Neutral Citation Number: [2020] EWCA Civ 621

Case Nos: C9/2019/2280 &
C9/2019/2146

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
THE HON MR JUSTICE NICKLIN
Claim No CO/3341/2019

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
THE HON MR JUSTICE MURRAY
[2019] EWHC 2233 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/20

Before :

LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF
(1) VALENTIN GARREC
(2) YURI MENDES

Appellants

- and-

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- and-

THE ADVICE ON INDIVIDUAL RIGHTS IN EUROPE
(AIRE) CENTRE

Intervener

- -

Becket Bedford and **Natasha Jackson** (instructed by **Instalaw Solicitors Limited**) for the **Appellants**
Julia Smyth (instructed by **Government Legal Department**) for the **Respondent**
Simon Cox and **Agata Patyna** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Intervener**

Hearing date: 5 May 2020

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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. There are before the court two appeals which raise similar issues in respect of interim relief where a decision by the Secretary of State to deport EEA nationals is appealed.

2. The Immigration (European Economic Area) Regulations 2016 (SI 2016 No 1052) ("the EEA Regulations") implement the Citizens' Directive, i.e. European Parliament and Council Directive 2004/38/EC of 29 April 2004 about the right of citizens of the Union and their family members to move and reside freely within the territory of the EU and EEA Member States ("the Directive").

3. Under regulation 36 of the EEA Regulations, in respect of a decision to deport an EU/EEA national, there is a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) ("the FtT"); but, under regulation 33, the Secretary of State may nevertheless give directions for removal pending the appeal if she certifies that, despite the appeal process (or the period for an in-time appeal) not having run its course, such removal would not be in breach of the European Convention on Human Rights ("the ECHR"). Regulation 41 provides that a person who has been removed pending an appeal may apply to the Secretary of State for permission to return to the United Kingdom for the purpose of making submissions in his appeal, and that such permission must be granted unless his return might have a serious adverse impact on public policy or security.

4. Where an appeal against a decision to deport an EEA national is made and the applicant's case is certified under regulation 33, the FtT has no power to grant interim relief pending the determination of the appeal. Therefore, any applicant who wishes to obtain such relief has to apply to the Administrative Court for judicial review of the regulation 33 certification, and he can then apply for interim relief in those proceedings.

5. That is what happened in each of cases; and, in each, interim relief was refused. In Mr Garrec's case, the interim relief sought was a prohibition on removal pending the determination of his appeal. In Mr Mendes's case, he was in fact removed to Portugal, so the interim relief ultimately sought was for a mandatory order for his return. They now each seek to appeal against the refusal of interim relief.

6. At a hearing on 5 May 2020, Becket Bedford and Natasha Jackson appeared for the Appellants, Julia Smyth for the Secretary of State, and Simon Cox and Agata Patyna for The Advice on Individual Rights in Europe (AIRE) Centre, a proposed intervener.

7. At the hearing, I gave various directions and said that I would give reasons in a judgment later. These are those reasons.

Valentin Garrec

8. I can deal with Mr Garrec's case very shortly, because the Secretary of State has recently revoked the relevant deportation order and the appeal in relation to interim relief has consequently become entirely academic. It is now common ground that all

substantive issues between the parties have been resolved. The only outstanding issue is as to costs.

9. At the hearing, I directed that, by 4pm on 6 May 2020, the parties agree and file a draft Consent Order, formally bringing the appeal and claim to an end, and providing for written submissions, and then responses, on costs. It was agreed that the Master should determine costs on the papers.

Yuri Mendes

10. Given Mr Garrec is no longer an extant appellant, in this judgment I will refer to Mr Mendes as simply "the Appellant".

11. The Appellant was born on 17 September 2000 in Lisbon. He is a Portuguese national, and of course an EU citizen. It is not entirely clear as to when he first arrived in the UK – but it seems that he entered the UK to settle here with his family, exercising their right to freedom of movement, in 2013 or 2014.

12. Between 2015 and 2018, the Appellant was convicted on four occasions of numerous criminal offences including, on 6 March 2018, for six robberies for which he was sentenced to a 12-month detention and training order.

13. On 16 August 2018, the Secretary of State gave the Appellant notice of liability to deportation, in respect of which the Appellant made representations on 3 September 2018. Those representations were rejected, and a deportation order served, on 17 September 2018, the Appellant's eighteenth birthday.

14. The Appellant's custodial term expired on 25 September 2018, and he was transferred to immigration detention. Bail was refused. Removal directions were set for 23 April 2019; but it appears that the Appellant made an application for judicial review on his own account on 18 April, about which there is no further information and which was apparently not formally served, but which effectively deferred removal.

15. On or about 30 May 2019, the Appellant wrote to Bail for Immigration Detainees ("BID") seeking legal advice. They gave advice about an out-of-time appeal against the Appellant's deportation order; and it is the Appellant's case that an appeal was indeed sent to the FtT by BID by fax on 24 June 2019. BID were not representing the Appellant in the appeal – the Appellant was formally representing himself – but, the Appellant says, they lodged the appeal on his behalf. In support of his assertion that an appeal was lodged then, the Appellant has produced part of a fax front sheet of that date, showing part of the first page of the Appellant's covering letter. However, that appeal was never acknowledged by the FtT, and was certainly never actioned.

16. In the meantime, on 21 June 2019, removal directions were again set, this time for 2 July 2019. On 27 June 2019, BID referred the matter to Instalaw Solicitors, the Appellant's current solicitors; and they sent a letter before action the following day, requesting a response from the Secretary of State by the close of business on 29 June 2019.

17. No response having been received, they commenced judicial review proceedings on 2 July 2019, the day for which the removal directions were set. The claim challenged

the regulation 33 decision to certify the case. It sought an order quashing the certification decision and, in the meantime, an interim order preventing his removal to Portugal. It seems that Instalaw thought that they had more time than they did have to restrain removal, because they mistook the landing time of the relevant flight (14.05) for the take-off time (11.20); but, in any event, Lang J refused application for interim relief some time that day on the papers. In the meantime, however, the Appellant was in fact removed to Portugal on that flight.

18. The Appellant renewed his application for interim relief, now in the form of a mandatory order requiring the Secretary of State to take steps to return the Appellant to the UK, which was heard by Murray J. In a judgment handed down on 11 July 2019 ([2019] EWHC 2233 (Admin)), he refused the application.

19. The Appellant now seeks to appeal that refusal of interim relief. He does so on three grounds, but Ground 1 appears to be an overarching ground of which Grounds 2 and 3 are strands. It is submitted that Murray J erred in rejecting the proposition that the absence of any mechanism in the EEA Regulations whereby an application for interim relief can be heard in the same judicial forum as the appeal is a violation of article 31.2 of the Directive, which provides that, where a judicial challenge to an expulsion decision is accompanied by an application for interim relief, then generally the relevant person cannot be removed until the application for interim relief has been decided. As I have explained (paragraph 4 above), the right to appeal to FtT against a deportation order in the EEA Regulations does not carry with it a right to apply to the FtT for an interim order to suspend enforcement pending the appeal; and an appellant who wishes to have interim relief is required to commence separate judicial review proceedings of the regulation 33 certificate and then seek such relief from the Administrative Court in that claim (as the Appellant did in this case).

20. As I have indicated, Grounds 2 and 3 appear to be in substance strands of that essentially single ground.

21. First, as Ground 2, it is submitted that requiring such an approach – dissociating the appeal from the application for interim relief pending the appeal – infringes the EU principle of equivalence because, in the judicial review proceedings, an appellant has to show that there is a serious issue to be tried on ECHR grounds whereas, if the interim application could be made in the appeal, then he would only have to show that there was a serious issue on EU law grounds including grounds under Part IV of the Directive.

22. Second, as Ground 3, it is submitted that such an approach also infringes the EU principle of effectiveness, in that (i) the Appellant was a child when he was given the opportunity to make representations on the notice of liability to deportation and there was a failure to ensure that, as a minor, he was properly represented, (ii) the scheme does not provide for notification to the Appellant of the right to seek judicial review or the time limit for bringing a claim, and (iii) the Appellant is exposed to a greater costs risk.

23. In the meantime, much has happened that potentially bears upon this appeal.

    i) By an Order dated 17 January 2020 (sealed on 20 January 2020), on the basis that the appeal was against the refusal of permission to proceed, under CPR

rule 52.8(5) and (6), I granted permission to proceed and retained the judicial review claim in this court so that it could be heard at the same time as the appeal in Garrec.

ii) On 30 April 2020, the Appellant made an application to this court to amend his Grounds of Claim in the judicial review. Relying on version 6.0 of the Secretary of State's own guidance "Managing foreign national offenders under 18 years old" (14 January 2016) (which has recently come to the notice of his legal team) and the Appellant's GCID Records (obtained after Murray J's judgment), Mr Bedford submits that there were procedural irregularities in the deportation order because the Appellant, at the time a minor, did not have access to a responsible adult when the notice of liability to deportation was served on him in August 2018. A Youth Offender Team member was present, but that person neither had the function of giving neutral advice or assistance to the Appellant nor did he do so. There is an application to allow the fresh evidence into the appeal which, it I said, both supports the application to amend and also Ground 3 in the appeal.

iii) On 20 March 2020, the AIRE Centre made an application to intervene in the appeal.

iv) On 19 January 2020, the Appellant in person submitted an application to the FtT for an out-of-time appeal of the decision to deport him. The application and the covering letter are both dated 19 January 2020; and there is no reference in either to any earlier application to appeal. The appeal was set down for a hearing on 19 March 2020. The Appellant did not attend. In a determination promulgated on 26 March 2020, on the basis that the Appellant did not lodge an appeal until January 2020 (i.e. after his removal), Designated FtT Judge McClure concluded that the appeal was out-of-time and there were no good reasons for extending time. He accordingly dismissed the appeal. On 22 April 2020, through different solicitors (Turpin Miller), the Appellant lodged with the FtT an application for permission to appeal to the Upper Tribunal on the primary basis that Judge McClure was wrong not take into account the evidence that an appeal to the FtT had been made in June 2019, i.e. the fax front sheet to which I have referred. That application has not yet been determined. I pause to note that, if there was no extant appeal at the time of the Appellant's removal, no question of interim relief pending the outcome of an appeal would arise.

v) On 28 February 2020, Foster J handed down judgment in Hafeez v Secretary of State for the Home Department [2020] EWHC 437 (Admin), in which she held that an EU proportionality analysis in accordance with article 27 of the Directive is required before the power to certify in regulation 33 can be exercised, i.e. a decision to certify can only be made if, on the facts of the particular case, removal is appropriate and necessary to achieve the objective pursued namely to preserve the public interest against the threat posed by the individual. The Secretary of State has indicated that she does not propose to appeal. As a result of that judgment, new guidance to caseworkers has been published, and removals on the basis of certifications prior to the hand down of the judgment have been suspended (and, as I understand it, decisions on certification in those cases will be remade).

24. That leaves the following procedural matters requiring consideration.

25. First, it is common ground between the parties – and, from the documents now before the court, clearly the case – that the Administrative Court has not yet determined the application for permission to proceed. Thus, the Order of 17 January 2020, insofar as it granted the Appellant permission to proceed and retained the judicial review in this court, was made on a false premise, namely that the court below had refused permission to proceed which it had not (and still has not) done. That Order addressed neither the challenged decision of Murray J to refuse interim relief nor the grounds of appeal upon which that decision was challenged. In the circumstances, and without prejudice to any other route by which the judicial review may be retained in this court, in my view the Order of 17 January 2020 (insofar as it relates to the Appellant) should be revoked. At the hearing, I duly revoked that part of that Order. That leaves the Appellant's application for permission to appeal Murray J's Order outstanding.

26. Second, Mr Bedford submitted that I should nevertheless retain the judicial review in this court. Miss Smyth accepted that there was a route whereby that could, as a matter of jurisdiction, be achieved; and helpfully set out that route, as follows.

27. Chief Adjudication Officer v Foster [1992] 1 QB 31 concerned the issue of whether a Social Security Commissioner had jurisdiction to entertain an appeal on the ground that the relevant regulations made under the Social Security Act 1986 were *ultra vires*. The Court of Appeal held that he did not. The House of Lords reversed that decision, holding that he did (Commissioners' Reports R(IS) 22/93). However, they left untouched the observations of Lord Donaldson of Lymington MR, made in grappling with the issue of how the Court of Appeal in that case might retain and determine a judicial review with an associated, but distinct, appeal:

> "It is also to be remembered that a judge of the Court of Appeal can sit as a judge of the High Court: see section 9(1) of the [Senior] Courts Act 1981. Accordingly a Lord Justice – even one hearing the primary appeal – could, sitting as a judge of the High Court, refuse leave to apply and thus clear the decks for this court to grant leave and add the substantive application for judicial review to the primary appeal, if that was the sensible and most cost-effective way of dealing with the matter."

That suggests that there must be a refusal of permission to proceed by the High Court which can then be referred to this court on appeal; but that decision can be made by a judge of this court sitting as a High Court Judge. It is consistent with CPR rule 52.8(5) and (6) (which, of course, post-date Foster), which provides that, on an application for permission to appeal a refusal of permission to proceed, this court may, instead of giving permission to appeal, give permission to proceed and then retain the substantive judicial review.

28. On that basis, I accept that it would therefore seem possible, as a matter of jurisdiction, for me acting as a High Court Judge to refuse permission to proceed with the judicial review in this claim, and then proceed, as a judge of the Court of Appeal, to grant permission to proceed and retain the judicial review in this court.

29. However:

i) Although section 9(1) of the 1981 Act provides that a judge of this court may sit as a High Court Judge, he or she may only do so "at the request of the appropriate authority", i.e. the Lord Chief Justice or (in this case) the President of the Queen's Bench Division. I cannot sit as a High Court Judge simply of my own volition.

ii) It is clear that the course suggested by the Master of the Rolls in Foster would be exceptional and rare. Both to refuse permission to proceed as a High Court Judge and then grant permission to proceed as a Judge of the Court of Appeal is a procedural device which could only be used where justice clearly requires it.

iii) Whilst there may be cases in which justice can best be done by determining a judicial review in this court, generally there are good reasons for the Administrative Court retaining its proper role of determining judicial review claims at first instance, including fairness to the parties. That court is able to resolve any factual disputes, and often cull and refine the arguments and issues: and, if this court determines such a claim, then the parties are essentially robbed of one layer of appeal.

iv) In my view, there are more than adequate reasons for not adopting the course proposed by Mr Bedford in this case. In particular, I am entirely unconvinced that it would be a sensible, cost-efficient or indeed just thing to do. As the discussion at the hearing confirmed, there are substantial procedural and legal issues in the judicial review claim that need to be resolved, including the amendments to the claim proposed only last week to which the Secretary of State has not yet had time to respond; and the legal proposition that the FtT cannot entertain an appeal on the basis that a decision is *ultra vires* and therefore a nullity, so that that issue can and must be determined by the courts. There are also some potential factual issues such as when the Appellant arrived in the UK and the precise circumstances in which he was served with the notice of liability to deportation. I am also unpersuaded, as Mr Bedford contended, that the issues in the appeal now before the court (which concerns interim relief) will wholly or substantially overlap with the issues that might, after any amendments allowed, feature in the judicial review. I accept that some of the new evidence upon which the Appellant wishes to rely in the substantive judicial review may also be relevant in the interim relief appeal; but that does not mean that it is necessary for the two to be merged into one hearing. In my view, such merger would be clearly unwise.

30. It is my firm view that this is not one of the rare cases in which this court should take on the function of determining this substantive judicial review: indeed, despite his substantial best efforts, Mr Bedford has fallen far short of persuading me that this court should pursue the extraordinary course he proposed and hijack the claim from the Administrative Court. In my view, by far the better course is to allow that claim to proceed, in the usual way, in that court. The Appellant's application to amend the claim, and rely on further evidence, must be made there.

31. That leaves the Appellant's application for permission to appeal the order refusing interim relief. The grounds of appeal are, as I have described, relatively narrow; and I understand that the issues they raise may have a wider import than this case (although

it seems to me that Hafeez and the consequential amendments to the Secretary of State's guidance is likely to reduce the scope of the issues for the future). So that these issues can be fully canvassed and the court given full flexibility, and to ensure that the issue of interim relief is dealt with without further delay, at the hearing I directed that the application of permission to appeal (together with the application to adduce fresh evidence) should now be listed, on a rolled-up basis, before a full constitution of this court.

32. In respect of the application to intervene, the AIRE Centre is a charity and specialist law centre dedicated to promoting awareness of, and compliance with, European and international law. It has extensive experience in litigation before the domestic and international courts, including as an intervener, and (as Mr Cox made clear) it is very conscious of its obligations not to duplicate submissions made by the parties. I have read the application: the Appellant is supportive, and the Secretary of State neutral. In my view, the AIRE Centre may be able to provide a useful contribution to the appeal. Consequently, at the hearing I gave it permission to intervene, limited to 15 pages written submissions and oral submissions limited to responding to any questions which the court may have at the hearing itself.

33. In my view, it should be possible to hear the oral arguments in less than a day; but, as Mr Bedford considered there might be some doubt (particularly if conducted remotely), I agree that there should be a second day in reserve. For listing purposes, I formally gave the hearing a one and a half day estimate. Skeleton arguments should filed and served sequentially. Mr Bedford has already served a skeleton for the main hearing: but I gave him seven days to consider whether he wishes to make any changes to that. Thereafter, I directed the Intervener to file and serve its written submissions within 7 days thereafter, and the Secretary of State to serve a skeleton by 4pm on 27 May 2020. I directed that the appeal shall be listed, if possible, in the period 2 June to 31 July 2020, with the parties giving dates of availability for that period by 4pm on 6 May 2020.

34. In my view, those directions should ensure that the appeal is fully and properly prepared by the time of the hearing. However, to ensure that it is, I grant permission to apply. Given the procedural history, any further application should be referred to me, or of course to the presiding judge of the constitution of the court when known.