In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Roohi and Another) v Secretary of State for the Home Department (2014 Act: saved appeal rights) IJR [2015] UKUT 00685 (IAC)

Heard at
Field House

2 and 5 October 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

THE HON. MR JUSTICE McCLOSKEY, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

The Queen on the Application of

NAGINE ROOHI
NILABEN MANISHKUMAR PATEL

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr M Biggs, instructed by Mayfair Solicitors, appeared on behalf of the Applicants.

Mr W Hansen, instructed by the Government Legal Department appeared on behalf of the Respondent

(1) The commencement of the Immigration Act 2014 does not remove rights of appeal from those who were served with appealable decisions before 6 April 2015.

(2) This means that those with a right of appeal exercisable only from outside the United Kingdom (including some ETS cases), have an adequate alternative remedy, and as such judicial review will not lie save in a small minority of cases that are in some way exceptional.

JUDGMENT

Introduction

1. The "ETS cases" arise from decisions refusing to extend, or effectively terminating, a large number of individuals' leave to remain in the United Kingdom. Following a broadcast investigation by the television programme "Panorama" and internal review by Educational Testing Services itself, the conclusion was reached that many English language certificates issued by ETS had been obtained in a fraudulent manner, because thousands of tests had been undertaken not by the person named on the certificate but by somebody else. The effect of this discovery, and the Secretary of State's action on it, varied between individuals. Some had an in-country right of appeal against the decision about their leave; others had or have a right of appeal exercisable only from outside the United Kingdom. Efforts by substantial numbers of those in the latter class to maintain judicial review proceedings have been met by the Secretary of State's argument that permission should be refused because there is an adequate alternative remedy in the form of the out-of-country appeal, prescribed by Parliament in their case. The Secretary of State's argument to that effect has been accepted; and it is clear that, for those who have an out-of-country right of appeal, judicial review will not lie save in a small minority of cases that are in some way exceptional. We do not need to give any more detail about the background, which is set out in detail in judgments by Beatson LJ in R (Mehmood and Ali) v SSHD [2015] EWCA Civ 744 and R (Sood) v SSHD [2015] EWCA Civ 831.

2. The claims for judicial review fall for determination by this Tribunal in those cases covered by the Lord Chief Justice's direction under s.18(6) of the Tribunals, Courts and Enforcement Act 2007, and otherwise by the High Court. Many of the claims were stayed awaiting the judgments of the Court of Appeal to which we have referred. When those judgments were both available, the Tribunal's staff began, on judicial authority, a process of writing to the individual claimants inviting them to say whether, in the light of the authoritative statements of the law now available, they wished to proceed with their claim and, if they did, requiring them to submit amended grounds within a specified timescale, failing which their applications would be automatically struck out.

3. The present applications for permission to apply for judicial review are amongst those in which amended grounds have been submitted. They raise the same issue, and after setting out the facts we shall not need to distinguish between them. The issue is one of general application. Mr Biggs submits on their behalf that, as a result of the commencement of the relevant provisions of the Immigration Act 2014, they do not have a right of appeal of any sort, and that judicial review is accordingly an appropriate remedy: indeed, he argues, it is their only remedy.

The Facts

4. Ms Roohi is a national of Pakistan. She came to the United Kingdom on 11 August 2012 as a student. On 29 December 2013 she sought an extension of her student leave. On 14 January 2014 she was granted further leave, expiring on 30 November 2015. Her application had been supported by an English language certificate from ETS. After investigation the Secretary of State gave notice on 25 September 2014 that she proposed to remove Ms Roohi from the United Kingdom on the ground that she had used deception in seeking leave to remain. Under s.10(8) of the Immigration and Asylum Act 1999 that notice had the effect of invalidating the leave previously given. The notice of decision correctly indicated that she could appeal against it after she had left the United Kingdom.

5. Ms Patel is a national of India. She came to the United Kingdom on 11 September 2009 with leave as a student. The leave was extended a number of times. The most recent extension was granted on 14 September 2013, to expire on 12 April 2015. Ms Patel's application was also supported by an English language certificate from ETS. In her case after investigation the Secretary of State served notices on 11 August 2014, with the same content and same effect as those served on Ms Roohi.

6. Each of the Applicants has remained in the United Kingdom without leave following service of the removal decisions.

The Immigration Act 2014

7. The Immigration Act 2014 makes sweeping changes to the rights of appeal in respect of immigration decisions. The changes are in Part 2 of the Act, and take effect for the most part by amending the appeals provisions of Part 5 of the Nationality, Immigration and Asylum Act 2002. It is common ground that, under the provisions of the 2014 Act, there is no appeal against decisions such as those that the Applicants challenge.

8. The relevant provisions of the 2014 Act have been introduced by commencement orders. For present purposes we need refer only to the Immigration Act 2014 (Commencement No.3, Transitional and Saving Provisions) Order 2014 (SI 2014/2771) as amended by the Immigration Act 2014 (Commencement No.4, Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015/371). So far as these applications are concerned, the effect of those orders is that the appeals provisions of the 2014 Act are brought into effect with certain savings. The appeals provisions that were in force immediately before commencement continue to apply (and the 2014 provisions do not apply) in so far as they relate to decisions in a number of classes set out in article 9(1) of the No.3 Order as amended by the No.4 Order. Four classes are set out in article 9(1). The first three are particular types of decision made on or after 6 April 2015, which is the relevant commencement date. Those provisions clearly have no impact on the present applications. Article 9(1)(d) is the only provision which saves appeal rights in relation to a decision made before 6 April 2015. It does so in the following words:

"(d) a decision made before 6th April 2015 in relation to which, immediately before 6th April 2015, an appeal could have been brought or was pending under the saved provisions".

Mr Biggs' submissions

9. Mr Biggs' submission is in essence perfectly simple. The Applicants each had a right of appeal that could be exercised only from outside the United Kingdom. Immediately before 6 April 2015 (and indeed at all relevant times) the Applicants were not outside the United Kingdom. For that reason they could not have brought an appeal. The words of article 9(1)(d) therefore do not apply to them, and no right of appeal was saved. Since 6 April 2015 they have been without a right of appeal.

10. Mr Biggs deployed his argument with his customary industry and subtlety. He reminded us that the statutory bar on bringing an appeal from within the United Kingdom is jurisdictional and not merely procedural. He referred to Mucelli v Government of Albania [2009] 1 WLR 276, R (Nirula) v First-tier Tribunal [2012] EWCA Civ 1436 and Virk v SSHD [2013] EWCA Civ 652. Mindful of that distinction, Mr Biggs examined other uses of the word "bring" and its cognates in the context of the institution of proceedings, with the aim of showing that the phrase "could be brought" must refer to circumstances in which there is no jurisdictional bar.

11. In what Mr Biggs described as the analogous context of the Limitation Act 1980, which sets out the time limits for "bringing actions", the authorities, including Page v Hewetts Solicitors [2012] EWCA Civ 805, and Horton v Sadler [2006] UKHL 27 show that an action is "brought" when the claimant has done all that he could do to issue the claim, but the failure to "bring" an action in time does not raise a jurisdictional bar. We do not find that analogy at all helpful: it does not assist at all in determining whether an action could be brought.

12. Mr Biggs then drew attention to s.3C of the Immigration Act 1971 as reformulated by the Nationality, Immigration and Asylum Act 2002 and amended by the Immigration, Asylum and Nationality Act 2006. That section provides for the extension of the leave of a person who, whilst in the United Kingdom with current leave, makes an application for the extension of that leave. Sub-section (2) extends the leave, potentially for three successive periods, set out as follows:

"(2) The leave is extended by virtue of this section during any period when –
(a) the application for variation is neither decided nor withdrawn,
(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, *while the appellant is in the United Kingdom* against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
(c) an appeal under that section against that decision, *brought while the appellant is in the United Kingdom*, is pending (within the meaning of section 104 of that act)."

13. Sub-section (3) provides that leave extended by s.3C "shall lapse if the applicant leaves the United Kingdom". The words we have put in italics are those added by the 2006 Act. The explanatory note says that these insertions are "minor amendments", "making clear that leave shall only be continued when an in-country appeal may be brought or is pending". Mr Biggs' submission is that the amendments were unnecessary (or practically unnecessary), because leave under s.3C(2)(a) could only be triggered "by virtue of a right of appeal which was always exercisable while the appellant remained in the UK". He builds on that proposition the argument that the words "an appeal could be brought" must refer to the procedural or circumstantial possibility of the actual individual bringing an appeal, not to the right of appeal itself. He submits that this indicates that the similar language in article 9(1)(d) also refers to the procedural entitlement to bring an appeal rather than the right of appeal, and that even unnecessary words will be inserted by Parliament in order to make that distinction clear.

14. In our judgment, Mr Biggs' argument on this point is completely wrong. It begins from the wholly false premise that so far from being a minor amendment, the words in question had no effect at all. In order to appreciate their effect, it is necessary to remember that, although some appeals cannot be brought from within the United Kingdom, others can. An appeal brought while the appellant is in the United Kingdom is, by s.104(4), treated as abandoned if the appellant leaves the United Kingdom. Some (but by no means all) grants of leave lapse if the holder leaves the United Kingdom. But the holder of leave which is current, and which does not lapse on his departure from the United Kingdom, is at liberty to bring and pursue an appeal from outside the United Kingdom. That possibility is fully recognised in the First-tier Tribunal's rules setting out the time within which notices of appeal must be given. At the time of the amendments introduced by the 2006 Act, the provisions were in r.7 of the Asylum and Immigration Tribunal (Procedure Rules) 2005; they are now in r.19 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. There are three possibilities. If the appellant is in the United Kingdom, the time limit is fourteen days. If the person was in the United Kingdom when the decision was made, but is prohibited by the 2002 Act from appealing whilst in the United Kingdom, the period is twenty-eight days after the person left the United Kingdom. In the general case, if the person is outside the United Kingdom, the period is twenty-eight days from the receipt of the notice of the decision.

15. We consider that the "minor amendments" made to s.3C by the 2006 Act are designed to cure two possible ambiguities. The first, in sub-s.2(b), makes it clear that the maximum extension of time under that paragraph is the fourteen days available to a person appealing in-country, not the longer period that would be available to him if he were appealing from outside the United Kingdom. This point in itself is amply sufficient to counter Mr Biggs' argument. The reference to bringing an appeal in s.3C(2)(b) is indeed a general reference to appealable decisions, not a specific reference to decisions that can be appealed from within the United Kingdom.

16. The amendment in paragraph (c) deals with the following by no means impossible sequence of events in the case of a person who has leave which does not lapse on

his leaving the United Kingdom, and who makes, during its currency, an application for its extension. (1) A makes his application. (2) A leaves the United Kingdom. (3) A's original period of leave expires. (4) A's application is determined. (5) A gives notice of appeal within fourteen days. In this case, A's original period of leave continues until event (3); his leave is then extended by paragraph (a) until event (4). It does not matter that he is not within the United Kingdom; although if he had waited for event (3) before leaving the United Kingdom, his s.3C leave would have lapsed on his departure. Following event (3), his leave continues under paragraph (b), but only for the period of time available to in-country appellants. If he has returned to the United Kingdom during the period limited by paragraph (b), and has brought his appeal from within the United Kingdom, then his leave continues under paragraph (c). If, however, his appeal is brought from abroad, then even though he brought it within the period of time limited by paragraph (b), his leave is not extended by paragraph (c) as amended.

17. As we have said, that series of events is by no means impossible. In a more complex way it demonstrates again that the relevant words in s.3C refer in general to the right of appeal in general, and not to the jurisdictional, factual or procedural circumstances in which an appeal could actually be launched. Quite apart from the 2006 amendments, that can be seen also in the fact that, provided that the person has not left the United Kingdom during the currency of his s.3C leave, paragraph (b) applies whether or not an appeal is actually brought.

18. For the foregoing reasons we reject entirely Mr Biggs' argument that either before or after amendment, s.3C(2) of the 1971 Act "contained an implicit limitation to rights of appeal exercisable in-country".

19. Mr Biggs' final argument is based on the possibility of a decision being issued so shortly before the commencement of the 2014 Act provisions that the person affected has no practical opportunity to leave the United Kingdom before 6 April 2014. He says that in such a case it would be absurd to regard that person as a person who "could have" brought an appeal immediately before commencement. That argument, however, is ambivalent. It only has any force if Mr Biggs' principal submission that the words of article 9(1)(d) refer to a procedural, factual or jurisdictional entitlement to bring an appeal. If, on the contrary, they refer instead to the making of what may be called an appealable decision, the difficulty does not arise.

Mr Hansen's submissions

20. Mr Hansen indeed adopts that very position. He points out that the phrase in question is not directed to the appellant: it is directed to the decision. Article 9, as amended by the No.4 Commencement Order, does not refer to the appellant, or the person bringing the appeal: instead, it refers to the decision. That is, we note, a distinction from the provisions which the No.4 Order amended, which did refer (albeit with different effect) to the person bringing the appeal. Mr Hansen's submission is that the simple meaning of the words in article 9(1)(d) is that any decision against which an appeal could be brought is one in respect of which the

old appeals provisions are saved. The question is whether, as a matter of law, the decision carried a right of appeal. In the present cases, the decision did carry a right of appeal, as the notice of decision made clear: what is more, each of the applicants could have exercised that right of appeal by leaving the United Kingdom. The Secretary of State's position is that the appeal rights communicated to the applicants when the decisions were made were preserved by the saving provisions of the Commencement Orders.

Discussion

21. For the reasons we have given in setting out his submissions, we are unpersuaded by Mr Biggs' submission that analysis of the words used in article 9(1)(d) leads inexorably to the conclusion for which he contends. On the contrary, it appears to us that, looking at the matter as a whole and in context, the true construction of the words is that for which the Secretary of State contends. Five factors contribute to our conclusion.

22. The first is that to which we have already referred. The words are capable of bearing the meaning advanced by the Secretary of State: the use of similar phrases in other contexts, to which Mr Biggs referred us, does not show that the meaning of the words necessarily excludes the saving of the applicants' rights of appeal. The second reason is that to which Mr Hansen specifically alluded. Although Mr Biggs' submissions were largely directed to the position of the applicants (or, generally, potential appellants) the Commencement Order defines the saved provisions primarily by reference to the decisions, and does not in this context mention potential appellants.

23. Thirdly, it is necessary to consider the status of individuals who have been notified of a decision and of the rights of appeal against it. The Immigration (Notices) Regulations 2003 require a notice of decision to include an indication of the rights of appeal and as we have said, the required notices were served on the applicants. It is a general principle of statutory construction that a provision will not be regarded as depriving an individual of a vested right unless the legislative intention to do so is clear: we should therefore strain against a construction removing it. That principle has statutory force in s.16(1)(c) of the Interpretation Act 1978 and in the realm of vested procedural rights extends even to the acquisition of immunity by the passage of time: Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553. On services of the decision and notification of the appeal rights, those rights, acquired under the 2002 Act as then in force, vested in the applicants: a contrary position would be wholly unarguable. There is nothing in the 2014 Act or the Commencement Orders that indicates an intention contrary to the usual principle: indeed the saving of existing appeal rights suggests that the usual principle is indeed to prevail

24. The fourth consideration is that the reading proposed by the Secretary of State gives a result which is much neater and more coherent. The existence or not of the right of appeal depends on the nature of the decision and not on the movements of the person affected by it. The final reason is connected with that. It is that in each case where a right of appeal lies only from outside the United Kingdom, the notice of

decision is served on a person who has, at the date of the decision, no right to be in the United Kingdom. It is overwhelmingly more likely that the meaning of article 9(1)(d) is to be derived from an assumption that those affected will observe the law than that they will break it.

25. Apart from the linguistic arguments advanced by Mr Biggs, the only factor of any importance counting against the interpretation which we have indicated we prefer is that it potentially requires the structure of appeals under the 2002 Act before amendment to be preserved indefinitely, in case a person like the applicants, served before 6 April 2015 with a notice indicating a right of appeal exercisable only outside the United Kingdom should at some future date leave the United Kingdom and seek to exercise the right of appeal. The preservation of old appeal rights is bound to have some effect of that sort. It does not seem to us that the potential effects in the present case are sufficient to show that the interpretation we prefer is wrong. In particular, no absurdity is demonstrated.

26. The conclusions set out above are those we reached following the hearing of these applications. We are fortified in our view by having read a decision of Beatson LJ refusing permission to appeal to the Court of Appeal in an application evidently relying in part on arguments similar to those put before us by Mr Biggs, (R (Islam) v SSHD C2/2015/1663). He characterised the arguments as "utterly unarguable" and the application as a whole as totally without merit.

Conclusion

27. For the foregoing reasons we reject the arguments advanced on behalf of the applicants. Their rights of appeal, exercisable only from outside the United Kingdom, are preserved by the saving provisions of the Commencement Orders. For the reasons given in the decisions of the Court of Appeal mentioned in [1] above, those rights of appeal are an adequate alternative remedy. Their applications for permission to apply for judicial review, based on the amended grounds which we hereby permit, are therefore refused.

C M G Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 17 November 2015