ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 29 January 2008

Before:

Mr Justice Hodge, President
Senior Immigration Judge Chalkley

Between

SD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr G. Hodgetts, instructed by Wilson & Co.
For the Respondent: Mr J. Gulvin, Home Office Presenting Officer

In the rare case where an immigration judge, prior to the promulgation of a determination, receives a submission of late evidence, then consideration must first be given to the principles in Ladd v Marshall [1954] 1WLR 1489. Under those, a tribunal should not normally admit fresh evidence unless it could not have been previously obtained with due diligence for use at the trial, would probably have had an important influence on the result and was apparently credible. If, applying that test, the judge was satisfied there was a risk of serious injustice because of something which had gone wrong at the hearing or this was evidence that had been overlooked, then it was likely to be material. In those circumstances, it will be necessary either to reconvene the hearing or to obtain the written submissions of the other side in relation to the matters included in the late submission.

NOTE

1. This is a reconsideration of the appeal of SD, born 7 October 1973, a citizen of Russia. In a determination served on 29 September 2006, Immigration Judge Markham David dismissed the appellant's claim on asylum grounds and on

human rights grounds. Reconsideration was ordered in October 2006 by a senior immigration judge. This reconsideration was adjourned for health reasons when it first came on for hearing on 5 June 2007.

2. The appellant arrived in the United Kingdom on 14 July 1996 with leave to enter stamped in his passport, limiting his employment to a period of three months with Kelsey Farms. The visa was extended on 15 August 1996, enabling the appellant to work until 30 November 1996.

3. On 27 November 1996, the appellant applied for asylum. He was not interviewed in relation to this claim until 15 September 2000, nearly four years later. His asylum claim was refused on 11 October 2000 and the appellant appealed in time. That appeal was not progressed by the respondent until they sent the papers to this Tribunal on 10 May 2006. There is no explanation in the papers from the respondent as to why the asylum interview was delayed for some four years, and the onward submission of the appeal was delayed for approximately five and a half years after the adverse decision.

4. The appeal was heard on 7 September 2006. It was argued before the immigration judge that the appellant had continuously resided in the UK for ten years while his asylum claim had been under consideration and so had developed a strong private life in the UK. It was submitted that interference with that private life by enforced removal would be disproportionate, and that, therefore, the appellant should succeed in his claim under Article 8 ECHR. The immigration judge rejected this argument on the basis that the appellant had "not had any form of leave after his temporary admission".

5. On 8 September 2006, immediately after the conclusion of the hearing, the appellant's then counsel put in additional evidence on behalf of the appellant concerning the long residence rule contained in para 276A Immigration Rules (HC395 as amended). It was said that the appellant did in fact satisfy the "lawful residence" requirement of the Rules. The evidence was he had had continuing leave to remain in the UK for a period in excess of ten years. In those circumstances it was said to be disproportionate to reject the appellant's Article 8 claim, given that the Immigration Rule in relation to long residence of over ten years appeared to have been wholly satisfied.

6. This new evidence and the submissions on it reached the immigration judge by post on 14 September 2006, when his determination had been prepared and dictated and sent for typing. He declined to take the submissions into consideration, setting out the following reasons:

> "1. No leave was sought at the hearing of this appeal to submit any further arguments in writing after the hearing of the appeal, nor was this possibility suggested at all at any time.

2. I do not consider that I have jurisdiction to consider these submissions in the course of this appeal. They can properly be put before the Secretary of State in the course of the appellant's application for indefinite leave to remain on the basis of long residence, and if this application is not successful, it can be argued subsequently before an immigration judge on appeal.

3. If I thought I had jurisdiction to consider these submissions, I would have had to reconvene the hearing of this appeal in any event."

7. It is the appellant's case that the immigration judge was wrong in law to reject this additional evidence and the submissions, and the error was material.

Post-hearing evidence and submissions

8. It is the duty of all advocates to ensure that, when they appear before a court or tribunal, they are in a position to inform the court or tribunal of all relevant cases and statutory provisions. The duties are clearly spelt out in the Bar Code of Conduct 2004 at para 708, and in the Solicitors' Code of Conduct at para 11.01. The duty applies equally to Home Office Presenting Officers and to OISC representatives.

9. An obvious requirement at any final hearing before the AIT is that both parties put before the Tribunal all and any relevant matters on which they intend to rely, both factual and legal. As a general rule it is not in the interests of the parties or of the administration of justice for there to be post-hearing submissions. Nor should parties attempt to submit post-hearing evidence save in very exceptional circumstances.

10. In *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49, the Court of Appeal among a number of other matters considered whether the then Immigration Appeal Tribunal could "take account of material which becomes available between the date of the hearing and the date of the promulgation of its decision". The Court concluded at para 27:

> "As we understand it, the agreement on both sides has proceeded on the basis that, up until the date of promulgation, the IAT would have been at liberty to admit further evidence (whether or not it was under any duty to do so). That seems correct. In accordance with ordinary principles, the IAT remains seized of the matter until the decision is formally communicated to the parties."

11. The Asylum and Immigration Tribunal (Procedure) Rules 2005 provide at paras 22 and 23 as follows:

> "22(1) Except in cases to which Rule 23 applies, where the Tribunal determines an appeal it must serve on every party a written determination containing its decision and the reasons for it.

23(1) This rule applies to appeals under s 82 of the 2002 Act where:

a) The appellant is in the United Kingdom and
b) The appeal relates in whole or in part to an asylum claim.

(4) The Tribunal must serve its determination on the respondent."

12. So in asylum cases, the determination must be served on the respondent, who then has a duty to serve it on the appellant. In all other cases, the Tribunal must serve both parties with the determination. Importantly, in both types of case, Rule 22 and Rule 23 both provide that the Tribunal must serve the determination "not later than ten days" after either the hearing finishes or, where there has been no hearing, after the matter is determined. In the cases of both *E and R* there was a delay of some months between the hearing of the appeal and the serving of the determination. A delay of more than ten days after a hearing before the determination is served now breaches the AIT Procedure Rules and ought to be rare. The requirement that any determination be served within ten days of a hearing reinforces the absolute need on the part of all parties to put all the facts and matters on which they rely, together with their legal submissions, before the Tribunal at the hearing.

The immigration judge's ruling

13. Here the late evidence submitted was that the ten year residence rule had been satisfied and submissions were made on that. The first reason given by the immigration judge for not taking the late evidence and submissions into account was that no leave was sought at the hearing to submit late material, nor was the possibility suggested during the hearing. That is correct so far as it goes. Had such leave been given, the judge would have been obliged to consider any material put in within such time limit as might have been suggested. If any such agreement is made, and if the judge considers the material might affect any determination, then, in fairness, the respondent may need to be given an opportunity to deal with it, either in writing or, if necessary, by reconvening the hearing. The practice of agreeing to post-hearing evidence or submissions should only be adopted in exceptional circumstances, given the general obligation to present all relevant material at the hearing itself and the likelihood of significant delay and a breach of the Procedure Rules where such permission is given.

14. The immigration judge was therefore right so far as it goes to say that if he did have jurisdiction to consider the late submissions, he "would have had to reconvene the hearing of this appeal in any event".

15. In his second reason for refusing to consider the late submissions, the immigration judge said he did not have jurisdiction to consider them. He was wrong. *E and R* makes it plain that he was "at liberty to admit further evidence". The late submission contained evidence which suggested that the Tribunal had been wrongly told that the appellant had not had "any form of leave after his

temporary admission". The Court of Appeal in *E and R* left it open as to whether the Tribunal in such circumstances is under a duty to admit further evidence. But it did give guidance as to how to proceed.

16. As is well known, in *E and R* the Court of Appeal accepted that a mistake of fact giving rise to unfairness was a separate head of challenge on an appeal on a point of law in the context of asylum and immigration appeals "where the parties shared an interest in cooperating to achieve the correct result". In relation to the then Immigration Appeal Tribunal, the Court concluded at para 92 that, in exercising the discretion to direct a rehearing in relation to new evidence received before the decision had been formally notified to the parties, "the principle of finality would be important" and:

> "To justify reopening the case the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence it should be guided by *Ladd v Marshall* principles, subject to any exceptional factors."

17. Hence, in the rare case where an immigration judge, prior to the promulgation of a determination, receives a submission of late evidence, then consideration must first be given to the principles in *Ladd v Marshall* [1954] 1WLR 1489. Under those, a tribunal should not normally admit fresh evidence unless it could not have been previously obtained with due diligence for use at the trial, would probably have had an important influence on the result and was apparently credible. If, applying that test, the judge was satisfied there was a risk of serious injustice because of something which had gone wrong at the hearing or this was evidence that had been overlooked, then it was likely to be material. In those circumstances, it will be necessary either to reconvene the hearing or to obtain the written submissions of the other side in relation to the matters included in the late submission.

Material error of law

18. Both the appellant and the respondent failed the immigration judge in this case. The appellant had, by September 2006, clearly had leave to remain in the United Kingdom for a period of over ten years. He arrived in July 1996 and was given leave to enter to work. That was extended. Prior to the end of the extension, he had applied for asylum. The effect of that application was to continue the leave to remain. The adverse decision in relation to the asylum application made in October 2000 had not put an end to the leave to remain, as the appellant had exercised his right to appeal against that decision in a timely manner. The long subsequent delay meant that that the appellant had been here for ten years with leave to remain in September 2006. The respondent has a general duty to the Tribunal as set out above to draw relevant matters to its attention, and these factors were within the knowledge of the Secretary of State and should have been communicated to the immigration judge. The appellant's late submission of the

information could have cured the position but the immigration judge mistakenly disregarded that.

19. The mistake of fact as to the appellant having ten years' leave to remain in the UK was, as it turns out, in the words of *E and R* "an established fact which was uncontentious and objectively verifiable". The failure to recognise this fact has resulted in unfairness and amounts to an error of law. Had the immigration judge been aware of this fact, he would have had to weigh that in the balance when considering the proportionality of the claim that the appellant's right to private life under the provisions of Article 8 ECHR was engaged.

20. It is clear to this Tribunal that the appellant meets the requirements of 276B(i)(a) of the Immigration Rules, as "he has had at least ten years' continuous lawful residence in the United Kingdom". There is a public interest test in para 276B(ii) which the appellant will have to satisfy, as he will need to show that "having regard to the public interest, there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of his long residence", and in making that decision account has to be given to a series of issues set out from (a) to (g) in para 276B(ii).

21. We acceded to the request from the Secretary of State that, as no consideration appears to have been given to the public interest issue, the matter should be sent back for a further hearing for this aspect of the matter to be considered.

22. We have noted that there is nothing in the papers to suggest that the appellant has not satisfied the public interest test, but that may be a matter for further consideration. We have also noted from the immigration judge's decision that the appellant may also have already made an application for indefinite leave to remain at some stage prior to the hearing in September 2006. If he has, and the Secretary of State has still not decided on that application, this further delay in a case already full of lengthy delays will not doubt be a factor in considering the issue of proportionality.

Conclusion

23. The immigration judge made a material error of law in this case for the reasons given. The matter is to be considered at a second stage reconsideration.

MR JUSTICE HODGE
PRESIDENT
Date: 22 February 2008