Deport First Appeal Later

Category Name: MW 370

1. This is a convenient shorthand way of referring to an important recent Court of Appeal decision, *Klarie v. The Secretary of State for the Home Department* [2015] EWCA Civil 1020. The Court had to consider the effect and validity of section 94B of the Nationality, Immigration and Asylum Act 2002, inserted into that Act by section 17 of the Immigration Act 2014 and effective as from 28 July 2014.

2. Rights of appeal against adverse Home Office decisions are now set out in section 82 of the Nationality, Immigration and Asylum Act 2002 as amended by section 15 of the Immigration Act 2014. Section 82(1) allows a right of appeal only in cases in which the Home Secretary has decided:

a. to refuse a protection claim, i.e. a claim for asylum or humanitarian protection;
b. to refuse a human rights claim or
c. to revoke a person's protection status, i.e. to revoke a person's status as a refugee under the United Nations Refugee Convention or his/her entitlement to humanitarian protection.

For further information on these provisions please see Legal Briefing Paper 343.

3. Section 94 of the 2002 Act sets out in subsection (4) a list of countries other than Member States of the European Economic Area, to which the Home Secretary may add other countries if she is satisfied that there is no serious risk of persecution or of infringement of human rights in those countries. Subsection (6) authorises the Home Secretary to omit countries from the list by making an order. By section 94(1) and (2) if the Secretary of State is satisfied that a claimant making a protection claim is entitled to reside in a state listed in subsection (4) she must certify that claim as clearly unfounded unless she is satisfied that it is not clearly unfounded.

4. Similar provision is made by Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in respect of Member States of the European Economic Area, i.e. the European Union plus Norway, Switzerland and Iceland. Those Member States are to be treated as safe, i.e. as places where a person's life or liberty will not be threatened for any of the reasons set out in the Refugee Convention.

5. Section 17 of the Immigration Act 2014 makes further amendments to the 2002 Act which require that in certain circumstances appeals must be brought from outside the United Kingdom. By the revised section 92 of the 2002 Act if a claim on which a particular appeal is based is certified as clearly unfounded

in accordance with the provisions explained in paragraphs 3 and 4, the appeal must be brought from outside the United Kingdom. This section applies also to human rights claims, including claims under section 94B of the 2002 Act made by persons liable to deportation.

Court of Appeal decision

6. Section 94B of the 2002 Act is referred to as the "deport first appeal later" provision and was recently considered and approved by the Court of Appeal in the case quoted in paragraph 1. The section provides that the Secretary of State may certify the claim as clearly unfounded if she considers that the removal of the appellant to the country to which it is proposed that he be removed would not be unlawful under section 6 of the Human Rights Act 1998, which imposes on public authorities a duty not to act contrary to the European Human Rights Convention (ECHR). The Court ruled that the test to be applied in considering this section was whether the removal of the appellant from the United Kingdom for the duration of the appeal process would breach his human rights, i.e. in this case rights under Article 8 of the ECHR, the right to respect for private and family life, home and correspondence. For the appellant in this case it was argued that it would be very difficult for him to instruct lawyers, gather evidence and do other things necessary for the conduct of an effective appeal from outside the United Kingdom. These arguments were rejected and the Court noted that entry clearance cases provided a precedent in that, e.g. appeals against refusal of a visa for a spouse being brought from another country, had always been conducted from abroad. In such cases the other spouse conducts the appeal in the UK as sponsor. The Court took the view also that specialist immigration judges cold be relied on to ensure that an appeal from outside the UK was fairly conducted.

7. This was a human rights claim and it is reasonable to assume but cannot be taken for granted that if the Court of Appeal were now to consider a protection claim which was similarly certified by the Home Secretary it would reach the same conclusion. Section 94B relates specifically to human rights claims made by persons liable to deportation, which in most cases means either convicted foreign criminals whose deportation has been recommended by a court, or persons whose continued presence in the United Kingdom is not considered by the Home Secretary to be conducive to the public good. (Immigration Act 1971, sections 5 and 6.) Clause 34 of the Immigration Bill presently going through Parliament seeks to widen the scope of section 94B by amendments extending provision for certification of appeals as being clearly unfounded and consequent requirement for appeals to be conducted from outside the United Kingdom to all cases of administrative removal as well as deportation. Administrative removal is provided for in section 10 of the Immigration Act 1999 and enables the removal of any foreign national not lawfully in the United Kingdom or in various other categories listed in the section. This Clause has survived the scrutiny of the Public Bill Committee and it is reasonable to assume that it will become law. Having regard to the very large numbers of illegal immigrants believed to be in the United Kingdom, the scope for providing for appeals to be heard from outside the United Kingdom will be greatly increased.

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