IN THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

R (on the application of Badalge) v Secretary of State for the Home Department IJR [2015] UKUT 00325 (IAC)

Field House
London

Hearing date: Wednesday, 8 April 2015
Judgment handed down: Monday 11th May 2015

BEFORE

UPPER TRIBUNAL JUDGE WARR

Between

THE QUEEN (ON THE APPLICATION OF KALUM KRISHANTHA KANDA ADDARA BADALGE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr M Biggs of Counsel, instructed by SEB Solicitors appeared on behalf of the Applicant.

Mr M Gullick of Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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JUDGE WARR:

1. The applicant is a citizen of Sri Lanka born on 15 August 1979. He arrived in this country as a student in 2010. On 24 February 2014 he made an application for further leave to remain as a student. This was an in-time application as his leave expired on 28 February 2014. The applicant's leave was extended pursuant to Section 3C of the 1971 Immigration Act.

2. The application for judicial review relates to decisions reached by the respondent on 15 July 2014. On that date the respondent decided to remove the applicant from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999. She also reached a decision on the outstanding application for leave to remain. The respondent noted that the applicant had submitted a certificate from the Educational Testing Service (ETS) in relation to his application and it was the respondent's contention that ETS had found "significant evidence to conclude that your certificate was fraudulently obtained." Accordingly the respondent found that the applicant had used deception and refused the application under paragraph 322(1A) of the Immigration Rules. In the refusal letter under the heading "Section C: right of appeal" the respondent wrote as follows:

> "This decision is not an immigration decision under Section 82. Section 82(2) (d) concerns a 'refusal to vary the 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'.*
>
> This is not the situation in this case, as the effect of the prior Section 10 decision means that any existing leave to enter or remain in the United Kingdom was invalidated under Section 10(8) so you have no leave to enter or remain at the time the decision to refuse to vary leave to remain was notified."

3. In contrast the removal decision informed the applicant that he was entitled to appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 but only after he had left the United Kingdom.

4. In a nutshell the applicant contends that he has an in-country right of appeal. Permission was granted by Upper Tribunal Judge Coker on 29 September 2014.

5. The short point in this case is that since the applicant submitted his application for further leave to remain as a Tier 4 (General) Student on 24 February 2014 before the expiry of his leave to remain the refusal decision should generate an in-country right of appeal.

6. The argument was considered by the Administrative Court in Shahbaz Ali v Secretary of State for the Home Department [2014] EWHC 3967 (Admin) (Helen Mountfield QC sitting as a Deputy High Court Judge).

7. In that decision the judge decided that the decision to remove the applicant preceded the decision to refuse the application. Mr Biggs submits that the decision was wrongly decided and refers to paragraph 25 where the judge stated:

> "However, as a matter of law, I find that the removal decision preceded the refusal decision. It is clear from the caselaw that a decision takes effect at the moment when it is given, not the moment when it is drafted (see *SSHD v Ahmadi* [2013] EWCA Civ 512, [2014] 1 WLR 401 at [20-25]). Thus, accepting as I do that the removal decision was served first, at 6.19 am on 11 August 2014, and the refusal decision second, at 6.21am, it follows that the refusal decision was second in time."

Counsel argues that in fact the case of Ahmadi [2013] EWCA Civ 512 decided the opposite. He submitted that at paragraph 22 of the judgment Sullivan LJ had decided that an immigration decision as defined by Section 82 of the 2002 Act takes place when that decision was taken and not when the notice of such a decision was given.

8. Counsel submitted that the applicant's appeal right vested before the 1999 Act invalidated the applicant's leave to remain. The decision had to

be taken before notice of it was given it was submitted and Section 3C only took effect on notice of the decision being given. There was a clear distinction between an immigration decision and notice of the decision as was apparent from the cases of E (Russia) v Secretary of State [2012] EWCA Civ 357 and JN (Cameroon) v Secretary of State for the Home Department [2009] EWCA Civ 307. It was submitted that under Section 82(2)(d) of the 2002 Act the right of appeal vested when a decision within the terms of the Section was taken. Reference was made to SA (Section 82(2) (d): interpretation and effect) Pakistan [2007] UKAIT 00083. By way of contrast, Section 10(8) of the 1999 Act only had effect in invalidating the appeal rights which must have vested before the applicant's leave to remain as extended by Section 3C was invalidated.

9. Paragraph 322(1A) of the Immigration Rules required the decision maker to refuse an application on being satisfied that deception had been used which contrasted with the discretionary regime under the 1999 Act. Accordingly the decision under the Immigration Rules must have preceded the Section 10 decision. While Section 10 invalidated any leave to enter or remain previously given, it did not divest a right of appeal. An in-country right of appeal would not be an empty one and the Secretary of State would be bound to acknowledge the declaratory effect of a determination to the effect that the decision under Section 10 was unlawful.

10. Mr Gullick submitted that what was said by Sullivan LJ in Ahmadi made the position quite clear in paragraphs 22 to 25 of the judgment:

> "22. I readily accept Mr. Blundell's submission that the 2002 Act, in sections 82 and 105 draws a distinction between making, or taking an immigration decision, and giving written notice of that decision to the person concerned. I do not accept his submission that the same approach is to be found in the 1971 Act. Section 3 confers the power to give and to vary leave to remain. The first part of section 4(1) provides that this power shall be exercised by the Secretary of State. The second part of section 4(1) provides that the power "shall be exercised by notice in writing given to the person

concerned." The notice in writing is not a subsequent step following the exercise of the power; it is the way in which the power is to be exercised. Mr. Blundell's submission invites us to read section 4(1) as though it said: "and notice in writing shall be given to the person concerned of the exercise of the power."

23. The authorities relied upon by Mr. Blundell, Rafiq [[1998] Imm IR 193] and Hashmi [[2002] EWCA Civ 728], do not support his submission. Hashmi turned on its own facts and established no point of principle, while Rafiq tends to support Mr. Malik's submission: that the decision-making process prescribed by section 4(1) (and section 3C (6) and rule 2 of the 2006 Regulations) is not the making of a decision followed by the notification of that decision to the person concerned, but the making of a decision by giving notification of it to the person concerned. Although the Court, for understandable reasons given the very different legislative context, did not consider that the Yeovil case was of particular significance, it did consider that the proposition that there was no planning permission unless and until notice of planning permission had been given to the applicant was consistent with the Secretary of State's case on section 4(1), which it accepted.

24. Section 3C (6) and the 2006 Regulations are consistent with section 4(1). The 2006 Regulations do not determine when notice is to be given of a decision on an application for variation of leave; they determine when an application is decided for the purposes of section 3C: it is not decided until notice has been given. I do not accept Mr. Blundell's submission that the 2006 Regulations apply only for the purpose of determining when an application is "decided" in paragraphs 3C(1)(c) and (2)(a), and have no application to paragraph 3C(2)(b). The 2006 Regulations determine when an application for variation of leave is decided for the purposes of section 3C as a whole. There has to be a consistent approach to this question throughout the section. Paragraph 3C (2) (b) extends leave during any period when an appeal could be brought under section 82(1) of the 2002 Act against the decision on the application for variation. Before an appeal can be brought under section 82 there has to be a decision on the application for variation against which the person can appeal. Subsection 3C (6) and the 2006

Regulations make it clear that there is no decision on the application for variation for the purpose of paragraph 3C (2) (b) until notice of the decision has been given.

25. Mr. Blundell accepted that on the Secretary of State's approach to section 3C there was an overlap between the extension of leave under paragraph (a) of subsection 3C(2) – until notice of the decision was given – and leave beginning to be extended under paragraph (b) – when the decision was "made" prior to notice of the decision being given. In my judgment, subsection 3C (6) requires a consistent answer to the question – when is an application decided for the purpose of section 3C – and the answer to that question for the purpose of paragraph (b) is that there is no decision against which an appeal can be brought under section 82(1) until notice of the decision has been given. Mr. Blundell submitted that this would result in an inconsistency between paragraphs 3C (2) (b) and 3D (2) (a) because subsection 3C (6) applies only to the former, and not the latter. This submission is based on the Secretary of State's erroneous approach to section 4(1) (see paragraphs 22 and 23 above): the power to vary leave under section 3(3) (a) is exercised by notice in writing given to the person affected. Giving the notice does not follow the exercise of the power; it is the manner in which the power is exercised. For these reasons I would reject ground 1 of the Secretary of State's appeal."

Mr Gullick submitted that there was no decision until notice was given and any refusal of the application to vary leave to remain could not have had legal effect unless and until it was communicated to the applicant. Quite apart from the case of Ahmadi, Mr Gullick submitted that the applicant's argument was inconsistent with R v Secretary of State ex parte Anufrijeva [2003] UKHL 36 where Lord Steyn at paragraph 26 had stated that:

"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."

11. Mr Gullick submitted that the decision in Shahbaz Ali was correct as was the refusal of permission to apply for judicial review in R (Shah) v Secretary of State for the Home Department [2014] EWHC 3301 (Admin) (Lewis J). Having referred to s 10(8) of the 1999 Act Lewis J stated at paragraphs 15 and 16 as follows:

> "15. That is what happened here. Because of the alleged deception the Secretary of State did decide to remove him. That had the consequence when notification was given of invalidating the leave to remain. Thereafter, no matter how the Secretary of State expressed herself, what she was doing was saying because your leave has been invalidated you do not have leave to remain and we cannot therefore vary it by extending the time. Therefore that, no matter how expressed, did not amount to an immigration decision within the meaning of section 82(2) (d) of the 1999 Act and therefore there is no in country right of appeal.
>
> 16. Standing back from the matter, therefore, I am satisfied that the contrary position is unarguable. The Secretary of State has made a decision here under 10(1) (b). That carries with it a right of appeal but only from outside the United Kingdom. That decision invalidates any previous leave given and therefore there would be no need, and no legal provision, for a decision refusing the application to vary leave, as there is no leave. Consequently the claim to challenge the decision to refuse leave and the claim to challenge the removal decision under section 10 should not be granted permission because there is an alternative remedy, namely appeal out of country in relation to the only true decision, which is the removal decision."

12. Mr Gullick argued that the refusal decision was effectively a nullity. The decisions in E (Russia) and JN (Cameroon) dealt with the question of the effect of non-compliance with the Notices Regulations and were not relevant to the issues in this case. The case of Ahmadi made it clear that a decision on an application to vary leave to enter or remain was not made until written notice of the decision had been given in accordance with the

Notices Regulations and that until after a variation decision had been made there could be no appeal or extension of leave under Section 3C. In the case of SA (Pakistan) the decision was the result of an application – see paragraph 4. The powers referred to in the decision in Ahmadi applied. These were the powers in Section 3 and 4 of the 1971 Act. The decision in Ahmadi could not be distinguished as was apparent from what was set out in ground 1 at paragraphs 20(ff).

13. The effect of the decision to remove the applicant was by statute to invalidate the earlier application. The operative decision was the removal decision and not the refusal decision.

14. Mr Biggs in reply submitted that the circumstances in Ahmadi were distinguishable and a key issue was the Immigration (Notices) Regulations 2003. It was apparent that the regulations operated only if a decision had been taken in advance and accordingly there was a need for two decisions. The right of appeal vested in advance of any notice. Mr Biggs submitted that Anufrijeva was authority for the opposite proposition – the applicant was being deprived of the right to access to justice by the removal of his right of appeal against the refusal decision and ambiguous language should not be used to frustrate that right.

15. At the conclusion of the submissions I reserved my decision. I am very grateful to Counsel for setting out the arguments so concisely and clearly.

16. In Shahbaz Ali Helen Mountfield QC found that the removal decision preceded the refusal decision and that it was clear that the decision took effect at the moment when it was given and not at the moment when it was drafted. It is submitted that the learned judge misunderstood what was said in Ahmadi. However I find with respect that it was a misunderstanding on the part of the applicant's representative of what was said in Ahmadi. What is said in Ahmadi at paragraphs 22 to 25 which I have set out above do not support the applicant's contention, they

clearly support the respondent's position. The decision in Shahbaz Ali was consistent with the authorities and was in my respectful view entirely correct. What is said in paragraph 26 of Anufrijeva makes the position quite clear. Notice of the decision is required before it can have the character of a determination with legal effect.

17. In relation to the point based on paragraph 322(1A) of the Rules as Mr Gullick submitted in a footnote to paragraph 22 of his skeleton argument the submission presupposes that the respondent was required to take the decision on the application to vary leave before doing anything else at all.

18. As Mr Gullick further points out, even if the applicant had a vested right of appeal – as Mr Biggs argues – any leave to remain previously given is invalidated by Section 10(8) of the 1999 Act and there was no leave capable of being varied, his leave to remain being invalidated by the removal decision. A right of appeal is provided by Parliament against the decision to remove. This right of appeal is exercisable out of country. As Lewis J said in Shah at paragraph 16 "...the contrary position is unarguable." This application is an attempt to get round what Parliament has clearly provided.

19. For the reasons I have given, I do not find that the decision of Shahbaz Ali was wrong, on the contrary it appears fully and correctly to analyse the statutory provisions. The circumstances in this case and that case are similar. I see no reason to distinguish the case or to depart from it. Accordingly, this application fails. *~~~~0~~~~*