Approved judgment

Neutral Citation Number: [2008] EWHC 1140 (Admin)
Case No: CO/11595/20077 and CO/5121/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd May 2008

Before :
THE HON MR JUSTICE BLAKE
- -
Between :

PETER MBA ETAME **Claimant**

- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT
ASYLUM AND IMMIGRATION TRIBUNAL **Defendants**

And between:

BANSLEM ONUJITE ANIRAH **Claimant**

- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**
- -
- -
Mr. R. Husain and Mr. R Toal (instructed by Wilson & Co)) for Etame and
Mr. R. Husain and Ms. R. Kotak (instructed by Turpin & Miller) for Anirah
Ms. E. Laing QC (instructed by the Treasury Solicitor) for the Defendants
Hearing date: 18th April 2008
- -

Judgment

Approved judgment

Mr. Justice Blake

Introduction

1. These two applications for judicial review have been heard together because they raise a common issue of law of some general importance in asylum and human rights appeals. Both claimants applied to the defendant Secretary of State to have deportation orders made against them revoked on asylum or human rights grounds. These applications were rejected. Both had previously made asylum or human rights claims that were the subject of adverse determinations and unsuccessful appeals before the deportation orders were signed. Both claim to have the right of appeal with suspensive effect (that is to say an appeal from within the United Kingdom) as a result of this immigration history and the proper meaning of s. 92(4)(a) of the Nationality Immigration and Asylum Act 2002.

The case of Anirah

2. In the case of Mr. Anirah this is the sole issue. He is a Nigerian national who entered the United Kingdom as a visitor in 1988, was given leave to remain as a student, married a British citizen in August 1991 and was granted indefinite leave to remain on the basis of that marriage in May 1995. There are four children of that marriage aged between 10 and 16. He undoubtedly has resided lawfully in this country for a long time and during that residence has established a home, family and private life that deserves respect within the meaning of Article 8 European Convention on Human Rights (ECHR).

3. However on the 2nd March 2001 he was convicted of a conspiracy to import into the country a large quantity of Class A drugs and was sentenced to 10 years imprisonment. On the 20th May 2005 the Secretary of State decided to deport Mr. Anirah on grounds conducive to the public good pursuant to s. 3(5) Immigration Act 1971 and the immigration rules applicable to such decisions: HC 395 paragraphs 362 to 364. Mr. Anirah appealed against this decision and contended amongst other things that deportation at the end of the lengthy prison sentence he was serving for his criminal conduct was an interference with his right to family life and was not justified in the broader interests of the community applying Article 8(2) ECHR. By the time of the appeal the marriage had broken down and the wife had instituted divorce proceedings. Whilst she was willing for the children to make indirect contact with the claimant through letters, phone calls and emails she was not prepared to take them to visit him in prison whilst he was serving his sentence.

4. The Immigration Judge (IJ) dismissed the appeal on the 11th July 2005 and the AIT upheld this decision on 18th December 2006. In due course that appellate decision became final and can not be challenged collaterally by judicial review. Thereafter a deportation order was signed against him.

5. After further judicial review proceedings that do not need to be recited, the Secretary of State agreed to consider further submissions put forward in June 2007. The submissions sought a revocation of the deportation order before it had been implemented. Those submissions were concerned with the human rights claim and argued that the IJ had applied the wrong test of exceptionality rather than the correct one of proportionality and relied on the continuing family life between the claimant and his children. Those submissions were rejected on the 19th November 2007. The defendant refused to revoke the deportation order. In due course

directions for removal to Nigeria were set. On the 27th December 2007 this application for judicial review was made on the basis that the claimant had a further right of appeal.

6. Although the claimant submits that in rejecting his submissions the Secretary of State herself erred in law by failing to find that family life was established between the claimant and his children, he does not allege that the issues, the evidence or the supporting argument advanced in the June 2007 representations were sufficiently different to amount to a fresh human rights claim.

The case of Etame

7. Mr. Etame is a citizen of Cameroon who entered the country clandestinely on a date unknown and applied for leave to remain on asylum grounds in May 2005. This application was rejected in July 2005 and there was no appeal against it. Removal directions were set but before they could be implemented the claimant was prosecuted for criminal wrongdoing.

8. On the 20th February 2006 he was sentenced in the Crown Court to twelve months imprisonment concurrent on his plea of guilty in the Magistrates Court to three inter-related offences of having a false instrument (a Belgian passport) with intent, using the same false instrument and obtaining a pecuniary advantage (employment) by a false representation that he was entitled to work in the United Kingdom.

9. As a result of this conviction a decision was taken to make a deportation order on grounds that his deportation would be conducive to the public good, rather than merely remove him as someone who had been refused leave to enter. One essential distinction between removal and deportation is the fact that when a deportation order is made a person is precluded by statute from re entering the United Kingdom until the order is revoked.

10. The claimant appealed against the decision to make the order. His grounds of appeal alleged persecution and ill treatment in Cameroon on the basis of his political opinions and activities and also because of sexual activity as a homosexual.

11. The Tribunal rejected his appeal on the 14th August 2006. This decision became final after a request for reconsideration was dismissed and on the 6th December 2006 the deportation order was signed against him requiring him to leave the United Kingdom and preventing his return here.

12. Thereafter fresh solicitors acting for the claimant submitted further argument and evidence relating to his treatment as a homosexual in Cameroon and the risks he would face on return there. These representations were rejected on the 27th March 2007 and again on the 25th May 2007. The latter decision went on to explain that the representations did not amount to a fresh claim; the deportation order signed would not be revoked, and there was no in-country right of appeal against this decision as the claimant had not made a fresh claim for asylum or human rights protection.

13. The claimant nevertheless sought to enter an appeal with the AIT, but on the 11th June 2007 an immigration judge decided that the decision of the 25th May 2007 was not an appealable decision. At a renewed application for permission in September 2007 the claimant obtained permission to bring judicial review proceedings against both the AIT and the Secretary of State arguing that he had a right of appeal against the refusal to revoke the deportation order, that

such a right was for an in-country appeal, and that in any event the representations made amounted to a fresh claim for protection. The Secretary of State subsequently accepted that the decision in question was an appealable but not that such an appeal could be made from inside the UK. On the 28th May 2008 the Secretary of State gave further reasoning in support of her contentions.

14. The question whether there was a fresh claim to refugee or human rights protection is a distinct issue in the case of Etame that does not arise in the case of Anirah. It will be considered separately after the resolution of the common issue.

The right of appeal

15. The general statutory provisions about a right of appeal in immigration cases are to be found in s. 82 (1) NIAA 2002 that provides a right of appeal to the AIT "where an immigration decision is made in respect of a person". S. 82(2) then sets out what is meant as an immigration decision. The list of such decisions includes refusal of leave to enter, refusal of leave to remain if the result is that a person has no leave to enter or remain, a decision that a person is to be removed, a decision to make a deportation order and a refusal to revoke a deportation order. In both these cases it is now agreed that there were refusals to revoke a deportation order and thus a separate immigration decision had been made following the original decisions to make a deportation order and in the case of Mr. Etame, the earlier decision to refuse leave to enter.

16. Section 84 of the 2002 Act provides that where there is a right of appeal the grounds of appeal may include a claim that removal of the appellant would be contrary to the UK's obligations under the Refugee Convention and that the decision is contrary to s. 6 of the Human Rights Act 1998.

17. Mr. Husain who appears for both claimants observes that there will be many cases where a person is the subject of more than one immigration decision during a period of a single stay in the United Kingdom. Where there is more than one immigration decision Parliament has made distinct provisions to enable repeated claims to be certified and further rights of appeal to be curtailed or excluded.

18.. He makes the further general observation that by s. 83 in certain circumstances a person who makes a claim for asylum that is rejected may appeal to the Tribunal against the rejection of his asylum claim. Such a provision is by way of contrast to the position established in the 1993 Act and after where asylum decisions are not themselves appealable but only the immigration decision engendered in response to an asylum claim.

19. By way of further preliminary observation he invites the court to note that the present statutory scheme excludes the mere giving of removal directions from the list of "immigration decisions". In doing so, Parliament reversed the decision of the Court of Appeal in the case *of R (Kariharan) v SSHD* [2003] QB 933. He points out that the Court of Appeal applied a broad-based approach to the meaning of immigration decision in this case, even though there was no or no adequate mechanism to prevent abuse by repeated applications for protection made after the giving of fresh removal directions. By contrast, under the scheme this court is now considering Parliament has carefully identified the immigration decisions that carry a right of appeal, and has further provided significant new mechanisms to prevent or curtail appeals where the exercise of the right of appeal might lead to abuse by repetition of the same claim as one that had been previously rejected.

20. Ms. Laing for the Secretary of State does not dispute that a right of appeal arises when a decision that is an immigration decision is taken. She reminds the court that what is in issue is whether the right of appeal is to be exercised from within the United Kingdom or not. This is governed by s. 92 of the NIAA 2002.

Appeal from within the United Kingdom

21. Section 92(1) establishes the general proposition that a person may not appeal under s. 82(1) while he is in the United Kingdom unless his appeal if of a kind to which this section applies. There then follow a number of subsections providing in which circumstances an appeal is one to which the section applies. First, under s. 92(2) are appeals against immigration decisions by those who are normally lawfully present in the UK or claim to be free from immigration control: these are appeals against a certificate of entitlement, refusal of variation of leave and certain variations of leave to remain, cancellation of indefinite leave to remain and a decision to deport. Second, under s. 92(3) there are appeals for those who arrive with prior entry clearances with further provisions modifying this right.

22. Third, s. 92(4) is the provision that is relied on in this case. It reads as follows:-

> "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,* or
>
> (b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom."

(emphasis supplied)

23. Mr Husain points out that the words used in (a) refer to the past tense "has made" by contrast to the words in 92(4)(b) "makes a claim". Asylum claim and human rights claim are defined by s. 113 as meaning a claim made by a person to the Secretary of State that to remove the person form or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under s. 6 Human Rights Act 1998. It is to be observed that this definition will be amended by s. 12(1) and 12(2) of the Immigration Asylum and Nationality Act 2006 where in both cases a new provision is inserted to the effect that the definition "does not include a claim which having regard to a former claim falls to be disregarded for this purpose in accordance with the immigration rules".

24. The Immigration Rules at the time material to both claimants contained paragraph 353 (inserted by HC 1112)

> "Where a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim person. The submission will amount to a fresh claim if significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

> i. had not already been considered; and
>
> ii. taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".

25. Mr Husain points out that Section 94 contains provisions for certification of appeals. This section applies to a s. 82 (1) appeal where the appellant has made an asylum or human rights claim. Section 94(2) provides

> "A person may not bring an appeal to which this section applies (in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."

26. He relies on that provision as being directly applicable to resolve problems arising from abusive or repeat claims being advanced as grounds for appeal against successive immigration decisions that would otherwise be appealable. Where such a certificate is issued it prevents the appeal from being made in country in reliance on s. 92(4), but it does not exclude a right of appeal altogether. There are other mechanisms for certification of appeals notably under s. 96 where a right of appeal at all can be removed if a matter could have been raised in a previous appeal and there is no satisfactory explanation why it is not.

Issue 1: In country right of appeal

Appealable decision

27. It is common ground between the parties that both decisions to refuse to revoke the deportation order were immigration decisions within the meaning of s. 82 (1) and (2) (k). Accordingly both were decisions that carried the right of appeal under that section. Both parties therefore submit that the IJ was wrong in the case of Etame to rule that there was no appealable decision in this case.

28. I agree with this submission. Where it is clear that the Secretary of State has made an immigration decision within the meaning of s. 82(1) there is a right of appeal under that section. A more difficult question might have been whether she is always *required* to make an immigration decision in response to representations received. This issue does not arise in the two cases before the court but has arisen in immigration cases in the past. The question of whether fresh representations raising an asylum claim should be met with a fresh immigration decision giving rise to a right of appeal was considered by the Court of Appeal in *R v IAT ex p SSHD* [1990] Imm AR 492; and the High Court in *R v SSHD ex p Kazmi* [1995] Imm AR 73 see Macdonald 4th edition (1995) para 12.101 and 105. Unguided by further submissions from counsel I rather suspect that a further immigration decision is necessary where a different claim has been made to that determined previously.

29. Although the IJ was wrong to conclude as he did in the case of Etame it is not necessary to quash the decision on this ground alone, because if the defendant's submissions are correct there is a right of appeal to be exercised from abroad and time for lodging such an appeal does not run until the claimant is removed. This judgment is declaratory of the existence of the right of appeal and will be binding on any future immigration judge determining the question.

30. On the other hand if the claimant's submissions on the principal issue are to be preferred the relief to be granted will not only be declaratory of the right of appeal but would go on to state that the right of appeal can be exercised inside the United Kingdom before removal.

" Has made a claim"

31. It is clear that on the literal meaning of the words in s. 92(4) (a) any historic claim to asylum or human rights protection would generate a right of appeal to be determined before removal where an immigration decision is taken. Mr. Husain submits that the literal meaning of the statutory language is to be deployed and he relies on recent Tribunal authority to that effect.

32. In the case of *ST (s. 92(4)(a): meaning of has made) Turkey* [2007] UKAIT 00085 the AIT chaired by Mr. Ockelton determined that the literal meaning of these words was the appropriate statutory meaning of the words. The AIT were aware of the odd consequences of this reading and noted:-
    i. An in-country appeal would follow where a historic asylum or human rights claim had been made even though the subsequent immigration decision may not be in response to a claim to such issues.
    ii. An in-country right of appeal would follow even if the previous human rights/asylum claim had been made in the distant past on a previous visit to the UK as there was nothing in the statutory language to cut down the reach of such a historic claim.

33. The AIT noted that the submission to the contrary (faintly advanced by the Home Office presenting officer in the case before it) depended on:
    i. reading the meaning of the statutory term claim to asylum in the light of the immigration rules defining fresh claim, and
    ii. ascribing a meaning to the language of the 2002 Act that was only spelt out in the 2006 Act that had yet to be brought into force.

34. Mr. Husain's principal submission in support of these applications was that both claimants had made asylum claims in the past and therefore had an in-country right of appeal against the immigration decision of refusal to revoke their deportation orders whatever the nature of the representations that led to these decisions. This submission was firmly based on the decision of this experienced AIT and he further invited the court to give weight to this decision because it was a conclusion of a specialist tribunal experienced in immigration and asylum law citing Lady Hale in *AH (Sudan) v SSHD* [2007] 3 WLR 832 at [30] as applied by the CA in *AS and DD (Libya) v SSHD* EWCA Civ 289 at [15].

35. Whatever the correct answer to this question of statutory interpretation, I reject this further submission. On a pure question of statutory construction the higher courts will decide the meaning of the words used by Parliament for itself. They do not give weight to the conclusions of the AIT. This is not a case concerned with the application of legal principles to a particular factual context, where the cases show that an experienced AIT can be assumed to have applied the law correctly unless the contrary is shown. The AIT enjoys no inherent advantage over this court in question of statutory construction, indeed the reverse is the case. In addition to the court's inherent expertise on the principles of statutory construction, it has had the considerable advantage not afforded to the AIT of detailed submissions by eminent counsel on the relevant principles that guide the determination of the question. As it happens, the SSHD has sought to challenge the decision of the AIT in *ST (Turkey)* and I was the judge who granted permission to bring such a challenge in January 2008.

36. Mr. Husain next submitted that it was appropriate to give the statutory words their literal meaning as the words were plain despite what he recognised were anomalous consequences in so doing. He placed emphasis on three principles derived from the authorities:-
    i. Where the right of appeal had been afforded by Parliament it formed an important right of access to the court by the individual and such a right protected by common law principles of construction was not to be cut down or diminished unless ambiguous words compelled that conclusion: *R v SSHD ex p Saleem* [2001] 1 WLR 443 at 449D, 452B, and 457H.
    ii. If the plain meaning of the words was liable to give peculiar results and the potential for abuse in the form of repeated applications, it was not for the court to read down the words or read in limitations but it was for Parliament to legislate to prevent such abuse in the light of the consequences as revealed by judicial interpretation *R (Kariharan) v SSHD* [2003] QB 933 at paragraph 30 and 36.
    iii. In any event in the 2002 Act Parliament *had* provided for substantial powers in s. 94 (2) for the Secretary of State to certify a human rights or asylum claim as manifestly unfounded and thus prevent an appeal being pursued in country. There is a corresponding match between the breadth of s. 92(4)(a) and the precise power to certify certain appeals that rely on it as abusive under s. 94(2).

37. Ms Laing QC for the defendant recognised that the literal construction of the words had the effect and consequences as found by the AIT and relied on by the claimants in their first broad head of argument. She submitted however that there were other principles of statutory construction other than the principle of giving effect to the plain words of Parliament:
    i. The words should be construed in the context of the scheme of the statute as a whole.
    ii. If the consequences of adopting a literal construction were so peculiar as to be characterised as absurd, then principles of statutory construction required the court to read the words to avoid the absurdity.
    iii. In identifying the context of the statute and the mischief to be guarded against it is permissible to have regard to the notes on clauses.

38. The first two propositions are well-established principles of statutory interpretation see *Bennion on Statutory Interpretation* (Fifth Edition) 2008 at section 190, and Part XX1. See also *Aharon Barak* "*Purposive Interpretation in Law*" Princeton (2005) at p. 80 "Deviating from the language of the text to avoid absurdity".

39. It is was established in *R (Westminster City Council) v National Asylum Support Service* [2002] I WLR 2956 per Lord Steyn at 2959 B-C that explanatory notes on clauses are admissible aids to the construction of the context of the statute, and the mischief to be legislated for. It is further clear from the subsequent decision of the House of Lords in *R v Montilla* [2004] 1 WLR 3141 [2004] UKHL 50 delivered by Lord Hope at [33] to [36] that headings and side-notes are now also to be admitted for a similar purpose, and that older authority to contrary effect is no longer good law.

40. The notes on clauses indicate that the draftsman contemplated appeals in respect of immigration decisions made in response to claims made in country "during a current period of stay". This is inconsistent with a purely historic claim. I accept that such notes are only admissible as to context and do not discharge the court's duty of ascertaining the meaning of the words used by Parliament. Despite the limited assistance such aids can give, they are a clear pointer away from the literal meaning. When added to the rule against absurdity and the

rule of construction of a section in the statutory context, they undermine the starting point of a literal construction of the words used.

41. On this first issue I prefer the submissions of the defendant. Parliament has carefully defined the cases where there is a right of appeal; the grounds of an appeal that may be advanced and the circumstances when the right of appeal may be exercised in the United Kingdom prior to removal. It is obviously important that there is an in-country appeal in asylum and human rights claims at least engaging Article 3 ECHR. A claimant with a current well-founded fear of persecution may face irreparable harm on return if his or her claim is dismissed and the appeal can only be exercised from abroad but there is no reason why a purely historic protection claim should require or deserve an in country appeal.

42. Whilst there may be cases where the process of admission and removal may give rise to two immigration decisions and potentially two occasions for an appeal, this is no indication that in every case Parliament concluded that every subsequent appeal should be heard in country. If two claimants seek to revoke a deportation order purely on the basis of compassionate circumstances personal to them that do not engage a protection claim too it is entirely illogical that they should be treated differently as to whether their appeal should be heard in country by the irrelevant happenstance of whether one of them had made a protection claim in the past that has no bearing on their present predicament or claim to remain.

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 a construction is consistent with the requirements of an effective remedy where an important right is concerned and consistent with the minimum 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 to which further consideration will be given later in this judgment. 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. In particular it would not be surprising that appeals against a refusal to revoke a deportation order would be heard abroad following removal as consideration of such revocation would normally follow after the decision has been implemented and the person removed in accordance with the deportation order.

"*an asylum claim or a human rights claim*"

44. Mr. Husain's alternative submission was that if s. 92(4) required a nexus between the asylum or human rights claim and the immigration decision that generated the right of appeal that nexus was established in these cases. Both had made representations on human rights grounds, Art 8 in the case of Mr. Anirah and Art 3 in the case of Mr Etame and the latter had made an asylum claim as well. Both had therefore made claims that to remove and exclude them from the United Kingdom would be inconsistent with the United Kingdom's obligations and both were therefore claims within s. 113. It was illegitimate to construe "claim" in s. 92(4) by

reference to the immigration rules and the procedure for determining whether a claim is a fresh claim or not as the rules cannot govern the meaning of primary legislation. It was further illegitimate to construe the 2002 statute in the light of the amendments that had subsequently been made and had not been brought into force.

45. These appeared to be formidable submissions and unlike the submissions based on a historical claim to protection had no apparently absurd consequences at odds with the scheme and policy of the 2002 statute as a whole. There was nothing inconsistent with the explanatory notes Further Mr Husain relied on an obiter remark of Laws LJ in the case of *JM v Secretary of State for the Home Department* [2006] EWCA Civ 1402; 4th October 2006 (unreported) where in response to a submission made on behalf of the Home Office that the relevant provision of s. 92 applies only to a fresh asylum or human rights claim, his Lordship said:

> "I am not sure that this is right as a matter of law …but it is plain if the Secretary of State certifies that the human rights claim is clearly unfounded, as he may do under s. 94 of the 2002 Act then there is no in-country appeal"

The learned editors of Macdonald *"Immigration law and Practice"* (7th Edition) (2008) at 18.25 note this observation and the AIT decision in *ST Turkey* and prophetically anticipate that "further litigation can be anticipated" without offering their own opinions on how it should be decided.

46. Where there is a current and disputed asylum or human rights claim it would make every sense for the appeal by which the outcome is disputed to have suspensive effect and enable it to be brought before removal in order to give practical effect to the *non-refoulement* principle reflected in Article 33(1) Refuge Convention. It is obvious that a right of appeal against a decision that refuses recognition as a refugee by a person who has presented a credible arguable case that they face persecution or ill treatment on removal would be ineffective to prevent a breach on an international obligation if the challenge can only be made after removal to the place where the ill treatment is feared. You do not have to be persecuted to establish a well founded fear of persecution. It is neither necessary nor appropriate to prove the existence of a well-founded fear of persecution or substantial grounds for fearing a real risk of ill-treatment by being removed to see what happens.

47. Although the right to an effective remedy under Article 13 of the ECHR has not been enacted as a Convention right within the Schedule to the Human Rights Act 1998, it is apparent that the case law of the Strasbourg Court as to the requirements of an effective remedy to prevent a violation of Article 3 of the ECHR would need to be considered and taken into account by any court charged with examining whether removal would be a violation of a human right (see Human Rights Act 1998 s. 2 (1) and s. 6)).

48. In supplementary written submissions lodged after close of the oral argument, Mr Husain also prayed in aid Council Directive 2005/85/EC of the 1st December 2005 that applies to all asylum claims made after 1st December 2007.

49. Article 32 of the Directive concerns subsequent applications for asylum and Article 32(3) recognises that these may be subject to a preliminary examination as to whether new elements or findings relevant to qualification have been presented.

50. Article 39 (1) provides that:

> "(1) Member States shall ensure that applicants for asylum have the right to an effective remedy before a court of tribunal against the following.
>
> ……
>
> (c) not to further examine the subsequent application pursuant to Article 32.
>
> …….
>
> (3)Member States shall where appropriate provide for rules in accordance with their international obligations dealing with:
>
> (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;
> (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing the applicants to remain".

51. It will be apparent from this that the concept of an effective remedy does not always require suspensive effect where a further claim to asylum is made, but there must be an effective remedy where the further claim is not accepted as being sufficiently different from the earlier one to make a different outcome.

52. If the true meaning of the statute were to be determined only from the words used by the draftsman alone, I would conclude that Mr. Husain's second submission was correct and should be adopted. In my judgment, the passing remarks of Laws LJ noted at [45] above was doing no more than noting that the words of the statute itself did not give foundation for the Home Office submission.

53. However, Ms. Laing for the defendant relied on a further principle of statutory construction that Parliament in re-enacting the same words in a statute that have been the subject of prior judicial interpretation intends the words to have the same meaning in the absence of specific provision to the contrary. The principle is recognised in Bennion *loc cit* at section 201 and Part XIV "The Informed Interpretation Rule". A recent application of the principle in a different context is the decision of the House of Lords in *A v Hoare* [2008] UKHL 6 [2008] 2 WLR 311 per Lord Hoffman at [15]- [16].

54. The relevance of this principle to the present problem is as follows. In the Asylum and Immigration Appeals Act 1993 Parliament gave specific rights of appeal on asylum grounds in respect of immigration decisions that responded to claims for asylum. "Claim for asylum" was defined in s. 1 as "a claim made by a person whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from or required to leave the United Kingdom". In the case of *R v SSHD ex p Onibiyo* [1996] QB 768 the Court of Appeal had to consider two issues: first whether more than one claim for asylum could be made during one stay in the United Kingdom and it concluded that it could (p.781-2); second, when did a further claim for asylum during the same stay amount a claim for asylum within the meaning of the statute and thereby generating a further right of appeal? It was accepted by counsel for the asylum seeker on the basis of previous Court of Appeal authority that there had to be something different about the further claim in order for it to amount to a claim for asylum within the meaning of the statute. Sir Thomas Bingham MR agreed with this submission and the previous decision of the court but added his observations at 783H-784A.

> "The acid test must always be whether comparing the new claim with that earlier rejected and excluding material on which the claimant could reasonably have been expected to rely ion the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim".

55. Ms. Laing submits that Parliament has enacted successive statutory references to claim to asylum against the background of this authority and must have intended that the words used had the same meaning as under the 1993 Act. Whereas it was necessary to explain in Rule 353 the Immigration Rules (cited above at [24]) when a further claim would be treated as a fresh claim using the guidance first given in *Onibiyo* as the basis, it was not necessary for the draftsman to spell out the *Onibiyo* definition of claim for asylum in the statute as the informed interpreter would already know what the words meant. This submission therefore responds to two of the most persuasive reasons relied on by the AIT in *ST* and adopted by Mr. Husain:-
    i. This is not a case of the Immigration Rules defining the statute. It is a case of the drafters of the statute being content to adopt and leave alone the judicial interpretation of the same words in an earlier statute.
    ii. No assistance can be gained in favour of the claimants' interpretation by the fact that in the 2006 Act the draftsman did expressly define claim to asylum by a reference back to the immigration rules that *inter alia* explain when a claim is a fresh claim. In this light the 2006 statute was removing ambiguity and clarifying the law but not seeking to change it. For a recent example of such an approach in the context of immigration and asylum see *R (Khadir) v SSHD* [2006] 1 AC 207 at [35] and [36].

56. In the end, I have been persuaded that these submissions are correct, and that only a first claim to asylum or a fresh claim will result in an in country appeal under s. 92(4). Admittedly there was no body of case law concerned with fresh human rights claims that Parliament might have been reflecting in the 2002 Act, but the similarities between a claim that the UK's obligations under the Refugee Convention would be violated with the same proposition by reference to the ECHR suggest that the outcome in the asylum context should also apply to the human rights one. Indeed it would be absurd if it did not.

57. The defendant's construction is consistent with international principles and the EU Directive. Where a claim for protection has been considered and rejected and the rejection upheld on appeal there is no violation of the principle of *non-refoulement* in removing the person concerned. Where a repeat claim is made that is not a fresh claim for protection there is accordingly no need to grant a suspensive right of appeal. Certification of such claims may not always be appropriate. The claim itself may be credible and genuine but merely unsuccessful. It is preferable not to risk challenge by certifying such a claim as unfounded rather than indicating it is not a claim that generates a suspensive appeal.

58. The defendant's construction would also resolve the riddle of whether a repeat immigration decision of the same kind as one taken previously is always necessary. If every such application generated a fresh in country right of appeal, I doubt whether the Secretary of State would respond to a claim for asylum by a fresh immigration decision unless and until satisfied that it was a fresh claim. The present practice suggests that fresh representations will be responded to by fresh decisions but only fresh claims generate in-country rights of appeal. In a

sense this is generous to those making such representations because they can at least be assured that there *will be* a decision responding to the claim. Further the defendant's construction ensures that there is a right of appeal available to challenge the decision although one that can only be exercised from abroad. This is less draconian than a s. 96 certificate that would remove all rights of appeal. It leaves the repeat claimant who has not made a fresh claim in the same position as a first time claimant whose claim is considered so weak that it can be the subject of a s. 92(4) certificate.

59. Mr. Husain submitted in his written reply that in the 2002 Act Parliament was setting out a comprehensive new set of appeal provisions for asylum claims and provided for certification where it felt necessary. Implicitly Parliament had moved on from the *Onibiyo* decision that a fresh claim was the trigger for a suspensive right of appeal. I do not accept that submission and conclude that there is symmetry about the defendant's submissions as to the working of the statutory scheme that is missing from those of the claimants. Moreover, this is a symmetry now supported by the decision of the Court of Appeal in *ZT (Kosovo)* to be further considered at [62] below.

60. In an asylum case, the EU Directive is applied by first requiring the SSHD to consider whether the claim is a fresh one. If it is, it should either be allowed or be subject to a suspensive appeal in country. Whilst the decision as to whether this is a fresh claim is one for the defendant Secretary of State to take, it will be closely supervised by the courts on judicial review. The test is an objective assessment of difference in respect of the materials relied on and the assessment of a different outcome. This has been said not to be a demanding test see *WM (DRC) v SSHD* [2006] EWCA Civ 1495 at [7]. The court is not substituting itself for the decision maker and if the objective evaluation depends on the assessment of the credibility of the new material the review question focuses whether it was open to the decision maker to reach the conclusion that he did (see further observations of Buxton LJ in *WM (DRC)* at [16] to [19]). But if the objective analysis of the materials leads to the conclusion that the outcome might well be different it will not be open to a reasonable Secretary of State properly directing himself to certify the claim: see Lord Bingham in *Razgar v Secretary of State* [2004] AC 368 at [17]. In all cases where part of the analysis of the legality of the decision turns on the assessment of real risk, the principle of anxious scrutiny applied in protection claims requires the court to assess what the new material might well establish. If the court performs this function in a judicial review of a fresh claim decision it is supplying the effective remedy required both by Article 13 of the ECHR and Article 33 of the EU Directive. If it does not I doubt whether it would. Where it has been lawfully concluded that the claim is not a fresh claim, then nothing in the Directive or the Refugee Convention requires a suspensive appeal to be exercised in country.

61. In an Art 8 human rights case such an appeal from abroad may not be futile notwithstanding the absence of the appellant. It is not the case that an Article 8 appeal invariably requires suspensive relief, particular where the decision challenged is a second refusal to revoke a deportation order. In Mr Anirah's case, for example, it can take into account not only the passage of time since the dismissal of the original appeal, but also the fresh circumstances including the continued existence of family ties and the absence of criminal activity by the appellant. It can also take into account refinements and advances in the applicable law.

62. The defendant's construction is materially supported by the decision of the CA in *ZT (Kosovo)* [2008] EWCA Civ 14 (24th January 2008) where the court was considering a case that had been certified under s. 94 of the 2002 Act on the basis that the country of origin was on a white

list of presumptively safe countries. Sedley LJ was critical of aspects of Home Office in determining such claims and said at [17] to [18] :-

> "In my judgment the process required by the 2002 Act and the Immigration Rules where an application has been rejected and then renewed is essentially the following. First, under §353, the Home Secretary needs to consider whether she now accepts the claim: it is clear from the wording and structure of §353 that this does not depend on its being a fresh claim within the meaning of the rule: the option of acceptance is untrammelled. If the renewed claim is rejected but contains enough new material to create a realistic prospect of success on appeal, the Home Secretary must so decide and her refusal, being a refusal of a fresh claim, can then be appealed. If, however, the Home Secretary lawfully decides that it is not a fresh claim, she does not need to consider whether, having rejected it, she should also certify it as clearly unfounded; for, not being a fresh claim, its rejection is not appealable at all, whether in-country or out. It is only, therefore, to a first claim that the process of certification is relevant. This will, however, include a certified claim which has been varied or added to by a further application while an appeal against refusal is still open or pending. §353 does not apply to such a claim, and it is accordingly here alone that the question of lifting an extant s. 94 certificate can arise.
>
> Thus, far from a renewed claim such as the present one going straight into the s. 94 process, its proper destination is §353. Applying this rule, the Home Secretary should have decided whether now to accept the claim and, if she decided to reject it, whether it was nevertheless a fresh and therefore appealable claim. If it was, the claimant would have secured what he wanted, which was an in-country right of appeal. If it was not, he had no further recourse: his original claim had been certified; he would now have nothing further to appeal; and the Home Secretary would have nothing further to certify".

For reasons already noted no one suggests that there is no right of appeal at all in these cases, but the reasoning is powerful support for the proposition that what determines whether there is an in country right of appeal is whether there is a fresh claim or not.

Second Issue Fresh Claim in Etame

63. I now return to the question of whether the subsequent representations by Mr. Etame did amount to a fresh claim within the meaning of the rules and the guidance of the Court of Appeal in *WM (DRC)* noted above.

64. The AIT in its decision of 3rd August 2006 accepted that the claimant was a homosexual and that he was beaten up and assaulted so severely that it resulted in him being in hospital, but they were unable to accept his assertion as to how the injuries were caused and specifically doubted his claim that the injuries had been inflicted in prison. It considered that the account that the claimant gave in his evidence of daily torture in prison made it unlikely that he would be in a fit state to escape, and that therefore either the ill-treatment claimed or the ability to escape or both was false. It had medical evidence in the form of a letter from a community

psychiatric nurse as to three physical problems including injury to the anus and psychological sequela. It did not rule out that his problems were connected with an affair with son of the police chief but in the end concluded that there was "some local difficulty in his home village arising from his sexual activity". The Tribunal did not consider that this state of affairs entitled him to asylum in the United Kingdom. These difficulties would not be replicated on relocation to the capital Yaoundé because the information from the British High Commission was that although there discrimination against homosexuals and homosexual activity was a criminal offence there were few prosecutions other than crimes against minors or rapes, and homosexuality was effectively tolerated in Yaoundé. Further the Tribunal took into account that asylum had not been claimed in the first country of potential asylum and considered this undermined credibility.

65. The fresh evidence the claimant now relies on consists of the following:-
    i. There is a full statement from the claimant detailing anal rape in Douala prison and sexual torture including the use of a flick knife to the anus by fellow prisoners. He says he was too embarrassed and traumatised by the nature of the injuries to spell out the specifically sexual nature of the ill treatment he suffered in Douala prison in Cameroon.
    ii. There is a statement from a GP who is a forensic medical examiner with considerable experience in medico-legal aspects of asylum claims. She found evidence of 3 distinct unsutured scars one above the groin and two immediately above the applicant's anus. She says "in my opinion the scars above his anus are highly consistent with injury by a thin sharp knife. They are injuries for which it is difficult to give any causation other than assault by another person. The lack of permanent evidence of direct trauma to the anus is still consistent with the injuries described". She further points out the well-recognised reticence that male rape victims may have in describing sexual assaults to others he is not familiar with.
    iii. There is an expert report from a social anthropologist with special expertise in Cameroon who gives expert evidence of sexual abuse of prisoners in prison by guards and inmates, with those known to be homosexual at particular risk. The expert further gives evidence of the practice of sending prisoners on work gangs to places outside the prison (which is how the claimant says he managed to escape) and the practice of remanding those suspected of sodomy charges in custody. He responds to the information from the High Commission by the observation that the fact that many of these cases do not come to trial disguises a higher profile where successful prosecution and sentence might have been noticed. He confirms the supporting contemporary evidence of systemic discrimination throughout Cameroon against those who are homosexual.

66. The response of the Secretary of State to this material is contained in the letters of the 15th May 2007, 25th May 2007 and 28th January 2008. Putting the three decisions together it appears to me that the Secretary of State was informing the claimant that his case did not amount to a fresh claim with reasonable prospects of success because:-
    i. As to the evidence of rape he could complain to the police about this and receive adequate state protection.
    ii. It is not unreasonable to expect the claimant to relocate to one of the bigger cities in the Cameroon such as Douala or Yaoundé and behave discreetly there so as not to attract police attention.
    iii. There is no evidence that societal prejudice against homosexuals has resulted in numerous actual prosecutions of homosexuals although there is some evidence of detention of those accused of sodomy.

67. It is apparent that the claimant's further material is fresh, credible and was not available to be called at the original appeal hearing either because the experts were not known to the claimant's former solicitors or the sexual basis of his mistreatment in prison was too difficult for the claimant to address.

68. The central question is what impact might it have had on the AIT if the case was reconsidered there. The AIT did not accept significant parts of the claimant's case and drew adverse inferences from the delay in putting forward the case he did and exaggeration of what had occurred to him in prison.

69. In my judgement the central issue for the Secretary of State was whether this new material created a realistic chance that a fresh appellate body would accept the claimant's case that he had been subject to serious sexual assault in prison. If the appellate body were to conclude that the claimant might well have suffered such treatment in such circumstances, then it would be difficult to conclude that there was no serious risk of harm on return:-
    i. Delay in making a claim has little weight if there is an assessment that the claimant has indeed been persecuted and/or severely ill treated before coming to the UK as claimed.
    ii. Other doubts about credibility were made in the absence of objective material that suggests the claimant's case is consistent with known country conditions as to the treatment of homosexuals in Cameroon, and that his inflated accounts of daily torture may have been a way of avoiding the embarrassment of explaining the regular rape and sexual torture he claims to have experienced that he objectively supported by medical findings.
    iii. The characterisation of the claimant's problems as a local difficulty would not be sustainable if it transpired that he had been raped and sexually tortured in state facilities in one of the principal cities of the country Douala.
    iv. If the claimant might well have had difficulties resulting in an affair with the local police chief's son and had been remanded in custody in suspicion of sodomy and had been sexually tortured there by officials and prisoners with official impunity, he would be significantly worse off than the generality of men of homosexual orientation who had come to no adverse attention outside their local community.

70. Whilst past persecution on sexual orientation social group grounds is neither necessary nor sufficient to sustain a claim to asylum or human rights protection, it puts a claimant for protection in a significantly better position if he can demonstrate it. As the EU Qualification Directive 2004/83/EC Article 4(4) puts it

> "the fact that and applicant has already been subjected to persecution or serious harm …is a serious indication of the applicant's well- founded fear of persecution or real risk of suffering harm unless there are good reasons to consider that such persecution or serious harm will not be repeated".

71. The difficulty that I have with the decision letters responding to this material to date is that they do not address any of the above considerations. In my judgement the material presented was of sufficient coherence and relevance to undermining the previous appellate consideration that it required these consequences to be addressed. Further the Secretary of State's own response to the evidence of anal rape would be wholly inadequate if directed to the core allegation that he was raped in a state institution with at least state connivance in sexual torture of homosexuals. If this might have happened sufficiency of state protection would not be an answer to the claim.

72. Beyond these matters there is concern that references to avoiding persecution by discreet behaviour are mis-directions in law, because it is now established by the case of *J v SSHD* [2006] EWCA Civ 1238 that a person should not be required to give up a way of life that is fundamental to his or her identity as a human being to avoid ill treatment of a severity as to amount to persecution. Such a principle needs to be applied in the context of concrete facts as to way of life and potential risk of serious harm. In this case outside the risk of sexual torture of homosexuals whilst on remand for sodomy charges, I am uncertain as to whether evidence of persecutory harm for those who are not discreet exists for the Cameroon. This merely serves to emphasise the importance of whether the claimant has been remanded in custody in Douala prison as he claims.

73. In my judgement applying the well-established principles of anxious scrutiny to ensure that there is an effective remedy appropriately disposing of the claim to be a fresh claim, the defendant's decision is flawed and should not stand.

74. The appropriate remedy is for the decision to be set aside and remitted to the Secretary of State for reconsideration according to law in the light of this judgment.

Conclusion

75. For the reasons given above I conclude that neither appellant has an in-country appeal as of right simply by virtue of having made a protection claim or having made fresh representations supported by different material in pursuit of such a claim.

76. In Mr. Anirah's case it is not claimed that the representations amounted to a fresh claim. He will have a right of appeal from abroad. As previously noted this is an appeal can examine whether his continued exclusion from whatever family life he enjoys with his children in the UK can be convincingly justified for one or more reasons related to public order. This is not just a sterile repeat of the previous decision, and there would be serious grounds for requiring a complete re-evaluation in the light of developments. As Mr. Husain points out:-

    i. The test of exceptionality applied in Mr Anirah's appeal has now been generally disapproved by the House of Lords in *Huang v SSHD* [2007] 2 AC 167. The issue is whether continued deportation is a fair balance between the competing interests.

    ii. Exceptionality was a particularly inappropriate test to apply in a case of deportation of someone who had been admitted for permanent settlement in the UK, and has some considerable measure of integration here. This is not a case about departing from the policy of the rules as to who should be admitted into the UK in the first place. The Immigration Rules relating to deportation HC 394 (at paragraph 364) make clear that where human rights principles do not themselves require the deportation order to be revoked, it will only be in an exceptional case than a purely domestic balance of those liable to deportation will come down in their favour.

    iii. The policy of seeking the deportation of those who have committed serious crimes is a relevant starting point in the balance, but the content of Article 8 rights is more deep-rooted than the current state of Ministerial policy. Family life entered into with leave and that cannot be replicated and relocated elsewhere should be respected and not interfered with unless a proportionate response to a pressing social need justifies it. Despite the particular iniquities of drug trafficking Strasbourg decisions since the land mark case of *Boultif v Switzerland* (2001) 33 EHRR 1179 have demonstrated that where there is no longer a risk of re-offending respect for the family life of drug offenders may weigh

more heavily than the public interest in a deterrent policy, see for example *Amrollahi v Denmark* 11th July 2002

iii. The passage of time in a revocation case is of particular importance in Article 8 cases. A number of decisions from Strasbourg have stressed that even where deportation is appropriate in principle it may be disproportionate if it is open ended and of indefinite duration.

77. For Mr. Etame, access to a suspensive appeal on the merits is through a decision of whether the claim for protection is a fresh one or not. This is a decision for the Secretary of State subject to the close supervision of the court and I have concluded that the present decision is flawed and requires revisiting. If it is concluded on reconsideration that the claim is a fresh one, but it is still refused, he will have access to a right of appeal before removal. If it is not, then this is because there are no real prospects of success in establishing a protection claim. His right of appeal from abroad may be somewhat redundant in those circumstances although could operate as a final check on his safety in the event that the risk of ill-treatment remains a real and immediate one.