OUTER HOUSE, COURT OF SESSION

[2006] CSOH 138

P1045/03

OPINION OF LORD PHILIP

In the Petition

of

GHOLAN HOSSEIN SHIRAZI FARSCHI

for

Judicial Review of a Decision of the Immigration Tribunal

Act: Govier; Allan McDougall
Alt: Drummond; Solicitor to the Advocate General

6 September 2006

[1] This is a petition at the instance of Gholan Hossein Shirazi Farschi for judicial review of a determination of the Immigration Tribunal dated 26 January 2002 refusing leave to appeal against a determination of an adjudicator, Mrs. C.M. Phillips, promulgated on 4 January 2002. In that determination the adjudicator dismissed the petitioner's appeal against a decision of the Secretary of State for the Home Department (the respondent) dated 16 July 2001 refusing a grant of asylum under the 1951 United Nations Convention Relating to the Status of Refugees and giving directions for the petitioner's removal from the United Kingdom.

[2] The petitioner is a citizen of Iran. He entered the United Kingdom clandestinely on 28 March 2001 and claimed asylum on 25 April 2001. The basis of his claim was that he feared persecution in Iran because he was a supporter of Mujahedin-e Khalq (MEK). In his interview with an immigration officer he said that his job, along with two other men, was to reinforce the bodies of cars for the MEK in a workshop rented by them. One day his team leader told him that one of the members of the group of three had been detained and taken for questioning by security forces in Iran. The group leader received orders to close the workshop to prevent its discovery. The petitioner decided to leave Iran as he was afraid that the detained man might give his name to the authorities. He also claimed a right to remain in the United Kingdom under Articles 2, 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the ground that his rights would be violated if he were to return to Iran.

[3] His claim for asylum was refused on the ground that he had failed to establish a well-founded fear of persecution, and that, in any event, he could have moved from Tehran, where he lived, to other parts of Iran. His claim under the Human Rights Convention was refused on the ground that he had failed to establish that there were substantial grounds for believing that there was a real risk that he would face treatment contrary to Article 3, if returned to Iran. The Secretary of State found that he had failed to establish that there was a reasonable likelihood that the authorities in Iran would have any interest in him or knowledge of his alleged involvement with the MEK. His claim under Articles 5 and 6 was rejected on the ground that those articles did not have extra territorial effect.

[4] The petitioner appealed to an adjudicator. The stated grounds were that he was a refugee facing persecution for his involvement with the MEK and, if returned to

Iran, would face the reasonable likelihood of harm, contrary to the 1951 Refugee Convention and Articles 2, 3, 5 and 6 of the European Convention on Human Rights.

[5] At paragraphs 7 and 8 of her determination and reasons the adjudicator referred to the grounds of appeal as follows:

> "Grounds of Appeal
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> 7. The grounds of appeal and statement of additional grounds are in general terms and do not address the issues raised in the Reasons for Refusal Letter. The appellant relies upon articles 2, 3, 5 and 6 of the European Convention on Human Rights. Credibility is raised as an issue in the reasons for Refusal Letter of 15 May 2001 (*sic*).
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> 8. At the hearing the appellant's representative accepted that the appellant had not given evidence of past persecution. His fear of future persecution was based upon his support for the Mujahadin. The appellant's representative therefore restricted the appellant's claim to articles 3, 5, 6, 7 and 14 of the European Convention on Human Rights although the skeleton argument refers to article 3 only. The appellant's representative relied strongly upon the case of *Jafari* (01TH10524), (see para 22) and the likelihood that the authorities would impute political opinion from involvement with the Mujahidin."

[6] In paragraphs 16, 17 and 18 of the determination and reasons the adjudicator set out the information provided by the petitioner as follows:

> "16. At the asylum interview the appellant said that he had been a supporter of the Mujahadin for 4 years. The organisation wanted to make their cars more resistant and strong. The cars would look ordinary from the outside but technically they would be different. He contacted the person from the Mujahadin and three of them began to work in a workshop that the

organisation had rented. The appellant was in charge of the front chassis and wheels and the resistance of the body. The others were in charge of the engine and the system. One of the team leaders told that one of the members of the group of three had been detained for questioning and there was no news of him. Through the team leader they were ordered to close the premises and leave. The appellant felt that they would come after the rest of the team since the team member may have disclosed their names. The appellant felt that there was no security for him so he left. He has family and relatives in the United Kingdom and feels safe here.

17. In his witness statement he added that he arrived in a container on 28 March 2001 and made his way to Glasgow. He lost his last passport in Turkey. He was a supporter of the Mujahadin as they were democratic and want free elections. In the last twenty years the government of Iran had killed intellectuals and executed thousands of Mujahadin without trial. On return to Iran he would face very severe treatment if the connection between himself and the Mujahadin was disclosed. He could not move to another part of Iran as people would question why a person from Tehran was in their area.

18. In his evidence at the hearing the appellant added that the work that he did for the Mujahadin was in connection with his business. He was self-employed and did not work solely for the Mujahadin. He was in Turkey, where he went to travel and obtain information that he could not obtain in Iran, when he met a person in the post office. The appellant suggested that he could do some work for the Mujahadin in a garage that they had. About 2 months after his return he was contacted. If they had not contacted him, he would just have continued with his work. The appellant did not join the Mujahadin he

supported them. He supported himself financially on the salary that he received from his job. He gave the Mujahadin a special discount for the work that he did for them. He could not work solely for the Mujahadin as this may have given rise to suspicion. He had to accept work from other customers in that garage. His job was to re-inforce cars. He had produced his qualifications to Home Office. In Iran his job was called metalwork of a car, but he was only qualified to deal with the suspension and steering. In Iran these parts were changed and re-inforced rather than replaced. His job did not exist in the United Kingdom. In Iran because it was expensive to get parts for cars people tended to repair rather than replace them. This was a procedure which was commonly done to cars in Iran. The incident leading to his departure from Iran took place about 1 month before his departure. When they found the co-worker did not turn up the garage closed down. The appellant went into hiding in his own house and the houses of relatives in Tehran. He had no problems with the authorities during that period. He funded his travel to the United Kingdom with money that he had retained from the sale of land. On arrival in the United Kingdom his cousin sent him some money and he travelled by train to Glasgow as he was not feeling well. He could not remember how many days he was in Glasgow before he claimed asylum. Any discrepancy in the dates was due to his confusion and nervousness. There are checkpoints at the roads and stations near the border in Iran where they check for people who have been forbidden to leave the country and for narcotics and drugs. The appellant did not have any problem leaving the country. He travelled to a town near the border with Turkey and then to the mountain area in Turkey and from a city there he travelled by lorry. He lost his passport on the journey through

Turkey. He could not explain why he had said that he had left it in Iran when he completed the screening questionnaire. On return to Iran he feared imprisonment and execution."

[7] In her assessment of the evidence the adjudicator concluded, on the basis of the objective evidence before her that the petitioner would be returned to Iran as a failed asylum seeker with or without a passport, but with an identity card. Since, on the objective evidence, such persons were of little interest to the Iranian authorities, she found that there was nothing in his individual background which suggested that there was a real risk that he would be detained or questioned or suffer ill treatment amounting to persecution on return to Iran. She was unable to accept his account of carrying out work for the MEK at his garage in Tehran because of the inconsistencies in his evidence, his lack of knowledge of the Mujahadin, the inherent implausibility of the MEK, an Iraq based militant organisation, whose members faced execution or lengthy incarceration, taking cars for standard repairs to a Tehran garage, and his failure to claim asylum on arrival.

[8] The adjudicator's decision was in the following terms:

"Asylum and the 1951 Convention

Decision

34. Given my findings as set out above, I find that the appellant has failed to discharge the low burden of proof upon him to show that there is something in his individual history in Iran which exposes him to a real risk of persecution for a 1951 Refugee Convention reason on return there. I find that the appellant's removal would not cause the United Kingdom to be in breach of its obligations under the 1951 Refugee Convention.

Human Rights - European Convention

35. The appellant's representative has submitted that the appellant's rights under Article 3 of the European Convention on Human Rights are engaged. I have considered whether the appellant's claim engages such rights. I find on the facts established, as set out above, that it does not.

Decision

36. I find therefore that if the appellant is now returned to his country of nationality, there is no real risk that he will suffer a breach of his protected rights in terms of the European Convention on Human Rights and that the decision appealed against would not cause the United Kingdom to be in breach of the law or its obligation under the European Convention on Human Rights.

Summary of Decision

37. I dismiss the appeal under the 1951 Refugee Convention.

38. I dismiss the appeal under the European Convention on Human Rights."

[9] The petitioner appealed to the Immigration Appeal Tribunal. The grounds of appeal were that there was material before the adjudicator which, properly interpreted, disclosed a reasonable likelihood that he would be perceived as a sympathiser with an opposition political group in Iran and would be at risk of persecution. The errors in interpretation on which he relied were that the adjudicator had erred (i) in attaching significance to the absence of past persecution of the petitioner; (ii) in failing to take proper account of evidence before her that the petitioner faced a real risk of persecution or violation of his rights under Article 3 of the European Convention on Human Rights were he to be returned to Iran; (iii) in relying on a Netherlands Ministry of Foreign Affairs Report dealing with the risks faced in Iran by returning asylum seekers; (iv) in attaching significance to discrepancies in the appellant's

evidence; (v) in failing to attach weight to the CIPU Country Assessment in Iran of April 2001 and the United States State Department Report which supported the appellant's fear of persecution and human rights violation; (vi) in failing to give sufficient weight to the case of *Hadami* v *Sweden*; and (vii) in failing to attach sufficient weight to the decision in the case of *Jafari* v *Secretary of State for the Home Department*.

[10] The Immigration Tribunal refused leave to appeal. Their determination was in the following terms:

> "In noting at paragraph 8 of her determination that the applicant's representative accepted that the applicant had no given evidence of past persecution, the Adjudicator did no more than record that fact and there is no indication that she regarded this in any sense as a condition precedent to recognition of refugee status. She considered the evidence, both subjective and objective carefully, and came to clear and soundly based conclusions. Her adverse credibility finding was based on a careful assessment of the evidence, and the Tribunal considers it is not reasonably susceptible to challenge as alleged or at all.
>
> In the light of her findings it is not reasonably arguable that a person with the applicant's history would face a well-founded fear of persecution on return to Iran. She was right to distinguish *Jafari* as she did and, although she did not specifically refer to *Hadani* in her conclusions, the history there was clearly distinguishable.
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> Leave to appeal is refused."

[11] At the first hearing, Mr. Govier for the petitioner argued, firstly, that the adjudicator had erred in law in failing to approach the appeal with the requisite care;

secondly, that she had erred in law by failing to exercise her jurisdiction; and thirdly, that the Immigration Appeal Tribunal had erred in failing to grant leave to appeal against the flawed decision of the adjudicator.

[12] Referring firstly to paragraph 8 of the adjudicator's determination and reasons, and in particular the sentence,

> "The appellant's representative therefore restricted the appellant's claim to Articles 3, 5, 6, 7 and 14 of the European Convention on Human Rights, although the skeleton argument refers to Article 3 only."

Mr. Govier submitted that the only proper interpretation of the paragraph was that the adjudicator had concluded that the appeal under the Refugee Convention had been abandoned and was accordingly based solely on Human Rights Convention grounds. The appeal under the Refugee Convention had not in fact been abandoned. Although there were subsequent references to the asylum claim in the determination and reasons, the decision was confused, and the adjudicator had failed to approach the claim under the Refugee Convention with the requisite care.

[13] In relation to the claim under the Human Rights Convention, Mr. Govier submitted that, in his additional grounds of appeal to the adjudicator, the petitioner had made it clear that he was relying on Articles 2, 3, 5 and 6. At paragraph 8 of the determination and reasons the adjudicator said that his claim had been restricted to Articles 3, 5, 6, 7 and 14. She gave no explanation for the omission of Article 2 or the addition of Article 14. Article 2 had been dropped from the original grounds of appeal. At paragraph 35, in rejecting the claim under the Human Rights Convention, the adjudicator referred only to Article 3. The only inference was that she had not addressed the arguments relating to Articles 5, 6, 7 or 14. In these circumstances she had failed to approach the human rights case with requisite care, and had failed to

exercise her jurisdiction in determining that aspect of the case. There was a patent error on the face of the adjudicator's determination. In that situation, the Immigration Appeal Tribunal should have granted leave to appeal. The decision not to grant leave should therefore be reduced.

[14] For the respondent, Miss Drummond pointed out that the grounds on which the petition was based had not been advanced in the appeal to the Immigration Appeal Tribunal. She submitted that when the court is asked to review a refusal of leave by the tribunal on a point not taken in the notice of appeal to the tribunal, leave should be granted only if the court is of the opinion that it is properly arguable that the point would have had a strong prospect of success had leave been granted, *R.* v *Home Secretary ex parte Robinson* [1998] Q.B. 929, *Mutas Elabas* Petitioner (2 July 2004 unreported) per Lord Reed at paragraphs 20 to 23. The petitioner also required to satisfy the court that the points on which the petition was based were obvious to the tribunal and cried out for an answer. The petitioner was unable to do so. None of the grounds of appeal to the tribunal was based on the contention that the adjudicator had considered the asylum claim to have been abandoned. The drafter of those grounds therefore rightly assumed that the asylum claim had been dealt with. Counsel for the petitioner had looked at a single sentence in paragraph 8 of the determination in isolation. The first two sentences of that paragraph clearly related to the asylum claim. If the determination was read as a whole it was clear that the asylum claim had been dealt with.

[15] Miss Drummond went on to submit that the petition was based on the adjudicator's alleged lack of care. The petitioner had to satisfy the court that the *Wednesbury* test had been met. It was not sufficient to say that any error on the face of the determination, however insignificant, showed carelessness and thus vitiated the

decision. The error must be one which would have made a difference to the decision. The adjudicator's decision was based on credibility. The errors cited by the petitioner accordingly had no material effect on the decision.

[16] In relation to the claim based on the Human Rights Convention the adjudicator had decided at paragraph 36 that none of the Articles of the Convention were engaged. That finding related to all the Articles of the Convention. The adjudicator having found that there was no real risk of persecution, it was difficult to see how any claim under the Human Rights Convention could succeed, see *Kacaj* v *Secretary of State for the Home Department* 2002 Imm. A.R. 2003. The standard of proof was the same in both Conventions. At the time of the adjudicator's determination there was doubt as to whether, in cases in which the applicant was seeking to avoid return to a foreign country, articles other than Article 3 could be relied on if Article 3 was not engaged. That doubt had now been resolved, but such articles could only be engaged in exceptional cases where there had been a flagrant denial of the right, *R (Ullah)* v *Special Adjudicator* [2004] UKHL 26. The petitioner could not say that there was even a possibility that claims under Articles 2, 3, 5, 6, 7 or 14 could succeed. The adjudicator was under no obligation to carry out a mechanical process of narrating all the evidence and analysing it into classes and explaining it factor by factor. The test was whether the determination and reasons left the informed reader in no real or substantial doubt as to the reason for the decision and the material considerations which were taken into account, *Asif* v *Secretary of State for the Home Department* 1999 S.L.T. 890 at 894G-J, *Singh* v *Secretary of State for the Home Department* 2000 S.C. 219 at 223. If the decision was read as a whole the adjudicator had satisfied those requirements.

[17] The petitioner's argument that the adjudicator should be taken to have treated his asylum claim as abandoned, is, in my view, ill founded. While paragraph 8 of her determination could have been more felicitously expressed, it seems to me that, in the first two and last sentences of that paragraph she is referring to the asylum claim. In paragraph 21 she says:

> "The appellant's representative invited me to find the appellant credible and uphold the claim on Refugee Convention and Human Rights Convention grounds."

In paragraph 30 she says that she found the petitioner's account inconsistent with a well-founded fear of persecution, and distinguished the case of *Jafari* which is an asylum case. In paragraph 33 she rejects the contention that there was a risk that the petitioner would suffer ill treatment amounting to persecution on return to Iran. In paragraph 34 she specifically rejects the petitioner's claim under the Refugee Convention. The argument that she treated it as abandoned does not therefore bear examination.

[18] I turn to consider the petitioner's arguments that the adjudicator failed to approach the human rights case with requisite care, and failed to exercise her jurisdiction. Neither of these arguments was advanced before the tribunal. The approach which the court in an application for judicial review should adopt to arguments not advanced before the tribunal was considered by the Court of Appeal in *R* v *Secretary of State for the Home Department, ex parte Robinson*, [1998] QB 929. Lord Woolf M.R. said at page 945:

> "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."

[19] In *R* v *Secretary of State for the Home* Department, ex *parte Kolcak* [2001] Imm. A.R. 666 it was held that a similar principle should be applied to issues of fact. At page 669 Stanley Burnton J. said:

"12. In cases where the parties are legally represented, it seems to me that it is not incumbent on the Tribunal, as I say, to analyse all the material to see whether there is some issue of fact which has not been taken on behalf of the applicant for asylum, and which could have been. On the other hand, if one is readily discernible, that is to say obvious in that sense on reading the material, it is one which the Immigration Appeal Tribunal should bear in mind and take into account in making its decision provided it is one which if taken would have a strong prospect of persuading the Tribunal to grant leave to appeal."

The same applies *mutatis mutandis* to the judge in an application for judicial review of the tribunal's decision.

[20] Applying this approach to the arguments advanced on behalf of the petitioner, I consider that there is, on the face of the adjudicator's determination, a certain apparent confusion as to the articles of the Human Rights Convention which were being relied on by the petitioner, and a lack of clarity as to the adjudicator's decision on the claims based on the various articles other than Article 3. While it is clear, throughout the determination, that Article 3 was being relied on and that the adjudicator properly considered and rejected the claim based on it, I do not think that the decision set out in paragraph 36 makes it sufficiently clear that it was intended to cover the claims under all of the articles of the Human Rights Convention. There is, therefore, in my view, a discernable argument that the adjudicator failed to take into

account all the matters that she ought to have taken into account, or properly to exercise her jurisdiction.

[21] It is not however enough that the points now taken in support of the motion for judicial review are arguable. The petitioner has to show that the errors in law on which he relies actually made a difference to the decision. As Lord Browne-Wilkinson said in *R* v *Hull University Visitor, ex parte* Page [1993] AC 682 at 702,

> "What must be shown is a relevant error of law i.e. an error in the actual making of the decision which affected the decision itself."

And in *Imre Fulop & Ors* v *SSHD* [1995] Imm. A.R. 323, Neill L.J. said at page 330,

> "It is always necessary to consider: what is the effect of any procedural irregularity? Is it really going to make any difference to the decision? It is only if there was a possibility of that happening that one would have to go on to consider whether it is a suitable case to grant leave to move for judicial review."

[22] In my opinion, even if the adjudicator, on the face of the determination, had done what the petitioner now says she should have done, that is, given reasons for rejecting the claims under articles other than Article 3, it would have made no difference to her decision. As I have said, she did properly consider the claim under Article 3, but she rejected it because she did not accept the veracity of the essential elements of the petitioner's claim. She did not accept that he would be of interest to the Iranian authorities if he returned to Iran, and so did not accept that there was a real risk that he would suffer ill treatment in violation of his rights under Article 3. Counsel for the petitioner made it clear that he did not seek to challenge the adjudicator's finding on credibility. In these circumstances, standing the unchallenged finding on credibility, it is inevitable that she would have rejected the claims based on

Articles 2, 5, 6, 7 and 14. Since the petitioner's evidence was not believed, there was no room for the rights under any of these articles to be engaged.

[23] Moreover, the House of Lords held in *R (Ullah)* v *Special Adjudicator* that successful reliance on articles other than Article 3, in order to resist extradition or expulsion, requires the presentation of an exceptionally strong case. Lord Bingham of Cornhill said at paragraph 24

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, para. 91; *Cruz Varas*, para. 69; *Vilvarajah*, para. 103. In *Dehwari*, para. 61 ... the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a 'near-certainty'. Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, para. 113; *Drodz*, para. 110; *Einhorn*, para. 32; *Razaghi* v *Sweden*; *Tomic* v *United Kingdom*. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on Articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes."

Lord Steyn, at paragraph 50, said:

> "It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to

be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged."

[24] For the reasons I have already set out, I am unable to see how a case based on the arguments now advanced on behalf of the petitioner could be regarded as strong. If the adjudicator had clearly dealt with the claims based on the articles other than Article 3, standing her unchallenged rejection of the petitioner's evidence, all of them would have been bound to fail.

[25] I shall accordingly sustain pleas-in-law 1 and 3 for the respondent and repel the plea-in-law for the petitioner.