IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 8th October 2002
Date Determination notified:
....11/11/02.....

Before:

Mr Justice Collins (President)
Mr D K Allen
Professor D B Casson

Between:

JAMILA OMAR HAMZA

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant, Ms Jamila Hamza, claimed to have entered the United Kingdom by air from Kenya on 5th September 2000. She attended at the Home Office on 26th September and claimed asylum. Her claim was based on her assertion that she was a citizen of Somalia, born on 2nd February 1976. She then gave an account of her tribulations upon which she relied to establish her asylum claim. She had, in fact, she said, moved from Somalia to Kenya, but that was because of her fears of persecution, or so she alleged.

2. The Secretary of State did not believe that she was from Somalia, and indeed did not believe her account. She admitted in interview that she had entered the country using a false passport provided to her by an agent, that being a Dutch passport which might explain, if it was accepted at face value by the Immigration Officer, how she came to be admitted because she would have been regarded as a national of a country of the European Union.

3. As we say, the Secretary of State did not believe her account and when it was pursued before the Adjudicator, he equally did not believe her. He decided she was not a national of Somalia. Indeed, he went further and decided on the evidence before him, that she positively was a citizen of Kenya. That he decided, as he put it, on the balance of probabilities. That is not directly material so far as this appeal

is concerned, because all that is material is that it has been decided that she was not a national of Somalia. What she was doing was putting forward a lying and dishonest claim to try to enable her to remain in this country.

4. When the matter came before the Adjudicator, the question of the possibility of an appeal being made simultaneously under s 66(2) of the 1999 Act was raised. That was based upon the decision of the Tribunal in Zeqaj [2002] UKIAT 00232, which was a case where the Home Office, in error, had issued removal directions to a Kosovar to Albania. For reasons which need not concern us, that mistake was persisted in before the Adjudicator and was still in existence before the Tribunal. The Appellant had, at all times, in that case asserted that he was, as indeed was the truth, a citizen of Kosovo and when the matter came before the Tribunal it was decided that his asylum appeal did not succeed. That was not altogether surprising. When he had left Kosovo it may well be that an asylum claim might have had merit, but the situation in Kosovo had changed radically since then. So the only question was whether the removal directions should stand. The Tribunal recognised that there was, if the appeal were dismissed, at least a theoretical possibility that removal could take place to Albania because the appeal was, of course, against the removal directions on the basis of the asylum claim. That seemed to the Tribunal to be wrong and capable of working an injustice and, in the circumstances, on the facts of that case, it was decided that leave to pursue a s 66(2) appeal should be granted. Mr Deller, who then represented the Secretary of State, as he has in this appeal before us, did not seek to argue against the decision of the Tribunal to permit the s 66(2) appeal to proceed because, in that way, the removal directions were disposed of. Of course it would have been open to the Secretary of State to issue fresh removal directions thereafter to Kosovo, which is what should have been done in the first place.

5. We have referred to Zeqaj because it is essential, in our view, to bear in mind that it was a very different case from this case. We are concerned with the circumstances of this case because it is by no means unique. There seems to be something of a culture of people coming to this country claiming they are citizens of a country in which there is trouble and in which it may be feasible to suggest that there is persecution. They spin a tale which fits in with the circumstances in that country and based on that they claim asylum. This case involves Somalia. The same assertions have been made, in the experience of the Tribunal, in connection with Afghanistan, Burundi and sometimes even Sri Lanka and parts of Eastern Europe, and we do not doubt that there are other countries in respect of which similar allegations can be made. It is therefore something of a growing problem.

6. That being so, the Tribunal in a recent determination which is starred Asif Khan v Secretary of State [2002] UKIAT 004412 issued a determination which, to a large extent, was intended to deal with this particular sort of situation. In paragraph 14 of that determination, the Tribunal said this:

> "We firmly take the view that an Appellant cannot be heard to claim, for the purposes of his asylum appeal, that he comes from a particular country and, in the same proceedings, for the purposes of s 66, that he does not come from that country. That should be sufficient to deal with any case in which, in the same appeal, an Appellant claims that he is from a particular

> country but, if the Adjudicator does not believe that, then he claims for the purposes of an appeal under s 66 that he is not from that country. To do so is simply an abuse and we will not tolerate it. It follows that an appeal under s 66, based on the falseness of the information given for the purposes of any other grounds of appeal in the same appeal, will not succeed."

That approach we regard as a very proper one, but we have to consider whether it fits in with the language of the Act because we recognise that as a Tribunal set up under statute, there may be argument about the extent of any inherent jurisdiction that we may have.

7. We turn to the conclusions of the Adjudicator, Mr Varcoe, in the instant case. In paragraph 37, he says this:

> "Now clearly at the time that the directions were set, there were indeed grounds on which the Secretary of State could reasonably have set removal directions for Somalia. Had he chosen instead to set directions to, say, Kenya, I suspect that a representative for the Appellant would have argued that this was unreasonable since, on the face of the Appellant's claim, this would have been the wrong country. Accordingly, I conclude that since I deliberately did not deal with the nationality as a separate and preliminary issue, it is now open to me to regard an appeal under s 66(2), albeit it relates to an appeal under s 69(5) of the same Act, as being one which I need not consider. In any case, at the hearing Mr Masters, representing the Respondent, did not specifically either consent to such an extension of the grounds of appeal nor did he demur. However, I cannot believe that the intention of Parliament was to allow an Appellant first to put forward a claim for asylum based on a particular country and then, when it is shown that there was no connection between the Appellant and that country, to argue that he should be able to alter the grounds of appeal so that the removal directions should be held to be invalid. It seems to me that s 66 should not be interpreted in that manner. Nor do I believe that the decision in Zeqaj requires me to do so."

8. With those observations, we entirely agree. We should go back to consider the precise wording of s 66 to see whether the approach suggested by Mr Varcoe conforms to the proper construction of that section. S 66(2) reads:

> "(2) That person [that is to say a person in respect of whom directions for his removal have been given on the ground that he is an illegal entrant which is the one that matters in the circumstances of this case] may appeal to an Adjudicator against the directions on the ground that on the facts of his case there was, in law, no power to give them on the ground on which they were given.
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> (3) This section does not entitle a person to appeal while he is in the United Kingdom unless he is appealing under s 65 or s 69(5)."

Now that enables a person, in respect of whom appealable removal directions have been given, to say not only that he is a refugee but also that there was no power to give the directions on the facts of his case. What he is not entitled to do is to blow hot and cold and say "*On the facts of my case, I am a national of*

country A and I cannot be returned to country A because it would be contrary either to the Refugee Convention (s 69(5)) or the Human Rights Convention (s 65). But, if you, the Adjudicator, decide that I am not a national of country A, then the removal directions cannot stand because, on the facts that you have then found, there would be in law no power to give them on the ground on which they were given".

9. In our view, because, like Mr Varcoe, we do not believe that Parliament could have intended an individual to rely on his own fraud to obtain an advantage, s 66(2) must be construed to mean that the facts of his case mean the facts asserted by the Appellant in support of his appeal. That is to say that the Appellant is entitled to appeal under s 66(2) if, and only if, he asserts facts which mean that there was in law no power to give the directions on the ground on which they were given. If he fails to establish those facts, his claim will fail.

10. Thus, to take the Zeqaj case, it was perfectly proper for the Appellant in that case to say "*You cannot direct my removal to Albania, because I am, and it is my case that I am, a national of Kosovo, and not of Albania*". No question of any deception, no question of any reliance upon his own fraud arose. That being so, we are satisfied that in a case such as the one before us, if the Appellant were to try to run an appeal under s 69(5) or s 65 and an appeal under s 66(2) on different bases, the Adjudicator should require him to state what his case was. If he was not prepared to assert other than he was a national of the country to which removal directions had been set, then the s 66(2) appeal could not succeed. Whatever may in due course be the findings made by the Adjudicator, it would not in those circumstances get off the ground. If that construction of s 66(2) is correct, then it is not proper for a subsequent s 66(2) appeal to be made opportunistically or leave sought to advance such an appeal. It would not only be an abuse of process, but also it would be contrary to the proper construction of s 66(2), because it would not be an assertion that on the facts of the Appellant's case there was in law no power to give the directions in question.

11. We appreciate that this is perhaps to be regarded as a somewhat narrow construction of the wording of s 66(2), but we believe that it is a construction which is necessary and which is clearly in accordance with the intention of Parliament because, as we repeat, like Mr Varcoe, we cannot conceive that Parliament would have permitted a person to come to this country, to put forward a fraudulent claim to be able to stay here and then if that fraud was detected, to rely upon it to obtain an advantage to enable the removal directions to be set aside. Accordingly, we go further than the Tribunal in Asif Khan not because we do not agree with them, but because we take the view that not only would it be an abuse of the process (and the Tribunal may well have, albeit it is a creature of statute, an inherent power to prevent its processes being abused) but also because it is contrary to what we regard as the correct construction of s 66(2).

12. In this case, as we have indicated, Mr Varcoe not only did not believe that the Appellant came from Somalia, but found as a fact that she came from Kenya. Often, the Appellant in these cases does not assert other than that he or she comes from a particular country, and when that is rejected it is not always easy to determine which country he or she in fact is from. It would no doubt be of

assistance to the Secretary of State, and generally for the determination of the correct course of action in relation to an individual, if an Adjudicator were able to decide the issue of nationality. Of course, we recognise that it may well be in many cases that there is insufficient information to enable him to do so and we do not for a moment suggest that he should go off at a tangent and try to deal with matters which have not been the subject of any proper evidence. But sometimes, and this case is a good example, it is possible because there are, in reality, only two possible contenders – either the country from which the Appellant alleges he or she came, or some other country which is the obvious candidate. As we say, if an Adjudicator feels able to do that then it would be helpful if he did so, but he must bear in mind that if he is going to make a positive finding against the Appellant, then he must do so not on the asylum standard, but on a higher standard which would be the balance of probabilities. That indeed is the basis upon which this Adjudicator approached his task in that respect.

13. All in all, we regard this as an admirable determination and for the reasons given by the Adjudicator and developed by us, we are satisfied that the appeal was correctly dismissed. Accordingly, we ourselves dismiss this appeal.

MR JUSTICE COLLINS
PRESIDENT