

MNM (*Surendran* guidelines for Adjudicators) Kenya * [2000] UKIAT 00005
IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 12/10/2000
Date Determination notified: 01/11/2000

Before

The Honourable Mr Justice Collins
Mr C M G Ockelton
Mr M W Rapinet

MNM and Secretary of State for the Home Department	APPELLANT
	RESPONDENT

DETERMINATION AND REASONS

1. The applicant, a citizen of Kenya, appeals against the decision of Mrs Scott Baker, special adjudicator, dated 10 August 2000 whereby she dismissed her appeal against the refusal by the respondent to grant her leave to enter and asylum.
2. Ground 1 of the Grounds of Appeal alleges that the appellant had not received a fair hearing because, broadly speaking, the special adjudicator took over the role of the Home Office Presenting Officer, since no-one appeared to represent the respondent. The tribunal was informed that the appellant proposed to argue *inter alia* that Article 6 of the European Convention on Human Rights (ECHR) applied and had been breached. In the circumstances, having regard to the importance of this point and the need to determine whether the argument was correct as soon as possible, the parties were asked to deal with it and to produce all relevant authorities and material. In addition, it was decided that this determination should be starred. Accordingly, it must be applied by all adjudicators and will be followed by all tribunal members.
3. We had the advantage of hearing arguments from counsel on both sides. Mr. Williams (who did not appear before the special adjudicator) represented the appellant and Miss Dinah Rose represented the respondent. We are most grateful to both of them for the assistance we were given, particularly as we are conscious that the notice was short. We are satisfied that we have been referred to all relevant material.
4. The appellant arrived in the United Kingdom on 21 November 1998 and claimed asylum. It is, for reasons which will become clear, unnecessary to set out the account she gave or the facts found by the special adjudicator in any detail. Suffice it to say that in July 1998 her husband, who was a member of the Democratic Party (DP), was detained and she had not seen him since. The authorities alleged that he had had in his possession and she knew the whereabouts of some documents which would incriminate the DP. In August 1998, the authorities came again to her home seeking the documents and treated her with such violence that she ended up in hospital. It was this that had led her to leave Kenya and to seek asylum.

5. In the refusal letter dated 6 March 2000, the respondent did not seek to challenge the account given by the appellant in interview of what had happened to her. He rejected her claim because any fear she had was not well-founded since what had happened to her resulted from unauthorised acts by individuals which contravened the law of Kenya and which would be investigated and dealt with by the authorities. There was no evidence of persecution of members of the DP.
 6. Shortly before the hearing before the special adjudicator, the appellant's representatives asked for an adjournment to obtain medical evidence. This was refused. At the hearing on 19 July 2000, there was no Home Office Presenting Officer or other person representing the respondent. The appellant was represented by Ms. Raggi Kotak of counsel. At the outset, she asked for an adjournment because the appellant had by letter dated 4 July 2000 applied to the respondent to be permitted to stay because her removal would constitute a breach of Article 3 of the ECHR. That letter raised matters which went beyond the circumstances relied on in the asylum claim. No response to that request had been received nor has it at the time this appeal was heard. The special adjudicator refused that request since she had no jurisdiction to consider any Article 3 claim and there was no reason not to consider the asylum claim. That decision is not attacked in this appeal.
 7. The special adjudicator then offered an adjournment because of the absence of a presenting officer. She told the appellant's representatives that she had problems with credibility. No application was made. We were told by Mr. Bryant, the appellant's solicitor who was present at the hearing on 19 July, that the appellant was unwell and most anxious, having attended, that her asylum appeal be determined and was adamant that, since the request to await the Article 3 decision had been refused, she did not want the appeal adjourned. The special adjudicator decided that she would ask questions of the appellant based on the statement which was before her and that at the conclusion of her questioning on each paragraph of the statement, Ms. Kotak would have the opportunity to ask any questions to clarify matters. The hearing was conducted in that way.
 8. In the result, the special adjudicator concluded that the appellant's account was not credible in certain respects. She relied on an alleged conflict between what she had said in interview and what she said in evidence to support her conclusion that the appellant's husband had not been involved to the extent she had alleged in the D.P. and so the maltreatment she had suffered (the occurrence of which she was, despite being sceptical about it, not prepared to reject) was not for any Convention reasons. However, the special adjudicator went on in Paragraphs 34 to 36 of her determination to decide that even if the appellant's account was altogether true and she had been persecuted for a convention reason, she would not be at risk were she to return to Nairobi and so, in effect, the so-called internal flight option was open to her. Against that finding there has been no appeal.
 9. Mr. Williams submitted that Article 6 of the ECHR applied to proceedings before the Immigration Appeal Tribunal and that the manner in which the hearing had been conducted constituted a breach of it. Further, he submitted that we were entitled to give the appellant relief and allow the appeal in consequence of that breach.
10. Article 6(1), so far as material, reads:-

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The key phrase for our purposes is “in the determination of his civil rights and obligations”. This expression means something different to a continental as opposed to an English lawyer. The jurisprudence of the European Court and Commission has approached the application of Article 6 on the basis that the word ‘civil’ incorporates the distinction between private and public law. Thus in *Uppal v U.K. (1979) 3 EHRR 391* the Commission concluded that decisions to deport were of an administrative order, were made in the exercise of discretion by immigration authorities and so were not covered by Article 6(1). In *P v U.K. (1987) 54 D.R. 211*, the Commission stated that it had “constantly held that the procedures followed by public authorities to determine whether an alien should be allowed to stay in a country or should be expelled are of a discretionary administrative nature, and do not involve the determination of civil rights within the meaning of Article 6(1)”.

11. The reference to discretion as a reason for the non-application of Article 6(1) seems to us a little curious. It is because it is an administrative act and so any rights found in public law that the Article does not apply. In asylum cases, discretion is not a relevant consideration. If the claim falls within the Geneva Convention, asylum must be granted. But the Commission has more recently revisited the issue in *Adams & Benn v U.K. (11.1.97)*. One of the arguments raised in that case was that Article 8A(1) of the EC Treaty conferred on European citizens and so on the applicant Adams a right to work and reside within the territory of member states. Thus there was no question of exercising discretion. The Commission stated (Transcript p 8):

“While it appears subject to argument in the English Court as to whether this provision (sc: Article 8A(1)) is declaratory or confers directly applicable rights in domestic law, the Commission in any event is of the opinion that any right involved is of a public law nature, having regard to the origin and general nature of the provision, which lacks the personal, economic or individual aspects which are characteristic to the private law options Consequently, the matter falls outside the scope of the concept of ‘civil rights and obligations’.”

Accordingly, the application on this ground was declared inadmissible.

12. This approach has been raised before the Court in a decision on admissibility, *J.E.D. v U.K. (2.2.99)*. This was an asylum case and the application was based on the lack of any proper appeal against a renewed application for asylum following the dismissal of the applicant’s first claim. The Court did not deal with the question since it regarded judicial review, which the applicant could and did take, was an adequate remedy. But in a more recent decision, *Maaouia v France (22.3.2000)* the Court has decided that the issue should be argued before the Full Court.

13. The full Court has now determined the issue in a decision dated 5 October 2000. We were not referred to it in the course of argument but have since obtained a copy of the judgments. The Court has upheld the existing jurisprudence and decided that the distinction between public and private law rights reflected by the use of the word ‘civil’ means that administrative decisions concerning entry into or removal from a state are not

within Article 6(1). Since we had decided in any event to reach that conclusion, at least until the decision in *Maaouia v France* was known, there was in our view no need to put the decision to the parties. It supported Miss Rose's submissions and Mr Williams could not have been able to add anything to his arguments.

14. The Strasbourg jurisprudence thus establishes that the correct approach is to distinguish between private law rights, which are covered by Article 6(1), and public law rights, which are not. There may be some overlap so that, for example, social security issues are within Article 6(1): see *Salesi v Italy* (1993) 26 EHRR 187. Other decisions suggest that where there may be a pecuniary benefit involved or the deprivation or prevention of economic use of property (e.g. planning laws), Article 6 will apply. Mr. Williams pointed out that decisions in relation to immigration may affect the right to work or to obtain benefit and so have, at least indirectly, a pecuniary impact.
15. The exclusion of immigration decisions from Article 6(1) and the distinction drawn between public and private law rights thus exists and is, indeed, fundamental to the question whether Article 6(1) applies. In our view, we should approach the question in accordance with that jurisprudence. That means that Article 6(1) does not apply to either adjudicators or to the Tribunal. Nor, presumably, will it apply to cases heard on appeal or judicial review in immigration cases.
16. However, whether Article 6(1) applies or not will make little if any difference. The fact is that the IAA provides an independent and impartial tribunal established by law. The hearing is in public and the procedures are designed to ensure that it is fair. If there is any unfairness, the tribunal or the Court of Appeal will correct it. Thus any complaints that the special adjudicator conducted an unfair hearing fall to be considered by us and we apply the same tests as would be applicable if Article 6(1) applied. The only advantage which Article 6(1) might confer is the requirement that the hearing be held within a reasonable time. That does not arise in this case and should not, unless some disaster occurs, arise in any case having regard to the timetables and procedures laid down by the adjudicators and the tribunal.
17. We are satisfied that, if Article 6(1) had applied, we could have considered whether there was a breach. Section 65 of the Immigration and Asylum Act 1999 applies only to decisions of the Secretary of State or immigration or entry clearance officers. This led Miss Rose to submit that no right of appeal on human rights grounds lay against a decision of an adjudicator where the breach alleged was that of the adjudicator. That may be so, but Section 6(1) of the Human Rights Act 1998 obliges the tribunal not to act in a way which is incompatible with a Convention right and s.7(1)(b) enables reliance to be placed on any Convention right in any appeal on other grounds. It would be a breach of s.6(1) for the tribunal not to act to cure a breach of a Convention right if one existed. Thus the tribunal could not be prevented by s.22(4) from itself dealing with the issue. Furthermore, any appeal based on alleged unfairness would not need to be based on Article 6, but Article 6 breaches could be raised in it. Thus this case can be distinguished from *Pardeepan* (00/TH/2414).
18. The absence of representatives on behalf of the Home Office has been regularly criticised by adjudicators and the tribunal. While we appreciate the problem created by the increase in the number of cases and the consequential increase in sittings, in an adversarial process, which appeals to the IAA involve, it is very difficult for the adjudicator if the Home Office is unrepresented. It is as if in a criminal case the Crown were unrepresented. The adjudicator cannot and cannot be expected to conduct its case

for the Home Office. Equally, he will be understandably and correctly reluctant to let what he regards as an improbable account lead to a wrong decision because it has not been tested or all relevant material has not been produced.

19. The tribunal in June 1999 sought to give guidance to adjudicators how to act if there was no-one representing the Home Office. It is unfortunate that that guidance was not widely reported, although we are aware that it was circulated by the Chief Adjudicator to all adjudicators. In *Muwinyi v Secretary of State for the Home Department (Immigration Law Update Vol 3 No 3 p.13)* the President observed that adjudicators were not bound to accept accounts at face value but could and should probe apparent improbabilities. However, they must not involve themselves directly in questioning appellants or witnesses save as was absolutely necessary to enable them to ascertain the truth and must never adopt or appear to adopt a hostile attitude. That is wholly consistent with the *Surendran* guidelines which show how the adjudicator should conduct such an exercise. We have decided to incorporate those guidelines in this determination and append them as an annex to it. They must be observed. If they are not, there is a real danger that the hearing will be regarded as having been conducted unfairly.
20. In this case, the special adjudicator did not follow the procedure set out in Paragraph 5 of the Guidelines. The course she adopted did give rise to the impression that she was putting the Home Office case and was conducting her own examination of the appellant. That in our view was not fair and is sufficient in itself to vitiate the findings she reached that the appellant's account was in certain material respects not credible.

21. In her most helpful skeleton argument, Miss Rose submitted that the appellant through her representatives had waived any irregularity. It is clear that waiver can operate, but, as the Court of Appeal has recently stated in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. (2000) 2 WLR 870 at 883E:-*

“It isclear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not”.

We think, too, that there must be freedom of choice in the sense that the party alleged to have waived the irregularity must not have been subject to any improper pressure. We take the view that the special adjudicator's approach that an adjournment would be offered but, if it was not accepted, she would act as she had indicated was to apply improper pressure because it put Ms. Kotak in an impossible position if her instructions were, as we are told they were, that there should then be no adjournment. We are not saying that the special adjudicator was consciously applying improper pressure; she clearly was not. But the course she adopted produced that result because she was unaware of the situation faced by Ms Kotak. The guidelines are designed to avoid such situations arising. In any event, the mere fact that she allowed the case to continue cannot lead to a conclusion that there must have been a waiver. All the circumstances must be considered. In the light of the fuller information before us, Ms. Rose did not seek to press the waiver argument and we reject it.

22. In addition, we have no hesitation in rejecting the special adjudicator's finding based on a supposed discrepancy between what was said in interview and in evidence. Reference to her own record of proceedings shows that the appellant had said that her persecutors had said that the papers they wanted showed that the DP was getting help from outside Kenya and that it was supporting and promoting tribal strife. There is no

discrepancy and Miss Rose understandably did not seek to support the special adjudicator's reasoning in this regard. This too means that the credibility findings cannot stand.

23. In the circumstances, we approach this appeal on the basis that the appellant's credibility is not challenged and that we accept the account she has given. That, however, does not mean we must allow the appeal. Mr. Williams accepted that there was no criticism of the way in which the hearing was conducted in any other respect and, in particular, that, subject to one argument, he could not criticise the conclusion on internal flight. The argument was that the credibility findings may have tainted the special adjudicator's views on internal flight. While we do not think that argument has any validity, the absence of any ground of appeal relating to the internal flight conclusion precludes Mr. Williams from relying on it. He submitted that he should be allowed to consider whether to seek to amend since he had, as he put it, been sidetracked by concentrating on the Article 6 and fairness points. That seems to us to be an impossible contention since it was only last Thursday, after the appellant's solicitors had submitted their appeal bundle, that they were told of the tribunal's wish for them to deal with the Article 6 and unfairness points.

24. The Immigration and Asylum Appeals (Procedure) Rules 2000 enable the tribunal to grant leave on specified grounds (Rule 18(9)) and provide that the notice of appeal shall be based on the grounds for which leave was given (Rule 20). Rule 21 enables the tribunal to vary grounds, but it will only do so if proper notice is given and it is persuaded that any new ground is properly arguable and has a real prospect of success. Mr. Williams suggested that he might find new material which showed a change for the worse in Kenya as regards DP members or sympathisers. If such existed, we would expect it to have been included in the bundle in any event. But we are, as we told Mr. Williams, well aware that there is no such material.

25. Accordingly, notwithstanding the errors made by the special adjudicator, we dismiss this appeal on the internal flight ground. We note that the appellant will suffer no injustice since, if the respondent rejects her Article 3 application, she will have an appeal under s.65 of the 1999 Act when all matters, if there is fresh evidence, can be considered in the context of the ECHR.

MR JUSTICE COLLINS

Annex

THE SURENDRAN GUIDELINES

1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having been withdrawn. The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn. In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.
2. Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof.
3. Where an adjudicator is aware that the Home Office is not to be represented, he should take particular care to read all the papers in the bundle before him prior to the hearing and, if necessary, in particular in those cases where he has only been informed on the morning of the hearing that the Home Office will not appear, he should consider the advisability of adjourning for the purposes of reading the papers and therefore putting the case further back in his list for the same day.
4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.
5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.
6. It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the special adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these

matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the appellant, and the appellant is virtually conducting his own appeal. In such event, it is the duty of the special adjudicator to give every assistance, which he can give, to the appellant.

7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, the special adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise, however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.
8. There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that the special adjudicator concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to the special adjudicator that the question of whether or not the appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of *Adan*). Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto.
9. There are documents which are now available on the Internet and which can be considered to be in the public domain, which may not be included in the bundle before the special adjudicator. We have in mind the US State Department Report, Amnesty Reports and Home Office Country Reports. If the special adjudicator considers that he might well wish to refer to these documents in his determination, then he should so indicate to the representative and invite submissions in relation thereto.
10. We do not consider that a special adjudicator should grant an adjournment except in the most exceptional circumstances and where, in the view of the special adjudicator, matters of concern in the evidence before him cannot be properly addressed by examination of the appellant by his representative or submissions made by that representative. If, during the course of a hearing, it becomes apparent to a special adjudicator that such circumstances have arisen, then he should adjourn the case part heard, require the Home Office to make available a Presenting Officer at the adjourned hearing, and prepare a record of proceedings of the case, which should be submitted to both parties up to the point of the adjournment, and such record to be submitted prior to the adjourned hearing.