

Appeal No: HX11499-2002  
[2002] UKIAT04412... \*STARRED\*

# IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 29<sup>th</sup> August 2002  
Date Determination notified:  
.....26<sup>th</sup> September 2002.....

Before:

Mr C M G Ockelton (Deputy President)  
Mr J R A Fox  
Mr S L Batiste

Between:

**ASIF KHAN**  
APPELLANT

and

**Secretary of State for the Home Department**  
RESPONDENT

## **DETERMINATION AND REASONS**

1. The Appellant's nationality is unknown. He has claimed at all material times to be a citizen of Afghanistan. He appeals, with leave, against the determination of an Adjudicator, Mr J J B Nicholson, dismissing his appeal against the decision of the Respondent on 5<sup>th</sup> October 2001 to give directions for his removal to Afghanistan as an illegal entrant. Before us he is represented by Mr Kumi, instructed by Sriharans, and the Respondent is represented by Ms Paddick.
2. The heart of the Appellant's claim is that he is a refugee from Afghanistan. He gave to the Secretary of State a circumstantial description of his past. It was that history that he repeated before the Adjudicator. Neither the Secretary of State nor the Adjudicator believed that his story was the truth. Neither the Secretary of State nor the Adjudicator believed that the Appellant is from Afghanistan.

3. In the course of refusing his claim, the Secretary of State wrote this, at paragraph 15 of the letter of refusal:

“As a result of your obvious lack of knowledge about the area that you claim to have lived in, the Secretary of State has concluded that you are not from Nengahgar. This in turn has given the Secretary of State cause to doubt that you are, in fact, an Afghan as claimed. The Secretary of State has therefore considered all the available evidence presented in your asylum claim, but has concluded that you are not genuinely of Afghan nationality.”

And then at paragraph 20:

“The Secretary of State is not satisfied that you are an Afghan and has refused your claim for asylum and your human rights claim on the basis that you are not from Afghanistan. Directions will be given for your removal to Afghanistan, as this is the country of which you claim to be a national. This is being done solely in order to enable you to appeal to an Adjudicator and enable to decision to refuse your claim for asylum to be reviewed. If you appeal against the refusal of your claim for asylum and the Special Adjudicator also concludes that you are not from Afghanistan, we will seek to establish your true nationality.”

4. The Appellant did appeal, as we have said. The Adjudicator concluded as follows:

“I note the arguments put by Mr Kumi on the Appellant’s behalf - they were ably put but they do not persuade me that there is any truth to this Appellant’s story. Having weighed the evidence, I am not persuaded that this Appellant is from Afghanistan. His knowledge of the country was very limited and I am not persuaded that he was a credible witness.”

Later, the Adjudicator wrote as follows:

“The onus lies on the Appellant to persuade me that it is reasonably likely that he is a refugee within the definition given in Article 1A of the Refugee Convention. He has failed to do so because he has not persuaded me either that it is reasonably likely that he comes from Afghanistan or that it is reasonably likely that he would come to any harm if he was returned there.”

And later, the Adjudicator emphasises his position as regards to the Appellant’s nationality when he says that another issue “*of course is academic as he does not come from Afghanistan*”.

5. The Adjudicator went on to consider whether, in those circumstances, the Secretary of State’s notice of decision that the Appellant should be removed to Afghanistan was valid and he concluded that, (although the matter was not strictly speaking for him) as a result of his decision, the notice would not be regarded as valid.
6. Before us, Mr Kumi has raised three principal matters. The first is that the Adjudicator’s determination was defective in that it failed to identify the

Appellant's nationality. The second is that, in any event, the notice of decision to remove to Afghanistan is invalid and cannot be acted upon because the Appellant is not from Afghanistan, which appears to be what the Adjudicator decided. The third is that the notice of removal is unlawful because of the terms in which the Secretary of State indicated that he was giving that notice (those terms are the ones we have set out in paragraph 20 of the letter of refusal). We deal with each of those points in turn.

7. First, nationality. Mr Kumi submitted that it was the Adjudicator's task to assess the Appellant's nationality. He acknowledged that no country of nationality for the Appellant had been offered, other than Afghanistan. He acknowledged also that the burden of proof of nationality was on the Appellant and that it was not for either the Adjudicator or for the Secretary of State to establish the Appellant's nationality. Mr Kumi referred us to the decision of the Tribunal in Tikhonov, [1998] INLR 737. In that case, the Tribunal, constituted by the then President and two legal members, decided that "*It was not possible to decide an asylum claim without identifying the country or countries of nationality of the claimant, or alternatively concluding that the claimant was stateless. The burden of proving such nationality or statelessness was upon the claimant and the identification of the relevant country or countries had to be decided on the evidence*".
8. Tikhonov, however, was a case in which the basic facts of the Claimant's history were not in serious doubt. He was a person who, in terms both of ancestry and in terms of the changing politics of Eastern Europe, was of doubtful nationality. In order to assess his claim under Article 1A(2) of the Refugee Convention, it was evidently necessary to determine his country of nationality from the available options. In those circumstances, the Tribunal felt able to take the view that an Adjudicator should always decide which of the nationalities was relevant for the purposes of the claim. We have some doubts whether the rule in Tikhonov is expressed too widely. It does appear to us that if an Appellant's claim is of such a nature that it gives no rise to a well-founded fear of persecution whatever his nationality, it cannot in principle be right to say that it cannot be assessed without determining his nationality. But that is perhaps not of immediate relevance to the present appeal.
9. So far as the present appeal is concerned, the position is that the Adjudicator had precisely two choices on the evidence before him. He had the opportunity of deciding that the Appellant was from Afghanistan as he said: and he had the opportunity of rejecting the Appellant's account, in which case there was no alternative country of nationality that he could properly offer. We do not accept Mr Kumi's submission that, in those circumstances, an Adjudicator is obliged to find a country of nationality for the Appellant. If the Appellant offers only one country and is not

believed in his account, the determination that he does not come from that country is entirely adequate as a determination of his nationality for the purposes of the appeal which the Appellant is raising. For those reasons, so far as the question of nationality is concerned, we regard the determination as entirely appropriate. We have to say that had it been suggested to us that the Adjudicator erred in the reasoning he brought to the determination of nationality, we should have said that there was no merit at all in any such argument. It is quite clear that the Adjudicator dealt with this issue with the greatest of care.

10. Secondly, then, is the question of whether, given that the Appellant is found by the Adjudicator not to be of Afghan nationality, it is right that the removal directions are invalid. Removal directions of an illegal entrant are made under paragraphs 8 and 9 of Schedule 2 to the 1971 Act. We do not need to set them out in full. As is well known, they provide that removal directions of an illegal entrant may be made, broadly speaking, to a country or territory which falls into one of four categories. They are set out in sub-paragraph 8(1)(c). They are a country of which he is a national or citizen, or a country or territory in which he has obtained a passport or other document of identity, or a country or territory in which he embarks for the United Kingdom, or a country or territory to which there is reason to believe that he will be admitted. In the present case, it has not been suggested that any category other than the first is applicable. There can be a notice of removal to a country of which he is a national or citizen.
11. The centrepiece of Mr Kumi's argument on this point is that, given that the Appellant has been found by the Adjudicator not to be a national or citizen of Afghanistan, the removal directions must be void: and that, as we understand it, was the Adjudicator's view as well. The issue of whether the removal directions are or are not void cannot be considered by us in isolation from the Appellant's rights of appeal. It is only if the Appellant has a valid appeal against a notice that an Adjudicator or the Tribunal can determine the validity of the notice. It is common ground between the parties in this appeal that the validity of the directions for removal is capable of being questioned by an Appellant under s66 of the 1999 Act, the relevant parts of which are as follows:

“66. Validity of directions for removal

- (1) This section applies if directions are given for a person's removal from the United Kingdom
  - (a) on the ground that he is an illegal entrant; ...
- (2) That person may appeal to an Adjudicator against the directions on the ground that on the facts of his case there was in law no power to give them on the ground on which they were given.
- (3) This section does not entitle a person to appeal while he is in the United Kingdom unless he is appealing under s65 or 69(5).”

12. The present case is one in which the Appellant is appealing under s 69(5), so he has a right of appeal under s 66 while he is in the United Kingdom and that right of appeal is limited. It is an appeal against the directions on the ground that, on the facts of his case, there was in law no power to give them on the ground on which they were given. We emphasise that the right of appeal under s 66 is limited because the general right of appeal to an Adjudicator under paragraph 21(1) of Schedule 4 to the 1999 Act is on the basis that a decision was not in accordance with the law, but the next succeeding sub-paragraph of that paragraph makes it clear that the general right of appeal on that ground is subject to any limitation on the rights of appeal. Such a limitation is to be found in s 66(2).
13. The Appellant then has or had or might have had a right of appeal against the directions for removal on the ground that they directed removal to a country of which he was not, as found by the Adjudicator, a national. Mr Kumi suggests that, under those circumstances, the removal directions are invalid. Afghanistan is, following the Adjudicator's decision, not a country authorised by paragraphs 8 and 9 of Schedule 2 as a destination for the Appellant's removal. Again, though, it seems to us that the question must be determined in the context of an actual appeal. In fact, there was no appeal under s 66 before the Adjudicator, as he recognised. Indeed, it is difficult to see how there could be because, so far as the appeal to the Adjudicator is concerned, the Appellant's claim was that he was from Afghanistan.
14. We firmly take the view that an Appellant cannot be heard to claim, for the purposes of his asylum appeal, that he comes from a particular country and, in the same proceedings, for the purposes of s 66, that he does not come from that country. That should be sufficient to deal with any case in which, in the same appeal, an Appellant claims that he is from a particular country but, if the Adjudicator does not believe that, then he claims for the purposes of an appeal under s 66 that he is not from that country. To do so is simply an abuse and we will not tolerate it. It follows that an appeal under s 66, based on the falseness of the information given for the purposes of any other grounds of appeal in the same appeal, will not succeed.
15. We pause, in passing, to note the case of Zecaj [2002] UKIAT 00232, to which we have been referred. That was a case in which there was no inconsistency in what the Appellant had said. He was a Kosovan who had been, by only one of a series of errors which the Secretary of State had made in his case, issued with notice of removal to Albania. He had always said he was Kosovan and one of the things that he said on his appeal was that the directions for his removal were invalid as they were for Albania. The Tribunal's acceptance of that argument does not in any sense

undermine what we have said about an Appellant who maintains inconsistent countries of origin for various purposes in his appeal.

16. As we have indicated, the Adjudicator did not formally have before him an appeal under s 66 and the question then arises whether an Appellant, who is found by the Adjudicator not to be from the country which he claims to be from, has a subsequent right of appeal under s 66. Might he say, *“Following the Adjudicator’s determination which I accept, I appeal against the removal directions on the basis that, as has now been established as a fact, I am not from the country which is mentioned in them”*? It would appear at first sight as though he could do so under s 66. If he has not previously raised the issue, then s 66 ought to give him a right of appeal. But we note that by then the decision for his removal, against which he appeals, will be of some age and under Rule 6 of the Immigration and Asylum Appeals (Procedure) Rules 2000, where an Appellant makes an appeal within the United Kingdom, notice of appeal has to be given not later than ten days after the notice of the decision was received. So any such appeal is in practice certain to be out of time and we cannot see that it would generally speaking be right to enable a person to raise a late appeal when the reason for the lateness is that he has previously sought to deceive everybody who has considered his case.
17. It follows from the foregoing that an appeal under s 66 will be unsuccessful if it is raised on the basis of inconsistent facts in the principal appeal; and it cannot be raised later because it will be out of time. The effect of s66 must, in our view, be limited to cases such as Zecaj where there has been some factor which does not involve a judgement prejudicial to the Appellant, but simply that in fact there has been an error in the directions given. It follows that we reject Mr Kumi’s second principal submission.
18. The third submission was that, given the terms of paragraph 20 of the Respondent’s letter of refusal, the Secretary of State was not entitled to give the directions which he did give. We have to say that paragraph 20 does give us pause for thought. The Secretary of State was, in our view, entirely entitled to reject the Appellant’s claim to be from Afghanistan, but nevertheless to give removal directions for Afghanistan. The reason for that is that the appropriate course of action for an Appellant would be to appeal under s 66 or s 69, or indeed s 65. The Appellant could no doubt choose whether to say that he was not from Afghanistan or to say that he was from Afghanistan. The tactics of the Appellant’s appeal are not a matter for the Secretary of State. In making the removal directions, it appears to us that the Secretary of State was entitled for those purposes to accept what he had been told by the Appellant. In reaching that conclusion we are following the determination of the Tribunal in Ali [2002] UKIAT 01437.

19. The difficulty arises in the present case because of the use of the word "*solely*". As Ms Paddick acknowledged, the use of that word was ill-advised because, if the Adjudicator had concluded that the Appellant was from Afghanistan but not a refugee, he would have been removed in accordance with the removal directions. It follows that the giving of the removal directions was not *solely* in order to enable an appeal.
20. Reading the paragraph as a whole, it appears to us that the word "*solely*" properly interpreted applies to the insertion of a particular country in the notice, rather than to the issuing of the notice as a whole. What is being said is that the Secretary of State is giving removal directions, and the removal directions are to Afghanistan. The choice of Afghanistan is done on the basis of the Appellant's story and that is the only reason why that country has been chosen. Following the giving of the directions for removal, the Appellant has an appeal which he has indeed argued.
21. In any event, it appears to us that Mr Kumi's third principal submission is doomed to failure for the reasons that we have already given. He has no general right to assert that the directions for removal are given not in accordance with the law. He has that right only under s 66. The ground on which the directions for removal were given is the ground that the Appellant is an illegal entrant. The directions are for removal to Afghanistan, a country which he cannot in these proceedings be heard to say that he is not from. It follows that whatever may be the merits of Mr Kumi's argument based on paragraph 20, they are not capable of being raised in proceedings before the Adjudicator or before the Tribunal.
22. We are aware that there are many cases where Appellants have claimed to be from a country which the Secretary of State does not believe that they are from and where the Adjudicator shares the Secretary of State's incredulity. For that reason, we briefly summarise our conclusions in this appeal.
23. First, an Adjudicator who considers the evidence properly and concludes that an Appellant is not from the country which he claims to be from is entitled simply to say so. Second, an Appellant who claims to be from one country for the purposes of his asylum appeal is not entitled in the same appeal to claim to be from another country for the purposes of raising a claim under s 66.
24. In the present case, the determination looked in some detail at everything which could possibly be said on the Appellant's behalf. Mr Kumi has, very properly, not sought to have us set it aside for any reason other than those which we have mentioned. For the reasons we have given, we dismiss the Appellant's appeal.

C M G OCKELTON  
DEPUTY PRESIDENT