Rajan (Related claimants: *Kimbesa* explained) Sri Lanka * [2001] UKIAT 00008

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 30/01/2001
Date Determination notified: 8/2/2001

Before

Mr Justice Collins (President)
Mr C M G Ockelton
His Honour Judge J Townend

Between

MUNIGESU RAJAN

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The appellant, Munigesu Rajan, is a citizen of Sri Lanka who was born on 26 January 1970. He is a Tamil. He arrived in this country in April 1998 with his wife and claimed asylum. His asylum claim was considered but was rejected on 27 September 1998 and he was refused leave to enter. He appealed against the refusal and his appeal was originally listed for hearing on 19 August 1999. For some reason that appeal was abortive and there was an order for transfer which led to the next listing of his appeal for hearing on 6 January 2000. Counsel then appearing for the appellant requested an adjournment. The record of proceedings indicates that Counsel told the adjudicator that the appellant's wife had now made an application for asylum in her own right and had been interviewed but that no decision had been reached. That does not appear to be wholly accurate because there is other information suggesting that the wife had not in fact been interviewed until July 2000.

2. Be that as it may, Counsel applied for an adjournment relying on the authority of ex parte Kimbesa, a decision of Mr Justice Ognall, unreported, dated 29 January 1997. We will come back to Kimbesa in due course but according to the record, Counsel submitted that there was a strong factual nexus between the appeal of the appellant and the application of his wife, and that the matters should be heard together. There was of course at that stage no appeal by the wife because no decision had been made and the assumption seems to have been that her

application would be rejected. In any event, the adjudicator then decided that the matter should be adjourned and should be listed 'For Mention' in six months time.

3. On 10 July the appeal came before another Special Adjudicator, who was informed that the appellant's wife's application was still awaiting consideration. A further adjournment followed and the matter came before another Special Adjudicator on 11 September 2000. On that occasion it seems that the Home Office was not represented but that the adjudicator was told that still no decision had been made and a direction was given that the matter be listed 'For Mention' the following month.

4. So it was that it came before Professor Casson on 11 October 2000 when the appellant was represented by Counsel, not Mr Pretzel who has represented him before us, and the respondent by a Home Office Presenting Officer who had no file. Professor Casson noted that the appellant's solicitors, Sri & Co., who we are told are also the solicitors acting on behalf of his wife, had in June 1999 signed a Certificate of Readiness which stated: 'We are now in every respect ready to proceed with this appeal'. Counsel requested a further adjournment to enable the appeal to be heard together with that of the appellant's wife whose claim had still not been decided. Again, we comment that there was and still is no appeal by the wife. Thus any question of a combined hearing under Rule 42 cannot arise.

5. Professor Casson took the view that the interests of justice required that the appeal be heard without further delay and he refused the adjournment. He directed that a witness statement be produced and the matter came on for hearing on the merits on 30 October 2000. Sri & Co. failed yet again to comply with the direction and no witness statement was available. Again Counsel repeated his request for an adjournment. He informed Professor Casson that the wife had been interviewed in connection with her asylum application in July but that no decision had been reached. The wife did not attend the hearing, had not attended it on 11 October, and there was no statement available or produced to indicate that her case impinged in any way upon that of the appellant or, more importantly, that the appellant's ability to present his case as he would wish was in any way prejudiced by the fact that a decision on his wife's application had not yet been reached, or that his wife was in any way inhibited from giving such evidence as he might have wished her to give in connection with his own appeal. There was absolutely no material put before Professor Casson which could have led him to believe that there would be the slightest prejudice to the appellant's case.

6. In his determination, Professor Casson has considered the law applicable to decisions to adjourn. He has noted that reliance was placed upon the decision of Mr Justice Ognall in Kimbesa. Kimbesa is unreported and understandably and properly so because it is a case which turns entirely on its own facts. It also turns upon an application of Rules which are now superseded by the 2000 Procedure Rules in a way which indicates that adjournments should be sparingly granted. The relevant present Rule is 31 of the Immigration & Asylum Appeals (Procedure) Rules 2000. Rule 31.1 reads:

> 'Where an adjournment of the appeal is requested the Appellate Authority shall not adjourn a hearing unless it is satisfied that refusing the adjournment would prevent the

just disposal of the appeal.'

7. As we have already indicated, there was nothing before Professor Casson that could conceivably have begun to satisfy him that refusing the adjournment would prevent the just disposal of the husband's appeal.

8. In Kimbesa the situation was very different. The appellant in that case had two brothers who had very shortly before the hearing arrived in this country and claimed asylum. Their cases were very much the same as, and factually involved with, that of the appellant and it was necessary in order to do justice that the facts of all three should be considered together. Further, Mr Justice Ognall was persuaded that it would be unfair to expect either of the brothers to have their accounts tested before they had had the opportunity of being interviewed and only a short time after they had arrived in this country. Accordingly, it was not in the interests of justice to have refused the adjournment in that case. And that is all that Kimbesa decides, that on the facts before Mr Justice Ognall it was unjust for the adjudicator to have proceeded. At the time that Kimbesa was decided, as we have said, the relevant rules were not as they now are. We have to, and adjudicators have to, apply the rules as they stand. What Professor Casson said in summary, in paragraph 16 of his determination, was this:

> 'Whatever the position may have been in the past, it is in my judgement now clear that ex parte Kimbesa is not to be regarded as authority for any proposition which requires the adjournment of a pending appeal on the grounds that asylum applications by relations of the appellant are under consideration. Rule 31 of the current Rules overrides any general principle which might be thought to have emerged from the decision in ex parte Kimbesa. In this case I was not satisfied that refusing the adjournment would prevent the just disposal of this appeal and I directed that the hearing should proceed.'

9. The general principle that Professor Casson is there referring to is the one he had referred to in the previous sentence, namely that ex parte Kimbesa is authority for the proposition that an adjournment of a pending appeal must follow if there are concurrent applications by relations. If Kimbesa has been used for that proposition it has been misused. It is not authority for any such proposition, it never has been and it is as well that it should be laid completely to rest by this determination. We hope that Kimbesa will never again be cited for any such proposition.

10. The reality is that an adjudicator must look at the words of Rule 31(1) and will refuse an adjournment unless satisfied that refusing it would prevent the just disposal of the appeal. Of course, the existence of concurrent applications by members of the family is a relevant consideration and it may, in an appropriate case, point to an adjournment. This is manifestly not such a case on the facts, as we have already indicated.

11. One point that was taken by Mr Pretzell was that Professor Casson said that he was taking into account the remarks of the Court of Appeal in Deen-Koroma [1997] Imm AR 242, which were made in the context of the 1996 Rules. He

complains that that authority had not been referred to in the course of argument and Counsel had not been able to deal with it, and he submits that that is in itself unfair and renders the decision reached one which should be set aside.

12. Of course, as a general rule, if there is a material authority which a judge finds after argument, and which may have a significant bearing on the outcome of the appeal, he ought to take steps to ensure that Counsel or representatives who have appeared before him are made aware of it and are given the opportunity to make any observations about it. That is a general proposition but like all such propositions it will depend upon the nature of the authority and the circumstances. This particular authority, with respect to Professor Casson, is not one which so far as we can see takes the matter anywhere. It merely reiterates the point that an adjournment should be granted if it would be unjust to refuse it. That is a statement, with respect, of the obvious, indeed we are not quite sure why the learned editor of the Immigration Appeal Reports thought it right to report Deen-Koroma. It seems to us that it is an authority for nothing which is not self-evident. Certainly, it is not an authority which Counsel could conceivably have made any useful observation about, and in the circumstances, whatever may be the general principle, the reference to Deen-Koroma cannot be said to have prejudiced the matter.

13. As will be apparent, we have not referred to the detailed facts of this case. That is because Professor Casson carefully reviewed the material before him and the evidence that had been given and concluded that the appellant did not have a well-founded fear of persecution in Sri Lanka for any Convention reason, and in the alternative that he had failed to show that it would be unreasonable or unduly harsh for him to relocate to Colombo. It is not suggested, nor could it be suggested, that there is anything wrong with the decision on the merits. The appeal is brought solely on the ground that an adjournment should have been granted in the circumstances. As we have made clear, in our judgment not only was Professor Casson not wrong to refuse an adjournment, there was no other course that he could properly have taken having regard to the Rules and to the information that was placed before him. In those circumstances this appeal must be dismissed.

MR JUSTICE COLLINS
PRESIDENT