IMMIGRATION APPEAL TRIBUNAL

Heard at: Field House
On: 30 March 2004
Prepared: 30 March 2004

Determination notified
06 April 2004

Before:

Mr L V Waumsley (Vice President)
Mr R Baines JP

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

For the Appellant: No appearance
For the Respondent: Mr A Sheikh, Home Office Presenting Officer

1. The appellant, who claims to be a citizen of Somalia, appeals with permission against the determination of an adjudicator (Mr D R M Harmston), sitting at Cardiff Magistrates Court, in which he dismissed her appeal on both asylum and human rights grounds against the respondent's decision to refuse her leave to enter the United Kingdom after refusing an application for asylum made by her.

Adjournment application

2. The appellant did not appear at the hearing before us, either in person or by her representative. Shortly before the start of the hearing, a fax message dated 13 March 2004 from the appellant's representatives, South West Law (Legal Services in the Community) Ltd, was placed before us. The material part of that message reads as follows:

> "It has just come to our attention that counsel for the appellant, Miss Rosalyn Choudhury is not available to represent our client at today's hearing. The misunderstanding arose as we failed to notify Miss Choudhury's clerk of the date and time of the hearing as we assumed the Tribunal had informed her of

the date and time following the Directions hearing where she represented the appellant on Monday, 16/02/04 at Field house.

In light of this misunderstanding could we respectfully request an adjournment of the hearing listed for today".

3. With respect to the appellant's representatives, that fax message discloses a regrettable degree of carelessness on their part. It is clear from the fax that they had received the notice of hearing which had been sent to them a little over a month ago on 25 February 2003. They state that they had "assumed" that the Tribunal had also informed the counsel instructed by them on their client's behalf of the date and time of the hearing. There was no justification for that assumption. Rule 39(1) of the Immigration and Asylum Appeals (Procedure) Rules 2003 provides as follows:

> "When the appellate authority fixes a hearing it must serve notice of the date, time and place of the hearing on:
> (a) every party; and
> (b) any representative acting for a party".

4. Rule 46(4) of the same Rules provides as follows:

> "Where a representative begins to act for a party, he must immediately notify the appellate authority of that fact".

5. There is no indication on the appeal file that Miss Choudhury of counsel had notified this Tribunal in those terms. Indeed, it is difficult to see how a member of the Bar practising as such, as opposed to a solicitor or representative authorised under section 84 of the Immigration and Asylum Act 1999, could properly act as an appellant's representative for this purpose in light of the professional code of conduct governing members of the Bar. In the circumstances, the assumption made by the appellant's representatives was wholly unjustified. It was their responsibility to ensure that counsel was briefed by them in good time of the hearing of their client's appeal. They have no excuse for their failure to do so.

6. Despite this clear failure on the part of the appellant's representatives, we might nevertheless have been minded to accede to the adjournment application in light of the fact that the appellant herself was clearly not personally to blame for the absence of counsel at the hearing before us. However, in light of our decision which follows, we concluded that there would be no useful purpose to be served by adjourning the hearing. The application to do so was therefore refused.

Background

7. Turning now to the substance of the appeal, the appellant arrived in the United Kingdom in November 2002. She applied for asylum shortly after her arrival. The grounds on which she did so may be stated shortly. She claimed that she was of Somali nationality, and a member of the Reer Hamar clan, which is one of the minority clans in Somalia. As a consequence, she had been subjected to persecution in the past, and feared that she would be subjected to similar persecution in the future if she were to be returned to Somalia.

8. In his determination, the adjudicator rejected the appellant's evidence in its entirety. He concluded that, not only was she not a member of the Reer Hamar clan, but in reality she was not even a Somali national. It was on the basis of those findings that he dismissed her appeal on both asylum and human rights grounds.

Grounds of appeal

9. The appellant seeks to challenge the adjudicator's conclusions on a number of grounds as set out in the grounds of appeal incorporated in her application for permission to appeal to this Tribunal. Those grounds may be summarised as follows:

    1. The adjudicator erred in failing to indicate to the appellant and her counsel that he considered her claimed Somali nationality to be in issue until the closing submissions made by her counsel;
    2. He failed to give effect to a concession made by the respondent regarding the appellant's claimed nationality;
    3. He failed to put matters to the appellant for her response;
    4. He erred in the refusing her application to adjourn the hearing;
    5. He erred in refusing to allow her witness to give oral evidence on her behalf.

    We will deal with each of those grounds in turn.

Failure to indicate that nationality was in issue

10. It is alleged in the grounds of appeal that the adjudicator stated for the first time that he considered the appellant's nationality to be in issue during the course of the closing submissions made on her behalf by her counsel. At that stage, the appellant's oral evidence had already been given, and it was therefore too late for her to deal with this issue as part of her evidence.

11. The assertion made in this ground appears to be well founded. Indeed, the adjudicator has indicated at paragraph 15 of his determination that it was only during the course of the submissions made by the appellant's counsel that he indicated for the first time that the appellant's nationality was in issue. That was not a matter which had been raised by the respondent, either in the reasons for refusal letter or elsewhere. The respondent was not represented the hearing before the adjudicator. It is therefore clear that a challenge to the appellant's nationality cannot have been raised on behalf of the respondent during the course of the hearing itself. It was clearly a matter which was raised by the adjudicator himself after hearing the appellant's evidence.

12. It was of course properly open to the adjudicator to take the point that he was not satisfied that the appellant was in truth a Somali national as she had claimed. The fact that the respondent had not raised the point, either during the course of the hearing or previously, was no reason why the adjudicator himself should not do so. It was clearly a material point on which the appeal was likely to founder if the appellant was unable to persuade him to the requisite standard that she was a Somali national as claimed. The appellant has no legitimate cause for complaint that the adjudicator raised this highly material issue of his own motion.

13. However, having done so, it was necessary for the adjudicator to allow the appellant a proper opportunity to meet the point, if she was able to do so and wished to do so. It may well have been that the appellant would have been unable to satisfy his concerns. Nevertheless, as a matter of natural justice and procedural fairness, she was entitled to have a proper opportunity to attempt to do so. It was therefore incumbent upon the adjudicator, if so requested, to allow the appellant to be recalled to give further oral evidence on the point. Indeed, if the appellant could show that she had been taken by surprise by a point which had not previously been raised and which she was therefore unprepared to deal with, it would have been open to her to seek an adjournment so as to enable her to do so, e.g. by adducing further documentary or oral evidence relevant to the issue.

14. The fact that the adjudicator did not indicate his doubts regarding the appellant's claimed nationality until her counsel came to make his closing submissions is not of itself a matter of which the appellant may legitimately complain. It may very well be that it was not until the appellant had completed giving her oral evidence that the adjudicator realised that the appellant's true nationality was an issue on which he remained unsatisfied. Clearly, he cannot be criticised for keeping an open mind on the point until the oral evidence had been completed. Indeed, it would be a matter of legitimate criticism if it could be shown that he had come to a premature conclusion before the appellant had completed giving her evidence. Nevertheless, having come to the conclusion that the nationality was a relevant issue, albeit that it had not been raised by the respondent, it was important that the adjudicator should give the appellant a fair opportunity to deal with it.

15. In this regard, there is no indication, either in the adjudicator's determination itself or in the grounds of appeal to this Tribunal lodged on the appellant's behalf, that her counsel applied to the adjudicator to be allowed to recall the appellant to give further evidence. Likewise, there is no indication that he applied for an adjournment so as to enable the appellant to adduce further evidence of some other kind, e.g. documentary evidence or oral evidence from a third party, to meet the point.

16. The onus to do so was on the appellant's counsel, if he considered that course of action to be appropriate, not on the adjudicator. He elected not to do so. In the circumstances, we see no evidence to suggest that there was in reality any procedural unfairness or breach of the principles of natural justice on the part of the adjudicator in this regard. This ground provides no arguable basis for interfering with the adjudicator's conclusions.

Failure to give effect to a concession

17. It is alleged in the grounds of appeal lodged on the appellant's behalf that the adjudicator erred in failing to give effect to a concession by the respondent regarding the appellant's claim to be of Somali nationality. In that regard, reliance is placed by the appellant on the determination of this Tribunal in *Carcabuk and another v Secretary of State for the Home Department* (00/TH/01426) in which it was held that adjudicator must accept a concession made by the respondent, unless it has been withdrawn by him. Although that determination was not starred, it nevertheless stipulated that the guidance contained in it was to be followed both by adjudicators and by this Tribunal.

18. The alleged concession on which the appellant seeks to rely is that contained in the respondent's reasons for refusal letter in which the appellant's nationality was referred to as "Somali". With respect to the appellant's counsel who settled the grounds of appeal on her behalf, the assertion that the references in the reasons for refusal letter to the appellant's nationality as being Somali constituted a concession on the respondent's behalf is manifestly unsustainable.

19. On the contrary, the reasons for refusal letter discloses that the appellant's asylum claim was refused by the respondent on non-compliance grounds under paragraph 336 of the Statement of Changes in Immigration Rules (HC 395) after she had failed to attend an interview in connection with her asylum claim. Whilst there is a reference in the reasons for refusal letter at paragraph 2 to the appellant's claim that she was a member of "the Rer Hamaar (sic) clan in Somalia", that was no more than a recital of the appellant's own claim. It was manifestly *not* a concession on the respondent's part that the claim was true. The assertion that it was is plainly wrong.

Refusal of adjournment application

20. As recorded by the adjudicator at paragraph 2 of his determination, an application was made to him for an adjournment on two grounds. The first was that the appellant had located a witness who would be able to give evidence regarding her clan membership. The second was that the appellant's counsel thought that it would be appropriate to obtain psychiatric evidence as to her mental state at the time of her interview some seven months previously in November 2002.

21. As regards the first of those reasons, the adjudicator has recorded at paragraph 2 of his determination that it transpired that the appellant had known of the presence of the proposed witness in the United Kingdom for some time. When she was asked by her solicitors some two months previously in April 2003 whether she had any witnesses who could be called to give evidence on her behalf, she had told them that she did not because the presence of this particular potential witness did not spring to her mind. As regards the second reason, it is asserted in the grounds of appeal settled by the appellant's counsel at paragraph 3.5 that the necessity to obtain a psychiatric report had arisen only on the day of the hearing when the counsel in question had taken instructions from the appellant.

22. Clearly, the presence of the potential witness had been known to the appellant for some time prior to the hearing. She had had ample opportunity to mention the point to her solicitors so as to enable them to take a statement from the potential witness and decide whether or not to call him to give evidence on the appellant's behalf. She has no one else but herself to blame for her failure to do so.

23. If it was indeed the case that it would have been appropriate to adduce psychiatric evidence on the appellant's behalf regarding her mental state some seven months previously in November 2002, clearly that mental state was a condition which had subsisted for some time, certainly long enough to enable her solicitors to realise that it was a matter on which psychiatric evidence was required. Her solicitors plainly took the view that such evidence was not required. The counsel briefed on her behalf took the contrary view, albeit only shortly before the hearing before the adjudicator started at 11:30 am.

24. That was far too late to seek to raise the point for the first time. The hearing before the adjudicator took place in June 2003. The appellant's notice of appeal to the adjudicator was completed by her solicitors (who are still the same solicitors representing her now) in January 2003. They had therefore had at least five months in which to arrange for psychiatric evidence to be adduced, if thought appropriate. They did not do so.

25. In light of the fact that the appellant's solicitors had filed a certificate of readiness on 7 May 2003 in which they certified that they were "in all respects ready to proceed", the adjudicator was plainly entitled to reject the adjournment application in light of the presumption against adjournments contained in paragraph 40(2) of the 2003 Procedure Rules in the following terms:

> "An adjudicator or the Tribunal must not adjourn a hearing on the application of a party, unless satisfied that the appeal or application cannot otherwise be justly determined".

26. This ground provides no arguable basis for interfering with the adjudicator's determination. His decision to refuse the adjournment application was one which was properly open to him.

Failure to put matters to the appellant

27. It is alleged in the grounds of appeal that the adjudicator erred in failing to put to the appellant for her response a number of adverse credibility findings made by him at paragraphs 19 and 20 of his determination in relation to the appellant's account of past events in Somalia. It is argued on the appellant's behalf that in failing to do so, the adjudicator acted both in breach of the rules of natural justice and the *Surendran* guidelines, i.e. the guidelines set out in the appendix to the determination of this Tribunal in *Surendran v Secretary of State for the Home Department* (21679, unreported).

28. That submission is misconceived. The appellant was, or should have been, well aware from the terms of the respondent's reasons for refusal letter that the credibility of her asylum claim had not been accepted by the respondent. Accordingly, the burden of proof remained on her to satisfy the adjudicator to the appropriate standard, i.e. the lower standard referred to by this Tribunal in its starred determination in *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, [2001] INLR 354, that her account was true. It was no part of the adjudicator's responsibility to assist her to do so by pointing out to her during the course of the hearing the weaknesses and discrepancies in her evidence so as to allow her a further opportunity to deal with them, if she was able to do so. Indeed, if the adjudicator had done that, it could legitimately be argued on behalf of the respondent that, by so doing, he had abandoned his judicial impartiality and had, in the time-honoured expression, "descended into the arena".

29. Instead, the adjudicator was properly entitled to keep his own counsel and to remain silent throughout the hearing, leaving the parties to advance their respective cases to the best of their ability. If authority for this proposition is required, it is to be found in the judgment of the Court of Appeal in *Secretary of State for the Home Department v Maheshwaran* [2002] EWCA Civ 173 and in the Opinion of Lord Carloway in the

Outer House of the Court of Session in *Mehmet Koca v Secretary of State for the Home Department*, IAS Update Vol 7 No 4.

Refusal to allow witness to give oral evidence

30. It is alleged on the appellant's behalf in her grounds of appeal that a corroborative witness attended the hearing to give evidence on her behalf, but that the adjudicator refused to allow him to do so because no witness statement had been served as required by the directions given previously. There is no reference to this matter in the adjudicator's determination. He has not been asked for his comments on the point. In the circumstances, we are not in a position to make a finding one way or the other as to the truth of the allegation.

31. However, the allegation is contained in grounds of appeal which have been settled on the appellant's behalf by the member of the Bar who represented her at the hearing before the adjudicator. In light of the professional obligation on members of the Bar not to mislead this Tribunal by making assertions which they know or believe to be untrue, we are prepared to assume in the absence of any evidence to the contrary that the assertion made on the appellant's behalf is true.

32. With respect to the adjudicator, we are bound to say that if it is indeed the case that he refused to allow the appellant to call a witness to give oral evidence on her behalf despite the fact that the proposed witness was present and ready to do so, he allowed himself to fall seriously into error. It is trite law that asylum appeals require "anxious scrutiny" -- see, by way of example, the decision of the House of Lords in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, [1987] 1 All ER 940, [1987] 2 WLR 606, [1987] Imm AR 250. They are appeals which potentially involve vital issues of life, limb and liberty. In consequence, the overriding objective to ensure that justice is done must inevitably outweigh all other considerations.

33. The oral evidence which the proposed witness was said to be ready and able to give was plainly material to the outcome of the appeal. That evidence, if given, might well have persuaded to the adjudicator to arrive at a different conclusion in relation to the appellant's claimed nationality. Indeed, it might well have persuaded the adjudicator that the appeal should have been allowed by him, rather than being dismissed.

34. In the circumstances, it would clearly have required a weighty reason to justify the excluding such potentially material evidence. Save in the case of a persistent or contumelious refusal by the party in question to comply with directions, it is difficult to see how a decision by an adjudicator to prevent an appellant from calling a witness who is present and ready to give oral evidence could properly be justified in any save the most exceptional circumstances. Certainly, a refusal to allow such a witness to be called merely because the appellant's representatives had failed to comply with a previous direction to file a witness statement prior to the hearing would be difficult (if not impossible) to justify. The displeasure which was evidently felt by the adjudicator, understandable as it is, at the failure by the appellant's representatives to comply with the direction to file witness statements prior to the hearing manifestly does not justify his decision to exclude that evidence.

35. With respect to the adjudicator, his decision to refuse to allow the appellant's witness to be called was plainly wrong and amounted to a denial of justice on his part. Mr Sheikh, who appeared before us on behalf of the respondent, did not seek to persuade us to the contrary. He was right not to do so. Instead, he acknowledged, very properly, that for this reason alone, the adjudicator's determination could not be allowed to stand. His exclusion of potentially material evidence had the result that his determination could no longer be regarded as safe and sustainable. As a consequence, Mr Sheikh acknowledged that the appeal would inevitably have to be remitted for rehearing.

36. He sought to persuade us that the appeal should be remitted to the same adjudicator for reconsideration. However, we have no hesitation in concluding that that would be wholly inappropriate. It is clear from the adjudicator's determination that he has already formed a strong adverse conclusion in relation to the truth of the appellant's evidence. He would be likely to approach a rehearing in the same frame of mind, however hard he might try to put his previous conclusions out of his mind. In the circumstances, we are satisfied that there is no alternative save to remit the appeal for a fresh hearing before another adjudicator.

Decision

37. This appeal is therefore allowed to the limited extent that it is remitted for a fresh hearing before an adjudicator other than Mr D R M Harmston.

Signed Dated

L V Waumsley
Vice President