Upper Tribunal
(Immigration and Asylum Chamber)

MB (admissible evidence; interview records) [2012] UKUT 00119(IAC)

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
on 6 February 2012

Determination Promulgated

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Before

MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

MB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Caskie, instructed by Quinn Martin and Langan
For the Respondent: Mr M Lindsay QC, instructed by the Solicitor to the Advocate General for Scotland

1. R (Dirshe) v SSHD [2005] EWCA Civ 421, [2005] 1WLR 2685, is not authority for the proposition that where a claimant requests tape-recording of an interview, but that is not carried out, the record is inadmissible.

2. *Cadder v Her Majesty's Advocate [2010] UKSC 43 has no application to the admissibility of asylum interview records, immigration proceedings being of a distinct nature to criminal proceedings. Admission of interview records does not breach a claimant's right to a fair trial.*

3. Tribunals do not have a general discretion to refuse to receive relevant evidence on the basis of procedural defects as to how it was obtained. Rule 51(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 is not to that effect. Apart from circumstances where lateness of the evidence means it is unfair to receive it, issues of fairness go to the weight to be attached to evidence, not admissibility.

DETERMINATION AND REASONS

Introduction

1. The appellant in these proceedings is an Iranian national who claimed asylum on or about 1 September 2008. We direct that in any report of this case he shall be identified by the initials MB. His substantive asylum interview took place on 12 September 2008. Before the interview, his solicitors sent a letter indicating that as there was no funding for them to attend, they wanted the interview to be tape-recorded.

2. Where no representative is present to keep an independent record, the practice of tape- recording of interviews has been permitted by the Home Office following the decision in R (Dirshe) v Secretary of State for the Home Department [2005] EWCA Civ 421; [2005] 1 WLR 2685. In the event, the appellant was interviewed without tape-recording. His asylum claim was refused on 22 September 2008.

3. On 19 November 2008, an appeal to the Asylum and Immigration Tribunal was dismissed by Immigration Judge Hamilton. He observed that there had been no tape-recording as requested and this was unfortunate, but he received the record of interview into the proceedings. He concluded that the appellant was not a credible informant as to the circumstances giving rise to his claimed fear of persecution.

4. Part of the reason why Judge Hamilton was not satisfied that the appellant had told the truth concerned the date of the strike at a factory where the appellant claimed he was employed, which resulted in him coming to adverse attention of the authorities in Iran. The appellant's case was that this happened in February 2008. The Home Office produced documentary evidence of protests during the course of a strike at the Alborz Tyre manufacturing company in April 2008. The judge said that he was satisfied that the protests took place in April, not in February, and therefore found that information provided by the appellant identifying the February date was not genuine.

5. However, the Judge went on at paragraph 45 of his determination as follows:-

> Even if I had been satisfied the event took place in February, 2008, I would have not have been prepared to accept the appellant was part of those events. For the reasons I have detailed above

> I do not find the appellant credible. His evidence is inconsistent. He has at a very late stage tried to discredit the asylum interviewer, and I believe he has done this simply to try and assist his claim.

6. Reconsideration of this decision was refused.

7. In due course the appellant made representations to the Secretary of State which, he submitted, amounted to a fresh asylum claim. Those representations were refused, but on 10 June 2010, on his application for judicial review, the Lord Ordinary, by consent, reduced the decision of the Secretary of State and remitted the case for further consideration. Part of the fresh material on which the appellant relied in that judicial review was information indicating there were strikes at the tyre factory in both February and April 2008.

8. On 19 February 2011, the Secretary of State took a fresh decision, once again rejecting the appellant's account on credibility grounds. At paragraph 23 of that decision, having regard to the information provided by the appellant, she said it was accepted that protests took place in 2008 at the Alborz tyre factory. The decision letter continued, however, that it was not accepted "that you had any involvement in these protests or even that you worked at the Alborz tyre factory". The Secretary of State noted the contradictions and inconsistencies found by Immigration Judge Hamilton in the 2008 decision, and the alternative finding of the Immigration Judge, irrespective of the date of the protests.

9. There was then an appeal to the First-tier Tribunal, Immigration and Asylum Chamber. That appeal first came on for hearing in April 2011, but was put over for certain documents upon which the appellant relied to be checked. The matter then came before Immigration Judge Forbes on 13 June. By that stage, it became apparent that the appellant and his representative could not rely upon documents he had submitted, suggesting that he was wanted by the authorities for participation in a demonstration, because the authenticity of the documents was not supported by his expert.

10. There is in the file a typed up version of Immigration Judge Forbes' record of proceedings, in which he records as follows:-

> I put it to [Mr McGowan, solicitor for the appellant] that I might therefore have to accept that the only ground of appeal open to him rested on procedural unfairness in relation to the holding of the substantive interview when the appellant claimed he had been unwell. He accepted that that was the only position he could adopt. We discussed how he might vary the grounds of appeal to include that aspect. He wanted some days to do that. I decided with him that I would fix a further CMR for the 21 June, 2011.

Further to that hearing, the appellant did indeed amend his grounds of appeal to include a further ground that the asylum interview was unfair, and its record should not have been received in the appellate proceedings by Judge Hamilton or Judge Forbes.

11. The proceedings were adjourned to the 27 June, when the question whether the asylum interview should have been received by either judge was considered. Judge Forbes rejected the appellant's case for not receiving this material. He went on to dismiss the appeal on refugee and subsidiary protection grounds.

12. Although at a point in his determination Judge Forbes refers to the issue of whether the interview should have been received as one question, he does not in fact decide any other questions. In the light of his record of proceedings of 13 June, it appears that he understood that no other issue had been raised.

13. The appellant then sought leave to appeal to the Upper Tribunal. His grounds of appeal essentially summarise his case as follows:-

    a. Following the decision in Dirshe, the appellant had a right to have an interview tape recorded.
    b. The appellant never waived his right to a tape recorded interview.
    c. By analogy with Cadder v Her Majesty's Advocate [2010] UKSC 43 there was a breach of the appellant's rights to a fair hearing, by reason of the decision of the judge to receive the interview record in the immigration proceedings.

14. Further, the grounds of appeal stated:

> The Immigration Judge erred in fact in finding that the appeal … was not insisted upon. The appellant's representative made it clear to the Immigration Judge during the course of the hearing that if the Immigration Judge was not with him in relation to the procedural issue he wished to address the Tribunal on the remaining substantive grounds of appeal. The said error of fact may be established by uncontentious and objectively unverifiable evidence.

15. Permission to appeal on all grounds was granted by the UT in August, 2011. The judge granting permission made no direction for filing of evidence to support the contention that all grounds of the original appeal were intended to be pursued.

16. In support of his appeal, the appellant has submitted to us a very substantial factual bundle containing an undated skeleton argument of some four paragraphs, not materially amending the point of law that is central. We also had a helpful skeleton on behalf of the Secretary of State, supported by authorities, contending that the Immigration Judge did not err in law in not receiving this material.

Was There a Material Error of Law by Judge Forbes?

17. When the appeal was called on for hearing before us on 6 February, Mr Caskie did not advance submissions on the lines set out in his grounds of appeal and skeleton argument and the volume of authorities that he had prepared. We can well understand why.

18. In our view, those arguments were misconceived for the following reasons:

(i) The case of Dirshe did not establish that an asylum applicant had a right to have interviews tape recorded, merely that a blanket policy refusing tape-recording in cases where a claimant did not have his own representative able to take an independent note of the proceedings was unlawful. Further, the decision says nothing about the admissibility of an unrecorded interview into immigration proceedings where the appellant had asked for such a recording.

(ii) The analogy between admissibility of evidence in criminal proceedings and in immigration proceedings is misconceived. As far as we are aware, there is no general discretion in the courts of either England and Wales or of Scotland to decline to receive relevant evidence in civil proceedings, by whatever means that evidence may have been obtained. By contrast, in criminal proceedings in both jurisdictions there is a well-recognised power to decline to receive evidence that is unfairly obtained.

(iii) Whilst the duty to act compatibly with a person's human rights might require a public authority not to use certain information obtained in breach of those rights, the difficulty for the appellant is that there has been a consistent line of authority that asylum appeals are not the determination of a civil right or obligation, so as to engage Article 6 ECHR; and no case has been or could be made that the interview was an aspect of private life to which Article 8 might attach.

(iv) The Secretary of State points out in her skeleton argument that very recently a constitution of the Upper Tribunal, Immigration and Asylum Chamber in Abdul Kuidiri v Secretary of State for the Home Department AA/01658/2011 rejected precisely the same argument as Mr Caskie has identified in his grounds of appeal, seeking to extend the criminal law principle in Cadder to immigration appeals. Kuidiri is an unreported decision. If the matter had been pursued any further before us, we would have granted the Secretary of State permission to rely upon it, because its reasoning is highly relevant to the present issue, and we agree with it.

(v) Judge Forbes was bound to take the findings of fact by Judge Hamilton as a starting point for his consideration of this appeal. No argument had been submitted to Judge Hamilton that he should not have received the record of interview in this case. No complaint was made by the appellant or his solicitors following 12 September 2008 that he had been deprived of a tape recorded interview. No complaint was made generally of the inaccuracy of the written record, as opposed to the reasons why the appellant had given the answers that he did.

(vi) The appellant made a witness statement between the date of the interview and the date of the hearing in November 2008, in which he makes no complaint about the absence of tape-recording. He makes specific observations upon why

he did not give information in response to questions. He does not suggest that he gave information that had not been properly recorded.

(vii) The reason why the interview was not recorded was not a refusal by UKBA to do so, but the fact that the appellant indicated that he did not mind whether it was recorded or not at the start of the formal inquiry into his claim. We observe that he had given the UKBA officials quite a lot of information about himself and his family without tape recording earlier in the process.

19. Instead, Mr Caskie developed a new submission that he had not identified previously. He submitted that rule 51(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 assisted him in the submission that there was a power in the Tribunal to exclude evidence on the ground of unfairness in how it was obtained. Rule 51(1) reads as follows:

> The Tribunal may allow oral, documentary or other evidence to be given of any fact which appears to be relevant to an appeal or an application for bail, even if that evidence would be inadmissible in a court of law.

20. We accept that this rule affords discretion to receive relevant but otherwise inadmissible material in support of an issue. We disagree, however, with the proposition that that rule gives the Tribunal a novel jurisdiction to refuse to accept evidence that is most relevant to an appeal and would otherwise be admissible in a court of law. As already indicated, our understanding is that both in England and Wales and in Scotland, civil courts have no such jurisdiction.

21. Mr Caskie cited no authority for the proposition that rule 51 had this ambit. As far as we are aware, there is no decision of the AIT or the Upper Tribunal to this effect. In our view, he confused two distinct issues, namely the exercise of discretion by a Tribunal to refuse to accept evidence tendered late, because to do so at that late stage may be unfair, and the ability of a judge to refuse to accept evidence that was provided in time, on the basis that the circumstances under which it was obtained or recorded were unfair.

22. There may be documentary evidence based on third or fourth hand hearsay where the original informant may well be unreliable and where any testing of such evidence may be impossible, where a judge would attach little or no weight to the evidence. But that is a far cry indeed from excluding the primary evidence in an asylum appeal, namely what the claimant him or herself says in an interview contemporaneously recorded. By contrast with the position in criminal proceedings, where the purpose of an interview is to explore the state's case of criminal conduct by the suspect, the asylum interview is the opportunity for the claimant to advance his or her case for protection in the United Kingdom.

23. Mr Caskie then developed a second submission not previously intimated, namely that in the particular circumstances of this case, notably the request by his solicitors that the interview be tape recorded, and the fact that the written record showed that

the appellant had requested frequent breaks as he was not feeling well, no reasonable Immigration Judge, properly directing himself, could have placed any weight whatsoever on the content of the interview.

24. We are satisfied, essentially for the reasons developed by Mr Lindsay QC replying to this submission, that it also has no foundation. Irrationality is a high test to meet. No submissions appear to have been advanced, either before Judge Hamilton or before Judge Forbes, that no weight could be attached to the record of proceedings. Judge Hamilton was aware that the absence of tape recording posed a potential disadvantage to this applicant, but nevertheless reached his own reasons as to why the interview record was probative of his assessment of the appellant's credibility, for reasons that are reasonable and well open to him to arrive at. The absence of any post-interview evidence that the written record failed to record what the appellant said, or to give a true picture of his state of health on the day, is significant.

25. We disagree with Mr Caskie's argument that unless the Tribunal was prepared to exclude reliance upon interview evidence in such circumstances, there would be no incentive for the Secretary of State to permit tape recordings of asylum interviews at all. A person who asks for tape recording of his or her interview in order to have an independent reliable record cannot have such a request unreasonably refused. If an application is unreasonably refused, he or she may refuse to participate in the interview, can make a prompt complaint about the refusal, and if there is an issue promptly taken with the reliability of the record or the absence of information about the appellant's state of health or the quality of interpretation that may be captured by the tape recording but missed from the written record, it may well be open to a judge to refuse to assign any weight to that interview. Further, an unlawful refusal may result in the judge concluding that the immigration decision itself was not taken in accordance with the law, and allow the appeal on that basis: see Naved (student – fairness – notice of points) [2012] UKUT 14 (IAC).

26. But there was no such challenge here, and although the appellant did indicate at various points that he was not feeling well and wanted a break, neither he nor subsequently his solicitors responded to the interview process as a whole by contending that the procedure was unlawful or unfair. In all the circumstances, we conclude that the Immigration Judge was entitled to give the weight to the discrepancies and inconsistencies he identified for the reasons he did.

27. This then merely leaves the question of whether Immigration Judge Forbes was wrong, having decided the issue whether the record of interview should be admitted, to dismiss the appeal without more. At first sight, that would be a rather unusual course of action. We understood that Mr Lindsay was prepared to accept that the matter should be remitted to the First-tier Tribunal, on the basis of what the learned Judge said in his determination.

28. However, once we look at the record of proceedings on 13 June, which we raised with Mr Caskie at the outset of the hearing, a different perspective is brought to the

issue. We have received no statement from the appellant's solicitor to contradict the record or to indicate that he expressly maintained other grounds of appeal. We are not prepared to assume that the Judge was acting under a misapprehension in what he recorded in the record of proceedings.

29. Moreover, on further analysis we agree with Judge Forbes that in substance there was nothing left in this appeal, if the Immigration Judge was entitled to receive the interview record and to make the findings as to credibility that he did. That decision was the starting point for any further consideration of this case. If there was no good reason to conclude that it was wrong in the light of subsequent developments, then the fresh claim and the second appeal would not succeed.

30. Events following Judge Hamilton's decision show he was not entitled to hold against the appellant the fact that he said that the relevant strike and demonstration was in February 2008 rather than April 2008. It is clear, however that the Secretary of State did not hold that against the appellant in the fresh refusal of the asylum claim, and it was therefore no longer an issue before Judge Forbes. Judge Hamilton had made the clear alternative finding that even if the appellant was right about dates, he nevertheless remained not satisfied that these events related to the appellant's claim in any material way, for reasons he gave. The appellant's attempt to rely upon fresh evidence of being wanted by the Iranian Authorities failed. That being the case, there was nothing left to justify allowing the protection claim. No independent human rights claim was advanced.

31. We have examined the decisions of both judges with care, in the light of the history of this claim, but we find that there has been no error of law by Judge Forbes. This appeal is accordingly dismissed.

Signed

Mr Justice Blake
President of the Upper Tribunal
Immigration and Asylum Chamber

Date

16 February 2012