



Neutral Citation Number: [2019] EWHC 2233 (Admin)

Case No: CO/2561/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 August 2019

Before :

THE HONOURABLE MR JUSTICE MURRAY

Between :

The Queen on the application of YURI MENDES
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Claimant

Defendant

Mr Becket Bedford (instructed by **Instalaw Solicitors Ltd**) for the **Claimant**
Mr Paul Fisher (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 11 July 2019

Approved Judgment

Mr Justice Murray :

1. This is the renewal of an urgent application (N463) dated 2 July 2019 (“the Application”) by the claimant, Mr Yuri Mendes, for interim relief, seeking an order to prevent his removal from the United Kingdom by the defendant, the Secretary of State for the Home Department, on that day pursuant to a deportation order dated 17 September 2018 (“the Deportation Order”). Mr Mendes was at that time scheduled to be removed on flight TP1367, departing on that day from London Heathrow Airport (Terminal 2) to Lisbon. Lang J refused the application on 2 July 2019 on a review of the papers, for the following reasons:

“The Claimant has failed to identify arguable grounds for judicial review of the decision to remove, having regard to the deportation order made as long ago as September 2018 and the decision to certify. An ongoing appeal process is not a sufficient reason to defer removal, and as the decision letter explained, an application can be made for temporary re-entry for any hearing.”

2. Mr Mendes was deported to Lisbon on 2 July 2019 in accordance with deportation arrangements set out in a Notice of Deportation Arrangements dated 21 June 2019 (“the Removal Notice”) sent to Mr Mendes while he was in immigration detention at HMP Forest Bank. The Removal Notice read in relevant part as follows:

“The Secretary of State has directed that you be removed from the United Kingdom

by (ship/craft) **TP1367**
to country/territory **Portugal (Lisbon 14.05)**
on **02 July 2019**

You must report to the Immigration Office at Heathrow TN2 for the 11.20am flight”

3. Mr Mendes and his legal advisers appear to have understood the notice to referring to a scheduled departure time from London Heathrow of 14:05 (see, for example, section 1 of the Application, para 13 of Mr Mendes’s Detailed Statement of Facts and Grounds and para 7 of the witness statement dated 1 July 2019 of Mr Stuart Luke, a solicitor at Instalaw Solicitors Limited (“Instalaw”), Mr Mendes’s solicitors). The scheduled departure time was, however, 11:20, as is clear from the last line quoted above. 14:05 was presumably the scheduled time of arrival of that flight in Lisbon. On 2 July 2019 the flight departed 25 minutes late at 11:45.
4. Given that Mr Mendes was successfully removed from the UK on 2 July 2019, the interim relief now sought on this renewal of the Application is for an order requiring the Secretary of State to facilitate his return to the United Kingdom by arranging or facilitating a flight for Mr Mendes from Portugal and his entry through United Kingdom border control.

5. This interim relief is sought in connection with Mr Mendes's application dated 2 July 2019 for permission to apply for judicial review ("the Principal Claim"), seeking to challenge the Secretary of State's decisions:
 - i) to certify under regulation 33 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") that his removal from the UK to Portugal would not be unlawful under section 6 of the Human Rights Act 1998 ("the Regulation 33 Certification");
 - ii) to detain him under immigration legislation; and
 - iii) to remove him from the UK on a flight to Lisbon on 2 July 2019.

Background

6. Mr Mendes is a national of Portugal. He was born on 17 September 2000.
7. Mr Mendes came to the United Kingdom from Portugal with his mother and siblings. On his own account, he arrived in the UK in 2013, although the Secretary of State noted in her decision notice (ICD.4933) accompanying her letter to Mr Mendes dated 17 September 2018 informing him of her decision to deport him ("the Decision") at paras 3 and 14 that his AssetPlus report stated that he arrived in the UK in 2014 (presumably self-reported).
8. As a European Union national, Mr Mendes would have entered the UK on the basis of his right of free movement within the EU. Accordingly, the position of the Secretary of State is that it is not known when Mr Mendes entered the UK, but she does not accept that he had gained a right of permanent residence before the date of the Deportation Order by virtue of five years' continuous residence under regulation 15(1) of the 2016 Regulations. Mr Mendes has reserved the right to run that argument on his out-of-time appeal to the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") in respect of the Deportation Order. He does not, however, rely on it in relation to the Application.

Mr Mendes's offending history

9. Between 21 November 2015, when Mr Mendes was 15 years old, and 6 March 2018, he was convicted on five occasions for 12 offences:
 - i) On 21 November 2015 he was convicted at Manchester and Salford Juvenile Court of possession of an article with a blade/sharp point on school premises. For that offence, on 26 November 2015, he was made subject to a 9-month referral order.
 - ii) On 7 July 2016 at Greater Manchester Juvenile Court, he was convicted of criminal damage and battery. For those offences, on 28 July 2016, he was given a 12-month youth rehabilitation order, with a supervision requirement and an electronically-monitored curfew requirement. He was also ordered to pay compensation of £250 and made subject to a 12-month restraining order.
 - iii) On 1 September 2016 at Greater Manchester Juvenile Court he was convicted of attempted robbery. For that offence, on 22 September 2016, he was made

subject to an 18-month Detention and Training Order (“DTO”), which was subsequently varied on appeal to a 12-month DTO. He was also ordered to pay compensation of £250.

- iv) On 12 June 2017 at Greater Manchester Juvenile Court he was convicted of failing to comply with the DTO resulting from his conviction on 1 September 2016. He was fined £30.
- v) On 6 March 2018 at Greater Manchester Juvenile Court he was convicted of six counts of robbery and remanded in youth detention accommodation, until he was sentenced on 27 March 2018 to 12-month DTO.

Notice of liability to deport, the Deportation Order and immigration detention

10. On 16 August 2018, when he was 17 years old and in detention under the DTO imposed on 27 March 2018, Mr Mendes was served by the Secretary of State with a Notice of Liability to Deport, informing Mr Mendes that the Secretary of State intended to make a deportation order against him on grounds of public policy in accordance with regulation 23(6)(b) and regulation 27 of the 2016 Regulations.
11. On his own account, without the assistance of legal advice, Mr Mendes made representations to the Secretary of State as to why he should not be deported, which were received by the Secretary of State on 3 September 2018.
12. On 17 September 2018, Mr Mendes’s 18th birthday, the Deportation Order was made, and Mr Mendes was sent a letter by the Secretary of State informing him of the Deportation Order, noting that consideration had been given to his representations of 3 September 2018 and enclosing a copy of the Decision, in which (at paras 8 to 54) the Secretary of State gave her reasons for rejecting those representations and for making the Deportation Order. In the Decision, the Secretary of State also:
 - i) (at paras 55 to 79) set out her analysis of Mr Mendes’s rights under article 8 of the European Convention on Human Rights (ECHR) and concluded that his deportation would not breach the UK’s obligations under article 8 of the ECHR because the public interest in deporting him outweighed his right to private and family life in the UK;
 - ii) (at paras 81 to 82) advised Mr Mendes of the possibility of voluntary departure from the UK;
 - iii) (at paras 83 to 85 and 108 to 109) advised Mr Mendes of his rights of appeal to the FTT under regulation 36 of the 2016 Regulations and under section 82 of the Nationality, Immigration and Asylum Act 2002, (at paras 110 and 122) advised him that if his circumstances changed so that he had new reasons or grounds for remaining in the UK, he should notify the Secretary of State as soon as reasonably practicable and (at para 121) advised him of the deadline for appeal, namely, 14 calendar days after service on him of the Decision;
 - iv) (at para 86) made the Regulation 33 Certification and (at paras 87 to 107) gave reasons for it;

- v) (at paras 111 to 120) advised Mr Mendes of his right under regulation 41 of the 2016 Regulations to re-admission to the UK for the purposes of making submissions in person at any appeal hearing; and
 - vi) (at paras 123 to 128) advised Mr Mendes that if he did not leave the UK voluntarily within one calendar month of the date of service of the Decision his removal would be enforced, that the Deportation Order invalidated any leave to enter or remain in the UK, that he was prohibited from re-entering the UK while the Deportation Order is in force, that if he wished to seek legal advice he “must do so now” and that if he remained in the UK he would be doing so illegally and would be subject to further enforcement action.
13. Upon his release from detention under the DTO imposed on 27 March 2018 on 25 September 2018, Mr Mendes was taken into immigration detention.
 14. On 19 November 2018 Mr Mendes applied for immigration bail, but on 30 November 2018 his bail application was refused. On 30 January 2019 Mr Mendes’s immigration detention was reviewed by a Case Progression Panel, which recommended that detention be maintained.

Subsequent events

15. On 12 March 2019 the Secretary of State authorised Mr Mendes’s removal, and removal directions were set for 23 April 2019.
16. On 18 April 2019 Mr Mendes apparently lodged an application for permission to apply for judicial review of his removal, as a result of which the Secretary of State on 20 April 2019 deferred the removal directions. The immigration history set out in Immigration Factual Summary enclosed with the Removal Notice records the filing of the application, but also records that on 9 May 2019 the Secretary of State contacted the court and was informed that no sealed judicial review application had yet been served, following which she decided to take no further action on it.
17. Mr Luke noted in his witness statement dated 1 July 2018 at para 8 that he had no further information or documentation concerning the judicial review application that Mr Mendes had apparently made in April 2019, including as to whether the application remained extant or whether permission had yet been determined. He also had no information regarding the grounds on which the application was made. That remained the position at the hearing before me.
18. On or about 30 May 2019 Mr Mendes wrote to Bail for Immigration Detainees (BID) seeking legal advice on his case. On 17 June 2019 BID responded to his letter with advice regarding an out-of-time appeal to the FTT. At para 10 of his witness statement, Mr Luke stated that it was his understanding that BID had lodged an appeal with the FTT on 24 June 2019. At the hearing the position remained that the FTT had not yet responded to the application for permission to appeal out-of-time.
19. On 21 June 2019 Mr Mendes was served with the Removal Notice.
20. On 27 June 2019 BID referred Mr Mendes’s case to Instalaw, who prepared and sent to the Secretary of State an urgent letter before action dated 28 June 2019, asking for

a response by 4:00 pm the following day in light of the fact that Mr Mendes's removal was scheduled for 2 July 2019. No response having been received by that deadline from the Secretary of State, Instalaw prepared and issued the Application as well as the Principal Claim.

Evidence reviewed

21. In addition to Mr Luke's witness statement dated 1 July 2019, I had witness statements dated 8 July 2019 from Mr Mendes and from Ms Anna Mendes, his mother, and a witness statement dated 9 July 2019 from Mr Marco Fernandes, his step-father. I have had regard to these as well as the other documents lodged by Mr Mendes with the application.

The Free Movement Directive and the 2016 Regulations

22. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 ("the Free Movement Directive") is implemented in the UK principally by the 2016 Regulations, which supersede earlier implementing regulations made in 2006.
23. The relevant provisions of Regulation 33 of the 2016 Regulations are as follows:

“(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ('P') [under regulation 23(6)(b)], in circumstances where –

- (a) P has not appealed against the ... decision [to remove P under regulation 23(6)(b)], but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
- (b) P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed 2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the

Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

- (3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.
- (4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—
 - (a) where the removal decision is based on a previous judicial decision;
 - (b) where P has had previous access to judicial review; or
 - (c) where the removal decision is based on imperative grounds of public security.
- (5) In this regulation, ‘finally determined’ has the same meaning as in Part 6.”

Submissions

24. Mr Becket Bedford, for Mr Mendes, submitted that regulation 33 of the 2016 Regulations is not compatible with the Free Movement Directive and is therefore unlawful. In particular, it does not properly implement the procedural protections that should be afforded Mr Mendes under articles 27, 28, 30 and 31 of the Free Movement Directive, which provide more stringent protections for him.
25. Mr Bedford submitted that the test set out in regulation 33 is limited to a consideration of whether the human rights of a person subject to threat of removal would be infringed, including whether that person would face a “real risk of serious irreversible harm”. This, however, does not go far enough. In assessing the Application, the court should be able, for example, to take into account that Mr Mendes was not afforded the procedural protections set out in articles 30 and 31 in relation to the Notice of Liability to Deport that was served on him while he was still a 17-year-old child.
26. Mr Bedford submitted that regulation 33, as drafted, wrongfully excludes the application of the common law to the question of interim relief. The court should be able to apply the ordinary common law principles under *American Cyanamid v Ethicon* [1975] AC 396 (HL), appropriately adapted to the public law nature of the case as set out in *Belize Alliance of Conservation Non-Governmental Organization*

(BACONGO) v Department of the Environment of Belize [2003] UKPC 63 (Practice Note) at [35]-[39] (Lord Walker of Gestingthorpe).

27. Applying those principles, Mr Bedford submitted, if Mr Mendes can establish that he had, as a matter of fact, resided in the UK for a continuous period of five years and therefore had acquired a right to permanent residence, then a decision by the Secretary of State to remove him could only be justified on “serious grounds of public policy and public security”, a much higher test that the Secretary of State would not be able to meet in this case. Not only is there a serious issue to be tried, but the potential strength of Mr Mendes’s case should weigh heavily in his favour when considering the balance of convenience.
28. Mr Bedford also submitted that no notice was given to Mr Mendes of his right to challenge the Regulation 33 Certification, as required by article 30(3) nor was he afforded the procedural safeguards of article 31 of the Free Movement Directive so that he could seek redress against the Regulation 33 Certification. The Decision informed Mr Mendes of his right to appeal against the Deportation Order, but it did not inform him how he could challenge the decision to remove him.
29. Mr Bedford noted that the Directive assumes that redress procedures seeking substantive relief in relation to a deportation decision and interim relief in relation to removal would be available from the same court or administrative authority. The UK, however, idiosyncratically splits these, with substantive relief to be sought from the FTT and interim relief from the Administrative Court. Hence, the Directive does not deal with these separately in articles 27, 28, 30 and 31.
30. At the heart of the unfairness in this case, Mr Bedford submitted, is the fact that the Secretary of State served the Notice of Liability to Deport on Mr Mendes when he was still a child of 17 years at a time when he was particularly vulnerable given that he was in immigration detention. Children are protected by article 28(3)(b) of the Free Movement Directive against deportation except on “imperative grounds of public security”. Yet the Secretary of State started this deportation process ahead of Mr Mendes’s 18th birthday, with the Deportation Order and Decision precisely timed to be issued on that day.
31. Mr Bedford submitted that Mr Mendes could not properly have been expected to respond appropriately to the Notice of Liability to Deport unless he had been provided with free legal advice at that time and in a timely manner, which he was not. Had he been properly advised then as he should have been, he would have been able to make effective representations to the Secretary of State that may well have resulted in the Secretary of State not making the Deportation Order and not making the Regulation 33 Certification.
32. Mr Bedford submitted that, in serving the Notice of Liability to Deport on Mr Mendes while he was still a child, the Secretary of State failed to have regard to article 24 (The rights of the child) of the Charter of Fundamental Rights of the European Union (“the Charter”) and, in particular, articles 24(1) and (2), namely, the need to have regard to the child’s views, in accordance with the child’s age and maturity, and the need to have the child’s best interests as a primary consideration. The Secretary of State also failed to have regard to article 47 (Right to an effective remedy and to a fair trial) of the Charter by not ensuring that Mr Mendes had effective access to justice to

challenge and seek redress in relation to the Notice of Liability to Deport while he was still a child.

33. Mr Bedford submitted that the Secretary of State took unfair and therefore unlawful advantage of Mr Mendes's youth and vulnerability by starting the deportation process before his 18th birthday while he was in immigration detention. But for the Secretary of State's denial to Mr Mendes of necessary procedural safeguards ahead of her decision to deport him and but for that denial, Mr Mendes might have been in a different position.
34. For these reasons, Mr Bedford submitted, the Deportation Order and the Regulation 33 Certification are flawed. The Free Movement Directive requires that the court should have regard to the legality of those decisions and whether there is a serious issue in the appeal. To the extent that Regulation 33 does not allow that, it is incompatible with the Directive and therefore unlawful. Accordingly, it is appropriate for the court to grant the interim relief sought against the Secretary of State.
35. In response, Mr Paul Fisher, for the Secretary of State, submitted that there is no basis for arguing that the ordinary principles that apply on determination of an application for interim relief in a public law context are excluded by the terms of regulation 33. The test to be applied by the Secretary of State before it can make a certification under regulation 33 is set out in sub-clauses (2) and (3) of regulation 33. Sub-clause (4) simply provides that if a person applies for interim relief, as happened in this case, then the person cannot be removed from the UK by the Secretary of State until the court has made its decision on the application.
36. Mr Fisher submitted that, applying the ordinary principles that govern interim relief to the Application, there is no serious issue to be tried as whether regulation 33 is unlawful in its terms or in its application to this case. The legality of the Deportation Order is a matter for the out-of-time appeal to the FTT and is not relevant to the Application.
37. Mr Fisher submitted that it cannot be said that article 31 of the Free Movement Directive has not been properly implemented by the 2016 Regulations. Article 31(2) of the Free Movement Directive is implemented by regulation 33(4). Article 31(4) of the Free Movement Directive is implemented by regulation 41.
38. As to redress procedures for the substantive relief Mr Mendes is seeking, Mr Fisher submitted that Mr Mendes has those redress procedures via the appeal process to the FTT. Mr Mendes's rights under articles 27, 28, 30 and 31 are protected under the relevant provisions of the 2016 Regulations. As noted by AG Szpunar in his Opinion in Case C-184/16 *Petrea v Ypourgou Esoterikon kai Dioikitikis Anasygrotisis* (27 April 2017) at para 77, the Free Movement Directive in articles 30 and 31 lays down a number of procedural rules with which EU member states must comply if they are to restrict an EU national's right of residence, however detailed implementation of those rules via administrative and judicial proceedings in a member state is a matter for the domestic law of the member state, subject to the principles of equivalence and effectiveness.
39. Mr Fisher noted that article 31(2) of the Free Movement Directive assumes that the substantive decision to expel an EU national on grounds of public policy, public

security or public health may be carried out prior to the exhaustion of redress procedures. Article 31(4) ensures that the affected individual has the right to temporary re-entry to the relevant member state in order to submit his or her defence. All of this is properly reflected in the 2016 Regulations.

40. Regarding Mr Bedford's argument that the Secretary of State unlawfully started the process of deportation while Mr Mendes was a minor, Mr Fisher submitted that that is irrelevant. There is no decision of the Secretary of State impugned by the Principal Claim that occurred when Mr Mendes was a minor. He was served with the Deportation Order on 17 September 2018 and the Regulation 33 Certification was made as at that date. Mr Mendes had plenty of time to seek legal advice from that point until he was deported on 2 July 2019. Regulation 41, consistently with article 31(4) of the Free Movement Directive, affords him the protection of a limited right of re-entry to advance his defence in relation to his appeal, should the FTT grant permission to consider it out-of-time. There is no basis on which it would be appropriate to grant the interim relief sought by the Application.

Decision

41. I agree with Mr Fisher that the ordinary principles applicable to an application for interim relief apply to the determination of the Application. They are not excluded by regulation 33. Applying those principles, I reach the same conclusion as Lang J reached when she refused the Application by her order dated 2 July 2019 after a review of the papers. Although Mr Bedford eloquently expanded upon his grounds for the Application, I am not persuaded that it is appropriate to grant the interim relief sought.
42. As noted by Mr Fisher, it is clear that the Free Movement Directive and the 2016 Regulations contemplate the possibility of an EU national's removal while that person pursues substantive redress against the removal decision. Mr Bedford has not persuaded me that it is arguable on the Application that regulation 33 is itself unlawful or has failed properly to implement the Free Movement Directive.
43. In the Decision at paras 86 to 107, the Secretary of State has given detailed reasons for making the Regulation 33 Certification. There is, in my view, no serious issue to be tried in that respect.
44. The fact that Mr Mendes was a minor when the Notice of Liability to Deport was sent is, in my view, not relevant. As noted by Mr Fisher, the only decisions challenged by the Principal Claim were made when Mr Mendes was no longer a child. Over nine months passed after the Deportation Order was made before Mr Mendes was removed. He had ample time during that period to seek legal advice.
45. As noted by Lang J, and as clearly contemplated by the Free Movement Directive and the 2016 Regulations, the fact that there is an on-going appeal process is not a sufficient reason to defer removal. As noted in the Decision at paras 111 to 120, under regulation 41 of the 2016 Regulations, reflecting article 31(4) of the Free Movement Directive, Mr Mendes can make an application for permission to re-enter the UK in order to make submissions at his appeal hearing, if the FTT grants permission to appeal out of time.

Conclusion

46. The Application is refused.