20 April 2016

PRESS SUMMARY

R (on the application of Nouazli) (Appellant) v Secretary of State for the Home Department (Respondent) [2016] UKSC 16
On appeal from [2013] EWCA Civ 1608

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Clarke, Lord Carnwath, Lord Toulson

BACKGROUND TO THE APPEAL

The appellant, an Algerian national, entered the United Kingdom in 1996 and was refused asylum. He married a French national in 1997. He was granted a residence permit, and had acquired a right of permanent residence by February 2003. He had two children with his wife but they were estranged by July 2004 and she returned to France in late 2005. By the end of January 2012, the Appellant had acquired 28 criminal convictions for 48 offences, including one 23-month sentence. The Home Secretary unsuccessfully attempted to deport him for that reason in January 2007. But he continued to offend, and was sentenced to 20 weeks' imprisonment for an offence of theft on 25 January 2012.

On 3 April 2012, just as the appellant was due to be released from custody for that offence, the Secretary of State served him with notice of her intention to make a deportation order against him under the Immigration (European Economic Area) Regulations 2006, on grounds that he would pose "a genuine, present and sufficiently serious threat to the interests of public policy" if he remained. He was detained from 3 April 2012 to 6 September 2012 (on bail from 6 June) under regulation 24(1) and Schedule 3 of the Immigration Act 1971 pending a decision being made on whether to deport him. He was served with a fresh Notice to that effect on 7 September 2012, and was again detained from 7 September 2012 until 2 January 2013.

The appellant contended that his detention pending removal was unlawful, and sought judicial review. He argued that his detention contravened article 27(1) of the Citizens Directive (2004/38/EC) and that regulation 24(1) was incompatible with European law and unlawful because it discriminated against him on the basis of nationality without lawful justification contrary to Article 18 TFEU (there being no equivalent provision for pre-decision detention in relation to family members of British nationals or non-EEA nationals). The Upper Tribunal and the Court of Appeal dismissed his claim and appeal respectively.

Before the Supreme Court, the appellant raised four essential points of challenge, namely that (i) the power to detain under regulation 24(1) was discriminatory without lawful justification, (ii) the power was unnecessary and disproportionate, (iii) the absence of a time limit for detention infringed the *Hardial Singh* principle and (iv) regulations 21 and 24 failed to accurately transpose the safeguards in articles 27 and/or 28 of the Directive.

JUDGMENT

The Supreme Court unanimously dismisses Mr Nouazli's appeal, thereby holding that the appellant's pre-decision detention was not unlawful. It further declines to make a preliminary reference to the CJEU. Lord Clarke gives the judgment, and Lord Carnwath writes a concurring judgment.

REASONS FOR THE JUDGMENT

The legal framework for detention pending a decision to deport comprises Articles 27 and 28 of the Citizens Directive, as transposed by the EEA Regulations 2006. EEA Nationals or their family members exercising EU rights benefit from powerful protections against their expulsion from the UK, and can only be removed if certain limited circumstances apply, including where there are grounds of public policy, public security or public health [**30, 36**].

The power to detain under regulation 24(1) does not discriminate without lawful justification against EEA nationals and their family members. The general principle is that Article 18 TFEU is only concerned with the way in which EU citizens are treated in member states other than their states of nationality, and not the way in which member states treat nationals of other countries residing within their territories – see the decision of the European Court of Justice in *Vatsouras and Koupstantze v Arbeitsgemainschaft (AGRE) Nurnnerg* (Joined Cases C-22/08, C-23/08) [2009] ECR I 4585. Third country nationals are not appropriate comparators for testing discrimination: such "discrimination" is simply a function of the limited scope of the EU legal order, into which third country nationals do not fall [**39-49**]. Nor is there discrimination between EU nationals and third country nationals contrary to article 21(1) of the EU Charter of Fundamental Rights [**50-51, 61, 104**].

The appellant's new way of putting this argument was that discrimination occurs between British nationals and EEA nationals (exercising treaty rights) who each have third country spouses, since the spouse of the EEA national who is liable to be detained might be hypothetically deterred from exercising their own free movement rights – the principle in *Surinder Singh* (*R v Immigration Appeal Tribunal Ex p Secretary of State for the Home Department* (Case C370/90) [1992] 3 All ER 798). But this argument also fails, since there is no basis for holding that the actual or hypothetical rights of this appellant's spouse, who was long since estranged, would be so affected in this case [**52-60, 104**]

As to proportionality, it is not in dispute that regulation 24(1) must be applied proportionately, but it was not argued that it was applied disproportionately in this case [**62**]. In this case, the absence of a specified time limit for detention does not infringe the principles in *R v Governor of Durham Prison, Ex P Hardial Singh* [1984] 1 WLR 704. That approach is fact-sensitive, and the clear statutory framework here provides sufficient judicial scrutiny. The *Hardial Singh* approach, moreover, is entirely consistent with European law [**63-78, 105**].

Finally, regulations 21 and 24 do not fail accurately to transpose the safeguards in articles 27 and 28 of the Directive and are compliant with it [**80-84, 106**].

The recent CJEU decision in *JN v Staatssecretaris van Veiligheid en Justitie* (Case C-601/15), brought to the Court's attention in written submissions after the conclusion of the hearing, concerns a different Directive that is not binding on the United Kingdom. It also materially differs from the Citizens Directive because it contains an express freestanding power of detention for applicants for international protection, and not detention pending a deportation decision. It does not affect the disposal of this appeal [**88-96**].

Lord Carnwath writes a concurring judgment, setting out the appellant's four overall challenges and agreeing with Lord Clarke that they should be dismissed [**97-107**].

References in square brackets are to paragraphs in the judgment