EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Hardie
Lord Mackay of Drumadoon

[2010] CSIH 28
XA149/08 & XA30/09

OPINION OF THE COURT

delivered by LORD REED

in Appeals

by

HA and TD

Appellants;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Bryce; Drummond Miller (for first appellant)

Act: Winter, Solicitor Advocate; McGill & Co (for second appellant)
Alt: Webster (in the first appeal), Lindsay (in the second appeal); C. Mullin

6 April 2010

Introduction

[1] These appeals were heard separately but are closely related in their subject matter. Both are concerned with procedural fairness in proceedings before the Asylum and Immigration Tribunal. In both, the critical question is whether the immigration judge

was entitled to base his conclusion to some extent upon a matter which had not been raised during the course of the hearing before him. This is a question which has been raised in numerous recent appeals, and applications for leave to appeal, to this court. Against that background, it is convenient to begin by considering the issue of fairness in the context of proceedings before the Tribunal in somewhat general terms, before turning to the circumstances of these particular appeals.

[2] Procedure before the Tribunal is regulated by the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005 No. 230), as amended. The overriding objective of the Rules is "to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible" (Rule 4). These objectives of fairness, speed and efficiency are reflected in the requirements imposed by the Rules. They require, for example, that the appellant give notice of an appeal within a specified time limit: in the case of a person in the United Kingdom, the time limit is 5 days after being served with notice of the decision if the person is in detention, or 10 days in any other case (Rule 7). The notice of appeal must set out the grounds of appeal, give reasons in support of those grounds, and, so far as reasonably practicable, list any documents which the appellant intends to rely upon as evidence in support of the appeal (Rule 8). Unless rejected by the Tribunal on preliminary grounds, the notice of appeal must be served on the respondent (Rule 12). The respondent must file with the Tribunal the notice of the decision appealed against, any other document served on the appellant giving reasons for the decision, any statement of evidence form completed by the appellant in relation to the decision, any record of an interview with the appellant in relation to the decision, and any other unpublished document relied upon; and those documents must also be served on the appellant. They need not however be filed or served before 2pm on the business day before the hearing

(Rule 13). The appeal must ordinarily be considered by the Tribunal at a hearing, but there are a number of circumstances in which the Tribunal may determine an appeal without a hearing. These include circumstances where the parties consent, or where the appellant and his representatives are outside the United Kingdom, or where the Tribunal considers that the appeal can be justly determined without a hearing (Rule 15). The Tribunal may hear an appeal in the absence of a party or his representative in a variety of circumstances: for example, if the party is outside the United Kingdom or is unable to attend the hearing, or if the party is unrepresented and it is impracticable to give him notice of the hearing (Rule 19). The Tribunal's power to adjourn hearings is restricted (Rule 21). The Tribunal must ordinarily issue a written determination within 10 days of the hearing (Rule 22). Subject to Section 108 of the 2002 Act, the Tribunal must not take account of evidence that has not been made available to all the parties (Rule 51(9)).

[3] The Rules thus contain a number of requirements which are designed to secure procedural fairness, but they do not replicate ordinary judicial procedures. That reflects, to some extent, certain practical difficulties commonly experienced in asylum and immigration appeals. The appellant may, for example, be outside the United Kingdom, as may his representative, or the whereabouts of the appellant may be unknown. The procedures also reflect the importance attached to the prompt disposal of appeals: the short time limits for giving notice of appeal, for lodging documents prior to the hearing, and for the Tribunal to issue its determination following the hearing, impose constraints on all involved.

[4] Subject to the Rules, the Tribunal has the power to decide the procedure to be followed in relation to any appeal or application (Rule 43(1)). In doing so it must however act fairly. What fairness requires has been considered by the Tribunal and by

the courts in numerous cases, a few of which we shall shortly turn to. It is however necessary to emphasise, before doing so, the relevance of certain general observations made by Lord Mustill in *R* v *Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at page 560, in a speech with which the other members of the House expressed their agreement. As Lord Mustill observed, what fairness requires is essentially an intuitive judgment. Although it is possible to identify a number of general principles, they cannot be applied by rote identically in every situation: "what fairness demands is dependent on the context of the decision". An overall judgment must therefore be made in the light of all the circumstances of a particular case. That said, guidance can be obtained from decided cases, provided careful attention is paid to any relevant factual circumstances, and judicial *dicta* are not taken out of context.

[5] In relation to the context in which the Tribunal operates, a number of salient features were identified by the Court of Appeal in *Secretary of State for the Home Department* v *Maheshwaran* [2004] Imm AR 176 at paragraph 3:

> "Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators can not be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given."

[6] One factor which has been emphasised in numerous cases is the specialist nature of the Tribunal (see e.g. *AH (Sudan)* v *Secretary of State for the Home*

Department [2008] 1 AC 678). This has implications for procedure before the Tribunal: although the procedure is adversarial (*R* v *Secretary of State for the Home Department, ex parte Abdi* [1996] 1 WLR 298 at page 301 per Lord Mustill), the Tribunal is not confined to a consideration of the evidence and submissions presented to it by the parties. In that regard, the observations made by Sedley J and cited in *Secretary of State for the Home Department* v *Abdi* [1994] Imm AR 402 at page 412, in relation to adjudicators appointed under the previous legislation, remain apposite:

> "Adjudicators are not recruited from the Clapham omnibus. They are skilled and specialised office-holders carrying out an independent and, in many respects, judicial function of profound importance to the individuals who come before them ... From case to case they will build up a fund of information about different third countries. It would be wrong, of course, for them to decide cases upon the basis of private information of this kind; but it would also, in my judgment, be wrong for them to ignore such information and close their minds to everything except the evidence that the Home Office chose or the applicant was able to put before them."

In that case (per Steyn LJ at page 420), and in subsequent cases (e.g. *Gnanavarathan* v *A Special Adjudicator* [1995] Imm AR 64), it was accepted that the adjudicator was entitled to rely on matters within his own knowledge, provided such matters were disclosed to the parties so as to afford them a fair opportunity to deal with them.

[7] Similarly, the Tribunal may identify an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least, for it to base its decision upon its view of that issue without giving the parties an opportunity to address it upon the matter. That point is illustrated by the decision of this court at an earlier stage of the proceedings in relation to the first appellant, reported as *HA* v *Secretary of State for the Home Department* 2008 SC 58. As we shall explain, the first appellant's claim for asylum is based on an account of having had a relationship in Afghanistan with the daughter of an army commander, who became pregnant as a result of the relationship. At an earlier stage of the proceedings, an immigration judge

rejected the credibility of the first appellant's account in part because no evidence had been given of the precautions taken by the couple against pregnancy: an issue which had not been raised by the respondent, or by the immigration judge himself at the hearing. The court stated, at paragraph 30 of its opinion:

> "[T]here is in our opinion force in the submission that it was unfair of the immigration judge, if he found in the absence of evidence about precautions against pregnancy ground for regarding the evidence about the relationship as implausible, not to put that point to the appellant to give him an opportunity to put forward evidence on the point. If he had done so, the appellant might, or might not, have been able to allay his concern, but the procedure would have been fair."

The court also noted that the immigration judge had speculated, in the absence of evidence, about the way in which the couple would have been likely to have acted in relation to precautions against pregnancy. The court was critical of the immigration judge's doing so, partly because there was no indication that he was alive to the possible relevance of cultural and other differences between the United Kingdom and Afghanistan.

[8] As an expert body, the Tribunal is entitled to reject evidence notwithstanding that the evidence has not been challenged before it. Fairness may however require it to disclose its concerns about the evidence so as to afford the parties an opportunity to address them. That point is illustrated by the decision in *Kriba* v *Secretary of State for the Home Department* 1998 SLT 1113, where the applicant had relied on a letter from Amnesty International which was not challenged by the respondent and which had been relied on by the Immigration Appeal Tribunal in another case shortly beforehand. The adjudicator however attached no weight to the letter, describing it as anecdotal and inadequately sourced. The applicant was not given an opportunity to adduce additional evidence to support what was stated in the letter. Lord Hamilton granted an application for judicial review, stating at page 1116:

> "The weighing of the evidence before him is a matter for the special adjudicator and the fact that evidence is unchallenged by the presenting officer does not of itself oblige the special adjudicator to accept it. In the present case, however, where the evidence was not only unchallenged and uncontradicted but came from an apparently responsible source and was a vital element in this part of the petitioner's case, it was, in my view, procedurally unfair wholly to reject it without first affording to the petitioner an opportunity to adduce support for it."

In the particular circumstances of that case, the applicant could reasonably proceed on the basis that there was no need for him to adduce evidence on this vital point besides the letter, given that the letter was unchallenged and came from a source which was generally treated as reliable (and had recently been treated as reliable in relation to that very letter), unless he was put on notice of the adjudicator's concern.

[9] Even where a point is expressly conceded by one party, the Tribunal is not obliged to accept the concession; but in that situation, as was observed in *Maheshwaran* at paragraph 4,

> "... it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the Tribunal indicates that it is minded to take that course."

[10] There is, on the other hand, no general obligation on the Tribunal to give notice to the parties during the hearing of all the matters on which it may rely in reaching its decision. That point is illustrated by the decision of the Court of Appeal in *Sahota* v *Immigration Appeal Tribunal* [1995] Imm AR 500, where the applicant sought asylum on the basis that he had been arrested and tortured on a number of occasions by the police of his native country. He stated in evidence that the police had wanted to know the whereabouts of his brother, who belonged to a proscribed organisation. His brother had eventually been killed by the police. He (the applicant) feared that he too would be killed if he returned. The adjudicator accepted the applicant's account but refused his appeal on the basis that there was no evidence of a continuing risk to the applicant following his brother's death. The applicant sought leave to apply for

judicial review on the basis that there had been a breach of natural justice, since the adjudicator had not asked the applicant why he continued to fear persecution following his brother's death. Leave was refused. Kennedy LJ, with whose judgment Sir Thomas Bingham MR and Millett LJ expressed agreement, said (at pages 504-505):

> "I for my part can see no reason why the adjudicator should have done more than she did. The applicant was seeking to persuade her, the onus being on him, that he, at the time when the decision fell to be made, had a well-founded fear of persecution. He pointed to the fact that in the past his brother was a member of a proscribed organisation, but that did not answer the problem which he had to face, namely why the fear should exist after the brother was no longer alive. I do not see why the adjudicator should have asked him more specifically. Apparently he dealt with the matter himself in evidence in relation to this particular matter. Of course, there are cases, and there are authorities which show, that a determining body such as an adjudicator should not decide an issue on some matter which has not been properly canvassed in evidence. But this whole question of the fear of the applicant, and the basis of that fear, was in fact the subject matter of proceedings before the adjudicator. ..."

The court thus accepted that the applicant had had a fair opportunity to present his case. There was no unfairness in the adjudicator's concluding that the evidence led was insufficient to discharge the onus, without raising its insufficiency in the course of the hearing.

[11] Another decision which is of assistance, as it concerns another type of situation which frequently arises in practice, is *R* v *Immigration Appeal Tribunal ex parte Williams* [1995] Imm AR 518. In that case, the adjudicator had made adverse findings on credibility on the basis of discrepancies between the account of material events which the applicant had given in evidence and the account which he had given in his asylum application and in his asylum interview. Leave to apply for judicial review was sought on the basis of procedural impropriety: it was argued that the adjudicator should have reminded the applicant of his earlier accounts. Leave was refused. Harrison J noted that the applicant had been represented by counsel at the hearing and

had had the opportunity to deal with discrepancies between his oral evidence and what had been said in his asylum application or in his interview. The adjudicator was not bound, as a matter of natural justice, to point out the inconsistencies.

[12] There is in general no unfairness in proceeding in that way, since an applicant can generally be expected to be aware that the Tribunal will have to assess his credibility, and the consistency of the account he has given in evidence with any previous accounts contained in the documents before the Tribunal will plainly be relevant to that assessment. As the Court of Appeal observed in *Maheshwaran* at paragraph 5:

> "Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

[13] Given the judicial nature of the Tribunal's function, it is generally inappropriate for it to become involved in challenging the evidence placed before it. As Moses J observed in *R* v *Special Adjudicator, ex parte Demeter* [2000] Imm AR 424 at page 430:

> "The appeal should be, and is, adversarial. It is important that the special adjudicator should avoid, if possible, giving any appearance of entering into the arena by challenging the account that the applicant gives himself."

There are however circumstances where, as a matter of fairness, the Tribunal cannot remain silent in the face of the evidence presented to it. One example of such

circumstances has already been given, in the case of *Kriba* v *Secretary of State for the Home Department*. Other examples can be found amongst the reported decisions, and we shall refer to some in a moment. It is however necessary to emphasise that such circumstances are fact-sensitive. The Tribunal is not under a general obligation to air its concerns about the evidence presented to it, even if the evidence is unchallenged. The point is illustrated, in relation to an adverse finding on credibility based on discrepancies between an applicant's account, by such decisions as *Ex parte Williams* and *R* (*Hyseni*) v *Special Adjudicator* [2002] EWHC 1239 (Admin). It is also illustrated, in relation to a finding based on the vagueness of an applicant's evidence, by the decision in *Hassan* v *Immigration Appeal Tribunal* [2001] Imm AR 83, in which Buxton LJ remarked at paragraph 18:

> "Particular complaint is made that the adjudicator should not have concluded that the applicant's evidence was vague, without in some way warning him that he was going to come to that conclusion and asking him to improve matters. I have to say I simply cannot understand that complaint. The finding that the adjudicator made, that the evidence was vague, was one that he came to having heard everything that the applicant and his representative wished him to hear. It was the sort of conclusion that anybody who has to adjudicate on evidence is entitled to come to. The idea that the applicant not having satisfied the adjudicator in the course of the hearing, the adjudicator was under some obligation to ask him to start again is, in my view, plainly unfounded."

This general approach is consistent with that adopted by the courts in relation to other types of adversarial procedure. In the context of criminal proceedings, for example, the court stated in *Hunt* v *Aitken* 2008 SCCR 919 at paragraph 17:

> "Counsel's final argument was that it had been procedurally unfair for the justice not to disclose his doubts about Mrs Hunt's evidence: since the Crown had not challenged specifically that aspect of her evidence (although her credibility and reliability in general had been challenged), the complainer's solicitor had had no opportunity to address the issue in his closing submissions. We are unable to accept that contention. A judge hearing a case is not obliged to interrupt the proceedings whenever he has doubts about the credibility or reliability of a piece of evidence; nor is he obliged to provide the parties with a list of his concerns about the evidence so that they can be addressed during submissions."

We also note the remarks made by Lord Diplock, in a different but not entirely unrelated context, in *Hoffmann La Roche & Co AG* v *Secretary of State for Trade & Industry* [1975] AC 295 at page 369.

[14] As we have indicated, however, circumstances can arise in which the Tribunal cannot fairly adopt the passive role which a judge or a jury would ordinarily adopt. Such circumstances are particularly apt to arise in situations where the Secretary of State is unrepresented at the hearing before the Tribunal. The difficulties which can arise in securing a fair hearing in such circumstances have long been recognised by the Tribunal itself: see *MNM* v *Secretary of State for the Home Department* [2000] INLR 576. They were also recognised by this court in *Koca* v *Secretary of State for the Home Department* 2005 SC 487. That was a case in which the adjudicator had rejected the credibility of an aspect of the applicant's account on the basis of what she considered to be discrepancies between the evidence given by the applicant at the hearing and his earlier statements. The court quashed the decision on the ground that the reasoning was inadequate, but added *obiter* remarks in relation to procedural fairness on which reliance was placed in the second of the present appeals. In particular, the court said at paragraph 20:

> "It is, we consider, an important feature of this case that the respondent was not represented at the hearing before the adjudicator. There was no cross-examination as such whereby any such inconsistencies, contradictions or discrepancies might well have been highlighted. ... On one reading of the material before the adjudicator ... it does not really involve any contradiction on the reclaimer's part but, as counsel for the respondent himself described it, a 'development of his evidence'. Again, with regret, we have to say that the reasoning of the adjudicator in relation to this matter is somewhat opaque. In any event if, as seems to be the case, any perceived contradiction or inconsistency in the reclaimer's position was going to form a significant reason for rejecting his appeal then, in the particular circumstances of this case, it appears to us that fairness required that, prior to the issue of her decision, she gave the reclaimer or his representative an opportunity to comment upon, or seek to explain, it."

In that passage, and later in the same paragraph, the court made it clear that its observations reflected the particular circumstances of the case, which included the fact that the respondent had not been represented at the hearing and the fact that the matter which occasioned the adjudicator's concern might be capable of clarification or explanation. The *dicta* in that case should not therefore be understood as laying down any general rule inconsistent with the approach adopted in *Maheshwaran* and in the present appeals.

[15] Finally, it is necessary to bear in mind that a procedural impropriety will not vitiate a decision if it is apparent that no prejudice was suffered: *Ahmed* v *Secretary of State for the Home Department* [1994] Imm AR 457 (following *Malloch* v *Aberdeen Corporation* 1971 SC (HL) 85 at pages 104 and 118).

[16] Against that background, we turn next to consider the circumstances of the present appeals.

The first appeal

[17] The first appellant is a citizen of Afghanistan who entered this country clandestinely. On 3 December 2003 he applied for asylum as a refugee under the Geneva Convention. That application was refused. He appealed against that decision. After protracted proceedings which it is unnecessary to narrate, his appeal was heard by the Tribunal, which issued its decision on 30 June 2008. Both the first appellant and the respondent were represented at the hearing, and the first appellant gave evidence. The Tribunal refused the appeal. The first appellant has been granted leave to appeal against that decision by this court.

[18] The basis of the first appellant's claim for asylum is summarised by the Tribunal as follows:

> "The Appellant claims to have worked with his brother-in-law who operated a welding shop in Mazar-i-Sharif. While working there, he encountered a woman named M who attended a nursing school close to the shop; He began a relationship with her. She became pregnant as a result of that relationship. She advised her mother of this pregnancy. The Appellant was advised by M's ten year old sister that her mother was aware of her pregnancy and that the Appellant was the father of her child. The Appellant then fled to an aunt's home in Kotah Barghas. M's father is a Commander in General Doustom's army. His sister visited him there and advised that his brother-in-law had been arrested as M's father wished to trace the Appellant. The Appellant fled to the home of a friend. He then contacted his brother who was residing in the United Kingdom and obtained his agreement to sell the family home in Afghanistan. This was sold for $9,500. The Appellant paid $8,500 to an agent to take him to the United Kingdom. Following the Appellant's departure from Afghanistan his sister and brother-in-law fled to Kabul to escape the attentions of M's father. They continued to be targeted in Kabul and fled Afghanistan for Peshwar. The appellant has also been advised that an arrest warrant has been issued for him charging him with having unlawful sexual relations with the daughter of Commander A. The Appellant considers he will be targeted by Commander A in any part of Afghanistan to which he has to locate."

[19] The Tribunal did not accept the credibility of the first appellant's account of the events which had caused him to leave Afghanistan. In that regard, they noted first an inconsistency between his account of the discovery of M's pregnancy and the issuing of the purported arrest warrant, which was dated 26 June 2003:

> "In the statement dated 15th December 2003, the Appellant claims M became pregnant about 7 months ago. This would suggest a date of around May 2003. At the SEF Interview on 13th January 2004 (D7-Q18) he suggested she became pregnant 5 months after their relationship began. This would suggest she became pregnant around June 2003. This is consistent with the terms of his oral evidence where he indicated that they did not sleep together for the first 5 months of their relationship. At the SEF Interview, he indicates M told her mother of her pregnancy two months after she became pregnant. This was also his position in his oral evidence. The difficulty this causes the Appellant is that if M became pregnant in May or June 2003 and her mother discovered this two months later, her mother cannot have been aware of the position until July or August 2003. This would mean no arrest warrant could possibly have been issued for the Appellant in June 2003 as M had not told anyone that she was pregnant at this time."

[20] Secondly, the Tribunal noted inconsistencies between the accounts given by the first appellant, in the documents before the Tribunal, concerning the time that had elapsed between his leaving his home and his leaving Afghanistan.

> "The Appellant's account of the sequence of events leading up to his departure from Afghanistan are even more unsatisfactory. In his statement dated 15th December 2003, he outlines that he travelled initially to his aunt's house and thereafter to a friend's house before fleeing Afghanistan. He also explained how he asked his friend to go to his brother in law to tell him to sell the family home and it took a month to find an agent to take him out of Afghanistan.
> ...
> At the SEF Interview the Appellant also describes spending four or five days at his aunt's home before his sister arrived. Thereafter he remained there for a further five days before going to a friend's house for eight days. On the eighth day his brother-in-law came to see him and he contacted his brother in Glasgow that same day and was given permission to sell their family home in order to fund his departure. During the interview he stated 'The day I spoke to my brother, my brother-in-law put the house on sale, found an agent and sent me away the next day' (D13-Q0). He was asked to confirm whether an agent was found the day after he spoke with his brother and that he left. He indicated that was the case (D14-Q52). The difficulty this causes for the Appellant is that his statement dated 15 December 2003 makes clear that it took one month to find someone to take him out of Afghanistan whereas during interview he suggests that the day after his brother told him to leave Afghanistan, an agent had been found and he left. These accounts are simply not consistent. In his statement for the appeal, the Appellant reverts back to his original position that it took a month to find someone to take him out of Afghanistan. We consider the inconsistency in relation to how long it took to find an agent and therefore how long he remained in Afghanistan very substantially damages the credibility of his account."

[21] Thirdly, the Tribunal noted a number of reasons for questioning the genuineness of the arrest warrant:

> "The Appellant has produced an arrest warrant that he claims was obtained by a relative of his friend J, who works in the police station in Mazar-i-Sharif. There are a number of difficulties for the Appellant with this arrest warrant. Firstly, the translation of the arrest warrant bears a date 26th June 2003. This warrant cannot have been issued on this date if the information given by the Appellant at interview and in his original statement that M became pregnant in May or June 2003 and first advised her mother of this some two months later is correct. The warrant also makes reference to the Appellant having escaped and disappeared in June 2003, suggesting that the warrant was not issued immediately after the incident came to light, but only some time after his disappearance.
> In the course of cross examination, the Appellant made clear that M's father would not wish others to know that his daughter was pregnant as it would bring shame on the family. He also accepted that there would be no difficulty for Commander A in bringing a false charge against him. We therefore do not consider it is credible that the charge against the Appellant as detailed on the document produced by the Appellant would be one of having sex with the daughter of Commander A.

> The Appellant made clear that the document he had received was sent by his friend from Mazar-i-Sharif. However, it was pointed out to the Appellant that the country code shown on the document (00998) relates not to Afghanistan but to Uzbekistan. Although the Appellant stated in his oral evidence that many Afghans travel to foreign countries on a daily basis, this does not alter the fact that the Appellant has made clear that the document was sent to him from Afghanistan and the document itself suggests that it was not. We consider this further undermines the credibility of both the document and the Appellant's account."

In relation to the last point noted by the Tribunal, the country code to which the Tribunal refers is the international dialling code recorded in the fax header.

[22] On behalf of the first appellant, it was submitted that the decision of the Tribunal was vitiated by procedural unfairness. In that regard, counsel relied on the decision in *HA* v *Secretary of State for the Home Department*. Counsel submitted in the present case that, if the Tribunal intended to reach a conclusion on the basis of discrepancies in the evidence, then it ought to put those discrepancies to the appellant or his representatives. Paraphrasing the opinion of the court in *HA*, counsel submitted that, if the Tribunal had done so, the appellant might, or might not, have been able to allay its concern, but the procedure would have been fair.

[23] The circumstances in the present case appear to us to be materially different from those with which the court was concerned in *HA*. As we have explained, that was a case in which the immigration judge based his conclusion upon the absence of evidence relating to an issue which he (and he alone) had identified in his own mind as being of significance. Without alerting the parties to the issue, or affording the parties any opportunity to address it, he formed an adverse view of the first appellant's credibility on the basis of the absence of evidence bearing on the issue, and on speculation as to what such evidence would have been likely to disclose. In the present case, on the other hand, the inconsistencies on which the Tribunal founded were apparent from the documents before the Tribunal, of which the first appellant

and his representatives had prior notice; and it appears that the other difficulties relating to the arrest warrant were raised in the course of cross-examination. The reliability of the accounts which the first appellant had given, and the genuineness of the arrest warrant, were plainly matters of importance. In the circumstances, we are satisfied that there was no violation by the Tribunal of the first appellant's right to a fair hearing.

[24] Finally, we should record that although the application for leave to appeal to this court relied also upon Article 8 of the European Convention on Human Rights, counsel departed from that aspect of the application, stating that the first appellant no longer insisted upon it.

[25] In the circumstances, the first appeal must be refused.

The second appeal

[26] The second appellant is a citizen of Nigeria. He entered the United Kingdom and applied for asylum as a refugee under the Geneva Convention. That application was refused. He appealed against that decision. The appeal was heard by Immigration Judge D'Ambrosio. Both the second appellant and the respondent were represented at the hearing, and the second appellant gave evidence. The immigration judge issued his determination on 30 October 2007. He refused the appeal. On 6 May 2008 an order was made by this court for the reconsideration of that decision. The appeal was then reconsidered by Senior Immigration Judge Deans, whose decision was issued on 19 December 2008. He decided that Immigration Judge D'Ambrosio had not made any material error of law and that his decision should therefore stand. The second appellant has been granted leave to appeal against that decision by this court.

[27] The basis of the second appellant's claim for asylum is summarised by the Senior Immigration Judge as follows:

> "The basis of the appellant's claim for asylum was his claimed membership of the Oodua People's Congress (OPC). He claimed to be an active member of this organisation. On 23 October 2005 he attended an OPC rally in Lagos where a fight broke out between rival OPC factions. The appellant was stopped by the police, who found his OPC membership card and arrested him. The appellant was detained for two weeks, during which he was questioned and beaten. He was then charged with 'domestic disturbance'. The OPC provided a lawyer to represent him. The appellant was informed by the lawyer that he could not guarantee the appellant would be acquitted. The lawyer nevertheless secured the appellant's release on bail. The appellant feared that he would be convicted and severely ill-treated in prison. Accordingly he fled to the United Kingdom."

[28] The immigration judge rejected the second appellant's evidence. He gave a number of reasons for doing so, foremost amongst which were the following:

> "(1): He claims to be an OPC member, in support of which he has provided an OPC membership card issued from a Lagos address. It states that he is an OPC member ' under the faction of Dr Frederick Fasehun' for KETU Zone.
>
> (2): In Nigeria there is a town or city called KETU which is located in OYO State, but there is also a KETU area in Lagos. So it is unclear whether the KETU Zone stated on the OPC card relates to that in OYO State or in Lagos.
>
> (3): The OPC card shows the appellant's photograph which resembles him as I saw him at the appeal hearing.
>
> (4): But the OPC card also shows his purported signature which is simply 'Daniel'. That OPC card signature is very clearly different from his numerous signature(s) on other documents in process, such as his screening interview form, his SEF and his witness statement. Those all state his Christian name and surname. They are each written in similar fashion with similar 'flourishes'. It is apparent that the person who signed "Daniel" on the OPC card is not the same person as the appellant.
>
> (5): From the foregoing peculiarities, I find that I cannot rely on the OPC card which the appellant provided as being genuine. It is not sufficiently reliable to show that he is or ever was an OPC member."

[29] As the senior immigration judge commented, there was nothing in the first three points which was adverse to the second appellant's credibility. The immigration judge had before him evidence that the second appellant moved to Lagos in 2004. If there

was a Ketu district in Lagos, as the immigration judge found, then it would be reasonable to infer that this was the area to which the membership card referred.

[30] The senior immigration judge recognised that the fourth point raised an issue of greater concern, since the difference between the signature on the card and other signatures was not raised by either party, or by the immigration judge himself during the hearing. It was submitted to the senior immigration judge that the point ought in fairness to have been raised at the hearing, so that the second appellant would have an opportunity of providing an explanation. Reference was made to *Koca* v *Secretary of State for the Home Department*. The senior immigration judge however distinguished *Koca* as relating to the situation where the respondent is unrepresented. He noted that both parties had been represented, and that the difference between the signatures was apparent from an examination of the documents, which had been available to both parties. He concluded that the question of fairness depended on the extent to which the immigration judge's decision had been based on the difference between the signatures:

> "Of course, if the only issue on which the Immigration Judge rejected the credibility of the appellant's evidence was the question of the discrepancy over the signature, then it might be wrong for the Immigration Judge to make an adverse finding against the appellant without that discrepancy being put to the appellant. The same argument might apply even if the discrepancy was one of particular significance among a number of other issues. In this appeal, however, I am satisfied that the question of the signature on the ID card was comparatively minor by comparison with several of the other reasons given by the Immigration Judge for disbelieving the appellant's evidence."

Those other reasons were (1) a delay by the second appellant in claiming asylum following his arrival in the United Kingdom, (2) his failure to produce a passport, although he claimed to have obtained a visitor visa for the purpose of travelling to the United Kingdom and (3) his having been convicted, since his arrival in the United Kingdom, of using a false passport.

[31] As it appears to us, the difference between the signatures to be found on the documents cannot be regarded, for the purpose of considering whether the second appellant received a fair hearing, in the same way as a difference between the accounts contained in the documents. The parties can be taken to anticipate that the immigration judge will consider the contents of the documents and may attach significance to differences or inconsistencies which are to be found there. The fact that such differences or inconsistencies were not raised during the hearing will not therefore usually result in unfairness: see *Maheshwaran* and the other relevant decisions cited earlier. The parties would not however ordinarily anticipate that the immigration judge would compare the signature on a document relied on as evidence with the signatures to be found on the documents prepared for the purposes of the asylum claim, such as the asylum application and the interview form. In reality, the immigration judge was raising an issue - the genuineness of the signature on the membership card - and reaching a decision on that issue, without giving the parties any notice of that issue or affording them an opportunity to address it. To do so was in our view procedurally unfair. The unfairness is analogous to that which arose in other cases where reliance was placed by the Tribunal upon its own view of an issue which was never raised with the parties, such as *HA*.

[32] We accept that, notwithstanding the procedural impropriety, the court might not interfere if there had in reality been no prejudice, since for other reasons the immigration judge would inevitably have reached the same conclusion even if there had been no question as to the signature on the card. We cannot however agree with the senior immigration judge's assessment that this was a comparatively minor matter. The basis of the second appellant's asylum claim was his membership of the OPC. The only evidence he possessed to confirm his membership of the OPC was the

membership card. Unsurprisingly, the immigration judge placed the question of the genuineness of the card at the forefront of his assessment of credibility.

[33] Counsel for the respondent submitted that the second appellant had suffered no prejudice, since the difference between the signatures was manifest and incontrovertible . Reliance was placed on the decision in *Ahmed*. The solicitor-advocate for the second appellant submitted however that his client had an explanation: he had changed his signature between the date when he obtained the membership card and the date when he signed the asylum forms. He was entitled to have his explanation considered by the Tribunal. We agree. This is not a case in which it is clearly demonstrated that the procedural impropriety was of no significance.

[34] It follows that this appeal must be allowed. Since the appeal will have to be re-heard, it is unnecessary of us to deal with the other ground on which leave to appeal was granted, which concerned the immigration judge's repeated references to the absence of corroboration of the second appellant's evidence.

[35] In the circumstances, we shall allow the second appeal and remit the case to the Upper Tribunal.