EA (Immigration - Rule 48(5)) Ghana [2004] UKIAT 00227

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 9 August 2004
Date Signed: 9 August 2004
Date Determination Notified: 18 August 2004

Before:

Mr S L Batiste (Vice-President)
Mr G F Sandall
Mr S S Percy

Between

Appellant

and

ENTRY CLEARANCE OFFICER, ACCRA

Respondent

DETERMINATION AND REASONS

For the Appellant: Mr A McGregor, instructed by Messrs Afrifa & Co.
For the Respondent: Ms T Hart, Presenting Officer.

1. The Appellant, a citizen of Ghana , appeals, with permission, against the determination of an Adjudicator, Mr S M Southgate, dismissing her appeal against the decision of the Respondent on 19 February 2002 to refuse entry clearance as a spouse of a person who is present and settled in the United Kingdom.

2. The Adjudicator dismissed the appeal for three reasons, after having accepted that there was a subsisting marriage between the Appellant and her husband, the sponsor. First, he was not satisfied on the evidence before him that the Appellant had the intention of living permanently with the sponsor. Second, he was not satisfied that the sponsor had adequate accommodation for himself and the Appellant in property which he owned or occupied exclusively, and without recourse to public funds. Third, he was not satisfied that the Appellant and the sponsor would be able to maintain themselves adequately without recourse to public funds.

3. The grounds of appeal, as advanced by Mr McGregor before us, are essentially on a narrow basis. The Adjudicator recorded in paragraphs 3.1 to 3.2 that at the commencement of the hearing before him, the Appellant's representative sought to file further evidence in support of the appeal. This evidence contained amongst other things a witness statement from the sponsor. However standard directions had been given to the effect that all documents to be relied upon at the hearing had to be filed with the Tribunal in triplicate at least fourteen days before the hearing. The Appellant's solicitors had confirmed in their form of reply of 25 June 2003 that they were ready to proceed in all respects. The hearing took place on 28 August 2003. The Adjudicator referred the Appellant's representative to the breach of directions and to Rule 48(5) of the Immigration and Asylum Appeals (Procedure) Rules 2003, and invited him to make submissions as to why there were any good reasons for admitting the new evidence. The case was put to the back of the list to give the Appellant's representative time to take instructions and prepare. When the hearing resumed later that day there was a letter from the Appellant's solicitors, Messrs Afrifa & Co confirming that the senior partner took full responsibility for not complying with directions, as "the file had gone to sleep". He asked the Adjudicator to accept the bundle and not punish the Appellant for his mistake. The Adjudicator concluded that there had been some eighteen months since the Respondent's decision, to prepare for the appeal and there was no good reason given for the breach of directions. He therefore refused to admit afresh evidence and proceeded to determine the appeal on the evidence available.

4. Mr McGregor has argued that this decision amounts to an error in law, which requires the remittal of the appeal to be heard afresh by another Adjudicator. Ms Hart disagreed. It is with this issue that we are mainly concerned in this appeal, though an Article 8 point was also made to which we shall refer later.

5. Rule 48(5) of the Immigration and Asylum Appeals (Procedure) Rules 2003 states as follows.

> "An Adjudicator or the Tribunal must not consider any evidence which is not filed or served in accordance with time limits set out in these Rules or directions given under rule 38, unless satisfied that there are good reasons to do so."

6. We note at this point that under Rule 48(5) an Adjudicator does not have an unfettered discretion to admit new evidence. He is prohibited from considering any evidence not filed in accordance with the time limits set, unless he is satisfied that there are good reasons to do so. The Adjudicator cited this Rule in the determination and so clearly directed himself to the appropriate framework within which he had to make this decision. It is also clear from the determination that he invited the Appellant's representative to address him on the relevant issues. He gave time to enable this to be done. The only argument eventually raised by the Appellant's representative in response as to why there was good reason to admit the late evidence was that there was a solicitor error for which the Appellant should not suffer.

7. Mr McGregor then directed us to a recent case of the Tribunal in **MD (Good reasons to consider) Pakistan [2004] UKIAT 00197**. He acknowledged that the facts were materially different. That was an asylum appeal in which the Adjudicator had refused to receive a witness statement presented on the morning of the hearing, in breach of directions, and consequently refused to allow the claimant to give oral evidence. He therefore determined the appeal without a hearing. That Tribunal noted that the directions given in that appeal for the filing of documents were the standard directions, as they are in the appeal before us, and they went on to offer some guidance on Rule 48(5) in the following terms.

> 10. The Adjudicator may well have appreciated that the Rule prohibited the consideration of evidence served late but that prohibition is subject to the qualification "unless satisfied that there are good reasons to do so". There is nothing in the determination to suggest that the Adjudicator asked if there were good reasons why he should receive the evidence. That is not the same thing as asking if there were good reasons why the evidence had been served late. We have to say that the grounds of appeal suggest to us very strongly that there were no good reasons for the evidence being served late. If as is suggested, the Appellant had difficulty maintaining contact with his solicitors, or them with him, then it is a difficulty that could have been remedied by telephone calls, letters, travelling, using local agents, or instructing a different firm.
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> 11. Although it may be easy for an Adjudicator, faced with an Appellant who has failed to comply with directions and who has not disclosed his case, to forget how important his decision may be, it is incumbent on him to remember his duty. Rule 4 provides "the overriding objective of these Rules is to secure the just, timely and effective disposal of appeals". In a case considering the proper application of paragraph 45(2) Barnes V-P said
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> > "Adjudicators should be conscious that part of their overriding duty is to ensure a just disposal. Partly this is because a just disposal will be a final disposal; partly because there is a duty on immigration judiciary to give the most anxious consideration to applications which involve a claim that their makers fear persecution for a Convention reason if returned to their own country or, since the introduction of the Human Rights Act 1998, that they will suffer inhuman or degrading treatment contrary to Article 3."
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> 12. The Procedure Rules provided for the oral hearing of an appeal. The Appellant wanted to give evidence and produced a witness statement, albeit late. Adjudicators have a duty to apply the most anxious scrutiny and the high standards of fairness to the Appellant's case.
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> 13. One of the problems of the late disclosure of evidence is that it can cause unfairness to the Secretary of State who is expected to respond to a case that he has not considered. This does not mean that it will always be right to exclude evidence that is served late. Often late service of evidence will not really cause any difficulty to the other side,

> usually the Secretary of State. Often a witness statement simply repeats points that have been made previously but puts them into a better order or makes points that might be dealt with better in cross-examination in any event. Where this Adjudicator in our view was clearly wrong is that he decided to exclude the evidence upon which the Appellant wanted to rely without inquiring if there were any "good reasons" to admit the evidence, including if admitting it would cause any unfair problems to the Secretary of State.
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> 14. Faced with an application of this kind it is clear that the Adjudicator should have reminded himself of the requirements of Rule 48(5) and addressed his mind specifically to the points raised there and particularly, if he decided to exclude the evidence, explain carefully why he was not satisfied that there were good reasons to consider it.
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> 15. We do not intend to make an exclusive list of "good reasons" but the Adjudicator should have inquired into the significance of the evidence, the reason for the late submission and any problems that late service would cause to the other side. "Good reasons" must mean more than that the evidence is relevant. Adjudicators never have to consider evidence that is not relevant at all. However "good reasons" could include the fact that the evidence is highly pertinent; that it could not have been served in accordance with directions; that the other side had notice of the failure of the evidence and that considering it causes no unfair difficulty to the other side"…….

8. Mr McGregor has argued that the Adjudicator did not undertake such inquiry and that this general guidance is as applicable to immigration appeals as to asylum appeals, both of which covered by the same Procedure Rules. Ms Hart has argued that the Adjudicator's decision was properly open to him and does not reveal any arguable error of law, which is the only basis upon which the Tribunal can intervene. We have considered their detailed submissions.

9. We begin by observing that Rule 48(5) plainly applies to both asylum and immigration appeals. However there are material differences inherent in different types of application, and those differences impinge upon what may constitute "good reasons" in any particular case. The Tribunal in MD Pakistan was dealing with an asylum appeal in which the claimant's case was not apparent from the case file. The consequences of this are highlighted in the quotation from the determination of Barnes V-P, where he describes the particular dangers faced in deciding such appeals without hearing the evidence as a whole. A failed asylum seeker may be returned to a country where he will face death or torture. To have the right in those circumstances to sue his solicitors for negligence is of little benefit or comfort to him. Also the proper determination of the issues arising in an asylum appeal is a final determination. There is no ability in reality to repeat the application on the same basis of claim. Furthermore in asylum appeals it may be very difficult to get evidence in the time available. Additionally, although the burden of proof is on the claimant, the standard of proof is much lower than in immigration appeals to reflect these difficulties. All this is why the concept of "anxious scrutiny" exists and is so important in asylum appeals and why

Adjudicators should, as indicated in MD Pakistan be very cautious indeed in reaching decisions that do not take into account all the substantive evidence and submissions.

10. The position in immigration appeals against refusal of entry clearance is however materially different. Whilst applicants will be anxious to secure expeditious entry clearance, life and death issues do not normally arise if they fail. The applicant is normally out of country. There is generally plenty of time after the Respondent's decision to provide evidence before an appeal hearing and there should be no difficulty in providing it. An unsuccessful claim can be repeated so often as is wished, if better evidence becomes available. A claim of negligence against an incompetent solicitor is a viable proposition if loss has been incurred thereby. The Respondent in immigration appeals for entry clearance is generally an Entry Clearance Officer, stationed abroad. It is less easy for a Presenting Officer to get immediate instructions. The acceptance of late evidence, if it is of any material significance, may well require an adjournment in fairness to the Respondent with further consequent delay. Most of all, the imperative of "anxious scrutiny" does not apply in immigration appeals and this is relevant when assessing the "overriding objective" in Rule 4, where the factors to be balanced are "the just, timely and effective disposal of appeals and applications in the interests of the parties to the proceedings and in the wider public interest". Thus whilst Rule 48(5) applies equally to immigration and asylum appeals, what would constitute "good reasons" for failing to comply with directions may be very different in each, and it may well be much easier to establish them in asylum appeals than in immigration appeals.

11. Within this context, we have assessed what the Adjudicator actually did in this appeal. First we note that he correctly directed himself to the terms of Rule 48(5) as recommended by the Tribunal in MD Pakistan. Next he invited the Appellant's representative to make all necessary submissions relating to the admission of the late evidence under Rule 48(5) and put the hearing to the back of his list to give time for preparation. When the case resumed, he carefully considered the reasons advanced. He gave his reasons for rejecting them as being "good reasons" under Rule 48(5). All this is in line with the guidance given by the Tribunal in MD Pakistan. The Adjudicator is not required to guess what is in mind of the Appellant's representative once he has invited him to make full submissions. He should deal properly with the submissions that are made and this he has done. He then went on to deal with the appeal on the basis of the available evidence. Another material difference from MD Pakistan is that in this appeal, the nature of the application was fully described on the case file together with the supporting evidence submitted to the Respondent and the notes of the Appellant's interview. We cannot see any error in the Adjudicator's approach to the application of Rule 48(5) in the context of this appeal. Having had her appeal dismissed on the evidence available, the Appellant now has the opportunity to make a further application to the Respondent if better evidence can be offered.

12. The grounds of appeal also argue that the appeal engages Article 8 and the Adjudicator did not deal with it in the determination. That no doubt is because no

Article 8 claim was raised in the grounds of appeal to the Adjudicator, or subsequently to him. The decision by the Appellant not to raise Article 8 (if indeed any thought was given to this matter by her solicitors) may well reflect the decision of the Tribunal in M (Croatia) [2004] UKIAT 00024* that the test is whether the decision of the Respondent under appeal was lawfully open to him. On the Adjudicator's sustainable findings of fact, the decision plainly was lawfully open to the Respondent, as the application does not satisfy three of the requirements of the relevant Immigration Rules, and no exceptional circumstances have been advanced. There could be no successful Article 8 appeal on the facts of this case

13. For the reasons given above this appeal is dismissed.

Spencer Batiste
(Vice President)

Approved for electronic transmission