Heard at Field House AO (Age Dispute - Asylum Interview - Procedure) Lebanon [2004] UKIAT 00040

On 28 January 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

08 March 2004

Before:

Mr Andrew Jordan
Mr K. Drabu, VP
Mr N. Kumar, JP

Between

APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation
For the appellant: Mr A. Salfiti, solicitor of Messrs Salfiti & Co
For the respondent: Mr D.N. Saville, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Palestinian who comes from the Burj Al Shemali Palestinian refugee camp near Tyre in the south of Lebanon. He appeals against the determination of an adjudicator, Mr T. Jones, dismissing his appeal against the decision of the Secretary of State to refuse both his asylum and his human rights claims.

2. The appellant is a single man born on 22 December 1984 and is 19 years old. He entered the United Kingdom on 8 November 2002 avoiding immigration controls and claimed asylum on 11 November 2002. The Secretary of State refused his claim and made a decision on 18 December 2000 giving directions for his removal from the United Kingdom to Lebanon, thereby giving rise to a right of appeal under section 69 (5) of the Immigration and Asylum Act 1999. The appellant duly appealed.

3. The appellant claimed that all the members of his family were associated with Fatah. In March 2002, Fatah organised a demonstration in the camp which was attacked by members of Hamas. The appellant claims he opened fire causing an immediate escalation of the violence. This resulted in the Lebanese authorities forbidding demonstrations outside the camp. The appellant claimed he challenged this prohibition and this resulted in his becoming a wanted man in the eyes of the Lebanese authorities. In addition, his opposition to the activities of Hamas and the Islamic groups opposed to Fatah has resulted in his being targeted by them. As a result, he claims he had no alternative but to flee.

4. As the adjudicator points out in paragraph 13 of the determination, there were a number of discrepancies in the appellant's account. In paragraph 14 of the determination the adjudicator analysed these discrepancies and concluded that they undermined the central parts of the appellant's claim. Accordingly, the adjudicator was not satisfied that the appellant had a well-founded fear of persecution for a Convention reason or was at risk of a violation of his human rights. He dismissed the appeal.

5. The appellant appealed to the Tribunal. In the grounds of appeal a challenge is made to the adjudicator's handling of the interview record. The appellant has consistently claimed that he was born on 22 December 1984. He was interviewed on 13 December 2002, 9 days before he would say he reached his eighteenth birthday. The Secretary of State, however, disputed the appellant's age and claimed that he was older. The issue is set out in paragraph 12 of the Refusal letter dated 16 December 2002 in which the Secretary of State said:

> "*When you made your application for asylum, you claimed that your date of birth is 22 December 1984. However, you have failed to produce any evidence to substantiate this claim. Although you claim to be a minor your physical appearance before the ASU Officer suggested that you were over 18. In the absence of any*

evidence to the contrary the Secretary of State does not accept that you are a minor and is satisfied you should be treated as an adult in accordance with paragraph 349 of HC 395 (as amended)."

6. In paragraph 14 of the determination the adjudicator found that the Immigration Officers acted in good faith in conducting the interview in the genuine belief that the appellant was over the age of 18. He said:

> "*Certainly given the physical appearance of the appellant before me, I might have subscribed to a similar view. In the absence of being able to ascertain his age precisely, I am prepared to give the appellant the benefit of the doubt and subscribe to the date of birth he gives before me.*"

7. It was for the appellant to satisfy the Secretary of State and the adjudicator on the lower standard as to his age. We have avoided making any assessment of his age in the course of the hearing before the Tribunal. At the hearing before the adjudicator, no Home Office Presenting Officer appeared. The adjudicator was deprived of the opportunity of hearing cross-examination on this issue, assuming (as we do) that it remained a live issue. We do not know whether any evidence was advanced by the appellant in support of his claim to be a minor at the date of his interview but it was always part of the appellant's case that he was born on 22 December 1984. We do not consider that the adjudicator can be criticised for accepting the appellant's contention that he was not yet 18 when the interview took place. If, as he claims, he was born on 22 December 1984 he was a month short of his majority when he completed the Statement of Evidence Form that was submitted to the Home Office and was 9 days short of his majority when he was interviewed at the Home Office. The adjudicator's finding that the interviewer acted in good faith when conducting the interview and making an assessment of his age is not challenged in the grounds of appeal.

8. The grounds of appeal argue that the adjudicator should have disregarded the contents of the interview because, according to the adjudicator's own findings, the appellant was a minor at the time the interview took place. Paragraph 352 of HC 395 provides:

> *“352. A child will not be interviewed about the substance of his claim to refugee status if it is possible to obtain by written inquiries or from other sources sufficient information properly to determine the claim.*

When an interview is necessary it should be conducted in the presence of a parent, guardian, representative or another adult who for the time being takes responsibility for the child and is not an Immigration Officer, an officer of the Secretary of State or a police officer. The interviewer should have particular regard to the possibility that a child will feel inhibited or alarmed. The child should be allowed to express himself in his own way and at his own speed. If he appears tired or distressed, the interview should be stopped."

9. It is apparent from the foregoing that, in most circumstances, a child should not be interviewed. Indeed, if the child is represented, written inquiries will almost always provide sufficient information properly to determine the claim, provided the information supplied is comprehensive. However, the paragraph also envisages circumstances in which a child may be interviewed and the safeguards that are then to be adopted. Paragraph 352 makes no provision for a case in which the age of the claimant is in dispute.

10. It is not for the Secretary of State to determine the claimant's age, although in disputed cases he will have to form an opinion of it. The onus is upon the claimant to establish that he is a minor if he is asserting it. The final decision, however, rests with the adjudicator as part of his fact-finding duties. It follows that the Secretary of State in an application in which age is in issue will not finally know whether the claimant is a minor until, in a case which is subject to appeal, the adjudicator so finds. This does not, of course, prevent the Secretary of State from forming his own opinion as to age, whether or not supported by expert evidence, and thereby making a decision as to whether an interview should be conducted. In the present case it was apparent from the appellant's appearance, as found by the adjudicator, that the Secretary of State acted in good faith in making an assessment that the appellant was not a minor. In our view, therefore, the Secretary of State cannot be criticised for conducting the interview.

11. When the matter came before the adjudicator, it was clearly good practice on his part to make a finding as to the appellant's age. There may be circumstances where it is not necessary but in many cases a finding as to the appellant's age will be important in making an assessment of the appellant's overall level of understanding. This may well go to issues of credibility. It may well have a bearing on any claim in human rights. It does not seem to us to be normally appropriate to deal with age as a preliminary issue unless that

finding effectively determines the appeal. Rather, the issue as to the appellant's age will usually be one of the several issues that the adjudicator is required to resolve. Since the ultimate decision will come as a result of hearing all of the evidence and submissions made upon it, the appellant's age may only finally be determined at the conclusion of the hearing and not during the course of it. If there has been an interview, as occurred in the present case, the adjudicator will have heard evidence about the contents of the interview whether or not he later decides that an interview should not have taken place because the appellant is a minor.

12. There is no rule of law in immigration cases that excludes evidence obtained in an interview of a minor which should not have taken place or which might legitimately have taken place but was not conducted in accordance with paragraph 352 because, for example, it was not conducted in the presence of the child's representative. Although the 1999 Act makes provision for Codes of Practice in relation to the conduct of inquiries, we were not referred to any specific provisions of a Code of Practice that governed this matter.

13. The Tribunal takes the view that the rules of the evidence in relation to appeals before an adjudicator are necessarily widely drawn. In the Immigration and Asylum Appeals (Procedure) Rules 2000, Rule 37 permits the appellate authority to receive oral, documentary or other evidence of any fact which appears to that authority to be relevant to the appeal, even though that evidence would be inadmissible in a court of law. Rule 48 (1) of the Immigration and Asylum Appeals (Procedure) Rules 2003 provides a similarly wide discretion:

> "*48 (1) An adjudicator or the Tribunal may allow oral, documentary or other evidence to be given of any fact which appears to be relevant to an appeal or an application for bail, even if that evidence would be inadmissible in a court of law.*"

14. The safeguard inherent in these provisions is that the adjudicator is free to operate his judgment as to the weight that he attaches to the evidence provided to him. Thus, for example, an adjudicator may decide to attach very little weight to the contents of a telephone conversation with a person who was told by some other unidentified third person of facts material to the claim. If that example is extreme, it is the almost invariable task of an adjudicator to make an assessment of the weight that can be attached to a witness giving evidence before him by considering his age, education,

experience and understanding. This consideration will rarely be voiced in a determination, far less capable of scientific evaluation. Consequently, there need be no difference in the adjudicator's approach to the evidence given by this appellant at a time when he was 17 years 11 months old and the time a few weeks later when he had attained his majority. Very different considerations would, of course, apply had the evidence been given at a time when he was much younger.

15. There are circumstances in which the Tribunal discern a role for exclusionary evidence, such as pursuant to Rule 48(5) where the adjudicator and the Tribunal are required by law not to consider any evidence which is not filed in accordance with time limits set out in the Rules or directions given to the parties under Rule 38, unless satisfied that there are good reasons to do so. Notwithstanding this, such exclusionary provisions are subject to the overriding objective in Rule 4 to secure the just, timely and effective disposal of appeals and applications in the interests of the parties and in the wider public interest. That said, we see no justification for a general principle that excludes the record of an interview conducted with a minor if the adjudicator or the Tribunal receives no credible evidence that it was conducted unfairly and it is an accurate record of the claim of the person interviewed, commensurate with his age and understanding.

16. It must also be borne in mind that an interview conducted with a minor may advance the claim, rather than detract from it. The present appeal is a case in point. There is no dispute that a minor is capable of providing, and ought to provide, a SEF setting out his claim, albeit the statement is provided in a confidential setting where the minor is unlikely to experience anxiety. In the instant appeal, however, the nature of the claim was not the claim that the appellant, as an adult, was subsequently to advance. For example, in paragraph 13 (iii), it appears that the appellant said in his asylum interview record and in his evidence that the Lebanese authorities did not arrest him. In contrast, in his SEF, the appellant expressly stated that he was arrested. See paragraph 8 at A23 of the statement annexed to the SEF. This discrepancy is repeated in paragraph 14 of the determination. Consequently, although Mr Salfiti sought to exclude the contents of the interview record, it is our view that the interview supports the claim that the appellant advanced before the adjudicator. Whilst it could not, of course, remove the discrepancy, it cannot but have neutralised (to some extent at least) its effect. Had the appellant advanced for the first time at the hearing a claim that was substantially different from that set out in his application, we venture to

suggest that an adjudicator might justifiably had treated this as undermining his overall credibility. In the present appeal, the interview afforded the appellant with an opportunity less than a month after the completion of his SEF to put the record straight.

17. There can, of course, be no room for cherry-picking of the evidence. A party is not entitled to rely on those parts of the evidence which support his claim whilst claiming to reject those parts which no longer accord with the claim. In the instant case, Mr Salfiti was unable to draw to our attention any answers given in the interview that the adjudicator relied upon in making any adverse findings on credibility. Indeed, as far as we can tell, the interview record encapsulates the case advanced before the adjudicator and might, therefore, be relied upon in supporting the submission that the appellant had been consistent. If, as the appellant contends, the evidence of the interview record should, as a matter of law, have been excluded, the appellant would have been unable to have placed any reliance upon its contents, for good or for ill. In other words, an exclusionary principle in this case would have acted to the detriment of the appellant and in violation of the overriding principle.

18. The adjudicator dealt with the evidence set out in the interview in these terms in paragraph 14 of the determination:

> "*His solicitor has rightly pointed out that at the time of the interview the appellant would have been just under the age of 18. There are no representations before me to exclude the interview and I have sought to take fully into account the question of the appellant's age. I have looked at the flow of the interview, it does seem to flow without any problems, the appellant at the end was given an opportunity to make comments and he did so... His solicitor has asked me to take into account his age at interview and that I have sought to do, and have taken fully into account the guidelines given at paragraph 196 of the UNHCR guidelines, and the UNHCR guidelines generally, in determining the appeal.*"

19. In our judgment, this is precisely the approach that the adjudicator ought to have taken. Had there been adverse findings capable of being drawn from the contents of the interview, it is apparent that the adjudicator would then only have reached an adverse finding after taking into account the age of the appellant at the time of the interview. As it is, there was nothing brought to our attention in the interview that the adjudicator relied upon in his determination as

undermining the appellant's account. Contrast this with the contents of the SEF, about which no criticism was or could be made, which contained discrepancies upon which the adjudicator was justified on relying in drawing adverse conclusions. In these circumstances, even if the interview evidence should have been excluded (which we reject), there would have been no material difference to the adjudicator's ultimate conclusion.

20. For these reasons, we consider that the grounds of appeal are without merit. In paragraph 1 of the grounds it is argued that the adjudicator was wrong in law in accepting the interview record, irrespective of the fact that he was not asked to exclude its contents. That argument is not sustainable. In paragraph 2 of the grounds, it is suggested that the express finding by the adjudicator that the interviewer acted in good faith was irrelevant. In our view, it was open to the adjudicator to make a positive finding of good faith. Furthermore, it was as well to decide the issue one way or the other because, had he made a finding that the interviewer had acted in bad faith or oppressively, these would have been important considerations in his assessment of the weight to be attached to the interview record. Indeed, it is at least arguable that bad faith on the part of the interviewing officer might be one of the rare occasions which justified the exclusion of the evidence altogether. The remaining grounds of appeal rely on the adjudicator's admission of the interview record into evidence as a flaw of such significance as to render the adjudicator's ultimate conclusion unsafe. For the reasons we have given, we do not consider the admission was wrong but, even if it had been, there is no material before us that suggests it had an adverse effect upon the adjudicator's ultimate conclusion.

21. We do not propose to go into the merits of the appeal itself. The adjudicator's approach to the evidence was proper. He gave adequate and intelligible reasons on which he based a conclusion that the Tribunal finds is sustainable. Mr Salfiti sought to argue that Palestinians returned to the Lebanon are at risk of death and the violation of their Article 2 rights upon which he also attached a claim that Palestinians are subjected to discrimination in violation of Article 14. We do not consider that there is a reasonable likelihood on the facts as found by the adjudicator that this appellant will be killed on return to the Lebanon. It follows that there is no Article 14 claimed based on discrimination that is capable of attaching to a claim under either Articles 2 or 3 of the ECHR. Accordingly, the appeal is dismissed.

Decision: The appellant’s appeal is dismissed.

Andrew Jordan
Vice President
Date: 4 February 2004