Heard at: Field House

AD (Fresh Evidence) Algeria
[2004] UKIAT 00155

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 18th May 2004

Date Determination notified:

16th June 2004

Before:

The Honourable Mr Justice Ouseley (President)
Mr J Barnes (Vice President)

Between:

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Miss V Easty, instructed by Richard Payne & Co
For the Respondent: Mr J McGirr, a Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Algeria born on 3rd July 1970 who arrived in the United Kingdom on 23rd May 2002 using his own Algerian passport. On the following day he applied for asylum at port. Following completion of a screening form, he submitted a statement of evidence form and statement on 5th June 2002, which had been completed with the assistance of his then solicitors.

2. On 5th July 2002 he was interviewed on behalf of the Respondent in the presence of his representative with the assistance of an Arabic interpreter. At the commencement of the interview he said he was fit and well and confirmed that his self-evidence form previously submitted was a true and accurate account of his claim. He confirmed that his only fear of persecution in Algeria was from the group of terrorists he had referred to in his earlier statement and that he had no problem prior to 6th February 2000 when he was first

approached by two men asking him to supply medical equipment to which he had access from his employment as a paramedic technician in a pharmacy in a hospital in his home town in Bifda. That was the only occasion on which they approached him in any way although they warned him that he had to comply with their requests. On the same day he reported the matter to the police but they said there was nothing they could do at that stage although he should return if anything further happened. He did not then return to work because he was scared. On 3rd April 2000 he was informed that his car, which he had left parked, had been burned out. The police were made aware of this by him and gave him a record of the report but they had no suspects. He became increasingly depressed and took extended leave, not returning to work until August 2001 when his employers said that they required him to go on a training course in France, which he undertook between 10th and 25th January 2002. After this he returned to Algeria and to his work. About two weeks later he learned that some men had come to see him again when he was absent from the office and subsequently after two days he was told by neighbours that some men had come looking for him at his home during his absence. He then went to live with a friend until he left the country on 22nd May 2002. He did not know to which group the men belonged but he knew that they were terrorists "*from their features and their speech*". He said he meant "*the body build, they were not normal people*". He explained at interview that during his prolonged absence from work when he was suffering from depression, his employers used to call him frequently to return which he finally did when his health had improved, commencing with the course referred to above. He was asked whether there were any other incidents that he had not told the interviewer about that he wished to mention and he replied "*no*". He was asked whether he had any further comments relevant to his claim and again replied "*no*". He agreed that he had understood all the questions and the interpreter and was satisfied with the conduct of the interview although he declined to sign the interview record.

3. The Secretary of State refused his asylum application for the reasons set out in a letter of 10th July 2002 which included a general challenge to credibility, and expressed the view that if true the Appellant could have sought the protection of the state and in any event also could reasonably have relocated elsewhere in Algeria if he had any fear in his home area. On 15th July 2002 the Secretary of State issued directions for his removal to Algeria following refusal of leave to enter after refusal of his asylum application. He appealed against that decision on both asylum and human rights grounds in wholly generalised terms.

4. His appeal was listed for substantive hearing on 20th November 2002 before Mr Bernard Dawson, an Adjudicator, when he was initially represented by Mr B Obszinski, a solicitor. It is clear from the Adjudicator's determination that no additional statement had

been filed and served for that hearing and there is no reference in the Adjudicator's careful determination to any documentary evidence having been served either. Miss Easty was unable to refer us to any evidence to show that any such documents had been filed either prior to or at the hearing.

5. At the beginning of the hearing Mr Obszinski asked that it be heard with the public excluded and then applied for an adjournment to which the Presenting Officer indicated he had no objection. The Adjudicator records the nature of that application at paragraph 2 of his determination as follows:

> " … He had seen the Appellant on 11 November for finalising his statement. In going through that statement it emerged the Appellant had omitted his account of rape by the police when he returned from France (25 January 2002) when he reported to them harassment by terrorists. They had regarded him as an Islamic spy and beat him and raped him. In the light of the latter aspect the Appellant was not willing to go into detail and Mr Obszinski had offered him the opportunity of seeing a female solicitor in his office. He had not yet seen her. The Appellant also wanted an all female Court and further time would be needed for a medical report … ."

6. The proceedings before the Adjudicator were then governed by the Immigration and Asylum Appeals (Procedure) Rules 2000 which provide as follows at Rule 31:

> (1) Where an adjournment of the appeal is requested, the Appellate Authority shall not adjourn the hearing unless it is satisfied that refusing the adjournment would prevent the just disposal of the appeal.
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> (2) Where a party applies for an adjournment of a hearing, he shall, where practicable, notify all other parties of the application and –
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> (a) show good reason why an adjournment is necessary;
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> (b) establish any fact or matter relied on in support of the application; and
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> (c) offer a new date for the hearing.

7. Whether an adjournment should be granted is not, of course, a consensual matter for the parties to decide but requires judicial consideration by the Adjudicator having regard to the requirements of the Procedure Rules.

8. The Adjudicator then deals with what next happened as follows:

> "4. I reminded the representatives of the overriding objective in these appeals and I did not consider an adjournment necessary for the just disposal of the appeal. I indicated that in order to accommodate the Appellant I would hear the appeal in camera. I directed that Mr Obszinski take a further statement from the Appellant on these new aspects of his case and gave him time to do so whilst I heard another appeal. I also indicated I would give

such further directions as I felt necessary once the statement had been prepared.

5. Some 1¾ hours later the hearing resumed. Mr Obszinski asked me to reconsider my decision. He had not been able to take a statement from the Appellant without an interpreter. I indicated this was a point he had not raised earlier and Mr Obszinski submitted this was something I might have been aware of. In the course of my further enquiries, it emerged that the Appellant, who had previously instructed White Ryland, had instructed Rees Wood Terry [who still represent him at the present time] on 4 September 2002. Mr Obszinski had made no attempt to notify the Immigration Appellate Authority of his need for an adjournment even though he first became aware of the matter some nine days ago. The female solicitor to which the matter had been passed was on holiday but she had not gone until the week commencing 18 November. It was Mr Obszinski's view that the time available was insufficient for the female solicitor to take a statement.

6. I rose to consider this matter again and announced that I had given the matter further careful thought. I reiterated my earlier conclusion that an adjournment was not justified having regard to the time the Appellant had had to bring this aspect to his advisors' attention. I remained of the view that the Appellant's sensitivities regarding the evidence to be given could be accommodated by the hearing being in camera.

7. Mr Obszinski then withdrew. He indicated he had advised the Appellant it was a matter for him to give evidence or not. However Mr Obszinski remained throughout the hearing.

8. I then addressed the Appellant having satisfied myself that he understood the interpreter giving his evidence in Algerian Arabic.

9. I explained to the Appellant the application which had been made by Mr Obszinski and the decision which I had reached.

10. The Appellant indicated that he did not want to give evidence without his representative when I asked if he had any objection to Mr Obszinski being in what was to be a closed hearing. I indicated to him that he did not have to give evidence if he did not want to but he should understand that the hearing was going to go ahead and it was his opportunity to add to his account set out in the record of interview and in his statement and to make himself available for the Home Office to question him.

11. The Appellant then asked to address me. He expressed concern that he could be asked questions by the Home Office and put in a position he would not be able to answer. He went on to say somewhat obliquely because all the answers and the solutions were in what happened next. I reminded the Appellant that the hearing was his opportunity to give that evidence. He asked if this would be about everything which I confirmed. The Appellant however stated he was not comfortable about giving evidence. I reminded him that I had excluded the public from the Court for that reason and that he would be given the fullest opportunity to put across his story. If I considered the questions asked by the Home Office to be unreasonable I would stop them.

12. I then asked the Appellant how he would like to proceed. I reminded him that he did not have to give evidence if he did not want to do so. He did not wish to give evidence."

9. The Adjudicator then heard submissions from the Presenting Officer and noted the Appellant's claim as contained in his original statement on the self evidence form and interview record. He noted that the Appellant was unequivocal in his answers at interview that he only feared persecution from "*those groups*" and not from anybody else; the absence of any problems prior to 2000; his ignorance of the identity of the terrorist group to whom those he referred to belonged; his lack of knowledge whether any colleagues have been approached; that he had never supported a political organisation; and that during the time he was off work he had suffered depression and had been asked frequently to come back. He noted that he was specifically asked whether there were any other incidents he had not mentioned and that he had answered "*no*". The Adjudicator noted the issues raised in the refusal letter to which we have briefly referred above; the fact that the government was, on the objective evidence produced, in control of the majority of its territory and that the GIA were no longer a nationwide organisation; the Appellant's delay in leaving Algeria from February 2000 until May 2002; and the fact that he could have sought protection in France in January 2002. He identified the burden and standard of proof in asylum and human rights claims. He noted that according to the objective evidence produced on behalf of the Respondent that the main terrorist groups operating in Algeria were the GIA and the GSPC who appeared to pursue their aims with violent force. He recorded that he drew no adverse inference from the failure of the Appellant to give evidence but that he must accept the consequences of not having done so; he considered that the Respondent's challenge as recorded in the reasons for refusal letter and in submissions before him "*was legitimate and justified*". He dealt with the evidence before him as follows:

> "24. I think it significant the Appellant came to no actual harm from the terrorists he believed the men who had approached him represented. Given the reputation of those groups in the background material, I question whether they would have been content not to pursue the Appellant further other than burning his car when he did not respond positively to their requests for medical and surgical equipment. I have some difficulty in reconciling the Appellant's explanation at interview that he had not asked colleagues at work whether they had been approached. This seems implausible. Certainly his employers appear to have been very tolerant in allowing him a year off and it is odd that they then decided to send him on a training course to France. According to the Appellant's statement he was told by this colleague that two men had come looking for him and seemed upset. It is surprising the Appellant did not discuss matters further with him.
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> ...
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> 26. I have given careful thought how I should deal with the intimation by Mr Obszinski of the Appellant's proposed evidence of rape on the occasion of his reporting to the police the second occasion of

> demands after his return to work in January this year. I had endeavoured at the hearing to reassure the Appellant that he would be able to give his evidence in a safe environment and that I would prohibit any unreasonable questions. Again the Appellant must accept the consequences of not taking this opportunity. He has not established even to a reasonable degree of likelihood any new factors. On the material before me I conclude the Respondent was right to reject his claim.
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> 27. My conclusion therefore is that the Appellant has not told the truth of the reasons why he left Algeria and has not therefore established a need for international protection. Even if it were the case the demands had been made on the Appellant, the fact that so long passed without any actual harm leads me to the view that were he to return, there is no real risk of any harm coming about. The Appellant's problems stemmed from his employment. He could perfectly well take up employment with another firm."

10. The Appellant sought leave to appeal to the Tribunal against the dismissal of his appeal by the Adjudicator. The challenge mounted in the grounds of appeal is essentially that the Adjudicator was wrong not to grant the adjournment requested to an all female Court and wrong to conclude there was sufficient time for a statement to have been taken prior to the hearing; nor was it possible to take a statement without the presence of an interpreter in the short adjournment while the hearing of the appeal was put back and the Adjudicator should have realised that. The implication of the introduction of new evidence at a late stage required an adjournment for a medical examination "*in order to check for evidence of anal scarring*" and "*it is likely that a psychiatric report would also have been necessary*". The Adjudicator could not have prevented the Presenting Officer from asking question which he deemed to be unreasonable. For those reasons the Adjudicator was wrong to conclude that the Appellant had not told the truth of the reasons why he left Algeria and he did not have the opportunity of considering all the evidence.

11. Leave to appeal to us was granted because it was considered that it was just arguable that medical evidence might have been of sufficient relevance in provision of evidence that the claimant had been the subject of anal penetration at some point in time and because the grant of leave would enable Adjudicators to be given current guidance in relation to late applications for adjournment "*notwithstanding that the rules are predicated against adjournment (see Rule 31(1)) unless the Adjudicator is satisfied that refusing the adjournment prevented the just disposal of the appeal*". It was pointed out that just disposal was one which took account of the interests of both parties to the appeal in securing the overriding objective of the "*just, timely and effective disposal of appeals*" (Rule 30(2)). It was observed that cogent medical evidence would no doubt be filed to support the Appellant's case.

12. We note that the Procedure Rules currently relevant are the Immigration and Asylum Appeals (Procedure) Rules 2003 which

came into force on 1st April 2003. The relevant rule is Rule 40 which is couched in terms which are not dissimilar from those contained in Rule 31 of the 2000 Procedure Rules, but for the sake of completeness we set them out now:

> (1) Subject to any provision of these Rules or of any other enactment, an Adjudicator or the Tribunal may adjourn the hearing of any appeal or application.
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> (2) An Adjudicator or Tribunal must not adjourn a hearing on the application of a party unless satisfied that the appeal or application cannot otherwise be justly determined.
>
> (3) Where a party applies for an adjournment of a hearing, he must –
>
> (a) if practicable, notify all other parties of the application;
>
> (b) show good reason why an adjournment is necessary; and
>
> (c) produce evidence of any fact or matter relied upon in support of the application.

13. What we say in this determination in relation to adjournment, therefore, applies equally whether the appropriate Rules for consideration are the 2000 or 2003 Rules.

Hearing in public

14. At the commencement of the hearing before us, Miss Easty made an application that the public should be excluded from the hearing. This was on the basis that it would be unfair to the Appellant for the public to be admitted because the appeal before us depended in part upon his allegation that he had been subjected to anal rape in January 2002. It was Miss Easty's broad submission that where evidence of such a nature was involved, the public should be excluded whether or not the Appellant was to give evidence. She was asked whether she had any authority for this proposition but said she did not. It would be the position in the Employment Tribunals.

15. We refused this application. Whatever may be the position in other Tribunals, the 2003 Procedure Rules make specific provision for proceedings before the Immigration Appellate Authority in Rule 50 which provides as follows:

> (1) Subject to the following provisions of this rule, every hearing before an Adjudicator or the Tribunal must be held in public.
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> (2) Where an Adjudicator or the Tribunal is considering an allegation referred to in Section 108 of the 2002 Act, all members of the public must be excluded from the hearing.
>
> (3) An Adjudicator or the Tribunal may exclude any or all members of the public from any hearing or part of a hearing if it is necessary –
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> (a) in the interests of public order or national security; or

(b) to protect the private life of a party or the interests of a minor.

(4) An Adjudicator or the Tribunal may also, in exceptional circumstances, exclude any or all members of the public from any hearing or part of a hearing to ensure that publicity does not prejudice the interests of justice, but only if and to the extent that it is strictly necessary to do so.

16. The reference to Section 108 of the 2002 Act has no relevance to Miss Easty's application. It relates only where there is an allegation that a document relied on is a forgery and that disclosure to the party propounding the document of a matter relating to the detection of the forgery would be contrary to the public interest. Subject to this the principal position is that proceedings should be in public. In the present case the fact of the late allegation made by the Appellant is already a matter of public record in the Adjudicator's determination. There has been no application for the Appellant to give evidence before us and there is no danger to him or prejudice to his case from the discussion as necessary of the allegation in the course of submissions to us. There was in our judgment no arguable basis for excluding the public from this hearing.

The refusal of an adjournment

17. Miss Easty then sought remittal of the appeal so that it might be heard afresh before another Adjudicator. This was on the basis of the additional evidence now sought to be adduced before the Tribunal in the subjective bundle filed on behalf of the Appellant. This included a witness statement dated 5th May 2004 made by him, photocopies of some original documents from Algeria with certified translations dated prior to the Appellant's departure together with letters from some family members, a psychiatric report of 25th February 2003, a medical report from his General Practitioner of 23rd February 2004 and a report prepared by a mental health nurse of 19th April 2004. There was a separate small objective bundle comprising documents post dating the hearing before the Adjudicator and the Respondent had filed the CIPU Algerian Assessment of October 2003. We note that those bundles had not been received until the day before the hearing contrary to the Tribunal's standing directions that any documents relied on must be filed and served not later than 14 days prior to hearing if they are to be taken into account.

18. It remained Miss Easty's submission that the Adjudicator had erred in refusing to adjourn the hearing before him and in then determining the appeal without the benefit of hearing evidence from the Appellant. Although apart from the current objective evidence, she was seeking this remittal on the basis of evidence which could and should, had the Appellant so desired, have been made available to the Adjudicator at the hearing before him, it was

her somewhat bold submission that we could not in any way evaluate evidence and its relevance because this was a matter which could be dealt with only by an Adjudicator at a fresh hearing following remittal and that the interests of justice demanded a remittal to which Mr McGirr did not object. If the Appellant's case were taken at its highest on all the information now available which was not before the Adjudicator the Appellant's case was at least arguable. If the documents from Algeria had been before the Adjudicator then he had failed to deal with them but, although this did not appear in the Appellant's statement in the bundle, it was her case that the Appellant had given the documents to his representatives prior to the hearing. No evidence from the representatives in this respect had been included in the bundle filed.

19. Mr McGirr indicated to us that he had supported the application for remittal on the somewhat different basis that the documents from Algeria provided some corroboration for the account which the Appellant had originally given and that the medical reports went some way to assist on credibility issues but, nevertheless, he would otherwise rely on what was said in the refusal letter and even if the Appellant's claims as now made were taken at their highest there must at least be open to him the alternative of internal relocation which he could reasonably be required to undertake.

20. In the course of her submissions, Miss Easty made it clear that subject to what she said about the failure by the Adjudicator to grant an adjournment, she made no criticism of his approach to the evidence which was before him subject to the question of his failure to make any reference to the Algerian documents in existence at the time of the Appellant's departure from Algeria. So far as those documents are concerned, there is no evidence before us that they were produced to the Adjudicator and, having regard to the careful way in which he deals with what took place before him at the hearing, and the way in which he considered the evidence before him, it seems to us clear that these documents were not in fact produced to him. We have proceeded on that basis.

21. The argument that the Adjudicator erred in refusing the adjournment application either when made initially or later is not tenable. The framework for his decision is the provision in the Rules that no adjournment should be granted unless he was satisfied that refusing it would prevent the just disposal of the appeal. He has to consider that in the light of the overriding objective and the procedural requirements as to how such an adjournment application should be made. It is a discretionary decision which will only be overturned if it has been shown that the discretion has not been exercised in accordance with the relevant principles.

22. Here, the application had not been notified in advance and it is difficult to see that any steps were taken to establish the basis for it; there was merely what Mr Obszinski said.

23. The Appellant had had ample time to prepare his appeal, to consider his evidence and his new claims and to seek advice from his solicitors, which could have led to medical evidence being obtained. We note that he apparently chose to change his representatives who had acted for him throughout the asylum process, just over two months before the hearing date.

24. We do not accept that even with the late change of story, some nine days before the hearing, it would have been impractical for some statement to have been taken, or for the female solicitor if necessary to take it before she went on holiday. Besides, it was the Appellant who created this problem.

25. We also note that there was no evidence before the Adjudicator as to why the story of anal rape could not have been brought out earlier. We were told by counsel that this was because of the cultural shame and trauma the Appellant felt. That does not explain the timing so close to the appeal and after a change of solicitors, nor was it supported by evidence.

26. Besides, the key change to the story, as revealed in the new statement sought to be adduced before us, is that the Appellant was detained by the police for two months on suspicion of being a terrorist when he went to tell the police of the approaches of terrorists, was kept in harsh conditions, beaten up and also raped in detention by some people (seemingly police because the same people released him later) for going to the police in the first place when he had been told not to by the terrorists. The rape became an incident in the course of a larger story which showed both a fear of terrorists and an absence of police protection. There was no explanation in that detailed statement as to why the story was changed so late, nor as to why no part of it, even excluding the rape, had been revealed or even hinted at earlier.

27. The Adjudicator was asked to adjourn in part so that medical evidence could be obtained. In the light of the circumstances before him, the explanations given and also those matters which were unexplained, he was entitled and right not to adjourn. It is impossible to speculate as to what would have happened had the Appellant given apparently credible evidence on his new story. He would certainly have been cross-examined. This was not one of those cases where, on the day, no Home Office Presenting Officer was present which restricts the extent of the questioning of a change such as this. But the fact is that he had the opportunity to give evidence and declined to do so, even with his lawyer present.

28. Nothing that we have subsequently heard causes us to think that the Adjudicator was wrong.

29. An adjournment was also sought so that an all-female court, Adjudicator, interpreter, usher could be set up. There may be circumstances in which consideration is given to such a request for such a court in the IAA, but its lack of availability is not the basis for an adjournment. The parties cannot choose the judge – Adjudicators are appointed to hear all cases within their appointment.

30. Finally, we turn to the attitude and withdrawal of Mr Obszinski. He decided to withdraw representation but not his presence when his adjournment application was refused, telling the Adjudicator he was leaving it to the Appellant whether or not to give evidence. The Adjudicator was right to proceed and gave the Appellant every opportunity to say all that he wished to say. It was his decision to stay silent. It might be possible to regard Mr Obszinski's behaviour as irresponsible but we have not heard from him, nor have any allegations of misconduct been made to him by those now representing the Appellant. Nor has the Appellant provided evidence, waiving privilege, as to misconduct. It is not for us to make further comment because it is always possible that where a case ceases to be one which public funds will properly support, an application for an adjournment is the last step which can be made, following the refusal of which, withdrawal is inevitable. Here, Mr Obszinski stayed, for unknown reasons.

31. What would be entirely wrong would be for an Adjudicator to grant an adjournment which was not otherwise merited because of a withdrawal or threatened withdrawal by a representative if an adjournment is refused. A representative cannot withdraw, and an Appellant refuse to give evidence, when an adjournment is refused in the hope that an adjournment can thereby be forced on the Adjudicator, or that the evidence which could have been given to him will be admitted on appeal, leading to a remittal. That is a dangerously misguided and unrealistic hope. The appeal process envisages that each party will play his proper part, and take advantage of the opportunity it provides within the Rules.

32. Of course, if an adjournment for the obtaining of evidence is properly refused, as it was here, it makes it rather more difficult for that evidence to be subsequently successfully adduced on appeal, for that would simply have the effect of holding, rather contradictorily, that the adjournment should have been granted in reality.

33. Having properly indicated that the appeal was to continue before him, the Adjudicator explained the options available to the Appellant in an exemplary manner and we agree with him that the Appellant must take the consequences of his own decision not to give evidence before him.

34. We must, therefore, first consider whether it is appropriate for this evidence to be submitted in evidence at all. This appeal is doomed to fail unless the new evidence is permitted to be adduced and persuades us that there was an error of fact or law in consequence in the determination. This appeal was pending in the Tribunal before 1st April 2003 and the effect of the transitional provisions in the 2003 Rules, notably Rule 61(3), is to preserve the right of appeal on error of fact and law.

35. The admission of evidence not before the Adjudicator is, however, governed by the 2003 Rules, Rule 21. This is apparently tighter than Rule 22 of the 2000 Rules in requiring an explanation as to why the evidence was not produced by the Adjudicator, but the principle expressed was already generally applicable.

36. In E & R [2004] EWCA Civ 49, the Court of Appeal was concerned with whether the Tribunal should have looked at evidence which had not been made available to it at the time when it heard the appeal from an Adjudicator, but was only produced when it was considering an application for leave to appeal to the Court of Appeal against its own promulgated decision. In that case, as in the present appeal, the right of appeal to the Tribunal was under the earlier regime. In paragraph 92 of that judgment, Carnwath LJ said:

> "In relation to the role of the IAT, we have concluded:
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> (i) The Tribunal remains seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties;
>
> (ii) following the decision, where it was considering the application for leave to appeal to this Court, it had a discretion to direct a rehearing; this power was not dependent on its finding an arguable error of law in its decision;
>
> (iii) however, in exercising such discretion the principle of finality would be important. To justify re-opening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by Ladd v Marshall principles, subject to any exceptional factors."

38. The Ladd v Marshall factors are summarised as follows in paragraph 23(ii):

> "New evidence will normally be admitted only in accordance with '*Ladd v Marshall* principles' (see *Ladd v Marshall* [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2325; White Book para 52.11.2). The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently

> credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876."

39. Although the Court of Appeal was dealing with the Tribunal's power to remit a case to itself instead of granting leave to appeal to the Court of Appeal, we consider that it sets out principles equally applicable to the reception of fresh evidence when hearing the appeal originally and as it would do were it to remit the appeal to itself. The approach ought to be the same in each instance. The principles do not just cover the decision to rehear, with different principles governing the hearing of the appeal.

40. We are therefore satisfied that the admissibility of the new evidence now sought to be introduced is to be determined by Ladd v Marshall principles subject to any exceptional factors meaning that it should be admitted in the interests of justice. We have to consider the reasons for its late production, its importance and its apparent credibility, and the interests of justice.

41. For this purpose, we must, notwithstanding its very late submission, consider that evidence.

42. In his statement of 5th May 2004, the Appellant adds to his original account by saying that on 20th February 2002 he once again approached the police and told them what had happened but they accused him of helping the terrorists and then seeking police protection; he was detained in a cell in bad conditions having been forced to strip. Two days later he says that two or three men came into the cell who told him that he had been warned not to go to the police and because he had not obeyed he was going to pay the price. He was then hit by a metal bar or instrument over the head and anally raped and otherwise sexually abused. Such assaults occurred more than four times subsequently whilst he was held in prison for two months until those who had raped and abused him dragged him out of the cell, blindfolded him, drove him off in a car and released him. He initially returned to his parents' house and then went to live with a friend, his mother remaining with him to nurse him back to health until he was able to leave the country through arrangements which his parents had made. The statement contains no explanation of why this additional and far more serious basis of his claim was not given until a few days prior to the appeal before the Adjudicator some two months after he had first instructed those then and currently advising him. It was not produced to the Adjudicator because of the Appellant's late change of story, and the asserted difficulties in taking a statement, together with his refusal, as a matter of his own choice, not to give evidence. He said he was concerned about being questioned, which is not altogether surprising.

43. As to the documents which were said to originate from Algeria, the first purports to be a civil juridical report of the finding of a burned out car on 11th April 2000 following a request from the Appellant, a copy of which was, it said, given to him on that day; secondly, what is described in the translation as a medical certificate of 2nd February 2000 from a psychiatrist at the University Medical Centre in Bijda certifying that the Appellant had been treated on many occasions for depression and was given sick leave from April 2000 to August 2001. It is possible that the date on the photocopy of the original is 2/04/2000. Finally, there is what purports to be a police report dated 3rd April 2000 concerning the burnt car and summarising information provided by the Appellant that on 6th February 2000 he had been visited by two people belonging to a terrorist group, seeking medicines and asking him not to tell the authorities; they returned a week later and said that if he did not bring the medicines "*they would kill me for sure*"; he asked for more time, and shortly afterwards he received news that his car was burnt. As to the last document, we noted that what is said there does not wholly coincide with what the Appellant claimed in his initial statement or at interview where there was no reference to a second visit a week later when he asked the terrorists for more time. As to the purported medical certificate there is the additional oddity that it appears on the face of it to give him leave of absence through sickness from April 2000 until August 2001, a period of some sixteen months which would suggest remarkable prescience on the part of its maker. As we have said, there is no evidence that these documents were before the Adjudicator and no specific explanation as to why that was so. It may be that the Appellant had them but did not disclose them as he did not give evidence. It may be that he did not have them then, but, if so, he has offered no explanation as to why not.

44. Turning to the medical evidence, there is a psychiatric report of 25th February 2003 based on a single interview for one hour early in February. The report sets out what the Appellant told Dr N Janil, who describes himself as a Consultant Psychiatrist approved under Section 12 of the Mental Health Act 1983. It adds a new detail that he claims to have been admitted to a mental hospital for one month in April 2000, but is otherwise an uncritical recital and records that he says at the time of his report that he spends most of his time walking in the streets and perhaps reading occasionally but had been unable to continue with courses he started in September 2002. There is nothing in the report dealing with the Appellant's failure to mention any of the matters in 2002 which now form a central part of his basis of claim but equally there is nothing to suggest that Dr Janil was ever informed of this. On the basis of his acceptance of what he was told by the Appellant, the doctor arrives at the following conclusions:

> "11.1 [AD] suffered as a consequence of sexual assault and imprisonment post traumatic stress disorder as defined by DSM4 of the American Psychiatric Association, a copy of which is

enclosed. [None was provided with the document submitted to us].

11.2 [AD] is also moderately depressed as evidenced by low mood, fleeting suicidal thoughts and guilt feelings consistent with a depressive episode."

Dr Janil expresses no view as to the effect of the Appellant's claimed mental condition resulting in his admission as an in-patient to a mental hospital in April 2000 or to what extent such symptoms as he notes briefly may be referable to that period. He says he is not qualified to give an opinion following a physical examination to validate the experience of rape. He recommends cognitive behavioural therapy.

45. The reason why this material was not provided to the Adjudicator goes back to the very reason why the adjournment was sought and refused – the late change of story.

46. There is also a letter of 19th April 2004 from a Mr Maddern who describes himself as a community mental health nurse with the Asylum Seeker Service but he has no personal knowledge of the Appellant and is working solely from notes and the psychiatric report to which we have referred. He records that it appears he has been receiving support from the Mental Health Service for Asylum Seekers since March 2003, having made significant progress so that his symptoms although still present are not having a major impact upon his functioning and he has commenced voluntary work and is able to socialise well. The mental health nurse with whom he had direct contact had left the service but she had advised him on 21st January 2004, given his improvement, to contact her if he required any further input. As he had not made contact by 23rd March his case had been closed. This is an update which relates to mental condition relevant as an aspect of credibility and as a possible Article 8 point.

47. The final medical report was apparently dated 23rd February 2004 and was intended to deal with any physical symptoms. It recorded that the only physical scar was a 2cm scar over the left side of his forehead. It also noted that he had been referred to the University Hospital of Wales Gastroenterology Department for altered bowel habit which started after his serious sexual assaults but the report gives no clinical evaluation as to causation of any such problem or its nature and so in our view is of little assistance being once more based on an uncritical acceptance of what the Appellant chose to tell the writer of the report. It gives no indication of his own experience in the field. It is notably silent as to any anal examination or as to what could or could not be deduced from what was or was not seen. It was the grounds of appeal which raised the need for a report to check for evidence of anal scarring. The reason it was not produced to the Adjudicator goes back to the late change of story for which the Appellant was responsible.

48. Finally, there are four copy letters with translations from the Appellant's brother, but the only one which might have any possible relevance is dated 8th September 2002 and was thus in existence at the date of the hearing before the Adjudicator. It claims that three men came to look for him at home but they are not further identified beyond the letter saying they are doing the same to the majority of people who work in hospitals and refuse to help them. Subsequent letters make no reference to any repetition of such incidents. No explanation was proffered for its not being before the Adjudicator.

49. The fresh evidence does not in general satisfy the first requirement of the test in Ladd v Marshall. The new story could have been provided earlier in written form and at the hearing, even more readily if the crucial part (detention, beating and lack of protection) had been covered; the rape allegation could be seen as providing an excuse for later revelation, but does not explain the particular late timing here. The medical documents could have been obtained if the new story had been revealed a while earlier. The reports from Algeria and the one relevant letter were all in existence; no evidence suggests they were not available or could not have been made available with reasonable diligence.

50. The third requirement of apparent credibility, albeit not necessarily incontrovertible, is not met by his new statement. He gives no explanation for the change of story at that stage or the late production of the new documents.

51. The Appellant had been given a clear opportunity by a female interviewer to state whether there were any other incidents which he had not previously mentioned and unequivocally replied that there were not. Even had he been unwilling to refer to his claims to have been sexually assaulted, we can see no reason why he should not have referred to an apparent unlawful detention in harsh conditions where he was beaten, by the police for a period of two months, the nature of which he says caused him to believe they were in league with those whom he had previously claimed to be terrorists. It could hardly have been a matter more central to his whole basis of claim because he was suggesting collusion by the authorities with those he feared and not simply that he had a fear of no one but the unidentified men to whom he had referred. Without that additional claim, the basis of claim disclosed was clearly weak and he had been given very detailed reasons by the Respondent in the refusal letter as to why it did not lead to any recognition of a need for international protection. The claim as expanded would engage those identified shortcomings in the original claim. He is trying to identify a lack of police protection, hitherto ignored. It was a last minute change. He had every opportunity to state it to the Adjudicator. His refusal of the opportunity to do so, does not now entitle him to do so when he has got in order what he now wishes to say. It is notably not supported by any physical medical evidence; the silence as to anal

examination seems deliberate. The psychiatric evidence is wholly dependant on what he has to say and is of limited analytical quality anyway.

52. Insofar as Miss Easty submits that we have no power to evaluate the additional evidence which she seeks to introduce, she is wholly mistaken. That evaluation is a necessary part of the application of the Ladd v Marshall tests.

53. We are therefore wholly satisfied that the additional evidence sought to be introduced should be excluded on Ladd v Marshall principles. There is nothing about it in the circumstances which suggest an exception is appropriate. The essential point is that he had a full opportunity to prepare his case, to disclose its essentials, and to say what he wished to say to the Adjudicator. He cannot say in effect that if an adjournment is properly refused, he will obtain the fresh evidence and achieve the same result through an appeal.

54. The underlying basis of Miss Easty's argument has therefore disappeared. She conceded, and we would so have found in any event, that on the evidence before him the Adjudicator's findings are clearly sustainable so that the only possible area of argument left open is that irrespective of the manifest failures on the part of the Appellant and his advisors, and irrespective of the inadmissibility of the evidence now sought to be relied on, the procedure before the Adjudicator was so fundamentally flawed that the Appellant was deprived of an opportunity to put his case. As we have explained, he was not.

55. The updated background material would be admissible, as would updated medical evidence in an Article 8 claim, because changes in personal circumstances or country conditions are relevant to the decision on an appeal following Ravichandran [1996] Imm AR 97, SK (Croatia) [2002] UKIAT 05613 and DD (Croatia)* [2004] UKIAT 00032.

56. For the above reasons this appeal is dismissed.

MR JUSTICE OUSELEY
PRESIDENT