IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 11/04/2001
Date Determination notified: 4.5.01

Before

The Hon Mr Justice Collins (President)
Mr C M G Ockelton
Mr K Drabu

Between

Aleksejs ZENOVICS APPELLANT
and
SECRETARY OF STATE FOR THE HOME DEPARTMENT RESPONDENT

For the Appellant: Ms. E. Saunders (RLC)
For the Respondent: Mr. A. Hunter (Counsel)

DETERMINATION AND REASONS

1. The appellant is a citizen of Latvia who was granted leave to enter the United Kingdom as a visitor for 6 months on 19 September 1998. He overstayed. He was apprehended on 22 September 2000 when he was returned to Holyhead having been refused leave to enter the Republic of Ireland. When he was served with a notice that he was an illegal entrant he claimed asylum essentially on the ground that he feared persecution as a businessman by organised criminals to whom he owed money. His claim was rejected by the respondent on 2 October 2000. He had also claimed that it would be a breach of his human rights to return him to Latvia: he specifically relied on Articles 2, 3 and 5 of the European Convention on Human Rights. This claim was also rejected.

2. The respondent in the letter rejecting the claims certified that the asylum claim was one to which Paragraph 9(4)(a) of Schedule 4 to the Immigration and Asylum Act 1999 (the 1999 Act) applied and Paragraph 9(7) did not apply so that rights of appeal would be 'subject to the accelerated appeals procedure'. This would mean that there would, if the adjudicator agreed with the certification, be no right of appeal to the Immigration Appeal Tribunal. But the letter, after dealing with and certifying the asylum claim, went on to reject but not to certify the human rights claim.

3. The appellant appealed to an adjudicator against the removal directions served by the respondent. In accordance with the provisions of ss.74 and 75 of the 1999 Act, the

notice served on him required him to include all reasons he might have to enable him to remain in the United Kingdom so that his appeal would cover not only asylum but human rights and indeed any other possible ground upon which he might be entitled to remain. Thus any appeal would enable the adjudicator to deal with all possible grounds that the appellant might have in accordance with the 'one stop' procedure: see s.77(2) of the 1999 Act which provides:-

"... the appellant is to be treated as also appealing on any additional grounds -

(a) which he may for appealing against the refusal, variation, decision or directions in question under any other provision of this Act ... "

4. The appellant's grounds of appeal asserted that he should not be returned to Latvia because he had a well-founded fear of persecution and because he had 'compelling reasons under the 1950 European Convention for the Protection of Human Rights and Fundamental freedoms'. His appeal was heard on 20 November 2000 by an adjudicator, Mr. P. W. Cruthers. While the adjudicator was, as he put it, "generally satisfied that [the appellant's] evidence was honest", he had some reservations but decided that he did not qualify for asylum nor did his human rights claim succeed. He agreed with the respondent's certification of the asylum claim.

5. Following the dismissal of his appeal, the appellant and his representatives were sent a notice informing them that the asylum claim was certified, that the adjudicator agreed with that certificate and that therefore the appellant had no right of appeal to the I.A.T. The RLC challenged this, asserting that there was a right of appeal on the human rights claim which had not been certified. In due course, a notice of appeal was lodged limited to human rights grounds. It was alleged that the adjudicator had erred in a number of respects. Leave to appeal was granted in the following terms:-

> "The adjudicator agreed with the respondent's certificate; but it is now suggested that the fact that this appellant also raised a claim under the Human Rights Act 1998 nevertheless gives him a right of appeal. Leave is granted, limited to this point in the first instance".

Rule 18(9) of the Immigration and Asylum Appeals (Procedure) Rules 2000 (the 2000 Rules) clearly enables a grant of leave to be limited to particular grounds. In this case, we must decide whether we have jurisdiction to hear the appeal. That means deciding whether the agreement by the adjudicator with the asylum certification precludes any appeal even on human rights grounds. If it does, this appeal will have to be dismissed. If it does not, the tribunal will have to consider whether to hear an appeal on the merits since they have not yet been considered.

6. This appeal has been starred since the question whether a right of appeal exists is important and there has been some difference of opinion about it. Furthermore, it seemed desirable that, if possible, the tribunal should give some guidance to adjudicators to assist them in dealing with appeals where part only of the claim has been certified.

7. The answer to the problem raised in this appeal lies in the true construction of paragraph 9 of Schedule 4 to the 1999 Act. We should set it out in full as originally enacted. It has since been amended by the Race Relations (Amendment) Act 2000. We shall consider the significance of those amendments in due course. We should say that Mr. Hunter was unable to tell us when the amendments came into force; he thought it was within the

fortnight or so before the hearing. Suffice it to say at the material time the unamended Paragraph was in force. It read:-

> *"Convention cases"*
> 9(1). This paragraph applies to an appeal under Part IV of this Act by a person who claims that it would be contrary to the Convention for him to be removed from, or to be required to leave, the United Kingdom, if the Secretary of State has certified that, in his opinion, that claim is one which
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> (a) sub-paragraph (3), (4), (5) or (6) applies; and
> (b) sub-paragraph (7) does not apply.
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> (2) If, on an appeal to which this paragraph applies, the adjudicator agrees that the claim is one to which this paragraph applies, paragraph 22 does not confer on the appellant any right to appeal to the Immigration Appeal Tribunal.
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> (3) This sub-paragraph applies to a claim if, on his arrival in the United Kingdom, the appellant was required by an immigration officer to produce a valid passport and -
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> (a) he failed to do so, without giving a reasonable explanation for his failure; or
> (b) he produced an invalid passport and failed to inform the officer that it was not valid.
>
> (4) This sub-paragraph applies to a claim under the Refugee Convention if
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> (a) it does not show a fear of persecution by reason of the appellant's race, religion, nationality, membership of a particular social group, or political opinion; or
> (b) it shows a fear of such persecution, but the fear is manifestly unfounded or the circumstances which gave rise to the fear no longer subsist.
>
> (5) This sub-paragraph applies to a claim under the Human Rights Convention if-
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> (a) it does not disclose a right under the Convention; or
> (b) it does not disclose a right under the Convention, but the claim is manifestly unfounded.
>
> (6) This sub-paragraph applies to a claim if -
>
> (a) it is made at any time after the appellant -
> (i) has been refused leave to enter the United Kingdom under the 1971 Act;
> (ii) has been recommended for deportation by a court empowered by that Act to do so;

(iii) has been notified by the Secretary of State's decision to make a deportation order against him under section 5(1) of the 1971 Act as a result of his liability to deportation; or

(iv) has been notified of his liability to removal under paragraph 9 of Schedule 2 to that Act;

(b) it is manifestly fraudulent, or any of the evidence adduced in its support is manifestly false; or

(c) it is frivolous or vexatious.

(7) This sub-paragraph applies to a claim if the evidence adduced in its support establishes a reasonable likelihood that the appellant has been tortured in the country to which he is to be sent.

(8) "Contrary to the Convention" means contrary to the United Kingdom's obligations under the Refugee Convention or the Human Rights Convention.

8. The first thing to note is that in sub-paragraph (1) the words "contrary to the Convention" should be read as 'contrary to the United Kingdom's obligations under the Refugee Convention or the Human Rights Convention': see sub-paragraph (8). The 'one-stop' procedure which is dealt with in ss.74 -78 of the 1999 Act requires that asylum and human rights grounds should generally be considered in one appeal. We have already set out s.77(2). We note that s.77(5) defines 'additional grounds' as those specified in response to a notice under s.74(4). The 'one-stop' procedure does not prevent a human rights ground being raised subsequently and not included in an appeal against an asylum refusal (see s.76(3)). However, the failure to raise it at the appropriate time may (apart from affecting its merit) justify a certificate under paragraphs 9(5) or 9(6).

9. Ms Saunders, in a most helpful skeleton argument, has submitted that there are two claims, one under the Refugee and the other under the Human Rights Convention. Each claim has a right of appeal attached to it. Those appeals are heard together, but are in reality two separate appeals each of which claims its own certificate. Paragraph 9(4) and (5) identify the separate certificates. That, she submits, coupled with the identification in paragraph 9(8) of the possible alternative claims, underlines the intention that each claim must be individually certified and that rights of appeal can only be removed from the claim that is certified and not from that which is not. She also makes the powerful point that to remove rights of appeal in respect of a claim which is not certified would be manifestly unfair. Although the expression 'right of appeal' is used, in reality it is only if the statute enables an appeal to be brought that such a right exists.

10. Unfortunately in our judgment the terms of Paragraph 9 are too clear to enable us to accept Ms Saunders' submissions. Paragraph 9(1) recognises that an appeal may contain claims under either or both the Conventions. But there is only one appeal before the appellate authority which may contain different grounds or claims. The one-stop requirements are that all relevant grounds are contained in any appeal: see ss.74(4) and (7), 75(2), 76(2) and (3) and 77 passim. Of course, particular appeals may be based only on one or other of the Conventions so that paragraphs 9(4) and (5) can apply with no possible unfairness. The problem is that most will rely on both Conventions. Paragraph

9(1)(a) applies to a certificate under any of paragraphs 9(3), (4), (5) or (6). If the adjudicator agrees with the certificate, paragraph 9(2) precludes an appeal generally and not only in respect of the certified claim.

11. We have said if the adjudicator agrees with the certificate, an appeal is precluded. The wording of Paragraph 9(2) as unamended makes no sense. Paragraph 9(1) provides that Paragraph 9 applies to a Part IV appeal if the respondent has certified that a relevant sub-paragraph applies. Thus the adjudicator must inevitably agree that the paragraph applies if the respondent has so certified. This is not what was intended. The purpose of Paragraph 9(2) was to enable the adjudicator to form an independent view whether the particular sub-paragraph certified did in fact apply or whether the respondent was wrong to have certified that there had been no torture. That is what the provisions of the Asylum and Immigration Appeals Act 1993 (the 1993 Act) had provided (Paragraph 5(7) of Schedule 2). The amendment introduced by the Race Relations (Amendment) Act 2000 makes Paragraph 9(2) read:-

> "If, on an appeal to which this paragraph applies, the adjudicator agrees with the opinion expressed in the Secretary of State's certificate, Paragraph 22 does not confer on the appellant any right to appeal to the Immigration Appeal Tribunal "

This makes the position clear, albeit it is not particularly well drafted since there will normally be no certificate as such but only an indication that the Secretary of State has certified. The Race Relations (Amendment) Act 2000 also introduces a new paragraph 9A enabling the Secretary of State to certify that an appeal under Part IV of the 1999 Act claiming that the appellant 'has been racially discriminated against' (sic) is manifestly unfounded. This recognises that there must be a separate certificate for a claim based on racial discrimination although again it is badly drafted since its language is inapt for appeals which contain claims under either Conventions as well as racial discrimination. However, poor drafting in Paragraph 9A cannot determine the true construction of Paragraph 9.

12. The purpose behind Paragraph 9 is in our view clear. Each of sub-paragraphs (3), (4), (5) and (6) identifies some misconduct or failure by the person concerned to do something he should have done. Sub-paragraph (3) deals with misconduct on entry and sub-paragraph (6) with claims which will be suspect because not made at a proper time or which are palpably false. Sub-paragraphs (4) and (5) deal with claims which do not engage either Convention or which are manifestly unfounded. The penalty, if the certification is upheld, is the removal of an appeal to the I.A.T. The provisions contained in Paragraph 5(2) of Schedule 2 to the 1993 Act enabling particular countries to be designated in a statutory instrument as in general safe have not been re-enacted. The ability to certify in relation to a country so designated was always anomalous and the decision of Turner J in *R (Javed) v Secretary of State for the Home Department* that to designate Pakistan was irrational shows how wise Parliament was to remove it. It was in any event hardly fair that an asylum seeker who had a reasonable although ultimately unsuccessful claim should have no appeal to the I.A.T. simply because the country he was fleeing was regarded as generally safe. Furthermore, the situation in countries can change rapidly and there is no guarantee that such a change can equally rapidly be reflected in an amendment to the relevant statutory instrument.

13. In the circumstances we would expect that each claim is in some way regarded as defective before an appeal right which otherwise exists could be removed. That is not

the effect of Paragraph 9(4) and (5). Mr. Hunter argued that Parliament did deliberately so provide because otherwise there would be problems if, as was likely, the I.A.T. needed to revisit findings of fact which resulted in the upholding of the certification on, say, the asylum claim. This argument assumes that Parliament would have countenanced that justice and fairness should be subordinated to convenience. We find that unlikely; at least, we would be surprised if it were done consciously with no dissenting voices. But in reality the argument contains the seeds of its own destruction. If the claims under the two Conventions are based on the same facts or the findings on one should determine the other both ought to be certified if certification under sub-paragraph (4) or (5) is considered appropriate.

14. In our view, the explanation for the difficulties created by Paragraph 9 lies in the draftsmen's incorporation of the new right of appeal created by s.65 of the 1999 Act with the existing paragraph dealing with certification. We strongly suspect that those responsible at the Home Office did not initially realise that to certify sub-paragraph (4) would, if the adjudicator agreed, remove the right of appeal in respect of the Human Rights claim as well. The form of the letter in this case supports our suspicion. Ms Saunders has put before us a refusal letter in another case dated 23 October 2000 in which both claims have been certified, the one under Paragraph 9(4)(b), the other under Paragraph 9(5)(b). So far as we are aware, there is no consistency. It is our clear view that, if a certificate is considered appropriate, and if there are claims under both Conventions based on the same facts, both claims or neither should be certified. Otherwise, unfairness will result. Since paragraph 9(2) requires, if the right to appeal is to be denied, that the adjudicator agrees with the opinion expressed in the certificate, he can only so agree if both claims were properly certified. He must agree with the whole and not only part of the opinion. We should add that claims should be certified only if the Secretary of State is sure that it is right to do so. Any doubt should be resolved in favour of not certifying. If the appeal fails before the adjudicator, the I.A.T. will not grant leave to appeal unless there is a real prospect of an appeal succeeding (see Rule 18(7) of the 2000 Procedure Rules). To certify a case which is doubtful is to run the risk of delay and expense because judicial review is sought.

15. The nonsense created by Paragraph 9(2) further supports our view that there has been a failure by Parliament properly to scrutinise Paragraph 9. Mr. Hunter did not concede that it was nonsense but did not put forward any argument that made sense of it. We must however try to do so, at least so that it enables the adjudicator to do what Parliament clearly intended to do (or so we presume since the alternative is absurd). In *McMonagle v Westminster City Council* [1990] 1 All ER 993 the House of Lords regarded words in statutory provisions as mere surplusage where those words frustrated what their Lordships regarded as the true purpose of the legislation. Here it is necessary to read in words which have been omitted. Thus we would provide the unexpressed but clearly intended object of the verb 'agrees' by inserting after it the words "with the opinion of the Secretary of State". This does not entirely as a matter of pure grammar provide the desired result, but it may suffice.

16. While the difficulty is most apparent in relation to sub-paragraphs (4) and (5), it can arise under (3) and (6). If claims under both Conventions are made to the Secretary of State, he must in our view certify both under (3) or (6). This is because the singular includes the plural and, unlike (4) and (5), neither Convention is individually specified. This construction of the provisions avoids some of the possible unfairness. But the Secretary of State may certify an asylum claim which is the only claim made to him. On appeal, a Human Rights claim may be added. In those circumstances, we would

hope that the Secretary of State, if necessary through the HOPO, would decide whether to maintain the certification as applicable to both claims (as it probably would be) or to withdraw it.

17. Parliament has provided that the right of appeal is to be removed only if the adjudicator agrees with the Secretary of State's opinion. If he says nothing, the right will remain. He must positively express his agreement. But he must act in accordance with the provisions of the Act. We have already expressed the view that to maintain the certification of a claim under one Convention but not the other and so prohibit an appeal would be unfair. Does that enable an adjudicator not to agree and so to permit an appeal? We have no doubt that it should since no judge would ever want unless constrained by the legislation in question to do what he believed to be unfair. But there are difficulties. Paragraph 9(2) as amended speaks of agreement "with the opinion expressed in the Secretary of State's certificate". The Secretary of State will have certified that a particular sub-paragraph applies to the relevant claim. And it is that opinion and only that opinion with which the adjudicator may agree. His belief that it would be unfair to maintain the certification albeit it was correctly given in respect of the claim to which it related is not easily seen to be a reason to fail to agree with it.

18. This approach is consistent with the reasoning of Sedley LJ in *Bajwa v Secretary of State for the Home Department* [2000] IAR 364. That was a decision of a single Lord Justice on an application for leave to appeal and so is not technically binding on us. Nevertheless, it is entitled to be accorded great respect and we should not disagree with it unless satisfied that it is wrong. *Bajwa* was concerned with a certification under Paragraph 5(2) of Schedule 2 to the 1993 Act because the appellant was from Pakistan and had not been tortured. There was therefore, as Sedley LJ held, no basis for not agreeing with the certification. But the argument on behalf of the appellant recorded in Paragraph 13 of the judgment and its rejection in Paragraph 14 applies equally to any other sub-paragraph justifying certification once the facts have been found. With very considerable regret, we have to accept the force of his reasoning.

19. We would add one proviso. There are a number of Human Rights claims being made which, because of *Pardeepan*, could not have been made earlier. It would be manifestly perverse to use Paragraph 9(6)(i), (ii), (iii) or (iv) to certify such a claim if any of those sub-paragraphs were applicable only because the claim could not have been made at an earlier time. It would in such a case be open to an adjudicator not to agree that the relevant sub-paragraph applied because he should not properly agree with a perverse as opposed to an unfair opinion.

20. If faced with a situation such as arises in this case, an adjudicator should in our view consider very carefully whether he can agree with the factual basis of the certification. As Mr Hunter recognises, it may be difficult to justify a certification under one Convention and not the other when the facts are common to both. An adjudicator should never agree with a certificate unless he is satisfied that he should and the fact that to do so will produce unfairness will oblige him to consider with the greatest care whether he is so satisfied. If he is not and so does not expressly agree with the Secretary of State's opinion, the right of appeal will remain and the Tribunal can, if an application is made, decide whether leave should be granted.

21. For the reasons we have given, we must with regret dismiss this appeal. We hope that no such application will need to be made again because the Secretary of State should only certify the whole and not merely part of a claim.

22. The appellant, who was in custody, had made an application for bail to the tribunal pursuant to Paragraph 29(4) of Schedule 2 of the Immigration Act 1971 (the 1971 Act). At the conclusion of the hearing, we stated that the appeal would be dismissed, but it is still technically pending until finally determined (1999 Act s.58(5)). It is not finally determined until our determination is promulgated (see Rules 2 and 25 of the 2000 Procedure Rules). However, Paragraph 29(4) limits the power to grant bail to a recognizance "conditioned for his appearance before the Tribunal". The hearing has been held and there is to be no further appearance. Accordingly, the tribunal's power to grant bail was exhausted. The result was that bail could only be granted by an immigration officer or an adjudicator pursuant to Paragraph 22(1A) of Schedule 2 to the 1971 Act. With no objection on behalf of the respondent, it was decided to treat the application as if made under Paragraph 22(1A) and the application was heard by the President sitting as an adjudicator.

23. We would only add this. There was listed before us another appeal, *Hrbac v Secretary of State for the Home Department* CC/23208/2000. That appeal raised the same matters as arise in the instant appeal with the additional point that the certification was bad on its face because in the refusal letter it was said:-

> "In addition the Secretary of State certifies that your claim is one to which Paragraph 9(5)(b) of Schedule 4 to the 1999 Act applies because your fear of persecution is manifestly unfounded ..."

The appellant had made claims under both Conventions and so it was not possible to know which claim the Secretary of State was really intending to certify. Unfortunately, the adjudicator and the appellant's representative (there being no attendance on behalf of the respondent) had failed to notice the defect and the adjudicator had purported to agree with the certification. It was agreed by Mr. Hunter that a certification which was bad on its face could have no legal effect and so was not capable of affecting the rights of appeal. The Secretary of State could not in the circumstances be said to have certified within the meaning of Paragraph 9(1). Accordingly, the right of appeal remained. In *Hrbac's* case, leave had been granted on other grounds and so we directed that the appeal proceed in the usual way.

24. On 25 April we received a fax from Ms Saunders asking us to entertain a further argument based on the Human Rights Act. There is before the Administrative Court in *R (Marcu) v An Adjudicator* a claim involving certification and counsel has sought leave to amend to include a declaration that to preclude an appeal on human rights grounds when only the asylum claim was certified would be to breach Article 14 of the European Convention on Human Rights.

25. We have been provided with a copy of the proposed amendment and we are asked to permit full submissions from both sides. We refused the request. The argument is wholly misconceived and has not the faintest chance of success. Article 14 is not free standing. It prohibits discrimination in securing the enjoyment of the rights and freedoms set out in the Convention. Even if Article 6 applied to immigration decisions and appeals to the IAA (which it does not), there is no Convention right to more than one appeal. Both the Secretary of State and the adjudicator have considered whether the rights the appellant alleges will be breached if he is removed have in fact been breached. In those circumstances, there is no Convention right or freedom which could be in issue

for the purposes of Article 14. To suggest that an applicant for asylum enjoys a status which is protected by Article 14 is, with respect, nonsense.

26. The application is too late and in any event we could not be assisted by any further submissions.

MR JUSTICE COLLINS
PRESIDENT