ASYLUM AND IMMIGRATION TRIBUNAL

MK (Accession – effect on asylum related appeals) Bulgaria CG [2007] UKAIT 00004

THE IMMIGRATION ACTS

Heard at	Determination Promulgated on
Taylor House, 5 January 2007	17 January 2007

Before
SENIOR IMMIGRATION JUDGE STOREY

Between

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr Ogunnubi of TM Legal Services
For the respondent: Mr Parkinson, Home Office Presenting Officer

From 1 January 2007 nationals of Bulgaria and Romania became EEA nationals. This has major consequences for any pending asylum-related appeals by such persons. If their appeal relates to an immigration decision made before 1 January 2007 – and it has not been withdrawn - it must be allowed, since removal of EEA nationals is unlawful except where public policy, health or security reasons require otherwise. (The only exception to this arises in respect of deportation decisions governed by regulation 8(2) of the Accession (Immigration and Worker Authorisation) Regulations 2006.)

Reported decisions on the current AIT list of Country Guideline cases relating to countries which have since acceded to the EU no longer afford current guidance. It is appropriate, therefore, that they be removed. It may be in an unusual case raising issues for example of chain refoulement, that there will still be a role for country guidance cases dealing with member

States of the EU, but clearly none of the existing cases dealing with the accession member States fall into that category.

DETERMINATION AND REASONS

1. The appellant is a national of Bulgaria. On 26 September 2006 the respondent made a decision to refuse to grant asylum and to remove him from the United Kingdom by way of directions under s.10 of the Immigration and Asylum Act 1999 (the 1999 Act). He appealed. His appeal came before me on 5 January 2007.

2. Before proceeding further, it is necessary to set out recent changes affecting nationals of Bulgaria and Romania as from 1 January 2007.

3. On 21 June 2005 a Treaty of Accession was signed between the 25 existing member States of the EU and the Republic of Bulgaria and Romania (OJ L 157/11). This Treaty provides that existing member States can, as derogation from the usual position under European Community law, regulate access to their labour markets by nationals of Bulgaria and Romania and make consequential adjustments to their ancillary rights of residence. This derogation can be applied for a transitional period of 5 years (from 1 January 2007 to 31 December 2011) with provision for a Member State to continue to maintain restrictions for a further two years in the case of disturbances to its labour market. Signed on the same date as the 21 June 2005 Treaty of Accession was the Protocol concerning the conditions and arrangements for the admission of the republic of Bulgaria and Romania to the EU. The Treaty of Accession has been implemented in the UK by the European Union (Accessions) Act 2006 (the 2006 Act). Section 2 of this Act states:

> " Freedom of movement for workers
> (1)The Secretary of State may by regulations make provision concerning –
> (a) The entitlement of a national of an acceding State to enter or reside in the United Kingdom as a worker;
> (b) Any matter ancillary to that entitlement."

4. This Act came into force on 1 January 2007. Under powers conferred by s.2 the UK government has introduced the Accession (Immigration and Worker Authorisation) Regulations 2006 (the "2006 Accession Regulations") which make provision in relation to the entitlement of nationals of Bulgaria and Romania to reside and work in the United Kingdom on the accession of those states to the European Union on 1 January 2007.

5. Of some importance is regulation 8 which makes transitional provisions to take account of the fact that on 1 January 2007 Bulgarian and Romanian nationals and their family members will generally fall to be treated under the immigration regime applying to EU nationals rather than under the third country national immigration regime set out in the Immigration Act 1971. Regulation 8 states:

> "(1) Where before 1 January 2007 directions have been given for the removal of a Bulgarian or Romanian national or the family member of such a national under paragraphs 8 to 10A of Schedule 2 to the 1971 Act or section 10 of the 1999 Act, those directions shall cease to have effect on and after that date.

(2) Where before 1 January 2007 the Secretary of State has made a decision to make a deportation order against a Bulgarian or Romanian national or the family member of such a national under section 5(1) of the 1971 Act –

(a) that decision shall, on and after 1 January 2007, be treated as if it were a decision under regulation 19(3)(b) of the 2006 Regulations[the Immigration (European Economic Area) Regulations 2006] ; and
(b) any appeal against that decision, or against the refusal of the Secretary of State to revoke the deportation order, made under section 63 of the 1999 Act or section 82(2)(j) or (k) of the 2002 Act before 1 January 2007, shall, on or after that date, be treated as if it had been made under regulation 26 of the 2006 Regulations.

(3) In this regulation-

(a) "the 1999 Act" means the Immigration and Asylum Act 1999;
(b) "the 2002 Act" means the Nationality, Immigration and Asylum Act 2002;
(c) any reference to the family member of a Bulgarian or Romanian national is a reference to a person who on 1 January 2007 acquires a right to reside in the United Kingdom under the 2006 Regulations as the family member of a Bulgarian or Romanian national."

6. (There were similar transitional provisions in relation to nationals from the 10 countries (the "A10") which acceded to the European Union in May 2004: see regulation 6 of the Accession (Immigration and Worker Registration) Regulations 2004, since replaced by provisions in the Immigration (European Economic Area) Regulations 2006 (the "2006 EEA Regulations")).

7. Regulation 2 of the 2006 EEA Regulations defines "EEA national" to mean "a national of an EEA State". "EEA State" is defined to mean:

"(a) a member State, other than the United Kingdom;
(b)Norway, Iceland or Liechenstein; or
(c) Switzerland".

8. Since Bulgaria and Romania are now member States, nationals of Bulgaria and Romania now come within the definition of EEA nationals as contained in the 2006 EEA Regulations, subject only to the special provisions under the 2006 Act and the 2006 Accession Regulations to which reference has already been made.

9. Regulation 11 of the 2006 EEA Regulations deals with the right of admission to the United Kingdom by an EEA national and certain categories of family members of an EEA national. Regulation 13 headed "initial right of residence" states:

"(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding 3 months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA state.
(2) A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.

(3) But-
(a) this regulation is subject to regulation 19(3)(b); and

(b) an EEA national or his family member who becomes an unreasonable burden on the social assistance of the United Kingdom shall cease to have the right to reside under this regulation."

The appellant's case

10. In response to a request by the Tribunal for clarification as to the Home Office policy position, the respondent submitted a letter dated 8 January 2007 from the Appeals Operational Policy Manager stating that:

> "The SSHD confirms that it is his policy as of 1 January 2007, that nationals of Romania and Bulgaria will only be removed on grounds of public policy, public security or public health."

11. The letter added:

> "It is emphasised that any EEA national has an unfettered right to reside in the UK for up to three months without exercising treaty rights".

(We take the latter to be a reference to regulation 13 of the 2006 EEA Regulations).

12. The decision under s.82 of the 2002 Act against which this appellant appealed was to remove from the United Kingdom by way of directions under section 10 of the 1999 Act. It was therefore an immigration decision within the meaning of s.82(2)(g):

> "a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b) or (c) of the Immigration and Asylum Act 1999 (removal of persons unlawfully in United Kingdom)".

13. That decision was made on 26 September 2006. However, by operation of regulation 8(1) of the Accession Regulations 2006, "[w]here before 1 January 2007 directions have been given for the removal of a Bulgarian or Romanian national or the family member of such a national under...section 10 of the 1999 Act, those directions shall cease to have effect on or after that date."

14. The legal effect of this regulation as applied to the appellant's case is that whilst the decision made against him still has effect (regulation 8(1) only deals with directions, not with a decision that a person is to be removed as such) that decision can no longer be acted upon since, as an EEA national, the appellant is someone who is lawfully in the United Kingdom and can only be removed on public policy grounds (under regulation 19 of the 2006 EEA Regulations). Accordingly the decision is not in accordance with the law and his appeal must be allowed on that basis.

15. It is not necessary here to analyse the extent to which the new position of nationals from Bulgaria and Romania is the same as or differs from that which faced nationals of the "A10" countries when their countries became member States of the European Union on 1 May 2004: the position of A10 nationals was dealt with in MH (Accession nationals not now removed) Slovakia [2004] UKIAT 00315. However, from the above it is clear that in any pending appeal by a national of Bulgaria and Romania where the decision is an immigration decision under s.82(2)(g), their appeal must be allowed.

16. From the wording of regulation 8 it is clear that the same will apply in the case of an immigration decision under s.82(2)(h) and (i). These identify as an immigration decision:

> "(h) a decision that an illegal entrant is too be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (control on entry: removal).
> (i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family)".

17. The question arises as to the proper disposal of other asylum-related appeals before the AIT by nationals of Bulgaria and Romania where there is an immigration decision under subsections of s. 82 other than s.82(2)(g)-(i). How should such appeals be dealt with now that they are EEA nationals? (Plainly appeals before the AIT will not be ones where the Secretary of State has made use of his power to certify appeals by EEA nationals: see s.94 (4) Nationality, Immigration and Asylum Act 2002, para 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the Asylum (First List of Safe Countries) (Amendment) Order 2006, SI No.3393.

18. The above question will not arise, of course, where the appellant chooses, as he may well do, to withdraw his appeal, in the light of the new legal position created by accession. In such cases a notice must be made under Rule 17(3) of the Asylum and Immigration Appeal Tribunal (Procedure) Rules 2005. However, if there is no withdrawal, then the following would appear to be the case.

19. If the immigration decision in question is one to make a deportation order or to refuse to revoke a deportation order (i.e. an immigration decision under s.82(2)(j) or (k)), special considerations, albeit somewhat different, also apply: see regulation 8(2) of the 2006 Accession Regulations.

20. Turning then to immigration decisions other than those under s. 82(g), (i), (j) and (k), the position is the same as that which arose in relation to A10 nationals in May 2004 and the approach to be taken now should be the same as taken then by the Tribunal in MH. By virtue of having become EEA nationals, nationals of Bulgaria and Romania are no longer in a situation where they face removal from the United Kingdom unless they pose a threat to public health, public policy or public security. In the absence of such considerations, it would be unlawful for the Secretary of State to seek to act on such a decision. The fact that they do not face removal from the United Kingdom means that appeals by such individuals should therefore be allowed (on EU grounds only) unless they are shown to pose such a threat.

21. In the light of the material change to the legal position of nationals of countries who have since acceded to the EU (the A10 and now Bulgaria and Romania), it is clear that reported decisions on the current AIT list of Country Guideline cases no longer afford current guidance. It is appropriate, therefore, that they be removed from this list. It may be in an unusual case raising issues for example of chain refoulement, that there will still be a role for country guidance cases dealing with member States of the EU, but clearly none of the existing cases dealing with the accession member States fall into that category.

22. For the above reasons:

23. The appeal in this case is allowed.

Signed:

DR H H Storey (Senior Immigration Judge)

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