Case No: C5/2008/2251

Neutral Citation Number: [2009] EWCA Civ 307
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: IA/10946/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 12th March 2009

Before:

LORD JUSTICE RIX
LORD JUSTICE RICHARDS
and
SIR PAUL KENNEDY

- -

Between:

JN (CAMEROON)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr D Bazini (instructed by the Refugee Legal Centre) appeared on behalf of the **Appellant**.

Ms S Leek (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Richards:

1. The appellant is a national of Cameroon. He entered the United Kingdom illegally in August 2000 with false documentation and resided here under an assumed identity. He lived initially in London but moved to Leeds in 2002. Later that year he met a woman, Ms Ngongo, a Congolese national, who was subsequently granted refugee status. A relationship developed between the two of them and they had two children together. She also had an older child by another man. In November 2006 they both travelled to Cameroon in connection with the death of the appellant's father. While there he told her for the first time of his true identity and immigration status. She forgave him his deception and they entered into a legally binding marriage whilst still in Cameroon. On their return to the United Kingdom at the end of November 2006 he was apprehended for use of a false passport. He was charged with possession of a false instrument contrary to section 25(1) of the Identity Cards Act 2006. He pleaded guilty and was sentenced to 15 months' imprisonment with a recommendation that he be deported.

2. On 2 July 2007 the Secretary of State served on him notice of a decision to make a deportation order. On 26 September 2007 the Secretary of State notified him of the refusal of an asylum claim that he had made following his arrest. The appellant did not appeal the asylum claim but did appeal the decision to make a deportation order. That appeal was dismissed by the AIT (Immigration Judge Hemingway and Ms PL Ravenscroft) in a decision dated 25 October 2007. Reconsideration was ordered, but in a decision dated 16 July 2008 the Tribunal (Deputy President Ockelton and Immigration Judge

Kelly) found that there was no material error of law in the original decision. An application for permission to appeal against the decision on reconsideration was adjourned by Sedley LJ to today's hearing on notice to the Secretary of State

3. The grounds of appeal raise two issues. The first is whether the Tribunal erred in law in finding that it had jurisdiction to entertain the appeal. That issue remains live and is indeed the only live issue. The second ground alleged an error of law by the Tribunal in relation to the application of Article 8 of the European Convention on Human Rights. Mr Bazini has made clear this morning, however, that in the light of observations made by Sedley LJ he is not pursuing that ground. In my opinion, he is eminently sensible to have adopted that course.

4. I therefore turn to the jurisdictional issue, which relates to the notice of decision to make a deportation order. The appellant's case is that, because the notice did not specify the country to which the appellant would be deported, the notice and the decision to make the order were invalid and in consequence the Tribunal lacked jurisdiction to entertain the appeal. This was the sole point raised on the reconsideration and it is submitted that the Tribunal erred in law in rejecting it.

5. The legislative framework within which the issue arises is as follows. The decision was made under section 5(1) of the Immigration Act 1971 ("the 1971 Act") which empowers the Secretary of State in defined

circumstances to make a deportation order against a person, "that is to say, an order requiring him to leave and prohibiting him from entering the United Kingdom."

6. Any decision to make a deportation order under section 5(1) is an "immigration decision" within section 82(2)(j) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). By section 82(1), where an immigration decision is made in respect of a person he may appeal to the Tribunal. By section 84 the grounds on which an appeal may be brought include "(a) that the decision was not in accordance with immigration rules; … (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 … as being incompatible with the appellant's Convention rights; … (e) that the decision is otherwise not in accordance with the law;"

7. Section 105(1) of the 2002 Act empowers the Secretary of State to make regulations requiring a person to be given written notice where an immigration decision is taken in respect of him. Subsection (2) provides that the regulations may in particular provide that a notice must give information about the right of appeal. Subsection (3) provides that the regulations may make provision about service.

8. The regulations made under section 105 are The Immigration (Notices) Regulations 2003 ("the 2003 Regulations"). Those regulations have been amended from time to time. Regulation 4 provides that the decision-maker must give written notice to a person of any immigration decision taken in

respect of him which is appealable. Regulation 5 makes provision as to the contents of a notice given under Regulation 4. Paragraph 1 of regulation 5 provided at the material time as follows:

> "A notice given under regulation 4(1) is to --
>
> (a) include or be accompanied by a statement of the reasons for the decision to which it relates; and
>
> (b) if it relates to an immigration decision specified in section 82(2)(a), (g), (h), (ha), (i), (ia), (j) or (3A) of the 2002 Act:
>
> (i) shall state the country or territory to which it is proposed to remove the person; or
>
> (ii) may, if it appears to the decision-maker that the person to whom a notice is to be given may be removable to more than one country or territory, state any such countries or territories."

Other paragraphs of regulation 5 relate to matters such as the provision of information about the right of appeal.

9. The jurisdictional issue revolves around the requirement in regulation 5(1) to state the country or territory to which it is proposed to remove the person.

10. The facts material to the issue are these. By letter dated 23 February 2007 the Secretary of State notified the appellant that she was considering whether to act on the court's recommendation to deport him. The letter stated:

> "If you feel there are any reasons why you should not be deported to *Cameroon* [emphasis added] on completion of your sentence you should submit these in writing … within five days of this notification."

11. The actual notice of decision to make a deportation order dated 2 July 2007 stated that it was "To: Jules Ngah Cameroon 25 May 1968". It recited the appellant's conviction and the court's recommendation for deportation and stated that the Secretary of State had decided to make a deportation order under section 5(1) of the 1971 Act. It then said:

> "This Order requires you to leave the United Kingdom and prohibits you from re-entering while the order is in force."

It did not specify the country to which it was proposed to remove the appellant.

12. Cameroon was, however, referred to in a letter of 2 October 2007 to the appellant giving reasons for the deportation decision. Moreover the issues addressed in the asylum claim, both in the supporting evidence from the appellant and his wife and in the Secretary of State's decision of 25 September 2007 refusing the claim, all related to return to Cameroon.

13. The appellant's notice of appeal to the Tribunal made no mention of the failure to state the proposed country of return in the notice of the deportation decision. That issue was, however, raised in argument before the original panel, which at paragraph 57 of its decision accepted that the notice did not refer to a country of removal but noted:

> "Of course, there is no dispute, in fact, as to where the Respondent intends to deport the Appellant to. It is accepted by all parties that the Appellant is a Cameroonian national and, in the letter of 2nd October 2007 explaining the reasons why a decision has been taken to make a deportation order, reference is made to Cameroon."

The panel went on to reject what it described as the technical arguments advanced on the applicant's behalf in relation to the omission of the country of destination from the notice.

14. On the reconsideration the Tribunal dealt with the issue on the basis that the purpose of the 2003 Regulations is to give assistance to the person in respect of whom a decision has been made in mounting an appeal, but that a person may waive the requirements of the Regulations by appealing against a notice in the form in which he receives it. The notice in the present case was a notice of an immigration decision within section 82. By submitting a notice of appeal through his representatives in time, the appellant had waived any defect in the notice. The Tribunal further observed that there was no conceivable case for indicating that the appellant had been prejudiced or misled by any defect in the notice. There was no suggestion that any destination for him other than Cameroon would be appropriate and he had made his case throughout on the basis that his removal would be to Cameroon.

15. In R v SSHD ex parte Jeyeanthan [2000] 1 WLR 354 the Court of Appeal adopted a flexible approach in the specific context of immigration towards the effect of non-compliance with a procedural requirement: see, in particular, *per* Lord Woolf MR at pages 362 C-F and 366 C-D. Ex parte Jeyeanthan was one of the cases considered by the House of Lords in R v Soneji [2006] 1 AC 340, which is now the leading authority on the effect of non-compliance with a procedural requirement. The House of Lords held in Soneji that the

mandatory/directory distinction had outlived its usefulness and that the emphasis ought instead to be on the consequences of non-compliance and asking whether it was the legislative intention that an act done in breach of the requirement should be invalid: see, for example, *per* Lord Steyn at paragraph 23. That approach is in line with, but is possibly more straightforward than, what was said in ex parte Jeyeanthan and in any event is the approach that in my judgment should now be applied.

16. In the present case the Tribunal proceeded on the basis that there had been actual non-compliance with the requirement to state in the notice the country to which it was proposed to remove the appellant. In my opinion it was right to do so. The mention of Cameroon in the heading to the notice looks like a reference to the appellant's nationality and certainly cannot be taken of itself as a statement of the proposed country of destination. The notice is silent on that question. Whether one talks in terms of strict compliance or substantial compliance, the position is that the notice does not comply.

17. On the other hand it is clear that the proposal was in fact to remove the appellant to Cameroon and that nobody was or could reasonably have been in any doubt on the point. References to Cameroon run through all the correspondence relating to the deportation decision and the asylum claim. The panel hearing the original appeal recorded, as I have said, that there was no dispute that the Secretary of State intended to remove the appellant to Cameroon, and his appeal proceeded on that basis. The issue was raised before the panel as a technical issue, not because omission of the statement

was said to cause the appellant any prejudice or difficulty in presenting the appeal. That is the background against which one must consider whether omission of the statement from the notice invalidates the notice or the decision to make a deportation order.

18. For the appellant Mr Bazini submits that it does have the effect of invalidating and that the Tribunal therefore lacked jurisdiction to entertain the appeal. In his submission the purpose of the notice is not merely to provide a person with assistance in mounting an appeal, as stated by the Tribunal. The notice has the important function of informing the immigration officer of the place to which he has power to deport the person in question. That will not appear from the deportation order itself: the order is not an order for removal and does not imply travel to any particular country; the requirement under it is simply not to be in the United Kingdom. There will often be no appeal and therefore no appeal decision from which the permitted destination can be extracted. The Secretary of State's letter accompanying the decision will not universally identify the country concerned: such letters not infrequently refer to more than one country (where, for example, there are disputes concerning nationality). There may also be a sequence of decision letters and appeals in a particular case and, when it comes to acting on the decision to deport, the immigration officer's file may be incomplete and contain an outdated decision. In practice, Mr Bazini tells us, it is unfortunately often the case that there are deficiencies in the file relied on.

19. Mr Bazini emphasises the importance of the exercise of the power to deport and the consequences it can carry for the individuals involved; individuals who may be vulnerable persons and may lack legal representation and have limited English. In those circumstances he submits that it is imperative that the decision to deport be implemented on the correct footing without any room for mistakes, and that all this underlines the vital need for the notice of the decision to deport to specify the country of destination. He seeks to derive support from a passage in the decision of the Immigration Appeal Tribunal presided over by Ouseley J in KF (Removal Directions and Statelessness) Iran [2005] UKIAT 00109, at paragraph 79, where the following was said:

> "We think that the Secretary of State Decision Notice should be clear as to its consequence when enforcement comes, it should be understood simply with the knowledge that the appeal against it has been allowed or dismissed and should not require the determination of the appeal body to be with it or understood properly before the consequences for the Claimant are clear."

20. He also relies on the fact that in chapter 15 of the relevant Immigration Directorate Instructions, in a section dealing with service of the relevant form, it is stated:

> "**The proposed destination on removal must be specified and the notice signed and dated."** [emphasis in original]

I would, however, say at once, in relation to that, that in my view it takes matters no further since it merely reflects, so far as material, the requirement in regulation 5(1) of the 2003 Regulations themselves. Nothing turns on the use of the word "must" rather than "shall".

21. Turning more generally to the case presented by Mr Bazini, I am not in the least persuaded by the submissions advanced. I am satisfied that non-compliance of the requirement in Regulation 5(1) to state the proposed country of destination in the notice given under Regulation 4 does not give rise to invalidity or deprive the Tribunal of jurisdiction to entertain an appeal. It is important in the first place to distinguish between the notice and the decision to make a deportation order. The immigration decision against which a right of appeal arises under section 82(2)(j) of the 2002 Act is the decision taken under section 5(1) of the 1971 Act to make a deportation order. The statutes impose no requirement that such a decision or order should state a proposed country of destination. On the contrary, as already mentioned, the deportation order is defined simply as an order requiring a person to leave and prohibiting him from entering the United Kingdom.

22. Further, the statutes impose no requirement as to the giving of notice of a decision to make a deportation order or as to the contents of such a notice. Section 105 of the 2002 Act empowers the Secretary of State to make regulations providing the written notice to be given and provides that they may contain certain provisions. It does not impose a duty to make regulations or prescribe the content of regulations so made. Thus, as a matter of straightforward construction of the statute, the Regulations do not condition the exercise of the decision-making power under section 5(1) of the 1971 Act, and it is impossible in my view for non-compliance with a requirement contained in the Regulations to affect the validity of a decision made under the statute.

23. But even if the requirements in the Regulations did condition the exercise of the statutory decision-making power, non-compliance would not in my view produce invalidity. The notice can be of only very limited value when it comes to enforcement of the deportation order and the issue of removal directions by an immigration officer. The fact is that the immigration officer is going to have to look beyond the notice and to examine the file as a whole in order to satisfy himself as to the permitted destination. That is because the required statement in the notice is no more than a proposal as at the time of the notice: it is a statement of the proposed destination, and more than one destination may be proposed. What is and is not ultimately decided on as the actual destination, and what is permissible as an actual destination, may depend upon the outcome of any appeal process and any further consideration by the Secretary of State. It is unfortunate that, as we are told, the file is often incomplete. But that cannot in my view have any effect upon the issue before us. It does not mean that the notice must be regarded as an essential element for the purposes of subsequent enforcement.

24. In common with the Tribunal on the reconsideration, I consider that the purpose, or at least the essential purpose of the requirement to state the proposed destination in the notice is to assist the person concerned in relation to any appeal, enabling him to put forward in the appeal such case as he may have under the Refugee Convention or the European Convention on Human Rights by focusing on the stage of removal and testing the lawfulness of what is proposed. The issues arising in a deportation appeal may not be co-

extensive with those arising in an appeal against an ordinary removal decision in a non-deportation case, but the purpose of the requirement is the same in each case. This ties in, moreover, with the other matters that must be included in the notice, notably an explanation of the person's appeal rights and how they may be exercised. The entire focus is on the appeal process, not on the ultimate enforcement of the deportation order by means of removal directions.

25. The distinction that I have drawn between the decision and the notice, what I have said about the purpose of the requirement to state the destination in the notice, and indeed the importance of removal directions as a separate and distinct stage in the exercise, are all supported by the judgments of Rix LJ in the cases of MA (Somalia) v SSHD [2009] EWCA Civ 4, in particular paragraphs 49-51, and MS (Palestinian Territories) v SSHD [2009] EWCA Civ 17, in particular paragraphs 29- 30. Those cases concerned the ordinary removal provisions, but the reasoning in them is relevant in the context of a decision to make a deportation order too. It suffices for present purposes to quote just one passage in paragraph 49 of the judgment in MA (Somalia)

> "In my judgment these authorities lead to the following conclusions relating to the present appeal. (i) The notices of decision in this case do not include removal directions. (ii) The notice of decision to remove (which I assume is among the matters appealed from) is an immigration decision giving a right of appeal under section 84(1)(g) but does not contain, either expressly or inherently, any removal directions. (iii) The reference to removal directions towards the end of that notice is only an indication of a "proposed" country of removal pursuant to regulation 5(1)(b) of the 2003 Regulations. (iv) Thus the proposal to remove MA to Somalia was a proposal not a decision. The decision was to remove, and the proposal was to

> remove to Somalia. The purpose of the requirement of the Regulations that the country to which it is proposed to return an applicant should be stated in the notice of decision to remove is no doubt, as [counsel for the Secretary of State] submitted, to enable the applicant to test the validity of the proposal for the purposes of the applicant's appeal under either convention."

26. I should also mention that those two cases examine the Tribunal's decision in KF, to which Mr Bazini referred us, and also changes in regulation 5(1) following the decision in KF, to allow for the possibility of alternative destinations to be stated in the notice, which was not the position at the time when KF was decided. If and to the extent that there is any inconsistency between the later decisions and KF, then I think it clear that the later decisions should be followed.

27. Turning then to the facts of this case, the position is that the proposed destination was clear and that the appellant's ability to present his appeal was not impaired in any way by the failure to state the destination in the notice. In that situation non-compliance with the requirement has plainly not had any material adverse effect on fulfilment of the purpose for which the requirement is imposed. Applying the approach in Soneji it is clear that non-compliance is not intended in those circumstances to result in invalidity, whether of the notice or, if that were otherwise possible, of the decision. It is on that straightforward basis rather than on the basis of waiver of a defect, as appears in the Tribunal's decision, that I would decide the matter.

28. If, which is not the present case, the proposed destination were unclear and were not clarified in the course of the appeal process, even then I do not think

that that would result in invalidity of the notice or of the decision. It would mean instead that the person concerned had not had an effective opportunity to present his case under the relevant conventions in relation to any specific country of removal. When it came to the making of removal directions for removal to a specific destination, he would be in a position to challenge those directions without the possibility of it being said against him that his rights had been exhausted by the previous appeal process. It is unnecessary to consider whether there would be some implied further immigration decision or whether any further challenge would be by way of appeal or judicial review. Again the issues have been to some extent touched on in the cases of MA (Somalia) and MS (Palestinian Territories) to which I have already referred. Further discussion of that aspect of the matter is not needed for a decision in the present case.

29. I come back to the fact that in this case the proposed destination for removal has been clear throughout. My conclusion is that non-compliance with the requirement to state the proposed destination in the notice of decision is no more than a technicality which has no effect on the validity of the notice or of the decision to deport. It follows that the jurisdictional argument fails at the first hurdle; and, whilst I would grant permission to appeal on the relevant ground (and on that ground alone), the substantive appeal should in my view be dismissed.

Lord Justice Rix:

30. I agree.

Sir Paul Kennedy:

I also agree.

Order: Appeal dismissed