Neutral Citation Number: [2009] EWCA Civ 174

Case No: C5/2008/1846

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
SENIOR IMMIGRATION JUDGE D E TAYLOR
AS/00526/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2009

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE JACOB
and
LORD JUSTICE LLOYD

- -

Between :

T E (ERITREA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ms Shazia Khan (instructed by Miles Hutchinson & Lithgow) for the **Appellant**
Mr Steven Kovats (instructed by Treasury Solicitors) for the **Respondent**

Hearing date: Thursday 15 January 2009

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Judgment

Lord Justice Sedley :

1. The appellant is a young Eritrean woman who has been here since January 2003. She sought asylum, but this was refused and her appeal against the refusal was dismissed. However, because she was still a minor, she was given discretionary leave to remain until 30 March 2005, the eve of her 18th birthday. Some three weeks before her leave expired she applied for an extension which, two years later, the Home Secretary refused.

2. The formal notice of refusal to vary leave, dated 3 July 2007, explained that there was a right of appeal on grounds which included any incompatibility of removal with the appellant's ECHR rights. It also explained that all grounds for being allowed to remain *or* for not being removed must be advanced on the appeal, but that any grounds already advanced did not need to be repeated. And it spelt out that if there was no appeal, or if any appeal failed, "you will be removed to Eritrea". The accompanying letter, of the same date, gave reasons for refusing humanitarian protection and asserted that while family life was not engaged, any interference with the appellant's private life would be justified.

3. The appellant appealed against the decision. The appeal came before IJ Thornton, who dismissed it. On a directed reconsideration SIJ Taylor found that the determination contained no material error of law.

4. With permission granted by Hooper LJ, it is submitted to this court by Ms Shazia Khan, in an impressive argument on the appellant's behalf, that the immigration judge erred materially in overlooking the Home Secretary's failure to address §395C of the Immigration Rules, and that both she and, on reconsideration, the senior immigration judge compounded the omission.

5. The reason why the oversight is said to be material is this. S.10(1)(a) of the Immigration and Asylum Act 1999 gives the Home Secretary power to remove an overstayer from the United Kingdom. But by §395C of the Immigration Rules:

> "Before a decision to remove under section 10 is given, regard will be had to all the relevant factors …"

By §395D removal is prohibited if it would violate Convention rights. It follows, in the Home Secretary's submission, that unless and until there has been a refusal to vary and any appeal against the refusal has been dismissed, a person in the position of the appellant is not an overstayer, with the result that the Home Secretary cannot yet consider removing her and that the appellant cannot, or not yet, rely on §395C (or presumably §395D) to resist removal.

6. On reconsideration, SIJ Taylor held that the material factors

> "are only to be considered under paragraph 395C in the context of a decision to remove under section 10. It cannot therefore be open to the Appellant to argue that it is not in accordance with the law for the Secretary of State not to consider those factors in relation to a variation appeal. Whether the effects of the Rules are rational or irrational is not a matter for me."

This puts with precision the issue which we now have to decide.

7. The distance between the parties is at first sight nevertheless minimal, because the Home Secretary accepts that once the appellant becomes an overstayer she cannot be removed if, on due consideration and if need be on appeal, it is found that removal would be wrong or would violate her Convention rights. But the real difference is considerable, because to remain here as an overstayer is a criminal offence by virtue of s.24(1)(b) of the Immigration Act 1971. An overstayer also loses both the right to work and entitlement to mainstream state benefits, and anyone who employs him or her commits a criminal offence. And by §320(7B) of the Rules entry clearance is to be refused to former overstayers who have not left voluntarily within 28 days.

8. Many foreign nationals whose leave has expired may well choose to remain here for as long as it takes to exhaust, first, their rights of appeal against the refusal to vary their leave and then the giving of directions for their removal. The appellant, however, does not wish to be placed in a position of near-outlawry in order to do this. She argues accordingly that all the issues arising or potentially arising in her case should have been addressed together. It might have been thought that they had been, since her art. 8 rights were fully canvassed both with the Home Office and on appeal, which on one view is the entire purpose of §395C read with §395D. But it is common ground between counsel that §395C is capable of operating in the individual's favour even where §395D does not, and we have approached this appeal accordingly.

9. Granting permission to appeal, Hooper LJ wrote:

> "It seems strange that the respondent is content for persons in the appellant's position to be able to have 'another bite at the cherry' rather than sorting out all the issues at this stage. That said, there may be very good reasons why the respondent adopts this position."

10. The skeleton argument of Steven Kovats for the Home Secretary does not respond to this implied invitation. Indeed it points out that, since 1 April 2008, s.47 of the Immigration, Asylum and Nationality Act 2006 has allowed the Home Secretary to combine her decision about removal with her refusal to vary an applicant's leave to enter or remain, although we are told that the necessary administrative arrangements have not been put in place to make use of this power. I will return briefly to this at the end of my judgment.

11. For the appellant it is submitted by Ms Khan that a two-stage process with a dangerous gap is not a necessary product even of the present provisions. There is nothing to stop the Home Secretary, and in due course the AIT, from dealing with variation and removal together. If so, then, given the consequences for the individual of separating the two stages, it is both unjust and irrational not to deal with them in immediate sequence.

12. Mr Kovats accepts that there is nothing in the pre-April 2008 arrangements to prevent the Home Secretary from doing this (so that the new arrangements simply spell out what was already the case). But he submits that it is not necessarily unfair or unreasonable to separate the two stages. So far as the present appellant is concerned, her desire to have the issues compendiously dealt with has been respected, he submits,

by a Home Office undertaking that any adverse decision under §395C will attract a right of appeal.

13. This court was faced with an analogous question in *JM v Home Secretary* [2006] EWCA Civ 1402. There a Liberian asylum-seeker had been refused a variation of the six months' leave on which he had entered the UK and had appealed on both refugee and human rights grounds. At the hearing, however, he sought to reserve the latter on the ground that, unless and until removal directions were given, he had no need to rely on Convention rights. The adjudicator rejected this contention and dealt with all the issues, finding against the appellant. Before the AIT the appellant sought to reverse his position but the AIT, differing from the adjudicator, held that the human rights claim was not justiciable. When the case came before this court the Home Secretary made common cause with the appellant, submitting that the adjudicator had been right and the AIT wrong. Because the parties were now, as Laws LJ put it, singing in unison, counsel for the Attorney-General was invited to introduce a note of discord into the argument, but the conclusion of the court was that the parties were right and the AIT wrong.

14. Mr Kovats submits that the decision in *JM* affords no sure guidance in the present case because it was based on different statutory provisions. These are to be found in s. 82(1), which includes in the term "immigration decision" both a refusal to vary and a decision to remove, and s.84(1), which enables an immigration decision to be attacked for breach of the appellant's Convention rights. It is perfectly true that the material provisions are not the same, but that does not mean that the reasoning which led the court to conclude that variation and removal should be dealt with together has no bearing on the present case.

15. Thus Laws LJ, giving the single reasoned judgment, said at §16-18:

> "16. There are other statutory provisions to which I will refer in addressing counsel's submissions. Evidently the court has to decide whether an "immigration decision" consisting in a refusal to vary leave, which is appealed pursuant to section 82(2)(d), is an immigration decision "in consequence of which" the appellant's removal would be unlawful under the Human Rights Act section 6 as being incompatible with the appellant's Convention rights. The answer to the question must, I think, depend on the sense Parliament intended to give to the phrase "in consequence of". In a case where variation of leave has been refused, removal is not an immediate consequence. Removal directions must separately be given if the appellant is to be removed under the present statutory regime. Such directions cannot be given contemporaneously with the refusal to vary leave. But removal may at least be an indirect consequence of the refusal to vary: without it, removal directions could not lawfully be given. Did Parliament, in enacting section 84(1)(g), intend this latter, wider sense of consequence or only the narrower sense so that it referred to an imminent removal?
>
> 17. There is first, as it seems to me, a consideration of public policy which illuminates the construction of the subsection. As the Secretary of State submits by Miss Grey of counsel, once a person's

> appeal against a refusal to vary his leave is dismissed, he must leave the United Kingdom. If he does not, he commits a criminal offence (Immigration Act 1971, section 24(1)(b); the 2002 Act, section 11). His entitlement to state benefit is also affected. If another employs him, that other is guilty of a crime (Asylum and Immigration Act 1996, section 8). On the AIT's view of the question, namely that the human rights issue is not justiciable on a variation of leave appeal, the unsuccessful appellant in such a case, if he has a potential article 8 claim which would so to speak come live on his removal, surely faces a very unsatisfactory choice. Either he leaves the United Kingdom, as the criminal law says he must, without his human rights claim being determined, or he remains until removal directions are given, anticipating that at that stage he will be able to ventilate his human rights claim before the AIT.
>
> 18. It seems to me to be wrong in principle that the price of getting before an independent tribunal, for a judicial decision on a human rights claim should be the commission of a criminal offence and other associated legal prohibitions. But that seems to me the effect of the AIT's conclusion. However, the position may be even starker than this. Given what I have said so far, it might be thought that an appellant who after an unsuccessful variation appeal waits until removal directions are set, will at that stage, at any rate, have a clear right of appeal exercisable from within the United Kingdom in which he could deploy his human rights claim. The appeal would lie under section 82(2)(g), which I have read. But that is not necessarily the position. By force of section 92 of the 2002 Act, a section 82 appeal against an immigration decision of the kind specified in section 82(2)(g) can only be maintained from abroad, unless a human rights claim has been made within the meaning of section 113; that is, it must have been made in the place designated by the Secretary of State."

He went on to say at §22-3:

> "22. It is true, judging anyway from the terms of the decision letter, that article 8 had not at that stage distinctly, been raised; it was raised later before the adjudicator. But article 8 issues might readily have been raised; and there is plainly force in this submission that, depending on the particular facts, human rights issues are indeed likely to be integral to the process of deciding whether an immigrant's leave should or should not be varied.
>
> 23. There is a further point. It is clear that the legislation leans in favour of what are called "one-stop appeals". Miss Grey refers to sections 96 and 120 of the 2002 Act. I will not set them out; it is enough to say that successive appeals under section 82 are discouraged by procedures for the service by the Secretary of State of a "one-stop" notice on an appellant, requiring him to state all the reasons why he should be entitled to remain in the United Kingdom, and he may not subsequently raise such issues in a later appeal if the Secretary of State certifies that he should have or did or would have been permitted to

> raise them in an earlier appeal. Such a notice was given in this case, accompanying the Secretary of State's refusal to vary the appellant's leave (page 93 of the bundle)."

16. A parallel result was arrived at by the AIT in relation to deportation (which until the 1999 Act was how overstayers were dealt with) in *EO (Turkey)* [2007] UKIAT 00062.

17. All these considerations appear to me to apply with equal cogency in the present case. If there is nothing to stop variation and removal being considered together – and it is accepted that in the present case there is nothing – then the practical utility of deciding them in immediate sequence and letting the AIT be seized of the issues compendiously on appeal is now recognised by the change in the Home Secretary's statutory powers. The main argument that Mr Kovats has been able to deploy against it is that it will not necessarily condense or curtail appeals because by the time an appeal against a compendious decision on leave and removal has been concluded, new grounds for opposing removal may have arisen, requiring a fresh decision.

18. This seems to me both a counsel of despair and a somewhat eccentric approach to public policy. The state has, or ought to have, an interest in not multiplying administrative proceedings and appeals, especially where the facts and issues overlap and where segregating them creates uncovenanted difficulties for the individual. If, by inviting submissions as to why removal should not follow if the application for variation of leave is refused, a comprehensive decision can be arrived at and if necessary appealed, there can be few cases in which this would not be the right course to take. The possibility of new grounds for non-removal arising is an ever-present one which a two-stage approach cannot eliminate.

19. But to say this is not to say that the Home Secretary could never fairly or rationally take variation and removal in separate stages. I simply do not know. There may be cases in which it is both practical and fair to segregate them. What can be said is that the present appellant's desire not to find herself breaking the law in order to resist removal is an entirely reasonable one in which the Home Secretary, for reasons both of practice and of public policy, ought to concur. Whatever else may determine the choice of course by the Home Secretary, it cannot properly be random or dictated by simple administrative convenience.

20. It was recognised in the course of argument that the decision on this appeal might have an impact on the exercise of the powers introduced by s.47 of the 2006 Act. We accordingly gave Mr Kovats leave to introduce in writing any further submission on this score, and Ms Khan leave to respond to it. In the event, while putting in a helpful note on the legal position of an overstayer, Mr Kovats has not found it necessary to take up the court's offer.

21. While therefore the appellant cannot, in my judgment, establish as a general principle that the Home Secretary must always deal with variation and removal in tandem, it is cogently arguable that there was no good reason for not doing so in her case and that segregating them is unfair to her. The Home Secretary has undertaken to the AIT that there will be an in-country right of appeal if the §395C decision is adverse; but Ms Khan points out that once that right is exhausted the problem of being an overstayer pending the making and contesting of removal directions will revive unless further leave to remain is then granted.

22. Because this issue arose for the first time at a very late stage of the proceedings, the Home Secretary has not so far addressed it on the basis on which it needs to be addressed. She should now have the opportunity to do so. The court will welcome counsel's proposals as to the form of order which will best accomplish this.

Lord Justice Jacob

23. I agree with the judgment of Lord Justice Sedley.

Lord Justice Lloyd

24. The Appellant arrived in this country on 6 January 2003. She applied for asylum, but this was refused and her appeal was unsuccessful. However, the Respondent found that she was a minor and, on 24 February 2004, granted her discretionary leave to remain until 30 March 2005. Before that leave expired she applied for further leave to remain on 7 March 2005. It is that application that has led to this appeal.

25. The application was refused by the Respondent on 3 March 2007. The notice of the refusal explained the right of appeal against the decision. It also stated that in the notice of appeal the Appellant should make a formal statement stating her reasons for wishing to remain in the UK, including any grounds on which she should not be removed from, or required to leave, the UK. Equally, if she did not appeal but had any further reasons or grounds which she wished them to consider she should send them to a given address within a stated time. This notice was given, and was expressed to be given, under section 120 of the 2002 Act. Any matter identified in such a statement which could amount to a ground of appeal falls to be considered on the appeal: section 85(2). The Respondent's notice also said, under a heading "Removal Directions", that if she did not appeal, or if her appeal was unsuccessful, she would have to leave the UK as soon as possible when her leave to remain expires, and that if she did not leave voluntarily she would be removed.

26. The Appellant appealed against that refusal. The appeal was heard by Immigration Judge Thornton on 14 November 2007 and dismissed in a decision dated 27 November. She applied for reconsideration of the decision. Leave was granted by Senior Immigration Judge Allen on 3 January 2008, but at the first stage reconsideration hearing, on 28 April 2008, Senior Immigration Judge Taylor found that there was no error of law, for reasons set out in the decision dated 30 April 2008. Permission to appeal was refused by the AIT but granted by Hooper LJ.

27. The single ground on which the appeal has been argued is the Respondent had wrongly failed to consider the factors relevant under paragraph 395C of the Immigration Rules, that Immigration Judge Thornton was wrong in law in not taking into account those factors, and that in turn Senior Immigration Judge Taylor was wrong not to recognise this.

28. In the Reasons for Refusal Letter dated 3 July 2007, the Appellant's claim for leave to remain was stated as having been based on two grounds: a claim for international protection based on a fear of mistreatment if returned to Ethiopia because of her mixed nationality, engaging articles 2 and 3, and a claim for discretionary leave in order to continue her education and employment, based on family and private life, and therefore in the realm of article 8. It was also stated that consideration had been

given, in addition, to whether she qualified for a grant of humanitarian protection under paragraph 339C of the Immigration Rules. No reference was made to any factors which might be relevant under paragraph 395C but which did not arise under articles 2, 3 or 8.

29. In her notice of appeal dated 1 August 2007 she advanced five grounds of appeal. At that stage, and at all stages since then, she was professionally represented. The grounds of appeal are fairly short and can usefully be set out here in full, since they contain the only information put before us as to the factors which the Appellant said she wished to have taken into account.

> "We are appealing the decision to refuse our client Immigration under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on the following grounds as set out in Section 84.
>
> 84(a) The decision is not in accordance with the Immigration Rules.
>
> 84(c) The decision is unlawful as it is incompatible with my rights under the European Convention on Human Rights, namely Article 8.
>
> 84(e) The decision is not in accordance with the law.
>
> 84(f) The Secretary of State's discretion under the Immigration Rules should have been exercised differently.
>
> 84(g) Removal from the UK as a result of the decision would breach the UK's obligation under the 1951 Refugee Convention and/or be incompatible with my rights under the European Convention on Human Rights.
>
> The Appellant submits that she has a well founded fear if returned to Eritrea on account of her mixed ethnic origins and her families problems and also that she may be accused of evading Military Service. She is at the age when she should have completed her Military Service.
>
> The Appellant will also submit that if returned she does not wish to undertake any Military Service, she believes that she will be imprisoned.
>
> The Appellant will submit she has tried to contact the Red Cross to establish her families' whereabouts but they have been unable to trace them.
>
> The Secretary of State believes the Appellant will be able to return to Eritrea and live with her father. The Appellant does not know the whereabouts of her father, he was arrested and taken by the Ethiopian Authorities. She could not reside with him in Eritrea.
>
> The Appellant will submit that she would have problems if returned to Eritrea on account of her mixed race.

> The Appellant will submit that she has established a private life in the United Kingdom. She has lived here now for 5 years, she has attended College and is now working, she is an Admin Assistant for Everyday Language Solutions. She also acts as an Interpreter. During her time in the UK she has also undertaken many voluntary tasks and has established a close network of friends.
>
> To return her to Eritrea would breach her Article 8 rights.
>
> Further grounds to follow."

No other grounds did follow, so far as we know.

30. Thus, the grounds of appeal contain no reference to paragraph 395C, and the factual matters relied on are of a kind which, if of sufficient substance and gravity, could have attracted one or other of the relevant articles of the ECHR or the Refugee Convetion.

31. Consistently with this, it seems (to judge by the terms of the determination and reasons given by Immigration Judge Thornton) that the appeal, at which both parties were represented, was argued without any reference to paragraph 395C. Certainly there is no reference to that paragraph in the determination.

32. It was in the application for reconsideration dated 12 December 2007 that, for the first time, reference was made to paragraph 395C. It was submitted that Immigration Judge Thornton's decision was "flawed by her failure to allow the appeal on the basis that the Secretary of State has not considered the matters set out in paragraph 395C of the Immigration Rules before deciding to remove the Appellant to Eritrea". The point was then made that if the Respondent were to proceed to remove the Appellant by way of directions under section 10 of the 1999 Act, without a further right of appeal, the Appellant would be denied the opportunity to argue that discretion under paragraph 395C ought to have been exercised differently. It was said to be unclear whether removal directions under section 10 gave rise to an in-country right of appeal, and that accordingly, in the circumstances of the present case, "the appropriate course is for the Immigration Judge to require the Secretary of State to consider the factors set out in paragraph 395C and that her appeal should, following EO, have been allowed to this extent in order to await a lawful decision by the Secretary of State". The reference is to *EO (Deportation Appeals: Scope and Process) (Turkey)* [2007] UKAIT 00062.

33. The order for reconsideration rejected one ground advanced, but held that the ground which I have outlined above was arguable.

34. Senior Immigration Judge Taylor summarised the submissions succinctly at paragraphs 11 to 13:

> "11. Miss Khan told me at the commencement of the hearing that Miss Lonsdale, on behalf of the Respondent, had informed her that [the Appellant] will have a full right of appeal when removal directions are set under Section 10 of the Immigration and Asylum Act 1999, and

> that the appeal would not be certified under Section 94 of the Nationality, Immigration and Asylum Act 2002.
>
> 12. Miss Lonsdale confirmed that all matters in relation to Rule 395C will be considered when a decision is made to issue removal directions under Section 10. In her submission the grounds were misconceived.
>
> 13. Miss Khan submitted that the factors in Rule 395C should be decided straightaway, and she asked me to make a decision that the Secretary of State had not acted in accordance with the law in not considering those factors in the context of the variation appeal. The appellant would suffer disadvantage in the future if she did become an overstayer and then wished, for example, to apply for entry clearance. In her submission the Secretary of State's position was that the appellant would be forced to become an overstayer before her application under 395C could be considered, and it was irrational for the law to uphold any principle which invited people to become overstayers."

35. She then set out paragraph 395C, and continued as follows:

> "15. The above factors are only to be considered under paragraph 395C in the context of a decision to remove under Section 10. It therefore cannot be open to the Appellant to argue that it is not in accordance with the law for the Secretary of State not to consider those factors in relation to a variation appeal. Whether the effects of the Rules are rational or irrational is not a matter for me.
>
> 16. The Secretary of State has undertaken in this case to consider the relevant factors, in their proper context, and has said that any refusal will attract the right of appeal. The appellant has obtained the remedy she seeks in the grounds.
>
> 17. The grounds rely upon EO for the proposition that the Tribunal should first consider whether the decision-maker took into account the factors set out in paragraph 395C and whether a discretion was exercised on the basis of them. However, EO was concerned with the scope of deportation appeals and appeals against the issue of removal directions under Section 10 of the 1999 Act. This is a variation appeal and therefore EO does not apply."

36. It appears, from the terms of the written submission to the AIT for permission to appeal, that in the course of the hearing before SIJ Taylor reference was made to the fact that the Appellant is not only concerned to ensure that she has an in-country right of appeal against an eventual removal direction (which she has secured, by concession) but also that she should not become an overstayer before her position is considered under paragraph 395C. That point lies at the heart of the appeal as it was presented to us.

37. It is convenient to set out paragraph 395C here in full:

> "395C. Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State including:
>
> (i) age;
>
> (ii) length of residence in the United Kingdom;
>
> (iii) strength of connections with the United Kingdom;
>
> (iv) personal history, including character, conduct and employment record;
>
> (v) domestic circumstances;
>
> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
>
> (vii) compassionate circumstances;
>
> (viii) any representations received on the person's behalf.
>
> In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account."

38. While the Appellant's present appeal against the refusal in 2007 of the application made in 2005 for variation of the leave to remain is pending, her leave to remain, which would otherwise have expired at the end of May 2005, is deemed to continue: see Immigration Act 1971 section 3C(2)(c) and Nationality Immigration and Asylum Act 2002 section 104. If the appeal is decided against her, then subject to time for a petition for leave to appeal to the House of Lords, her leave to remain will come to an end. The law would then require that she should leave this country, having no right to remain. She would be committing a criminal offence by staying, it would be unlawful for her to be employed absent special permission, she would not be entitled to mainstream state benefits, and she would risk being unable to obtain entry clearance in future because of having overstayed previously. These are the consequences that she wishes to avoid, by having her position considered in relation to paragraph 395C while she still has leave to remain.

39. There is one short answer to her appeal, namely that this point was not identified in her grounds of appeal against the refusal to vary her leave to remain, nor in any separate statement under section 120, and it is therefore not open to her on this appeal. One of the permissible grounds of appeal is that a discretion conferred by immigration rules should have been exercised differently: section 84(1)(f). The argument would have to be that, despite her failure to show that articles 3 or 8 required her to be allowed to remain, the discretion to grant further leave to remain should have been exercised in her favour on compassionate grounds such as are identified in paragraph 395C. It does not seem to me that her notice of appeal identifies that as one of the grounds, despite reference being made to section 84(1)(f) in terms. Nor do I find that surprising, given that her Counsel did not argue the case by reference to paragraph 395C at the hearing before Immigration Judge Thornton. The determination records that Counsel was instructed at a very late stage, but

evidently it had not occurred to anyone that this appeal was about paragraph 395C, rather than about articles 3 and 8. In my judgment the appeal to the AIT, as it was presented on behalf of the Appellant, was about those articles and not about paragraph 395C. It was therefore not open to the Appellant to argue then, nor is it now, that the refusal to extend her leave to remain was wrong in law because of failure to give thought to paragraph 395C and to matters relevant under that paragraph which are not relevant to the human rights claim.

40. This is not a merely formal point. The factors to which regard has to be had under paragraph 395C are those relevant which are known to the Secretary of State. Regard has to be had to them on the part of the Secretary of State, or any immigration officer who conducts the consideration in question, before making a decision as to removal. It is for that reason that, in submissions to SIJ Taylor, the Appellant sought a direction that the Secretary of State should consider the relevant factors, and that the appeal should be allowed pending a decision to be reached after that (see paragraph [32] above).

41. The ground of appeal set out in section 84(1)(f) of the 2002 Act, that a discretion under the Immigration Rules should have been exercised differently, presupposes that the decision maker had the relevant material at the time the decision was taken. Here, that was not the case. The decision taken could not fairly be criticised for a failure to have regard to paragraph 395C factors when no mention of the paragraph had been made at the time of the decision and no factors which could be relevant under it (as distinct from factors relevant to the asylum and human rights claims) had been put forward at the time. Moreover it is clear that the Appellant would be entitled to appeal in due course against the decision to make removal directions, and (in the present case) would be able to do so from within the UK. It seems to me that the correct course is for such factors, not having been relied on by the Appellant previously, to be deployed as and when notice is given of an intention to make removal directions, and if the conclusion is properly challengeable, for that to be done by a further appeal at that stage.

42. However, Mr Kovats did not rely on this point in his skeleton argument, and it is not the only answer to the appeal. The factors identified in paragraph 395C overlap with, but go beyond, those that could be relied on by way of a human rights or asylum claim. If this were not so, there would be no point in the paragraph, because paragraph 395D prohibits removal under section 10 if that removal would be contrary to obligations of this country under the Refugee Convention or the Human Rights Convention. Paragraph 395C would add nothing to this unless it required consideration of matters which would not justify a claim that those Convention obligations preclude removal.

43. Mr Kovats submitted that paragraph 395C represents an opportunity for the circumstances of a person who is subject to removal to be considered generally, rather than only by reference to Convention rights, before a removal direction is made. He described it as a mercy provision. In practice this consideration has not been undertaken at the same time as consideration of an application for variation of a right to remain, though he accepted that the terms of the legislation do not preclude such simultaneous consideration, and now, in effect, they expressly permit it.

44. An appeal lies against removal directions made under section 10: see Nationality Immigration and Asylum Act 2002 section 82(2)(g). However, such an appeal is not to be brought while the appellant is within the UK, unless (relevantly) the appellant has made an asylum claim or a human rights claim: section 92(1), (2) and (4)(a). The risk that such an appeal would be brought even though the human rights or asylum claim was unarguable, or had already been rejected, is provided for by the Secretary of State's ability to certify that the asylum or human rights claim, as the case may be, is unfounded: section 94. A right of appeal which can only be exercised after having left the UK may not always be nugatory, but would clearly be of little comfort to the present appellant. Thus, the concession of an in-country right of appeal against removal directions, which is assured by the undertaking not to issue a certificate under section 94, is of considerable value to the appellant. That is what she sought by her written submissions at the stage of the reconsideration (see paragraph [32] above). Even more valuable to her, however, would be a position in which her original appeal against the refusal of an extension to her leave to remain would continue while the Secretary of State considered the application to her of whatever factors are said to be material under paragraph 395C.

45. Leaving aside the failure of the Appellant to refer to any paragraph 395C matters at the stage of her original application for further leave to remain, and at the stage of her appeal against the refusal of such leave, the contention is that, at least in the present case, it was irrational for the Secretary of State not to embark on the exercise which is necessary under paragraph 395C at the same time as considering an application for further leave to remain. The ground put forward for this is that, otherwise, that exercise has to be undertaken at a time when the applicant is an overstayer, and subject to the serious disadvantages identified at paragraph [38] above. Ms Khan submitted that it would be curious, ironical and irrational for the mercy afforded by this paragraph to be available only to someone who fails to comply with his or her legal obligation, becoming an overstayer, and not to someone such as the Appellant who still has the right to remain and does not wish to become an overstayer.

46. She submitted that there is nothing in paragraph 395C which has the effect that it cannot be implemented while the person in question still has leave to remain, and that the Immigration Rules ought not to be so construed as to require a relevant person to become an overstayer. I agree with the first proposition, but I do not agree with what I take to be the implication of the second, namely that, where the person in question has leave to remain, for the time being, paragraph 395C not only can, but must, be applied before the leave to remain has come to an end. On any footing it can be applied at a time when the person in question does not have the right to remain, because that is the normal situation in which the making of removal directions will be under consideration. It seems to me that it is for the decision-maker to consider whether to have regard to paragraph 395C factors, if asked to do so, at a time when the person in question does still have the right to remain and is not yet subject to removal. In the present case there was no such request, so the question does not arise. If there had been, the decision as to whether or not to accede to the request is subject to challenge on *Wednesbury* grounds.

47. The Appellant relied on *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402 and on *EO (Deportation Appeals: Scope and Process) (Turkey)* [2007] UKAIT 00062, mentioned above. Sedley LJ has quoted the material passages

from *JM* in paragraph [15] above. The effect of the decision in *JM* is that human rights grounds are justiciable on an appeal against refusal of a variation of leave to remain, and they were, of course, considered in the Appellant's appeal to the AIT. It seems to me that it is a material distinction that *JM* was concerned with human rights grounds, since those have to be considered before removal, and they give rise to a right to an in-country appeal. In the present case, though the grounds relied on overlap with asylum or human rights grounds, if they are not found to be of sufficient gravity to show that removal would be in breach of international obligations, they may qualify for consideration on discretionary or compassionate grounds under paragraph 395C. I do not find it surprising in principle that such factors should not attract the same degree of protection as those which do engage this country's international Convention obligations.

48. *EO* was concerned directly with the process of deportation which is analogous to but different from removal under section 10, but reference was also made to the position as regards removal, at paragraphs 40 and following:

> "40. As we have already indicated, the part of the Immigration Rules dealing with deportation deals also with "administrative removals", that is to say removal of those liable to removal under s10 of the 1999 Act. Such persons are most often those who have overstayed their leave. We set out the relevant paragraphs of the Immigration Rules in the form which they had from 20 July 2006. [The rules are then quoted.]
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> 41. These provisions of the Immigration Rules have had effect since 2 October 2000. In their case, the change on 20 July 2006 was certainly not substantive. The change was to insert into paragraph 395C the words which, as we have seen, were before that date in paragraph 364. Until then, paragraph 395C had simply contained a reference to those words in paragraph 364. Following their deletion from paragraph 364, they needed to be set out in full in paragraph 395C.
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> 42. The "old learning", if we may so express it, on those subject to removal under s 10 was that their rights of appeal were severely limited. They could appeal on the ground that they were not in truth liable to removal, or on the ground that their removal would breach the Refugee Convention or the Human Rights Convention, but little else was available to them. During the course of argument relating to the scope of the right of appeal against deportation decisions, it emerged that the Secretary of State's view was that the scope of an appeal against a decision to remove under s10 should not be so narrowly construed. After taking instructions again over the short adjournment, Mr Eicke confirmed that the Secretary of State's view was that in an appeal against a decision to issue removal directions under s10 of the 1999 Act (which is an appealable decision under s82(2)(g) of the 2002 Act) all the grounds of appeal set out in paragraph 84(1) may be deployed, including that relating to the exercise of discretion.

> 43. We agree with this reading of the statutory provisions; but this is also an important concession. That is why we record it here, even though it has not immediate bearing on the matters we have to decide.
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> 44. So far as the appellate process is concerned, two conclusions follow from it. The first is that, where the decision to give removal directions under s10 does not clearly demonstrate a proper consideration of the matters set out in paragraph 395C and the exercise of a discretion to make the decision, the decision will be one which is challengeable on the ground that it is not in accordance with the law, and the result should normally be that an appellant's appeal is allowed on that basis only, leaving the Secretary of State to make a new and lawful decision in accordance with the Immigration Rules.
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> 45. Secondly, if the decision was procedurally proper and was one which was open to the Secretary of State to make, the appellant can nevertheless succeed in an appeal by showing that the discretion to make the decision, conferred by s10 of the Act and appearing also in paragraphs 395A to D of the Immigration Rules, should have been exercised differently.
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> 46. We do, however, need to point out in this context that a decision that a person is to be removed by way of directions under s10 does not carry a general right of appeal from within the United Kingdom. That is because s82(2)(g) is not in the list of immigration decisions carrying that right in s92(2). But there is an in-country right of appeal under s92(4) if the appellant "has made an asylum claim, or a human rights claim, while in the United Kingdom". "Asylum claim" and "human rights claim" are phrases defined in s113 and are subject to amendments by the 2006 Act which have not yet come into force. What does appear to be clear, however, is that, for example, an overstayer who claims asylum and is refused, and appeals, may, in addition to grounds of appeal relying on his *rights* under the Refugee Convention or the European Convention on Human Rights, deploy an argument that, even if he has no right to be in the United Kingdom, the Secretary of State's *discretion* should have been exercised in such a manner as to allow him to stay."

49. That recognises the right of appeal against a removal decision, on the ground that paragraph 395C factors were not properly addressed, but that this right of appeal would normally be exercisable only from outside the UK. That is consistent with the proposition that the paragraph 395C process is to be undertaken separately from and later than any consideration of a claim to be entitled to leave to enter, or to an extension of leave to remain, or as the case may be, since the reference is to a separate, and necessarily later, appeal against the decision to give removal directions. However, the point which we have to consider was not at issue in that case, so the help given by the decision goes only so far.

50. Much reliance is placed on section 47 of the Immigration Asylum and Nationality Act 2006. By that section, where a person, such as the Appellant, has leave to enter or remain in the UK which is extended pending an appeal, the Secretary of State has

power to decide that the person should be removed, in accordance with directions to be given, if and when that leave ends. Such a decision is appealable under section 82(2)(ha) of the 2002 Act, and the appeal is an in-country appeal. There is already provision allowing removal directions to be given even though an asylum claim is pending or while an appeal is pending, under sections 77(4) and 78(3) of the 2002 Act. These provisions did not feature in argument before us, and I proceed on the assumption that this is not done in practice in a case of this kind, where there is a subsisting leave to remain, and that, in practice, no decision to remove is made under section 10 in a case of this kind unless and until the person in question has stayed in this country despite the failure of any in-country appeal and the consequent expiry of the prior leave to remain. (Under section 10(8) of the 1999 Act, notification of a decision to remove invalidates any otherwise current leave to remain, but my impression is that this would not affect the statutory continuation of leave to remain under section 3C(2)(c) of the 1971 Act.) In the meantime, after that expiry, the applicant would not be entitled to stay in the UK and would be subject to the sanctions imposed on those who have no right to be here, referred to at paragraph [38] above. Those are sanctions which are laid down as part of the legislative regime in order to implement this country's immigration policy.

51. It seems to me likely that the circumstances of the present case are by no means untypical, though no doubt there are many different kinds of case in which application is made for a variation of leave to remain. If it is right that the Secretary of State ought to have looked at paragraph 395C at the same time in the present case, it is likely to be so for many other cases as well. We were told that administrative arrangements have not yet been made to bring section 47 into practical use. There may be much to be said for bringing the section into use, but I would hesitate before coming to a conclusion which meant that the Secretary of State would have to bring the section into use for many cases at an early date, and which would also have an impact on cases already decided and with pending appeals.

52. It can be said that this would not be the direct result of a decision in the Appellant's favour, because, as I understand it, she does not aim for a conditional and proleptic decision as to removal directions. All she asks is that, because the failure of this appeal would mean that she is no longer entitled to stay, and removal directions can be expected to follow in due course, the paragraph 395C factors should be considered at this stage, in support of the application for leave to remain, on the basis that, if they were to be deemed sufficient to justify not making removal directions, the effect would be the same as granting leave to remain, and the appeal against the refusal to vary the leave to remain ought therefore to be allowed.

53. Thus, it does not seem to be said that the Secretary of State should have proceeded at once to a decision about removal, or should now so proceed. If she were not to do so, then the paragraph 395C exercise would have to be undertaken at the point when a removal decision is being considered. I take it that, in that event, the Appellant would wish that exercise to be carried out by reference to the fact as they then exist. There could then be a separate appeal in due course against the removal directions. On that appeal it would be relevant to consider whether the paragraph 395C factors, whatever they may be, had been properly considered. In the present case, the appeal would be in-country. In another case it would not be, unless asylum or human rights grounds were relied on and the Secretary of State did not issue a certificate under section 94.

Matters relied on under paragraph 395C might be expected to be, or to include, some of a kind which could be relevant to an asylum or human rights claim. Much may therefore depend on the attitude of the Secretary of State to the use of certificates under section 94 in such cases.

54. If the Appellant's current appeal were to fail, and she were to remain in this country despite her leave to remain coming to an end, and if the Secretary of State were then to proceed towards the making of removal directions, it would be necessary for the Secretary of State to give the Appellant the opportunity to put forward such factors as she wished to be taken into account under paragraph 395C. The position would be considered by reference to the factors then put forward, as the facts then stand. Such a consideration would be necessary in any case, even if there had been a previous consideration by reference to some factors which could be relevant under the paragraph. There is therefore a risk that, if the Appellant's present contention is accepted, the paragraph 395C process would have to be undertaken twice: once before leave to remain has expired, and again after that at the time when a decision as to removal is (subject to the effect of paragraph 395C) to be made. If the procedure provided for under section 47 comes to be used, provision will no doubt be made for paragraph 395C factors to be advanced and considered while the appeal is pending by virtue of which the leave to remain is extended for the time being. In that case, it may be that the risk of having to address similar factors twice can be eliminated or at least reduced. Until that change in the process is brought into effect, it seems to me that it cannot be said to be irrational for the Secretary of State to leave the factors relevant under paragraph 395C to be addressed at the time when the making of a removal decision is under consideration. Mr Kovats submitted that that is the appropriate stage for the factors to be considered, because it is necessary that they should be considered then, and to address them beforehand would therefore involve duplication of effort. (I understood this to be his response to the implicit question posed by Hooper LJ, as quoted by Sedley LJ at paragraph [9] above.) I see the force of that, which seems to me to be a rational basis for not undertaking the paragraph 395C process before the question of making a removal decision has arisen, even in a case (unlike the present case) in which the person in question has asked that factors be addressed by the decision-maker under paragraph 395C as well as by reference to human rights or asylum grounds, in deciding whether or not to vary the leave to remain.

55. Ms Khan's submissions appeared to be designed to lead to the conclusion that the Secretary of State must undertake a consideration under paragraph 395C in any case in which she is asked to do so at the stage of deciding whether or not to extend an existing leave to remain. I do not accept that this is the Respondent's obligation. Moreover, in the present case the Respondent was not asked to do so at that stage.

56. That having been said, the Appellant appears to have made good and constructive use of her time in this country during her leave to remain, and does not appear to wish to use the appeal process for the purposes merely of procrastination. On the one hand, it would not have been unlawful, in the sense of irrational, for the Respondent to leave the paragraph 395C exercise until the stage (if it arrived) at which the Appellant is liable to be removed, even if it had been asked for earlier. On the other hand, if the point had been raised at the outset, it would have been a sensible decision to undertake that exercise at that earlier stage, especially in the light of the similarity of

the grounds which, it seems, would be relied on under the paragraph to those relevant on the human rights and asylum grounds as such, and given that the Respondent could have taken a decision in principle about removal, to take effect subject to the outcome of the appeal, if she had not been persuaded by the factors relied on under the paragraph.

57. I therefore agree with Sedley LJ that, the point having been raised at the reconsideration stage before SIJ Taylor, albeit that this was later than it might have been, it would now be appropriate for the Respondent to undertake the consideration required by paragraph 395C. Like him, I would be grateful for proposals from Counsel as to a form of order which might allow this to be done while this appeal is still pending. One possibility would be for us to adjourn the appeal so as not to dispose of it finally until the parties have gone through the process required under paragraph 395C.