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Asylum - The Supreme Court Allows Repetitious Appeals

1 The new United Kingdom Supreme Court began to function from 1 October 2009 from the sumptuously refurbished Middlesex Guildhall on Parliament Square, opposite the Palace of Westminster. It took over the judicial function previously exercised by the House of Lords of being the final court of appeal for all courts in the United Kingdom. On 26 November it gave judgment in a case concerned with asylum which had started in the House of Lords.

2 The case, ***BA and PE v. Secretary of State for the Home Department*** combines two cases raising the same legal issue. Both claimants had failed in their appeals against deportation on asylum grounds. The Secretary of State made orders for their deportation and their attempts to have the orders revoked were unsuccessful. The claimants sought judicial review of the refusal to revoke the order on the ground in each case that they faced persecution if returned to their countries of origin, respectively Nigeria and Cameroon. In both cases previous applications for asylum had failed and appeals against refusal had been dismissed. In what follows I have written in the interests of simplicity only about asylum, but the same comments apply ***mutatis mutandis*** in relation to infringement of human rights, including the references to statutory definitions in the 2002 and 2006 Acts and in the Immigration Rules.

3 The applications for judicial review failed in the High Court and in the Court of Appeal. The case turned on the interpretation of section 92 of the Immigration and Asylum Appeals Act 2002, which governs the scope of appeals against immigration decisions which may be appealed in the United Kingdom. By section 92(4)(a) of that Act an immigration decision includes an appeal against an adverse decision on an asylum or human rights claim made and refused in the United Kingdom. Section 113(1) of the 2002 Act defines an asylum claim as “a claim made by a person to the S ecretary of State…..that to remove the person from or require him to leave the United Kingdom w ould breach the United Kingdom’s obligations under the Refugee Convention”- i.e. that removal wo uld involve returning the person concerned to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. In both cases the claim on asylum grounds under section 92(4)(a) was based on the same material as already considered and rejected when their asylum appeals were heard and dismissed.

4 The question of fresh asylum and human rights claims is dealt with by paragraph 353 of the Immigration Rules. Where a claim has already been considered and a fresh claim is made, the decision taker, whether Secretary of State, case worker or immigration judge, has to consider whether the evidence and submissions made in support of the claim are ***significantly different*** from the material that has been previously considered. Being ***significantly different*** means that the evidence and submissions have not previously been considered and taken together with the earlier material create a realistic prospect of success, notwithstanding the previous rejection.

5 The question which the Supreme Court had to consider in deciding whether an appeal lay against the decision to deport was whether paragraph 353 was to be taken into account or not, i.e. did the fact that the material was repetitious prevent an appeal from being made. The words of the sections from the 2002 Act quoted in paragraph 3 above do not specifically exclude a repetitious appeal, but there was case law from the Court of Appeal based on an earlier Act containing identical wording, which had concluded that repetitious appeals were not to be taken into account.. This would seem to be a common sense interpretation, but unfortunately it was not accepted by the Supreme Court, which by a majority ruling based on a meticulous reading of the relevant statutory provisions and case law concluded that an appeal against deportation was not excluded simply because the material lodged in support did not disclose any new material as required by Paragraph 353.

6 This decision has to be regarded as a setback which militates against efficient immigration control. It means that a person against whom a deportation order has been made will always be able to appeal against that order and delay its execution by submitting a human rights or asylum claim, even though the material in support of that claim has already been submitted in support of an unsuccessful appeal. As noted, it was a majority of their lordships which reached the decision. Baroness Hale delivered a dissenting judgment and the following statement from her judgement is particularly telling:

> "This country is bound not to expel people in breach of their human rights or w hen they have a well-founded fear of persecution in their home country. We must of course have a fair system for deciding whether expulsion will be in breach of those obligations. An initial decision followed by an appeal system in this country is sufficient to do this. **This country is not bound to allow people to make essentially the same claim time and again as a way of staving off their departure.'**[Emphasis supplied.]

7 In paragraph 3 above I have quoted the definition of "asylum claim" as it presently stands in se ction 113 of the 2002 Act. The majority of the Supreme Court chose to take a very literal view of that definition rather than adopt a more purposive interpretation which would have led to a result in keeping with the desirable result of a refusal to accept a repetitious appeal as a means of deferring or preventing the claimants' expulsion from the United Kingdom. It is much to be r egretted that the Supreme Court has failed in this instance to take proper account of the national and public interest in an effective system of immigration control and the avoidance as far as possible of a multiplicity of legal proceedings as a means of frustrating deportation. The fact that Baroness Hale, considering the same statutory provisions and case law, was able to reach an opposite conclusion to that of the rest of her colleagues, clearly indicates that such a conclusion was open to all the members of the court, but they chose not to take it.

8 A revised definition of "asylum claim" is contained in section 12 of the Immigration, Asylum and Na tionality Act 2006:

> "asylum claim" –
> (a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under t he Refugee Convention, but -
> **(b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part [of the Act] in accordance with the immigration rules.**

[Emphasis supplied.]

Unfortunately the section has not yet been brought into force, so the additional words highlighted are not yet part of the law. If they had been, the Supreme Court would have been bound to take account of them and would have reached a different conclusion. I do not know why section 12 has not yet been brought into force but clearly in view of Supreme Court's decision, the sooner t hat happens the better.

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