that he should seek to view an appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes. The dangers were well described in an article by Sir Thomas Bingham, as he then was, in 1985 in a passage quoted by the IAT in Kasolo v SSHD 13190, the passage being taken from an article in Current Legal Problems. Sir Thomas Bingham said this:

> "'An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."

26. None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be. The decision maker is not expected to suspend his own judgment, nor does Mr Singh contend that he should. In appropriate cases, he is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief. The point was well put in the Awala case by Lord Brodie at paragraph 24 when he said this:

> "… the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal of fact is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole".

He then added a little later:

> "… while a decision on credibility must be reached rationally, in doing so the decision maker 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".

27. I agree. A decision maker is entitled to regard an account as incredible by such standards, but he must take care not to do so merely because it would not seem reasonable if it had happened in this country. In essence, he must look through the spectacles provided by the information he has about conditions in the country in question. That is, in effect, what Neuberger LJ was saying in the case of HK and I do not regard Chadwick LJ in the passage referred to as seeking to disagree.

28. The question which then clearly arises is: did this adjudicator fail to adopt such an approach? There is no doubt that he reminded himself of the need to look at the issue in the foreign context. At paragraph 16 of his determination he said this:

> "Credibility findings can only really be made based on a complete understanding of the entire picture placing the claim into the context of the background material regarding the country of origin."

29. He clearly had regard to the information about conditions in Iran provided by the Home Office CIPU report about that country. He summarises much of that report in an earlier part of his decision. It makes depressing reading, with references to arbitrary arrest and reformers being regarded as counter-revolutionaries. So the adjudicator certainly sought to avoid the dangers to which I have referred. Nor can it properly be said that he fell into the trap of merely asserting that the appellant's account was incredible without giving reasons for such a finding. As I have indicated earlier, he gave a number of reasons.

30. Perhaps inevitably some of those reasons are more convincing that others. I can see that it is not impossible for a solider to have negligently left a rifle in a lorry, despite the seriousness with which such carelessness would no doubt be regarded in Iran. But the adjudicator's finding on credibility was based on an accumulation of points. He looked at the issue of credibility in the round. He was entitled, in my judgment, to take the view that it was incredible that a high-ranking member of the intelligence agency would intervene on behalf of someone suspected of terrorist activity. Even more so the alleged fact that such a person would put up his home as security for someone facing such a serious charge, where it was highly likely that the latter would flee.

31. Likewise, the adjudicator was entitled to regard the alleged granting of bail as beggaring belief. Mr Singh is right to draw attention to evidence of corruption amongst the Iranian judiciary, but the offence allegedly committed by the appellant was very serious indeed. As Mr Garnham QC for the Secretary of State has emphasised, the appellant's own evidence was that the authorities took a very serious view of the theft of the rifle, and one of the documents produced by the appellant described this as challenging:

> "… the holy order of the Islamic Republic and for disturbance of national and internal security, in cooperation with seditious and anti-revolutionary groups". (see page 39 of the appeal bundle)

Anti-revolutionary groups are to be regarded, effectively, as anti-state groups in Iran.

32. It is extremely difficult to believe that anyone would grant bail to a person facing or potentially facing such a charge. Moreover, this does mean that there was a degree of internal inconsistency in the appellant's own account.

33. For these reasons I have concluded that the adjudicator was entitled to reach the finding which he did on credibility and that he did not err in the approach which he adopted on that issue. It would have been better if he had dealt with the documentary evidence before forming a view on credibility, but his comments on the documents were accurate. He was entitled to attach little weight to them, and it would not therefore have affected his overall finding had he considered them at an earlier stage. Since he did not err on the credibility issue, the IAT was right to uphold him on this, as it did, before turning to the effect of Section 8 of the 2004 Act.

34. Whether its views on the meaning and effect of that section were sound is, as I have indicated earlier, a matter for another day, as is the whole issue of the compatibility of Section 8 with the ECHR. For present purposes it is enough for my part to have concluded that the adjudicator did not err and that whether the IAT was right or wrong as to Section 8 is irrelevant to this appeal.

35. For the reasons which I have given, I would dismiss this appeal.

36. LORD JUSTICE CARNWATH: I agree that the appeal should be dismissed for the reasons given by my Lord, Lord Justice Keene, and that in those circumstances section 8 does not arise. However, it may be useful to record the limited way in which section 8 is apparently interpreted by the Secretary of State, as appears from the submissions before us in the skeleton of Mr Neil Garnham QC for the Secretary of State:

> "The Secretary of State accepts that section 8 should not be interpreted as affecting the normal standard of proof in an asylum/human rights appeal. There is nothing in the wording of the Act that requires (or indeed permits) such a result. The effect of section 8 is simply to ensure that certain factors relating to personal credibility are taken into account when that standard of proof is applied. The weight and significance of those factors will vary according to the context and the precise circumstances of the behaviour."

37. That appears to be in line with the passage from the speech of Baroness Scotland of Asthal QC for the Government in the House of Lords, Hansard 5 April 2004 Column 1 at 683 where she said:

> "The clause will not force a deciding authority to give undue weight to any of the factors it lists; it will merely ensure that all these factors are considered in a systematic and transparent way."

38. LORD JUSTICE WARD: I agree.

Order: Appeal dismissed.