ASYLUM AND IMMIGRATION TRIBUNAL

SA (In-country appeal; human rights; other grounds) Bangladesh [2005] UKAIT 00178

THE IMMIGRATION ACTS

Heard at: Field House

Date of Hearing: 8 November 2005
Date Promulgated: 16 December 2005

Before:

Mr L V Waumsley (Senior Immigration Judge)
Professor A Grubb (Senior Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S J Muthusagaran, Turner, Miller & Higgins Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

Where an appellant has an in-country right of appeal under section 92(4) because he has made a human rights or asylum claim, the Tribunal is required to consider and determine any ground of appeal listed in section 84 which is properly raised by the appellant, including that the Secretary of State's decision was "otherwise not in accordance with the law".

DETERMINATION AND REASONS

1. The Appellant is a citizen of Bangladesh. He seeks reconsideration of the decision of an Adjudicator, Mr R Whiting, dismissing, on human

rights grounds, his appeal against the decision of the Respondent taken on 20 April 2004 to remove him as an illegal entrant to Bangladesh. Permission to appeal to the IAT having been given on 11 March 2005, that grant takes effect as an order for reconsideration before the AIT under the transitional provisions.

2. The Appellant married [ ] a British citizen on 11 January 1992. They are first cousins and the marriage was arranged. In April 1992, he applied for entry clearance to join his wife in this country but that application was refused under the (then) 'primary purpose' rule. He appealed and his appeal was eventually (and finally) dismissed by an Adjudicator in March 1994 with permission to Appeal to the IAT refused in May 1995. Not content with the outcome, the Appellant entered the UK illegally in November 1995 and lived with his wife and her five children from a previous marriage. In May 1999, he applied for leave to remain on the basis of his marriage but on 20 April 2004 that application was refused by the Secretary of State and he was served with the notice of a decision to remove him as an illegal entrant which is the decision the subject of this appeal.

3. In his appeal to the Adjudicator, the Appellant could not rely on the 'spouse' rule in paragraph 284 of the Immigration Rules (HC 395) as he did not have extant leave to enter or remain. Instead, he relied upon his right to private and family life under Article 8 of the European Convention and also upon the fact that the Secretary of State had failed to consider his case under DP3/96, the Home Office policy on removal in marriage cases. The Adjudicator accepted, as had been conceded, that at the date of the hearing the appellant's marriage was genuine and subsisting. Nevertheless, he dismissed the appeal setting out in a careful and detailed judgment his reasons for concluding that the Appellant's removal would not be disproportionate under Article 8(2), taking into account DP3/96. However, the Adjudicator concluded that he had no jurisdiction to consider whether the Secretary of State had acted "otherwise not in accordance with the law" in failing – as undoubtedly he had – to consider DP3/96 directly in reaching his decision to remove the Appellant as an illegal entrant. Although the Grounds of Appeal challenged both the Adjudicator's decision on Article 8 and on the jurisdiction point, the Vice President granted leave only on the latter issue, regarding the Adjudicator's decision on Article 8 as plainly correct. We are restricted to that ground of appeal by Rule 62(7) of the 2005 Procedure Rules.

The issue

4. Miss Muthusagaran, who appeared on behalf of the Appellant, submitted that the Adjudicator had been wrong in law to exclude the Appellant's challenge to the Secretary of State's decision on the ground of appeal in section 84(1)(e) of the 2002 Act that the decision was 'otherwise not in accordance with the law'. She submitted that once an

Appellant had an in-country right of appeal under section 92 of the 2002 Act because he had made a human rights claim, he could rely upon any ground set out in section 84 of the Act and was not restricted to challenging the decision on human rights grounds alone.

5. Somewhat to our surprise, Mr Avery, who represented the Secretary of State, sought an adjournment during the course of his submissions in order to take instructions on the Secretary of State's position and the implications of a decision in favour of the Appellant on the scope of an appeal following a human rights claim. We saw no basis for such an adjournment. It has been clear that this was a point in the case since, at the latest, the hearing before the Adjudicator on 20 November 2004 and the point in the case since the grant of permission to appeal on 11 March 2005. Mr Avery was not, in our view, in any way inhibited in the submissions that he could make on an issue which turns upon the correct interpretation of Part V of the 2002 Act. We, therefore, refused the application and continued the hearing.

The scope of an in-country appeal

6. Part V of the 2002 Act governs appeals to the AIT. For these purposes the important provisions are to be found in sections 82, 84 and 92. We will also have to consider the relevant parts of sections 85 and 86 later.

7. We begin with section 82(1) which states:

> "(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal."

8. Subsection (2), paragraphs (a)-(k) then sets out the "immigration decisions" which may be appealed to the AIT. (Although not relevant to this appeal, there is also the so-called 'upgrade appeal' on asylum grounds only in section 83 and appeals against EEA decisions falling within the Immigration (European Economic Area) Regulations 2000, SI 2000/2326.)

9. Section 84 sets out a number of grounds – (a) to (g) – upon which an appeal against an immigration decision falling within section 82 must be brought. So far as relevant to this appeal, section 84(1) provides:

> "(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds – ...
>
> (e) that the decision is otherwise not in accordance with the law; ...
>
> (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. ...".

10. What sections 82 and 84 do not indicate is whether an appellant's appeal may be brought whilst he is in the UK or only after he has left. That issue is determined by section 92 which is relied upon by Mr Avery and which, so far as it is relevant to this appeal, provides as follows:

> "**92. Appeal from within United Kingdom: general**
>
> (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) and (j)….
>
> (4)This section also applies to an appeal against an immigration decision if the appellant –
>
> (a) has made an asylum claim, or human rights claim, while in the United Kingdom, or
>
> (b) is an EEA national or a member of the family of an EEA national and makes a claim to the Secretary of State that the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom.".

11. The wording of section 92 is plain: a person may not appeal against an "immigration decision" under the 2002 Act whilst in the United Kingdom unless section 92 applies. By virtue of section 92(2) certain immigration decisions are always appealable from within the UK (subject to certification on a 'clearly unfounded' basis under section 94). These are decisions: to refuse a certificate of entitlement, to refuse to extend leave, to curtail existing leave, to revoke indefinite leave to remain and to make a deportation order (s82(2)(c), (d), (e), (f) and (j) respectively). Other decisions falling within section 82(2) may only be appealed from within the UK if the appellant has made an 'asylum claim' or 'human rights claim' as defined in section 113 (s92(4)(a)), or where he makes a claim relying on his EU rights as an EEA national or family member (s92(4)(b)). Removal decisions against illegal entrants and overstayers or their families fall within this latter category of decisions.

12. In this case, the appellant appeals a decision to remove him as an illegal entrant. That is an immigration decision falling within section 82(2)(h). As such, it is not a decision that comes within section 92(2) as one which automatically generates an in-country right of appeal. It is, however, accepted by both parties that the appellant made a 'human rights claim' and so, by virtue of section 92(4)(a), he has an in-country right of appeal.

13. Mr Avery relied upon section 92(4) and submitted that the Appellant could only rely on human rights grounds in this appeal. The appellant is limited to the ground (or grounds) in section 92(4) which give rise to the appeal being in-country. Other grounds could (if at all) only be raised once the appellant had left the UK.

14. In our judgment, this is not the correct interpretation of the 2002 Act. First, Mr Avery's submission fails to recognise the logical framework provided by Parliament in Part V. Sections 82, 84 and 92 of the Act address discrete issues governing appeals to the AIT: (1) defining what decisions are appealable (s 82); (2) stating the grounds upon which such an immigration decision may be challenged (s 84); and (3) defining whether or not that appeal may be brought whilst the individual is in the UK (s 92). Each section has a distinct role in governing appeals to the AIT. The sections must, of course, be read cumulatively but they function separately. Section 92 does not define the grounds upon which an appeal may be brought. That is obvious for decisions falling within section 92(2) which makes no reference to any matter which could conceivably be thought of as a "ground" of appeal. But, it is no less true for appeals which can only be brought in-country by virtue of section 92(4), as in this case. Once an appealable decision falling within section 82 has been made, the function of section 92 is solely to determine whether there is an in-country right of appeal against that decision. What "grounds" the appellant may rely upon in that appeal (whether in-country or not) is then determined by section 84. There is nothing in section 84 which limits the grounds upon which a particular "immigration decision" may be challenged on appeal, apart from restricting 'upgrade appeals' under section 83 to asylum grounds only. Otherwise, <u>any</u> ground properly brought before the AIT may be relied upon.

15. Second, section 92 represents Parliament's intention to restrict in-country appeals to certain kinds of case – whether to certain immigration decisions (s92(2)) or to any immigration decision where an asylum, human rights or EEA claim has been made (s92(4)(a) and (b)). Otherwise, the appellant may be removed forthwith and may only appeal after he has left the UK. That, in our view, is a crucial guide for us in interpreting the 2002 Act. If an appellant has an in-country appeal and cannot be removed until the appeal is finally determined, commonsense suggests that all the bases for his challenge to the immigration decision should be considered in that one appeal. We see no merit in Mr Avery suggestion that the appellant should be left to raise a second appeal based upon these "other" grounds once he has left the UK. Indeed, we are far from persuaded that the appellant could have a second (out-of-country) appeal against a single immigration decision. In our judgment, once the appellant has an in-country right of appeal because he has made a claim, such as a human rights claim, we see no reason why that appeal should be in any way restricted so as to exclude any ground within section 84 upon which he properly wishes to rely.

16. Third, as Miss Muthusagaran submitted, the 'one stop' provisions of the 2002 Act require the Tribunal to consider <u>any</u> ground of appeal specified in section 84 which is properly raised by an Appellant.

17. The lynch-pin of the 'one stop' provisions is section 120 which requires an appellant, when served with a notice in writing by the Secretary of State, to state any grounds "additional" to those in his application which he claims entitles him to enter, remain or not to be removed from the United Kingdom. If an appellant does not state an additional ground upon which he could rely, he runs the risk of two adverse consequences. First, he will not be allowed to raise that ground in an appeal unless the Tribunal permits him to vary his grounds of appeal under Rule 14 of the Procedure Rules. Secondly, if the appellant subsequently raises a ground in a further application to the Secretary of State that he should have raised earlier, the Secretary of State may issue a certificate under section 96 removing any right of appeal against an immigration decision following that further application.

18. Thus, an appellant who, for example, has made a human rights or asylum claim is invited to state "additional" grounds for challenging the immigration decision. We note that in this case the Secretary of State's decision letter dated 20 April 2004 addressed to the appellant contains just such a notice (at page 4) and the Notice of Appeal states that the appellant relies on DP3/96.

19. An "additional" ground having been set out, sections 85(2) and 86(2) of the 2002 Act, instruct the Tribunal what it must do. Section 85(2) provides:

> "(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against." (our emphasis)

20. Subsection (3) goes on to state that the section 120 statement may be made before or after the appeal has been commenced.

21. The Act could not be clearer and it is in mandatory terms – the Tribunal "shall consider" any matter raised which constitutes a ground of appeal under section 84. The requirement is without limitation or restriction. Section 86(2) adds further weight to this by requiring that what must be "considered" by the Tribunal must also be "determined" by it. Section 86(2) provides:

> "(2) The Tribunal must determine –
> (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
> (b) any matter which section 85 requires it to consider." (our emphasis)

22. The combined effect of these provisions puts beyond doubt any argument that the Tribunal is restricted to determining an appeal only on human rights grounds or asylum grounds or EEA grounds, whichever is the basis under section 92(4) for the appeal being in-country. The mandatory requirements of sections 85(2) and 86(2) lead to only one conclusion. In an in-country appeal against an immigration decision

under section 82, the Tribunal is required to consider and determine any ground of appeal listed in section 84 properly raised by an appellant before the Tribunal, including (as in this case) that the Secretary of State's decision was "otherwise not in accordance with the law" on an Abdi basis (D S Abdi [1996] Imm AR 148) because he failed to consider an applicable policy such as DP3/96.

23. The position under the 2002 Act is, therefore, different from human rights and asylum appeals governed by the Immigration and Asylum Act 1999. There, it is clear from the statutory wording, and as was held by the IAT, that an appeal under section 65 on human rights grounds (or under section 69 on asylum grounds) is restricted to those particular grounds and an appellant cannot also argue that the decision was "not in accordance with the law" (e.g. A (Jamaica) [2003] UKIAT 00083).

Conclusion

24. The Adjudicator erred in law in failing to consider whether the Secretary of State's decision to remove the appellant as an illegal entrant was "otherwise not in accordance with the law". Initially, Mr Avery submitted that any error of law was not material as DP3/96 was not applicable to the appellant and, in any event, the Adjudicator had taken it into account when assessing the proportionality of the Appellant's removal under Article 8(2). Ultimately, Mr Avery accepted that if we were against him on the issue of the scope of the appeal, the appeal should be allowed so that the Secretary of State could consider the application of DP3/96 to the Appellant. He was right to concede this. The appellant is entitled to have his case determined, inter alia, on the basis of the Secretary of State's marriage policy in removal cases set out in DP3/96 which, in principle, is applicable to him. Although, in paragraph 9 of his decision letter, the Secretary of State makes some reference to matters which might be relevant to DP3/96, he does not articulate and apply the detailed elements of his policy. It is for the Secretary of State, and not the Tribunal, to determine the application of the policy to the appellant's circumstances. The only proper course is, therefore, the one accepted by Mr Avery.

Decision

25. For the above reasons, we conclude that the Adjudicator made a material error of law in his determination.

26. We substitute a decision allowing the appeal to the extent that the appellant's application is outstanding before the Secretary of State to consider the application of DP3/96.

PROFESSOR A GRUBB
SENIOR IMMIGRATION JUDGE

Date: