IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 15/02/2000
Date Determination notified: 13/3/00

Before

The Honourable Mr Justice Collins
Mr A Hatt
Mr J Latter

Ali HADDAD APPELLANT
and
Secretary of State for the Home Department RESPONDENT

DETERMINATION AND REASONS

1. This appeal concerns the construction and correct application of Paragraph 340 of HC 395 which is designed to penalise asylum seekers who fail to co-operate with the Secretary of State to enable him to decide whether their claim is well-founded. There are a number of tribunal decisions which do not entirely agree on the correct approach of the appellate authorities when an appeal is brought against a refusal of an asylum claim based on Paragraph 340. Some have suggested that the special adjudicator should consider whether there was a reasonable excuse for the failure to co-operate. If he or she decides that there was, the matter can be remitted to the respondent; otherwise, the appeal should be dismissed. Others have suggested that the whole claim should be considered and any evidence put forward by the appellant taken into account as with any other appeal. It is clearly desirable that the tribunal should indicate which is correct.

2. This case has accordingly been 'starred' and heard by a tribunal consisting of the President and two legally-qualified members. It must therefore be followed by all tribunals and will be regarded as binding upon all adjudicators. It settles the particular points of law before it, in this case the true construction of Paragraph 340 and the correct approach of the Appellate authorities to appeals brought against decisions of the respondent which rely, whether wholly or in part, on Paragraph 340.

3. Before coming to the facts of this appeal, we must set out the principles which we believe should be applied. Paragraph 340 is one of a number of paragraphs under the general heading 'Consideration of Cases' within Part 11 of the Rules which deals with asylum. It reads:-

> "A failure, without reasonable explanation, to make a prompt and full disclosure of material factors, either orally or in writing, or otherwise to assist the Secretary of State in establishing the facts of the case may lead to refusal of an asylum application. This includes failure to comply with a notice issued by the Secretary of State .....requiring the applicant to report to a designated place to be fingerprinted, or failure to complete an asylum questionnaire, or failure to comply with a request to attend an interview concerning the application or failure to comply with a requirement to report to an immigration officer for examination."

Section 2 of the Asylum and Immigration Appeals Act 1993 makes it clear that the Convention governs the Rules. It provides;-

> "Nothing in the immigration rules ... shall lay down any practice which would be contrary to the Convention".

The appellate authorities have under s.8 of the 1993 Act to consider only whether removal in any given case would be contrary to the United Kingdom's obligations under the Convention. Paragraph 328 of the rules underlines the primacy of the Convention by requiring that all asylum applications be determined by the Secretary of State "in accordance with the United Kingdom's obligations under the [Convention]".

4. Each signatory to the Convention will have its own methods of determining whether an asylum applicant has made out his or her claim. But it is in our view axiomatic that the decision to refuse asylum must be based on a judgment on the merits of the claim. If there is insufficient material placed before him to enable the Secretary of State to be satisfied to the appropriate standard that the claim is established, it will fail. A failure to comply with obligations referred to in paragraph 340 (apart perhaps from fingerprinting) is likely in many, perhaps most, cases to lead to the Secretary of State rejecting the claim because it has not been established. Equally, a failure to comply may damage an applicant's credibility and demonstrate that his claim is unfounded.

5. It would be contrary to the Convention to send someone back who was a refugee as therein defined. Thus it is incumbent upon the Secretary of State to ask himself before deciding to remove an asylum seeker whether his claim has been made out. If he refuses an asylum claim merely because the applicant has failed to comply with a requirement of the rules he will not have answered that all important question and will not have acted in accordance with the Convention. Thus he cannot say 'You have failed to comply therefore you cannot have asylum'. What he can say is 'You have failed to comply; the result of that failure is that you have not established your claim'.

6. This means that the Secretary of State must in all cases make a decision in accordance with Paragraphs 334 and 336. We were told by Miss Annetts, who appeared on behalf of the respondent, that she had been instructed that the Secretary of State is intending in most cases to follow that course. We were glad to hear it. The only cases she suggested might not qualify were those where there was no material before the Secretary of State other than a wholly unparticularised claim to asylum. Those too can and should be decided on the basis that the claim is not established. Paragraph 340 must in our view be construed in this way in order to comply with the Convention. To use it alone to justify a refusal would be contrary to section 2 of the 1993 Act and so contrary to law.

7. Even if the Secretary of State has purported to rely on Paragraph 340 alone, there is a decision refusing the asylum claim which is appealable under s.8 of the 1993 Act. When the appeal comes before the special adjudicator, the appellant will usually seek to give an explanation for his failure to comply and proffer himself to give evidence and perhaps produce some documentary material. The special adjudicator must then consider all the material, including any explanations for the failure to comply since that will inevitably bear on the appellant's credibility, and decide whether to remove the appellant would be contrary to the Convention. This task the special adjudicator performs in every asylum appeal. The only difference in the failure to comply cases is that the material available to the Secretary of State when he makes his decision may be sparse in the extreme or even non-existent. But there is no difference in principle and in many asylum appeals fresh

evidence is presented and explanations are given for actions which were relied on by the Secretary of State to impugn credibility.

8. Two further considerations fortify us in our conclusion that the special adjudicator must determine the appeal and decide whether the asylum claim is made out. First, we have considerable doubts whether there is jurisdiction to remit the matter to the Secretary of State. S.19 of the 1971 Act requires an adjudicator either to allow or dismiss an appeal and the appeal before him or her in a s.8 case will always be against the removal which is the consequence of any appealable decision made. We note that in the Act of 1993 Parliament felt it necessary to confer a power to remit to the Secretary of State in "third country" cases. There is certainly some difficulty in the concept of allowing an appeal and thus deciding that the appellant should not be removed but remitting the matter to the Secretary of State who may then still refuse asylum. However, we have not heard argument on the point and there are arguments which could justify such a course of action. Accordingly, we reach no conclusion.

9. Secondly, in some cases (we suspect a substantial number) the appellant will seek to justify his failure to co-operate by relying on the experiences which have led him to claim asylum. As will be seen, the present is such a case. Thus the special adjudicator will not be able to decide whether the lack of co-operation should be excused in isolation; he or she will have to consider whether the appellant's alleged sufferings have occurred. In those circumstances it would be absurd not to reach a conclusion on the whole claim.

10. We must now turn to the circumstances of the present appeal. The appellant is a 27 year old Algerian. He arrived in this country on 9 March 1995 via France and claimed asylum. He completed a SCQ on 13 March 1995. He was, he said, a young Muslim from Belcourt (a terrorist stronghold) who had become involved with the F.I.S. , but had limited his involvement to participation in demonstrations. But he was under constant suspicion and had been brought in for questioning by the police and advised to leave the country.

11. It was not until October 1996 that he was called for interview on 25 November 1996. He was then in Scotland, having left his address and failed to inform his solicitors where he was. He did not return until February or March 1997. On 3 March 1997 the respondent refused his claim. The reasons were that without documentary evidence or interview, little weight could be given to the SCQ. The failure to co-operate meant that he had not demonstrated a well-founded fear.

12. The special adjudicator only heard evidence directed to the appellant's explanation for his failure to attend for interview. He had been, he said, ill, upset and depressed because he had no family or friends in England and had gone to Scotland with a fellow Algerian asylum seeker. No evidence was given of what had happened to him in Algeria. The special adjudicator was unimpressed by the explanation put forward and concluded:-

> "In the circumstances I am satisfied that the respondent was justified in refusing the claim on the basis of non-compliance".

13. For the reasons we have given, this was a wrong approach. The special adjudicator should have considered whatever the appellant wished to put before her to support his claim that he should not be returned to Algeria. His failure to co-operate may adversely affect his credibility if the alleged justification for it is, on the whole of the evidence, not accepted. In the circumstances, since the appeal has not been considered, this appeal must be remitted to be heard by a special adjudicator other than Mrs Bremner.

Sir Andrew Collins
President