Neutral Citation Number: [2009] EWHC 827 (Admin)

Case No: CO/3507/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2009

Before :

MR C M G OCKELTON
(sitting as a Deputy High Court Judge)

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Between :

THE QUEEN ON THE APPLICATION OF CHARLES JACOB OMONDI	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Mr Richard Drabble QC & Mr Gordon Lee
(instructed by Duncan Lewis & Co) for the Appellant
Mr Neil Sheldon (instructed by the Treasury Solicitor) for the Respondent

Hearing date: 16 February 2009

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Judgment

Mr C M G Ockelton:

1. Section 83 of the Nationality, Immigration and Asylum Act 2002 reads as follows:-

> "(1) This section applies where a person has made an asylum claim and-
>
> (a) his claim has been rejected by the Secretary of State, but
>
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).
>
> (2) The person may appeal to an adjudicator against the rejection of his asylum claim."

2. The short question raised in these proceedings is whether s.83 applies to a person who has had leave, but only in the past, unrelated to his asylum claim or its rejection.

3. The claimant, a Kenyan national, came to the United Kingdom on 26 October 2002 and was granted leave to enter as a student, for three years expiring on 31 October 2005. Just before the end of that leave he made a further application for leave to remain as a student. That application was refused on 27 January 2006. Two years later, on 16 March 2008 the claimant was arrested as an overstayer. He then claimed asylum. His claim was on 18 March 2008. It was refused on 7 April 2008. In refusing the claim the defendant also certified it under s.94 (2) of the Nationality, Immigration and Asylum Act 2002. The claimant brought these proceedings challenging his consequent removal from the United Kingdom. Permission was granted by Sullivan J on 18 June 2008.

4. The effect of certification under s.94 is that the right of appeal that the claimant would otherwise have under s.82 of the 2002 Act cannot be exercised from within the United Kingdom. In his grounds as originally formulated, the claimant challenged the decision to certify his asylum claim. That ground of challenge is not now pursued. I therefore need only say at this point that the certification is on the basis that the claim is "clearly unfounded"; and that s.94 (3)–(4) imposes a presumption that a claim for asylum is clearly unfounded if it is made by a man from Kenya.

5. The ground which is pursued is that the certification under s.94 does not prevent this claimant for appealing from within the United Kingdom, because he does not need to appeal under s.82. He has a right of appeal under s.83, because of the terms of the section as set out above. He has made an asylum claim, which has been refused, and he has had a period of more than twelve months' leave. It is true, as Mr Drabble QC readily accepts, that the grant of leave had no connection with the asylum claim. But Mr Drabble argues that the words are clear. The claimant comes within the meaning of s.83. He has a right of appeal under s.83 and being deprived of an in-country right of appeal under s.82 does not hurt him very much.

6. Sections 82 and 94 are both in Part 5 of the 2002 Act, "Immigration and Asylum Appeals". The provisions of that part of that Act have been amended in almost every year since 2002. They constitute the principal provisions relating to such appeals. Section 82 provides that where an immigration decision is made in respect of a person he may appeal to the Asylum and Immigration Tribunal. The section then goes on to define what an "immigration decision" is. The provisions are complex but it is fair to say that, so far as concerns a person who is within the United Kingdom, immigration decisions either terminate leave or initiate the removal or deportation process. There is no right of appeal under s.82 against the *grant* of leave. So, therefore, a person who makes an application or claim, and is granted leave, but considers that the grant was made for the wrong reason, or for the wrong period, has no right of appeal under s.82.

7. That poses a difficulty in respect of asylum claimants who, although being refused asylum, have been granted a period of leave in the United Kingdom, either on a basis that is different altogether, or because they cannot be easily returned to their own countries, or because of some humanitarian reason thought by the Secretary of

State to fall short of entitlement to asylum. The difficulty is that under the Refugee Convention, a person who is a refugee is entitled not merely to be in the country, but to be in the country as a refugee. Merely granting him leave to remain is not of itself granting refugee status. In the 2002 Act the legislator made specific provision for this situation in s.83. There is also s.83A, which is as follows:

> "**83A Appeal: variation of limited leave**
>
> (1) This section applies where–
>
> (a) a person has made an asylum claim,
>
> (b) he was granted limited leave to enter or remain in the United Kingdom as a refugee within the meaning of the Refugee Convention,
>
> (c) a decision is made that he is not a refugee, and
>
> (d) following the decision specified in paragraph (c) he has limited leave to enter or remain in the United Kingdom otherwise than as a refugee.
>
> (2) The person may appeal to the Tribunal against the decision to curtail or to refuse to extend his limited leave."

8. Section 84 is headed "Grounds of Appeal", and sets out a wide range of potential grounds which may be deployed in an appeal under s.82. Sub- section (3) is as follows:-

> "(3) An appeal under s.83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention."

Subsection (4) makes similar provisions in respect of an appeal under s.83A. Sections 85-87 are concerned with the process of deciding appeals. I do not need to mention them in any detail. For the most part they apply to all appeals, whether under ss.82, 83 or 83A. Of some importance for present purposes is s.85(1):

> "(1) an appeal under s.82(1) against a decision shall be treated by the tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under s.82(1)."

9. Section 88 begins a group of sections headed generally "Exceptions and Limitations". Under certain circumstances, there is no right of appeal under s.82 at all. Under other circumstances the right of appeal can be exercised only on limited grounds, for example asylum grounds, human rights grounds, or race discrimination grounds. Section 92 is headed "Appeal from within United Kingdom: General". Subsection 1 provides that:

> "A person may not appeal under s.82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies"

In other words, the starting point is that there is no right of appeal from within the United Kingdom. The rest of this section sets out a considerable class of cases in which there is an in-country right of appeal. Amongst them is:-

> "92(4) This section also applies to an appeal against an immigration decision if the appellant-
>
> a) has made an asylum claim or a human rights claim while in the United Kingdom, ..."

10. Section 94 so far as is relevant to the issue between the parties in these proceedings is as follows:-

> "94(1) This section applies to an appeal under s.82(1) where the appellant has made an asylum claim or human rights claim (or both).
>
> (2) A person may not bring an appeal to which this section applies in reliance on s.92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in sub-section (1) is or are clearly unfounded."

11. Where there has been certification under that sub-section, therefore, the position is that the person affected, reading the statutory provisions, would find that an in-country right of appeal is potentially granted by s.82, apparently removed by s.92(1), granted by s.92(4)(a), but removed by s.94(2). But none of those provisions apply to an appeal under s.83. The right of appeal granted by s.83 is not subject to any prohibition on its exercise from within the United Kingdom.

12. In that context, however, it is also necessary to look at the final sections of Part 4 of the 2002 Act, immediately preceding those relating to appeals. Sections 77-79 contain various provisions preventing a person's actual removal from the United Kingdom, but allowing certain removal decisions to be made in his case. Section 77 provides that a person cannot be removed from or required to leave the United Kingdom while he has an asylum claim pending, that is to say between the date of the claim and the date of the Secretary of State's decision on it. Section 78 contains the following provisions:-

> "78(1) While a person's appeal under s82(1) is pending he may not be –
>
> (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts; or
>
> (b) required to leave the United Kingdom in accordance with the provisions of the Immigration Acts.
>
> …
>
> (4) this section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with s.92."

13. Mr Drabble submits that the complex statutory provisions relating to appeals under s.82 simply do not apply to the claimant, because he meets the requirements of s.83. He asks me to say that s.83 has a clear and obvious meaning: it does not carry any suggestion that the grant of leave to which reference is made in subsection (1)(b) has to be related in some way to the claim for asylum. He suggests that there is an obvious utility in providing that a person who has been in the United Kingdom for a period of a year or more, and may thus be thought to have made some connections here, should receive special consideration and advantages in an asylum appeal. That is why, submits Mr Drabble, there is no restriction on in-country rights of appeal under s.83. The removal of an in-country right of appeal is a draconian measure, not appropriate for a person that has been in the United Kingdom lawfully for a considerable time, as the claimant has (whatever his subsequent history may have been).

14. Mr Drabble submits that his reference to what he regards as the plain and obvious meaning of s.83 is supported by a footnote in *Macdonald's Immigration Law & Practice*, seventh edition, paragraph 18.16, which, it is fair to say, cites no authority but merely takes the same view as Mr Drabble urges on me. It was previously suggested on the claimant's behalf that the period of leave to which s.83 refers would always have to be, or to include, a period of leave before the asylum claim, if the claimant was to be able to exercise the right of appeal in a case where the period of a year is made up of shorter periods aggregated. If, in response to an asylum claim, a person was granted six months' leave, and then subsequently nine months' leave, he would meet the requirements of s.83, but, by the time he did meet those requirements, he would be out of time for appealing against the refusal of asylum. But Mr Drabble now accepts that that is not a good point. It is met by rule 7(3) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, which make specific provisions for the time limit for appealing in such a case.

15. Mr Sheldon's principal submission is that to read s.83 in the way Mr Drabble suggests would be to introduce an irrational element into an otherwise reasonably coherent scheme. Mr Sheldon submits that the legislator clearly intended that in-country rights of appeal should be available only in specified circumstances. There should be no in-country right of appeal against a proper rejection of a wholly unfounded asylum claim. There is no rational basis upon which it could be said, that the wholly unrelated grant of leave to the person on a previous occasion for a different reason should cause him to have an in-country right of appeal. There would be no sense in it. The section taken by itself appeared potentially to have the meaning for which Mr Drabble contended, but read in the context of the Act as a whole, it was clear that it could not have that sense. The period of leave referred to in s.83(1)(b) must be a period of leave granted in response to the asylum claim.

16. Mr Sheldon referred to the explanatory note to s.83. The text of that is as follows:-

> "Section 83 gives a right of appeal to an adjudicator on asylum grounds only (see s.84(3)) when an asylum claimant is refused asylum but granted leave to enter or remain more than a year. If periods of less than 12 months are given, the right of appeal arises when an aggregate of 12 months leave has been given <u>since the decision to refuse asylum was taken</u>. There is no right of appeal

> under s.82 for a person in this position and the purpose of this provision is to provide a specific single issue asylum appeal."

The emphasis is Mr Sheldon's. Mr Sheldon also cites the judgement of Blake J in Etame v SSHD and AIT [2008] EWHC 1140 (Admin). That case raised a not dissimilar question on the interpretation of s.92(4)(a): did that section give an in-country right of appeal to a person who had made an asylum or human rights claim, regardless of how long ago he had made that claim or in what circumstances? Or did it give an in-country right of appeal only in circumstances where the appeal related to the asylum or human rights claim? After considering the claimant's arguments based on the literal meaning of s.92(4)(a) and looking at the statutory scheme for appeals as a whole, Blake J said this:

> "[43] I have no difficulty in concluding that the consequences of the literal construction of s.92(4)(a) would indeed be absurd and give rise to arbitrary distinctions between individuals similarly placed for all relevant purposes. Parliament must have intended that the in-country right of appeal was to be given only where there was a nexus between the immigration decision formally generating the appeal and the representations or application that the immigration decision was responding to. Such construction is consistent with the requirements of an effective remedy where an important right is concerned and consistent with the minimal procedural rights the UK is required to afford asylum seekers whether by extrapolation from the binding international obligation of *non refoulement* reflected in Article 33(1) of the Refugee Convention or the Procedures Directives promulgated by the European Union …. Further, this construction is not inconsistent with or unduly restrictive of rights of appeal afforded by statute. In the immigration context it is not unusual to find appeal rights exercisable only from abroad. People who have no recognised right to enter or remain are not generally entitled to enter or remain for the purpose of appealing an adverse decision affecting such rights."

17. Mr Drabble replies to those particular submissions by pointing out that if the explanatory note supports the defendant's argument, it does not rule out the claimant's; and that Etame was an interpretation of a different provision of the 2002 Act.

18. I do not think any assistance is to be derived from a more detailed examination of the precise wording of s.83 and the other statutory provisions. It is true that s.83 has "but" rather than "and", but it is far from clear that the choice of word is material, and it is not easy to say what difference it makes. The use of the word "following" in s.83A means that in a claim under that section Mr Drabble could not make the submissions he makes here. But, as its numbering indicates, s.83A is not an original feature of the 2002 Act and a difference of wording between ss. 83 and 83A need not therefore have any implication for the meaning of s.83. Besides, s.83A deals with a different situation. A person to whom it applies has had leave up to (at least) the decision against which he appeals. If that decision terminates his leave his appeal is under s.82. If it does not (but shortens it, or allows it to continue unrenewed and unextended) there is no right of appeal under s.82, so different

provisions are needed. Those provisions, for that reason, need to differentiate between the leave up to the decision and the leave following it.

19. Like Blake J in Etame, I have no difficulty in concluding that the defendant's arguments are to be preferred. Reading s.83 in the way contended for by Mr Drabble would produce an absurd and illogical result. It would be entirely illogical that a person who had made an unfounded asylum claim should have an in country right of appeal arising solely from what Blake J in Etame at [42] called the "irrelevant happenstance" of whether he had had an unrelated grant of leave in the past. I am fortified in that conclusion by a number of factors. First, the only rational basis upon which Mr Drabble has been able to suggest someone in this claimant's position should have the right of appeal is that having been in the United Kingdom in the past should be a cause for him being given special consideration in the appeals process. But I cannot accept that argument. The right of appeal under s.83 is on Refugee Convention grounds only. If the purpose of the provision were to recognise the circumstances of a person who had been in the United Kingdom for some time, it would be absurd to exclude a human rights ground, as s.84(3) does. Secondly, the provisions of s.78 make it clear that launching an appeal under s.82 prevents removal. That benefit does not extend to appeals under s.83. In one sense, that is sufficient to deal with these proceedings anyway, because they appear to be based on the assumption that if the appellant has the right of appeal under s.83 and exercises that right, he cannot be removed while the appeal is pending. But that assumption does not appear to be right. If the appellant appealed under s.83, he could apparently nevertheless be removed from the United Kingdom. But the exclusion of s.83 from the provisions of s.78 is absurd if and only if Mr Drabble is right. If he is not right, a person appealing under s.83 *has* leave to remain in the United Kingdom and therefore does not need the protection of s.78.

20. The third reason is that s.85(1) has the clear intention of ensuring that all possible current appeals by an individual are dealt with by one appeal process. But s.85(1) again applies only to appeals under s.82. If Mr Drabble is right, the claimant has an appeal under s.83 and also an appeal under s.82, although, in the present case, the latter is exercisable only from abroad. If his s.83 appeal is unsuccessful, he can start new proceedings on an appeal under s.82. There is no suggestion that the statutory scheme envisages such a result. It is only because the claimant's asylum claim has been certified that he has no in-country right of appeal under s.82. If it had not been certified Mr Drabble's argument would entail separate rights under ss. 82 and 83, which would substantially reduce the obviously-intended effects of both ss. 85(1) (because there would still be two appeals) and 84(3) (because there would be no effective limit on the s. 83 grounds if a s.82 appeal was available alongside). This effect is avoided if ss.83 and 83A are understood as giving rights of appeal only in circumstances where no right of appeal exists under s.82. That understanding follows clearly from the wording of s.83A. It applies to s.83 if and only if the period of leave referred to in s.83(1)(b) is a period of leave granted in response to or after the asylum claim. As I have said, there is no right of appeal under s.82 against the grant of leave. The appellate structure makes sense only if the rights of appeal are mutually exclusive. They are mutually exclusive if the appeals under ss.83 and 83A arise only where the appellant has leave.

21. My conclusion is that the right of appeal under s.83 arises only in circumstances where the appellant has made an asylum claim which has been refused, and has been granted periods of leave exceeding one year in aggregate since the decision to refuse asylum. The claimant has no right of appeal under s.83, because his period of leave long pre-dates his asylum claim. His application for Judicial Review must therefore be dismissed.