Neutral Citation Number: [2024] EWHC 66 (Admin)

Case No: AC – 2017-LON- 004371

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 January 2024

Before:

MR JUSTICE LANE

- -

Between:

RUPERT JUNIOR GEDDES	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Dr R Wilcox (instructed by **Thompson & Co Solicitors**) for the **claimant**
Mr J Waite (instructed by **the Government Legal Department**) for the **defendant**

Hearing date: 19 December 2023

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Approved Judgment

This judgment was handed down remotely at 10:30am on 22 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Lane:

1. This is an application for judicial review of the defendant's deportation order in respect of the claimant, dated 19 September 2017. The proceedings have a protracted history but are now entirely concerned with the construction of section 104 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Permission was granted by Lang J on 7 March 2023 on the single ground that it was arguable the deportation order was unlawful by reason of the claimant's then pending application for permission to appeal to the Supreme Court; and that, if the order were unlawful, the claimant had been illegally detained from 30 October to 15 November 2017, given that his detention was authorised by the defendant so as to give effect to the order.

2. I am grateful to Dr Wilcox and Mr Waite for their most helpful submissions. Both were of a high order.

BACKGROUND

3. The relevant background is as follows. The claimant is a national of Jamaica. On 22 January 2007, at Inner London Crown Court he was convicted of wounding with intent to inflict grievous bodily harm and was subsequently sentenced to six years' detention in a young offenders institution. At the date of conviction and sentence, the claimant was 17 years of age. He also had two warnings against him; for theft in June 2004 and common assault in September 2006.

4. On 28 April 2014, the defendant decided that the claimant's deportation was conducive to the public good, pursuant to section 3(5)(a) of the Immigration Act 1971. This decision was served on 1 May 2014. The claimant appealed to the First-tier Tribunal under section 82 of the 2002 Act. At that time, an appeal under section 82 was able to be brought directly against such a decision. On 19 November 2014, that Tribunal dismissed his appeal. The claimant appealed to the Upper Tribunal which, on 26 March 2015, dismissed the appeal. The claimant then appealed to the Court of Appeal which, in a judgment handed down on 20 October 2016, dismissed the appeal: RJG v Secretary of State for the Home Department [2016] EWCA Civ 1042. The claimant then changed solicitors to Thompson & Co, who were in a position to apply for public funding to pursue an appeal to the Supreme Court. On 24 November 2016, Thompson & Co applied to the Supreme Court for an extension of time for filing an application for permission to appeal, whilst they sought to obtain public funding. On 25 November 2016, the Supreme Court granted an extension of time until 28 days after the final determination of the application for public funding. A copy of that decision was provided to the defendant's solicitors on 29 November 2016. A final determination of the claimant's application for

public funding was made on 30 May 2017. On 27 June 2017, the claimant filed his notice of appeal with the Supreme Court.

5. The claimant was detained on 30 October 2017 in order to give effect to his removal from the United Kingdom pursuant to the deportation order of 19 September 2017. This led to the initiation of the judicial review proceedings. On 13 November 2015, Supperstone J imposed a stay on removal until determination of the claimant's appeal to the Supreme Court. On 2 March 2013. Yipp J stayed the claimant's application for permission to bring judicial review until the Supreme Court had determined his application for permission to appeal. The Supreme Court eventually refused permission to appeal on 15 February 2022, over four years and seven months from the filing of the claimant's notice of appeal with that Court. The order of the Supreme Court said that "permission to appeal was adjourned pending the outcome in *KO (Nigeria)*, but that decision does not make it appropriate to give permission to appeal in this case". The judgment in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 had been handed down on 24 October 2018.

LEGISLATION

6. I shall set out the relevant legislative provisions. For reasons that will become evident, section 104 of the 2002 Act needs to be set out in its current form (which was the form existing at the time of the deportation order and detention), as well as in its original form and in the form it was from April 2005 to February 2010.

Nationality, Immigration and Asylum Act 2002

78 No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be—

(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section "pending" has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending—

(a) the giving of a direction for the appellant's removal from the United Kingdom,

(b) the making of a deportation order in respect of the appellant (subject to section 79), or

(c) the taking of any other interim or preparatory action.

(4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92.

79 Deportation order: appeal

(1) A deportation order may not be made in respect of a person while an appeal under section 82(1) that may be brought or continued from within the United Kingdom relating to the decision to make the order—

(a) could be brought (ignoring any possibility of an appeal out of time with permission), or

(b) is pending.

(2) In this section "pending" has the meaning given by section 104.

…

The following are the relevant provisions of section 104, as from 15 February 2010 (my emphasis in subsections (1)(b) and (2)):

104 Pending appeal

(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is **finally determined**, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while—

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

As mentioned above, it is necessary to set out the relevant provisions of previous versions of section 104. As originally enacted in 2002, they were as follows (my emphasis in subsection (2)) :

104 Pending appeal

(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purposes of subsection (1)(b) while **a further appeal** or an application under section 101(2)—

(a) has been instituted and is not yet finally determined, withdrawn or abandoned, or

(b) may be brought (ignoring the possibility of an appeal out of time with permission).

(3) The remittal of an appeal to an adjudicator under section 102(1)(c) is not a final determination for the purposes of subsection (2) above.

…

(5) An appeal under section 82(2)(a), (c), (d), (e) or (f) shall be treated as finally determined if a deportation order is made against the appellant."

As amended on 4 April 2005 by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the relevant provisions of section 104 became as follows (my emphasis in subsection (2)):

104 Pending appeal

(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purposes of subsection (1)(b) while —

(a) an application under section 103A(1) (other than an application out of time with permission) could be made or is awaiting determination,

(b) reconsideration of an appeal has been ordered under section 103A(1) and has not been completed,

(c) an appeal has been remitted to the Tribunal and is awaiting determination,

(d) an application under section 103B or 103E for permission to appeal (other than an application out of time with permission) could be made or is awaiting determination,

(e) an appeal under section 103B or 103E is awaiting determination, or

(f) a reference under section 103C is awaiting determination.

…

(5) An appeal under section 82(2)(a), (c), (d), (e) or (f) shall be treated as finally determined if a deportation order is made against the appellant."

Tribunals, Courts and Enforcement Act 2007

11 Right to appeal to Upper Tribunal

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising

from a decision made by the First-tier Tribunal other than an excluded decision.
(2) Any party to a case has a right of appeal, subject to subsection (8).
(3) That right may be exercised only with permission (or, in Northern Ireland, leave).”

13 Right to appeal to Court of Appeal etc.
(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.
(2) Any party to a case has a right of appeal, subject to subsection (14).
(3) That right may be exercised only with permission (or, in Northern Ireland, leave).
(4) Permission (or leave) may be given by—
(a) the Upper Tribunal, or
(b) the relevant appellate court,

on an application by the party.
(5) An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal.
…

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.
(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—
(a) the Court of Appeal in England and Wales;
(b) the Court of Session;
(c) the Court of Appeal in Northern Ireland.
(13) In this section except subsection (11), “the relevant appellate court”, as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).

THE CHANGE TO SECTION 104 OF THE 2002 ACT

7. Following the dismissal by the Court of Appeal of the appellant’s appeal in N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1141, Sedley LJ considered an application by the appellant for a stay on his removal pending either an appeal to the House of Lords, if the Court of Appeal were to

grant leave to appeal to that House, or pending a petition for leave to appeal, should the Court of Appeal refuse leave. In the light of section 104, as it then was, Sedley LJ concluded that the appellant did not need a stay, as "it would not be lawful to remove the appellant during the period either of an appeal to the House of Lords if this court gives leave to appeal, or at least the period limited for petitioning the House of Lords if this court refuses it." (paragraph 4)

8. The change which Parliament made to section 104 in April 2005 was profound. Instead of providing that an appeal was not finally determined while any kind of "further appeal" was ongoing or could be brought, section 104(2) set out the specific circumstances in which particular appeals or other forms of challenge would mean that an appeal was not finally determined. One such challenge involved an application under section 103A for an order requiring the (single-tier) Asylum and Immigration Tribunal to reconsider its decision. Appeals from that Tribunal were covered by section 104; but only insofar as these were to the "appropriate appellate court", defined in section 103B(5) as the Court of Appeal in England and Wales, the Court of Session and the Court of Appeal in Northern Ireland. No provision was made for appeals from those Courts to the House of Lords (the Supreme Court was established in 2009).

9. When the Asylum and Immigration Tribunal was abolished in 2010, section 104 was consequentially amended, so as to assume what is, for present purposes, its current form. The functions of the Asylum and Immigration Tribunal were taken over by the First-tier Tribunal and the Upper Tribunal, both of which had been established by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). As can be seen, sections 11 and 13 of that Act, which are mentioned in section 104(2), concern appeals to, respectively, the Upper Tribunal (from the First-tier Tribunal) and the "relevant appellate court" (from the Upper Tribunal). By reason of section 13(12) of the 2007 Act, the "relevant appellate court" can be only the Court of Appeal in England and Wales, the Court of Session and the Court of Appeal in Northern Ireland. No mention is made of appeals from those Courts to the Supreme Court.

10. In Niaz (NIAA 2002 s. 104: pending appeal) [2019] UKUT 00399 (IAC), the Upper Tribunal rejected the "submission that an appeal is not finally determined for the purpose of section 104 of the 2002 Act during the period when a judicial review of the Upper Tribunal's refusal of permission to appeal may be made or whilst an application for such a judicial review is awaiting decision" (paragraph 24). At paragraph 29, the Upper Tribunal held that "[a]lthough section 104(2) is describing situations in which an appeal is not to be regarded as finally determined, the corollary is that, where none of the situations described in sub-paragraphs (a) to (c) apply (and the appeal has not lapsed or been withdrawn or abandoned), the appeal in question must be treated as having been finally determined". The Upper Tribunal considered that "[a]ny other result would

mean the respondent could never safely assume that the removal of an individual would not violate section 78 of the 2002 Act."

THE CLAIMANT'S CASE

11. Dr Wilcox submitted that the legislature's failure specifically to mention appeals to (now) the Supreme Court in section 104 would represent a serious anomaly, unless the words "finally determined" in section 104(1)(b) were given what he said was their plain and ordinary meaning. An appeal to the highest Court of the land must have been intended to engage the statutory prohibition on removal. He said that Niaz could be distinguished on the basis that it was concerned with what he described as a "horizontal" challenge, by way of judicial review, as opposed to the "vertical" challenge of an upward appeal.

12. Dr Wilcox also drew attention to sections 14A to 14C of the 2007 Act, which were inserted by the Criminal Justice and Courts Act 2015. These sections enable a "leapfrog" appeal to be made directly to the Supreme Court from the Upper Tribunal. In such a case, Dr Wilcox submitted that it would be highly anomalous for there to be no statutory bar on removal, given that there would on any view be such a bar if the appeal had been made to the Court of Appeal etc.

DISCUSSION

13. Despite the skill with which the claimant's submissions were advanced, I am in no doubt that they must be rejected. The contention that the words "finally determined" must be given what is said to be their plain and ordinary meaning founders immediately because, if the meaning of the words were entirely plain, there would have been no need for Parliament to enact section 104(2), in either of its subsequent forms. It would have been just as obvious that an appeal to the Court of Appeal etc was covered by the phrase as that an appeal to the Supreme Court was within its scope.

14. At this point, the interpretative principle, *expressio unius est exclusio alterius* becomes a problem for the claimant. The fact that the legislature has specified sections 11 and 13 of the 2007 Act means it must have intended to exclude other appellate situations. It is also difficult to see how Dr Wilcox's horizontal/vertical distinction is compatible with his "plain and ordinary" argument. A horizontal challenge, such as an application to the court or tribunal concerned to set aside its own judgment, can call the finality of that judgment into question just as much as an onward appeal.

15. Dr Wilcox drew attention to the explanatory notes to the 2005 and 2010 amendments to the 2002 Act. There is, however, nothing in them which materially advances the claimant's construction of section 104.

16. As the Upper Tribunal observed in Niaz, there is a strong policy reason why Parliament intended section 104(2) to produce an exhaustive list of the situations in which an appeal is not finally determined. There can be no place for legislative uncertainty where the legality of something as important as removal of a person from the United Kingdom is in issue.

17. In any event, the claimant's categorisation of the position since 2005 as potentially anomalous ignores two matters. First, where a person facing removal has applied for permission to appeal to the Supreme Court, the defendant may decide of his own volition that he will not remove that person, even though there is no statutory bar on the defendant doing so. Secondly, that person can apply to the Court for a stay on removal, as happened in this case and as happened in N (Kenya) (albeit that Sedley LJ found it was unnecessary to grant a stay, in view of section 104 as then in force). Dr Wilcox said that seeking a stay would be equally possible in the case of pending appeals etc to the Court of Appeal, in which case it was difficult to see why such onward challenges are covered. The response to this is that there are far fewer cases of onward challenge to the Supreme Court than there are to the Upper Tribunal and to the Court of Appeal. A "bespoke" approach is, accordingly, understandable at this point.

18. Dr Wilcox prayed in aid sections 14A to 14C of the 2007 Act as a particularly egregious anomaly, if the defendant's construction of section 104 were correct. Section 14A(6) puts it beyond doubt that the section 14A process is not an application for permission under section 13[1]. In my view, however, the fact that these new sections were inserted without any consequential amendment to section 104 or without a provision deeming a section 14A application to be a section 13 application, is as compatible, if not more so, with Parliament having decided in 2005 and 2010 to exclude onward challenges to our highest Court and having seen no reason in 2015 to depart from those decisions. Given the rarity of successful section 14A applications, the point made in the last sentence of paragraph 17 above also applies.

DECISION

19. For these reasons, it follows that the deportation order was validly made and there was power to detain the claimant in pursuance of it. The application for judicial review is accordingly dismissed.

[1] "(6) Before the Upper Tribunal decides an application made to it under this section, the Upper Tribunal must specify the court that would be the relevant appellate court if the application were an application for permission (or leave) under section 13."