Case No: C4/2004/1710(A)(B)&(C)

Neutral Citation Number: [2005] EWCA Civ 421
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
MR JUSTICE HARRISON

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 20th April 2005

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LATHAM
and
LORD JUSTICE KEENE

- -

Between :

THE QUEEN ON THE APPN OF DIRSHE	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Nicholas Blake, QC & **Shahram Taghavi** (instructed by **Messrs O'Keeffe**) for the **Appellant**
Gerard Clarke (instructed by **Treasury Solicitors**) for the **Respondent**

- -

Judgment

Lord Justice Latham :

1. The appellant is a national of Somalia. He arrived in the United Kingdom on the 24th February 2004 and claimed asylum two days later. In accordance with the usual practice, he was provided with a Statement of Evidence Form on which to set out the basis of his claim, which he prepared with the assistance of his representatives and sent to the respondent on the 9th March 2004. On the 19th March 2004, the respondent informed the appellant's representatives that the appellant should attend for interview by an Immigration Officer, in accordance with the usual procedure. On the 1st April 2004, the appellant's representatives wrote to the respondent requesting that the interview be tape recorded, either by the appellant or by the respondent and giving notice that unless the interview was tape recorded, the appellant would apply for judicial review. The respondent refused the request that the interview be tape recorded; and these proceedings were accordingly commenced. The application for permission to apply for judicial review was refused by Harrison J on the 20th July 2004; and on the 12th November 2004 Sedley LJ gave permission to appeal against that refusal and ordered that the application proceed in this court.

2. It has been the consistent policy of the respondent that applicants for asylum should not be entitled to tape record the interview with the Immigration Officer, which is an integral part of the administrative decision making process in dealing with any claim for asylum. This policy was considered by Pitchford J in *Mapah –v- SSHD* [2003] EWHC 306 (Admin). In that case, the claimant had made a similar request to that made by the appellant in the present case, with the same result. The judge had before him a considerable body of material setting out the history of the policy, the protocols governing the conduct of the interview by the Immigration Officer, concerns about the quality of interpreters and interpretation during the course of such interviews, and problems relating to the accuracy of what is intended to be a verbatim note of such interviews taken by the Immigration Officer himself during the course of the interviews.

3. The relevant protocol was published in 2003. In this the interview is described as "essentially a fact finding exercise, an opportunity for the applicant to elaborate on the background to his or her application, introduce additional information and for the interviewing officer to test the information provided, if required."

4. Immigration Officers carrying out the interviews are specially trained. Interpreters appointed by the respondent are present for 90% or so cases where interpretation is necessary; and interpreters are required to reach certain minimum standards. The applicant is entitled to be accompanied by a representative, legal or otherwise, and an interpreter of his or her own. The officer is required to "keep an accurate, verbatim and legible written record, including comments made by the representative, the times of breaks and any difficulties in the course of the interview." The record will however, only contain the question, in English, and the English translation given by the interpreter of the answer.

5. The record of the interview is provided to the applicant, who is to be given an opportunity to record any disagreement at that stage, and is given a further five days in which to submit any comments, queries, or corrections. Although at one time it was the practice for the interview to be read back to the applicant, that policy changed

in 2003 so that this would only occur in exceptional cases, for example where the applicant appeared to be particularly disadvantaged in some way or another.

6. On the basis of this material, with which we have also been provided, Pitchford J held that the policy not to allow tape recording of interviews was not irrational and did not result in procedural unfairness justifying intervention by the Courts. Harrison J, when refusing permission in the present case, considered that there was no material difference between the present practice in relation to interviews and that which was considered by Pitchford J, and therefore dismissed the application on that basis. Before us, Mr Blake QC, on behalf of the appellant submits that Harrison J was wrong in that there has been a material change in the practice in relation to interviews, alternatively that we should re-visit the decision of Pitchford J in *Mapah*.

7. The material change in practice is that since the 1st April 2004 public funding has not, generally, been made available of the attendance of representatives or interpreters at interviews. The change was made by the Immigration Contract Specification (Immigration) which states, so far as material:

> "We will not pay for attendance at interviews conducted by the Home Office by you or any agent of yours unless you are authorised by us or we have granted you an extension to the Legal Help Cost Limit for this purposes.
>
> 1. You are authorised to claim reasonable costs in addition to the Legal Help Cost Limit for time spent, including travel and waiting, in accompanying a client to a substantive interview where:
>
>   a. The client is subject to a Home Office fast track process …. or
>
>   b. The client is to be interviewed by an Immigration Officer under PACE (usually in relation to an offence connected with illegal entry); or
>
>   c. Where it is alleged the client may impose a threat to national security.
>
> 2. You may apply for an extension to the Legal Help Cost Limit to cover the cost for time spent, including travel and waiting in accompanying the client to an interview where:
>
>   a. The client is a minor or claims on reasonable grounds to be a minor or
>
>   b. The client suffers or appears to suffer from a "mental incapacity"…..
>
>   c. In either case, the Home Office nevertheless intends to proceed with an interview.
>
> …."

8. Mr Blake submits that this has changed the position radically from that which pertained at the time that Pitchford J considered the question. At that time it was considered good practice by all those representing applicants for them to attend the interview, if appropriate with an interpreter, so that they could ensure that the interview was properly conducted, the interpreter was providing a competent and comprehensive interpretation of both the questions and the answers, and the verbatim record was a reliable record of what the applicant had been asked and had said by way of reply. He submitted, and the evidence with which we have been provided clearly supports the submission, that the interview can be a critical factor in the determination of any appeal in the event of a refusal by the respondent to grant asylum, as it can be relied on, on the one hand by the applicant to show consistency in his account, or on the other by the respondent to throw doubt on his credibility by reason of either inconsistency, or the omission of what are said, at the appeal hearing to be material parts of the story. He further submits, and again the evidence supports the submission, that there have been a significant number of appeals where the resolution of the issue of credibility has been determined by apparent discrepancies or omissions in the interview, or where apparent discrepancies in the record have been successfully resolved in the appellant's favour by evidence given by the representative or interpreter who was present at the interview.

9. He submits, therefore, that the opportunity for a representative or interpreter to be at the interview was a safeguard of considerable value to the applicant and must have been an important factor in the decision of Pitchford J that the procedure, taken overall, was fair. In the absence of such a safeguard, unless a tape recording is made of the interview, an applicant, particularly one whose first language is not English, is put at a very considerable disadvantage. In the latter case, he or she has no means of checking the accuracy of the verbatim record at the time; and, even if he or she can speak English any challenge to the record would be dependent solely on the applicant's own word, with all the difficulties that that presents, particularly bearing in mind that the burden of proof in asylum cases is on the applicant.

10. In these circumstances, he submits that where an applicant is dependent on public funds, the procedure no longer meets the requisite standard of fairness. The decision making process, and any appeal from it, is dependent to a significant extent on a document created by the interviewing officer, acting on behalf of the respondent, the reliability and adequacy of which the applicant is no longer in a position to challenge effectively. It follows that Pitchford J's decision on *Mapah* does not provide any support for the argument that the present practice meets the requisite standards of fairness.

11. Mr Clarke, on behalf of the respondent, submits that Pitchford J's judgment was not dependent upon the fact that there was the opportunity for an applicant to have a representative or interpreter present at the interview. Pitchford J recognised in that case that not all applicants availed themselves of the opportunity to have a representative or interpreter present. The entitlement to their presence has not been removed. The essential safeguard remains the opportunity for the applicant to make representations about the reliability or adequacy of the record. He or she is provided with a copy, and will no doubt obtain the appropriate advice as to its content from his or her representative in the five days which are allowed for representations after the

interview. The change in the Legal Aid provision did not therefore affect the fundamental fairness of the procedure.

12. Further, he submits that the policy cannot be described as irrational. To permit tape recorders to be taken into the interview would be to stimulate, in effect, a new area of inquiry into the reliability of the record, or the reliability of the tape recording or any transcript of the tape recording in a way which would be inimical to the prompt disposal of asylum applications and appeals. Every applicant would be entitled to make a tape recording, if he or she wished, and this would ultimately add to the overall costs of the system. His or her own representative and interpreter could be expected to go through the tape recording with a fine tooth comb which would necessarily mean that the respondent would have to do the same, either making his own recording, or requiring a copy of the recording made by the applicant. The opportunity to challenge the record of interview in this way could significantly disrupt the process of appeals if the challenge arose in the course of the hearing because of the need to examine the tape, or its transcript or both.

13. In our view, the central issue which we have to determine is whether or not the procedure meets the appropriate standard of fairness required by the importance of the decision that has to be made. Lord Justice Bingham, in *SSHD –v- Thirukumar* [1989] Imm AR 402 said, at page 414:

> "It is ….plain that asylum decisions are of such moment that only the highest standards of fairness will suffice"

14. The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the respondent, through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the respondent or appellate authorities as to the credibility of the applicant. The record of the interview is created by the interviewing officer, who is acting on behalf of the respondent. It follows that fairness requires that the procedure should give to the applicant an adequate opportunity to challenge its reliability or adequacy.

15. As Pitchford J pointed out in *Mapah*, at paragraph 62 of his judgment, the evidence clearly establishes that:

> "(1) Problems of interpretation can and do occur;
>
> (2) Questions translated into the applicant's language and replies given in that language are not recorded as such but put in the English translation.
>
> (3) Records cannot always, despite exhortation, be literally verbatim.
>
> (4) The reversal of the requirement for read back removed a measure of protection against unremarked mistakes in recording by the interviewer;

(5) An applicant does not necessarily have the representation of his own interpreter. Such an applicant would be at a disadvantage in identifying errors of translation.

(6) Immigration officials and Tribunals of appeal frequently judge credibility against the criterion of consistency;

(7) Tape recording of an interview by the applicant or by the Secretary of State would be much to alleviate these problems if and when they occur."

16. At the time of that decision, as we have already indicated, applicants were entitled to have a representative and even an interpreter present during the course of the interview. There was public funding available for their attendance. It follows that every applicant had the opportunity, even if some may not have availed themselves of it, of that benefit. The present position is entirely different. The vast majority of applicants will be dependent upon public funding if they desire representation. With the removal of any right to remuneration, no representative will be willing to accompany an applicant to an interview. It follows that the entitlement to have a representative or interpreter present is of no practical value in such cases. In our judgment, this is critical to the determination of the present application. So long as the respondent continues with the practice of relying upon a written record of the interview in its present form, the applicant must have an adequate means of insuring that the record is, as we have said, both adequate and reliable. As Pitchford J pointed out in *Mapah*, there are two potential areas of dispute inherent in this procedure. First is the quality of the interpreter. And second is the quality of the transcription by the interviewing officer who, with the best will in the world, is unlikely to be able to achieve complete accuracy every time and will often or at least in some interviews produce what is, in effect, an edited version.

17. Whilst it is true that the applicant has the opportunity to comment on the record, that is only of limited value. If English is not his first language the applicant will not be in a position to make any comment on the record until he has taken it to the representative and had an opportunity of going through the record with the representative and his own interpreter. If the applicant then wishes to challenge the record, he has no one to corroborate what he says. This puts the applicant at a significant disadvantage in practical terms in seeking to persuade either the respondent or an appellate authority that the record is indeed inaccurate.

18. So long as the applicant, however, was not only entitled, but able, to have his representative and interpreter present at the interview itself, that disadvantage was substantially reduced. Not only could the representative or interpreter make a note of what was said in the course of the interview but, either during the interview if appropriate, or at the end of the interview, they could make contemporaneous submissions as to the accuracy of the interpretation, or of the record, having read it after the interview. Such submissions would be much more likely to carry weight, or indeed result in amendments to the record, than the ipse dixit of the applicant himself some days afterwards. It follows that the presence of the representative or interpreter provided a real, practical safeguard against faulty interpreting or inadequate or

inaccurate record keeping, and sufficiently protected the applicant's interests to ensure the requisite standards of fairness. In our view, Pitchford J came to the correct conclusion in relation to the practice and procedure in place at the time of his decision.

19. But in practice, that safeguard is no longer in place. There is, therefore, real procedural unfairness as a result if a tape recording is not permitted when no representative or interpreter is present on behalf of the applicant. A tape recording provides the only sensible method of redressing the imbalance which results from the respondent being able to rely on a document created for him without an adequate opportunity for the applicant to refute it. This is not to suggest in any way that the respondent himself, or appellate authorities, would not conscientiously seek to come to a fair conclusion in the event of any challenge being made on behalf of the applicant to the content of the record based upon the applicant's own account. But it would be unrealistic to expect the decision maker to be unaffected by the fact that the record has been made by someone with apparently no axe to grind, whereas the challenge to it has been made by someone who has a real interest in the decision, and therefore a clear motive for seeking to challenge any uncomfortable answers set out in the record. The only appropriate method of redressing that balancing is to permit a tape recording to be made, if the applicant so wishes, of the interview.

20. There are undoubted practical difficulties which will result if tape recording is permitted, which we fully recognise. First and foremost, it means that in effect every applicant, other than one who has been able to afford his own representative and interpreter, will be entitled to tape record the interview. It will obviously be necessary in those circumstances to put in place by way of protocol or otherwise, some sensible procedural rules to prevent abuse, and to enable the tape recording process to be properly carried out. If, for example, there is to be a tape recording, it must be on the basis that a tape is available for both the applicant and the respondent so as to guard against the possibility of manipulation of the tape. Guidance will have to be given to ensure that any tape recording that is made is useful, in the sense that the tape recorder is so placed and used as to make an effective recording. Consideration will have to be given to the extent to which transcription of recordings is justified in any particular case. If there is an appeal from an adverse decision of the respondent, there will have to be effective pre-hearing case management to ensure that if any use is to be made of the tape or any transcript, it is confined to that which is strictly necessary for the purposes of determining the appeal. There may well be other practical matters that will need to be considered but with which we do not need to concern ourselves. Suffice it to say that we are satisfied that none of the potential problems justify the conclusion that the policy disallowing the use of tape recorders can, on the basis of the present practice in relation to funding, be justified.

21. We accordingly allow the application, and will hear submissions as to the appropriate form of order.

Lord Justice Keene: I agree

The Master of the Rolls: I also agree

Order:

1. The Court declares that it is unlawful for the Respondent to decline to permit an applicant for leave to enter or remain in the UK on grounds of asylum and/or humanitarian protection and who is not accompanied at his asylum or human rights interview by a legal representative and/or interpreter to tape record that interview.

2. The Respondent to pay the Appellant's costs. Appellant's costs to be the subject of detailed assessment if not agreed.

(Order does not form part of approved Judgment)