Case No: C5/2009/2297 +C5/2010/0423

Neutral Citation Number: [2010] EWCA Civ 567

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Immigration Appeal Tribunal
Senior Immigration Judge Eshun
Senior Immigration Judge Ward
DA/003122009 + DA/00046/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2010

Before:

LORD JUSTICE LAWS
LORD JUSTICE HOOPER
and
LORD JUSTICE RIMER

- -

Between:

AT (Pakistan)	**Appellants**
JK (Pakistan)	
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Zane Malik (instructed by Malik Law Chambers Solicitors) for the Appellants
Mr Robert Jay QC and Ms Marie Demetriou (instructed by the Treasury Solicitor) for the Respondent

Hearing date: 23 March 2010

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Judgment

LORD JUSTICE HOOPER:

1. The appeals of AT and JK from decisions of the AIT have been heard together because they raise common issues concerning section 32 of the UK Borders Act 2007 ("the Act") which received the Royal Assent on 30 October 2007 and which came into force on 1 August 2008. Section 32 is headed "Automatic deportation".

2. By virtue of section 32(4): "For the purposes of s.3(5)(a) of the Immigration Act 1971 (c77) [set out below], the deportation of a foreign criminal is conducive to the public good" and by virtue of section 32(5) of the Act, "the Secretary of State must make a deportation order in respect of a foreign criminal …". Section 33 contains exceptions to the duty to deport contained in section 32(5). These include, by virtue of subsection (2), where removal of the foreign criminal would breach (a) a person's rights under the European Convention of Human Rights ("the ECHR") or the UK's obligations under the Refugee Convention.

3. By virtue of section 32 (1) and (2) the definition of a foreign criminal includes a person "who is not a British Citizen", "who is convicted in the United Kingdom of an offence" and who "is sentenced to a period of imprisonment of at least 12 months".

4. The first issue in these appeals may be expressed in this way: "Does section 32 apply to a person convicted after the passing of the Act on 30 October 2007, but before section 32 came into force on 1 August 2008?"

5. Both appellants were convicted during this period, in the case of AT for an offence of conspiracy to steal committed in the period September to December 2006 and in the case of JT for an offence of rape committed in the year 1989. AT was sentenced to 15 months' imprisonment and JT to 5 years' imprisonment.

6. Mr Malik for the appellants submits that the answer to the question is in the negative.

7. Section 59 includes the commencement provisions. By virtue of that section the Secretary of State is empowered to bring into force, amongst others sections, section 32 by statutory instrument and to make transitional provision. Sub-section (4) provides

> In particular, transitional provision -
>
> …
>
> in the case of an order commencing section 32 –
>
> > (d) may provide for the section to apply to persons convicted before the passing of this Act who are in custody at the time of commencement or whose sentences are suspended at the time of commencement;
> >
> > … .

8. It is quite clear from this provision that Parliament intended that section 32 could apply to persons convicted before the passing of this Act who are in custody at the time of commencement or whose sentences are suspended at the time of

commencement, if the Secretary of State so ordered. He did so order (subject to an exception), see the UK Borders Act (Commencement No. 3 and Transitional Provisions) Order 2008 SI 2008 No 1818, 8 July 2008.

9. Mr Malik submits that Parliament did not intend that section 32 applied to any person convicted after the passing of the Act and before it came into force. Such persons are, he submits, in a better position than those convicted before the passing of the Act. He relies on the absence of any provision specifically dealing with the category of persons convicted after the passing of the Act and before it came into force and to the use of the word "is" in the definition of foreign criminal, see paragraph 3 above.

10. That in my view is a quite hopeless argument. The inclusion of subsection (d) shows very clearly that Parliament intended that section 32 would apply to any person convicted after the passing of the Act and before it came into force, unless the Secretary of State by statutory instrument ordered otherwise, which he did not do. Parliament did not intend to put such persons in a better position than those convicted before the passing of the Act.

11. I should add that this issue was examined at greater length by Nicol J in *Rashid Hussein v. Secretary of State for the Home Department* [2009] EWHC 2492 (Admin). He reached the same conclusion that I have and I agree with him.

12. Mr Malik submits, in the alternative, that giving the Secretary of State the power to deport those who committed an offence before the Act came into force is a breach of the second sentence of Article 7(1) of the ECHR which provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

13. If deportation under section 32 of the 2007 Act is a "penalty" then it seems strongly arguable that there would be a breach of Article 7 if the Secretary of Sate were to order the deportation under the 2007 Act of a person who committed an offence before the coming into force of the Act. This is because, under the immigration law in force when the appellants committed the offences, deportation was discretionary whereas under the 2007 Act it can properly be described (as the heading to section 32 describes it) as automatic, unless removal of the foreign criminal would breach a person's rights under the ECHR or the UK's obligations under the Refugee Convention.

14. The discretionary nature of the power to deport under the Immigration Act 1971 is shown by the following provisions of the Act. Section 3(5) states that:

> A person who is not a British citizen is liable to deportation from the United Kingdom if — (a) the Secretary of State deems his deportation to be conducive to the public good ...

Section 3(6) of the 1971 Act provides:

> Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.

Section 5(1) states:

> Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force. (Emphasis added)

15. Is automatic deportation under the 2007 Act a "penalty" for the purposes of Article 7?

16. Mr Malik submits that it is, Mr Jay QC submits that it is not.

17. Mr Jay relies upon an opinion of the European Commission in *Moustaquim v Belgium* 12 October 1989. In that case it was argued that the order for the deportation of the applicant was in part based on acts committed by him before he had reached the age of criminal responsibility and that this violated Article 7. The Commission agreed unanimously that it did not, saying in paragraph 75:

> This provision, however, which essentially outlaws the retrospective application of the criminal law, is not applicable in this case (see application no. 8988, decision of 10 March 1981, Decisions and Reports no. 24, p. 198). As the *Conseil d'Etat* observed in its judgment of 16 October 1985, the deportation order against the applicant does not constitute an additional penalty but a security measure. A measure of this kind taken in pursuance, not of the criminal law but of the law on aliens is not in itself penal in character.

18. Mr Malik relies on *Welch v. UK* Application no. 17440/90, 9 February 1995, 20 EHRR 247. In August 1988 the applicant was convicted of drug offences committed in 1986 before the coming into force of the confiscation provisions in the Drug Trafficking Offences Act 1986. A confiscation order was made against him under the 1986 Act. The European Court of Human Rights (ECtHR) held that the confiscation order constituted a retrospective penalty contrary to Article 7. The Court said:

> 28. The wording of Article 7 para. 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed

following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

29. As regards the connection with a criminal offence, it is to be observed that before an order can be made under the 1986 Act the accused must have been convicted of one or more drug-trafficking offences (see section 1 (1) of the 1986 Act at paragraph 12 above). ...

30. In assessing the nature and purpose of the measure, the Court has had regard to the background of the 1986 Act, which was introduced to overcome the inadequacy of the existing powers of forfeiture and to confer on the courts the power to confiscate proceeds after they had been converted into other forms of assets ... . The preventive purpose of confiscating property that might be available for use in future drug-trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation ... . However it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.

31. ...

32. The Court agrees with the Government and the Commission that the severity of the order is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.

33. However, there are several aspects of the making of an order under the 1986 Act which are in keeping with the idea of a penalty as it is commonly understood even though they may also be considered as essential to the preventive scheme inherent in the 1986 Act. The sweeping statutory assumptions in section 2 (3) of the 1986 Act that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise ... ; the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit ... ; the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused ... ; and the possibility of imprisonment in default of payment by the offender ... - are all elements which, when

> considered together, provide a strong indication of inter alia a regime of punishment.
>
> 34. Finally, looking behind appearances at the realities of the situation, whatever the characterisation of the measure of confiscation, the fact remains that the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted ... .
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> 35. Taking into consideration the combination of punitive elements outlined above, the confiscation order amounted, in the circumstances of the present case, to a penalty. Accordingly, there has been a breach of Article 7 para. 1.

19. Although we were not referred to them in argument there have been a number of cases in which orders which could only be made following conviction have been held to be preventive rather than punitive and therefore not within Article 7.

20. For example, in *BR* [2003] EWCA Crim 2199, [2004] 1 Cr App R(S) 59 it was held that a court order made pursuant to the Criminal Justice Act 1991 requiring a defendant convicted of a sexual offence committed before the coming into force of that Act to remain on licence for the whole period of his sentence did not breach Article 7 even though, when the offence was committed, the licence period would have been shorter. When considering whether to make such an order the court had to have regard to "the need to protect the public from serious harm from offenders" and "the desirability of preventing the commission by them of further offences and of securing their rehabilitation". The Court held that:

> 29. ... the true analysis of the relevant statutory provisions and the way in which they have been interpreted in the domestic and European courts demonstrates that an order for an extended licence is preventive not punitive.

21. In *Field and Young* [2002] EWCA Crim 2913, cited in *BR*, the Court held that a disqualification order made under section 28 of the Criminal Justice and Court Services Act 2000, disqualifying an adult from working with children, did not breach Article 7 albeit that the offence which led to the order was committed before the 2000 Act came into force.

22. In *Adamson v UK* 42293/98, the ECtHR held that the requirement on a person convicted of a sexual offence to register under the Sex Offenders Act 1997 did not breach Article 7 even though the offence which triggered the registration requirement had been committed before the Act came into force. The Court stated:

> Again, having regard to the preamble to the Act and also to the nature of the Act's requirements, the Court considers that the purpose of the measures in question is to contribute towards a lower rate of re-offending in sex offenders, since a person's knowledge that he is registered with the police may dissuade him from committing further offences and since, with the help

> of the register, the police may be enabled to trace suspected re-offenders faster.

23. The Court continued:

> Overall, the Court considers that, given in particular the way in which the measures imposed by the Act operate completely separately from the ordinary sentencing procedures, and the fact that they do not, ultimately, require more than mere registration, it cannot be said that the measures imposed on the applicant amounted to a "penalty" within the meaning of Article 7 of the Convention.

24. I note in passing that much more is now required of a person required to register and that judgment is awaited from the Supreme Court on the compatibility of the registration requirements with the ECHR.

25. Although we were shown no ministerial statements explaining why automatic deportation was introduced by the 2007 Act, I presume that at least one reason was to prevent re-offending in this country by a foreign criminal. It is right to say that the Secretary of State is not required to consider the risk of re-offending (although the issue may arise when Article 8 is being considered). Nonetheless the fact that automatic deportation will prevent re-offending by a foreign criminal in this country suggests that the measure can properly be categorised as preventive rather than punitive for the purposes of Article 7.

26. In any event I have little doubt that the ECtHR if faced with the issue in this case would reach the same conclusion as the Commission did in *Moustaquim*, namely that "a measure of this kind taken in pursuance, not of the criminal law but of the law on aliens is not in itself penal in character."

27. For these reasons I would reject Mr Malik's argument that automatic deportation under the 2007 Act is a "penalty" for the purposes of Article 7.

28. That disposes of the appeal in the case of JK.

29. Two further interlinked grounds are submitted by Mr Malik in the case of AT.

30. In AT's case his appeal to the AIT against the deportation order made by the respondent failed. Reconsideration was refused by a SIJ. Reconsideration was then ordered by a Deputy High Court Judge who said in his reason for ordering reconsideration:

> "2. ... it appears strongly arguable that the present decision is harsh and disproportionate on its particular facts ...
>
> 3. As to the decision on the Article 8 ground, ... I am concerned that what appears to me to be the very harsh conclusion reached may be one which inflicts on the Appellant and all the members of his immediate family (most especially his wife and child, both of whom have only ever lived in the UK, but also his in-laws) an infringement of their rights to family life (which was rightly and indeed

> inevitably held to be engaged on these facts) which is quite disproportionate to the benefit to the public in the prevention/control of crime, given the nature of the Appellant's offending and all the circumstances, and hence is a *Wednesbury* unreasonable conclusion. That is not a concern which I form lightly, and I have taken full account of the length of the sentence passed by HHJ Steiger and the quoted passages from his sentencing remarks.
>
> 4. ...
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> 5. Upon reconsideration it will be for the Tribunal to consider afresh the Article 8 ... issue ...".

31. Following the order for reconsideration SIJ Ward held that the Tribunal had not made any material error of law when considering the appellant's Article 8 submissions.

32. Mr Malik submits that SIJ Ward was bound by the decision of the Deputy High Court Judge:

> It is submitted that the High Court's order on a Statutory Review application is deemed to have the same effect as an order on a Judicial Review application. There is no statutory or procedural distinction. The order indeed has a binding effect on the Tribunal. It was mandatory for the Tribunal (here SIJ Ward) to act in accordance with the Deputy High Court Judge's order. Once the Panel's conclusion was deemed as *Wednesbury* unreasonable, it was not open to SIJ Ward to preserve that conclusion. She should have considered Article 8 afresh and substituted a fresh decision to allow or dismiss the appeal. It is submitted, with all due respect, that the way in which SIJ Ward undermined the Deputy High Court Judge's order may well be categorised as contempt. The decision is therefore materially wrong in law.

33. Mr Malik's submission is, I am afraid to say, hopeless. The effect of section 103(A) of the Nationality, Immigration and Asylum Act 2002, in so far as it relates to England and Wales, is that the High Court may make an order requiring the Tribunal to reconsider its decision if it thinks that the Tribunal *may* have made an error of law. The High Court has no jurisdiction to decide that an error *was* made. Indeed the decision is made without any representations from the respondent (except in so far as they can be found within the decision of the Tribunal or elsewhere in the papers before the Tribunal).

34. Mr Malik further submits that SIJ Ward erred in law in concluding that the Tribunal which dismissed the appellant's appeal against the decision of the respondent had not made an error of law in so far as the application of Article 8 was concerned. We looked with Mr Malik at the careful reasons given by the original Tribunal in paragraphs 27-38 for its conclusion that the removal of the appellant, notwithstanding the effect on both him and his family, was proportionate to the legitimate aim of controlling crime. Like SIJ Ward I can see no error of law in that conclusion.

35. For these reasons I would dismiss the appeal.

LORD JUSTICE LAWS

I agree.

LORD JUSTICE RIMER

I also agree.