MA (Illegal entrance – not para 395C) Bangladesh [2009] UKAIT 00039

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Procession House
On 7 August 2009

Before

SENIOR IMMIGRATION JUDGE ALLEN

Between

MA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr F Chaudhry, of IAS (Manchester)
For the Respondent: Mr J Parkinson, Home Office Presenting Officer

Section 10 of the Immigration and Asylum Act 1999 has no application to an illegal entrant to the United Kingdom and hence, as a consequence, neither does paragraph 395 of HC 395.

DETERMINATION AND REASONS

1. The appellant is a national of Bangladesh. He appealed to an Immigration Judge against the Secretary of State's decision of 29 October 2007 to remove him as an illegal entrant.

2. It is not necessary to go into the substantive issues of the appellant's claim since there is no challenge to the Immigration Judge's adverse credibility findings and his conclusion that the appellant would not be at risk on return to Bangladesh. At issue is the matter considered by the Immigration Judge at paragraphs 27 to 29 of his

determination. It is perhaps helpful if I quote those paragraphs in full as they appear in the determination promulgated to the parties:

> "27. As a starting point it is perhaps appropriate to address the concern expressed by Dr Chaudhry with regard to his reliance on paragraph 395(C). I have heard the representations on this aspect from both Dr Chaudhry and from Mr Burns, and I conclude that I agree with the interpretation of the Home Office. Dr Chaudhry contends that the wording on a Notice of Immigration Decision to be found on Form IS151B requires consideration of paragraph 395 and thereafter paragraph 364 of the Immigration Rules. In this case, I am quite satisfied that that is not the case. The wording grammar is of relevance. It states:
>
> > 'Decision to remove an illegal entrant/person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999 – Asylum/Human Rights Claim Refused.'
>
> 28. Dr Chaudhry submits that the reference to Section 10 of the Immigration Act and Asylum Act 1999 requires the Home Office to consider paragraph 395 of the Immigration Rules. The Home Office indicate that they do not agree and I support the Home Office contention. The Home Office case is based on the fact that there is a difference between taking relief pursuant to Section 10 on the grounds that the Appellant is an overstayer, as against the appellant being an illegal immigrant pursuant to Section 33 of the 1971 Immigration Act. Mr Burns submits, and I agree, that Section 395 does not apply if the appellant is an illegal entrant under the 1971 Act.
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> 29. Much is placed by Dr Chaudhry on the fact that the above paragraph recites both reference to illegal entrant and a person subject to administrative removal under Section 10 in the same sentence. With respect to Dr Chaudhry's analysis, I prefer the interpretation as submitted by the Home Office, namely that that title an IS151B sets out the circumstances in the alternative and you have to look at the various type of removal that is sought. This is not a case for removal on the grounds that the appellant is an overstayer. This is a case for removal where the appellant is an illegal immigrant. The relevant law is Section 33 of the 1971 Act and I conclude that the Home Office are right in stating that para 395 considerations do not apply."

3. The appellant sought reconsideration solely on the basis that, as was argued by Dr Chaudhry before the Immigration Judge, removal directions had been issued under Section 10 of the 1999 Act and therefore paragraph 395C was said to be patently applicable. A Senior Immigration Judge ordered reconsideration on the basis that the point was arguable.

4. The hearing before me took place on 7 August 2009. Dr F Chaudhry of the IAS (Manchester) appeared on behalf of the appellant. Mr J Parkinson appeared on behalf of the Secretary of State.

5. Dr Chaudhry relied on the grounds. He argued that removal directions had been made under section 10. He referred to a decision he had submitted of TE (Eritrea) [2009] EWCA Civ 174 and argued that it was relevant to the issue. There had been a failure to consider the paragraph 395C criteria and the decision was therefore materially flawed.

6. Mr Parkinson referred to what apparently used to be known as the PF1 and is now the form with the reference number 9836329, the front sheet to the Secretary of State's bundle to the Tribunal. Under the heading "Decision" the following is said:

> "On 29 October 2007 a decision was made to refuse to grant asylum under paragraph 336 of HC 395 (as amended), and on 29 October 2007 a decision was made to remove an illegal entrant from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971."

He argued that it was therefore the case that it was not a matter of removal by virtue of section 10, which did not apply to the appellant. The two documents should be read in concert. This was clearly a removal under the 1971 Act and not the 1999 Act. He made the further point that the appellant had never attended for interview and therefore it would have been impossible in any event, even if it were necessary to do so for the matter to be considered under paragraph 395C.

7. By way of reply Dr Chaudhry argued that the IS151B referred to removal directions under Section 10 and was applicable and had not been withdrawn.

8. I reserved my determination.

9. This appeal raises a short point on the ambit of section 10 of the Immigration and Asylum Act 1999 with reference to the form IS151B containing a notice of immigration decision. As Mr Parkinson has pointed out, the front sheet, as it were, to the Secretary of State's bundle refers to a decision being made to refuse to grant asylum under paragraph 336 of HC 395 (as amended) and on the same day a decision was made to remove an illegal entrant from the United Kingdom by way of directions under paragraphs 8 to 10 to Schedule 2 to the Immigration Act 1971. That is not of course a notice which complies or seeks to comply with the Notices Regulations, and the notice of immigration decision purportedly in compliance with those Regulations is the IS151B, the heading of which is as follows:

> "Decision to remove an illegal entrant/person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999/Asylum/Human rights claim refused."

10. The notice then goes on to refer to the appellant and the serving on him of form IS151A on 17 September 2007 informing him of his immigration status and liability to detention and removal and the decision to refuse his claim for asylum and/or human rights for the reasons stated in the attached letter and reference to the decision that had now been taken to remove him from the United Kingdom and his right of appeal.

11. At this point it is necessary to set out the relevant parts of section 10 of the Asylum and Immigration Act 1999. This states as follows:

"10. Removal of certain persons unlawfully in the United Kingdom

(1) A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if –

(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;

[(b) he uses deception in seeking (whether successfully or not) leave to remain;

(ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality, Immigration and Asylum Act 2002 (person ceasing to be refugee);] or

(c) directions […] have been given for the removal, under this section, of a person […] to whose family he belongs.

…"

12. It is not, I think, in dispute that the appellant is an illegal entrant to the United Kingdom. Indeed it is said at paragraph 9 of the Immigration Judge's determination that it had been the appellant's case that he had arrived illegally in the United Kingdom in November 1999 and since then had been working in the United Kingdom as a butcher. I see nothing in the wording of section 10 of the Immigration and Asylum Act 1999 to render it applicable to the appellant's case as an illegal entrant rather than a person who, for example, has only limited leave to enter or remain and does not observe a condition attaching to the leave or remains beyond the time limited by the leave. It would therefore not be lawful for the Secretary of State to remove the appellant from the United Kingdom in accordance with section 10 of the Immigration and Asylum Act 1999. It is clear from section 3(1) of the Immigration Act 1971 that a person who is not a British citizen:

"(a) …shall not enter the United Kingdom unless given leave to do so in accordance with [the provisions of, or made under] this Act;"

An illegal entrant is defined at section 33(1) of the 1971 Act as meaning a person:

"(a) unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, or

(b) entering, or seeking to enter by means which include deception by another person,

and includes also a person who has entered as mentioned in paragraph (a) or (b) above;"

Such a person may be removed by way of directions under paragraphs 8 to 10 of Schedule 2 to the 1971 Act.

13. If one returns to the notice of immigration decision in this case, it can be seen that, properly read, it covers a number of possibilities. I do not think the interpretation argued for by Dr Chaudhry before the Immigration Judge and before me that it is a decision in respect of a person subject to administrative removal under Section 10 of the 1999 Act can properly be made. The forward slashes in the heading clearly, in my view, indicate alternatives, though, as I pointed out to Mr Parkinson in the course of submissions, it would no doubt be of assistance if those acting on behalf of the Secretary of State would strike out the parts of the heading which are not applicable to the particular case so as to avoid potential confusion. It is therefore clear to my mind that a series of alternatives is postulated, and it is equally clear, bearing in mind that it would be unlawful for the Secretary of State to seek to remove the appellant under Section 10 of the 1999 Act for the reasons set out above, that it must be taken to be a decision to remove an illegal entrant under the 1971 Act.

14. If then one turns to paragraph 395 A-D of HC 395, it can be seen that paragraph 395A is concerned with persons liable to administrative removal in certain circumstances who prior to 2 October 2000 would have been liable to deportation. Paragraph 395B sets out the relevant circumstances, and I have quoted those above, from section 10 of the 1999 Act. Paragraph 395C then goes on to refer to all the relevant factors known to the Secretary of State to which regard will be had before a decision to remove under section 10 is given.

15. It is clear that the circumstances and the factors are relevant only to a section 10 removal and not to the case of removal of an illegal entrant. Had it been intended that these criteria were to be made to be applicable to the case of an illegal entrant whose removal was contemplated, then the Rule would have said so. There are no equivalent criteria in the case of the removal of an illegal entrant.

16. It is relevant to consider the decision in TE (Eritrea) to which Dr Chaudhry referred. This involved an Eritrean woman who had been in the United Kingdom since January 2003 and who had had an appeal against a refusal to grant asylum dismissed. She was given discretionary leave until the eve of her 18th birthday and, shortly before the expiry of that leave, she applied for an extension which, two years later, the Home Secretary refused. In the notice of refusal to vary leave it was said that there was a right of appeal on grounds including human rights grounds and it was said that all grounds for being allowed to remain or not being removed must be put forward on the appeal except those already argued and if there was no appeal or any appeal was unsuccessful she would be removed to Eritrea. Her appeal against this decision was dismissed and there was found to be no material error of law on reconsideration. The appellant appealed to the Court of Appeal on the basis that the Immigration Judge had erred materially in overlooking the Home Secretary's failure to address paragraph 395C of HC 395. For the appellant, it was argued that the consequence to her of effectively being put in the position of an overstayer, which she would be on the dismissal of any appeal against the refusal to vary and if the consideration of her removal would not occur until then, would put her in a position, as described by Sedley LJ, of near outlawry. Her argument that all of the issues arising or potentially arising in her case should have been addressed together was accepted by the Court

of Appeal. The principles set out in JM [2006] EWCA Civ 1402 were considered to apply with equal cogency in this case. There was no reason for variation and removal not to be considered together in the instant case. The Secretary of State undertook to allow an in-country right of appeal if the decision under paragraph 395C was adverse, and the judgment leaves open the form of order which would best achieve this.

17. It can be seen that this case is therefore materially different from the appeal before me. There is no question of the Secretary of State putting the appellant in a position where he is effectively committing a criminal offence by a failure to consider all relevant issues in his case at one time. Paragraph 395C issues simply do not arise for the reasons that I have set out above. Accordingly, TE (Eritrea) has no relevance to this appeal.

18. I therefore conclude that the Immigration Judge did not err in deciding that paragraph 395 considerations do not apply in this case, and his decision dismissing the appeal is maintained.

Signed

Senior Immigration Judge Allen