26 November 2009

PRESS SUMMARY

BA (Nigeria) (FC) (Respondent) v Secretary of State for the Home Department (Appellant) & Ors; PE (Cameroon) (FC) (Respondent) v Secretary of State for the Home Department (Appellant) (Consolidated Appeals) [2009] UKSC 7
On appeal from the Court of Appeal Civil Division [2009] EWCA Civ 119

JUSTICES: Lord Hope (Deputy President), Lord Scott, Lord Rodger, Lady Hale and Lord Brown

BACKGROUND TO THE APPEAL

BA and PE were each served a deportation order after unsuccessful appeals on human rights and asylum grounds against the decision to deport them. Both unsuccessfully made further submissions to the Secretary of State in an attempt to have the order revoked. They then applied to judicially review the decision not to revoke the deportation order, maintaining that their removal from the United Kingdom would be in breach of their human rights. **(Paras [3]-[5])**

This appeal concerns whether, once a claimant has had his appeal against a decision of the Secretary of State determined, he can make another appeal in-country on the same grounds which were rejected on the earlier occasion. The Secretary of State argued that a repetitive claim did not fall within section 92(4)(a) of the Nationality, Immigration and Asylum Act 2002, which provides for an in-country appeal where the claimant has made "an asylum claim, or a human rights claim" whilst in the UK. The Secretary of State argued that where, as in BA's case, further representations have not been advanced as a fresh claim as defined under rule 353 of the Immigration Rules, or, as in PE's case, have not been accepted as such by the Secretary of State, they can only be considered out of country and that there is no obstacle to the deportations. **(Paras [8]; [13]-[15])**

JUDGMENT

The appeal by the Secretary of State is dismissed by a majority of four to one. A claim for asylum which has been rejected should be allowed to proceed to appeal in-country under sections 82 and 92 of the Nationality, Immigration and Asylum Act 2002, unless it has been certified as clearly unfounded under section 94 or excluded under section 96. This should be so whether or not the Secretary of State has accepted it as a fresh claim. ***(Paragraph [32])*** *Lord Hope gave the majority judgment of the Court. Lady Hale dissented.*

REASONS FOR THE JUDGMENT

- Lord Hope considered the phrase "an asylum claim, or a human rights claim" in s 92(4)(a) in the context of the 2002 Act as a whole and rejected the Appellant's argument that the Supreme Court should follow the interpretation in *R v Secretary of State for the Home Department, ex parte Onibiyo* [1996] QB 768. In *Onibiyo*, "claim" in the context of the 1993 Act was held to mean a first claim, or a second or subsequent claim which has been accepted as a "fresh claim" by the Secretary of State, but not a claim which is repetitious. Lord Hope determined that whilst the 2002 Act uses substantially the same words as the 1993 Act, the statutory system is markedly different given the

addition of a range of powers enabling the Secretary of State or immigration officer to deal with repetitious claims. No inference was drawn from the amendment of s 113 by s 12 of the Immigration, Asylum and Nationality Act 2006 as it is not yet in force. **(Paras [25]-[29]; [44]–[46])**

- In a case such as this where no certification has been given under s 94 (providing for the exclusion of appeals that are clearly unfounded) or s 96 (removing the right of appeal if the claim raises an issue which has been or ought to have been dealt with in an earlier appeal), there is no need to impose a further requirement which is not mentioned elsewhere in the 2002 Act, namely that the words "a…claim" exclude a further claim which has not been held under rule 353 to be a fresh claim. **(Para [29])**
- The Appellant's construction risks undermining the beneficial objects of the Refugee Convention, as it would exclude, by s 95, claims which the Secretary of State considers not to be fresh claims from the ground of appeal in s 84(1)(g), when claims which are certified as clearly unfounded under s 94 would still be given the benefit of that section. (Section 84(1)(g) provides for an appeal where removal would place the UK in breach of its international or human rights obligations.) **(Paras [30]–[32]; [47])**
- Rule 353 does not affect the operation of the legislative scheme, which provides the complete code for dealing with repeat claims. **(Para [33])**

Lady Hale, dissenting, would have allowed the appeal.

- Lady Hale concluded "a…claim" in s 92(4)(a) of the 2002 Act ought to be given the same meaning ascribed to the phrase in the 1993 Act in *Onibiyo*. There was no need for it to be defined in the 2002 Act given it had already been judicially interpreted. **(Paras [39]–[40])** The addition of sections 94 and 96 should not be taken to mean that Parliament had abandoned the old meaning of "claim" without expressly saying so, particularly as the additional sections are not apt to cater for repetitious claims. **(Paras [41]–[42])**
- Lady Hale disagreed that the Appellant's construction would undermine the UK's international obligations. A person who presents a repeat claim on asylum or human rights grounds has already enjoyed the right of appeal on these grounds within this country. The current system allowing for an initial decision followed by an appeal system in the UK is sufficient compliance with those obligations. **(Paras [42]-[43])**

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html