Trinity Term
[2010] UKSC 25
On appeal from: [2008] EWCA Civ 17

JUDGMENT

MS (Palestinian Territories) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Saville
Lady Hale
Lord Mance
Lord Collins
Sir John Dyson SCJ

JUDGMENT GIVEN ON

16 June 2010

Heard on 26 and 27 April 2010

Appellant	*Respondent*
Stephen Knafler QC Duran Seddon (Instructed by Refugee and Migrant Justice)	Tim Eicke John-Paul Waite (Instructed by Treasury Solicitors)

SIR JOHN DYSON SCJ (delivering the judgment of the court)

The issue

1. Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides that where an "immigration decision" is made in respect of a person he may appeal to the Asylum and Immigration Tribunal, now the First-Tier Tribunal (Immigration and Asylum) ("the Tribunal"). Section 82(2) and (3A) define the meaning of an "immigration decision" and include at section 82(2)(h):

> "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 (c77) (control of entry: removal)".

2. We shall refer to the Immigration Act 1971 as "the 1971 Act". The issue that arises on this appeal is whether it is possible to challenge by way of an appeal an immigration decision within the meaning of section 82(2)(h) on the ground that the "country" or "territory" of destination stated in the notice of the decision is not one that would satisfy the requirements of para 8(1)(c) of Schedule 2 to the 1971 Act should removal directions to that country or territory in fact be given.

The facts

3. The appellant was born in Gaza in 1985. In 1990, he left Gaza and went to Libya where he lived until about 2002. He then spent time first in Italy and then in France before arriving clandestinely in a lorry in the United Kingdom in April 2007. Some time after his arrival in the United Kingdom, he claimed asylum and humanitarian protection. On 25 April 2007, he was served with a notice of illegal entry and of his liability to be detained under para 16(2) of Schedule 2 to the 1971 Act pending a decision whether or not he was to be given removal directions and be removed in pursuance of such directions.

4. By a letter dated 24 May 2007, the Secretary of State rejected the appellant's asylum and human rights claims. The letter was accompanied by a Form IS151B entitled "Decision to remove an illegal entrant/person subject to administrative removal under section 10 of the Immigration and Asylum Act 1999 ["the 1999 Act"]—Asylum/Human Rights Claim refused". The notice said: "a decision has now been taken to remove you from the United Kingdom". It gave

details about the appellant's right of appeal. Against the rubric "REMOVAL DIRECTIONS" appeared the following:

> "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**."

5. The appellant appealed. By a determination promulgated on 19 July 2007, Immigration Judge Lloyd dismissed his appeal on both the asylum and human rights issues that he had raised. She also dismissed his appeal in so far as it was based on the contention that the immigration decision made on 24 May was not "in accordance with the law" within the meaning of section 84(1)(e) of the 2002 Act. The argument advanced was that the decision was not in accordance with the law because removal directions could not lawfully be given to remove the appellant to the Palestinian Territories pursuant to Schedule 2 to the 1971 Act, since it was not a country or territory to which there was reason to believe that he would be admitted within the meaning of para 8(c)(iv) of Schedule 2 to the 1971 Act.

6. The immigration judge accepted the evidence given on behalf of the appellant by Elizabeth Griffith, a case worker with the Refugee Legal Centre (as it then was). Her evidence was that she had been told by a Mr Sumara at the Palestine General Delegate Office that a Palestinian could not return to the Palestinian Territories without an ID card. An ID card was proof that the bearer was resident in either Gaza or West Bank. Once in possession of an ID card, a Palestinian could apply for a passport/travel document. She said that she explained the appellant's circumstances to Mr Sumara. These were that upon leaving Gaza, the appellant had lost contact with his family and that to the best of his knowledge, he did not have a birth certificate and had no other Palestinian identity papers. Based on this information, Mr Sumara said that it was "very unlikely" that the appellant would be able to return to the Palestinian Territories. Mr Sumara later said that it would be "impossible" for the appellant to return in view of the fact that he had no birth certificate, no living parents and no ID.

7. The appellant sought a reconsideration of the immigration judge's determination by the Tribunal under section 103A of the 2002 Act. He did not challenge the immigration judge's findings in relation to his appeal on asylum or human rights grounds. The sole basis for his challenge was that the immigration judge had materially erred in law in failing to accept his argument that the immigration decision was not "in accordance with the law" within the meaning of section 84(1)(e) of the 2002 Act. On 17 August 2007, Senior Immigration Judge Jordan made an order for reconsideration.

8. On the reconsideration, the Tribunal (Mr Ockelton, Deputy President, Designated Immigration Judge O'Malley and Immigration Judge Parkes) concluded that the immigration judge had not made any material error of law and ordered her decision to stand. The appellant's appeal against this decision was dismissed by the Court of Appeal (Rix, Scott Baker and Jacob LJJ): [2009] EWCA Civ 17; [2009] Imm AR 3.

The statutory framework

9. Section 82(1) of the 2002 Act provides that where an "immigration decision" is made in respect of a person, he may appeal to the Tribunal. Section 82(2) defines "immigration decision" as meaning:

> " (a) refusal of leave to enter the United Kingdom.
>
> (b) refusal of entry clearance,
>
> (c) refusal of a certificate of entitlement under section 10 of this Act,
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain,
>
> (e) variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,
>
> (f) revocation under section 76 of this Act of indefinite leave to enter or remain in the United Kingdom,
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c33) (removal of person unlawfully in United Kingdom),
>
> (h) 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 (c77) (control of entry: removal),

(ha) a decision that a person is to be removed from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 (removal: persons with statutorily extended leave),

(i) a decision that a person is to be removed from the United Kingdom by way of directions given by virtue of paragraph 10A of that Schedule (family),

(ia) a decision that a person is to be removed from the United Kingdom by way of directions under paragraph 12(2) of Schedule 2 to the Immigration Act 1971 (c77) (seamen and aircrews),

(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),

(j) a decision to make a deportation order under section 5(1) of that Act, and

(k) …."

10. Section 84(1) specifies the grounds on which an appeal under section 82(1) against an immigration decision must be brought. They include:

"(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;

……

(e) that the decision is otherwise not in accordance with the law;

…….

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or

would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

11. Section 120 provides:

"(1) This section applies to a person if –

(a) he has made an application to enter or remain in the United Kingdom, or

(b) an immigration decision within the meaning of section 82 has been taken or may be taken in respect of him.

(2) The Secretary of State or an immigration officer may by notice in writing require the person to state--

(a) his reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and

(c) any grounds on which he should not be removed from or required to leave the United Kingdom."

12. Schedule 2 to the 1971 Act provides:

"8.

(1) Where a person arriving in the United Kingdom is refused leave to enter, an immigration officer may, subject to sub-paragraph (2) below--

(a) give the captain of the ship or aircraft in which he arrives directions requiring the captain to remove him from the United Kingdom in that ship or aircraft; or

(b) give the owners or agents of that ship or aircraft directions requiring them to remove him from the

United Kingdom in any ship or aircraft specified or indicated in the directions, being a ship or aircraft of which they are the owners or agents; or

(c) give those owners or agents directions requiring them to make arrangements for his removal from the United Kingdom in any ship or aircraft specified or indicated in the direction to a country or territory so specified being either--

(i) a country of which he is a national or citizen; or

(ii) a country or territory in which he has obtained a passport or other document of identity; or

(iii) a country or territory in which he embarked for the United Kingdom; or

(iv) a country or territory to which there is reason to believe that he will be admitted.

……

9.

(1) Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give any such directions in respect of him as in a case within paragraph 8 above are authorised by paragraph 8(1).

(2) Any leave to enter the United Kingdom which is obtained by deception shall be disregarded for the purposes of this paragraph.

10.

(1) Where it appears to the Secretary of State either--

(a) that directions might be given in respect of a person under paragraph 8 or 9 above, but that it is not practicable for them to be given or that, if given, they would be ineffective; or

(b) that directions might have been given in respect of a person under paragraph 8 above but that the requirements of paragraph 8(2) have not been complied with;

then the Secretary of State may give to the owners or agents of any ship or aircraft any such directions in respect of that person as are authorised by paragraph 8(1)(c).

(2) Where the Secretary of State may give directions for a person's removal in accordance with sub-paragraph (1) above, he may instead give directions for his removal in accordance with arrangements to be made by the Secretary of State to any country or territory to which he could be removed under sub-paragraph (1)."

13. The 2002 Act was enacted on 7 November 2002 and the provisions relating to appeals came into force on 1 April 2003. The Immigration (Notices) Regulations 2003 (SI 2003/658) ("the 2003 Regulations") were made on 11 March 2003 and came into force on 1 April 2003. The 2003 Regulations were made by the Secretary of State in exercise of the powers conferred on him by section 105 and 112(1) to (3) of the 2002 Act. They were subject to annulment in pursuance of a resolution by either House of Parliament. Regulation 4(1) provides that: "Subject to regulation 6, the decision-maker must give written notice to a person of any immigration decision…taken in respect of him which is appealable". Regulation 2 provides that an "immigration decision" has the same meaning as in section 82(2) and (3A) of the 2002 Act. Regulation 5 provides:

"(1) A notice given under regulation 4(1)—

…….

(b) if it relates to an immigration decision specified in section 82(2)(a), (g), (h), (ha), (i), (ia) (j) or (3A) of the 2002 Act—

(i) shall state the country or territory to which it is proposed to remove the person; or

(ii) may, if it appears to the decision-maker that the person to whom the notice is to be given may be

> removable to more than one country or territory, state such countries or territories"

The relevant legislative background to the 2002 Act

14. The 1971 Act did not create a general right to challenge removal directions, but limited that right to two circumstances. First, section 16 provided that, where removal directions were given for a person's removal (a) on the ground that he was an illegal entrant or had entered the United Kingdom in breach of a deportation order, or (b) under the special powers conferred by Schedule 2 to the 1971 Act in relation to members of the crew of a ship or aircraft coming to the United Kingdom to join a ship or aircraft as a member of the crew, he could appeal on the ground that on the facts of the case there was no power to give the directions on the ground on which they were given.

15. Secondly, section 17 of the 1971 Act gave a right of appeal against removal directions on the basis that removal should be to a different country or territory from that specified by the Secretary of State. That right was only given where directions were given for a person's removal from the United Kingdom (a) on his being refused leave to enter; or (b) on a deportation order being made against him; or (c) on his having entered the United Kingdom in breach of a deportation order.

16. This position did not change following the introduction of the Asylum and Immigration Act 1993 ("the 1993 Act"). Section 8(4) of the 1993 Act did, however, extend the right of illegal entrants to appeal against removal directions on the ground that removal would be contrary to the United Kingdom's obligations under the Refugee Convention.

17. Section 10(1) of the 1999 Act provided:

> "A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if--
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;
>
> (b) he uses deception in seeking (whether successfully or not) leave to remain; or

(ba) his indefinite leave to enter or remain has been revoked under section 76(3) of the Nationality Immigration and Asylum Act 2002 (person ceasing to be refugee);

(c) directions… have been given for the removal under this section of a person… to whose family he belongs."

18. The 1999 Act repealed Part 2 of the 1971 Act (which included sections 16 and 17), but the restricted right to challenge removal directions provided by the earlier statute was reproduced in sections 66 and 67 of the 1999 Act. The right of appeal on the ground that on the facts of the case there was no power in law to give removal directions on the ground on which they were given was extended to those who could be removed under section 10 of the 1999 Act. It was also held by the Court of Appeal in *R (Kariharan & Another) v Secretary of State for the Home Department* [2002] EWCA Civ 1102, [2003] QB 933 that there was a right of appeal against removal directions under section 65 of the 1999 Act on the ground that removal would be in breach of a person's rights under the European Convention on Human Rights ("the ECHR").

The appellant's argument

19. The following is a summary of the submissions of Mr Knafler QC. An "immigration decision" may be appealed by an illegal entrant on the ground that it is "otherwise not in accordance with the law" within the meaning of section 84(1)(e) when the notice of the decision states that he is to be removed to a country or territory to which he contends it is not lawful to give directions to remove him under the 1971 Act. The decision under section 82(2)(h) is not simply that an illegal entrant "is to be removed". It is that he is to be removed "by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971". Para 8(1)(c) limits the countries or territories to which removal is legally possible. Whether it is legal to remove an illegal entrant to a particular country or territory is manifestly relevant to the lawfulness of the decision to remove. The specifying or proposing of a particular country or territory in a notice of an immigration decision to remove an illegal entrant is an integral part of the decision.

20. The Secretary of State has to do no more than show that the destination country or territory to which he proposes to remove an illegal entrant is one to which there "is reason to believe" that the illegal entrant will be admitted within a reasonable time of the making of the immigration decision. An appeal to the Tribunal is a more effective mechanism than judicial review for resolving disputes as to the lawfulness of removing persons to particular destinations. To require a challenge to the proposed destination country or territory to be by way of appeal against the immigration decision, rather than by judicial review of the removal

directions when given is also more consistent with the "one stop" policy that is embodied in section 120 of the 2002 Act. It means that any challenge to the proposed destination stated in the notice of decision can be resolved by an appeal at the decision stage rather than by judicial review at the stage when the removal directions are actually given. Mr Knafler also says that his interpretation is supported by regulation 5(1)(b)(i) of the 2003 Regulations, which provides that the notice of an immigration decision : "shall state the country or territory to which it is *proposed* to remove the person" (emphasis added).

Discussion

21. Central to this appeal is the question whether the specifying or proposing of a particular country or territory in a notice of an immigration decision to remove an illegal entrant within the meaning of section 82(2)(h) of the 2002 Act is an integral part of the decision. If it is, then there is a right of appeal under section 84(1)(e) if it is not in accordance with the law to specify the country or territory that has been specified. We shall use the phrase "destination country" to denote the country or territory to which the notice proposes to remove the illegal entrant.

The language of the 2002 Act

22. There are a number of reasons why the language of section 82(2)(h), when read in its statutory context, does not support the argument that the proposing of a destination country is an integral part of an immigration decision.

23. First, in section 84 a clear distinction is drawn between an immigration decision that a person is to be removed from the United Kingdom and removal pursuant to removal directions in consequence of an immigration decision. Section 84(1)(g) provides as a ground of appeal that removal of the appellant from the United Kingdom "in consequence of the immigration decision would" breach the Refugee Convention or be incompatible with the appellant's ECHR rights. The use of the conditional "would" is to be contrasted with the use of the present tense "is" in sections 84(1)(a)(c) and (e). Thus Parliament has provided that in a case where it is alleged that removal in consequence of a decision to remove would involve a breach of the Refugee Convention or the ECHR, there is a right of appeal against the immigration decision itself. But that is the only case where Parliament has provided a right of appeal against a decision to remove by reference to the potential illegality of a consequent removal. This is a strong indication that the proposing of a destination country is not an integral part of an immigration decision under section 82(2)(h).

24. Secondly, the decisions referred to in section 82 that a person is to be removed are all decisions that a person is to be removed "*from the United Kingdom*." None refers to a destination. This indicates that a destination is not part of a decision. That is consistent with the fact that some removal directions are not required to propose a destination at all: see para 8(1)(a) and (b) of Schedule 2 to the 1971 Act.

25. Thirdly, the words "by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 Act" do not mean that the immigration decision itself must comply with the requirements of paras 8 to 10 of Schedule 2 to the 1971 Act. Section 82(2) describes one of five types of immigration decision that a person is to be removed from the United Kingdom. The same formula of "by way of directions under" is used in each case. In each case, the words "by way of directions" etc describe and identify the type of immigration decision that may be the subject of an appeal. The purpose is not to describe the content of lawful directions under the relevant statutory provision, since that is done by the statutory provision itself.

26. Fourthly, a person who is not an illegal entrant, but is refused leave to enter, can be the subject of removal directions under para 8 of Schedule 2. But an immigration decision under section 82(2)(a) (refusal of leave to enter) is not required to say anything about removal, still less specify the destination country to which it is proposed to remove the person. It follows that a person who is refused leave to enter cannot appeal against the refusal of leave to enter on the ground that removal to the destination country proposed in the notice of decision would not be in accordance with para 8 of Schedule 2 to the 1971 Act. But if the proposing of a destination country is an integral part of an immigration decision under section 82(2)(h), it is difficult to see why Parliament did not provide that the proposing of a destination country should not also be an integral part of *any* decision from which removal directions will result. There is no rational basis for distinguishing between an immigration decision within the meaning of section 82(2)(h) and any other immigration decision from which removal directions will result. This indicates that Parliament is unlikely to have intended that the proposing of a destination country should be an integral part of any immigration decision.

27. Fifthly, it is (rightly) common ground that there is no right of appeal against removal directions under the 2002 Act. The power to give removal directions is given by Schedule 2 to the 1971 Act. It includes the power to give detailed directions requiring arrangements to be made for the removal of a person in any ship or aircraft specified. Mr Knafler acknowledges that there is no right of appeal against directions of a "technical" nature in relation to the removal, such as the specifying of a particular ship or aircraft and other detailed "mechanics" of return or "technical" matters: see *HH (Somalia) and others v Secretary of State for the Home Department* [2010] EWCA Civ 426 at [82] to [84]. But he says that the

specifying of a particular destination is of a different character from directions of a "technical" nature and that there is a right of appeal in respect of that. We shall deal with his argument based on the 2003 Regulations later. But it is impossible, as a matter of construction of section 82(2)(h), to make the distinction between the different removal directions that Mr Knafler seeks to make. Either section 82(2)(h) imports into the immigration decision all future removal directions or it imports none. There is no warrant in the language of section 82(2)(h) for saying that the only direction that is imported into the decision is that which specifies the country of destination.

The legislative history

28. When the legislative history is taken into account, it becomes even clearer that Parliament did not intend that any of the removal directions should be treated as an integral part of the immigration decision. When Parliament provided for a right of appeal against removal directions in previous legislation, it did so in express terms. The 1971 and 1999 Acts permitted an appeal "against the directions". When the 1999 Act introduced a right to challenge prospective removal to a particular country, it did so in similarly clear terms: see section 67(2). The 2002 Act does not permit a challenge to removal directions on any grounds. And yet, if Mr Knafler is right, the effect of sections 82(2)(h) and 84(1)(e) is that an illegal entrant can challenge the lawfulness of future removal directions on grounds which could not have been the subject of challenge under any of the previous legislation. Under the pre-2002 legislation, those who were refused leave to enter, leave to remain or were the subject of a deportation order could challenge removal directions on the basis that removal should be a different country or territory from that specified by the Secretary of State, but no class of person could challenge removal directions on the ground that there were no grounds for believing that he or she would not be admitted to the destination country.

29. The declared purpose of the 2002 Act in relation to removal directions was set out in the Explanatory Notes to the statute which at para 220 stated:

> "...The position relating to removal directions has been clarified. It is the initial immigration decision which may result in removal which attracts the right of appeal, not any consequential giving of directions to the carrier or re-giving of directions following an appeal or temporary suspension."

In the light of this purpose, it would be remarkable if the effect of the 2002 Act were that a person could challenge future removal directions at all, let alone on

grounds on which removal directions that had been given could not have been challenged under the previous legislation.

Practical and policy considerations

30. There are also practical and policy considerations which justify the conclusion that Parliament is unlikely to have intended a scheme such as that for which the appellant contends. These provide yet further support for the interpretation of section 82(2)(h) which, for the reasons already given, we would adopt.

31. The controversial issues raised by immigration decisions are usually (i) whether the person is entitled to benefit from the immigration rules (eg whether he is an illegal entrant or entitled to leave to enter or leave to remain) and (ii) whether he is entitled to international protection under the Refugee Convention or the ECHR. These are suitable for determination at a "one-stop appeal" as envisaged by section 120 of the 2002 Act. We acknowledge that, if there is a long period between the date of determination and the date when removal directions are given, there may be a change in circumstances which materially affects the decision on asylum and humanitarian issues. But in many cases a decision on these issues will be determinative of the question whether an immigration decision that a person is to be removed from the United Kingdom is lawful.

32. On the other hand, the ability of the Secretary of State to give removal directions (whether under Schedule 2 to the 1971 Act or otherwise) will frequently depend on practical and operational issues which are only capable of being addressed shortly before the removal is to take place. These issues are inherently unsuitable for resolution at the time of an appeal, when the question of entitlement to international protection and/or whether there is a right to leave to enter or remain in the United Kingdom is being determined and at a time which may be long before the Secretary of State is in a position to give removal directions. As Sedley LJ stated in the Court of Appeal in *R (MS, AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310 at [26]: "It is also the case that the obstacles to return are commonly an amalgam of fact, governmental practice and policy, international law and local law, often in a form which is impossible to disentangle". Thus at the stage when no removal directions have yet been given, it may be difficult, if not impossible, for the Secretary of State or the Tribunal to determine when, if at all, it will be practicable to give them. We take account of the fact that, as Mr Knafler points out, the threshold set by para 8(1)(c)(iv) of Schedule 2 to the 1971 Act is no higher than that the destination country is one "to which there is reason to believe that he will be admitted". But take the present case where the obstacles to the appellant's removal are of a practical nature and concern the documentation necessary to secure his admission to the Palestinian Territories.

It may be very difficult for the Secretary of State at the decision stage and the Tribunal at the appeal stage to decide whether, *when the removal directions come to be given in the future*, the Palestinian Territories will be a country or territory to which there is reason to believe that the appellant will be admitted.

33. There is no reason to suppose that the Secretary of State will give directions for the removal of the appellant to the Palestinian Territories until he is satisfied that there is reason to believe that he will be admitted. The Secretary of State may need to engage in a detailed dialogue with the Palestine General Delegate's Office about the appellant's circumstances and possible methods of re-documentation. The Tribunal would not be in a position to evaluate any of this at an appeal before removal directions have been given. In the unlikely event that removal directions are given which cannot be implemented and the Secretary of State stands by his directions despite the practical problems identified by the person to be removed, then judicial review is available. But that should rarely be necessary, because the practical issues of the type that are not susceptible to appeal under section 84 of the 2002 Act are unlikely to be controversial.

34. On the other hand, the construction advanced on behalf of the appellant is inimical to the finality which the one-stop procedure is intended to achieve. If Mr Knafler is right, in the case of a person who has successfully challenged prospective removal directions, the Secretary of State is required to make a fresh section 82(2)(h) decision before the removal can proceed. In this way, a further right of appeal may be generated, although it has already been finally determined that the person had no entitlement to remain in the United Kingdom at all, whether under this country's international obligations or under the immigration rules.

The 2003 Regulations

35. Is a different conclusion as to the true interpretation of section 82(2)(h) compelled by regulation 5 of the 2003 Regulations? Mr Knafler submits that regulation 5 sheds "light on" the meaning of section 82(2)(h) of the 2002 Act. As Lord Lowry said in *Hanlon v The Law Society* [1981] AC 124, 193H-194C, there are circumstances in which regulations made under a statute and contemporaneously with it may "confirm" a certain interpretation of the statute or be a "reliable guide" to its meaning. But, as he also said, regulations do not decide or control its meaning, since that would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or *ultra vires.*

36. We doubt whether regulation 5 may be used as an aid to the true construction of section 82(2)(h). Although the 2003 Regulations and the relevant

provisions of the 2002 Act came into force on the same day, the regulations were made on 11 March 2003, some months after the 2002 Act was enacted on 7 November 2002. As Lord Lowry said, regulations do not decide or control the meaning of the statute under which they are made, since the possibility that the regulations are *ultra vires* cannot be disregarded. For the reasons that we have given, we consider that the meaning of section 82(2)(h) is clear and unambiguous and there is no need to seek "confirmation" or "light" from the 2003 Regulations as an aid to construction, even if it is a legitimate exercise to do so.

37. The explanation for the requirement in regulation 5(1)(b)(i) that the notice of decision should state the country or territory to which it is "proposed" to remove the person is that given by the Court of Appeal in this case and in the other decisions referred to at [28] of Rix LJ's judgment. It is that the proposed country of destination is needed in order to provide a focus for the issues which might arise for the purpose of an applicant's asylum and human rights claims. Indeed, it will usually be necessary for the immigration decision to identify the proposed destination country if the person is to be able to appeal under section 84(1)(c) or (g) at all. Appeals on the ground that to remove a person would breach his rights under the ECHR or the Refugee Convention usually involve a consideration of whether the conditions in a particular proposed destination country are such that his removal to that country would breach those rights. In the context of a proposed removal, an appeal on asylum or human rights grounds cannot be made in the abstract. The purpose of regulation 5, therefore, is to make the right of appeal given by section 84(1)(c) and (g) effective.

38. We would add that we agree with the further point made by Rix LJ at [29] that:

> "a proposed destination is not the same as a destination to which the Secretary has *decided* to remove the applicant, and may not even amount to a destination to which the Secretary of State *intends* to remove the applicant."

Conclusion

39. Our attention has been drawn to a number of previous decisions, including *GH (Iraq) v Secretary of State for the Home Department* [2005] EWCA Civ 1182, [2006] INLR 36; *AK v Secretary of State for the Home Department* [2006] EWCA Civ 1117, [2007] INLR 195; *MA (Somalia) v Secretary of State for the Home Department* [2009] EWCA Civ 4, [2009] Imm AR 413 and *HH (Somalia)* (already cited). We do not consider that anything that we have said in this judgment calls into question the decisions in these cases.

40. For the reasons that we have given, we would dismiss this appeal. There is no right of appeal against an immigration decision under section 82(2)(h) on the ground that the country or territory stated in the notice of the decision is not one that would satisfy the requirements of para 8(1)(c) of Schedule 2 to the 1971 Act.