RS and SS (Exclusion of appellant from hearing) Pakistan [2008] UKAIT 00012

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 18 December 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Clements

Between

RS
SS

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: Ms T White, instructed by Ali Sinclair Solicitors
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

The general rule that an appellant who is in the United Kingdom cannot be excluded from the hearing of his own appeal does not mean that he cannot, by himself or by his representative, consent to a requirement that he be absent from part of it. Evidence may gain in credibility from the removal of a possibility that a later witness has heard the evidence that an earlier witness gave. If two appeals are combined it is proper for an Immigration Judge to ask, and proper for a representative to agree, that one appellant remain outside while the other gives evidence. An alternative course of action is to hear the appeals successively.

DETERMINATION AND REASONS

1. The appellants are citizens of Pakistan, mother and son, the mother claiming to have been born in or about 1960 and the son in 1990. They arrived in the United Kingdom and claimed asylum. They were refused: one reason was that the Secretary of State did not accept that the son was as young as he claimed. Their appeals were therefore treated as separate appeals against separate decisions by the Secretary of State. They came before an Immigration Judge who dismissed them. The appellants have sought and obtained an order for reconsideration. Thus the matter comes before us.

2. The principal ground of appeal was that the Immigration Judge erred fundamentally, in Ms White's submission, in allowing himself to be misled in his reading of Rules 20 and 43 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and directing that in an appeal hearing, which was under Rule 20, to be a hearing of the two individual appeals together, the son could be required to be absent from the hearing for part of it during which time his mother gave evidence. There is no doubt about the background to the Immigration Judge's decision. It was that the evidence of both appellants was doubted by the respondent. The Immigration Judge was aware of the danger that if whoever gave evidence second had heard the first appellant's evidence being given, the evidence might, on the one hand, be tailored to fit the evidence which had already been given: but, as we pointed out to Ms White, on the other hand, the Immigration Judge would have been deprived of seeing the same story being told by a person who had <u>not</u> witnessed it being told before, which might well have supported its credibility.

3. The Immigration Judge indicated at the hearing that he proposed to require the son to be absent while the mother gave evidence. Exactly what happened after that has not become clear until this morning. It is not mentioned in Ms White's grounds. What appears to have happened is as follows. The Immigration Judge heard submissions from Ms White about the impossibility of requiring an appellant to be absent during the course of his own appeal. The Immigration Judge then adjourned briefly in order to consider what the position was under the Procedure Rules to which we have referred. When he returned to court he indicated to Ms White that there appeared to him to be two possibilities: one was that there be separate trials of the two appeals, in which case of course individual arrangements could be made for each trial without there being a risk that an appellant would be required to be absent for part of the trial for his own appeal, or alternatively that there could be a joint trial on the basis that he had indicated before.

4. Ms White has told us that in those circumstances, knowing the view that the judge took about the presence of the son for the whole of a combined hearing, she chose the combined hearing. She has told us today that it was her view that separate trials were, for various reasons in this case, impossible or impractical or unrealistic

or uneconomic or a waste. But the position is that having been offered the possibility of separate trials or a combined hearing and knowing that if there was a combined hearing the judge's view was that the son had to be absent while his mother gave evidence, she chose the combined hearing. In those circumstances it is clear that the absence of the son from the hearing, although expressed by the Immigration Judge in terms of requirement, was an absence which Ms White had, on his behalf, not merely accepted but in fact chosen.

5. Her principal submission is that an appellant cannot lawfully be required to be absent from any part of the hearing of his or her own appeal, save in the circumstances envisaged by s108 of the 2002 Act. We have a great deal of sympathy with that submission. However, an appellant is not on the other hand required to be present at the hearing of his appeal and there are many and good reasons why appellants sometimes do not attend the hearing, or all of the hearing of an appeal. An appellant properly represented by counsel who makes an informed decision in the circumstances we have given cannot properly complain subsequently about his absence from a part of the hearing, even if it is expressed by the Immigration Judge in terms of requirement.

6. It is often felt that absence from a hearing for part of a hearing is a real disadvantage to an appellant. It ought not to be in all circumstances. Clearly an appellant not at a hearing cannot, in his absence, give oral evidence. Sometimes, however, appeals and, of course particularly reconsiderations, do not depend on oral evidence: and in those circumstances it may well be that an appellant, properly advised, will not attend a hearing. Where there is evidence to be given in circumstances such as those we have indicated it appears to us that any counsel might quite properly accept the Immigration Judge's view and quite properly make the choice which she quite properly did. After all, the appellants' position was, and no doubt is, that their story was perfectly credible. They would not have been able to demonstrate the credit of their two accounts if the Home Office had been able to say of the son's evidence "well, of course he says that: he has just heard his mother's evidence". In the circumstances which arose in this case the decision to allow and indeed require the son to be absent during the giving of his mother's evidence was a decision which could only add to the force of submissions made about the credit of the story. As it happened, the Immigration Judge took an adverse view of the credibility of, in particular, the mother's evidence. But of course that was a subsequent judgment by the judge in his determination. At the time of the hearing Ms White had the job of showing that the evidence was credible and nothing that she did seems to us to have been wrong in that context. What we do think is wrong is to claim, as has been claimed in this case, after the result of the determination is known, that it was erroneous for the judge to behave as he did. As we have explained it was not erroneous, because on the son's behalf counsel waived his right to be present through the entire trial.

7. That deals with the principal matter of procedure raised in this reconsideration. There are, however, a number of other matters raised, principally going to the

Immigration Judge's assessment of credibility. In her helpful skeleton argument prepared for today's reconsideration hearing Ms White has raised a number of discrete issues attacking the Immigration Judge's assessment of credibility, which is set out in some detail at paragraph 10 with its sub-paragraphs lettered (a) to (j). Ms White's challenges go, if we may summarise them, to paragraphs (a), (c), (g) and (i): in other words to five of the ten paragraphs. In respect of two, at least, Ms White's claim is that the Immigration Judge did not recognise that the area of the evidence in which he was detecting a discrepancy was an area which was not at the core of the story of either the appellant or her son. The amount of weight to be given to issues of credibility and to questions of discrepancy or disagreement on evidence is a matter for the Immigration Judge. But we do not think that it can be too often repeated that there is no rule that issues of credibility do not matter if they do not go to the core of a claim. If an Immigration Judge finds that he cannot believe an appellant on matters which can be checked, he has no reason at all to believe the same appellant on matters which cannot be checked. The fact that the matters in the first category are apparently small matters and the matters in the second category are apparently large matters does not affect that position at all. An Immigration Judge who discovers that there are considerable discrepancies in an account, even if they go only to small matters, is entitled to say that he does not trust the appellant's word and as a result that he does not make findings of fact that he is invited to make on the evidence as a whole.

8. In two, at least, of the areas in which Ms White challenges the Immigration Judge's assessment of credibility she points out that the appellant had no reason to lie on those particular issues. That may or may not be right. But the Immigration Judge's task was not in principle to detect lies, it was in principle to discover whether he had trustworthy, or at any rate potentially trustworthy, evidence before him. If the evidence was tainted by discrepancies then, whatever the reason for the discrepancies, he was entitled to find that the evidence was not evidence which he accepted.

9. On two, at least, of the other matters on which Ms White challenges the Immigration Judge's assessment the basis of the challenge is that the Immigration Judge made assumptions which might or might not be appropriate in relation to a difference of culture. Those arguments have more weight and if the Immigration Judge had based his entire credibility findings on judgments of that sort, we might have had little difficulty in agreeing with Ms White's submissions. However, in the context of the determination as a whole, those two points are of little importance by themselves. There is no suggestion that the Immigration Judge's views expressed in the passages to which Ms White specifically makes reference infected his judgment on the other issues which he so clearly sets out in his determination.

10. One other area in which Ms White challenges the assessment of credibility relates to a difference of view between the mother and the son about an area of the son's knowledge. The mother's position was that she had shielded difficulties from her

son; the son's position was that he knew about them. That is of itself, as Ms White pointed out, not a discrepancy. But in fact the evidence taken as a whole was not merely about the mother shielding the son: the mother asserted that the son did not know elements which were a relatively central part of the claim which they both made. The son, on the other hand, made it clear that he did know. That, it appears to us, is properly identified by the Immigration Judge as a discrepancy. There is no discrepancy in the mother saying that she had attempted to keep matters from her son, but, bearing in mind their role in the claim which they made, the fact that by the time of the hearing they gave a different account of the son's knowledge was a feature of the evidence which the Immigration Judge was entitled to take into account.

11. Looking at the matter as a whole as we do and taking into account Ms White's submissions so carefully made in writing and orally to us, we reach the view that the Immigration Judge's assessment of credibility was entirely open to him for the reasons, or, at any rate, very nearly all of the reasons that he gives, and that there is no material error of law in the points raised by Ms White. Any error is of no significance at all in the context of the findings as a whole.

12. The next challenge made by Ms White relates to the Immigration Judge's assessment of the age of the son. The assessment of that, in the determination, reads as follows:

> "The male appellant is aware the Respondent challenges his age and does not accept he is a minor. The Appellant has adduced no evidence to support his claim to be a minor and even when applying the low standard of proof I am not satisfied he is a minor."

As Ms White has pointed out to us, partly with our assistance, there was in fact a considerable amount of evidence supporting the son's claimed date of birth of 20 April 1990. The fact that the son had stated that that was his birthday is of little significance; but his mother also gave that date and in the course of her interview she had on a number of occasions adverted to that claimed date of birth for her son. It is therefore quite wrong to say that the appellant has adduced no evidence to support his claim to be a minor: there was evidence. There was, however, quite clearly a challenge and as Mr Gulvin had pointed out to us, the mother's letter of refusal indicates that her son's date of birth is challenged; and goes on to say that if a Social Services report of the age of the son is produced, the Home Office will accept it for the purposes of his claim and appeal. We do not know whether any Social Services report was ever sought: what we do know is that none was produced to the Immigration Judge hearing this appeal. As Ms White points out it is no doubt difficult to prove a contested date of birth where the evidence would derive from a country in relation to which the Home Office might dispute any written evidence subsequently provided. This was, however, a case where the appellant had been given a clear indication of a way in which he could prove his age. He neglected to take the opportunity which was offered to him. In those circumstances, although the Immigration Judge was wrong to consider that there

was no evidence supporting the appellant's claim, it appears to us that it is, to say the least, extremely unlikely that he could have made a finding different from that which he did make.

13. As Mr Gulvin also pointed out, however, the Immigration Judge went on effectively to deal with the son's position even if he were the age he claimed. As he indicated in his conclusions, he rejected the mother's evidence. He did not accept any of the principal facts on which her claim was based. He went on to say that he was not satisfied that the son was a minor. It was conceded that the son had no free-standing asylum claim, but the Immigration Judge went on to say that even if he were under the age of 18 there was no reason why he could not return to Pakistan with his mother. That, it seems to us, is sufficient to cure any error of law in his approach to the evidence as to the son's age. His view was that even if the son were the age he claimed, he could return with his mother, who was an unsuccessful asylum claimant.

14. That takes us on to the fourth and last part of Ms White's grounds which are that the Immigration Judge failed to deal properly with what was said to be the son's independent claim under Articles 2 and 3 of the European Convention on Human Rights. As put to the Immigration Judge in the skeleton argument that Ms White had prepared at the hearing before him, the son's case depended on a number of answers given by him at interview indicating that for reasons relating to a family dispute in respect of land and the unwillingness of his uncles to allow his father's land to descend to him rather than to them and their families; his uncles were making threats against him and had ill-treated him. The high point of that case was that the uncles had been heard plotting to kill him. The evidence, when looked at in more detail, however, does not suggest any real substance in fears that the son may have had. So far as the threats are concerned, there is a clear difference in the evidence between the two accounts. It is said that one day, which may be as long ago as 2004, his uncles had threatened to kill him but, as the son said, they had not harmed him since. His mother, on the other hand, said that it was overhearing her husband and the uncles threatening to kill both her and the son that had caused her to leave Pakistan. So far as the mother's account is concerned, it falls with all the mother's other evidence. The son's own account must depend partly on what he heard from his mother and partly on his own experiences. In so far as he depends on what he heard from his mother the claim so based falls with the mother's credibility. His own experiences were that some time ago he was subject to some ill-treatment and has not been ill-treated since. That itself is an insubstantial basis for a present claim under Articles 2 and 3.

15. The Immigration Judge appears to have thought, and indeed indicates in his determination, that the son's claim stood or fell with the mother's. Despite Ms White's attempt to show that they are independent, it appears to us that the Immigration Judge was right in the view he took. The only substance in the son's claim was a substance which depended on acceptance of the mother's evidence.

For those reasons we find that the Immigration Judge did not materially err in law and we order that his determination dismissing both appeals shall stand.

C M G OCKELTON
DEPUTY PRESIDENT