WT (Adjournment; fresh evidence) Ethiopia [2004] UKIAT 00176

IMMIGRATION APPEAL TRIBUNAL

Date: 14th June 2004
Date Determination notified:
29 June 2004

Before:

Mr Justice Ouseley (President)
Miss B Mensah (Vice President)
Mr C P Mather (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Appearances:
For the Appellant: Mr L A Jackson of Thakrar & Co
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of an Adjudicator, Mr R J Manuell, promulgated on 5th November 2003. By that determination, he dismissed the Appellant's appeal on both asylum and human rights grounds against the decision of the Secretary of State to refuse him asylum and to issue removal directions to Ethiopia dated 14th May 2003. The Appellant is a citizen of Ethiopia, born in February 1970, who claimed asylum upon arrival in the United Kingdom on 15th March 2003.

2. The Appellant's case in summary was that he was a television cameraman who became a reporter working for Ethiopian Television, but because his work had been censored, he had been suspended for five months from Ethiopian Television in

2001 and had given news reports to the private press. In December 2002, security forces arrested him and took him to a political prison where he was detained without charge for 1½ months, beaten and harassed. In mid-January 2003, he was charged with supplying information to the private press and with working against the government; he was later released on bail.

3. At the end of February 2003, he had attended a meeting to discuss a new press law at which he had spoken his mind, but found that he was warned in consequence of what he said. Fearing the effect of the court summons which he received at the beginning of March and fearing that he would not receive a fair trial, he decided to leave Ethiopia. He took with him his six-year-old son at his wife's insistence. He said that if he returned to Ethiopia, the authorities would try to kill him and that he would be taken to prison where he would be tortured.

4. The Appellant produced a number of documents in support of his case including a medical report dated 8th July 2003 prepared by Dr Olunfunwa, a GP who examined the Appellant on a number of occasions after 9th April 2003. Counselling with the Medical Foundation had also begun in August 2003.

5. The Adjudicator did not accept that the Appellant was credible. He set the Appellant's claim, that he faced persecution by the government because of an imputed or actual political opinion, in the context of the variety of background material which the Adjudicator concluded showed that although some journalists at times experienced problems, there was a surprisingly high degree of freedom of expression, but that it co-existed with open manipulation of the media and resort to threats in some cases. He continued, in paragraph 40:

> "The examples of penalties imposed which are given by the US Department of State Report show that the court process is used and that cases and decisions are reported. It is significant that many of the individual journalists are cited by name. The penalties imposed tend to have been far less than those which the Appellant suggests he would face. I consider that the Respondent's account of conditions in Ethiopia is excessively rose-hued, but that the Appellant's views are exaggerated and excessively bleak."

6. The Adjudicator concluded that the Appellant's written evidence provided no cogent detail about the most material events, which he found difficult to understand in view of the length of the statements provided. Much of the evidence was sketchy and he could see no reason why the work produced by the Appellant would have been considered objectionable by the government "*given its toleration of the outspoken private press and of foreign correspondents*". He also said that it was difficult to see why the authorities had waited some eighteen months before bringing any charges and had pursued the Appellant rather than the

publishers.

7. The Adjudicator concluded the Appellant was trying to make up the gaps in his written evidence during the course of his oral evidence. He gave a number of instances as to why he reached that conclusion. These related to his contact with lawyers about the summons which he received and to his lack of knowledge of the fate of his brother-in-law who had stood bail for him, which the Appellant had breached.

8. The Adjudicator also concluded that the summons which the Appellant produced was not merely second-rate but was of no real value, given the absence of particulars and the unusual mode of service at the Appellant's place of work. The Adjudicator also found a document produced in support of the claim to have received a warning letter from Ethiopian Television after his participation in the conference on the new press law to be rather curious, both in format and in content.

9. The Adjudicator then turned to the claim made by the Appellant that he had been tortured in prison some five months before he was examined by the GP in London. He commented as follows, in paragraph 49:

> "Dr Olunfunwa, however, found no signs of physical injury which began to correspond with the Appellant's account of imprisonment in Ethiopia. The CIPU Assessment describes prison conditions as poor, with inadequate food: see paragraphs 5.72ff. The US Department of State Report describes the prisons as '*unsanitary*'. 6 weeks in an Ethiopian prison, especially if accompanied by torture, would be expected to be harmful to health. Dr Olunfunwa said the Appellant was in good health. He did not state that he considered the extent to which the Appellant's depression might have been caused or contributed to by the Appellant's absence from his wife and home, but uncritically accepted the Appellant's explanation. It thus seemed to me that little weight could be placed on the medical report as corroboration for any of the Appellant's claims. His lack of any signs of physical injury indicated that any ill treatment he had suffered in prison was far less severe than he claimed, indeed, cast doubt on his claim to have been imprisoned recently at all."

10. In paragraph 50, the Adjudicator concluded that the Appellant's claims in this respect sat uncomfortably with his ability to instruct a lawyer, to obtain bail, and to return to his work as a journalist after his release. He concluded that no explanation had been offered for the Appellant's treatment, apart from generalised government repression and the Adjudicator concluded that it was unlikely that the Appellant would have been tortured at all in the circumstances he described. The Adjudicator said:

> "Torture (punishment or sadism apart, neither of which apply on the Appellant's account of events) is administered to extract information which is not otherwise forthcoming. The alleged evidence against the Appellant was already available in the form of his newspaper articles.

> His place of employment at ETV was known. His personal history can have been no secret. There was, in short, no reason to torture the Appellant."

11. The Adjudicator continued, pointing out that, taking the evidence in the round, it seemed that the Appellant could not be treated as a reliable witness and that his evidence was seriously unreliable in almost all material respects. He continued to reject the claims that the Appellant had been pursued by the Ethiopian government or its agents or that he had been arrested, tortured, detained or imprisoned, or subject to any court process. He rejected the claim that he was of any prominence as a journalist and rejected the medical evidence for the reasons he gave in paragraph 49 and for its dependence on the Appellant's unreliable testimony, rather than observed physical evidence. He went through other matters in some detail adhering to his conclusions.

12. However, at the outset of the hearing on 10th October 2003 the Appellant, then, as now, represented by Mr Lee Jackson, had made a further application to adjourn the hearing. This time the application was made on the grounds that the Appellant had had an examination by the Medical Foundation on 8th October 2003 with a view to the provision of a medical report by 3rd December 2003, although no commitment could be given to that date. The Adjudicator refused the application "*because of the further and uncontained delay, which any further evidence would have entailed. I considered that there was sufficient evidence already available on which the Appellant's reliability could be fairly assessed*". This was, in fact, the second application for an adjournment, because on 26th August 2003 another Adjudicator had granted the Appellant an adjournment in order to enable video evidence to be filed and served. It had not been made on the basis that an appointment with the Medical Foundation had been made because, as we were told, the appointment was not itself made until 12th September 2003 and no adjournment was sought, perhaps understandably, on the mere grounds that the Appellant was seeking an appointment with the Medical Foundation. He had commenced counselling with the Medical Foundation at some time in August 2003, having been referred to the Medical Foundation on 15th March 2003 upon arrival in the United Kingdom.

13. Leave to appeal to the Tribunal was sought on the basis that the Adjudicator erred in law in failing to adjourn the appeal because it could not be justly determined without the Medical Foundation report. The Appellant had already seen the Medical Foundation, a date for the production of the report was known, although not guaranteed, and the Adjudicator ought to have exercised his discretion so as to adjourn the hearing beyond the closure date in the 2003 Procedure Rules. There were other criticisms of the

findings made in respect of detention and torture and various other findings which were made by the Adjudicator were also criticised.

14. Leave to appeal was refused. The Vice President pointed out that the Appellant had had ample time to obtain medical evidence before the hearing (which need not necessarily have been from the Medical Foundation) and the Adjudicator was correct in refusing to adjourn the hearing. She continued:

> "The Adjudicator discounted the appellant's account of torture for the reasons set out at paragraph 51-54. Those paragraphs are soundly and cogently reasoned, and the appellant's Grounds of Appeal do not disclose an arguable error in that reasoning. He repeats his argument that as a person in breach of his bail conditions, the appellant risks return to detention and similar ill-treatment. However, given that the appellant left Ethiopia openly on his own documents, that is not a sustainable argument (paragraph 53 and 56 of his determination).
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> The appellant further contends that the Adjudicator's other negative findings are unsustainable. Essentially he disagrees with the Adjudicator's assessment of the factual matrix. The Adjudicator's factual reasoning is careful, sound and sustainable. Permission to appeal to the Tribunal now lies on a point of law only, including a factual error sufficient to amount to an error of law (perversity or *Wednesbury* unreasonableness). These Grounds of Appeal do not disclose any error of law which would have made a material difference to the outcome of the appeal. There is no other compelling reason for the appeal to be heard."

15. Statutory Review of that refusal was, however, granted and the decision of the Tribunal reversed because the Vice President had assumed, in refusing leave, that the Medical Foundation evidence had not been provided to the Tribunal. It may very well not have been with her, but was somewhere within the purlieu of the Tribunal and ought to have been associated with the case file. The report was considered potentially relevant and significant which "*could*" have some bearing on the Appellant's credibility. The justice of the case required it to be considered by the IAT.

16. The first issue is whether it was wrong in law for the Adjudicator to refuse an adjournment on 10th October 2003 in order to receive the eventual Medical Foundation report. Rule 40(2) of the 2003 Procedure Rules states that an Adjudicator "*must not adjourn a hearing on the application of a party, unless satisfied that the appeal ... cannot otherwise be justly determined*". Also relevant to the application made on 10th October 2003 was Rule 13(6), which provides that the Adjudicator could fix a closure date more than six weeks after the date of the adjourned hearing "*in exceptional circumstances*" if the Adjudicator was satisfied by evidence that the appeal could not be justly determined within six weeks. The object of the closure date is to provide a time limit within which a case must normally be heard and to prevent a sequence of adjournments. As we have said, this case was

adjourned from 26th August 2003 to 10th October 2003 without any mention being made of the Appellant's desire to call additional medical evidence.

17. The Adjudicator would also have known from the file, because the hearing had come on on 26th August 2003 if only to be adjourned, that the notice of the dates of the first hearing for 10th July 2003 and for the full hearing on 26th August 2003 had been sent to the Appellant and his representative, Thakrar & Co, who were still representing him, on 20th June 2003. The file also showed that they replied on the standard form saying that they requested a hearing of the appeal and certified that they were "*in all respects ready to proceed*". They did not tick the box to say that they were currently not ready to proceed. The documentary evidence which they intended to produce was simply described as a court bundle.

18. The Adjudicator had before him a medical report from the GP dated 8th July 2003 which gave a brief history and a brief account of an examination. So far as physical signs are concerned relative to torture or physical ill-treatment, there was simply a reference to a complaint of pain in the left knee on walking long distances, but otherwise the Appellant was physically sound, although complaining of symptoms of depression and sleeplessness. It said that he was having counselling with the Medical Foundation and was to remain on anti-depressants. In very short form, it said that he had suffered physical and mental torture, having currently some treatment with a good long-term prognosis (it appears that the date of the commencement of counselling is wrong).

19. Mr Jackson recognised the difficulties he faced in arguing that the Adjudicator had erred in law in his refusal of the adjournment, but he pointed to the fact that the case came on only two days after the Appellant had been examined by the Medical Foundation and that the Medical Foundation had a high, but not unique, standing in the assessment of torture claims. They did not take on just anybody and so an examination by them indicated of itself that there was something in the case, because the Appellant had passed through what might be termed a screening process conducted by the Medical Foundation.

20. The decision as to whether or not to grant an adjournment is a judicial decision made in the exercise of a discretion, curtailed to the extent it is by the 2003 Rules. In order for such a decision to be held wrong in law by this Tribunal, it would be necessary to conclude that the decision was not one to which the Adjudicator reasonably could have come or that the Adjudicator had misdirected himself as to the approach to be adopted or had ignored relevant considerations. Both the Rules to which we have referred are designed to restrict the grant of adjournments.

21. The case had been adjourned once already, notwithstanding that the solicitors had previously said that they were ready to proceed. There had been no prior identification of the desire to call medical evidence or indeed medical evidence beyond that which was given by the GP. That GP's report covered the physical condition of the Appellant, as well as his mental state. If there were additional physical signs, such as scarring, upon which the Appellant wished to rely, it would have been open to him to refer to those in his statement or, as is not uncommon, to show them or some of them to an Adjudicator. There was nothing in the GP's report which would have suggested that it would be of particular advantage to wait for a Medical Foundation report because of any particular expertise which they would be able to bring to bear. Nor was there anything in the Appellant's description of his injuries or of what had happened to him which would have indicated to an Adjudicator that a report from the Medical Foundation was of real importance to his case.

22. There is no reason for an adjournment to be granted simply because an appointment has been obtained or has been actually attended with the Medical Foundation. They have a particular expertise, but it is not unique. It cannot be that the existence of a potential Medical Foundation report becomes the basis for successful adjournment applications without very much more to justify the adjournment. An Adjudicator would know that much of what they say consists of a description of physical symptoms which can be provided by others and an assessment that the signs or symptoms are consistent with what the Appellant describes. Consistency is not the same as proof and necessarily leaves open the point that what is seen is also consistent with some other cause of the injury.

23. The Adjudicator was right to point out that even though the appointment had been kept just two days before the hearing (and he would have known that the Medical Foundation has a long waiting list for appointments), it would still be many weeks and without any guarantee before the report was received.

24. There was no error of law in the refusal of an adjournment. The fact that the evidence which underlay the application for the adjournment is now available and would have been relevant before the Adjudicator, does not mean that the adjournment was wrongly refused. It will be rare that an adjournment which has been properly refused can in effect be set aside by the subsequent production of the evidence for the production of which an adjournment was sought.

25. We now turn to the fresh evidence in the form of the Medical Foundation report. Whilst the grant of Statutory Review amounts to the grant of leave to appeal to the Tribunal, it does not amount

to the grant of leave to adduce evidence which was not submitted to the Adjudicator. That is a matter exclusively for the Tribunal and nothing in the decision here on Statutory Review suggests otherwise. This is so, even where the fresh evidence has been persuasive to the judge in granting leave to appeal. The party wishing to rely on such evidence must comply with the requirements of Rule 21(2) of the 2003 Procedure Rules. The Tribunal has power only, in relation to this appeal, to consider errors of law. It is in that context that the application to adduce further evidence must be judged.

26. For reasons which we have set out in a number of determinations, we consider that the approach of the Court of Appeal in E v SSHD [2004] EWCA Civ 49 is applicable to appeals under the 2002 Act and 2003 Rules. The essence of that is that we should be guided by Ladd v Marshall principles in considering whether to admit new evidence, subject to any exceptional factors. See paragraphs 92 and 23.

27. We accept that this particular Medical Foundation report could not have been obtained with reasonable diligence for use before the Adjudicator. The Appellant did what he could to obtain an appointment as soon as possible. The Medical Foundation has a long waiting list, with a far greater demand on its resources than it is able to meet quickly and there was nothing more which the Appellant reasonably could have done to obtain the report earlier. It is, so far as it goes, obviously apparently credible in relation to the opinions expressed by the doctor, although not incontrovertible. It is not necessary for these purposes to examine the degree to which a report might be regarded as not apparently credible, either because of the quality of the report or because of the reliance of the doctor on the story provided by an Appellant who has been disbelieved.

28. Here, the particular aspects of the Medical Foundation report upon which the Appellant relied, related to its conclusions in relation to scarring. We also consider that it satisfies the second requirement that it would probably have had an important influence on the result, though would not necessarily have been decisive. We say that because although the Adjudicator set out a large number of reasons for concluding that the Appellant's case was not credible, reading the determination as a whole leads us to conclude that had the Adjudicator accepted that the Appellant had been ill-treated or tortured in the way described, he would have accepted the fact of detention, and his approach to everything else which the Appellant told him about what had happened in Ethiopia would have been markedly different. It does not follow, however, that the outcome would have been different because it would still have been open to the Adjudicator to reject the claim of torture and detention, but he would have had to deal with the evidence of the Medical Foundation report.

29. This identifies two pigmented scars on the anterior left knee which the Appellant attributed to being beaten with a stick and pushed to the floor and which the doctor concluded were consistent with that account. A further circular scar on the left shin was attributed to being beaten with a stick which was also said to be consistent. There was another scar on the rear of the left heel attributed to being jabbed with a gun barrel and two scars on the side of the left ankle, also attributed to being jabbed with a gun barrel, which were again said to be consistent with what the Appellant said. A similar scar on the left sole was given the same cause, and likewise was said to be consistent. A further circular scar on the left foot was said to be consistent with being beaten with a stick. Slight pain on movement of the left knee and slight crepitus was attributed to being beaten there and the symptoms were said to be consistent with it. There is roughened pigmented skin on the right and left back consistent with the Appellant's claim that they were caused by his being beaten with a leather whip. There were other signs consistent with being beaten on the back and being beaten on the head with a rifle butt. This is not a case where the very nature of the Appellant's occupation or lifestyle would have generated such scars readily. The Adjudicator does, however, point out that there was no evidence of poor physical conditions which is what would reasonably have been expected of someone recently detained in an Ethiopian prison for some weeks.

30. However, that does not mean that the Ladd v Marshall tests are satisfied. There is no reason why a GP could not refer to the scars which are visible on a physical examination and identify their location, size and nature and refer to the cause which the Appellant attributes to them. Indeed, there is no reason why the Appellant in his witness statement could not have referred to each of those scars with the cause identified, together with the production of photographs of them. The GP's report refers only to tenderness in the left knee and to no scars. The Appellant's statement refers only to scars on his back arising from being beaten there with the butt of a gun. The Medical Foundation report really adds very little in relation to psychiatric symptoms to what the GP provides and the Adjudicator knew that the Appellant was receiving counselling from the Medical Foundation.

31. The physical evidence contained in the Medical Foundation report could and should have been supplied by a GP or by the Appellant himself. It is for the Appellant to put his best case forward at the time when his factual material is for consideration on appeal to the Adjudicator, the Tribunal of fact. The only material in the Medical Foundation report which involves any degree of expertise is the comment that each of the scars was consistent with the cause put forward by the Appellant. As we have said, the Medical Foundation is well placed but not uniquely

well placed to offer that sort of comment and it is not a comment which takes matters very far because it is inherent in the concept of consistency, but no more, that there are other possible causes. It is only the reference to consistency with the Appellant's later, more detailed descriptions to the Medical Foundation, which might satisfy the Ladd v Marshall tests.

32. If the Appellant had given evidence about the scarring and its causes, it is that which, as much as anything, would have given the Adjudicator at least pause for thought as to the credibility of the other aspects of the Appellant's claims but the Appellant, legally represented as he was, did not provide that information.

33. However, even where new evidence satisfies the Ladd v Marshall tests, it does not follow at all that the case then should be remitted to an Adjudicator for the credibility of the Appellant to be assessed in the light of that new evidence. As the appeal is only on a point of law, it is necessary for an Appellant to identify the point of law which is advanced by the reference to this new evidence. The evidence has to show, or assist in showing, that there was an error of law by the Adjudicator. Evidence which would be relevant to the credibility findings made by the Adjudicator does not show of itself that the Adjudicator made an error of law. It therefore does not become relevant to any arguable ground of appeal.

34. We recognise that in E, paragraph 66, the Court of Appeal identified circumstances in which an error of fact could amount to an error of law. We do not consider that the Medical Foundation report identifies an error of fact in the way necessary for that to constitute an error of law. The scars may be uncontentious, but that they were caused by beating in the way put forward cannot be regarded as an uncontentious or objectively verifiable fact which has been established.

35. It cannot be said that the Adjudicator failed to take into account a material consideration because no material consideration of this sort was placed before him and he made no error of law in not considering it. His reasoning on the material before him is perfectly sound.

36. It will therefore be for the Appellant to see if the Secretary of State will entertain a fresh claim based upon this evidence. We make two observations. The restriction of the grounds of appeal to a point of law may have been intended and indeed may have the effect of shortening proceedings in the IAT or before Adjudicators on remittal, but they may entail an overall greater length of time being taken whilst the Secretary of State considers fresh claims that would otherwise have been dealt with within the Appellate process. It will be necessary for him to be particularly careful about the way in which he approaches fresh claims,

bearing in mind the limitations which the grounds of appeal impose on what the IAT itself can consider.

37. Second, ever-shortening timeframes for decision-making ought not to mean that specialist medical evidence where it is required is inevitably unavailable because of the overload which specialists find in torture or ill-treatment cases.

38. This appeal is, however, dismissed. It is reported for what we say in relation to fresh evidence on a point of law.

MR JUSTICE OUSELEY
PRESIDENT