Neutral Citation Number: [2008] EWCA Civ 495

Case No: C5/2007/2415

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
HX003362007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2008

Before :

THE MASTER OF THE ROLLS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE LAWRENCE COLLINS

- -

Between :

SK (SRI LANKA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Dr Austen Morgan (instructed by **Sriharans**) for the **Appellant**
Mr Andrew Sharland (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates: 23rd April 2008

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Judgment

Lord Justice Longmore:

1. This appeal raises two questions:-

   i) what is the effect of an oral announcement of a "decision" by an Asylum and Immigration Tribunal ("AIT")?

   ii) if an oral announcement is made that an appeal "is allowed" or is "to be allowed", what is the effect of a subsequent written determination to the effect that an error of law has been made but that a further reconsideration is required to dispose of the appeal?

2. The relevant procedural rules are the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("the Rules"). In relation to appeals to the AIT, Rule 22 provides:-

> "(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.
>
> (2) The Tribunal must send its determination –
>
> > (a) if the appeal is considered at a hearing, not later than 10 days after the hearing finishes; or
> >
> > (b) if the appeal is determined without a hearing, not later than 10 days after it is determined."

Rule 2 defines "determination" as meaning in relation to an appeal

> "a decision by the Tribunal in writing to allow or dismiss the appeal, and does not include a procedural, ancillary or preliminary decision."

3. The procedure whereby either the Tribunal itself or the High Court can order a reconsideration was explained in DK (Serbia) v SSHD [2006] EWCA Civ 1747, [2007] 2 All1 E.R. 483 and need not be reiterated here, save to say that Rule 29 provides that Rules 15-23 apply to reconsiderations of an appeal as they do to the initial determination of an appeal. Rule 31 then provides:-

> "(1) Where an order for reconsideration has been made, the Tribunal must reconsider an appeal as soon as reasonably practicable after that order has been served on both parties to the appeal.
>
> (2) Where the reconsideration is pursuant to an order under section 103A –
>
> > (a) the Tribunal carrying out the reconsideration must first decide whether the original Tribunal made a material error of law; and

(b) if it decides that the original Tribunal did not make a material error of law, the Tribunal must order that the original determination of the appeal shall stand.

(3) Subject to paragraph (2), the Tribunal must substitute a fresh decision to allow or dismiss the appeal. ….."

4. This is somewhat amplified by the Practice Direction of the AIT the material parts of which are as follows:-

"14. Procedure on reconsideration.

14.1 Subject to paragraph 14.12, where an appeal has been ordered under section 103A to be reconsidered, then, unless and to the extent that they are directed otherwise, the parties to the appeal should assume that the issues to be considered at the hearing fixed for the reconsideration will be whether the original Tribunal made a material error of law (see rule 31(2)) and, if so, whether the appeal should be allowed or dismissed, by reference to the original Tribunal's findings of fact and any new documentary evidence admitted under rule 32 which it is reasonably practicable to adduce for consideration at that hearing.

14.2 Where the Tribunal decides that the original Tribunal made a material error of law but that the Tribunal cannot proceed under rule 31(3) to substitute a fresh decision to allow or dismiss the appeal because findings of fact are needed which the Tribunal is not in a position to make, the Tribunal will make arrangements for the adjournment of the hearing or for the transfer of the proceedings under paragraph 12.3 so as to enable evidence to be adduced for that purpose.

14.3 Where the Tribunal acting under paragraph 14.2 adjourns the hearing or transfers the proceedings, it shall prepare written reasons for its finding that the original Tribunal made a material error of law and those written reasons shall be sent to the parties before the next reconsideration hearing.

14.4 The written reasons for finding that the original Tribunal made a material error of law shall be incorporated in full in, and form part of, the determination of the Tribunal which completes the reconsideration of the appeal. Only in very exceptional cases can the decision contained in those written reasons be departed from or varied by the Tribunal which completes the reconsideration (see R (Wani) v SSHD and AIT [2005] EWHC 2815 (Admin))."

The Facts

5. The appellant applied for asylum on 9th July 1993 when he arrived in the United Kingdom, apparently on grounds that he would face problems from the Sri Lankan authorities, including the Sri Lankan army, arising from the ethnic tensions in the country. This application was refused in June 1995 and an appeal was dismissed in December 1996.

6. Following the issue of removal directions, the appellant made further representations, which on 28th January 1997 he asked to be treated as a fresh claim for asylum. No action was taken on that for the next 7 years. In the meantime, on 25th August 2001 and 4th January 2002 the appellant made applications to the respondent for leave to remain based on his long residence and his business assets in the United Kingdom.

7. On 26th November 2004 the Secretary of State notified the appellant that in response to the January 1997 letter the asylum claim had been reconsidered taking into account the further representations, but that the earlier decision would not be reversed and that it had been decided that the further representations did not amount to a fresh claim.

8. On 29th November 2004 the appellant's August 2001 and January 2002 applications were refused.

9. On or around 9th December 2004 the appellant sought to appeal on human rights grounds the respondent's refusals of 26th November and 29th November 2004. On 14th December 2004 he then made a further application for leave to remain, this time as a businessman; that application was refused on 3rd February 2005. On 4th March 2006 the Secretary of State responded to the appellant's December 2004 appeal and informed him that the two decisions of November 2004 would be maintained.

10. On 6th May 2006 Immigration Judge Khan dismissed the appellant's appeal from these various decisions. The appellant had said

    i) that he had established a number of businesses in the United Kingdom, had relatives living in the United Kingdom, and himself lived with a British citizen with whom he had been in a relationship since 2000;

    ii) that he had been visited in the United Kingdom on three occasions by LTTE members asking for large sums of money as extortion and, though he was safe from the consequences of his refusals to comply with these demands while in the United Kingdom, he would not be similarly safe in Sri Lanka; and

    iii) that he relied on the substantial delays in dealing with the appellant's case. He therefore said that his removal would be in breach of Articles 3 and 8 ECHR.

11. The Immigration Judge however made adverse findings in relation to the appellant's credibility regarding the threat from the LTTE, found that the running of his businesses could be delegated pending an application for his return to the United Kingdom as his partner's fiancé, and concluded that, even taking into account the delays, the case did not surmount the threshold of Article 8 given the exceptionality test in Huang (as it was understood prior to the House of Lords' judgment in that case).

12. The appellant applied for a reconsideration, which on 2nd June 2006 Senior Immigration Judge McKee refused, but this decision was reversed, and a reconsideration was ordered, by Jackson J on 9th August 2006.

13. The reconsideration hearing took place before Senior Immigration Judge Gleeson and two other tribunal members on 12th December 2006. It is now common ground that at the end of the hearing, Senior Immigration Judge Gleeson said the appeal would be allowed. The Asylum and Immigration Tribunal's written determination was sent to the appellant on or about 26th April 2007. In that it was held that Immigration Judge Khan had erred in failing to apply Akaeke [2005] EWCA Civ 947 in relation to the delay issue, he had also erred in relation to proportionality and Article 8 by failing to mention Razgar [2004] 2 A.C. 368 and by applying an exceptionality test which the House of Lords had said was wrong in Huang [2007] 2 A.C. 167 The AIT therefore ordered a second stage reconsideration so that these matters could be dealt with. No reference was made in the written determination to the fact that Judge Gleeson had said in December 2006 that the appeal would be allowed. Judge Gleeson had unfortunately been unwell and had been unable to send the written determination within 10 days of the end of the hearing as contemplated by Rule 22(2) of the Rules. The probability is that by April 2007 she and the other tribunal members had forgotten that they had said that the appeal would be allowed.

14. A second stage reconsideration then took place before Immigration Judge Milligan-Baldwin and Immigration Judge Roberts on 20th June 2007, with the determination being promulgated on 27th July 2007. Regarding Articles 2 and 3, the AIT held that the appellant had not established any breach of these rights for the same reasons that his asylum appeal had been dismissed, i.e. that his account was not credible. Regarding Article 8, the AIT asked the Razgar series of questions, as approved by the House of Lords in Huang, and held that the interference with the appellant's private and family life by removing him to Sri Lanka would not be so grave as to constitute a breach of Article 8. The AIT therefore refused his appeal.

15. Permission to appeal from this decision was refused by Senior Immigration Judge McGeachy on 21st September 2007. Permission was then sought from the Court of Appeal. Richards LJ considered the papers and adjourned the application to an oral hearing, giving various directions to the parties to facilitate the investigation of what had been said orally by the AIT on 12th December 2006. He also gave permission to amend the Appellant's Notice. The oral hearing took place before Arden and Toulson LJJ, who, once the factual position set out in para. 13 above had emerged, granted permission to appeal on one ground of appeal on 21st January 2008. That ground is that, since an oral pronouncement allowing the appeal had been made, that oral decision must stand as the AIT's order and the written determination (that there be a reconsideration) should be disregarded. No point is made on behalf of the Secretary of State that this was never a ground of complaint made to the tribunal which conducted the reconsideration in June 2007 and it comes before us as a free-standing ground of appeal in relation to which (for entirely understandable reasons) we have had no assistance from the AIT itself.

Effect of "oral decision"

16. Dr Morgan for SK submitted that, although the rules clearly require a "written determination" to be sent to the parties, they neither expressly nor impliedly excluded the possibility of an oral decision being given.

17. He further said that that this opinion appears to be shared by the *Macdonald's Immigration Law and Practice*, (6th ed. Para. 18-156 foot note 4) which says:-

> "The new rules contain no express power to promulgate a determination orally at the end of the hearing, although it would clearly be within the power of the Tribunal to give the decision, while reserving the reasons, and some immigration judges routinely deliver the entire determination orally, sending a copy in writing as required by the rules"

The same comment appears in the new 7th edition, para. 18-162.

18. In 1997 the Secretary of State had power to refuse asylum and, if the country to which an applicant was liable to be returned had been designated as a country in which there was no serious risk of persecution, the Secretary of State could issue a certificate which meant that an appeal would be subject to an accelerated appeal procedure and, if the certificate was upheld by a special adjudicator, no further appeal was possible. At that time the relevant rules were the Asylum Appeals (Procedure) Rules, rule 11 of which provided:-

> "(1) The special adjudicator shall wherever practicable pronounce his decision at the conclusion of the hearing and he shall not later than 10 days after the conclusion of the hearing send to every party of the appeal written notice of the determination.
>
> (2) In an appeal which relates to a certified claim, the special adjudicator shall, if he agrees that the Secretary of State was right to certify the claim, pronounce his decision at the conclusion of the hearing and he shall not later than 5 days after the conclusion of the hearing send to every party to the appeal written notice of the determination."

"Determination" was defined in a similar manner to the word in the current Rules.

19. In R v Special Adjudicator ex parte Bashir [2002] Imm A.R. 1 the special adjudicator said at the end of an appeal "I overturn the certificate and allow the appeal" but, in the course of preparing his written determination, he changed his mind, and decided he should uphold the certificate and dismiss the appeal. The Secretary of State accepted that, in this unfortunate state of affairs, the determination should be quashed and the appeal re-heard but the appellant sought to argue that the original determination allowing the appeal and overturning the certificate should stand. He submitted that, once the special adjudicator had made his oral pronouncement, he was functus officio and everything that happened subsequently was a nullity.

20. Harrison J rejected the submission saying that, on the true construction of the rules, the special adjudicator was not functus officio until the written determination had

been promulgated. The judge added that, if an adjudicator had a change of mind, he ought to re-convene the hearing and invite further submissions.

21. I agree with that decision on the construction of the rules as they were in 1993. Since those rules expressly provided for a decision to be pronounced at the end of the hearing, they gave greater support to an argument for the finality of an oral pronouncement than do the present rules. The present 2005 rules only provide for a written determination and, although it is as Macdonald says, within the powers of the AIT to pronounce an oral decision, it is clearer than in Bashir's case that it is the written determination which constitutes the formal determination. The omission of the word "oral" in Rule 22 is unlikely to be accidental especially when one observes that Rule 45(3) of the current rules expressly provides in relation to directions that they can be given either orally or in writing, provided that they are given to every party.

22. Dr Morgan submitted that the position was different if the immigration judge had not changed her mind but "negligently forgot" that she had already said that the appeal would be allowed and followed it up with an inconsistent written determination. I cannot agree with that submission. The question is not one of "negligence" or "forgetting" but is whether the operative decision is the oral pronouncement or the written determination. For the reasons I have given, I consider it is the written determination.

23. I add that, for my own part, I deprecate any suggestion that the judge was negligent. All of us are prone to fall ill and, as anyone knows who comes to write up a decision after being ill, it is easy enough to forget what may have been one's preliminary conclusions at the hearing. To have different approaches to negligent and non-negligent amnesia would be both unworkable and contrary to principle.

Fairness

24. That does not mean that the AIT's disposition was satisfactory. Now that it has emerged that the appeal was indeed allowed orally but ordered to be reconsidered in the written determination, there should in principle be another determination as Harrison J decided there should be in Bashir. The Secretary of State submits, however, that in fact this has already happened in the form of the determination by Immigration Judges Milligan-Baldwin and Roberts on 27th July 2007. This was a decision made after a full analysis of the relevant facts and a correct application of legal principles. What, submits the Secretary of State, would be the point of going through the whole process again?

25. Dr Morgan submits that the right course is for the matter to be remitted to Senior Immigration Judge Gleeson and her colleagues so that they can at least explain how the written determination came to be made inconsistently with their oral pronouncement or, alternatively, that SK should at least have a second chance of persuading a different tribunal that his appeal should be allowed.

26. Now that all relevant facts have emerged in the course of this application for permission to appeal, I cannot feel the first course suggested would be consonant with justice. If the earlier tribunal did not remember their thought process after an interval of 4 months, any reconstruction of those processes over a year later is unlikely to be

more that speculative. Dr Morgan's second suggestion is, perhaps, understandable from the appellant's point of view but it would be very unsatisfactory for the parties to resubmit the same evidence and repeat the same arguments just in the hope that a different outcome might ensue. The fact is that SK's appeal has now been fully, properly and fairly considered and that should be the end of the matter.

27. I would dismiss this appeal.

Lord Justice Lawrence Collins:

28. I agree.

Master of the Rolls

29. I also agree.