R (on the application of SS) v Secretary of State for the Home Department (declaratory orders) IJR [2015] UKUT 00462 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of SS

Applicant

v

Secretary of State for the Home Department

Respondent

Before The Hon Mr Justice McCloskey, President of the Upper Tribunal

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr A Pipe, of Counsel, instructed by Bhatia Best Solicitors, on behalf of the Applicant and Ms N Candlin, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Birmingham Civil justice Centre on 09 June 2015, followed by further written submissions.

(i) The Upper Tribunal has a discretion to make a declaration under section 15(1)(d) of the Tribunals, Courts and Enforcement Act 2007. In common with all remedial orders in judicial review proceedings, this lies within the discretion of the Tribunal.

(ii) In deciding whether to make a declaration the Tribunal should bear in mind the educative and corrective function of judicial review. Furthermore, where a challenge exposes that a public authority has acted unlawfully, a declaration will normally be appropriate in circumstances where a quashing, mandatory or prohibitory order is an inappropriate form of relief.

Judgment

Delivered (finally) on 28 July 2015

Introduction

(1) This is the formal, written incarnation of the *ex tempore* judgment pronounced at the conclusion of this substantive judicial review hearing on 09 June 2015 and following consideration of the parties' responses to the Tribunal's invitation to make further submissions.

(2) The Applicant was granted permission to challenge the Secretary of State's decision refusing to issue her with a derivative residence card under regulation 18A of the EEA Regulations 2006. This provides, in material part:

> "*(1) The Secretary of State must issue a person with a derivative residence card on application and on production of –*
>
> *(a) a valid identity card issued by an EEA State or a valid passport; and*
>
> *(b) proof that the applicant has a derivative right of residence under regulation 15A.*
>
> *(2) On receipt of an application under paragraph (1) the Secretary of State must issue the applicant with a certificate of application as soon as possible.*"

By regulation 29A(1), the Secretary of State is empowered to accept alternative evidence of identity and nationality "*where the person is unable to obtain or produce the required document due to circumstances beyond his or her control.*" In accordance with regulation 15A, a person is entitled to a derivative right to reside in the United Kingdom for as long as such person satisfies the three prescribed criteria, that is to say that he/she –

(a) is the primary carer of a British citizen; who is

(b) residing in the United Kingdom; and

(c) such citizen would be unable to reside in the United Kingdom or in another EEA State if the carer were required to leave.

Two requirements are prescribed for acquisition of the status of "*primary carer*", namely, the person concerned -

(i) is "*a direct relative or a legal guardian*" of the British citizen concerned; and

(ii) is "*the person who has primary responsibility for that*

person's care" or "*shares equally* [such responsibility] *with one other person who is not an exempt person.*"

The Challenge

(3) The impugned decision of the Secretary of State, dated 28 November 2013, yields the following analysis:

(i) The Applicant failed to satisfy the identity card or passport requirement enshrined in regulation 18A(1)(a).

(ii) Irrespective of this failing, the application –

> "*… would still fall for refusal ……* [as] *…. there is …. insufficient evidence to show that the British citizen child ……. would be unable to remain in the United Kingdom/EEA if you were forced to leave. You have not provided evidence as to why the child's father is not in a position to care for the British citizen child if you were forced to leave the United Kingdom ……*
>
> *Furthermore, to be considered the primary carer we would expect you to provide evidence to show that the child lives with you or spends the majority of her time with you, that you make the day to day decisions in regard to the child's health, education etc and that you are financially responsible for the child.*"

(iii) In summary, it was considered that the Applicant failed to discharge the burden of proof of demonstrating on the balance of probabilities that the statutory requirements were satisfied.

(4) There are four grounds of challenge in total. The first of these (not in the pleaded sequence), which complains that the application could not be lawfully refused under regulation 18A(1)(a) on the ground that the Applicant's passport was in the possession of the Secretary of State's agents, was disallowed at the permission stage following an oral renewal hearing. It is, therefore, moot at this stage. The next ground raises the question of law of whether a claim based on Article 8 ECHR can be incorporated in an application under the EEA Regulations. The parties' representatives were aware that there is currently pending a reserved decision on this issue in the Upper Tribunal and I indicated that it would not be appropriate to advance arguments thereon, given in particular that this challenge can be decided on other grounds.

(5) The third ground which I shall address challenges the Secretary of State's assessment that the Applicant had failed to demonstrate that she is "*the direct relative or legal guardian of*" the child in question. This formulation of this ground requires a slight amendment of the Applicant's pleaded second ground which, having given the parties an opportunity to make submissions, I authorise. The aforementioned assessment is unparticularised and unreasoned. I consider that the evidence supplied with the application and subsequently in response to a request for elaboration, which included the child's birth certificate and other materials, demonstrated beyond peradventure that the

Applicant is the mother of the child concerned. On this basis alone, the impugned decision of the Secretary of State is vitiated by material error of fact and/or irrationality. This sounds also on the remainder of this ground since, taking into account the totality of the information supplied by the Applicant, I consider that it was not rationally open to the decision maker to conclude that there was insufficient evidence of the various, inter-related elements of the status of "*primary carer*".

(6) The fourth, and final, ground of challenge complains that the impugned decision is unlawful as it is in breach of each of the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*"). There is no dispute between the parties that the impugned decision falls within the section 55(2) embrace of *"any function of the Secretary of State in relation to immigration, asylum or nationality*". For the reasons elaborated in my *ex tempore* judgment, I consider this ground to be clearly established. In summary:

(i) There is a patent misdirection in law in the impugned decision, by reason of the formulation of the duty as a "*duty of care*". I reproduce the offending passage in full:

> "*The Home Office discharges its duty of care by acting on any concerns it identifies regarding the welfare of children with whom they come into contact and by conducting checks that are consistent with the impact of its decision making.*"

This is a classic breach of the "Tameside" principle: the decision maker has asked the wrong question (Secretary of State for Education and Science v Tameside MBC [1977] AC 1014).

(ii) This error is compounded by the unintelligible statement that the Home Office conducts checks "*that are inconsistent with the impact of its decision making*": this fails the plain English test.

(iii) This passage continues:

> "*To this extent, the position of your children …..* [both named] *… have been considered in the light of the requirements incumbent on the Home Office as defined under section 55 of the 2009 Act, section 11 of the Children Act 2004 and also in the light of the Supreme Court ruling in the case of ZH (Tanzania) [2011] UKSC 4*".

This passage betrays a fundamental misunderstanding of the duty contained in section 55(1). Its language belongs to a planet distant from that of section 55.

(iv) Furthermore, the suggestion that the Secretary of State's decisions considered this statutory duty to have been performed by carrying out "*checks*" relating to the children has no basis in fact: there is no evidence that no such checks were carried out.

(v) The confusion and misconception relating to the statutory duty

in play are further compounded by the invocation of what was, in the context, an entirely irrelevant statutory provision namely section 11 of the Children Act 2004.

The conclusion that there was a wholesale failure to discharge the duty of ensuing that the best interests of the child (not children – another glaring error) concerned would be a primary consideration is inescapable. The signal infirmities in this passage also impel inexorably to the further conclusion that there was a breach of the freestanding duty enshrined in section 55(3) of the 2009 Act to have regard to the Secretary of State's published guidance. I refer to, but do not reproduce, the relevant passages in JO and Others (Section 55 Duty) Nigeria [2014] UKUT 517, at [6] – [13].

(7) I add that there was no submission on behalf of the Secretary of State that the breaches of section 55 readily identifiable in the impugned decision were not material. Having regard to the terms of regulation 18A of the 2006 Regulations, it is conceivable that this argument may be canvassed in a suitable future case, which will permit a more intense examination of the interaction between section 55 and Regulation 18A. However, this issue does not fall to be determined in this appeal.

A Declaratory Order?

(8) To summarise, I have found two significant public law aberrations in the impugned decision. In considering the appropriate disposal of this challenge, it is necessary to balance these findings with the Applicant's inability, in making the original application to the Secretary of State, to satisfy the identity card/passport requirement of Regulation 18A(1)(a). Given this failure, a quashing order is plainly inappropriate since the impugned decision is sustainable on this basis. However, this analysis does not impel inexorably to the conclusion that the appropriate order is one simply dismissing this application.

(9) The central question which arises in these circumstances is whether it is appropriate to make a declaration in the exercise of the power conferred on the Upper Tribunal by section 15(1)(d) of the Tribunals, Courts and Enforcement Act 2007 (which continues to use the language "declaration"). This prompts some reflection on the contours and function of declaratory relief in judicial review proceedings.

(10) A declaratory judgment is a formal judicial statement pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment (see Zamir and Woolf, The Declaratory Judgment, 4th Edition, paragraph 1.02). The declaratory judgment has been described as "*as old as judicial history*" (Borchard, Declaratory Judgments, 2nd Edition 1941, p 87 *et seq*). Following a period of some quiescence, the declaratory order (or declaration, as it was formerly known) was re-energised in a series of decisions establishing that this remedy could be obtained in civil proceedings against the Crown and other public bodies. See, for example, the historic decision of Ridge v Baldwin [1964] AC 40 in which the House of Lords granted the relief of

declaring that the dismissal of the Appellant, a police officer, was null and void. During this era, reinforced by other memorable decisions such as Anisminic v Foreign Compensation Commission [1969] 2 AC 147, the availability of the declaratory order in private law coexisted with the prerogative orders available against public bodies in public law. The declaration achieved particular prominence as a result of the landmark reforms of judicial review effected in 1977 by the introduction of the new Order 53 of the Rules of the Supreme Court (now Part 54 of the Civil Procedure Rules). This extended the remedies available via the prerogative orders by adding those of a declaration, an injunction and, in limited circumstances, damages.

(11) The declaratory order is the most flexible and versatile of the remedies available in judicial review proceedings. In common with all such remedies the judicial decision whether to grant it is a discretionary one. It is frequently not the claimant's remedy of first choice, given the sharper cutting edge of a quashing order (formerly certiorari) or a mandatory order (formerly mandamus). However, its value and utility should not be underestimated. Furthermore, in common with all of the orders available to the Upper Tribunal in judicial review proceedings, it can be granted on the Tribunal's own initiative where the circumstances are considered appropriate.

(12) As decisions such as R (Macrae) v Herefordshire DC [2012] EWCA 457, at [31] and [40] and R v Investors Compensation Scheme, ex parte Weyell [1994] QB 749, at 767H illustrate, victory in substance for the claimant is not a necessary prerequisite to this order issuing. This is consistent with the educative and corrective function of judicial review, one of its multiple uses and values. Notably, the declaratory order has been the remedy granted in cases where there is a challenge to ministerial or departmental guidance and advice: see for example Laker Airways v Department of Trade [1977] QB 643 and Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112. Turning to the sphere of immigration law, a declaratory order is, in principle, available in proceedings in which a question arises concerning the *vires* or legality of a ministerial instruction ("IDI") given to Immigration Officers under the Immigration Act 1971 (section 4 (1) and Schedule 1, paragraph 1).

(13) A brief reflection on the remedy granted in a recent landmark decision belonging to the field of immigration and asylum law is instructive. In Detention Action v First-tier Tribunal (Immigration and Asylum Chamber), Upper Tribunal (Immigration and Asylum Chamber), and Lord Chancellor [2015] EWHC 1689 (Admin), the Administrative Court made an order quashing the Fast Track Rules contained in the Schedule to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The effect of this Order was to extinguish the Rules summarily. The contrast with a declaratory order is interesting. If the Court had, in the exercise of its discretion, opted for a declaratory order, namely an order declaring the Rules *ultra vires* and unlawful, the Rules would have survived. This illustrates the sharp difference between these two forms of remedy.

(14) Finally, I draw attention to the recent decision of the Supreme Court in Hunt v North Somerset Council [2015] UKSC 51. There the Appellant

was unsuccessful in his judicial review challenge at first instance. On appeal, while two substantive issues were determined in his favour no relief was granted. On further appeal to the Supreme Court, the Appellant contended that the Court of Appeal should have made a declaration that the Respondent had failed in its relevant statutory obligations. The opinion of Lord Toulson, with whom all Justices concurred, contains the following passage, in [12]

> *"… in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice".*

The immediately following words are also of note:

> *"That said, there is no 'must' about making a declaratory order …"*

In short, both the decision whether to grant relief and the selection of the appropriate remedial order are matters lying within the discretion of the court or tribunal concerned. This discretion extends to making an order which has not been specifically requested by the claimant.

(15) In the present case, I have found that the impugned decision of the Secretary of State is vitiated by a breach of both of the duties enshrined in Section 55 of the 2009 Act: see [6] *supra*. This is the second of two substantial flaws in the decision. In the exercise of my discretion, I have concluded that a declaratory order is appropriate. In particular, I am satisfied that this order will serve a useful function in the public interest, particularly given the misgivings expressed by this Tribunal about the quality of decision making in children's cases generally and the approach to the section 55 duties in practice: see JO (section 55 duty) Nigeria [2014] UKUT 517 (IAC) and MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC). Thus the order is designed to have an impact beyond the narrow confines of the present case. Furthermore, since future decision making involving these parties is eminently predictable, this order will provide guidance and education to the Secretary of State, minimising the possibility of any repetition of either of the two public law misdemeanours identified in this judgment. A declaratory order will also provide suitable vindication to the Applicant, marking the fact that his challenge has successfully exposed two substantial flaws in the Secretary of State's decision.

Order

(16) Accordingly, there will be a declaration in the following terms:

> *The Upper Tribunal declares that in making the decision of the Secretary of State dated 28 November 2013 whereby the Appellant's application for a derivative residence card under the Immigration (European Economic Area) Regulations 2006 was*

refused there was a failure to discharge the duties enshrined in section 55(1) and (3) of the Borders, Citizenship and Immigration Act 2009 and an unlawful assessment that the Applicant is not the direct relative or legal guardian of the child concerned."

(17) I consider that by virtue of and in response this declaratory order it will now be incumbent upon the Secretary of State to reconsider the impugned decision and to make a fresh one, mindful and respectful of the Tribunal's assessment and given the undisputed assertion that the Appellant's passport is now available. This will clearly have to be taken into account.

Costs and Permission to Appeal

(18) The Applicant has succeeded on two grounds and the general principle that costs follow the event applies. It matters not that the remedy is of the declaratory variety. Thus I award costs against the Respondent.

(19) The Respondent has applied for permission to appeal. I am not satisfied that this decision involves any point of principle of novelty or elevated importance. Moreover, the application for permission to appeal is in substance rooted in the misconception that the impugned decision has been quashed. This is not the effect of the declaratory order. In addition, the application misrepresents (again) the statutory language. Permission to appeal is refused accordingly.

Signed: _____

The President, The Hon Mr Justice McCloskey

Dated: **23 July 2015**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).