Citation Number: [2003] EWCA Civ 1250
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2

Wednesday, 30th July 2003

B E F O R E:

LORD JUSTICE THORPE

LORD JUSTICE SEDLEY

SIR SWINTON THOMAS

- - - - - - -

AHMED BENKADDOURI

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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(Computer-Aided Transcript of the Stenograph Notes of
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MR B HAWKIN (instructed by Messrs White Ryland solicitors, London, W12) appeared on behalf of the Appellant.
MR J P WAITE (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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J U D G M E N T
(As approved by the Court)

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LORD JUSTICE SEDLY:

The issues

1. This appeal concerns the meaning and ambit of the provision in rule 33 of the Immigration and Asylum (Procedure) Rules 2000 that in the case of a failure by the Home Office to comply with a procedural direction the adjudicator may allow an asylum-seeker's appeal without considering its merits. The 2000 Rules have been superseded by the 2003 Rules, but some of the considerations arising under the former may well be relevant to the new rules 4 and 45.

2. Permission to appeal was granted on the papers by Lord Justice Laws. The appeal is from a decision of the Immigration Appeal Tribunal (Mr R.G.Care, Mr A.G.Jeevanjee and Mr P.Rogers), dismissing Mr Benkaddouri's appeal against the adverse decision of an adjudicator (Mr J.W.Miller) on his appeal against a refusal of asylum. Lord Justice Laws confined the grant of permission to the point identified above, but notice has been given of intention to renew the application in relation to the adverse decision of the IAT upholding the adjudicator on the merits of the asylum and human rights claims. For Mr Benkaddouri, Mr Hawkin has rightly put the rule 33 issue at the forefront of his case.

An appeal on the merits?

3. It is nevertheless convenient, for reasons which will become apparent, to deal first with the renewed application. The applicant was a senior health technician in government employment in his home country, Algeria. He was prevailed on by the armed Islamic faction, the GIA, to steal and supply medicines for them and to treat their wounded. He finally left his job and fled via France to the United Kingdom, where he arrived in May 2000 and claimed asylum. He fears both reprisals from the GIA and ill-treatment from the Algerian police if, as he believes likely, he is arrested and interrogated on his return.

4. The short answer to his asylum claim has to be that, accepting his anxieties as genuine and well-founded, the persecution he fears is not by reason of his religion, his race, his actual or perceived political opinion, or any other listed ground. He is simply a decent man caught between the terrorists and the authorities.

5. But there remains the claim that he faces, if returned, a real risk of death at the hands of the GIA and of torture or inhuman treatment at the hands of the Algerian police. This court is not a court of appeal on the substance of such issues, except where the evidence is all one way or an error of law is detectable in the IAA's approach to it. Here, both the adjudicator and the IAT have concluded that the combination of personal and in-country evidence does not establish such a risk to the modest level required to attract human rights protection. The adjudicator has reasoned this out at length in paragraphs 11 to 19 of an impressively careful and cogent decision; and the IAT in their much briefer concluding paragraphs have come to the same view. Given the completeness of the adjudicator's findings which they were upholding, I do not accept Mr Hawkin's submission that the IAT's conclusion on this issue is inadequately reasoned. This apart, no error of law is suggested.

6. No question of law therefore arises from the IAT's dismissal of the appeal on the merits, and I would accordingly refuse the renewed application for permission to appeal to this court. But it is relevant to what follows that the single member (Mrs J.A.J.C. Gleeson) who granted leave to appeal to the IAT, did so both on the law and on the merits. In other words, the substance of the claim was arguable.

The breaches of procedure.

7. The question of what to do about repeated failures to comply with the IAT's directions arose out of a disgraceful series of errors and omissions, verging on the contumacious, on the part

of the Home Office. They are listed in paragraph 11 of the IAT's decision and were candidly admitted by the Home Office presenting officer, Mr Ouseley, to the adjudicator.

8. In short, the Home Office first denied receiving Mr Benkaddouri's statement of evidence form and refused his claim on that ground alone. His solicitors appealed on the ground that the form had been duly submitted in May, and at the appeal hearing the Home Office admitted that this was so and undertook to interview him. This they did in December 2000, but on the adjourned appeal hearing the presenting officer had no record of the interview. The hearing was again adjourned with a direction that any revised refusal letter be served at least 15 days before the resumption of the hearing. At the resumed hearing in March 2001 no fresh letter had been served, and the presenting officer had no knowledge of what decision had been taken. The case was further adjourned, and the Home Office set up a fresh asylum interview for the applicant. In August 2000 a fresh hearing date was set for the end of September. On the date set for the hearing the Home Office applied for and obtained a further adjournment to allow a fresh letter containing reasons for refusal to be served. The hearing was re-set for 13th November 2001 with a direction that all parties must attend. The Home Office did not attend. Instead, it wrote to say that it was relying on the reasons for refusal letter, but failed to say which one.

9. At this point counsel for Mr Benkaddouri applied for the appeal to be disposed of under rule 33(2). The adjudicator reserved the case to himself and adjourned it to 28th January 2002 to allow the Home Office to respond. He gave directions that the Home Office was to submit a skeleton argument 14 days in advance, that it should explain in advance its failure to comply with rule 10, and that it should identify the letter containing reasons for refusal on which it was going to rely. The Home Office did none of these things. All it did was turn up at the adjourned hearing, where it finally identified the reasons for refusal letter on which it was proposed to rely, and oppose the rule 33 application. In this it succeeded. It succeeded, too, in resisting the claim on its merits, and the IAT dismissed Mr Benkaddouri's appeal under both heads.

The law

10. Rule 33 provides:

> "Failure to comply with these Rules.
>
> (1) Where a party has failed -
>
> (a) to comply with a direction given under these Rules; or
>
> (b) to comply with a provision of these Rules;
>
> and the appellate authority is satisfied in all the circumstances, including the extent of the failure and any reasons for it, that it is necessary to have regard to the overriding objective in rule 30(2), the appellate authority may dispose of the appeal in accordance with paragraph (2).
>
> (2) The appellate authority may -
>
> (a) in the case of a failure by the appellant, dismiss the appeal or, in the case of failure by the respondent, allow the appeal, without considering its merits;
>
> (b) determine the appeal without a hearing in accordance with rule 43; or
>
> (c) in the case of a failure by a party to send any document, evidence or statement of any witness, prohibit that party from relying on that document, evidence or statement at the hearing."

Rule 30(2) provides:

> "The overriding objective shall be to secure the just, timely and effective disposal of appeals and, in order to further that objective, the appellate authority may give directions which control the conduct of any appeal."

11. It is clear that there is an error in the drafting of rule 33(1). It appears to give the appellate authority special powers of disposal if it is satisfied "that it is necessary to have regard to the overriding objective". This cannot be right. The whole point about an overriding objective is that it is always necessary to have regard to it. I suspect that the text originally read "that it is necessary having regard to the overriding objective", and that, in an endeavour to polish its prose, the meaning was upended. There is no doubt whatever, and Mr Waite for the Home Secretary accepts this on instructions obtained from the successor of the Department which drafted the rules, that the final part of rule 33(1) is to be read as saying:

> "Where … the appellate authority is satisfied in all the circumstances … that it is necessary to do so having regard to the overriding objective in rule 30(2), the appellate authority may dispose of the appeal in accordance with paragraph (2)."

12. Accordingly, while I would accept the concession of counsel for the Home Secretary that the rule as it stands makes no sense, I would reject his submission that the words are superfluous, not least because I reject his corollary that the words "merely serve to underline the fact that an appeal should not be allowed without consideration of the merits unless the overriding objective so demands it". The words are there, not "merely" there, to give practical effect to the overriding objective.

13. The powers activated by the conditions in rule 33(1) are permissive. But it does not follow that rule 33 creates simply a discretion, implying, as the word does, an elective course which, so long as it is lawful, is neither appealable nor reviewable. In a matter as important as this, both to the appellant and to the State, I consider that what the rule calls for is an exercise of judgment. The judgment, moreover, is a complex one. The decision-maker must first identify the procedural failures at issue (to which alone rule 30 relates: see R (Zaier) v IAT [2003] EWCA Civ 937), and form a view of their causes, their persistence and their gravity. Next, he or she must consider to what extent they have obstructed and may continue to obstruct the overriding objective. In this regard there is a potential tension, of which decision-makers need to be conscious, between the objective of timely disposal and the objective of just disposal of appeals. There is also within the concept of just disposal, in a case like the present, a tension between justice to the asylum-seeker and justice towards the public or the State. Next, the decision-maker must decide whether the overriding objective makes it necessary to resort to one of the measures spelt out in sub-rule (2). To do this, he or she must consider what the possible measures are; must eliminate those which have no useful bearing; and must then relate what measures remain to the circumstances of the failures and the overriding objective. The ultimate question to be answered is whether justice requires the step to be taken.

14. But does the formulation in sub-rule (2)(a), that the appeal may be allowed "without considering its merits", mean that no regard is to be had to the merits in deciding whether to use the power? Plainly, to consider the merits of an appeal in order to decide whether to allow it without considering its merits is self-defeating. What seems to me permissible, however, is to distinguish between the case which is bound to fail, for example because no Convention ground for asylum is being advanced, and the case which is at least arguable. It may well offend against the overriding objective of just disposal to let a claim succeed when, if tested, it is bound to fail; but it may correspond with the overriding objective of timely and

effective disposal to let a viable claim go through without further examination if the Home Office has been the sole or main cause of unacceptable delay or obstruction.

The adjudicator's decision

15. In the present case the adjudicator addressed the rule with care. He was in no doubt about the extent and gravity of the Home Office's procedural failures, nor about the absence of any proffered excuse, much less explanation, for them. He heard full argument before reaching a decision. He treated the matter as one of judgment, not of discretion, and he said this:

> "In normal circumstances I would have adjourned the matter and produced a written ruling. But I was acutely aware of the history of this matter and the fact that the appellant had attended 7 times previously in a case which was now into its third year. I accepted from his statement of 16th January 2002 that this had put stress on him, and moreover that the errors and failures of the respondent were directly responsible for that. This placed upon me constraints of time in both reaching a decision and giving expression to it. It had brooked of no delay. However, I could not ignore the fact that I now had before me sufficient to constitute a valid appeal against a notified decision of the respondent of which the appellant and his representatives had been aware since last October even if the respondent had not the good grace to forward to the IAA in proper form, or indeed at all until the morning of the hearing, the reasons for refusal letter and corresponding bundle. I had a statutory duty to fulfil in regard to the overriding objective. It seemed to me that rule 33(2)(a) was too condign in all the circumstances; rule 33(2)(b) was not favourable to the appellant and was inappropriate; and rule 33(2)(c) inapplicable given that the appellant and his representatives were aware of the existence of the second reasons for refusal letter in October 2001 even if the IAA was not. I was in a position to proceed. I determined so to do in order to give effect to rule 30(2). I dismissed the rule 33 application, although in censoring the respondent for the failures that his representative admitted to in regard to preparation and non-compliance with directions lawfully given I stated that the administration of justice had been brought into disrepute and my severe displeasure incurred."

(By 'condign' I apprehend that the adjudicator meant severe rather than well-deserved.)

The single member's decision

16. It is material to the reasoning set out in paragraph 15 above that in the present case, as has been noted, the single member took the view that an appeal to the IAT was viable on the merits as well as on the law. Although I have given my own reasons for thinking that there was in truth no life in the asylum appeal, the human rights appeal was certainly arguable.

Discussion

17. This was therefore not a case in which a first look at the substance of the appeal showed that it could not succeed on any count. Beyond this point, I accept that the intrinsic merits of the claim could not properly influence the decision under rule 33.

18. There is no doubt that rule 33(2)(a) permits an adjudicator in an appropriate case to allow an asylum appeal irrespective of its merits. There is no doubt, either, that an appropriate case can be constituted by a sufficiently bad history of procedural failures on the part of the Home Office. For Mr Benkaddouri, Mr Hawkin submits that, if the present history of repeated defiance and abuse of the IAA's process by the Home Office does not rank as a sufficiently bad case for the operation of rule 33(2)(a), the rule might as well not be there.

19. I have much sympathy with this submission. In particular, it was only at the final adjourned hearing that the Home Office bothered to say which letter of refusal it was relying on, and the one it chose, dated 25th June 2001 but not sent until 5th October 2001, stated (incomprehensibly) that the application had been recorded as determined on 2nd May 2001. But the IAT records in paragraph 17 of its determination what then happened:

> "As far as we could see, even on the day of the hearing of this appeal there was no proper valid decision dated 5 October 2001 before it. It is alleged that that is the decision triggering the appeal. It does not frankly exist. However, the appellant, not surprisingly, is thoroughly fed up and completely stressed by what has happened, and he simply wants the matter disposed of. He did not wish to take any point which might result in a further adjournment. Both parties therefore agreed that we should proceed on the basis that there was indeed a valid decision on 5 October and that therefore the proceedings before us are a valid appeal."

20. Even in such a situation, I think it is possible to recognise a material difference between a case in which repeated defiance of procedural directions has made a fair hearing impossible (if here, for example, the Home Office had continued to refuse to say which letter of refusal it was relying on), and a case in which, in spite of the unacceptable delay and stress which the Home Office's negligence has caused, it is still feasible, on the day set for the hearing, to try the appeal without any further injustice to the appellant.

21. The adjudicator took the reasoned view that this case was in the latter class, and I can detect no flaw in his reasoning. One can usefully contrast it with the decision in Razi (2001) 01 TH 01836. There, the failure of the Home Office to comply with a direction that it should file its reasons for rejecting the appellant's application for asylum had made a fair hearing impossible unless there were to be yet more delay. One can entirely understand the IAT's conclusion in relation to the adjudicator's decision to allow the appeal without more, that "no other course of action would have been reasonable in the circumstances". The same would have applied here if the adjudicator had decided, as he might legitimately have done, to determine the rule 33 application when it was made to him without first adjourning it; for at that stage the Home Office had failed to stipulate which reasons for refusal letter it was relying on, and the case was on a par with Razi.

The Immigration Appeal Tribunal

22. The IAT, as one would expect, looked more fully at the jurisprudence governing this issue. They were asked by Mr Hawkin, as we have been, to work by analogy with criminal proceedings. In criminal proceedings, given a serious enough denial of justice, an accused may walk free regardless of the evidence against him. But I do not think that the analogy holds. In criminal law an accused person is entitled to his freedom if he cannot be fairly tried. In refugee and human rights law, there is no equivalent entitlement to asylum or non-removal if the State fails to prove its case or to act fairly. The asylum-seeker has no default position comparable to that of the criminal defendant. There is accordingly no logical continuity between a failure of due process on the Home Office's part and the grant of asylum or non-removal to the person affected by it. Moreover rule 33(2)(a) does not purport to bridge this gap uniformly: it does so by way of rough justice only where there is no other sensible way of achieving the overriding objective.

23. This is plainly what Mr Justice Collins had in mind in Nori [2002] UKIAT 01887, when he said:

> "21 …… All we would observe is that in our judgment it is not right for an adjudicator ever to make use of rule 33 and to decide an asylum claim in favour of an applicant without considering at all the merits of that claim.
>
> 22. Asylum is a status which should not be granted to punish the Secretary of

> State for failing to do what he ought to have done. It should be considered on its merits. It may be that if the Secretary of State fails to carry out any investigation himself or to reach any conclusion himself, the adjudicator will have to make his decision on the basis of uncontroverted evidence from the appellant or without permitting the Secretary of State, if he has failed to comply with directions, to put in any material himself."

24. The IAT concluded at paragraph 18 of their decision:

> "The determination of refugee status and indeed, the determination of whether or not there has been a breach under the European Convention on Human Rights, are essentially administrative enquiries, albeit they have all the trappings of a judicial adversarial process (Sivakumaran: Ravichandran: Karanakaran). It is indeed for the claimant to show that he is at risk of persecution or of a breach under the European Convention on Human Rights and it cannot be said that the adjudicator was, at the date of the hearing, not in a position to dispose of those issues. He was. All the institutional failings by the respondent did no more, so far as the appellant is concerned, than to cause him great distress. We do not think though that they amounted to an actual prejudice to the extent that the adjudicator could not do justice to him."

Apart from their subsequent characterisation of the adjudicator's decision as an exercise of discretion rather than of judgment, it seems to me that their appraisal of the law and of the adjudicator's decision in the light of it was correct.

Conclusions

25. I do not think that the adjudicator was called on to adjourn the Rule 33 application when, on 13th November 2001, it was first made to him. The Home Office had by then had plenty of chances to puts its house in order, and Mr Waite accepts that, had the adjudicator decided the application there and then, it would almost certainly have succeeded. Mr Hawkin for his part accepts that he can offer no sufficient legal challenge to the eventual decision to adjourn the application. But adjudicators and tribunals should not assume that they have to give further rope to a defaulting party when application is made for a summary remedy for procedural default.

26. Once the Home Office had told the appellant which reasons for refusal it was relying on, and once the adjudicator had satisfied himself, as he did, that the appellant and his advisers had already had an adequate opportunity to consider and deal with them, there was no conclusive reason for the adjudicator to allow the appeal without considering its merits. His judgment that the overriding objective did not make it necessary to do so was reached after proper consideration of the relevant factors and is entirely defensible.

27. Permission having been refused to enlarge the issues, I would therefore dismiss this appeal on the single issue on which it comes before this court.

28. SIR SWINTON THOMAS: I agree.

29. LORD JUSTICE THORPE: I also agree.

Order: Application refused; appeal dismissed.