IN THE UPPER TRIBUNAL

R (on the application of Singh) v Secretary of State for the Home Department IJR [2016] UKUT 00058 (IAC)

Field House
London

2 November 2015

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

Between

THE QUEEN
(ON THE APPLICATION OF)
GURBACHAN SINGH

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms N Mallick, instructed by Asghar & Co, appeared on behalf of the Applicant.

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

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ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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JUDGE ALLEN: This is an application for judicial review of the respondent's decision of 9 April 2014 refusing to grant the applicant leave to remain in the United Kingdom. Subsequently, following directions from HHJ McKenna of 21 July 2014, the applicant filed and served amended grounds of claim including reference to support under section 21 of the National Assistance Act 1948 and the respondent's policy that a removal decision under section 10 of the Immigration and Asylum Act 1999 could be made when requested if the applicant was receiving section 21 support. Thereafter the respondent in a decision letter of 16 October 2014 refused the applicant's asylum and human rights claims and certified them. This had the consequence that the accompanying section 10 removal decision was appealable only from outside the United Kingdom. Subsequently His Honour Judge Anthony Thornton QC granted the applicant permission to amend his grounds of claim to include a challenge to the certification decisions.

2. Permission was granted on the papers by Upper Tribunal Judge Coker on 23 July 2015. She limited the grant of permission on the following basis, as set out at paragraph 13 of her order.

> "13. Permission is granted limited to
>
> (a) it is arguable that the applicant should have been served with an appealable decision on or about 9 April 2014;
>
> (b) it is arguable that the Article 8 human rights claim refused for reasons set out in the letter dated 16 October 2014 should not have been certified.
>
> 14. Permission to seek judicial review on all other grounds is refused."

3. With regard to the first ground, Ms Mallick argued that the applicant had been receiving section 21 support at the time he made his application and at the time of refusal. The Secretary of State had a policy which clearly said that when his application was refused that should have led to a removal decision, and therefore to an appealable decision. Prior to the sending of the Pre-Action Protocol ("PAP") the applicant had informed the Secretary of State that she had overlooked his section 21

support. The applicant had made a human rights and asylum claim and was entitled to an in country right of appeal under section 92(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). It would be unfair and irrational in the circumstances of the case for the applicant not to get a removal decision and refusal at the same time. This was because of the wording of her policy concerning section 21 support. As was said in Padfield v Ministry of Agriculture, Fisheries and Food [1968] 1 AC 997, where a statute (and this applied equally to a policy, in Ms Mallick's submission) conferred a discretion on the Minister to exercise or not exercise a power and it did not express the limit or define the extent of his discretion and did not require him to give reasons for declining to exercise the power, his discretion might nevertheless be limited to the extent that it must not be so used, whether by reason of misconstruction of the statute or other reason, to frustrate the objects of the statute which conferred it.

4. There was a policy to provide removal directions to people receiving section 21 support and the reason for this was that it was in the interests of the public purse to deal with such people swiftly. The Secretary of State should have been aware of the section 21 support and even if she were not aware, the applicant had challenged the Secretary of State's decision at the same time as the judicial review proceedings were begun against the local authority and therefore at the time of the PAP being sent to the Secretary of State she was aware that the applicant was in receipt of National Assistance support. Reference was made to the letter at page 222 of the bundle. In addition, there was a duty on the Secretary of State to enquire whether the applicant was in receipt of such support and the caseworker was required to consider whether removal directions should have been set at the same time as the refusal decision, and there had been a failure to consider a relevant matter and a decision made without the appropriate enquiries being made.

5. By at least 22 May 2014 the respondent had been aware that the applicant was in receipt of section 21 support and had been at the time of application and decision and indeed still was until today. In response to the PAP there should have been a removal decision and a right of appeal within the United Kingdom. It was clear from

the respondent's policy why a removal decision should have been made. There were early documents also, for example an email of 25 June 2013 informing the Secretary of State that the applicant was in receipt of section 21 support. The Secretary of State's chronology omitted relevant matters. It was wrong to say that support had ceased. It had been suspended but no more. The respondent had been told in 2013 about the section 21 support and again in the PAP letter and in the letter of 14 May 2014.

6. With regard to ground 2, there was also a policy on this in respect of section 94. There were five relevant questions set out there from leading authorities on certification and they had not been addressed. The respondent had conceded that it was an asylum claim which had been put forward by the applicant, at page 128 of the bundle. It was not necessary to stipulate that the person was making an asylum and human rights claim. The respondent had to look at the substance of the claim put forward and there were good reasons for not certifying as they had only looked at the human rights claim and not the asylum claim. In the JR response the Secretary of State had conceded that an asylum claim had been made. As the applicant had made an asylum application the claim should not have been certified. He had previously indicated a fear of return and that he was seeking international protection as could be seen from page 28 and also page 19 of the bundle. Under the terms of the policy the claim should not have been certified but if at all in respect of both claims and that had not been done. If the Secretary of State considered the claim to be clearly unfounded she should have made it clear in her previous decision that that was the case but that had not been done in any of the earlier letters. This was important because when she had considered the case she had not thought it was bound to fail. Section 94 did not require the Secretary of State when certifying to look at the issue of certification only when she issued an appealable decision. This applied irrespective of whether the respondent had decided to issue removal directions. Certification and a removal decision would go hand in hand if the Secretary of State was right, but this was in fact the wrong approach because it would not be logical for her not to consider certification when considering the substance of the application.

7. The Secretary of State had not properly addressed the relevant criteria in deciding whether to certify. She had only done so now because it was another way to stop the applicant having a right of appeal. The reasoning did not show consideration of the five questions set out in the guidance, taken from ZL and VL v Secretary of State for the Home Department [2003] EWCA Civ 25. Failure to do so meant that the conclusion was irrational. Reliance was placed in particular on the length of time the applicant had been in the United Kingdom, his age, being over 65, and his ill health. These factors meant that it could not be said that the claim was bound to fail. Relevant issues had been drawn to the Secretary of State's attention regularly from 2012 onwards.

8. In his submissions Mr Hansen argued with regard to the first ground that the applicant could not bring himself within the requests for removal decisions policy as he had already been informed he was liable for removal, in 2012. Insofar as he relied on section 21 support, the policy required him to provide evidence of support and he had never done so. Also, at the time of the decision refusing to make removal directions in response to the PAP letter there was no evidence that he was not being supported by Ealing: there was no evidence that he was being. Also further, even if he were entitled to a removal decision under the policy, it was necessary to consider what type of decision would have been made, and it was known that when the respondent made the removal decision in October 2014 she certified the entire claim including the human rights claim and there was no reason to think that any earlier decision would have been any different. The applicant had a removal decision and no in country right of appeal, but it would not have been any different.

9. It was wrong for focus to be placed, as had been, on 9 April 2014 when the human rights claim was refused with no right of appeal. The date of the decision refusing the request for a removal decision was relevant and that was 1 May 2014. It was also relevant that the PAP request was wrong with regard to the claimed obligation to make a removal decision when a decision refusing leave to remain was made. It was clear that that was not the case from R (on the application of Daley-Murdock) v Secretary of State for the Home Department [2011] EWCA Civ 161 and Patel and

Others v Secretary of State for the Home Department [2013] UKSC 72. It could not therefore be said that there should have been a removal decision when the decision was made on 9 April 2014. It was a power to make removal directions triggered by a valid request under the policy and if it fell within the policy. The PAP request at page 135 was a request with regard to exceptional circumstances and there was no reference to support so that was the basis of the request and the refusal was at page 213. Ms Mallick was seeking to get around that and the lack of evidence by saying that the onus was on the Secretary of State but this was contrary to the terms of the policy where applicants were told to provide evidence and as to what the Secretary of State knew, she had been told by Ealing that they were ceasing support from 25 April and the email put in did not do what was said by Ms Mallick and that the respondent therefore could not be criticised for failing to draw on inference from it.

10. For all those reasons the applicant did not come within the policy. Even if a removal decision should have been made earlier the human rights claim would have been certified as happened when it was reconsidered in October with the asylum claim, so the applicant had received what he could expect. It was clear from the wording of the policy that it was not applicable where an applicant had already been told that he or she was liable to removal. This was at page 110 of the bundle. The relevant criteria were set out at page 113. It was accepted that there was a public law duty to follow the policy unless there was a good reason not to, but the applicant did not fall within it and if he did he would get the same decision as he had received.

11. With regard to ground 2, the limited grant of permission by Upper Tribunal Judge Coker should be borne in mind. Ms Mallick had the problem that she sought to rely on the applicant's health conditions but the Article 3 claim had been certified and that certification had been upheld. Although the same facts could give rise to an Article 8 claim, as was clear from Baroness Hale's speech in R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27, it was very difficult to succeed on the same facts in a health case under Article 8 if they could not succeed under Article 3. The facts had therefore been considered and found to be properly certified. The Article 8 issue did not get the claim anywhere.

12. As regards the reasons for the grant of permission and the alleged inconsistency between the October certification decision and the refusal on 9 April which was not certified, it was the case that there was no need to certify in April as there was no right of appeal and it was clear from the policy that certification should not be done in such a case. Ms Mallick had argued that the January 2014 claim was an asylum and human rights claim, but that was wrong as could be seen from the decision letter. It was clear from that letter at page 127 of the bundle that it was necessary to apply in person if there was a claimed fear on return. In reality therefore this was a thin Article 8 claim and could not and did not gain sustenance from the applicant's health conditions. They had been considered and the Article 3 certification had been upheld.

13. His age and the length of residence did not take him beyond the certification threshold. He was an illegal entrant and had not sought to regularise his status. Representations had been made but the only leave to remain application had been on 2 January 2014. It was therefore the case that his private life in the United Kingdom had been acquired while his status was precarious. It was the case that he was now over 65, but although age was a factor there was no policy mandating a grant of leave to a person over 65. So ultimately the matter was to be approached as had been said in Khalid and Singh v Secretary of State for the Home Department [2015] EWCA Civ 74 at paragraph 71 that it was a point of substance ultimately. In any event it was not accepted that there was a deficiency in the reasoning of the decision. The October decision letter dealt fully with the relevant issues.

14. By way of reply Ms Mallick referred to the PAP letter at page 135 with specific reference to the respondent's failure to deal with section 21 support. The point was that in the letter the solicitors specifically pointed out that the Secretary of State had failed to apply the policy and the reference to the circumstances as one of the categories in the policy was irrelevant. The Secretary of State was being told that the policy was not being applied and that it should be read with the letter of 14 May 2014 about section 21 support. There was no other way in which this could be interpreted. The letter of 22 May 2014 was a request to respond to the PAP letter so the

respondent could only come to one conclusion and that was to make a removal decision. It could be seen from the policy that it did not require evidence of support to be provided. The solicitors' letter was sufficient in any event. The letter of 22 May to the Secretary of State meant that it was clearly incumbent on her to ask the applicant's solicitors for evidence. It was wrong to say that he was not in receipt of section 21 support and the case fell squarely within the policy.

15. With regard to ground 2 it was not just reliance on ill health but the three factors referred to above. Razgar concerned claims on the basis of ill health only and therefore was not determinative of the point. Reference was made to the care assessment report and the limited mobility of the applicant. He was clearly physically impaired and the evidence showed that his condition was severe and deteriorating. The respondent had not addressed the certification test properly and the matter could not be said to be cured by what was said in Khalid.

16. I reserved my determination.

Discussion

17. The first point concerns the argument that the respondent should have issued an appealable decision when the application for leave to remain was refused. The applicant has never had any valid leave to remain in the United Kingdom. He claims to have entered the United Kingdom in 2000. Accordingly he did not have leave to remain in the United Kingdom at the time when he made the application for leave and therefore the decision to refuse did not carry a right of appeal under section 82 of the 2002 Act.

18. The applicant makes his argument in respect of the respondent's policy "requests for removal decisions" which was brought in on 13 February 2012. This policy applies where a person has, *inter alia*, requested in a PAP letter before action that a removal decision be made. The request for a removal decision in this case was made in the PAP letter of 17 April 2014. Under the policy the respondent will assess the case and

serve a notice of removal if one of four situations applies. The two relevant ones in this case are:

(1) The applicant is being supported by the Home Office or has provided evidence of being supported by a local authority (under section 21 of the National Assistance Act 1948 or section 17 of the Children Act 1989); or

(2) there are other exceptional and compelling reasons to make a removal decision at this time.

19. The PAP letter made no reference to the former of these. An appealable decision was sought on the basis that there were exceptional and compelling reasons to make a removal decision at the same time as the decision to refuse because the applicant was old and frail and medically unwell having spent fourteen years in the United Kingdom, and would be at risk of dying if he were sent back.

20. I disagree with Ms Mallick that this can be taken with later communications to mean that the applicant was seeking a removal decision on the basis of the section 21 support. It is clear from this letter that a removal decision was sought on the basis of exceptional and compelling reasons. It is also clear from the wording of the policy, as set out above, that evidence has to be provided of section 21 support. That was not done at that time and indeed at no time has that been done.

21. By the time of the respondent's response, on 1 May 2014, the applicant had issued the judicial review claim on 24 April, having therefore given the respondent very little time in which to respond (the normal response time is fourteen days in accordance with paragraph 20 of the Protocol). The respondent said in that letter, *inter alia*, that based on the facts of the applicant's case she had decided not to make a removal decision. I consider that this response was properly open to her. The matters set out in the PAP letter which I referred to above were matters which in no sense even arguably required the respondent to conclude that they amounted to exceptional and compelling reasons.

22. I do not see any merit in the argument that simply because the applicant was, it is said, in receipt of ongoing section 21 support that the respondent was obliged to issue an appealable decision. It is clear from Ealing Borough Council's letter of 20 March 2014, paragraph 38, that it was proposed to withdraw the provision of accommodation and subsistence to the applicant on 25 April 2014. I agree with Mr Hansen that the respondent was entitled to take the view that when she responded to the PAP letter it was the case that the applicant on the evidence available was no longer in receipt of section 21 support (even if a removal decision on that basis had been requested).

23. To this can be added further the fact that in any event subsequently after the removal decision of 16 October 2014 the applicant had an out of country right of appeal. There is no obligation under the request for removals policy to provide an in country right of appeal, and again I agree with Mr Hansen that there is no reason to suppose that the respondent if she had been minded to make an appealable decision would not have made one that was exercisable out of country only. But in any event, as I have set out above, I consider that in light of the request that was made to the respondent in the PAP letter and her response to that, that she was under no obligation to make an appealable decision as a consequence of the request, and therefore that ground fails.

24. As regards the certification of the human rights claim, as noted above, this was refused and certified in the decision letter of 16 October 2014. Both the Article 3 and Article 8 claims were refused and certified. The second ground is based on the view that there is an arguable inconsistency in the decision to certify in October when this was not done at the time of the earlier refusal of leave in April 2014.

25. However, as the respondent has pointed out, the April decision concerned an out of time application for leave to remain on private life grounds and carried no right of appeal. As a consequence the respondent did not need to consider whether the claim was clearly unfounded. In addition, as set out at paragraph 21 of Mr Hansen's skeleton, the applicable guidance on certification provides that there are a number of

situations where a claim that is "clearly unfounded" should not be certified under section 94, and the relevant example of this is the case where there is no right of appeal following the refusal of the asylum or human rights claim. Therefore on the basis of the policy it would have been entirely wrong to certify at that earlier stage.

26. As regards the merits of the certification decision, I consider that the decision to certify was properly open to the respondent. As is set out above, there is no challenge before me as permission was not granted, concerning the certification of the Article 3 claim. I have referred above to what was said by Baroness Hale in Razgar about the likelihood of a foreign healthcare case succeeding under Article 8 where it fails under Article 3. I do not consider that this is such a case. The medical evidence concerning the applicant is not such as to show anything like an arguable breach of his Article 8 rights on return. The reasoning is in my view perfectly adequate, but in any event, as was held in Singh and Khalid [2015] EWCA Civ 74, if the matter is in substance bound to fail then the lack of full reasoning is not an illegal defect.

27. In conclusion I consider that the challenge to the certification is also not made out, and for the above reasons both grounds of review have, in my view, no merit. Accordingly the application is refused.

28. I have the parties' costs schedules but I will deal with any application for permission to appeal and any other ancillary matters when this judgment is handed down.

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