Asylum and Immigration Tribunal

MF (Rule 60 – correction – R1 procedure) Palestinian Territories [2007] UKAIT 00092

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2007

Before

SENIOR IMMIGRATION JUDGE LATTER

Between

MF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Sachdev of Counsel
For the Respondent: Mr K Wood, Home Office Presenting Officer

1. *Rule 60(1) can be used to correct substantial errors and omissions provided they can properly be categorised as clerical or accidental. The corrected determination supersedes the original determination.*

2. *Such errors can be corrected after reconsideration has been ordered.*

3. *The issue of an R1 notice inviting the parties to agree that there is a material error of law and to consent to an appeal proceeding to the second stage of the reconsideration is only an indication of the Tribunal's provisional view. It does not give rise to any legitimate expectation that the Tribunal will take that course.*

DETERMINATION AND REASONS

1. This is the reconsideration of an appeal against the respondent's decision made on 12 July 2006 to give directions for the appellant's removal following the refusal of his claim for asylum. His appeal was dismissed following a hearing before Designated Immigration Judge Reeds on 31 August 2006. The appellant is a Palestinian resident in the Occupied Territories. He arrived in the United Kingdom on 24 May 2006 travelling on a false passport and claimed asylum the same day.

Background

2. The background to the appellant's claim can briefly be summarised as follows. He was born on 1 April 1968 in Jenine Refugee Camp in the West Bank in Palestine. In 2002 Israeli forces attacked the camp destroying a large part of it including his grandfather's house. In April 2003 the appellant was working as a car mechanic when the camp was attacked by helicopters. In October 2003 he found a job in the Israeli Occupied Territories and would travel from Jenine on Sunday morning and return every Thursday. He had to travel through a small checkpoint. In November 2004 he was approached by a group of men who asked him to help them take things from Jenine to Israel. He was given the impression that they were from Hamas and that he was being asked to carry explosives. He did not wish to do so and decided to leave his job. His employer was surprised and asked him if there was a problem and whether he had been offered more money. The appellant said that there was no problem but his employer asked him to work one week's notice until he could find a replacement.

3. On 25 November 2004 he was approached by Israeli soldiers and taken in for interrogation. He was held in prison until 12 December 2004. He claims that he was tortured and ill-treated. To avoid further ill-treatment he told them why he wanted to leave his work and also disclosed the names of the three men who were from Hamas. He was told that he could go but his wife told him not to return home as Hamas were looking for him. His employer said he would help him and his family leave Palestine and arrangements were made with an agent for the appellant to travel to Jenine to meet his wife. His family were able to leave at that stage but the appellant remained working for the same employer until 23 May 2006 saving money so that he could join his family. He finally left on 24 May 2006 travelling by air to this country where he claimed asylum.

The Procedural Issue

4. The judge's determination was issued on 21 September 2006. She dismissed the appeal on both asylum and human rights grounds, but even the most cursory examination of the determination indicates that it was an incomplete document. Paragraphs 16, 19, 20, 22 and 23 refer to tape sections A-E respectively. The appellant applied for reconsideration which was ordered on 2 October 2006 in the following terms:

> "Unfortunately the determination appears to have been promulgated with large parts of the intended text missing (there is reference instead to the tape – presumably an instruction to the typist). As a result it is impossible to understand the determination and there are no reasons given for the decision as asserted in the grounds. On this basis there is a clear error of law."

5. The senior immigration judge following the R1/R2 procedure directed that a notice should be served on the parties indicating her provisional view that there was a clear material error of law and asking the parties whether they agreed to the reconsideration proceeding straight to the second stage. Meanwhile, as is clear from the appeal file the original judge became aware that an incomplete determination had been issued. She notified a senior immigration judge about this. Her fax is on the appeal file and confirms that the wrong file was attached when the decision was sent for electronic promulgation. The correct determination was then issued dated 16 October 2006 and headed "Amended Determination and Reasons (pursuant to rule 60 of the Immigration and Asylum Tribunal (Procedure) Rules 2005)". The appellant then applied for an order for reconsideration of this amended decision firstly on the basis that once reconsideration had been ordered the determination could not be subject to a rule 60 re-promulgation, the grounds arguing that the slip rule is not designed for this purpose and cannot be used to correct a failure to determine a case properly and secondly the grounds seek to challenge the substance of the decision. Reconsideration was ordered on both grounds on 16 November 2006.

Rule 60

6. I will deal firstly with the issues arising from the fact that an incomplete determination was promulgated, but subsequently corrected under the provisions of rule 60. Ms Sachdev's submissions are firstly that it was not open to the judge to use rule 60 to amend the determination. She argued that there could be no guarantee that the amended determination contained the tapes as originally typed up. There had been a major error which could not be corrected by the slip rule. Secondly, the appellant had been offered the opportunity of a full re-hearing at a stage

two reconsideration and he had a legitimate expectation that this was going to take place. The Tribunal had not been entitled to take a different view on the way the reconsideration should proceed following the issue of the amended determination. She submitted thirdly that once reconsideration had been ordered it was wrong to resort to using the slip rule. In substance the appeal had moved from a first instance hearing to the equivalent of an appeal hearing. The first instance judge should not have sought to correct her determination in these circumstances.

7. Mr Wood submitted that rule 60 clearly applied as there were omissions from the determination. An error had been identified which had been properly corrected. The appellant had not been deprived of any legitimate expectation. His expectation and entitlement was to receive the full determination of the Tribunal, not an incomplete determination. It has been open to him to challenge the judge's findings and reasoning in the amended determination: he had done so and had been granted an order for reconsideration.

8. Rule 60 of the 2005 Procedure Rules which is headed "Correction of orders and determinations" provided at the relevant time as follows:

> "60. (1) The Tribunal may at any time amend an order, notice of decision or determination to correct a clerical error or other accidental slip or omission.
>
> (2) Where an order, notice of decision or determination is amended under this Rule –
>
> (a) the Tribunal must serve an amended version on the party or parties on whom it served the original; and
>
> (b) if Rule 10(8) and (9), Rule 23(5) and (6) or Rule 27(5)(b) – (d) applied in relation to the service of the original, it shall also apply in relation to the service of the amended version.
>
> (3) The time within which a party may apply for permission to appeal against, or for a review of, an amended determination runs from the date on which the party is served with the amended determination."

9. This rule contains a power which may be used *at any time* but which is limited to correcting *a clerical error or other accidental slip or omission*. It is all too clear from the first determination issued in this appeal that there had been an accidental omission of parts of the determination identified as the contents of tapes A-E. The fact that an omission is substantial and includes all the relevant parts of the determination does not prevent it being an omission. The issue is whether the omission was accidental. In the present case this can properly be inferred from the determination itself as originally issued, but in any event it is clear from a note sent by the judge to a senior immigration judge confirming that the wrong determination was sent for electronic promulgation. I am satisfied

that in these circumstances it was open to the judge to correct her determination under the provisions of rule 60. There is no reason to believe that the determination as amended did not reflect the judge's original draft and no substance in the argument that the appellant cannot be sure that the determination is not as originally drafted. There was an accidental omission which was properly corrected.

10. Ms Sachdev also argued that it was not appropriate for such a correction to be made once an order for reconsideration had been granted. This argument cannot succeed. The rule itself provides that the correction may be made "at any time" and there is no basis for limiting this phrase to a time up until the grant of an order for reconsideration, not least as in many cases it is the application for review which brings to light the fact that there has been a clerical error or accidental omission and no purpose would be served by preventing the correction of an error after the grant of reconsideration. It would make no sense for there to be any inhibition on the correction of such errors. The Immigration and Asylum Appeals (Procedure) Rules 2003 enabled the Immigration Appeal Tribunal to amend an Adjudicator's determination where there was a clerical error. It was provided by rule 59 of those rules:

> "59. (1) An Adjudicator or the Tribunal may at any time amend an order or determination to correct a clerical error or other accidental slip or omission.
>
> (2) The power in paragraph (1) includes power for the Tribunal to amend an order or determination of an Adjudicator, after consulting the Adjudicator concerned …"

There is no reason to take the view that the single tier Tribunal should not also have the power to use the slip rule once reconsideration has been ordered and I am satisfied that providing any amendment falls properly within the provisions of rule 60(1) there can be no possible objection to the amendment taking place after reconsideration has been ordered. To take a different view would be to permit matters of form to triumph over matters of substance.

11. The appellant has also sought to argue that he had a legitimate expectation of a re-hearing following the issue of the notice indicating the judge's provisional view that there was a material error of law and inviting the parties to consent to the matter proceeding to the second stage. That notice gives the parties an opportunity of indicating their view: it does not commit the Tribunal to directing a second stage reconsideration although in the absence of submissions to the contrary, this is the step which would normally be taken. However, it is always open to the Tribunal in the light of any further information to direct that the matter is set down for a first stage reconsideration in any event. The notice did not give the appellant a legitimate expectation of a re-hearing at a second stage reconsideration.

12. I am therefore satisfied that the judge was entitled to amend her determination under the provisions of rule 60(1). The effect of the amendment is that the corrected determination supersedes the original one and the time limit for applying for a review runs from the date on which the amended determination is served. The appellant has exercised that right and has been granted an order for reconsideration. He has not lost anything or suffered any detriment by the use of the slip rule: he has received what he was always entitled to, the Tribunal's completed determination.

The Substantive Appeal

13. In the grounds it is argued on behalf of the appellant that the judge erred in law by dismissing the expert evidence in relation to the treatment of Palestinians. The expert confirmed that non-members were recruited by Hamas but the judge had dismissed this evidence without any objective backing for her finding. It is also argued that the judge had applied too subjective a test in relation to her credibility findings. In her submissions Ms Sachdev sought to support this submission by pointing to the judge's comments in paragraph 65 where she said that she did not believe that three men in the circumstances described by the appellant would put their safety at risk when only one need have done so and therefore she did not accept the appellant's account or the circumstances in which he claimed Hamas had approached him. The context of this comment was the appellant's evidence that the three men who approached him were guarded about their identity and the nature of the materials they wanted him to carry. The appellant said that they made it clear that they were from Hamas whilst not directly stating this. The judge said that she did not accept that three men would have approached him in this manner identifying them all with the Hamas group.

14. Ms Sachdev also referred to the following findings by the judge. In paragraph 66 of her determination the judge commented that it was the appellant's case that he had not said whether or not he was going to help Hamas and had asked for a period of two weeks to think about it but then he gave up his well paid job rather than directly refusing to help Hamas. Ms Sachdev submitted that there was no evidence of his job being well paid and the choice for the appellant was stark, his life or his money. In paragraph 74 the judge said that she did not believe that the appellant would have risked a journey back to Jenine to pick up his wife and children, only then to return back to Israel. There would be no reason for him to take such a risk or make such a journey as the agent could have collected the family. Ms Sachdev submitted that this failed to take account of the appellant's culture and the fact that his obvious concerns about his family's safety would make it understandable why he might put himself at risk. In paragraph 76 the judge commented on a document said to emanate from Hamas. The appellant had said that his employer had obtained it because of his contacts in the Jenine camp. It

was argued by the Presenting Officer that if that was how the document had been obtained, the appellant would have asked his employer about it. The judge found the appellant's evidence to be wholly unsatisfactory when he stated that he did not care about how his employer had obtained this document. Ms Sachdev submitted that the judge had erred by not considering whether the appellant would have asked such a question.

15. The final challenge to the determination relates to the fact that the judge found that the evidence in the appellant's case was inconsistent with evidence which had been given by his wife in her appeal. Her claim had been based on a second-hand account in the sense that it related to what had happened to the appellant and Ms Sachdev submitted that it could not be expected that two people would recount facts in exactly the same way. In any event the judge had only relied on the discrepancies identified in paragraph 72 of her determination: the appellant's wife had said that her husband had informed his employer about what had happened in the mosque and that it was the employer who brought Israeli agents to the appellant.

16. Mr Wood submitted that the judge had taken the expert evidence into account. On the issue raised in the grounds the judge had been entitled not to adopt the views of the expert and she had given clear and sustainable reasons for her finding. The judge's findings of fact were properly open to her. It was not arguable that she had applied a subjective approach as argued on behalf of the appellant. She was entitled to take discrepancies into account and to draw adverse inferences as to credibility.

Is There a Material Error of Law?

17. The judge has set out her assessment of the evidence comprehensively in paragraphs 52-82 of her determination. The basis of the appellant's claim is summarised at paragraph 51: he was considered by Hamas to be a collaborator or informer for the Israelis, having informed the authorities in Israel of the names of three members of Hamas who had asked him to smuggle packages containing explosives or bomb making equipment into Israel. Having reviewed the evidence the judge found that the appellant had not given a credible account and she rejected his evidence that he had ever been asked or approached by Hamas men to transport explosives into Israel. She did not believe that he had ever been arrested by the Israeli authorities and rejected the factual basis of his claim.

18. It is argued that the judge erred in the way he dealt with the expert evidence and in particular the evidence relating to the recruitment of Palestinians. The specific criticism relates to paragraph 60 of the report of Mr Joffe dated 16 December 2005 where he says:

> "Hamas, like all other groups, does make use of non-members to take materials, including explosives, into Israel. In one recent case, the carrier was a 15 year old boy who was discovered by Israeli soldiers carrying two pipe bombs at a checkpoint close to Nablus."

19. The judge referred to this passage in paragraph 59 of her determination and again in paragraph 60. She said that she did not believe that Hamas would have sought to recruit someone in the position of the appellant when they would not know if he was in fact someone they could trust or whether he was a collaborator with the Israelis (paragraph 60). When dealing with the evidence about the 15 year old boy used to carry two pipe bombs into Israel, she said that this related to one case only. It set out that the young boy was not a member of Hamas but it did not say that he had no connection or sympathy with that group or whether he was reluctant to carry out such a task. She took the view that the thrust of the information in the report and other objective material demonstrated that there were tens and thousands of supporters and sympathisers of Hamas, whereas the appellant was not a member, nor did he have any sympathy or support for that group. She considered it more likely that Hamas would recruit from its many supporters rather than apply pressure to those who expressly refused to show any visible signs of allegiance to their cause. I am satisfied that these were findings of fact properly open to the judge. She took the expert evidence into account, reached a decision properly open to her on the evidence and has given sustainable reasons.

20. I am not satisfied that there is any substance in the challenges to the judge's assessment of credibility of the appellant's evidence or the argument that the judge has adopted too subjective an approach. Ms Sachdev has made a number of specific criticisms which I have already identified. These were questions of fact for the judge to assess in the light of the evidence as a whole. This is not a case where the judge has failed to consider the appellant's account in its proper context. She has given clear reasons for rejecting the appellant's evidence. These grounds are in substance an attempt to re-argue issues of fact.

21. It is also argued that the judge was wrong to attach weight to discrepancies in the evidence given by the appellant's wife in her appeal which had been dismissed by an immigration judge in June 2005. An order for reconsideration was made but it was held that there was no material error of law. The judge has identified in paragraph 72 the differences in the accounts given by the appellant and his wife. They related to events central to the basis of the appellant's claim. It was for the judge to decide as an issue of fact whether an adverse inference as to credibility could properly be drawn from them.

22. In summary I am not satisfied that the judge made any material error of law. Her findings and conclusions were properly open to her for the reasons she gave.

Decision

23. The original Tribunal did not make a material error of law and it follows that the original determination shall stand.

Signed Date: 7 September 2007

Senior Immigration Judge Latter