MA (Transfer of Proceedings - Evidence Part Heard) Ethiopia [2003] UKIAT 00103

IMMIGRATION APPEAL TRIBUNAL

Heard at: Field House
On: 20 October 2003
Prepared: 20 October 2003

Determination notified
28th October 2003

Before:

Mr K Drabu (Chairman)
Mr L V Waumsley (legal member)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

For the Appellant: Mr S Muquit of counsel, instructed by Aston Clark, solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

1. The appellant, a citizen of Ethiopia, appeals with leave against the determination of an adjudicator (Mr P D Southern), sitting at both Surbiton and Hatton Cross, in which he dismissed her appeal on both asylum and human rights grounds against the respondent's decision to refuse her application for asylum and to give directions for her removal from the United Kingdom as an illegal entrant.

2. The appellant's appeal came before the adjudicator on two occasions, namely 27 January 2003 and 3 March 2003. The appellant gave oral evidence on both occasions. The reason for that is set out in some detail by the adjudicator in his determination at paragraph 2 in the following terms:

> "This appeal had first come before me on 27th January 2003 at Surbiton. The appellant gave evidence and was in the process of being cross-examined when Counsel for the appellant indicated a lack of satisfaction with the interpreter. It was suggested that the interpreter was not accurately translating the evidence of the appellant and as a result, it was submitted, there must be a risk that the evidence I had recorded in the Record of Proceedings was seriously

misleading. It was not possible to obtain a fresh interpreter on that day and so the case was adjourned to Hatton Cross on 3rd March 2003. Counsel for the appellant submitted that the case ought to be heard before a fresh Adjudicator. Indeed Counsel's instructing solicitors had written to the IAA in that regard. It was said in that letter that "to preclude any possible suspicion of prejudice, we consider that having Mr Southern hear the appeal again will defeat the purpose of the adjourned hearing". Counsel submitted to me that I should not hear the appeal on 3rd March because I would not be able to ensure that the appellant received a fair hearing as I would be unable properly to disregard the evidence I had heard on the earlier occasion. I rejected this submission. As will be seen from this determination I have not had regard to anything the appellant said to me on 27th January and indeed, I have not read the record I made of the proceedings on 27th January. I have based my decision entirely upon the evidence heard at Hatton Cross on 3rd March 2003".

3. The appellant was granted permission to appeal to this Tribunal on a number of grounds. However, for reasons which will appear below, it is only the first of those grounds which needs to be considered by us. That ground is conveniently summarised at paragraph 5 of the grounds of appeal as settled by the appellant's counsel in the following terms:

> "It is submitted that the SA's [adjudicator's] decision to proceed with hearing the appeal on 3rd March 2003 (notwithstanding the assurance that he had no regard to earlier controversial evidence) was, as a matter of procedural fairness, wrong in all the circumstances. It is submitted that the SA's decision to proceed with determining A's [the appellant's] appeal on 3rd March 2003 wholly undermined the very purpose of agreeing a de novo hearing.
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> It is submitted that justice not only needs to be done but also must be seen to be done. Whatever the ability of the SA to exclude from his mind controversial evidence taken earlier, this does not appease an appellant of the suspicion that such evidence was part of the information upon which a finder of fact determined his credibility".

4. At the start of the hearing before us, Mr Deller, on behalf of the respondent, informed us that he was not seeking to uphold the adjudicator's decision to proceed with the hearing on 3 March 2003. The appellant's oral evidence which the adjudicator had heard at the previous hearing was tainted because of the problems with the interpreter on that occasion, and the suspicion that that tainting might affect the adjudicator's assessment of the evidence given at the resumed hearing was by itself enough to undermined the safety of his assessment. Mr Deller was right to adopt that position.

5. We take account of fact that an adjudicator is a member of the judiciary, not a member of jury who could not reasonably be expected to put out of his mind evidence which he has already heard. Nevertheless, the fact remains that, however hard an adjudicator may seek to exclude from his mind evidence which he has already heard, even if that was on the previous occasion, the *possibility* remains that in arriving at his assessment of credibility in relation to the fresh evidence, he may be influenced, albeit unconsciously, by the tainted evidence heard previously.

6. In the circumstances, there remains the danger that the losing party may suspect that the adjudicator's assessment of the evidence was flawed, and that justice has not been done. The only way of ensuring that the suspicion, however unjustified it may be in a particular case, does not arise is to ensure that the fresh hearing takes place before a different adjudicator. That would of course necessitate obtaining a transfer order from a senior adjudicator under rule 52 of the Immigration and Asylum Appeals (Procedure) Rules 2003.

7. There is one further issue which requires comment from us, namely that the adjudicator having decided at the original hearing that the case should be relisted for a fresh hearing before another adjudicator, and having informed the representatives for both parties to that effect, subsequently changed his mind and arranged for the resumed hearing to be listed before himself without first giving the parties an opportunity to address him on the point. It is clear from his determination that the issue was canvassed by the appellant's counsel at the start of the resumed hearing, and to that extent both parties did have the opportunity to address the adjudicator on the issue at that time.

8. Nevertheless, as a general principle, an adjudicator who has decided to change his mind following a hearing at which he has informed the parties of his decision on a particular point should as a matter of procedural fairness give the parties an opportunity to address him further, if necessary by reconvening the hearing, before giving effect to his change of mind. It is unfortunate, to put it at its lowest, that the adjudicator did not do so in the present instance.

9. For the reasons set out above, we are satisfied that the adjudicator erred in proceeding with the hearing on 3 March 2003 despite the objections of the appellant's counsel, and that the procedural unfairness which occurred as a consequence is by itself sufficient to vitiate his determination. In the circumstances, there are no reliable findings of fact on the material issues which would enable us to substitute our own conclusions for those reached by the adjudicator. Accordingly, we see no alternative save to remit this appeal for a fresh hearing before another adjudicator.

Conclusions

10. As this appeal has raised two issues of wider importance, it may be of assistance to adjudicators generally if we summarise our conclusions on those issues as follows:

    1. Save where the evidence already taken is purely formal and is not in dispute between the parties, e.g. as to the witness's name, address and date of birth, an adjudicator who has had to adjourn a hearing because of problems with an interpreter after he has started to take evidence should not continue to hear the case, even with another interpreter, save with the *express* consent of both parties, and then only if he (the adjudicator) is satisfied that it would be proper to do so. Instead, the proceeding should be transferred to another adjudicator under rule 52 of the Immigration and Asylum Appeals (Procedure) Rules 2003;

    2. If an adjudicator has indicated to the parties during an open hearing that he is proposing to take a particular course of action, e.g. to have the case transferred

to another adjudicator, but subsequently decides to change his mind, he must not do so unilaterally without giving the parties a further opportunity to address him first, if need be by reconvening the hearing or inviting written submissions from them.

11. This appeal is allowed to the limited extent that it is remitted for a fresh hearing before an adjudicator other than Mr P D Southern.

Signed Dated

L V Waumsley
Vice President