Neutral Citation Number: [2011] EWCA Civ 164

Case No: T2/2010/1717

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
REF NO: SC732009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2011

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal, Civil Division)
and
LORD JUSTICE RIMER

- -

Between :

LO(Jordan)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Mr Edward Grieves (instructed by **Messrs Birnberg Peirce**) for the **Appellant**
Mr Neil Sheldon (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 15 February 2011

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Judgment

Lord Justice Maurice Kay :

1. This case is concerned with the jurisdiction of the Court of Appeal in relation to appeals from the Special Immigration Appeals Commission (SIAC) pursuant to section 7 of the Special Immigration Appeals Commission Act 1997. Section 7(1) provides:

> "Where the Special Immigration Appeals Commission has made a final determination of an appeal, any party to the appeal may bring a further appeal to the appropriate appeal court on any question of law material to that determination."

2. The appropriate appeal court in England and Wales is the Court of Appeal. Appeals from SIAC to this Court are not uncommon. However, the jurisdiction is limited to the bringing of "a further appeal" when SIAC "has made a final determination of an appeal".

3. In *Al-Jedda v Secretary of State for the Home Department* [2008] EWCA Civ 1041 the appellant sought to advance six grounds of appeal before SIAC. One ground, which would have been determinative of the appeal if it had been decided in favour of the appellant, was dealt with by SIAC as a preliminary issue. In the event, it was not resolved in favour of the appellant who was left to pursue the other grounds of appeal at a later date. However, he sought to appeal to this Court pursuant to section 7 in advance of the next stage of the proceedings in SIAC. This Court, comprising Lord Justice Scott Baker and myself, refused permission to appeal on the basis that the Court lacked jurisdiction. I said (at paragraph 7):

> "In my judgment the words of section 7(1) are clear and unambiguous. They provide for the possibility of an appeal to this Court when (but only when) there has been a final determination of the appeal to SIAC. That stage has not been reached in these proceedings."

I added (at paragraph 8):

> "It seems to me that section 7(1) provided for an appeal only after final determination, as I have construed it, because it did not wish the Court of Appeal to become seized of the case until the entire appeal to SIAC had been disposed of one way or the other."

4. Lord Justice Scott Baker expressed his agreement. Although permission to appeal was refused we directed that the case could be cited as authority in subsequent litigation.

5. The circumstances of the present case are not precisely the same as those in *Al-Jedda*. There, the matter proceeded to a further hearing after which the appeal to SIAC was dismissed on all grounds. At that stage, section 7 was undoubtedly engaged. In the present case SIAC resolved one issue against the appellant as a preliminary issue and adjourned the balance of the appeal to a later date. However, the balance of the appeal was never heard because the Secretary of State decided to withdraw the

decision to deport LO to Jordan. LO was released from detention and is no longer the subject of a decision to deport. Nevertheless, he seeks permission to appeal to this Court pursuant to section 7 in relation to the adverse decision on the preliminary issue whereby SIAC decided that, on the basis of open and closed material, he posed a risk to national security.

The Procedural History

6. On 10 March 2009 the Secretary of State decided that it would be conducive to the public good to deport LO to Jordan on national security grounds. On 12 March LO commenced an appeal to SIAC. He disputed that he was a risk to national security and also raised grounds of appeal by reference to Article 8 of the ECHR (he is a married man with seven children) and Article 3 (referring to ill-treatment on return to Jordan). From the outset, the Secretary of State accepted that deportation to Jordan would only be possible if appropriate assurances could be obtained from the Jordanian Government as to LO's treatment on return.

7. On 30 April 2009 LO applied to SIAC for bail. Following a consideration of open and closed material, the application was refused. SIAC considered that LO posed "very significant" risks to national security and that there was a high risk of his absconding.

8. The substantive appeal to SIAC was listed to commence on 9 February 2010. However, the Jordanian Government had not yet provided the requisite assurances. SIAC decided that the best course would be to determine the first issue, viz whether LO posed a risk to national security, as a preliminary issue. It anticipated that the obtaining of assurances from Jordan might take some time and that it might become necessary to review LO's bail status. It was considered desirable that any such subsequent review should be based on a thorough and authoritative assessment of the national security evidence rather than on the more summary assessment that had occurred or would occur in the context of a bail application. The hearing of the evidence on the national security issue took place on 9, 10, 22 and 23 February 2010. Judgment was reserved. On 22 February the Secretary of State informed SIAC that the assurances from Jordan had not yet been obtained. SIAC granted the Secretary of State an adjournment to mid/late April. On 4 March SIAC handed down its judgment on the national security issue. As it was adverse to LO, he remained in detention and preparations continued for the determination of the remaining issues at the resumed hearing.

9. The matter next came back before SIAC on 17 May 2010. The requisite assurances from the Jordanian Government were still not forthcoming. The Secretary of State applied for a further adjournment of four weeks. The application was opposed but SIAC, having heard evidence about the state of negotiations between the British and Jordanian Governments, granted the application and the remainder of the appeal was relisted for 8-9 July 2010. LO made a further application for bail but this was refused on 21 May.

10. As the finalisation of assurances from the Jordanian Government remained elusive, the Secretary of State decided to withdraw the decision to deport LO. The withdrawal decision was communicated to LO by a letter dated 17 June and LO was released from detention on that day. SIAC was informed of the withdrawal of the decision.

On 21 June SIAC formally notified the parties that, in the light of the Secretary of State's decision, there was "no longer an appeal before the Commission". Accordingly, the Article 8 and Article 3 issues were never determined by SIAC.

Further statutory provisions

11. The procedure governing the withdrawal of an appeal is specifically provided for in Rule 11A of the Special Immigration Appeals Commission (Procedure) Rules. It is in the following terms:

> "(1) An appellant may withdraw an appeal –
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> (a) orally, at a hearing; or
>
> (b) at any time, by filing written notice with the Commission.
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> (2) An appeal shall be treated as withdrawn if the Secretary of State notifies the Commission that the decision to which the appeal relates has been withdrawn.
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> (3) If an appeal is withdrawn or treated as withdrawn, the Commission must serve on the parties and on any special advocate a notice that the appeal has been recorded as having been withdrawn."

12. Accordingly, when the Secretary of State informed SIAC that it had withdrawn the deportation decision against which LO had appealed, his appeal was "treated as withdrawn" pursuant to Rule 11A(2). This was formally recorded pursuant to Rule 11A(3) as related in SIAC's letter to the parties on 21 June 2010.

Subsequent events

13. LO made an application to SIAC for permission to appeal its national security decision but SIAC refused permission on the basis that, in the circumstances, there had been no "final determination" of the appeal and that, in any event, it had no prospect of success. On 2 June 2010 the Secretary of State wrote to LO's solicitors with notification that LO's existing refugee status was revoked. An application was then made to this Court for permission to appeal but this was refused by Lord Justice Richards on consideration of the papers on 29 October 2010. His refusal was on the basis that this Court lacks jurisdiction but he was also unimpressed by the proposed grounds of appeal. LO then renewed his application for permission and the oral hearing was listed first before me on 19 January 2011. I gave a short judgment [2011] EWCA Civ 82 adjourning the application to be heard by two Lord Justices and on notice to the Secretary of State.

Discussion

14. On behalf of LO Mr Edward Grieves refers to disadvantages accruing to a person in the position of LO if he has no recourse to this Court to challenge the adverse decision on the national security issue. It has already been used to his detriment in the

revocation of his refugee status. Moreover, it is not unlikely that the Secretary of State will continue to seek assurances from the Jordanian Government and, if she is successful in obtaining them, she may serve a fresh notice of deportation. On LO's further appeal to SIAC he would be disadvantaged in relation to any bail application and also on the substantive issue of national security risk on the basis of an earlier decision which he never accepted to be correct in law but in respect of which he was unable to appeal. In any event, even if the Secretary of State does not make a further decision to deport him to Jordan, LO is stigmatised by a decision which he has been disabled from appealing. I acknowledge that there is a potential for detriment but that is irrelevant if the words of the statute clearly and unambiguously deny jurisdiction.

15. In my judgment, the wording of section 7 is as clear and unambiguous in its application to the present case as it was in its application to the circumstances of *Al-Jedda*. I adopt what was said there. It seems to me that there are two insuperable difficulties in the way of Mr Grieves' attempts to circumvent *Al-Jedda*. First, at the point when SIAC handed down its judgment on the preliminary issue on 4 March 2010, the position of LO was precisely the same as the position in *Al-Jedda*. Mr Grieves' submission has to be that a lack of jurisdiction on the part of this Court in March 2010 gave way to the establishment of jurisdiction by the very act of withdrawal or deemed withdrawal pursuant to Rule 11A. I am satisfied that that is not right. Secondly, Mr Grieves submits that the words "has made a final determination of an appeal" in section 7(1) must be construed so as to embrace "has made its last substantive decision in the course of an appeal". Again, in my judgment there is no warrant for such a construction. Quite simply, we lack jurisdiction.

16. As it happens, I am by no means convinced that the potential for detriment to LO is as great as was suggested. The concepts of issue estoppel and *res judicata* do not generally bite in public law (see Fordham, *Judicial Review Handbook*, 5th edition, paragraph 2.5.12). In any future litigation between the parties the national security issue would have to be determined in accordance with circumstances then prevailing. LO would not be bound by the previous judgment of SIAC, all the more so because it was a judgment which he would have appealed but for the lack of jurisdiction. Mr Grieves suggests that LO may yet have a remedy by way of judicial review. I do not propose to say anything about that. However, I would add that there is nothing unique about a litigant being disadvantaged by an irremediable judicial decision. It can happen, for example, to any litigant who loses badly on the facts, but wins on the law. As the order of the court records him as having succeeded, he as no recourse to an appellate court, however stigmatic the findings of fact may be.

Conclusion and disposal

17. It follows from what I have said that I am satisfied that this Court lacks jurisdiction to consider this appeal. The question then arises as to how we should dispose of it. It is before us as an application for permission. As I do not consider that the application passes the "real prospect of success" test on the jurisdictional issue, the normal course would be simply to refuse permission. At the conclusion of the hearing we canvassed the possibility of our granting permission and dealing with the appeal substantively, albeit as a two-judge court. Both parties indicated that they would consent to that, although Mr Sheldon's position remains that the appeal is unarguable. As we are a two-judge court, I would grant permission to appeal on the "some other compelling reason" basis, the reason being that I am reluctant to impose finality on this issue

without any possibility of further recourse. Accordingly, I would grant permission but dismiss the appeal. The grant of permission is limited to the jurisdiction issue. I do not propose to comment on the substantive grounds of appeal. For my part, I would be unlikely to grant permission to appeal to the Supreme Court (if such an application were made to us).

Lord Justice Rimer:

18. I agree. Mr Grieves addressed us with charm and eloquence but he was making bricks without straw. When SIAC handed down its judgment on the national security issue on 4 March 2010, it would not have occurred to either side that it was then making 'a final determination' of LO's appeal. Nor would it have occurred to LO that his time for an appeal against SIAC's decision on that issue had started to run. That was because the Article 3 and Article 8 issues also had to be decided before 'a final determination' of his appeal could be made; and in the events that happened, they never were. That was because the withdrawal of the deportation decision resulted, by force of Rule 11A, in LO's appeal to SIAC being 'treated as withdrawn'.

19. Mr Grieves' argument included the proposition that, in the circumstances that happened in this case, the 'final determination' for the purposes of the right of appeal was the last substantive determination made by SIAC in the course of the appeal. That appears to me to be a near impossible submission. It would mean that whether or not, and when, 'a final determination' had been made would depend upon uncertain future events. And how in practice could it work? Suppose that on 4 May 2010 SIAC had also ruled separately, adversely to LO, on his Article 8 ground. Following the subsequent revocation of the deportation order, would it be that ruling which would then have become 'a final determination'? If so, how could the earlier and separate national security determination also be 'a final determination'?

20. The concept of 'a final determination' in section 7(1) does not, in my judgment, admit of an interpretation as fluid, uncertain or as impractical as Mr Grieves submitted it could. Section 7(1) permits an appeal on questions of law against 'a final determination' of an appeal; and it appears to me to be clear that that point is only reached when SIAC has finally decided the appeal by issuing a decision as to its disposition. It is that decision that may then be appealed. In this case, no such decision was made: the appeal was treated as withdrawn.

21. I agree with Maurice Kay LJ, for the reasons he has given, that we should give permission to LO to appeal to this court on the jurisdiction ground. I would, however, also dismiss the appeal.