JK (Procedure Rules 2000:Rules 30 and 33(2)) Kenya [2003] UKIAT 00117

Promulgated; 30.10.03

IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
On: 14 August 2003
Prepared: 15 August 2003

Before

Mr Andrew Jordan
Mr P. Rogers JP

Between:

Claimant

and

The Secretary of State for the Home Department

Respondent

For the claimant: Mr F. Hammond, counsel
For the Secretary of State: Mr J. Wyatt, HOPO

DETERMINATION AND REASONS

1. The appellant is a national of Kenya. The Secretary of State appeals against the decision of an adjudicator, Mr D. P. Herbert, following a hearing on 1 November 2002 allowing the claimant's appeal against the decision of the Secretary of State to refuse both his asylum and his human rights claims.

2. The claimant was born on 3 August 1968. He claims to have entered the United Kingdom on 11 September 2001 using a British Passport. He only claimed asylum after he was apprehended when police raided the house in which he was staying on 18 December 2001.

3. The Adjudicator allowed the appeal under paragraph 33 of the Immigration and Asylum Appeals (Procedure) Rules 2000. The material part of the rule is in these terms:

"(1) Where a party has failed-

(a) to comply with a direction given under these Rules…

and the appellate authority is satisfied in all the circumstances, including the extent of the failure and any reasons for it, that it is necessary to have regard to the overriding objective in rule 30(2), the appellate authority may dispose of the appeal in accordance with paragraph (2).

(2) The appellate authority may

(a) in the case of failure by the Respondent, allow the appeal, without considering its merits."

4. The reference to paragraph 30(2) incorporates the overriding objective into the adjudicator's consideration in dealing with a decision under rule 33, namely the need to secure the just, timely and effective disposal of appeals. It is rule 30 that also contains the direction-making jurisdiction of the adjudicator. In order to put the overriding objective into effect, the adjudicator may give directions that *control the conduct of any appeal*. It is thus apparent that the circumstances in which an Adjudicator can give directions are limited. It is the conduct of the appeal that is the focus of the power to make directions. Directions cannot stray into areas outside that power and, in particular, cannot require the Home Office to perform its decision-making function. In broad terms, it is for the Home Office to decide how it shall deal with the application. Once, however, a decision is made dismissing an applicant's claim and the applicant has appealed against that decision, the Adjudicator has power to give directions regulating the conduct of the appeal but not the decision-making process on the part of the Home Office that lies behind it.

5. The appeal came before an Adjudicator, Ms Pitt, on 21 June 2002. The claimant argued that the Home Office interview conducted with the claimant at Oakington on 22 December 2001 was unfair, hostile and oppressive. A formal complaint had been made against the conduct of the interview and there was a note on the Home Office file to the effect that the refusal letter should not be issued before the complaint had been considered and dealt with. A consideration of the file revealed no evidence to suggest that the complaint had been dealt with or even considered, although the Reasons for Refusal letter was dated 28 December 2001. Ms Pitt considered that it was in the interests of justice to adjourn the appeal to enable the claimant to provide evidence in substitution for the interview record and for the Home Office to provide evidence of the outcome of the complaint and the effect on its decision to refuse the claimant's application.

6. Pausing there, the Tribunal considers that the adjudicator should have examined the relevance of a complaint about the conduct of an interview. It is possible for the conduct of an interview to have no bearing on the asylum appeal. If the claimant accepts that all the answers he gave are

true and should form part of his evidence in the appeal, it may be irrelevant that the interviewer conducted the appeal in an unprofessional manner. That would not, of course, prevent the claimant from making a complaint about the conduct of the interview. Indeed, if an interview is conducted in an unfair, hostile and aggressive manner, the claimant is entitled to raise this with the Home Office, if only to receive an apology. On the other hand, if the unprofessional manner in which an interview was conducted leads to the interviewee being confused and prevented from giving his account in an orderly and convincing manner, this may result in the interview record being treated by an Adjudicator as unreliable. At the very least, it may amount to an explanation for inconsistencies either within the interview record itself or between the interview record and a subsequent statement.

7. We asked Mr Hammond, who appeared on behalf of the claimant, whether his client was alleging that anything within the record of interview had failed to do justice to the account that he wished to give. Mr Hammond frankly conceded that he could not point to any question or answer in the interview that the claimant said was incorrect or misleading. Furthermore, we considered the contents of the Reasons for Refusal letter. It appears to us that there was nothing in the refusal letter that suggests the Secretary of State relied on the answers given in interview as undermining his claim. Indeed, in paragraph 7 of the letter, for example, the Secretary of State accepts the claimant's evidence as derived from answers given in interview. In these circumstances, it is difficult to see what relevance the complaint about the conduct of the interview might have had on the appeal before the Adjudicator. The complaint did not undermine the record of the interview or render its contents unreliable. Further, the right to adduce additional evidence to cover any additional matters was unaffected.

8. The adjudicator, nevertheless, gave a direction that the Home Office was to determine the complaint and inform the IAA and the claimant if the complaint was upheld and a new interview was to be required. The Tribunal considers that the Adjudicator had no power to make an order requiring the Home Office to determine the complaint made against it. This was not a direction aimed at controlling the conduct of the appeal. Furthermore, if the Home Office wished to conduct a new interview, that was a matter for the Home Office to decide. Having said that, given that the claimant was going to serve additional evidence, including a comprehensive statement setting out his claim in detail, it was not obvious why the Home Office would have wished to interview the claimant again.

9. In addition, the adjudicator directed that the case should proceed on the basis of the evidence that the adjudicator directed should be adduced. We are satisfied that the adjudicator was fully entitled to make this direction.

10. The matter came before another adjudicator, Mr Herbert, on 28 August 2002. We fully sympathise with the position of an adjudicator who is faced

with directions made by another adjudicator that have not been complied with. No adjudicator likes to see directions made on a previous occasion disregarded by either side. The Home Office had failed to comply with the directions made and had not complained that the Adjudicator was in error in making them. Mr Herbert repeated the directions made on 21 June 2002 and directed that if the Home Office upheld the complaint, consideration should be given to offering a new interview and issuing a fresh decision. For the reasons we have already stated, we do not consider that the adjudicator had the power to require the Home Office to give consideration to the manner in which it decides to conduct an application. Importantly, the adjudicator made it clear that a second failure to comply might result in the adjudicator exercising his powers under rule 33.

11. Mr Herbert sensibly reserved the appeal to himself and directed that the matter be re-listed before him on 1 November 2002. On that occasion the adjudicator only had before him a fax dated late the day before and enclosing a fax dated 30 October 2002 from the interviewing officer denying impropriety. She was unable to say what action had been taken about the complaint. It was clear to the adjudicator that little effort had been made by the Home Office to comply with the directions and what effort had been taken had been carried out too late. The adjudicator fairly described the delay as inordinate and inexcusable. In paragraph 22 of the determination, the adjudicator considered that the failure to comply went to the heart of whether the complainant was interviewed fairly. He went further. He decided that it undermined whether the asylum appeal was in accordance with the law. In reaching that conclusion, he could not have had in mind the information before us that the claimant did not seek to resile from any of the answers he gave in interview. Furthermore, he does not appear to have considered the refusal letter in which the contents of the interview did not form the basis for any adverse credibility finding.

12. By that stage, the adjudicator had before him the claimant's statement and was in a position to decide the appeal on its merits. If, during the course of the hearing, the Home Office had sought to raise inconsistencies between the interview and the oral evidence of the claimant, it would have been open to the adjudicator to prevent questioning on these matters because of the unresolved complaint about the conduct of the interview. In that way the adjudicator could have permitted the claimant to rely upon the interview if he chose to do so but could have prevented the Home Office from prejudicing the claimant unfairly. This was very much the point made by the Vice President, Mr DJ Parkes, when he granted permission to appeal. He stated: *"[The claimant] would have been capable, it might be thought, of explaining to the adjudicator, if it was so, why what was recorded at interview should have been rejected as unreliable and his evidence and statement before the adjudicator relied upon."* The claimant could have been put in a position where he was protected against prejudicial conduct by the Home Office.

13. The adjudicator decided that, in order for directions to have any effect whatsoever, compliance must fall equally. He quite properly decided that the claimant's representatives had complied with the directions and that the respondent had signally failed to do so. He found that the failure went to the heart of the claimant's case, a finding with which we disagree for the reasons we have given. He allowed the appeal. In doing so, he stated that he allowed the appeal both under the 1951 Geneva Convention and under the Human Rights Convention.

14. In *Mohammad Ahmed (01/TH/3484)*, the Immigration Appeal Tribunal, chaired by Mr D. K. Allen, considered a case where the adjudicator had directed the Home Office to serve a typed copy of the interview record and to provide a written response to the Notice of Additional Grounds. At the resumed hearing, the adjudicator allowed the appeal because the Home Office had failed to comply with the earlier directions. The Tribunal considered that the adjudicator had acted beyond his powers in making the directions. Nevertheless, it also considered how the adjudicator should have dealt with the appeal. In paragraph 14 of the determination, referring to the decision of *Muhamed (01/TH/1233)*, the Tribunal considered that in order to effect a just disposal, an adjudicator had to be persuaded that the right course was to dismiss the appeal by reason of the failure rather than to adopt the preferable course and decide the appeal on the material before him. In the circumstances of that case, the Tribunal decided that the adjudicator should have proceeded to hear the appeal on its merits.

15. In our judgment, there are two significant factors with the present appeal that are similar to the circumstances in *Mohammad Ahmed*. First, the directions made by both adjudicators were not directed towards the proper conduct of the appeal and were made without authority. It was submitted to us that this was not a point raised in the grounds of appeal, nor was it submitted to either adjudicator before the directions were made. In the Tribunal's view, whether the adjudicator has power to make a direction goes to the issue of whether he has jurisdiction to allow or dismiss an appeal under rule 33. If the parties do not raise whether the adjudicator was acting within his powers, it is open to the Tribunal to raise the issue as we have done in this appeal. Consideration of rule 33, as the case law reveals, almost always begins with a consideration of the power of the adjudicator to make the direction that is the subject of the failure. We do not consider that the parties could have been prejudiced by the Tribunal raising the matter.

16. For this reason, we consider that the adjudicator was in error in not proceeding with the appeal on its merits. The answers given by the claimant in the interview were not central to his case. The claimant had had a full opportunity to present his case in statement form and was available to give evidence, had he wanted to do so. The Tribunal accepts that this course of action would have relieved the Home Office of any adverse consequences of its own failure to comply. It might even be said

to represent a green light for further default. Furthermore, it contrasts with the results that often flow in the case of default by the claimant, where default may well result in real prejudice to the chances of a successful appeal. Nevertheless, we believe that an adjudicator should be reluctant to decide asylum or human rights appeals on the basis of procedural default and, in accordance with the overriding objective, should normally seek to decide them on the merits.

17. In the course of argument, an issue arose as to the effect of the adjudicator's decision to allow the appeal. It appears that it was the adjudicator's understanding that by allowing the appeal, he was reversing the Secretary of State's refusal to grant the claimant asylum or the right to remain under the ECHR. This conclusion is derived from the words of the determination that the appeal was allowed both under the 1951 Geneva Convention and the 1950 Convention. It is also apparent, of course that, in the case of a default by the claimant, the application of rule 33(2) prevents the claimant pursuing his appeal on the merits with the effect that his appeal is bound to fail. Barring an appeal, this is a final determination of his claims under both Conventions.

18. In the present appeal, the Secretary of State made a decision to issue removal directions and the claimant's right of appeal arose under the provisions of section 69(5) of the Immigration and Asylum Act 1999. It was submitted to us by Mr Wyatt that when rule 33(2) is applied against the Home Office, the effect is to quash the Secretary of State's decision to issue removal directions and no more. The result is that the claimant, far from succeeding in his appeal by establishing refugee status, merely finds that he is placed back into the limbo of awaiting a valid decision on his claim. The practical consequences of this situation were highlighted in the present case. The claimant is, arguably, better off with the Secretary of State's appeal allowed and the case remitted for hearing afresh on the merits than if the appeal is refused in which event the claimant does not have the benefit of a valid decision or the right of appeal attached to it. Mr Hammond, on the claimant's behalf, indicated the claimant's preference was to have his appeal decided sooner rather than later and, ironically, this result is more likely to happen if the appeal before us is allowed and remitted rather than refused.

19. On its face, this is a curious result but it is consistent with the scheme of the legislation. The right of appeal does not attach to the decision to refuse asylum or the claim under the Human Rights Act. Rather, it attaches to the associated immigration decision; in this case, the decision to issue removal directions. In any appeal, the claimant argues that the immigration decision is contrary to either or both of the 1950 or 1951 Conventions. If the appeal is decided on the merits then the adjudicator decides the asylum and human rights issues. That decision will determine whether the claimant has a right to remain. By contrast, if the appeal results in a decision under rule 33(2) arising out of a default by the Secretary of State to comply with directions, the immigration decision is

quashed and there is no decision on the asylum or human rights issues. The process then begins again from scratch. Compare this with an appeal that results in a decision under rule 33(2) arising out of a default by the claimant to comply with directions. In this case, the appeal is refused without considering the merits and the claimant has exhausted his right to a consideration of the issues raised in his claims.

20. The position that we have set out above is consistent with the decision of the Immigration Appeal Tribunal in *Tekle [2002] UKIAT 00704*, (Mr J. Freeman, chairman). The appeal concerned the decision of an adjudicator to allow the appeal because of non-compliance with directions by the Home Office. The Secretary of State's decision had been made under paragraph 340 of HC 395. Although critical of the Home Office, the Tribunal allowed the appeal with these words, found in paragraph 7 of the determination:

> *"The Home Office have a public responsibility to deal with asylum cases in good time: they have now wasted a whole year over this one, and we very much hope no such thing will ever happen again. This appeal is [allowed]: that does not of course mean that the asylum-seeker is entitled to asylum, but that the decision to remove her is in effect quashed. The Home Office will now we hope offer her an interview very shortly, and may then reach a fresh decision on the merits of her case."*

21. We agree with that analysis. For the reasons that we have given, we consider that the adjudicator was in error in allowing the appeal by reason of the failure of the Home Office to comply with directions. Accordingly, the appropriate course is to remit the appeal for hearing afresh before an adjudicator in order to decide the appeal on its merits. We set aside all directions made in relation to the complaint about the conduct of the interview. This has the fortunate result that the decision of the Secretary of State to issue removal directions has not been quashed. The claimant is, therefore, entitled to appeal against that decision and have his appeal heard, on its merits, before the adjudicator. Had the adjudicator reached the right decision in allowing the appeal by reason of the default of the Secretary of State in complying with directions, the effect would have been to quash the removal directions and to place the claimant in the position where no valid decision has yet been made. The adjudicator could not have required the Home Office to make a valid decision because he has no power to do so in his direction-making function. The claimant would then have been dependant upon the Secretary of State to make a fresh decision that would trigger the claimant's right of appeal if his claims were refused. When consideration is given to the exercise of the power under rule 33(2) to allow an appeal by reason of the default of the Secretary of State, an adjudicator should pay close regard to the practical consequences of quashing the immigration decision.

Decision: The appeal of the Secretary of State is allowed to the extent that the claimant's appeal is remitted for hearing afresh before an adjudicator other than Ms S.V. Pitt or Mr D.P. Herbert.

Andrew Jordan
Vice President
16 August 2003