16 June 2010

PRESS SUMMARY

MS (Palestinian Territories) (Appellant) v Secretary of State for the Home Department (Respondent) [2010] UKSC 25
On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 17

JUSTICES: Lord Saville, Lady Hale, Lord Mance, Lord Collins, Sir John Dyson SCJ

BACKGROUND TO THE APPEAL

The appellant was born in Gaza in 1985. Having lived in Libya until about 2002, he then spent time in mainland Europe before arriving in the UK in April 2007. He subsequently claimed asylum and humanitarian protection. On 24 May 2007, the Home Secretary refused the appellant's asylum and human rights claims. The letter sent by the Home Secretary recorded that a decision had been taken to remove the appellant from the UK and stated:

> *If you do not appeal, or you appeal and the appeal is unsuccessful, you must leave the United Kingdom. If you do not leave voluntarily, directions will be given for your removal from the United Kingdom to Palestine National Authority.*

The appellant appealed the decision under section 82 (2) (h) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). He did so on the grounds that the decision was 'not in accordance with the law' within the meaning of section 84 (1) (e) of the 2002 Act. The appellant argued that this was so because directions for his removal to the Palestinian Territories could not lawfully be given under Schedule 2 of the Immigration Act 1971 ('the 1971 Act'), since paragraph 8 (1) (c) of Schedule 2 required that there was reason to believe that he would be admitted to the country chosen.

The immigration judge accepted the evidence given in support of the appellant that, owing to his lack of documents and the fact that he did not have any living parents, he would not be admitted to the Palestinian Territories. However, the immigration judge rejected the appellant's argument that this meant that the decision was 'not in accordance with the law' under section 84 of the 2002 Act. The Immigration Tribunal and the Court of Appeal agreed with the immigration judge. The appellant appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismissed the appeal. The Court held that there is no right of appeal against an immigration decision under section 82 (2) (h) of the 2002 Act on the ground that the country or territory stated in the notice of the decision is not one that would satisfy the requirements of paragraph 8 (1) (c) of Schedule 2 to the 1971 Act. Sir John Dyson SCJ gave the court's judgment.

REASONS FOR THE JUDGMENT

- Central to the appeal was the question of whether the proposal, in a notice of an immigration decision, of a particular country to which the appellant was to be removed was an integral part of that decision **[para 21]**.

- A clear distinction was drawn in section 84 of the 2002 Act between the decision that a person is to be removed from the United Kingdom and removal under removal directions **[22]**. This was a strong indication that the proposal of a destination country in an immigration decision was not an integral part of the decision itself.

- Section 82 of the 2002 Act referred to decisions that a person is to be removed 'from the United Kingdom'. None of the decisions referred to mentioned a country of destination **[24]**.

- The fact that one type of decision mentioned in section 82 (2) (h) of the 2002 Act referred to a 'decision that an illegal entrant is to be removed from the United Kingdom *by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971*' (emphasis added) did not mean that an immigration decision must comply with Schedule 2 of the 1971 Act. The reference to the 1971 Act was merely descriptive of the type of decision appealed **[25]**.

- Not all of the decisions mentioned in section 82 required a proposed destination to be indicated to an applicant when the decision was communicated to him/her. If the proposal of a destination was an integral part of an immigration decision under s. 82 (2) (h), it was difficult to see why Parliament did not provide that the proposal of a destination country should not also be an integral part of *any* decision from which removal directions will result **[26]**.

- It was acknowledged by both parties that there was no right of appeal against removal directions under the 2002 Act. The power to make removal directions was granted by Schedule 2 to the 1971 Act. The Appellant had acknowledged that there was no right of appeal against directions of a 'technical' nature such as the specification of a particular ship or aircraft to be used for removal, but submitted that the specification of a particular destination was of a different character to these types of directions. It was, however, impossible to make the distinction sought by the Appellant **[27]**.

- The legislative background and explanatory notes to the 2002 Act supported the Court's conclusion **[28-29]**. There were also policy reasons which prevented the kind of challenge put forward by the Appellant **[30-34]**. The ability of the Secretary of State to give removal directions frequently depended on practical and operational issues that were inherently unsuitable for resolution at the time of the appeal against the decision. In the unlikely event that removal directions were given which could not be implemented as the person concerned could not enter the country of destination, judicial review was available.

- Regulation 5 (1)(b)(i) of the Immigration (Notices) Regulations 2003 ('the Regulations'), which stated that the notice of an immigration decision should state the country or territory to which it is "proposed" to remove the person, did not assist the Appellant **[35-38]**. The Appellant had submitted that the Regulations shed light on the meaning of the 2002 Act. However, the meaning of s. 82 (2) (h) was clear and unambiguous and there was no need to use the Regulations to discern its meaning. The reason for the requirement in regulation 5 was that the proposed destination was needed in order to provide a focus for the issues which might arise under an applicant's asylum and human rights claims.