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Heard at Field House

HT (Surendran Guidelines – Questioning – Test for Bias) Algeria [2003] UKIAT 00128

On 22 July 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

04/11/03

Before :

Mr J Barnes (Chairman)
Mr S L Batiste
Mr R Chalkley

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation

For the appellant: Miss J Lule of Counsel instructed by Simmons, Solicitors

For the respondent: Mr L Parker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Algeria born on 28 January 1972. He claims to have arrived in the United Kingdom on 20 June 2001 but he was at all events here on 25 June 2001 when he claimed asylum. He submitted a statement but subsequently failed to attend at interview. The Secretary of State refused his asylum application for the reasons set out in a letter dated 9 August 2001, such refusal being under both paragraphs 336 and 340 of HC395, the relevant Immigration Rules, although the claim was dealt with substantively insofar as it was set out

in the appellant's statement. On 15 August 2001 the Secretary of State issued directions for the removal of the appellant to Algeria as an illegal entrant after refusal of his asylum application. He appealed against that decision on both asylum and human rights grounds. His appeal was heard on 3 February 2003 by an Adjudicator, Miss C J Hamilton, who dismissed his appeal on the basis that his core evidence lacked credibility.

2. The appellant had been represented before the Adjudicator by Miss Lule, who also settled the grounds of appeal in respect of which leave was granted in relation to ground 7 which challenged the decision on the basis that the Adjudicator had failed to act in accordance with the Surendran guidelines as adopted in the "starred" Tribunal determination in MNM [00/TH/02423]; and in relation to ground 8 which asserted that the Adjudicator had failed to give any, or any adequate, reasons for her adverse credibility findings.

3. At the hearing before us we had the Adjudicator's record of proceedings as well as a transcript of Miss Lule's contemporaneous notes of the hearing before the Adjudicator. The respondent had not, of course, been represented before the Adjudicator.

4. It is not necessary for the purposes of this determination to set out the basis of the appellant's claim in any detail. It suffices to record that he claimed to have been threatened by members of the GIA in 2001 but that, following his seeking of protection from the police in Algeria, he claimed that he then become the object of suspicion on the part of the military security service who accused him of being a terrorist working for the GIA and sought to pressurise him into making a signed confession during detention. His treatment in detention led to him becoming ill and being transferred to a military hospital from which he was able to effect his escape and he then left Algeria and made his way to the United Kingdom, having since his arrival been informed that the authorities in Algeria were still seeking him.

5. It was common ground that if the appellant was credible in his claims, there was an arguable issue as to whether his removal would be in breach of the United Kingdom's International Treaty obligations.

6. So far as the challenge arising from the Surendran guidelines was concerned, both advocates had been referred by us to the Tribunal decision in Yildizhan [2002] UKIAT08315 which had given detailed consideration to the Surendran guidelines,

emphasising that they were no more than guidelines to the conduct of hearings in which the Secretary of State was unrepresented but that, whether or not they had been followed in a particular appeal, the issue for the Tribunal remained that of whether the findings of the Adjudicator were unsafe and unsustainable on the basis that the requirements of natural justice had not been followed by reason of apparent bias on the part of the relevant Adjudicator.

7. Since the Tribunal decision in MNM, the issue of the test for determining apparent bias has been the subject of consideration by the House of Lords in Porter and Another v Magill [2001] UKHAL 67. The test for apparent bias had been formulated by Lord Goff of Chieveley in R v Gough [1993] AC646 in the following terms:

> "…having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …"

8. That formulation of the relevant test was reconsidered in the light of Strasbourg jurisprudence by the Court of Appeal in in re Medicaments and Related Classes of Goods (No.2) [2001] 1WLR700 who summarised the Court's conclusions as follows:

> "When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the Tribunal was biased."

9. That formulation was approved by the House of Lords in Porter and Another v Magill save for deletion of the reference to "a real danger". In the leading judgment given by Lord Bingham of Cornhill, he said in this respect:

> "Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg Court. The question is whether the fair-

minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

10. That authority is, of course, binding on us and must inform, as has previously been accepted by this Tribunal, the proper approach to all questions of alleged bias which encompasses those appeals where it is said that such apparent bias arises from the failure to observe the Surendran guidelines.

11. It follows that a failure to observe those guidelines is not of itself sufficient to show apparent bias on the part of the Adjudicator. It remains the case that the relevant circumstances will still have to be found by the appellate court from the available evidence and their task will be to apply the test for apparent bias as formulated in Porter and Another v Magill.

12. The statement of the Tribunal in Hemachi [HX/07645/2001] that where there has been a failure to follow the Surendran guidelines the better course is to remit the hearing afresh before a different Adjudicator, cannot be regarded as authoritative following the decision of the House of Lords. It may be that it will be the right course but the Tribunal must first consider the existence of any apparent bias in accordance with the guidance of the House of Lords.

13. In her submissions to us Miss Lule rightly did not seek to suggest that because the Adjudicator had herself questioned the appellant in the course of the appeal this of itself gave rise to any basis for remittal. Quite apart from the fact that it seems to us that there is an inherent right in any judicial officer to ask questions of a witness in order to clarify issues which concern him, there is in any event nothing in the Surendran guidelines to suggest that there is anything improper in the Adjudicator asking questions as guideline 7 makes clear. It is recommended in paragraphs 5 and 6 of those guidelines that it is preferable for the Adjudicator to indicate the areas of concern so that the appellant's representative may deal with them in the course of examination in chief and this is no doubt good practical advice because it avoids the possibility that by asking questions the Adjudicator will give the appearance of a lack of impartiality and of entering into the arena. Whether the Adjudicator has done so in any given case is, however, a matter which requires investigation and resolution by application of the test for apparent bias. Whether objectively the result has been to cause any prejudice to the claimant in the outcome of the

appeal will be an important but not necessarily always a determinative consideration.

14. The nature of the challenge raised by Miss Lule was that the Adjudicator had identified areas in respect of which she wished to have clarification but had interrupted Miss Lule in the course of examination in chief seeking to deal with those identified areas. It is apparent from the record of proceedings that Miss Lule was able to ask only two questions in relation to the first issue for clarification raised by the Adjudicator before the Adjudicator herself intervened and took over the examination of the witness for the next five questions. That pattern was repeated during the remainder of the examination of the appellant with counsel being able to ask at most one or two questions before the Adjudicator again took over the questioning.

15. Additionally, Miss Lule complained that the questions which the Adjudicator sought to raise went beyond matters which had been challenged in the refusal letter and that this, too, was to extend the range of questioning in a way which was contrary to the Surendran guidelines. We have no hesitation in saying that there is no basis for such a submission. It is the function of the Adjudicator to determine the facts in each appeal and whether or not the Secretary of State is represented, the Adjudicator is not in that enquiry limited to issues which are the subject of direct challenge in the refusal letter. It is only where there are issues in respect of which there has been a clear and unequivocal concession on the part of the Secretary of State that it would be inappropriate for an Adjudicator to raise once more the issue which had been conceded. Paragraph 5 of the guidelines is quite clear that there is no limitation on an Adjudicator raising additional points as to credibility which arise from consideration of the papers and this is made clear again in MNM at paragraph 19 in the reference to the earlier Tribunal decision in Muwyinyi that Adjudicators were not bound to accept accounts at face value but could and should probe apparent improbabilities provided they did not involve themselves directly in questioning appellants or witnesses save as necessary to enable them to ascertain the truth, never adopting or appearing to adopt a hostile attitude.

16. In response to questions from the Tribunal, Miss Lule agreed that the real basis of her complaint was the degree to which the Adjudicator had interrupted her own examinations in chief so that she was deprived of the opportunity of drawing out the evidence in an orderly fashion without interruption.

17. So far as the second limb of the grounds of appeal was concerned, Miss Lule submitted that the Adjudicator's reasoning in rejecting the credibility of the appellant was inadequate and unsafe and that the Adjudicator had failed to evaluate that evidence against the known country background situation at any point in her reasoning. Further, that the adverse findings were derived from the Adjudicator's views as to what was and was not plausible. It is not necessary for us to detail the challenges in this respect further because Mr Parker conceded that there was merit in the challenges to the Adjudicator's approach to credibility. We are satisfied that concession is properly made and Ms Lule sought remittal so that the evidence could be taken afresh. We consider that this is the appropriate course. We also had some concern as to the way in which the Adjudicator inhibited the examination in chief of the appellant although that would not have been a determinative factor without further careful analysis which the accepted unsatisfactory nature of the reasoning to support the adverse credibility findings has rendered unnecessary on our part.

18. We are indebted to both advocates for their assistance, and in particular to Miss Lule for her very lucid and helpful submissions.

19. For the reasons which we have already given, we are satisfied that the Adjudicator's determination is unsafe and cannot stand. It will be necessary for the evidence to be taken afresh. We, too, are satisfied that the proper course is to direct remittal for this purpose, taking into account the requirements of the Procedure Rules. It is further not satisfactory in such circumstances that an appellate tribunal should become the primary finders of fact by reason of errors on the part of an adjudicator.

20. For the above reasons, this appeal is allowed to the extent that it is remitted for hearing afresh before an Adjudicator other than Miss C G Hamilton.

J Barnes
Vice President