SA (Section 82(2)(d): interpretation and effect) Pakistan [2007] UKAIT 00083

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Glasgow (Eagle Building) Date of Hearing: 20 July 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Designated Immigration Judge Macleman

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Byrne, of Drummond Miller
For the Respondent: Ms M MacDonald, Home Office Presenting Officer

(1) In order to give s82(2)(d) of the 2002 Act any meaning at all, it has to be read in such a way as entirely to exclude the effect of s3C of the 1971 Act. (2) Subject to that, s82(2)(d) means what it says, and a person whose existing leave continues beyond the date when a variation is refused has no right of appeal against the refusal.

NOTICE UNDER RULE 9

1. The claimant (to whom we refer as "the appellant") is a national of Pakistan. She arrived in the United Kingdom on 6 April 2005, with entry clearance as a spouse. That entry clearance took effect as leave to enter granted before her arrival and expiring on 3 February 2007. During the course of that leave she made an application for indefinite leave to remain in the United Kingdom as the victim of domestic violence. Her application was refused on 11 January 2007. The letter refusing the application noted that her leave continued until 3 February, and informed her that she had no right of appeal. Her solicitors

maintained that she had a right of appeal, and that the decision made in her case was one which fell within s82(2)(d) of the Nationality, Immigration and Asylum Act 2002. Mr Byrne (who appeared also before us) made similar submissions to an Immigration Judge, who rejected them, in a document entitled "Determination and Reasons", sent to the parties on 22 March 2007, and ending with the words "I dismiss the appeal as incompetent". The Secretary of State sought and obtained an order for reconsideration. Thus the matter comes before us.

2. There is an initial procedural difficulty, in that Rule 9 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/1230) requires the Tribunal, if there is no "relevant decision", to give notice that it does not accept the notice of appeal and to take no further action. It follows that the Immigration Judge's view that there was no right of appeal should have led him not to dismiss the appeal but to issue the notice envisaged by Rule 9. If he had done so, there could have been no reconsideration, because s103A of the 2002 Act permits reconsideration only of the Tribunal's decision *on an appeal*. The Immigration Judge having, however, purported to dismiss an appeal, we are content, as were the parties before us, to accept that we have jurisdiction to look into this matter.

3. Section 82 of the 2002 Act provides, in subsection (1), that where an "immigration decision" is made in respect of a person, he may appeal to the Tribunal. Section 82(2) sets out the types of decision which are "immigration decisions" for these purposes. At (2)(d) we find:

> "Refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain".

It is that provision upon which the appellant relies.

4. There is no doubt that s82(2)(d) is not happily worded. The reference to "refusal" makes it clear that this paragraph refers to a decision made as a result of an application. The problem is, however, that when other provisions of the statutory regime are taken into account, it appears that no decision could fall within s82(2)(d). If a person who has no leave makes an application for leave, and it is refused, the decision does not fall within that paragraph because the reason why the applicant now has no leave is not because he has been refused it but because he did not have it to begin with: his having no leave is therefore not "the result of the refusal". If a person who has leave applies for a variation of his leave and is refused at a time when his original leave still continues, then the decision does not fall within s82(2)(d), because the result of the refusal is not that he has no leave: his original leave continues.

5. What then of a person who applies during existing leave, but receives a negative decision only after his original leave expires? As we understand the matter, s82(2)(d) is intended to give him a right of appeal. But even

he cannot truthfully say that the result of the refusal is that he has no leave, because s3C of the 1971 Act continues his leave, first during the time between the expiry of the original leave and the date of the decision on it; secondly "during any period when an appeal under s82(1) could be brought against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission)"; and thirdly while any such appeal is pending. (The wording is quoted from s3C(2).) There is obviously no sense in this. The wording of s82(2)(d) excludes the appeal, because of the effect of s3C; but the latter section clearly envisages that the decision is appealable. Section 82(2)(d) can be understood only by entirely excluding the effect of s3C from its meaning.

6. That, however, does not assist the appellant. Mr Byrne pointed out that the effect of s82(2)(d) might be haphazard. If an application was made in time and refused during the period of leave, there would be no right of appeal; if it was refused after the period of leave then (subject to what we have said about s3C) there would be a right of appeal. That appears to us to be so: but Mr Byrne did not suggest any reading of s82(2)(d) properly open to us that would extinguish or ameliorate the effect of which he complained. There is no doubt that the result of the decision refusing to vary the appellant's leave was not that she had no leave to enter or remain in the United Kingdom: as the letter pointed out, her leave continued. For that reason she had no right of appeal.

7. To that extent the Immigration Judge was correct. There was and is no appeal before the Tribunal capable of being dismissed. For the reasons we have given, and rather belatedly it may be thought, this notice refusing to accept the notice of appeal is now issued.

C M G OCKELTON
DEPUTY PRESIDENT
Date: