Neutral Citation Number: [2009] EWCA Civ 119

Case No: 1. C4/2008/1562 & No.2. C4/2008/1559

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE BLAKE
No.1 CO/11595/2007 & No.2 CO/5121/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2009

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
LORD JUSTICE LLOYD

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Between :

1. The Queen on the application of BA (Nigeria)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
2. The Queen on the application of PE (Cameroon)	**Appellant**
and	
1. Secretary of State for the Home Department **2. Asylum and Immigration Tribunal**	**Respondents**

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Mr Raza Husain and Ms Raggi Kotak (instructed by Messrs Turpin & Miller) for the **1st Appellant**
Mr Raza Husain and Mr Ronan Toal (instructed by Messrs Wilson & Co) for the **2nd Appellant**
Ms Elisabeth Laing QC (instructed by Treasury Solicitors) for the **Respondents**

Hearing date: Tuesday 10 February 2009

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Approved Judgment

Lord Justice Sedley:

1. Although the facts of these two cases differ, they raise a single issue of law: in the absence of a fresh asylum or human rights claim, is the right of appeal against the Home Office's refusal to revoke a deportation order exercisable from within the United Kingdom?

2. It is possible to crystallise the issue in this way for two main reasons. First, it has been common ground, and was accepted by Blake J at first instance, that a refusal to revoke a deportation order is an immigration decision within s.82 of the Nationality, Immigration and Asylum Act 2002 and so carries a right of appeal. Secondly, in neither case has the claim been certified under s.94 as clearly unfounded: such a certificate, provided it survived any challenge by way of judicial review, would bar the proposed appeals. Each claimant therefore has a viable extant appeal against a refusal to revoke a deportation order.

3. BA is a Nigerian national married to a British citizen with whom he has four children. He has lived here since 1988, first as a student and then by virtue of a grant of indefinite leave to remain on the basis of his marriage. He was, however, served with a deportation decision after his early release on licence from a 10-year sentence for drug importation. His appeal to the AIT on human rights grounds against the decision failed, and a deportation order was made. The Home Secretary agreed to consider representations on his behalf seeking revocation of the deportation order. BA by his counsel accepts that these representations did not amount to a fresh human rights claim. The Home Secretary for her part accepts that the new claim is not without foundation and has not sought to certify it as such. When nevertheless she declined to revoke the deportation order, BA's lawyers issued the judicial review claim which is now before us on appeal, contending that he was entitled to conduct his appeal against the refusal from within the United Kingdom.

4. PE, a national of Cameroon, entered the United Kingdom clandestinely and sought asylum. He did not appeal against the Home Office's refusal, and removal directions were given. But before they had been implemented he was sentenced to 12 months' imprisonment for having a forged passport and using it to obtain work. In consequence, the removal directions were supplanted by a deportation order. Against this PE appealed on refugee convention and human rights grounds. The appeal was dismissed, but he sought reconsideration by the Home Office. This was refused for reasons which were held by Blake J to be flawed: his case was held by Blake J to be based on further material which was "fresh, credible and … not available to be called at the original appeal hearing". The judge consequently quashed the decision that there was no fresh asylum or human rights claim and remitted it for redetermination by the Home Secretary. The consequence, if it is found to be a fresh claim, is that PE will either succeed on it or, if it is considered but refused, will have an in-country appeal against the refusal to revoke the deportation order. It is only if it is not found to be a fresh claim that he will need to fall back on the claimed entitlement to an in-country appeal against the refusal to revoke the deportation order which is in issue in this appeal.. But at that point, if it comes, he too will be affected by the issue to which this appeal relates.

5. In both cases, however, Blake J concluded that the right of appeal against a refusal to revoke the material deportation order, if it was otherwise well made, could only be exercised from abroad.

6. Section 92 of the 2002 Act makes the following provision:

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
>
> (2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2)(c), (d), (e), (f)[, (ha)] and (j).
>
> (4) This section 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, ….."

7. Among the classes of decision ranked by s.82(2) as immigration decisions are (j) a decision to make a deportation order and (k) a refusal to revoke such an order. S.92(2) makes the former, but not the latter, appealable in country. But where, as here, the appellant has made an asylum claim or a human rights claim while in the United Kingdom, any immigration decision, including a refusal to revoke a deportation order, is on the face of it appealable in-country by virtue of s.92(4)(a). The ground of appeal in each case will necessarily be that set out in s.84(1)(g):

> "that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

8. A human rights claim and an asylum claim are defined by s.113 of the 2002 Act:

> "asylum claim"
>
> means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,
>
> "human rights claim"
>
> means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c42)(public authority not to

> act contrary to Convention) as being incompatible with his Convention rights, ……

9. Nobody has been able to tell us what purpose was intended to be served by requiring claims to be made at a place designated by the Secretary of State, but no such place has ever been designated and, as will be seen, the provision has now been prospectively repealed.

10. Blake J, in a full and careful judgment, [2008] EWHC 1140 (Admin), concluded that the first argument advanced by the claimants - that on a purely literal construction of s. 92(4)(a), any historic asylum or human rights claim gave an in-country or suspensive right of appeal - failed because it would lead to an inexplicable and arbitrary distinction between individuals who were similarly placed. It followed that, although not spelt out, there had to be a nexus between the immigration decision against which the appeal was directed and the content of the initial claim for protection. Keene LJ refused permission to appeal against this much of the decision, and the application in this regard has not been renewed.

11. The issue we have to decide formed the claimants' fallback case. It was submitted that, if such a nexus was needed, it manifestly existed in each of the present cases. The claims now made by both appellants were human rights claims; that made by PE was also an asylum claim; both fell within the meaning ascribed to those words by s.113 of the 2002 Act. So much was accepted. The rest, in the submission of Raza Husain for the claimants, followed from the plain words of s.92(1) and (4)(a): there was an in-country right of appeal. For the Home Secretary, Elisabeth Laing QC accepted, as she continues to do, that this is literally so; but she contended, and Blake J on consideration accepted, that an informed interpretation (to use Bennion's classification) showed that only an out-of-country appeal was intended to be available where, as here, there was no fresh claim. Mr Husain responds that there is no justification for glossing the plain words of the statute, not least because in 2006 Parliament enacted an amendment which has the very effect for which Miss Laing contends but which has not been brought into force.

12. We have the advantage of an excellent exposition of each side's case in the skeleton arguments of counsel and in the judge's reasons for preferring the Crown's submission. The two arguments do not, however, meet head-on. Miss Laing's starts, in effect, where Mr Husain's ends. The question is whether the former is sufficient to roll the latter back.

13. What Mr Husain says is this. Given what he now accepts is the requisite nexus between the reasons advanced for revoking the deportation order and the initial claim for protection, the 2002 Act sets out Parliament's chosen control mechanism. This consists of the detailed range of powers given by ss. 94 and 96 to certify (subject to judicial review) that a claim is clearly unfounded. Such a certificate stifles an in-country appeal, but it is common ground that the present cases are not certifiable. It follows that each appellant has a viable appeal, and that there is no requirement that he must leave the United Kingdom in order to prosecute it. There is no additional requirement that the material claim must be a fresh claim in order to be conducted in-country.

14. This argument was acknowledged by Blake J to be formidable. Unlike the argument based purely on a historic claim for protection, this one had, he said, "no apparently absurd consequences at odds with the scheme and policy of the 2002 statute as a whole", and was not inconsistent with the explanatory notes to the statute. Laws LJ in *JM v Home Secretary* [2006] EWCA Civ 1402 had doubted, albeit obiter, whether s.92 carried any requirement for a fresh claim, although the editors of Macdonald Immigration Law and Practice, noting this (7TH ed., §18-25), had done no more than prophesy litigation on the question.

15. The argument which persuaded Blake J that the meaning of the words on the face of statute was not decisive, and which Miss Laing advances again before us, is based generically on the "informed interpretation" principle and specifically on the decision of this court in *R v Home Secretary, ex parte Onibiyo* [1996] QB 768. Since the principle is somewhat elusive, it is more useful to start with the decided case.

16. *Onibiyo* fell for decision under the Asylum and Immigration Appeals Act 1993, which by s.6 prevented the removal of a person who had "a claim for asylum" waiting to be determined. The appellant had made one unsuccessful claim for asylum, but before he had been removed had made another. Perhaps surprisingly, the statute had not overtly anticipated this situation. In this court Sir Thomas Bingham MR, giving the leading judgment, held that the entitlement not to be removed continued while any fresh claim, but not any untenable or merely repetitious claim, was processed. The logic of the decision was simple: a fresh claim was no less a claim for asylum than the initial claim, whereas a repeat claim was one which had already been decided and an untenable claim was no claim at all. It followed that only a fresh claim could prevent removal.

17. Miss Laing's contention is that the same logic applies under the 2002 Act: where s.113 defines both an asylum claim and a human rights claim as "a claim" of a particular kind, it likewise means only an initial asylum or human rights claim or a fresh one. Neither definition embraces a repetitious or enhanced version of an earlier claim. As developed below and initially before us, it appeared that the vehicle for this argument was a version of the doctrine, sometimes known as the Barras principle after the decision of the House of Lords in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, that

> "where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it" (per Viscount Buckmaster at 411).

18. As the judge noted at §53, the principle is elaborated by Bennion (Statutory Interpretation, 4th ed, §201 et seq) as positing that Parliament, where it enacts words found in an earlier statute and judicially interpreted in that context, intends the words to bear the same meaning if the new context is similar.

19. However, as the argument developed, Miss Laing, in my view wisely, rather than seek to impute to the legislature in 2002 an unexpressed intention derived from

Onibiyo, invited us simply to apply directly to the 2002 Act the same verbal logic as this court had applied to the 1993 Act. If this was done, the result was clear: "an asylum claim" and "a human rights claim", as defined in s.113, can be made once and once only. It is only a fresh asylum or human rights claim that can rank, once again, as "a … claim".

20. Mr Husain meets this contention by contending that the statutory contexts are too widely different to accommodate any such simple logic. An unaddressed problem arose under the 1993 Act when an unsuccessful claimant made a second claim for protection. The court, in addressing it, had to consider on the one hand the international obligation to return nobody whose life or freedom might be placed at risk, and on the other the possibility of abuse if return could be indefinitely deferred by repeat claims. The meaning ascribed in Onibiyo to "a claim" suitably met both objectives. The 2002 Act, Mr Husain submits, reflects the experience of the intervening years, including that which informed the Immigration and Asylum Act 1999. It contains, in ss. 94 and 96, comprehensive provisions for preventing abuse. To go beyond this by glossing the meaning of "a … claim" risks doing the very damage that the decision in *Onibiyo* avoided, by permitting the removal of someone who might yet turn out to have an entitlement to protection here.

21. The force of this argument is exemplified by BA's case. Although it was conceded that it did not amount to a fresh claim, Blake J at §76 pointed out that it was "not just a sterile repeat" of the previous claim and set out, with evident approbation, a series of reasons of law and of fact why this was arguably so. If Miss Laing is right, BA has even so no right to remain here while he attempts to establish this case before the AIT. Asked whether there was any discretionary provision (there is nothing in the Act or Rules) for allowing a removed appellant to return for the purpose of giving evidence in support of his own appeal, Miss Laing was unable to assist. The fact is that, especially but not only where credibility is in issue, the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases. The reason why the Home Office is insistent on removal pending appeal wherever the law permits it is that in the great majority of cases it is the end of the appeal.

22. Although some of the argument on both sides has been directed to Rule 353 of the Immigration Rules and the respective decisions of this court [2008] EWCA Civ 4 and the House of Lords [2009] UKHL 6 in *ZT (Kosovo)*, it seems to me that the applicability of R.353 and R.353A, which concern the processing of fresh claims, is consequential on what we have to decide. The main materiality of this pair of rules is that they postdate the decision in *Onibiyo*, emphasising that that decision was filling a gap which has now been separately filled.

23. What may have a more direct bearing is the decision of this court in *R (Kariharan) v Home Secretary* [2003] QB 933 on the meaning and ambit of s.65 of the 1999 Act, which for the first time gave a right of appeal to anyone who alleged that an administrative decision as to their entitlement to enter or remain had breached their human rights. This court held that removal directions were such a decision. Auld LJ, giving the leading judgment, was not impressed by the argument that a restrictive interpretation was necessary to prevent abuse. On the one hand, as he pointed out in §30, a last-minute challenge would not necessarily

be abusive: there might genuinely have been changes of circumstance with the passage of time. On the other,

> "If and to the extent that such an interpretation is open to abuse by repetitive last-minute claims, it seems to me that Parliament must be taken to have had that possible outcome in mind in including the anti-abuse and one-stop provisions in the 1999 Act … The fact that those provisions may not provide absolute protection against abuse … is no basis for a contrary construction, given the importance of the human rights in play."

24. Agreeing with Auld LJ, I said (§36):

> "It is not this court's job to fill gaps perceived by one party to litigation in Parliament's provision, especially when the mechanism is not to read the abuse provisions generously but to constrict the antecedent right to which they relate."

25. Miss Laing submits that her reading of the 2002 Act is consistent with the thinking in *Kariharan*: not only does it not constrict the appeal right, she submits; it enlarges it by allowing both a first and a second claim to be entertained, so long as the second is a fresh claim. This takes away more with the left hand than it delivers with the right. The purpose and effect of the Home Secretary's case is to restrict appeals on both asylum and human rights grounds. It does not, save incidentally, address abuse.

26. What does, however, directly address the present issue is the amendment of s.113 of the 2002 Act enacted by s.12 of the Immigration, Asylum and Nationality Act 2006. When (or possibly if) it is brought into force it will substitute the following definitions:

> "asylum claim –
>
> (a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, but
>
> (b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purpose of this Part in accordance with immigration rules.
>
> human rights claim –
>
> (a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c42)(public authority not to act contrary to Convention) as being incompatible with his Convention rights but

> (b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with immigration rules, …."

27. Since the Rules in their present form exclude new claims which are not fresh claims, only a fresh claim will, under this formula, rank as an asylum or human rights claim in any case where an earlier challenge to removal has been made and failed. Mr Husain asks why the antecedent legislation, which does not contain this limitation, should be read as if it did. Miss Laing says that it is because the 2006 amendment only makes explicit what is already implicit.

28. These arguments brings us back to where we started: is it implicit in the 2002 Act that a second human rights or asylum claim must be a fresh claim if it is to be pursued in-country?

29. One possible relevance of the 2006 amendment is that it spells out what has to be imported into the 2002 Act if the answer is to be yes. What has to be imported is an element of the Immigration Rules, which for most purposes lack the force of law, so as to give them legal force. This has the characteristics of innovation, not of declaration. That by itself is persuasive but inconclusive: it might have been done without reference to an external source. Another possible relevance is that the provision did not come into force on the passing of the Act: it awaits ministerial implementation. Mr Husain asks, first, why this is so and, secondly, why it has not yet been done. The inference, he submits, is that the amendment is designed to effect a substantive alteration to individual rights and remedies.

30. What in the end persuades me that Mr Husain's case is to be preferred is that Miss Laing's case for glossing plain words which are designed to honour international obligations of potential importance to the individuals concerned is not made out. That the implication for which she contends is both feasible and arguable is not in doubt; but it is impossible to say that it is necessary, whether to make sense of the appeal provisions or to prevent abuse of them. The provisions make sense without it, and by 2002 Parliament had legislated as it thought right against abuse. There is no call in these circumstances for the courts to intervene as they had to in *Onibiyo*.

31. I would allow these appeals accordingly.

Lord Justice Longmore:

32. In spite of the excellence of Ms Laing's argument and the undoubted force of the reasoning of Blake J, I agree that these appeals should be allowed.

33. I have been somewhat troubled by the inter-action of sections 95 and 104(4) of the 2002 Act. They both contemplate that once an appellant leaves the United Kingdom, his appeal is deemed to be abandoned or cannot otherwise proceed. There is pursuant to section 94(9) an exception to this if the Secretary of State has certified, under section 94, that the claim is clearly unfounded. But it would be odd if a clearly unfounded claim could be pursued while the appellant is out of the jurisdiction but one, which is arguable, had to be deemed to be abandoned, once the deportation order had been executed.

34. I do not rest my decision on these considerations because no argument was directed to section 104(4), although Mr Husain did rely on section 95. I am content to say that I agree with the reasoning of Sedley LJ.

Lord Justice Lloyd:

35. I agree that these appeals should be allowed. Blake J puts the position very clearly in his judgment, and the rival contentions have been admirably advanced by Mr Husain and Miss Laing respectively. There are a number of puzzling features of the legislation, not least the, as it were, contingent presence on the statute book of a new definition of asylum claim and human rights claim in section 113 of the 2002 Act which, it seems, would put the matter beyond doubt. If it is mere clarification, as Miss Laing submits, why have these provisions not yet been brought into force, in the period of almost three years that has elapsed since the 2006 Act was passed? In construing the existing provisions, it seems to me that we have to ignore the amendment which is not yet in force.

36. For my part, what weighs most strongly in favour of the Appellants' contention is the difference between the state of the relevant legislation as it was at the time when *Onibiyo* was decided, under the 1993 Act, and the position now, in particular with the 2002 Act. In *Onibiyo* the Court of Appeal held that one person might make more than one asylum claim during a single period of presence in the UK, and went on to consider the consequences of and limitations on that freedom, which was not expressly provided for in the 1993 Act. In so doing, Bingham MR described the necessary ingredients of a new claim, in terms which provided a clear model for the drafting of rule 353, though the rule does not include any "*Ladd v Marshall*" element.

37. Since then, the legislation has been changed several times, and it now includes several relevant provisions, including some with particular application to appeals. Not only has rule 353 been brought into its present form (substantially as a result of *Onibiyo*) but it is supported by rule 353A which provides for suspensive effect during the consideration of any further submissions.

38. Anticipating the possibility of an applicant seeking to rely successively on different matters, section 120 of the 2002 Act allows the Secretary of State or an immigration officer to require a person to state all reasons for wishing to enter or remain in the UK, all grounds on which he should be permitted to enter or remain in the UK and all grounds on which he should not be removed from or required to leave the UK. Such a requirement was expressed (under the heading "One-Stop Warning") at the end of the Home Office's letter dated 20 May 2005 giving notice to BA of the decision to deport him. Much the same warning is given with notice of a number of immigration decisions. Any relevant matter identified in a statement following such a requirement has to be addressed on an appeal against the decision in question: see section 85 of the 2002 Act. In turn, if on a subsequent appeal against another decision the person seeks to rely on matters which could have been but were not raised in relation to the earlier decision (whether or not on appeal), without there being any satisfactory reason for them not having been raised then, the Secretary of State may so certify, in which case, subject to judicial review as regards the certificate, no appeal will lie against the later decision: see section 96(1) and (2) of the 2002 Act. This provides a

protection against abuse of the process analogous to *Johnson v Gore Wood* [2002] 2 AC 1.

39. Moreover, an in-country appeal on human rights or asylum grounds can be excluded by a certificate under section 94 to the effect that the claim is manifestly unfounded, which is subject to judicial review but not otherwise challengeable. Exceptionally, a person affected by such a certificate can bring an appeal from outside the UK on the grounds that his removal would be in breach of international asylum or human rights obligations, he being treated for the purposes of the appeal as if he had not been removed: see section 94(9) and section 95 of the 2002 Act. A person who has been removed from, or has otherwise left, the UK without being the subject of such a certificate cannot rely on the ground of appeal that his removal was in breach of the UK's international obligations as regards asylum or human rights: see section 95. As Sedley LJ points out, an out-of-country appeal may well be of limited efficacy for practical reasons, but presumably section 94(9) was included to avoid a risk that the issue of the certificate itself, albeit subject to a sanction of judicial review proceedings, could be said to breach international obligations.

40. By contrast, if what is put forward as a fresh claim on asylum or human rights grounds is rejected by the Secretary of State as not amounting to a fresh claim, if that refusal is not the subject of successful judicial review proceedings, and if no certificate is issued under section 94, the result is different. The issue of the certificate would allow for an eventual out-of-country appeal on human rights or asylum grounds; its absence shuts off that possibility. That is the position of the present Appellants.

41. As it seems to me, the development of the legislative provisions relevant to appeals against immigration decisions, and the powers given to the Secretary of State to limit the scope for in-country appeals (and in some cases any appeal at all), since the 1993 Act, deprive Miss Laing's submissions of the foundation which they need. She argues that, in section 92(4)(a) of the 2002 Act, "an asylum claim", and correspondingly "a human rights claim", means an initial claim or a fresh claim, in the *Onibiyo* sense. I do not consider that this is a proper implication. Clearly it must be a current claim, rather than one which is only a matter of history. But I agree with Sedley LJ that, on the present state of the legislation, the balance between the requirements of immigration policy on the one hand and compliance with the country's international obligations on the other is drawn in this respect by eliminating any purely historic claim, and eliminating any claim which is the subject of a relevant certificate, but leaving other claims, whether or not accepted by the Secretary of State as fresh claims, to be dealt with appropriately and to be the subject, if rejected, of an in-country appeal under sections 82 and 92.