

Public / human rights

Human rights update

Paul Harris & Alasdair Mackenzie discuss fresh claims & foreign cases

IN BRIEF

- Unfounded asylum claim under s 94 of the Nationality, Immigration and Asylum Act 2002.
- The extent and limits of the obligations of the UK under the European Convention on Human Rights where a threatened breach of the Convention might occur not in the UK but in another country to which the UK intended to deport or remove.

In *ZT Kosovo (Respondent) v Secretary of State for the Home Department (Appellant)* [2009] UKHL 6, [2009] All ER (D) 38 (Feb) the respondent ZT was a Kosovan Roma.

He claimed asylum in the UK on grounds of a fear of racial persecution in Kosovo. The home secretary refused his claim and certified it as clearly unfounded under s 94 of the Nationality, Immigration and Asylum Act 2002, with the effect that he was not entitled to appeal against the refusal from within the UK. ZT made further submissions backed by fresh evidence, but these too were rejected by the home secretary, who refused to treat them as constituting a fresh asylum claim attracting a right of appeal from within the UK.

Court of Appeal

Permission to proceed with a claim for judicial review was initially refused by Mr Justice Collins, but was granted on appeal by Sir Henry Brooke.

The substantive claim was then considered by the Court of Appeal. ZT's argument was that the procedure for deciding whether to treat such further submissions as a fresh claim was covered by para 353 of the Immigration Rules, whether or not a s 94 certificate had been issued. As the home secretary had not applied the para 353 test—namely whether there was a “realistic prospect” of an immigration judge allowing an appeal in light of the further submissions—the court granted the claim and quashed the home secretary's decision.

House of Lords

The home secretary appealed to the House of Lords on the grounds that the para 353 procedure did not apply where a s 94 certificate had been issued. The House of Lords held:

- (Lord Hope dissenting) Where the home secretary had certified an asylum claim as clearly unfounded, and the applicant had subsequently made further submissions without leaving the UK, her approach to those submissions should be that set out in para 353 of the Immigration Rules. Para 353 applied where “any appeal” relating to a previous claim was “no longer pending”; the inclusion of the word “any” implied that it was relevant even where, as here, no appeal could yet have been brought.
- (ii) On a claim for judicial review of a decision not to treat such submissions as a fresh claim under para 353, the question for the court, although technically a review of the reasonableness of the home secretary's decision, was effectively a judgment on whether the court would reach the same decision, there being little material difference, if any, between the two tests.
- (iii) Per Lords Phillips and Brown, the “realistic prospect” test for whether a fresh claim had been made was the same as the test for finding that a claim is not “clearly unfounded”. Per Lord Hope, there was a material difference of degree between the two phrases, the latter being stricter than the former. Per

- Lords Carswell and Neuberger, there was in theory a difference but in practice it would generally be hard to discern it.
- (iv) (Per Lord Hope, agreeing as to the outcome but dissenting as to the reasons) Para 353 was not intended to apply to cases where s 94 applied. The necessary insurance against the possibility that a person subject to s 94 certification would be removed before any further submissions had been properly considered was provided by para 353A of the Rules, which required the home secretary to consider such representations “under paragraph 353 or otherwise”.
 - (v) (Per Lord Hope) The majority decision that there was no material distinction between the tests under s 94 and para 353 would require the government's Asylum Policy Instructions to be rewritten and might require consideration of cases to be suspended in the meantime.

As to the facts, their lordships were unanimously agreed that there was no basis for impugning the home secretary's decision. The appeal was allowed.

Comment

Judicial review in respect of applications by people seeking a right of appeal against removal when that right can be exercised only outside the UK, or when a previous appeal has failed, has become a complex and procedurally burdensome area of law. Much work falls upon the Administrative Court, in the absence of a statutory right of appeal against rejection of such applications (an absence which could easily and perhaps conveniently be corrected by legislation).

In what appears to have been their (with respect, understandable) concern to simplify matters, the majority of their lordships come close to blurring a number of distinctions, the first two of which are traditionally vital ones in administrative law:

- between review and appeal on the merits;
- between irrationality and incorrectness; and

- between claims which are “clearly unfounded” and those with “no realistic prospect of success”.

Lord Phillips’s comment that “[i]f the court concludes that a [fresh] claim has a realistic prospect of success when the [home secretary] has reached a contrary view, the court will necessarily conclude that the [home secretary]’s view was irrational” seems novel in equating, on the face of it, disagreement with irrationality. However, Lord Phillips clearly had in mind that the test under para 353 is now effectively the same as that in certification cases, ie that “[i]f on at least one legitimate view of the facts or the law the claim may succeed”, the applicant must be treated as making a fresh claim and thus as entitled to appeal. To that extent, if the court, reviewing the facts and law, concludes that the asylum appeal may succeed before an immigration judge, then there would arguably be no room for the secretary of state reasonably to take the view that it cannot. Any apparent blurring of appeal and review may therefore relate only to this very specific area of law. Nevertheless, Lord Hope’s concern to defend the principle that there is a necessary distinction between review and appeal on the merits—indeed, that the court’s “jurisdiction to deal with the case, outside the decision-making scheme laid down by the statute, rests entirely on that principle”—appears to be more in accordance with conventional thinking.

Lord Phillips and Lord Brown treated the phrases “no realistic prospect of success” and “clearly unfounded” as effectively coterminous; Lords Carswell and Neuberger envisaged circumstances where there might be a difference but agreed to the extent that these would be rare. Lord Hope was alone in considering, with reference to metaphorical attempts to shoot a red traffic light in his motor car, that there was an intended difference which was worth being concerned about.

No fresh claim

It is unclear where the decision that the reviewing court requires, in effect, to make up the home secretary’s mind for her leaves many a fresh claim, especially those which focus on procedural errors or misdirections on the home secretary’s part as to fact or law rather than simple perversity: in some cases the court may now have to substitute its own view that there is no fresh claim for purposes of para 353, even where the home secretary has clearly misunderstood the facts or law and might, if she had not

done so, have agreed that there was one. It may be that in such cases the decision will still fall to be quashed. Otherwise the court risks becoming a primary decision-maker, which is some distance from the arm’s-length oversight which judicial review traditionally provides.

Danger to national security

On 18 February 2009 the House of Lords handed down judgment in the conjoined cases of *RB (Algeria) (FC) and another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department*, [2008] EWCA Civ 290, [2008] All ER (D) 133 (Apr) challenges to deportation, to Algeria and Jordan respectively of alleged Islamic terrorists, including Omar Othman, known as Abu Qatada, said to be a key figure in Al Qaida.

The home secretary wishes to deport each applicant on the ground that he is a danger to national security. The two Algerian nationals, RB and U, claimed that deportation would infringe their rights under Art 3 of the European Convention on Human Rights (the Convention) as it would expose them to a real risk of torture or inhuman or degrading treatment. Othman claimed that he could similarly not be deported to Jordan because deportation would expose him to a real risk of torture, contrary to Art 3, flagrant breach of his right to liberty under Art 5 of the Convention and flagrant breach of his right to a fair trial under Art 6.

In each case an unsuccessful appeal against the home secretary’s deportation order was made to the Special Immigration Appeals Commission (SIAC). Further appeals by RB and U to the Court of Appeal were dismissed. However, Othman’s appeal to the Court of Appeal succeeded on the single ground that deportation would infringe his right to a fair trial under Art 6.

Foreign cases

The House of Lords hearing therefore raised issues about the extent and limits of the obligations of the UK under the Convention where a threatened breach of the Convention might occur not in the UK but in another country to which the UK intended to deport or remove. Such cases under the Convention are referred to as “foreign cases” following terminology of Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

Such cases date back to *Soering v United Kingdom* (1989) 11 EHRR 439 where the European Court of Human Rights (ECtHR) considered a claim that an intended

extradition of a murder suspect to the US would be contrary to Art 3 because of the “death row” phenomenon of long delayed executions.

The ECtHR narrowly rejected the application on the facts, but affirmed the principle that, while Convention institutions were not normally concerned with potential, as opposed to actual, violations of Convention rights, such rights were engaged where there was a real risk of torture or inhuman or degrading treatment in the requesting country. The court also observed that in an exceptional case an extradition might also engage Art 6.

Chahal v United Kingdom

In *Chahal v United Kingdom* (1997) 23 EHRR 413 the ECtHR applied the same principle in the case of an alleged Sikh terrorist, upholding Mr Chahal’s challenge to his intended deportation from the UK to India on national security grounds, on the basis that there was a real risk that if deported he would be tortured while in custody there. A further concern in *Chahal* was the lack of an effective remedy because Mr Chahal was unable for security reasons to challenge the intelligence information against him. It was in response to this concern that SIAC was created, with provision for sensitive material to be considered in closed session with a special advocate representing the appellant.

Unfair trial

In *Bader v Sweden (App No 13284/04)*, [2005] ECHR 13284/04, the ECtHR upheld a challenge to refoulement of an asylum seeker on the ground that there was a real risk on return of a flagrantly unfair trial leading to imposition of the death penalty. However, the court found that the rights infringed were Art 2 (right to life) and Art 3, not Art 6. The ECtHR has not yet in a foreign case upheld a challenge based on Art 6.

Assurances

In both *RB and U* and *Othman* the British government had obtained high-level assurances that the intended deportees would not be tortured. The leading ECtHR case on assurances in this situation is *Saadi v Italy (App No 37201/06)*, [2008] ECHR 37201/06. There the Tunisian government had refused to give the assurances sought by the Italian government that an intended deportee would not be tortured although it had given other assurances in general terms. The ECtHR found that these

assurances were not such as to remove the real risk that Saadi would be tortured. In contrast in *Mamatkulov & Askarov v Turkey* (2005) 41 EHRR 25, assurances by the Uzbek government, combined with the fact that after deportation (which happened while the ECtHR hearing was pending, in breach of Convention Art 34), no signs of torture were apparent on medical examination in Uzbekistan, satisfied the ECtHR that there was no risk of a breach of Art 3.

The factual issues

In giving its unanimous judgment the House of Lords held that the issue of whether there was a real risk of torture or inhuman or degrading treatment in breach of Art 3 was one of fact for SIAC, and that the Court of Appeal did not have jurisdiction to re-examine the factual issues, save to the extent necessary to determine whether there was material before SIAC on which a reasonable tribunal might have found that there was no real risk of a breach of Art 3 (the traditional test for judicial review of a decision of fact, derived from *Edwards v Bairstow* [1956] AC 14,

[1955] 3 All ER 48). It then held that there was such material before SIAC including in particular the existence of the assurances by the Algerian and Jordanian governments. Similarly SIAC had been entitled to dismiss Mr Othman's Art 5 claim, which was based on the fact that Jordanian law provided for solitary detention without charge or access to a lawyer for up to 50 days, on the basis that this was unlikely to happen in his case.

With regard to Mr Othman's Art 6 claim, SIAC found that he would not receive a fair trial for two reasons:

- first the trial would be by a military court and as such not by independent and impartial judges; and second
- because it was likely that at the trial the prosecution would be permitted to rely on evidence from two witnesses, one since executed after being condemned to death, which had probably been obtained in breach of Art 3.

SIAC held, however, that this was not the test for upholding his appeal. For Art 6 to be engaged there had to be a "total denial of the right to a fair trial" in Jordan, and this had not been shown. In reversing SIAC's

decision the Court of Appeal held that this test was met because of the fundamental nature of the prohibition of torture. The House of Lords held, however, that the legal test applied by the SIAC was not an error of law and that the SIAC was entitled on the facts to find as it had done. It therefore upheld the home secretary's appeal, while dismissing cross appeals relating to the SIAC's findings of fact.

An uncertain future

These cases are likely to go to the ECtHR. While the House of Lords was precluded by the nature of the statutory right of appeal from considering questions of fact save to the limited extent needed to ensure that there was material on which a reasonable decision-maker could have reached the conclusion reached, the ECtHR will directly scrutinise the facts. The outcome of this scrutiny, particularly in the Othman case, where it is likely that evidence will be used in a prosecution in Jordan which was obtained by torture, must be highly uncertain. NLJ

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