Immigration

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Topics: Immigration

In dismissing the applicant's appeal against a refusal to allow his application for judicial review of the secretary of state's refusal to revoke a deportation order made against him, the Court of Appeal, Civil Division, held that the word 'matter' in section 96(1) of the Nationality, Immigration and Asylum Act 2002 included evidence that could have been raised, but had not been, on an actual or possible appeal against an earlier decision.

Applicant being imprisoned for fourteen months and respondent secretary of state serving notice of liability to deportation – Decision to make deportation order being made – Appeal to First-tier Tribunal (Immigration and Asylum Chamber) being dismissed – Deportation order being served – Applicant adducing new report from independent social worker – Secretary of state criticising late production of report and refusing to revoke deportation order

Khan v Secretary of State for the Home Department: Court of Appeal, Civil Division: 11 February 2014

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Section 96 of the Nationality, Immigration and Asylum Act 2002 (the 2002 act) provides, so far as material: '(1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the secretary of state or an immigration officer certifies — (a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined), (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and (c) that, in the opinion of the secretary of state or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.'

The applicant was a Pakistan national who had entered the UK as the spouse of a British citizen. He was subsequently granted indefinite leave to remain as the spouse of his British wife. The applicant was convicted of criminal offences and sentenced to a total term of imprisonment of 14 months. At the time of his conviction, he was separated from his wife. The applicant was served with a notice of liability to deportation. His representations in resistance to the making of a deportation order were rejected.

The applicant appealed to the First-tier Tribunal (Immigration and Asylum Chamber) (the FTT) against the respondent secretary of state's decision to make a deportation order, contending that his removal would constitute a disproportionate interference with his rights, those of his wife and his three children under article 8 of the European Convention on Human Rights. The FTT dismissed his appeal.

The applicant was not granted permission to appeal and the secretary of state signed and served a deportation order on the applicant. In advance of the deportation date, the applicant made further submissions accompanied by a report from an independent social worker. The report addressed the importance to the children of contact with the applicant and the likelihood of his re-offending. He contended that, if the report had been available to the FTT, its decision would have been different. The secretary of state criticised the late production of the report which could, she considered, have been produced at the earlier appeal hearing.

Further, she did not accept that the FTT's decision would have been different if it had had sight of the report. The secretary of state refused to revoke the deportation order and certified that the criteria in section 96(1) of the 2002 act had been met. The applicant sought judicial review of the secretary of state's refusal to revoke the deportation order. The application was dismissed. In construing section 96(1)(b) of the 2002 act, the judge found that 'matter', correctly interpreted, did include evidence, the relevant evidence in the instant case being the independent social worker's report. The applicant appealed.

He submitted that the judge's construction of section 96 of the act had been wrong. He contended that when section 96(1)(b) spoke of the new claim relying upon 'a matter that could have been raised in an appeal against the old decision' it meant only reliance on a new ground or issue and not new evidence in support of an old ground or issue. Consideration was given to sections 85, 86(2) and 120 of the act, section 96(1) as originally enacted and to the explanatory notes to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 which had introduced the relevant wording of section 96.

The appeal would be dismissed.

Section 96(1) of the 2002 act was directed to material that could have been raised, but had not been, on an actual or possible appeal against an earlier decision. On an appeal, the appellant relied upon his grounds of appeal and upon his evidence in support of such grounds. It was not surprising, therefore, to find that if a person had failed to appeal or had lost an appeal, he should

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not be permitted to adduce evidence that he could have relied upon on such an appeal, but had not (see [48], [73], [74] of the judgment).

Sub-sections (1) and (2) of section 96 of the act dealt with different subjects and it was not surprising that Parliament should have used a flexible word such as 'matter' to encompass the different material that might have been relied upon in each case. Nor was it surprising that when enacting the amended section 96 it had moved away from the word 'ground' and had not re-enacted section 96(3) as originally drafted.

It would have been surprising if Parliament, in enacting section 96(1), had intended the secretary of state and her officials to have become concerned with questions whether new submissions raised by a claimant were advancing new 'grounds' or new 'evidence'. Frequently, one could not draw such fine lines when immigration claimants advanced repeat claims.

Section 96(1) was properly directed to the advancing of new material as a whole, either grounds of appeal or evidence in support. It had to have been the intention to prevent claimants from advancing on a new appeal points and/or new material in aid of old points which might reasonably have been advanced in a previous appeal (see [48]-[51], [65], [68]-[71], [73], [74] of the judgment).

The judge in the instant case had been correct to dismiss the claim for judicial review (see [72]-[74] of the judgment).

R (on the application of BA (Nigeria)) v Secretary of State for the Home Department [2010] 2 All ER 95 considered; *R (on the application of ZA (Nigeria)) v Secretary of State for the Home Department*; *R (on the application of SM (Congo)) v same* [2010] All ER (D) 348 (Jul) considered; *Lamichhane v Secretary of State for the Home Department* [2012] All ER (D) 88 (Mar) considered.

Decision of Turner J [2013] 3 All ER 499 affirmed.

Raza Husain QC, Abdurahman Jafar and Chris Buttler (instructed by Duncan Lewis (Solicitors) Ltd) for the applicant; David Blundell (instructed by the Treasury Solicitor) for the secretary of state.

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