

NH (Rule 45 - No Substantive Consideration) Afghanistan [2003] UKIAT 00191  
**IMMIGRATION APPEAL TRIBUNAL**

Date of hearing : 19 May, 2004  
Date determination notified:  
21.5.2003

Before:

MR G. WARR  
DR H H STOREY

Chairman

Appellant

and

THE SECRETARY OF STATE

Respondent

**DETERMINATION AND REASONS**

1. The Appellant, a citizen of Afghanistan, appeals the determination of an adjudicator (Mr A J Olson) dismissing his appeal against the refusal of the respondent to grant his application for asylum..
2. Before us, the Appellant was represented by Miss K Marks, of Counsel, instructed by Lawrence & Co. Ms J Sigley appeared for the Respondent.
3. The appellant applied for asylum on the day after his arrival on 12 January 2003. He was interviewed on 6 February 2003. The Secretary of State gave his reasons for rejecting the application in a letter dated 18 February 2003. In the grounds of appeal the appellant stated he wished an oral hearing and indicated that the services of an interpreter would be required.
4. On 1 May 2003 the appellate authority issued a notice that the appeal would be heard on 21 May 2003. Attendance would be excused provided that the representatives replied to the directions contained in the notice. Absent a reply by 12 May the adjudicator would determine the matter in the appellant's absence. A further hearing date would be set if the reply was sent in in time.
5. The matter came before the adjudicator on 21 May 2003. There was no attendance. The adjudicator determined the matter under rule 45 of the Immigration and Asylum Appeals (Procedure) Rules 2003 for the following reasons:
6. "The appellant has not complied with directions issued. The appellant did not attend the hearing nor give instructions to his representatives to appear on his behalf, nor was a reply to directions completed. I have borne in mind the

provisions of rule 4 of the said rules, namely the overriding objective is to secure the just, timely and effective disposal of appeals.”

7. The adjudicator's determination is dated 25 May 2003. In fact, the representatives had replied to the notice by letter dated 19 May 2003 and this letter was received by the appellate authority on 21 May 2003 although it did not reach the adjudicator's hearing centre until after he had dealt with the matter.
8. In the grounds of appeal it is argued, relying on Ishaq Saqi Muhammad (01/TH/1233) promulgated on 14 June 2001, that the adjudicator had erred in failing to determine the appeal on its merits.
9. The representatives before us agreed that the appeal should be remitted for a hearing before a different adjudicator.
10. The adjudicator purported to determine the matter under rule 45(1)(c). Rule 45 is as follows:

“45.- (1) An adjudicator or the Tribunal may, subject to paragraphs (2) and (3) of this rule, determine an appeal without a hearing if -

(a) all the parties to the appeal consent;

(b) the party appealing against a relevant decision is outside the United Kingdom or it is impracticable to give him notice of a hearing and, in either case, he is unrepresented;

(c) a party has failed to comply with a provision of these rules or a direction of the appellate authority, and the adjudicator or Tribunal is satisfied that in all the circumstances, including the extent of the failure and any reasons for it, it is appropriate to determine the appeal without a hearing; or

(d) the adjudicator or Tribunal is satisfied, having regard to the material before him or it and the nature of the issues raised, that the appeal can be justly determined without a hearing.

(2) Where paragraph (1)(c) applies and the appellant is the party in default, the adjudicator or Tribunal may dismiss the appeal without substantive consideration, if satisfied that it is appropriate to do so.

(3) Where paragraph (1)(d) applies, the adjudicator or Tribunal must not determine the appeal without a hearing without first giving the parties notice of his or its intention to do so, and an opportunity to make written representations as to whether there should be a hearing.”

11. It will be observed that although the adjudicator considered he was acting under rule 45(1)(c) he was in fact determining the appeal under rule 45(2).

12. Counsel submitted that there was no essential difference between the Immigration and Asylum Appeals (Procedure) Rules 2000 and the current rules save that the power for an adjudicator under the former rule 33(2)(a) to allow a respondent's appeal without considering its merits no longer appeared.
13. Both the representatives submitted that where there was material available to the adjudicator he should deal with the case substantively under rule 45(1)(c). Rule 45(2) should be relied on only in exceptional circumstances.
14. We agree with the parties' submissions. It will be noted that the adjudicator determined the appeal on the basis that a reply to directions had not been completed. In fact, it had been completed, but sent in too late. As the Tribunal observed in Muhammad, had the adjudicator determined the appeal on its merits, the appellant might have had much greater difficulty in getting the decision overturned. The adjudicator had regard to the overriding objective but proper emphasis needs to be given to the word "effective". A failure to determine the appeal on its merits may well prove, as it has proved in this case, to be ineffective.
15. This was not a case where there was no material before the adjudicator. There had been an interview and an appellant's statement and a full and reasoned refusal letter. There was sufficient documentation to enable the adjudicator to give the appeal substantive consideration. By substantive consideration we do not mean that the adjudicator's determination of the issues needs to be set out at any great length. Indeed it may well be appropriate, depending on the circumstances, to set out the reasons in a comparatively brief form. It must be appreciated that the adjudicator's primary duty is not to penalise the appellant but to determine his appeal justly.
16. Where there has been no interview and a general lack of material to enable the adjudicator to make any informed decision, it may be appropriate to make use of rule 45(2). There may be other circumstances where rule 45(2) would have a part to play but in asylum appeals and where Article 3 is engaged great caution is advisable before recourse is had to the power to determine an appeal without giving the case substantive consideration.
17. It is to be noted that there is a two stage process involved where it is sought to rely on rule 45(2). The adjudicator must first consider whether it appropriate to determine the appeal without a hearing. If it is, the case may fall to be dealt with under rule 45(1)(c). However, a further discretion has to be exercised to bring rule 45 into play. The adjudicator needs to consider whether it is appropriate to determine the appeal without substantive consideration. The decision maker needs to be especially wary before taking that second step.
18. This decision is concerned with rule 45 only, cases where there is no hearing. Where either party attends, rule 44 is the relevant rule and this rule makes no provision for the determination of an appeal without substantive consideration.

19. For the reasons we have given above, and with the agreement of the representatives, the appeal is remitted for a hearing before an adjudicator other than Mr A J Olson.

20. The appeal is allowed to the extent indicated.

G. Warr

Chairman

17 November 2003