Upper Tribunal
(Immigration and Asylum Chamber)

Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC)

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 6 May 2011	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Grubb

Immigration Judge Holmes

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THABANG NARE

Respondent

Representation :

For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer

For the Respondent: Mr G Brown, instructed by Howells Solicitors

The decision whether to allow evidence to be given by electronic means is a judicial one, requiring consideration of the need to do so, the arrangements at the distant site, and the ability to assess such evidence, by reference to guidance such as that set out here.

DETERMINATION AND REASONS

Introduction

1.
The rules governing procedure in the Immigration and Asylum Chamber of the First-tier Tribunal are the Asylum and Immigration Tribunal (Procedure) Rules 2005, as amended (SI 2005/230) Rule 45 is headed “Directions”, and by Rule 45(4)(h), directions may:

“provide for a hearing to be conducted or evidence given or representations made by video link or by other electronic means”.

2.
This appeal raises issues as to the circumstances in which directions should be given for the taking of evidence by electronic means.

The Appeal

3.
Thabang Nare ("the claimant") is a national of Zimbabwe. He came to the United Kingdom as a visitor, obtained an extension to his leave, but has had no leave since 2005. In 2009 he decided to claim asylum. Since then he has pursued two appeals on asylum grounds: this is the second of them. He has a sister who is in the United Kingdom, as is his mother. His sister also claimed asylum in 2009. She has been granted asylum following a successful appeal against an earlier refusal.

4.
The claimant's first appeal was heard in his absence and dismissed. He did not appeal the adverse determination of Immigration Judge Boyd. The present appeal results from further submissions put to the Secretary of State at a later date. As Immigration Judge Zucker ("the IJ") recognised when the present appeal came before him, there is a clear tension between the judgement of Immigration Judge Boyd dismissing the claimant's first appeal, and the judgement of Immigration Judge A E Walker, who allowed the claimant's sister's appeal. Both appeals were based, to an extent on similar underlying facts, the evidence of which was rejected in the one judgement and accepted in the other.

5.
When the claimant's appeal came before the IJ, he sought to support it by evidence from his sister, who did not attend the hearing. It was said that she was unable to afford to travel to the hearing in North Shields. The history of this difficulty, and of the IJ's solution to it, is not easy to discover from the file. The note of proceedings at a case management review hearing on 19 April 2010 has the following entries:

"7. Are any witnesses aside from the appellant to be called?

Possibly sister

…

11. Special court requirements (e.g. all female preference, video link or player required)

No."

6.
Following that hearing, the appellant's then representative, Refugee and Migrant Justice, wrote to the First-tier Tribunal on 23 April 2010, stating as follows:

"As was indicated at the Case Management hearing, his sister will be available as a witness in this case but due to travel costs and time this would have to be by telephone"

The letter is endorsed:

"called Rep to explain witness auth to give evidence via telephone".

That note is dated "23/4/10" and signed "JA". We have not been told who "JA" is, or on what basis he or she was able to "auth" (sc authorise) the giving of evidence by telephone.

7.
By 28 April 2010 the matter was being treated as settled. A letter from the claimant's then representatives on that date describes the claimant's sister as "available as a telephone witness". The IJ's note of the hearing records evidence from the claimant's sister, and no cross-examination of it. The note does not indicate that the sister was not present in the hearing room, and does not indicate that the IJ heard any submissions on whether the taking of evidence by telephone was appropriate in this case. The IJ's determination says, at [39], "the appellant's sister gave evidence by telephone". It summarises her evidence, and records that the Presenting Officer did not cross-examine.

8.
In his determination, which appears to have been sent out on 11 May 2010, the IJ allowed the claimant's appeal.

9.
The Secretary of State then applied for permission to appeal to this Tribunal. The grounds are as follows:

" Ground 1

The IJ has failed correctly to apply procedure rules and materially prejudiced the Secretary of State.

A key witness the sister of the appellant was not present at the hearing to give evidence.

The presenting officer refused to cross examine by telephone as he was not satisfied with the witness's identity or the authenticity of her evidence.

It is submitted that the IJ should have called the witness to give evidence or should have placed less weight on her written evidence.

The IJ has found adverse 'findings of fact' as the Presenting Officer did not cross examine the witness (Paragraphs 42, 43 and 44 of the determination).

Paragraph 43

In the absence of any challenge to the appellants sister I accept and find as a fact that the appellants is the son of Colonel Nare.

Paragraph 44

I accept and find as a fact in the absence of any challenges that the appellants sister was raped and was raped by Zanu-PF supporters.

The IJ has failed to consider the overriding objective – The Asylum and Immigration Tribunal (Procedure) Rules 2005, subsection 4. Where the interests of all parties to the proceedings should be considered.

4 Overriding objective

The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest.

By allowing this appeal the IJ has incorrectly applied procedure rules and inadvertently prejudiced the respondent.

I request a material error of law is found."

10.
SIJ Perkins, sitting as a judge of the First-tier Tribunal granted permission, giving his reasons as follows:

"It appears that the Immigration Judge permitted a witness to give evidence by telephone. Arguably he had no power to do that and should not have received evidence in that way or, if he did, he should have made it plain that he could not give the evidence the weight that would be afforded to someone who attended and gave evidence. There are many reasons to be wary of evidence given away from the hearing room including the possibilities of impersonation that could not be proved later or of a witness being coached or threatened.

That said, the Presenting Officer's refusal to cross-examine the witness was, on face of things, bizarre. The Immigration Judge would certainly have risked criticism if he had rejected evidence that the Presenting Officer had decided not to challenge.

I note as well that the witness's assertion that she had been raped had been accepted on a previous occasion. It may be hard for the respondent to show that any error was material.

Nevertheless, the grounds are arguable and I give permission to argue each point.

11.
Thus it is that the Secretary of State's appeal comes before this Tribunal.

12.
The hearing before us was brief, because neither Ms Pettersen nor Mr Brown dissented from the view we had provisionally reached. That view is that, whatever error may have been made by the IJ in allowing the claimant's sister to give evidence by telephone, the Secretary of State had disabled herself from pursuing this appeal by the Presenting Officer's decision not to cross-examine. There is simply no basis for saying that the Presenting Officer was prevented from cross-examining: and in the absence of any cross examination, there is no basis for the Secretary of State to say that cross examination by telephone posed any disadvantages in this case. The Presenting Officer's decision was not to cross-examine, and that meant that before the IJ, the claimant's sister's evidence was not challenged.

13.
For that reason, any error of law made by the IJ in allowing the evidence to be given in this way was wholly immaterial, and the appeal to the Upper Tribunal cannot succeed. We shall dismiss it.

14.
Having said that, we are, however, confident that the IJ erred in his apparently ready acceptance of the proposal that the claimant's sister should give evidence by telephone, on the basis of an assertion made by her representatives that she could not afford to travel to the hearing. It is particularly unfortunate that there is no record of any procedural point taken at the hearing, or of any proper consideration given to the representative's request made by letter of 23 April 2010. Nor is there any record of directions given by the Tribunal under Rule 45(4)(h), save for the note by "JA"; and, unless "JA" is a member of the Tribunal, there is no record of any authorisation to "JA" to give directions of

this sort. The power to give directions for the taking of evidence by electronic link is a judicial power, and we would normally expect to see that it has been exercised by a judge after proper consideration of any issues raised.

15.
We recognise that it may be that in the particular hearing centre where the IJ was sitting, a certain nervousness about refusing requests for evidence to be taken by electronic link may have been engendered by the decision of the Court of Appeal in R (AM Cameroon) v SSHD [2007] EWCA Civ 131. But, as we read the judgements in that case, the problem there too was that a decision was reached too readily. In AM , the Immigration Judge appeared to have refused to consider making directions for evidence to be given by a live telephone link, without giving proper consideration to what the Court of Appeal thought were submissions which required it. AM is not authority for a proposition that directions should routinely be made for the giving of oral evidence other than by those present in a court room: on this point it simply confirms what ought surely to be regarded as the position in any event, that a judicial discretion is to be exercised judicially.

Discussion

16.
It seems to us that at least the following points are relevant in considering whether oral evidence should be given other than by a witness present in court.

17.
First, the usual model in the common-law system is for direct oral evidence to be given in the courtroom. Departures from that model are likely to reduce the quality of evidence, the ability of the parties to test it, and the ability of the judge to assess it, particularly where it has to be assessed against other oral evidence. Any application to call oral evidence by electronic link therefore needs to be justified. There is a measure of agreement across common-law jurisdictions that the taking of evidence, or the hearing of submissions, in this way requires regulation and ought not to be regarded as routine. The Civil Procedure Rules provide at CPR 32.3 simply that:

“The court may allow a witness to give evidence through a video link or by other means”,

but there is a lengthy practice direction at 32PD.33. That practice direction gives quite detailed guidance, and is itself based on a protocol of the Federal Court of Australia. At paragraph 2 is an observation similar to that which we have made above:

“[video conferencing] is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. A judgement must be made in every case in which [its use] is being considered…”.

18.
Secondly, another aspect of the giving of oral evidence live at the hearing of the appeal is that it is subject to a measure of formality and supervision. The witness attends what is clearly a formal (or semi-formal) room, stands or sits in the place used by those giving evidence from time to time, usually quite near the judge, and is directly subject to the procedure in the hearing. The setting of the hearing room, and the judge’s supervision of it, as well as the usual functions performed by Tribunal staff, and the presence of the parties or their representatives, ensure that the evidence given is the evidence of the witness, unassisted save as may be clearly apparent. If evidence is given electronically it ought to be subject to the same or similar constraints. It should be given from formal surroundings, subject at

the very least to control by appropriate officials, and it should be clear that nothing can be happening “off camera” (or equivalent) that could cast doubt on the integrity of the evidence.

19.
Thirdly, because it is a departure from the model, it is for a party seeking to adduce evidence by electronic link to establish that, for the Tribunal to take evidence in this way, is in the interest of justice, bearing in mind particularly the rights of other parties to challenge the evidence. It must also be for the party seeking to call evidence by electronic link to make the arrangements at the distant end, and to pay any expenses. Further, no party ought to expect to be allowed adjournments simply because of delay in making such arrangements.

20.
Fourthly, it is for the Tribunal to decide whether to allow evidence to be given by electronic link, and to give the appropriate directions. The Tribunal needs to bear in mind the interest of all parties, and the overriding objective of the rules. The decision will not be taken lightly, and no party has a right to call evidence by electronic link. If specific directions are given, they will be given in order to secure the interests of the parties and of justice, and it is therefore very unlikely that the Tribunal will allow the evidence to be given by electronic link if the directions have not been complied with.

Guidance

21.
With these observations in mind, we venture to offer the following guidance as to process. It is not intended to be comprehensive, and we expect that it will require elaboration as practice may develop. It owes a great deal to CPR 32PD. 33. Our guidance does not, we think, need to be so long or so detailed, but the following appear to us to be the minimum requirements:

a.
A party seeking to call evidence at an oral hearing by electronic link must notify all other parties and the Tribunal at the earliest possible stage, indicating (by way of witness statement) the content of the proposed evidence. (If the evidence is uncontested, an indication of that from the other parties may enable the witness’ evidence to be taken wholly in writing.)

b.
An application to call evidence by electronic link must be made in sufficient time before the hearing to allow it to be dealt with properly. The application should be made to the relevant judge (normally the Resident Senior Immigration Judge) at the hearing centre at which the hearing is to take place, and must give (i) the reason why the proposed witness cannot attend the hearing; (ii) an indication of what arrangements have been made provisionally at the distant site (iii) an undertaking to be responsible for any expenses incurred.

c.
The expectation ought to be that the distant site will be a court or Tribunal hearing centre, and that the giving of the evidence will be subject to on-site supervision by court or Tribunal staff.

d.
If the proposal is to give evidence from abroad, the party seeking permission must be in a position to inform the Tribunal that the relevant foreign government raises no objection to live evidence being given from within its jurisdiction, to a Tribunal or court in the United Kingdom. The vast majority of countries with which immigration appeals (even asylum appeals) are concerned are countries with

which the United Kingdom has friendly diplomatic relations, and it is not for an immigration judge to interfere with those relations by not ensuring that enquiries of this sort have been made, and that the outcome was positive. Enquiries of this nature may be addressed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division). If evidence is given from abroad, a British Embassy, High Commission or Commonwealth may be able to provide suitable facilities.

e.
The application must be served on all other parties, in time for them to have a proper opportunity to respond to it.

f.
The decision whether to grant the application is a judicial one. The judge making the decision will take into account the reasons supporting the application, any response from other parties and the content of the proposed evidence, as well as of the overriding objective of the rules. If the application is granted, there may be further specific directions, which must be followed.

g.
If there is a direction for the taking of evidence by electronic link, the Tribunal will nevertheless need to be satisfied that arrangements at the distant end are, and remain, appropriate for the giving of evidence. A video link, if available, is more likely to be suitable than a telephone link. The person presiding over the Tribunal hearing must be able to be satisfied that events at the distant site are, so far as may be, within the observation and control of the Tribunal, and that there is no reason to fear any irregularity.

h.
There will need to be arrangements to ensure that all parties at the hearing, as well as the judge, have equal access to the input from the electronic link. Particular attention needs to be given to the accommodation of any interpreter.

i.
In assessing any challenged evidence, the Tribunal may have to bear in mind any disadvantages arising from the fact that it was given by electronic link, and should be ready to hear and consider submissions on that issue.

j.
Nothing in this guidance is intended to affect the existing arrangements for the hearing of bail applications by video link from secure video conferencing suites. Nor is this guidance intended to affect the arrangements for video linking of one Tribunal room to another for the purposes of hearing submissions by video link.

Conclusion

22.
For the reasons given earlier in this determination, we dismiss the Secretary of State’s appeal. The IJ’s determination, allowing the claimant’s appeal stands.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER