ASYLUM AND IMMIGRATION TRIBUNAL

STARRED

JM (Rule 62(7); human rights unarguable) Liberia * [2006] UKAIT 00009

THE IMMIGRATION ACTS

Heard at: Field House
Date of Hearing: 16 August 2005

Promulgated: 06 February 2006

Before:

Mr C M G Ockelton (Deputy President)
Miss E Arfon-Jones (Deputy President)
Professor A Grubb (Senior Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Symonds of Refugee Legal Centre
For the Respondent: Ms R Brown, Home Office Presenting Officer

1. Rule 62(7) has effect in restricting the grounds which may be argued in a reconsideration to which Rule 62 applies. 2. If the appellant's human rights claim depends on the consequences of removal, his human rights grounds cannot avail him in an appeal against a decision that does not entail removal.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Liberia. He arrived in the United Kingdom on 3 July 2003 and was given six months leave to enter as a visitor. On 29 August 2003, he applied for refugee status. On 9 February 2004, the Respondent gave notice of his refusal to vary the Appellant's leave. The Appellant appealed under section 82 of the 2002 Act on asylum

and human rights grounds. His appeal was heard by an Adjudicator, Mr J R Devittie, who dismissed it on both grounds in a determination sent out on 21 May 2004. The Appellant applied for permission to appeal to the Immigration Appeal Tribunal on ten numbered grounds. He was granted permission on two of them. They are set out in the Vice President's reasons for her decision as follows:

> "It is asserted in the grounds of application that:
>
> (a) the Adjudicator failed to deal with the submission made on the Claimant's behalf that, as no removal directions had been set, the human rights claim could not be determined as removal could not be said to be imminent.
>
> …
>
> (b) that the Adjudicator's determination does not record the fact that the Claimant's daughter gave oral evidence and that, accordingly, her evidence has not been taken into account when the Adjudicator considered the Article 8 claim. This is arguable.
>
> Permission to appeal is granted to raise the above two points only. Permission is otherwise refused."

2. That decision is dated 29 September 2004. Following the commencement of the appeals provisions of the 2004 Act, the grant of permission operates as an order that this Tribunal reconsider the Appellant's appeal.

3. On 10 June 2005, the Appellant was notified that the hearing of the reconsideration would be on 16 August and he thereupon, through his representatives, sought to amend the grounds for reconsideration. The proposed amended grounds assert that the Adjudicator erred in law in his assessment of the personal and the country evidence; that he erred in law in failing to consider the activities of non-state agents; that he erred in law in failing to give reasons for his conclusions, and that his dismissal of the Appellant's human rights appeal was unsustainable on the evidence. As Mr Symonds of the Refugee Legal Centre (who appeared for the Appellant) recognised, it was far from clear whether the Tribunal had power to allow him to amend his grounds in this way. We are very grateful to him for the full skeleton argument that he produced, as well as for his submissions.

4. As we have said, this matter comes before the Tribunal on reconsideration, following the commencement of the appeals provisions of the 2004 Act. Those provisions came into effect on 4 April 2005. By then, the Immigration Appellate Authority and the Immigration Appeal Tribunal were both abolished and replaced by a single Asylum and Immigration Tribunal. The right of appeal from an Adjudicator to the Immigration Appeal Tribunal was abolished and replaced by a process under which, in appropriate cases, appeals are reconsidered. These changes are affected by the amendment of the 2002 Act. That Act, also

as amended by the 2004 Act, contains power to make rules for the conduct of appeals in this Tribunal, and the 2004 Act itself contains power to make transitional provisions.

5. The relevant transitional provisions are in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005 (SI 2005/656). Articles 4 and 5 are, so far as relevant, in the following terms:

> 4. Subject to article 3 [which simply postpones the effect of the following transition in cases where, at commencement, an appeal had been heard but the determination had not yet been sent out] –
> ...
> (b) any appeal to the Immigration Appeal Tribunal which is pending immediately before commencement shall continue after commencement as an appeal to the Asylum and Immigration Tribunal.
>
> 5.- (1) This article applies, subject to article 3, in relation to any appeal which
> immediately before commencement is –
> ...
> (b) pending before an adjudicator.
> (2) The Asylum and Immigration Tribunal shall, after commencement, subject to rules under section 106 of the 2002 Act deal with the appeal in the same manner as if it had originally decided the appeal and it was reconsidering its decision.

6. We do not need to set out the whole of the rule-making power. We hope that we do Mr Symonds submissions no injustice if we confine ourselves to the following:

> 106. Rules
> (1) The Lord Chancellor may make rules –
> (a) regulating the exercise of the right of appeal under section 82, or 83 or by virtue of section 109
> (b) prescribing procedure to be followed in connection with proceedings under section 82, or 83 or by virtue of section 109
> (1A) In making rules under subsection (1) the Lord Chancellor shall aim to ensure –
> (a) that the rules are designed to ensure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible, and
> (b) that the rules where appropriate confer on members of the Tribunal responsibility for ensuring that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible.
> (2) In particular, rules under subsection (1) –
> ...
> (v) may make provision about reconsideration of a decision pursuant to an order under section 103A(1) (which may, in particular, include provision about the action that may be taken on reconsideration and about the matters and evidence to which the Tribunal may have regard);
> ... .

7. The Rules are the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Contrary to Mr Symonds' submissions, we must start with Rule 62(6) and (7), which clearly apply to this appeal and are in the following terms:

> (6) Where, pursuant to a transitional provisions order, the Tribunal reconsiders an appeal which was originally determined by an adjudicator, Section 2 of Part 3 shall apply to the reconsideration, subject to paragraph (7).
>
> (7) Where –
>
> (a) a party has been granted permission to appeal to the Immigration Appeal Tribunal against an adjudicator's determination before 4 April 2005, but the appeal has not been determined by that date; and
>
> (b) by virtue of a transitional provisions order the grant of permission to appeal is treated as an order for the Tribunal to reconsider the adjudicator's determination, the reconsideration should be limited to the grounds upon which the Immigration Appeal Tribunal granted permission to appeal.

8. In his efforts to show that that Rule means something other than what it says, Mr Symonds made reference to a number of other provisions of the 2005 Rules.

9. Rule 4 is headed "*Overriding Objective*":

> 4. The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and the wider public interest.

10. Rule 14 provides that an Appellant may vary his grounds of appeal only with the permission of the Tribunal; but Rule 29 makes it clear that Rule 14 does not apply to reconsiderations.

11. Rules 26 and 27 relate to the procedure to be adopted on applications for review and orders for reconsideration made after commencement. Rule 26 provides, amongst other things, that the Immigration Judge (in fact a Senior Immigration Judge) deciding an application for review is to do so by reference only to the applicant's written submissions and the documents filed with the application notice and is not required to consider any grounds for ordering the Tribunal to reconsider its decision other than those set out in the application notice. Rule 27 requires the decision to be in writing and to include reasons. Rule 27(2) is as follows:

> 27(2) Where an immigration judge makes an order for reconsideration –
>
> (a) his notice of decision must state the grounds on which the Tribunal is ordered to reconsider its decision on the appeal; and
>
> (b) he may give directions for the reconsideration of the decision on the appeal which may –
>
> (i) provide for any of the matters set out in rule 45(4) which he considers appropriate to such reconsideration; and

(ii) specify the number or class of members of the Tribunal to whom the reconsideration shall be allocated.

12. Rule 31 is headed "*Procedure for reconsideration of appeal*" and is as follows:

> 31(1) Where an order for reconsideration has been made, the Tribunal must reconsider an appeal as soon as reasonably practicable after that order has been served on both parties to the appeal.
> (2) Where the reconsideration is pursuant to an order under section 103A -
> (a) the Tribunal carrying out the reconsideration must first decide whether the original Tribunal made a material error of law; and
> (b) if it decides that the original Tribunal did not make a material error of law, the Tribunal must order that the original determination of the appeal shall stand.
> (3) Subject to paragraph (2), the Tribunal must substitute a fresh decision to allow or dismiss the appeal.
> (4) In carrying out the reconsideration, the Tribunal –
> (a) may limit submissions or evidence to one or more specified issues; and
> (b) must have regard to any directions given by the immigration judge or court which ordered the reconsideration.
> (5) In this rule, a 'material error of law' means an error of law which affected the Tribunal's decision upon the appeal.

13. Rule 31 is in Section 2 of Part 3 of the Rules, and so applies to this appeal by virtue of Rule 62(6), subject only to Rule 62(7).

14. Rule 43 empowers the Tribunal to decide the procedure to be followed in relation to any appeal or application, that power is expressly "*subject to these rules*". Rule 45 is a general power to give directions, again specifically "*subject to any specific provisions of these rules*".

15. Mr Symonds directed his submissions to showing first, that, in a case proceeding entirely under the new appeals provisions, there would be power at the time of any reconsideration to amend the grounds for review which had originally been submitted, and secondly, that cases covered by transitional provisions, such as the present, should be treated in broadly the same way. We find, however, that we do not accept the second part of that argument: and it follows that the first part is redundant in this case.

16. In our judgment, there are very good reasons for treating cases covered by transitional provisions in a different manner from those governed entirely by the new appeals provisions. The new appeals provisions are intended to create a different appellate system. The transitional cases are those left over from a system in which there was a true appeal from the Adjudicator's determination. Cases governed entirely by the new provisions have no such appeal rights. In any event, there is clearly nothing in the remainder of the Rules that is equivalent to Rule 62(7): that fact of itself is sufficient to dispose of any argument that cases covered by transitional provisions are to be treated for these purposes

in the same manner as cases arising entirely under the new appeals provisions.

17. It is true that, under the 2003 Procedure Rules applying to appeals to the Immigration Appeal Tribunal, the appellant could have applied to amend his grounds of appeal and even to argue grounds on which permission to appeal had been refused. The matter was, however, within the discretion of the IAT. In his submissions to us, Mr Symonds appears to argue that the IAT had no jurisdiction to refuse to hear a good ground of appeal. That was not, however, the case. If it were, there would never be any reason to raise a good ground in advance. The true position is that if some reason for late submission of grounds, or for the need to amend, is given, then the merits of the proposed new grounds will play a part in deciding whether the reason is good enough to allow the amendment or to allow time to be extended. Further, it cannot be said that the regime that was in force immediately before the commencement of the present appeal provisions encouraged tardiness on the part of claimants. If a claimant wished to amend his grounds of appeal to the IAT, we can see nothing in those Rules that would have discouraged him from doing so immediately he received the grant of permission to appeal.

18. Further, before the commencement of the present appeal provisions, the parties had the option of seeking to reverse or amend the grant of permission by application for Statutory Review. Statutory Review was not Judicial Review, and so the fact that an amendment to the grounds could be allowed by the IAT did not preclude applications for Statutory Review on the basis that permission to appeal should have been granted on more grounds than it was granted. It is within our own experience that such applications for Statutory Review were made, and were sometimes successful.

19. There is a clear contrast with appeals governed entirely by the new appeals provisions. The application for review of the Immigration Judge's decision, although nominally an application to the High Court, is made to the Tribunal under arrangements governed by paragraph 30 of Schedule 2 to the 2004 Act. The member of the Tribunal dealing with the application does not "grant" or "refuse" it: he either orders reconsideration or makes no order. The application may be renewed to the High Court if the Tribunal makes no order. If the Tribunal orders reconsideration, that is the end of the matter so far as the application is concerned. There is simply no power to ask the High Court to add further grounds.

20. The extent to which further grounds can be added at the reconsideration stage in a case governed entirely by the new appeals provisions is not, we think, a matter which we should decide on this reconsideration. This is a case governed by the transitional provisions and, as we have shown, transitional cases are different. They are

governed by their own Rule – Rule 62: and if a reason for the different treatment of them in the 2005 Rules is required, it may perhaps be found in the fact that, having been subject to a different regime before 4 April 2005, claimants have had ample opportunity already to ensure that they have permission to argue all relevant grounds. Mr Symonds' argument is to the effect that, if an appellant has not taken the opportunity to put things right promptly, it is unfair for Parliament to deprive him of the opportunity to do the same thing after a period of delay. We do not agree.

21. It is true that, as Mr Symonds pointed out, there is an infelicity in the wording of Rule 62(7) in a case where there has been a successful application for Statutory Review. It looks as though even where the application for Statutory Review has been successful, the grounds for reconsideration should be those ordered by the Immigration Appeal Tribunal, not those added by the judge. That, of course, cannot be right: but it does not show that the Rule is to be interpreted in the way Mr Symonds suggests. It is apparent that for the purposes of Rule 62(7) the order of the judge on Statutory Review is taken to be, or at least to be part of, the grant of permission by the Immigration Appeal Tribunal. That is indeed what in effect it is. By reading the Rule in that way, it is given an interpretation which is in our judgment appropriate in context and sensible. The effect of reading it in the way proposed by Mr Symonds would be that it had the opposite effect to that expressed: his principal submission is that, despite Rule 62(7), the reconsideration should not be limited to the grounds upon which the Immigration Appeal Tribunal granted permission to appeal. That interpretation of a clear rule is unacceptable. It is abundantly clear from the structure of Rule 62, in particular paragraphs (6) and (7), that in a case subject to the transitional provisions order there is a limitation on the scope of the reconsideration.

22. We referred above to the rule-making power in the statute, not because Mr Symonds made any claim that the Rules were ultra vires but because it is clearly appropriate to look at the terms of the rule-making power in order to assess any submissions made on the meaning of the Rules themselves. As we noted, the statute expressly envisages rules restricting matters to which the Tribunal may have regard on reconsideration. Mr Symonds placed great emphasis on the requirement, both in section 106 and in Rule 4, for the Rules to secure that proceedings are determined "*fairly*". Mr Symonds submitted that it was unfair not to allow a claimant in particular (though the same would have to apply to the Secretary of State) to suffer for his delay in asserting the rights he now claims. We do not agree. Those who make asylum and human rights claims in particular assert matters which, if established, are of the highest importance to them. As succeeding legislation has made clear, an attempt will be made to deal with those claims as swiftly as possible. It cannot properly be said that some unfairness arises if a claimant finds that having not made his claim (or

part of his claim) promptly, he is not able to make it at all. Similar considerations apply to the delay by the Secretary of State in the appellate process. To put it in more general terms, a concept of fairness in the overriding objective simply does not imply that the party at whose instance the litigation takes place should suffer no penalty for tardiness or indolence.

23. We should refer briefly to an alternative interpretation of Rule 62(7) proposed by Mr Symonds. In his written skeleton, it appears as follows:

> "These words mean only that the AIT is to limit the hearing to submissions (and evidence) to the issue of material error of law: see the President's Practice Direction, 4 April 2005 … at paragraphs 14.7 to 14.9."

24. As it stands, that suggestion is incoherent. Mr Symonds expanded it in his oral submissions by reference to Rule 31. Self-evidently Rule 31 envisages a two-stage procedure in reconsiderations. The second stage, however, will only be reached if the result of the first is that the Tribunal takes the view that there was a material error of law in the previous determination. The Practice Direction envisages and regulates the circumstances in which the two stages of a reconsideration will take place on two separate occasions: but the duality of the process derives from the Rules, not the Practice Direction. Mr Symonds suggested that any restriction on the grounds imposed by Rule 62(7) has effect only at the first stage of any reconsideration and not at the second stage if there is a second stage. Thus, the limitation on the grounds would apply to the ascertainment of any material error of law; but if a material error of law was found, there would then be no restriction on the basis of the reconsideration.

25. We are unable to accept that interpretation of Rule 62(7). There is no doubt that Rule 31 treats the whole of the two-stage process as the reconsideration; and it is the "*reconsideration*" that has the limit imposed upon it by Rule 62(7). The words of Rule 62(7) simply cannot apply to one part but not the other part of a process described by Rule 31.

26. For the foregoing reasons, we hold that, with three reservations, Rule 62(7) means what it says. We are not persuaded that there is any reason it should not mean what is says; and in our judgment it is not unfair to have required those, who sought to take advantage of the existence of an appellate process to enlarge their grounds, to do so before the appellate process ceased to exist. Their situation is different from that of those who come after; they are not unfairly treated; and there is in any event nothing in the Rules or the 2002 Act which would enable us to give a meaning to Rule 62(7) other than that which it appears on its face to bear in restricting the ambit of a reconsideration in cases to which transitional provisions apply.

27. The three reservations are as follows. First, in our view Rule 62(7) is to be read in the light of any order made on Statutory Review: such order is to be treated as though it were incorporated in the Immigration Appeal Tribunal's grant of permission to appeal. Secondly, Rule 62(7) cannot prevent a challenge to jurisdiction and so enlarge the jurisdiction of the Tribunal: see SS (Somalia) [2005] UKAIT 00167. Thirdly, there is also a need to make allowance for obvious points of Refugee Convention law in the Robinson [1997] Imm AR 568 sense.

28. In the present reconsideration, the Appellant is accordingly restricted to the grounds upon which leave to appeal to the Immigration Appeal Tribunal was given. The Appellant cannot therefore challenge before us the dismissal of his appeal on asylum grounds: the grant of permission to appeal related purely to his dismissal of the appeal on human rights grounds.

29. The first of those grounds is of some interest, because of the way in which the issue has subsequently been treated by the Appellant's present representatives. It is clear from the ground and the grant of leave that, before the Adjudicator, the Appellant's position was that, as there was no intention to remove him, the Adjudicator could not deal with any breach of his human rights on removal. Grounds were put in to protect the Appellant's position, but the argument in the grounds is clearly that the Adjudicator should not have dealt with a human rights appeal depending solely on removal. The amended grounds, however, and Mr Symonds' brief submissions before us, make it clear that the Appellant's present position is entirely to the contrary. What he now seeks to argue is the reverse of what was argued in the grounds: he seeks to establish that in an appeal against a decision which does not give the Secretary of State any entitlement to remove an individual without making a further appealable decision, an appellant has a right to raise human rights grounds as though the second decision had already been made.

30. For the reasons we have given at some length earlier in this determination, it is not open to the Appellant to change his grounds of challenge in that way. We consider the issue on the basis on which it was put in the grounds.

31. It is sufficient for present purposes to say that we have considerable sympathy with the view that an Adjudicator should not consider the human rights implications of any decision which has not yet been made. The refusal to vary leave to remain is, if the effect of the refusal is that the claimant has no leave to enter or remain in the United Kingdom, an immigration decision appealable under s82. The asylum and human rights grounds of appeal are both in similar terms and are in s84(1)(g). They are the grounds:

> "that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the

> Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

32. Although Refugee Convention and Human Rights Convention rights are there treated together, there is a difference between them: a person who is in law a refugee has a status. A person who is merely one whose human rights inhibit his removal has no international status as such. As a result, in Saad, Diriye and Osorio v SSHD [2001] EWCA Civ 2008, [2002] INLR 34, the Court of Appeal, interpreting provisions similar to those in s84(1)(g) in respect of asylum grounds, held that the appellate authorities had a duty to ascertain the status of the appellants as refugees or not even if their removal was not imminent. It is true that the precise situation of those appellants is probably now covered by s83 of the 2002 Act, but Saad, Diriye and Osorio must still be authority for the correct interpretation of s84(1)(g) as it applies to asylum appeals.

33. The human rights position is different. The Appellant does not claim to have a status: he simply claims that he should not be removed. It is important to appreciate that, in any case in which this issue arises and to which the transitional appeal provisions apply, the Appellant is a person who, by asserting human rights grounds in his notice of appeal or one-stop notice to the Secretary of State, has made a "*human rights claim*" within the meaning of s113(1) and hence also s92(4) of the 2002 Act. He thus has an in-country right of appeal against the decision to issue removal directions against him under s10 of the 1999 Act as an overstayer if such a removal decision is ever made. He cannot be removed without the making of such a decision. If he is removed, it will not be "*in consequence of*" the decision to refuse to vary his leave, but "*in consequence of*" the decision to remove him. We are aware that it has sometimes been said that, in dealing with a refusal to vary leave to enter or remain, the appellate authorities should deal also with human rights on removal on the basis that removal is imminent: but it is not imminent in any legal sense because of the need for a further decision. So much is clear from the European Court of Human Rights decision in Vijayanathan and Pushparajah v France (1992) 15 EHRR 62. Our own experience suggests that this argument in fact ignores the realities as well as the law. A very small proportion of those who lose immigration and asylum appeals are ever subject to involuntary removal; when removal does take place it is often a very considerable time after the appeal decision. The argument would also require the Tribunal to assume that any officer charged with making a removal decision will ignore the claimant's human rights. There can be no proper basis for that assumption. For all these reasons, if there are human rights issues to be raised, they should be raised at the moment when removal is threatened, not simply at the moment when it becomes theoretically possible.

34. For those reasons, we agree with the Appellant's grounds on this issue as they were originally proposed. Miss Brown did not dissent from the

Appellant's original view that the Adjudicator should not have considered human rights on removal; she also undertook in the present case that the Secretary of State would not use the certification process to remove any rights of appeal that the Appellant might otherwise have if a removal decision is eventually made against him. We would also observe that since the Appellant's human rights could not be raised in this appeal, we see no scope for the application of the certification procedure in s96 in respect of his human rights in any subsequent appeal.

35. The second ground upon which permission to appeal to the Immigration Appeal Tribunal was given relates to the Adjudicator's treatment of the evidence going to the human rights appeal. In view of our decision on the first ground, this ground falls away.

36. As we noted at the beginning of this determination, the Adjudicator dismissed the appeal on asylum and human rights grounds. His dismissal of the appeal on asylum grounds is not validly challenged in this reconsideration. He erred in law in considering the human rights grounds in substance, but his error was not material because insofar as the appeal against refusal to vary leave depended on the human rights consequences of a different decision, he was bound to dismiss the appeal on human rights grounds.

37. There was no material error of law in the Adjudicator's determination, which we accordingly order shall stand.

C M G OCKELTON

DEPUTY PRESIDENT