IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 18/12/2001
Date Determination notified: 04/02/2002

Before:

The Honourable Mr Justice Collins (President)
Mr C M G Ockelton
Mr P R Moulden

BLEDAR ZEQAJ

APPELLANT

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Miss C Record, Instructed by Waterfords Solicitors, for the Appellant
Mr P Deller, HOPO, for the Respondent

DETERMINATION AND REASONS

1. This appeal has a most unfortunate history. The appellant is an ethnic Albanian from Kosovo. He arrived in the United Kingdom on 12 November 1999 and claimed asylum. He was an illegal entrant. His application was refused on 23 October 2000 on the basis that circumstances in Kosovo had changed and that the appellant had no reason to fear persecution by Serbs nor had he established any real risk of persecution or ill treatment by any ethnic Albanian groups. While his appeal to an adjudicator was pending, further representations were made on his behalf, in particular that to return him would be to breach Articles 3 and 14 of the European Convention on Human Rights. These further representations were rejected on 12 July 2001.

2. Unfortunately, due to lack of care on the part of the responsible immigration officer, the removal directions which were served on the appellant following the refusal of his asylum

claim specified Albania as the place to which the appellant was to be removed. This was clearly an error. The right of appeal under s69(5) of the Immigration and Asylum Act 1999 ('the 1999 Act') is in these terms:

> "If directions are given as mentioned in s66(1) for the removal of a person from the United Kingdom, he may appeal to an adjudicator on the ground that his removal in pursuance of the directions would be contrary to the [Refugee] Convention."

Paragraph 1 of Schedule 4 to the 1999 Act empowers the Secretary of State to provide by regulations that written notice of appealable decisions be given to those affected and for the contents of such notices. This has been done in the Immigration and Asylum Appeals (Notices) Regulations 2000 (2000 No 2246) ('the Notices Regulations'). Regulation 5(1)(b) provides:

> "A notice .. is to … if it relates to the giving of directions for the removal of the person from the United Kingdom, include a statement of the country to which he is to be removed."

3. Since the appeal lies against the removal directions, it is clearly of fundamental importance that the correct country should be named. The appeal will be against the removal to that country. Furthermore, the power to direct removal to particular destinations is limited by Paragraphs 8(1)(c), 9(1) and 10(2) of Schedule 2 to the Immigration Act 1971. Paragraph 8 deals with the powers of immigration officers on refusing leave to enter, but those powers are extended to embrace illegal entrants (paragraph 9) and those whose removal is directed by the Secretary of State because too great a time has elapsed to enable the immigration officers to use their powers or it is impractical to direct an immediate removal (paragraph 10(2)). Paragraph 8(1)(c) specifies the following 'countries or territories' as those to which a person's removal can be directed, namely:

> "(i) a country of which he is a national or citizen; or
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> (ii) a country or territory in which he has obtained a passport or other document of identity;
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> (iii) a country or territory in which he embarked for the United Kingdom, or
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> (iv) a country or territory to which there is reason to believe that he will be admitted."

Prima facie, Albania did not qualify under any of sub-paragraphs (i) to (iv). However, the notice of appeal served by the appellant's solicitors merely raised general grounds that to return the appellant would be a breach of the Refugee and the Human Rights Conventions. The Statement of Additional Grounds in pursuance of the 'one stop' notice did not add to the grounds and did not raise any other ground of appeal.

4. At the hearing of the appeal before the Adjudicator (N Renton Esq), the HOPO then appearing acknowledged that the removal directions were wrong but, as the Adjudicator records in his determination, "declined to withdraw the Secretary of State's decision". There is in the file a somewhat cryptic note in the Adjudicator's handwriting (it seems to be the record of proceedings) which records the HOPO saying:

"Removal directions are wrong. I do not withdraw decision but I withdraw R. M. (sic) new RDs will be issued."

Although he had been represented by his present Solicitors, at the hearing the appellant appeared in person. The significance of the error in identifying Albania instead of the Federal Republic of Yugoslavia in the removal directions does not seem to have been fully appreciated by anyone and seems to have wholly escaped the notice of the appellant's Solicitors who appear to have done nothing to assist the appellant in pursuing his appeal, beyond filling in the forms and settling grounds which do not deal with the points at issue

5. If the correct country is specified, but either the wrong part of that country is identified (for example, a direction to remove to Belgrade instead of Pristina in relation to an ethnic Albanian from Kosovo) or removal cannot for the time being be achieved to a safe part of the country (see, for example, Gardi v SSHD), an amendment is possible. But where the directions specify the wrong country, the position is different. The combination of s.69(5) of the 1999 Act and Regulation 5(1)(b) of the Notices Regulations means that the only appeal before the Adjudicator is that against removal to a named country. Recognition of the error should lead to a withdrawal of the directions and so to the disappearance of the appeal. It is, of course, open to the Secretary of State to issue fresh directions to the correct country which will trigger a fresh s.69(5) appeal. If this is done before the hearing, it will usually be possible to proceed on the proper basis, particularly if the appellant has not been prejudiced by the error. It can be done at the hearing provided that the appellant agrees to waive all procedural requirements.

6 In this case, the Adjudicator dismissed the appellant's appeal. He concluded, no doubt correctly, that the directions to remove to Albania were not permitted by paragraph 8(2)(c) of Schedule 2 to the Immigration Act 1971. He decided as follows:

"6. Therefore, these removal directions are not in accordance with the powers of the Immigration Officer who gave them and are consequently invalid.

7. This appeal was made under the provisions of Section 69(5) of the Immigration and Asylum Act 1999 which only applies when directions have been given for an Appellant's removal as, inter alia, an illegal entrant. In this case, there are no such valid removal directions, and therefore there cannot be a valid appeal.

8.The appeal is dismissed."

7. The Adjudicator was correct to decide that he could not allow the appeal under s69(5) since there was no material before him to suggest that to remove the applicant to Albania would be contrary to the Refugee Convention. But the effect of dismissing it was to leave the admittedly erroneous directions in being and so to leave the appellant (at least in theory) at risk of removal to Albania.

8. Since what happened in this case is regrettably not a unique occurrence, we have had to consider (without, we are bound to say, any real assistance from the appellant's representatives) what is the correct solution. Our attention was drawn to a tribunal determination, Pepaj v SSHD (01/TH/02655). A similar error had been made in that case. The tribunal allowed the appeal on the ground that, since Albania was not a country permitted by paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971, the decision of the Secretary of State was "not in accordance with the law or the immigration rules". However, since the appeal was under s.69(5), and there was no evidence that to return to Albania would breach the Refugee Convention, that course should not have been adopted.

Since the Chairman presiding in Pepaj is a member of this tribunal, we can say more easily that Pepaj should not be followed.

9. What has been overlooked is s.66 of the 1999 Act. S.66 applies inter alia if directions are given for a person's removal from the United Kingdom on the ground that he is an illegal entrant. S.66(2) provides:

> "That person 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."

This appeal can only be pursued once the appellant is out of the United Kingdom "unless he is appealing under s.65 or 69(5)". Mr Deller submitted that s.66(2) could not apply here because of the last eight words of the subsection. The ground on which the directions were given was that the appellant was an illegal entrant. Thus, he submits, the only relevant issue under s.66(2) would be whether he was a illegal entrant since, if he was not, there was in law no power to direct his removal. Errors in the directions themselves are not covered by s.66(2).

10. In our judgment, that is too restrictive a construction of s.66(2). It enables an appeal to be brought on any ground which is appropriate to an individual case that there was on the facts in law no power to give the directions. So here, the appropriate ground is that there is on the facts of this case no power to direct removal to Albania. It does no violence to the language to s.66(2) to construe it in this way, particularly as any appeal, as the use of the words "on the facts of the case" recognises, will depend on its particular facts and those facts may disclose a particular legal impediment to the directions which have been given. Albania was specified because the appellant was an illegal entrant and it was lawful to remove him to Albania. If either of those matters was shown to be wrong, there would be in law no power to give the directions on the grounds on which they were given. We accordingly suggested to Miss Record that she might seek leave to amend the grounds of appeal to rely on s.66(2). Mr Deller very properly did not seek to say that the Secretary of State was prejudiced by this amendment – it was, after all, his officials' incompetence which had created the difficulty – and so did not resist the application made by Miss Record, prompted by our suggestion. We gave leave accordingly.

11. It is clear that there is in law no power to remove this appellant to Albania since it is accepted that an error was made and the Secretary of State cannot establish that on the facts of this case Albania falls within paragraph 8(1)(c) of Schedule 2 to the Immigration Act 1971. That being so, the appeal under s.66(2) must be allowed. That means that the directions are quashed and so the appeal under s.69(5) disappears. If fresh removal directions are made, fresh rights of appeal will arise.

12. We recognise, as Mr Deller pointed out, that our construction of s.66(2) will open the door to argument in cases where a particular country which is not the country of nationality has been deliberately chosen. We see no reason to be concerned. An appellant will have to establish his case under s.66(2) on the balance of probabilities. If he is able to show that the country named does not fall within paragraph 8(1)(c), he will succeed in his appeal. If there is no error, we doubt whether such an appeal will, save in exceptional circumstances, stand any real chance of success.

13. We have starred this appeal because, as we have said, this situation is far from unique and the practice of Adjudicators has varied. If removal directions are to a country other than that of an appellant's nationality the question should be raised at a preliminary hearing whether they are correct. If it is accepted that an error has been made, the HOPO should be required to cause the directions to be withdrawn and fresh directions to the correct country should be issued. If necessary, there can be service of those directions, a fresh appeal and a fresh hearing or the procedural steps can be waived. Any appellant who cannot show any prejudice arising from the error will, if he refuses to waive the procedural requirements, run the risk that his attitude will be taken to show a desire to delay his appeal and to be inconsistent with a genuine claim for asylum. If the HOPO is unwilling to commit himself, or if there is no representation on behalf of the Secretary of State, the appellant should be encouraged to raise a s.66(2) appeal if he has not already done so. This will enable the Adjudicator to deal with all eventualities at the hearing of the appeal.

MR JUSTICE COLLINS