Neutral Citation Number: [2009] EWHC 153 (Admin)

Case No: CO/10589/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2009

Before:

THE HONOURABLE MR JUSTICE PITCHFORD

- -

Between:

JEANETTE KAGABO	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Hugh Southey (instructed by **Refugee Legal Centre**) for the **Claimant**
Jonathan Auburn (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 3 February 2009

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Judgment

Mr Justice Pitchford:

1. The issue raised by this claim, for which permission was granted by Owen J on 11 April 2008, is whether section 78(1) Nationality, Immigration and Asylum Act (NIAA) 2002 acts to prevent the Secretary of State from setting directions for removal of an applicant who has applied for an extension of time to appeal an adverse immigration decision.

Academic nature of the claim

2. In the claimant's case the issue is academic since, following the challenge to the removal directions, the Asylum and Immigration Tribunal (AIT) granted the claimant's application for an extension of time, heard the substantive appeal and dismissed it. Furthermore, the Secretary of State argues, I should not embark upon a consideration of the argument because the claimant, notwithstanding the acceptance of jurisdiction by the Immigration Judge, was not entitled to an in-country right of appeal under section 92 NIAA 2002. I am, however, persuaded that the legal issue is of sufficient general practical importance that I should consider the arguments and reach a decision. In my view, the issue has gathered further importance since the Secretary of State has abandoned the policy of giving automatic suspensory effect to an application for judicial review of an immigration or asylum decision. This applies

particularly to "fresh claim" representations rejected by the Secretary of State. I shall consider section 92 at the conclusion of this judgment.

Claimant's immigration history

3. Immigration Judge Wilson, in his determination promulgated on 4 November 2008, found that the claimant is a native of Uganda born on 10 April 1979. She *claimed* to have entered the UK in March 2000 and six days later claimed asylum as a citizen of Rwanda under the age of 18. At the time of her asylum claim the claimant was in possession of a forged Rwandan passport.

4. On 8 May 2000 the Secretary of State refused the claimant's asylum claim but, unaware of the deception, granted exceptional leave to remain (ELR) until 8 May 2004.

5. On 23 April 2004 the claimant sought an extension of leave. No decision was made and, by the operation of section 3C Immigration Act 1971, her leave continued.

6. On 25 July 2007 the claimant was called for interview. The subject was her Ugandan passport issued on 5 July 1999 identifying her as Janet Ayebele. That passport was genuine. It was stamped with a visa to enter the UK. Her entry date was 8 August 1999 when she was aged 20. The claimant had applied for the visa in Uganda before embarking for the UK. It followed she had deployed the false Rwandan passport to facilitate her applications for asylum and leave to remain.

7. On 25 July 2007, following her interview, the claimant was issued with a notice informing her of her liability to be removed under section 10(1)(b) Immigration and Asylum Act 1999 as a person who had used deception in seeking leave to remain. She was informed that she had an out of country right of appeal under section 82(1) NIAA 2002.

8. On 21 November 2007 removal directions were issued to the claimant informing her that she would be removed on 27 November to Uganda. On 21 November 2007 the Refugee Legal Centre purported to give notice appealing the decision of the same day to remove her. The notice foundered because the directions it challenged did not comprise an immigration decision under s.82(2)(g) NIAA 2002.

9. The mistake was realised and on 27 November 2007 the claimant sought to appeal out of time the immigration decision of 25 July 2007, and on 28 March 2008 she was granted an extension of time. Also on 27 November 2007 this judicial review claim was issued. Under the SSHD's then policy the issue of the judicial review claim suspended removal.

10. Having challenged the Secretary of State's decision to remove her in the face of what was claimed to be a genuine asylum claim, the claimant then abandoned the asylum claim and launched an Art 8 appeal on the grounds of her marriage on 20 April 2008 to a British citizen of Rwandan origin and the birth of their child in August of the same year.

11. The Immigration Judge found that the immigration decision was correct; in the Immigration Judge's view it was the only decision available in the light of the

claimant's deception. All the facts material to the Art 8 claim post-dated the claimant's application to the Tribunal to appeal out of time. He concluded "The actions to find a family life in the last 10 months is a flagrant attempt… to engage the terms of Art 8…so as to prevent the applicant's departure from the UK…I find that having regard to the need to maintain immigration control and the extent of the deception used in gaining entry…it is a proportionate decision…for her to be required to leave the UK."

The dispute

12. Mr Southey submits on behalf of the claimant that from the moment she gave notice to appeal the decision of 25 July 2007 out of time her appeal was 'pending' within the meaning of section 82(1) NIAA 2002. That being the case the Secretary of State could not, by the operation of section 78, remove the claimant from the UK.

13. It is submitted by Mr Auburn, on behalf of the Secretary of State, that the lodging of notice to appeal out of time does not create a 'pending' appeal. If that is the correct analysis there is no statutory prohibition on removal.

14. It is common ground that section 82 NIAA 2002 gave a right of appeal to the claimant. In its relevant parts it provides as follows:

> "(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part "immigration decision" means…
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain, ….
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c.33)(removal of person unlawfully in United Kingdom),….

There is no doubt that section 82(1) entitled the Claimant to appeal against the decisions made on 25 July 2007.

15. The claimant served her notice of appeal under section 82 of the 2002 Act on 27 November 2007.

16. Section 78 NIAA 2002 creates the relevant prohibition:

> "(1) While a person's appeal under section 82(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 a provision of the Immigration Acts.
>
> (2) In this section "pending" has the meaning given by section 104."

17. Section 104 provides (as amended with effect from 4 April 2005):

> "(1) An appeal under section 82(1) is pending during the period-
>
> (a) beginning when it is instituted, and
>
> (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).
>
> (2) An appeal under section 82(1) is not finally determined for the purposes of subsection (1)(b) while-
>
> (a) an application under section 103A(1) (other than an application out of time with permission) could be made or is awaiting determination,
>
> (b) reconsideration of an appeal has been ordered under section 103A(1) and has not been completed,
>
> (c) an appeal has been remitted to the Tribunal and is awaiting determination,
>
> (d) an application under section 103B or 103E for permission to appeal (other than an application out of time with permission) could be made or is awaiting determination,
>
> (e) an appeal under section 103B or 103E is awaiting determination, or
>
> (f) a reference under section 103C is awaiting determination..."

Mr Southey argues that the claimant's appeal was "instituted" for the purpose of section 104(1)(a) by service of her notice. From that moment the appeal was "pending" and the Secretary of State was prohibited from removing the claimant while her appeal remained undetermined.

18. For the defendant Mr Auburn argues that an appeal is "instituted" for the purpose of section 104(1)(a) only if the notice of appeal is served within the time limited, in the claimant's case 10 days, in the case of an appellant in detention, 5 days. Until the appeal has been instituted and before time is extended, if at all, the applicant remains at risk of removal. If the application for an extension of time succeeds, from that moment the appeal is instituted and pending. The decision whether to grant an extension of time is a preliminary decision and not a decision in the appeal itself.

Erdogan v SSHD

19. In *R (Erdogan) v SSHD* [2004] EWCA Civ 1087, the Court of Appeal was required to resolve whether the respondent was an asylum seeker entitled to receive support under section 95 Immigration and Asylum Act 1999. She was an asylum seeker if (section 94(1)) she had made a claim for asylum which had not been determined. By section 94(3) her claim for asylum had been determined "on the day on which the appeal is disposed of" and by section 94(4) her appeal was disposed of when it was "no longer pending for the purposes of the Immigration Acts".

20. The respondent had made a claim for asylum on 16 August 2001 which was refused on 9 May 2003. She appealed to an adjudicator under section 82(1) NIAA 2002 and her appeal was dismissed on 1 October 2003.

21. Under the statutory appeal scheme then in force, by section 101(1) NIAA 2002 the respondent was entitled to appeal with permission to the Immigration Appeal Tribunal (IAT) on a point of law. The time within which notice of an application for permission was required was, by rule 16 Immigration and Asylum Appeals (Procedure) Rules 2003, 10 days after service of the adjudicator's determination. That period expired on 17 October 2003. The respondent lodged her application for permission 3 days later. She was required to make an application to extend time. The question for the court was whether the appeal was "pending" while awaiting a decision from the IAT whether time for the notice of application for permission would be extended.

22. By section 104 of the 2002 Act before its amendment:

> "(1) An appeal under section 82(1) is pending during the period
>
> (a) beginning when it is instituted; and
>
> (b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).
>
> (2) An appeal under section 82(1) is not finally determined for the purposes of subsection (1)(b) while a further appeal or an application under section 101(2)
>
> (a) has been instituted and is not yet finally determined, withdrawn or abandoned; or
>
> (b) may be brought (ignoring the possibility of an appeal out of time with permission)."

23. The court held that had the application for permission to appeal to the IAT under section 101(1) been made within the time limited by rule 16, the appeal would have been pending as a "further appeal" within the meaning of section 104. Since it was out of time there could be no pending appeal unless and until the IAT extended time. Newman J gave the leading judgment with which Tuckey and Arden LJJ agreed. At paragraph 15 Newman J said:

> "As a matter of general approach to time limits in connection with an appeal, it seems to me that, since an application for permission to appeal within a statutory time limit exists as a statutory right, it has a character which an application made out of time does not. The existence of a discretionary power to extend time upon application being made gives rise to a procedural right which is inchoate in character. However, in this instance the result is, in my judgment, driven by the terms of section 104. Further, section 104(2)(b) includes within the meaning of a pending appeal the situation where an appeal has not been instituted, but the period when an appeal "may be brought" is still running. It is not simply the institution of an appeal which creates a pending appeal; it is the currency of the time limit. The words in brackets, "ignoring the possibility of an appeal out of time with permission" point to such an application being different in kind. The 2002 Rules, in my judgment, make the position clear. Rule 16(2) in terms provides that if permission to appeal out of time is granted, then the appeal will be in accordance with paragraph (1) of Rule 16. Once that occurs, there will be a pending appeal within section 104."

24. The court was aware that one of the consequences of this construction of section 104 was that the respondent and others in a similar position would not be protected by section 78 of the 2002 Act from removal from the jurisdiction while awaiting the Tribunal's decision whether to extend time. The court observed [para 20]:

> "…. The power of the Secretary of State so to do will be subject to the supervisory role of the court in judicial review to give protection where necessary."

25. Mr Auburn for the Secretary of State submits that I am bound by the judgment of the court that there is a critical difference between a notice of appeal lodged within the time limit set by the rules and a notice lodged outside the time limit. An appeal was not "instituted" for the purpose of section 104(1)(a) and 104(2)(a) unless and until it was brought within time "in accordance with these Rules" or time was extended. He submits that by a parity of reasoning an appeal to AIT under the current regime is not instituted unless notice is lodged within time or time has been extended.

Mr Southey argues that I am not bound by the reasoning in *Erdogan*. The court construed a specific statutory definition of the term "pending" by reference to the terms of section 104(2) which do not apply to the current statutory regime of appeal and application for reconsideration, and which do not appear in section 104(2) as amended. There are, Mr Southey submits, two competing policy considerations at work. The first is speedy resolution of asylum and human rights applications. The second is the requirement for effective access to judicial resolution of disputed administrative decisions. The appeals regime to which Ms Erdogan was subject had given her access to a judicial decision in her first appeal to the adjudicator. In the present case the claimant, when she submitted her out of time application, had enjoyed no access to a judicial decision on her asylum or human rights claims. Had she been removed administratively during her pending application the SSHD would have been in breach of the obligation to provide effective access to a judicial decision.

The Immigration and Asylum Appeals (Procedure) Rules 2003

26. Part 2 of the 2003 Rules dealt with appeals to an adjudicator. Under rule 6:

> "(1) An appeal to an adjudicator against a relevant decision must be instituted by giving notice of appeal in accordance with these Rules."

27. By rule 6(2) notice of appeal was not to be lodged at IAT but with the Secretary of State. By rule 9 the Secretary of State was to file relevant documents with the appellate authority and serve them on the appellant. Rule 7 set the time limits for lodging the notice of appeal in mandatory terms ("A notice of appeal by a person who is in the United Kingdom must be given…"). By rule 10, where a notice of appeal was given out of time the appellant was required to give reasons for the delay. The adjudicator was given responsibility for ruling whether the notice was lodged in time and, if not, whether to extend time on the ground that "by reason of special circumstances it would be unjust not to do so."

28. Part 3 dealt with "further" appeals to the Tribunal. By rule 15:

> "(1) An appeal from the determination of an adjudicator may only be made with the permission of the Tribunal upon an application made in accordance with these Rules."

The term "appellant", by rule 14(1)(a), applied to a party appealing to the Tribunal against an adjudicator's determination and included a party applying for permission to appeal.

29. Time limits for making applications for permission were set by rule 16 which provided that the Tribunal could extend time if "by reason of special circumstances it would be unjust not to do so".

30. There was, therefore, under the 2003 rule regime a two-tier system of appeals, the first as of right, the second only with permission. Both tiers required the appellant to lodge a notice "in accordance with these Rules". To comply with the rules the document had to contain specific information and be lodged within the time limit. Time could be extended after the event on identical grounds.

Amendment to NIAA 2002 and The Asylum and Immigration Tribunal (Procedure) Rules 2005

31. Amendments to the 2002 Act made by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 brought into being from 4 April 2005 the current appeal structure. In effect it removed the second tier appeal and replaced it with reconsideration by the AIT with leave. An appeal under section 82 is now made from the SSHD's decision to the AIT and heard by an Immigration Judge. Section 104(2) was replaced. It is now in the terms set out above at paragraph 17.

32. Applications for reconsideration on the ground of an error of law are made in the first instance to a Senior Immigration Judge at the Tribunal and decided on the papers. That decision is capable of review by the High Court.

33. In *YD (Turkey) v SSHD* [2006] EWCA Civ 52; [2006] 1 WLR 1646 the Court of Appeal considered the effect of the bracketed words in section 140(2)(d). Brooke LJ concluded:

> "9. The phrase "other than an application out of time with permission" is an obscure one. There can be no doubt that if this court does grant permission to appeal out of time, an appeal under section 103B will then be pending and section 78 will prohibit the Appellant's removal until after the appeal is determined. It appears to me that the phrase probably refers to an unusual situation in which this court has extended time for filing the appellant's notice as a discrete event and is therefore treated as having given permission for the application for permission to appeal to be made. The effect of section 104(2)(d) will then be that even if an extension of time is granted, no appeal will be pending for the purpose of section 78 until such time (if at all) permission to appeal is in due course granted."

34. The court went on to hold that although in these unusual circumstances the statutory bar on removal did not apply the Court of Appeal had an inherent jurisdiction to prevent removal, a jurisdiction which it would exercise only when the merits of the appeal clearly justified it.

35. It seems to me that the equivalent construction of section 104(2)(a) is unavoidable. While the AIT is considering an application for reconsideration having extended time for the application, section 78 does not prevent the removal of the applicant. This conclusion does not inevitably dispose of the current issue but it is difficult to

comprehend why Parliament should intend to exclude the operation of section 78 after time has been extended but not before.

36. Mr Southey submits that the 2005 Rules support his construction of section 104(1). Rule 6(1) as re-enacted is in its relevant terms is to the same effect as its 2003 equivalent:

> "An appeal to the Tribunal may only be instituted by giving notice of appeal against a relevant decision in accordance with these Rules."

37. Rule 7 sets the time limits for the notice and, as before, is in mandatory terms:

> "(1) A notice of appeal by a person who is in the United Kingdom must be given
>
> (a) if a person is in detention….
>
> (b) in any other case, not later than 10 days after he is served with notice of the decision…."

38. Rule 8 prescribes the contents of the notice of appeal. When the notice is served out of time it must, by rule 10, include an application for an extension of time which can be granted as a preliminary decision (rule 10(5) & (6)) by the Tribunal "if satisfied that by reason of special circumstances it would be unjust not to do so", and otherwise refused.

39. The competing arguments as to the interpretation of the 2005 Rules are as follows. The claimant contends that, by rule 6(1), the appeal is instituted as soon as the notice of appeal is given. That, contends the defendant, ignores the concluding words "in accordance with these Rules". To institute the appeal notice must be given within the time set by rule 7 and in the form required by rule 8.

40. Rule 11 is new. It provides:

> "(1) This rule applies in any case in which the respondent notifies the Tribunal that removal directions have been issued against a person who has given notice of appeal, pursuant to which it is proposed to remove him from the United Kingdom within 5 calendar days of the date on which the notice of appeal was given.
>
> (2) The Tribunal must, if reasonably practicable, make any preliminary decision under rule 10 before the date and time proposed for his removal.
>
> (3) Rule 10 shall apply subject to the modifications that the Tribunal may-
>
> (a) give notification under rule 10(2) orally, which may include giving it by telephone,
>
> (b) shorten the time for giving evidence under rule 10(3); and
>
> (c) direct that any evidence under rule 10(3) is to be given orally, which may include requiring the evidence to be given by telephone, and hold a hearing or telephone hearing for the purpose of receiving such evidence."

41. Mr Southey submits that rule 11 would serve no purpose if the SSHD retained the right under section 78 to remove an applicant who had served a notice out of time.

Rule 11(2) makes clear that the Tribunal's obligations apply only to a case in which it is necessary to consider an application to extend time. There would be no need for the SSHD to require expedition of the decision whether to extend time in order to remove the applicant on time in the event of refusal because she would have power to remove the appellant at the appointed time whether a decision had been made or not.

42. Mr Auburn submits, in effect, that this is too cynical a view. The SSHD would not wish, if it could reasonably be avoided, to remove an applicant whose application for an extension of time could reasonably practically be decided before the date set for removal. If section 78 did not protect the applicant from removal before the application was decided then she would not need to be further protected by expedition of the decision.

43. In his rejoinder Mr Southey maintains that the rule plainly exists in the interests of speedy removal not in protection of the interests of the applicant.

Access to a judicial authority

44. Mr Southey submits that the facts of the claimant's case demonstrate the unwelcome consequences of the defendant's construction of section 104. On 8 May 2000 the SSHD refused her application for asylum but granted her ELR until 8 May 2004. She could have appealed the decision to refuse asylum to an adjudicator but, since she had a generous extended leave, chose not to. At that time it was not open to the claimant to seek a decision under the ECHR. On 25 July 2007 the SSHD issued form IS151A. This provided her with her first realistic opportunity to challenge the asylum decision and to raise any ECHR right to resist her removal. If the effect of sections 78 and 104 of the 2002 Act is that the right to remove was not suspended and the claimant was in fact removed she would lose her right to appeal altogether by operation of section 104(4) which provides:

> "An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant leaves the United Kingdom."

45. Mr Southey submits that the claimant enjoyed a constitutional right of access to a court for a decision whether she was liable to removal, certainly once she had given notice seeking an extension of time (see *R v Lord Chancellor ex p Witham* 1998 QB 575). Allowing the SSHD to make an administrative decision to remove without permitting access to a court for a review of the decision would involve a violation of Art 13 of ECHR. Art 13 was not listed in Schedule 1 to Human Rights Act 1998 but for Art 3 protection to be effective the availability of an in-country judicial remedy was essential. In *Conka v Belgium* [2002] 34 EHRR 54 the ECtHR found a breach of Art 13 where Belgium failed to provide "an effective remedy before a national authority" notwithstanding the existence of a right to apply for judicial review and discretionary suspension of an order for removal. At paragraph 82 the court ruled:

> "Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination…. In such cases the

> remedy exercised by the applicant would not be sufficiently effective for the purpose of Article 13."

46. On the other hand, at paragraph 75 the court defined the threshold for the application of Art 13;

> "The Court reiterates that Article 13 of the Convention guarantees the availability at a national level of a remedy to enforce the substance of the convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Art 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law…"

47. The defendant responds that the jurisdiction of the AIT is in no sense withdrawn from appellants. It was the claimant's right to appeal to the AIT within the 2005 Rules. The right of access to courts is not absolute but may be regulated (*Golder v UK* [1975] 1 EHRR 524). Several procedural limitations have been approved in Strasbourg and in England and Wales.

Discussion

48. I consider myself bound by the reasoning in *Erdogan*. It is true that the court was dealing with "a further appeal" within the meaning of section 104(2) as then enacted, while the claimant's appeal was an original appeal under section 104(1) (as now and then enacted) rather than an application for reconsideration under section 103A(1) (the present equivalent of the former "further appeal"). However, the starting point for the Court's consideration was the question whether the applicant had (section 104(2)(a)) "instituted" an appeal by lodging a notice of appeal out of time. Section 104(2)(b) as then enacted provided that the <u>first</u> appeal was not finally determined while the time limited for filing an application for permission to lodge a notice of further appeal was current. For that purpose the possibility of applying out of time for an extension was to be ignored. The terms of subsection (2)(b) supported the court's provisional conclusion that the passing of the time limit was a critical event. The underlying finding was the existence of the distinction in character between the institution of an appeal (within time) and a preliminary application for permission to institute the appeal (out of time). The presence of the specific words in subsection (2)(b) confirmed that section 104 recognised the distinction.

49. Had the Court of Appeal in *Erdogan* been dealing with a first tier appeal to an adjudicator it seems to me that the result must have been the same, notwithstanding the absence of words equivalent to those in section 104(2)(b) governing section 104(1)(b). Rules 6(1) and 7(2) of the 2003 Rules were to the same mandatory effect in connection with a first tier appeal as were rules 15(1) and 16(1) in connection with a second tier appeal. Since the Court found that an appeal was not "instituted" unless the notice was lodged in time in accordance with the Rules I can see no rational basis for reaching a different conclusion in the case of a first tier appeal. I derive some support for this conclusion from the words of Brooke LJ at paragraph 9 of *YD*. He was in no doubt that *once* the Court of Appeal extended time for a section 103B notice the appeal was *then* "pending" for the purpose of section 78.

50. I do not consider that the re-enactment in different terms of section 104(2) of the 2002 Act removed the binding effect of the Court in *Erdogan*. It remains, in the absence of inconsistent statutory language, authority for the inchoate nature of the out of time application. Mr Southey sought to persuade me that the position was different for a second tier appeal (the equivalent of an application under section 103A(1) for reconsideration) from a first tier appeal (the equivalent of an appeal as of right to the Tribunal). His reasoning was that there is a good policy justification to be less generous towards the applicant who had already obtained a judicial ruling upon her asylum and/or ECHR rights claims than towards an applicant who had not yet had access to a court. I can read no such policy considerations into section 104 as it was to be read before or after 4 April 2005.

51. I recognise that the access to justice argument is an extremely important one. Access to a court cannot be ousted save by express statutory language. In my judgment, access to the AIT is not removed. The claimant had an unqualified right of appeal within the time limit set to ensure speedy resolution of asylum and immigration decisions. If she failed to avail herself of a right that did not amount to a deprivation of the right. Furthermore, a decision to remove while an extension of time application is awaiting decision is reviewable by the High Court in proceedings for judicial review. Where the claimant has "an arguable complaint" that her refugee status or her ECHR rights will be violated by removal, the court will be required to exercise its discretion in the claimant's favour. Formerly, it was the SSHD's policy not to remove when a judicial review application had been lodged. Now the claimant is required to lodge the application and obtain the order of the court. Only in clear cases will the court, in my experience, refuse a restraining order when the SSHD's decision is challenged by a claim for judicial review. These requirements seem to me to comply with the United Kingdom's obligation to provide an effective remedy to those who claim that their rights are being violated.

52. I recognise that the amendments to the 2002 Act together with the introduction of the 2005 Rules created a new and complete appeals regime. Nevertheless, I cannot find significant support for Mr Southey's interpretation of section 104 in the terms of new rule 11, and I can find no support at all for his argument founded on the terms of rules 6(1) and 7(1).

53. It follows that I must dismiss the claim.

Postscript - section 92 NIAA 2002

54. Section 92(1) NIAA 2002 provides that a person may not appeal while he is the UK unless the appeal is of a kind to which section 92 applies. An appeal against a decision to remove under section 10(1)(b) Immigration and Asylum Act 1999 is not a decision to which section 92 applies. However, one reason why the IJ accepted jurisdiction was that "at one point" the claimant had made an asylum claim. Section 92(4)(a) provides that section 92 "also applies to an immigration decision if the appellant (a) has made an asylum claim, or a human rights claim, while in the United Kingdom". A decision under section 10(1)(b) of the 1999 Act is an immigration decision as defined in section 82(2)(g) NIAA 2002. Since the claimant had in the past made an asylum application the IJ found she was entitled to an in-country right of appeal notwithstanding she was abandoning her asylum appeal to replace it with an Art 8 claim which she had not before made. The SSHD argued that this is not the

meaning of section 92(4) which is designed to catch *current* rather than historical claims. For an historical human rights or asylum claim to qualify under subsection (4) it needs to be a "fresh" claim as defined by IR 353.

55. The question whether section 92(4) applies when the asylum or human rights claim was historical or only when a current or "fresh" claim was made was considered by Blake J in *R (Etame and Anirah) v SSHD* [2008] EWHC 1140 (Admin); [2008] 4 All ER 798. The Court of Appeal has given permission to appeal his conclusion that section 92 does not apply to historical claims unless what is currently being appealed is a "fresh" claim as that term is now used in the asylum and human rights context. The appeal has not yet been heard.

56. I have not been concerned with the in-country dispute since the SSHD chose, in the light of rejection of the substance of the appeal, not to appeal the IJ's judgment. I have added this postscript in order to ensure it is understood the defendant does not concede that an in-country right of appeal existed in the claimant's case. My conclusion on the lack of suspensory effect of a notice of appeal out of time can only be of relevance where an in-country right of appeal exists.