Appeal No: HX 27020/2001(STARRED)
[2002] UKIAT 00266

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 20/12/2001
Date Determination notified: 05/02/2002

Before

The President, The H[on.] Mr Justice Collins
Mr C M G Ockelton
Mr P. R. Moulden

Kaltun Harun ABDILLAHI

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant: Ms. C. Gordon, Counsel
For the Respondent: Mr. P. Deller , HOPO

DETERMINATION AND REASONS

1. The appellant is a citizen of Somalia. She entered the United Kingdom illegally, probably on 23 May 2000, and claimed asylum on 25 May. That at least is what is said in the Reasons for Refusal letter, but it is to be noted that in the Form ICD 1045 it is recorded that the appellant "entered the United Kingdom clandestinely ... and claimed asylum on 23 May 2000 at the Home Office." The discrepancy has no material consequences in the circumstances of this case, since it is clear on either account that the appellant entered the United Kingdom illegally and so the question was whether she should be granted leave to remain rather than leave to enter. All too often the Appellate Authority is faced with this sort of carelessness by Home Office officials and it should not occur.

2. On 8 May 2001 she was sent a Notice of Decision which purported to comply with the Immigration and Asylum Appeals (Notices) Regulations 2000 (the 'Notices Regulations). This informed her that her application for asylum in the United Kingdom had been refused for the reasons given in the Reasons for Refusal letter attached. The notice did not state that she had been refused leave to remain on the basis of her claim for asylum. But the Notice continued: -

> "It has been decided, however, that because of the particular circumstances of your case, you should be granted exceptional leave to remain in the United Kingdom.
>
> The Secretary of State therefore grants you leave to remain until 05 March 2005".

There was then set out a Right of Appeal in these terms: -

> You are entitled to appeal to an adjudicator against this decision under Section 69(3) of the Immigration and Asylum Act 1999".

The Notice then set out, in accordance with the requirement of the Notices Regulations, information about how and within what time an appeal should be lodged.

3. The appellant did appeal and on 29 August 2001 her appeal came before an adjudicator (Professor D.B. Casson). He decided that the Notice served by the respondent did not fall within the terms of s.69 (3) of the 1999 Act and so there was no appealable decision. Accordingly, he dismissed the appeal, which he described as a 'purported appeal', without considering the merits. We too have not considered the merits since, if we are to decide that Professor Casson was wrong and that there was an appealable decision, we should remit the case to be heard by an adjudicator.

4. S.69 (3) is a singularly ill-drafted provision and the Home Office has not assisted itself or the Appellate Authority in choosing to issue a Notice of Decision which fails to follow its wording. It reads: -

> "A person who –
>
> (a) has been refused leave to enter or remain in the United Kingdom on the basis of a claim for asylum made by him, but
>
> (b) has been granted (whether before or after the decision to refuse leave) limited leave to enter or remain
>
> may, if that limited leave will not expire within 28 days of his being notified of the decision, appeal to an adjudicator against the refusal on the ground that requiring him to leave the United Kingdom after the time limited by that leave would be contrary to the Convention".

Professor Casson took the view that the Notice of Decision refused neither leave to enter nor to remain and so no right of appeal existed under s.69 (3).

5. While it would not, it seems, have made any difference to the result, Professor Casson made the point that the Notice was not a Notice of Refusal to remain "since leave to remain is applicable to a person who has previously been granted limited leave". That is not correct. A person who has entered the United Kingdom unlawfully may be refused leave to remain; he has already entered,

albeit unlawfully. Section 33(1) of the Immigration Act 1971 as amended defines illegal entrant to mean 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 include also a person who has entered as mentioned in paragraph (a) or (b) above."

Thus an illegal entrant encompasses a person who is trying to enter unlawfully and one who has succeeded in so doing. The former will, if he tries to regularise his position, seek leave to enter, the latter leave to remain. Hence Paragraph 9(1) of Schedule 2 to the 1971 Act reads as follows:-

> "where an illegal entrant is not given leave to enter or remain in the United Kingdom …."

6. The distinction can be important since Section 4(1) of the 1971 Act provides that immigration officers shall exercise the power to give or refuse leave to enter whereas the Secretary of State shall exercise the power to give leave to remain. Although Rule 328 of the Immigration Rules (HC 395) requires that all asylum applications be determined by the Secretary of State , leave to enter (if in issue) is to be granted or refused by an immigration officer – see Rules 330 and 331. And Rule 335 makes clear the distinction between the situation where a person has entered (whether lawfully or not) and where he has not. It reads:-

> "If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) or a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain".

7. The Notice of Decision in this case was signed not by an immigration officer but by a person on behalf of the Secretary of State. Accordingly, it could not have been a valid refusal of leave to enter, nor did it purport to be such a refusal. We should, however, draw attention to difficulties which might arise where an illegal entrant (for example, one who comes hidden in the back of a lorry) is apprehended at a port. It is then necessary to consider section 11 of the 1971 Act to determine whether he has or has not entered the United Kingdom. The answer to that may depend on whether he is apprehended before he has left "such area (if any) at the port as may be approved for this purpose by an immigration officer": see s.11(1). If he has not entered, only an immigration officer can grant or refuse leave to enter. If he has, only the Secretary of State can grant leave to remain. If, of course, leave to remain is refused, the Secretary of State will normally give removal directions and these are appealable under s.66 and 69(3) of the 1999 Act.

8. Refusal of leave to enter gives rise to a general right of appeal under s.59 of the 1999 Act, but that right is considerably circumscribed. For asylum seekers, the relevant right is that conferred by s.69(1). There is no right of appeal for an illegal entrant who is refused leave to remain. He can only appeal under s.69(5) if removal is directed. There is in addition the existence of a human rights appeal under s.65, but, if there is to be no removal, it is difficult to imagine that a refusal of

leave to remain to an illegal entrant could breach any of his human rights. In any event, Paragraph 4(4) of the Notices Regulations provides that the fact that a decision can be appealed under s.65 does not of itself make it an appealable decision of which written notice must be given under Paragraph 4.

9. It follows that there was in this case no appealable decision other than any which might arise under s.69(3). The position would be the same if leave to enter rather than to remain had been in issue. Both sections 59(1) and 69(1) refer to a refusal of leave to enter under the 1971 Act. If leave to enter is in fact given on any ground, there is no refusal under the 1971 Act and so no right of appeal. In any event, any right of appeal which might otherwise have existed would be removed by virtue of s.58(9) of the 1999 Act, which reads:-

> "A pending appeal under any provision of this Part other than section 69(3) is to be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom."

While the drafting may again be less than perfect, since there must exist a leave to enter or remain to enable an appeal under s.69(3) to be made, the intention is clear. A grant of leave to enter or to remain will prevent any appeal being pursued except under s.69(3). It is incidentally to be noted that the existence of s.58(9), which was not, it seems, drawn to the attention of the Court of Appeal, may limit the general application of *Saad, Diriye and Osorio v Secretary of State for the Home Department* (a decision in which judgment was given on 19 December 2001) to cases arising under s.8 of the Act of 1993.

10. *Saad's* case does, however, encourage us to adopt a purposive approach to the construction of s.69(3) so as to try to ensure that the right of appeal given by it is not rendered worthless. Thus it is submitted by both Ms Gordon and Mr Deller that it is implicit in the Notice of Decision that leave to remain was refused on the basis of the appellant's claim for asylum. The Notice states that the appellant had applied for asylum in the United Kingdom. That application was to remain in the United Kingdom, whether or not spelt out in those precise terms. The refusal inevitably meant that leave to remain had been refused on the basis of asylum. At the same time, leave to remain had been granted. Thus the only right of appeal was that arising under s.69(3) and the Notice of Decision identified that right. The Secretary of State intended that that right should be identified and that the appellant should be entitled to appeal against the refusal of refugee status. However poor the drafting, it is plain beyond any doubt that in enacting s.69(3) Parliament intended that a person should be entitled to establish refugee status even though he was not to be removed from the United Kingdom for what could be a substantial period in excess of 28 days. To deny an appeal in such circumstances would be to make the appellant suffer for an error in the Notice of Decision by the respondent. That should not happen unless the wording of s.69(3) precludes any alternative construction. In our judgment, particularly as there is no appealable decision and so no need for any Notice under the Notice Regulations other than that under s.69(3), it is not only permissible but inevitable to infer that leave to remain has been refused.

11. It would, perhaps, have made clearer what was intended if s.69(3) had read:-

> "A person –

(a) whose claim for asylum in the United Kingdom has been refused, but

(b) who …."

Equally, the Home Office Notice of Decision could have read something like:-

> "You have applied for asylum in the United Kingdom but your application for leave to remain on the basis of your asylum claim has been refused …."

If it had, no problem would have arisen. We suggest that in future the Notice follows the wording of s.69(3) and makes it clear that leave to enter or remain has been refused on the basis of the asylum claim. But, since bitter experience leads us to doubt whether this suggestion will be acted on within a reasonable time or at all, adjudicators should normally infer that leave has been refused.

12. It follows that this appeal must be allowed and the case remitted to an adjudicator to consider it on its merits.

13. We have before now referred to problems in s.69(3). The wording seemed and still seems to us to have required the adjudicator and tribunal to try to forecast what would be the situation in a particular country months or perhaps years ahead. This would be a difficult but not necessarily impossible task. Since it is dealing in questions of risk, the time when removal is to take place and the history of the situation in the country to which return is to take place would have been relevant. If there has been a history of repression, its continuance may perhaps reasonably be inferred. If, on the other hand, the situation is changing by the week (as, for example, in Afghanistan) or is likely to change (as in Kosovo once the UN was to be involved and the Serbs removed), it may be impossible to say what the position might be.

14. However, we now have guidance from the Court of Appeal in *Saad and others*. *Saad* and *Diriye* concerned s.8(2) of the 1993 Act. The Court of Appeal decided that Parliament, in enacting s.8, must be assumed to have intended to grant a status appeal. Thus the words in s.8(2) "it would be contrary to the United Kingdom's obligations under the Convention for him to be required to leave the United Kingdom after the time limited by the leave" must be read as requiring the appellate authorities to assume that the situation at the time of the appeal will remain the same when the leave comes to an end so that, if he is a refugee, his status can be established. There are real difficulties in this approach when the situation in a particular country is changing if not daily at least weekly or monthly. Afghanistan and Somalia provide obvious examples. While therefore we are far from persuaded by the reasoning of the Court of Appeal, this approach does at least achieve the purpose behind s.69(3) more simply than any other. What therefore must be done is to assess the situation at the time of the hearing and to decide on the facts as they then appear. No doubt if following a hearing before the adjudicator there are significant changes an appeal can be brought on the basis of those changes. But changes after the tribunal hearing will not be taken into account.

15. This should, we suppose, create no difficulties for the Home Office if the Secretary of State abides by the Rules and ceases automatically to grant indefinite leave to enter or to remain to refugees. Rules 330 and 335 require the grant of limited leave to enter or to remain and it is to be noted that Paragraph 1(3) of Schedule 2 to the 1971 Act provides:-

> "In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State …"

An instruction to grant indefinite leave to enter would appear to fall foul of this provision and to give rise to concerns that in following it an immigration officer would not be acting in accordance with his duties under the Act. However, we do not need to reach any conclusion on this. We do, however, urge the Secretary of State to reconsider his present policy since the decision in *Saad* means that he may find himself having to award refugee status to many who are likely to be able to return to their own country in safety when the situation there changes and when such a change is likely to occur.

MR JUSTICE COLLINS
PRESIDENT