Neutral Citation Number: [2009] EWCA Civ 727

Case Nos: C5/2008/2075 & C5/2008/2075(B)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
IA/01739/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2009

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE TOULSON
and
LORD JUSTICE RIMER

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
HH (IRAQ)	**Respondent**

- -
- -

Mr Robert Palmer (instructed by Treasury Solicitor) for the **Appellant**
Mr Rabinder Singh QC and Mr Mark Symes (instructed by Immigration Advisory Service) for the **Respondent**

Hearing date: Wednesday 24 June 2009

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Judgment

Lord Justice Sedley :

1. This appeal by the Home Secretary arises out of a surprising state of affairs. For a good many years – how many is not known – until 14 January 2008 a departmental operational enforcement manual (OEM) contained a paragraph (12.3) which included this:

> "Enforcement action should not be taken against Nationals who originate from countries which are currently active war zones."

2. HH is an Iraqi who is liable to deportation because, during the currency of a period of exceptional leave to remain here, he committed three sexual offences which resulted in a sentence of three and a half years' imprisonment. On 30 January 2007 the Home Office decided to make a deportation order against him. They did so without regard to the entry in the OEM which I have quoted because it had been forgotten. It was, however, mentioned in Macdonald's *Immigration Law and Practice* and so was relied on when HH appealed to the AIT. An initial adverse decision resulted in a directed reconsideration. A fortnight before that hearing was set to start the policy was withdrawn.

3. The AIT (Mr Ockleton D-P, SIJ Storey and SIJ Grubb) considered that notwithstanding its withdrawal, the policy had been in force, as they put it, at the date of the decision to make a deportation order. For reasons which we have not been asked to review, though which the Home Secretary does not necessarily accept, they concluded that Iraq was at that date an active war zone. They also concluded that the decision to make a deportation order counted as enforcement action within the meaning of the policy. It followed that, since the policy had plainly been overlooked, a decision had been taken which was not in accordance with the law, giving a ground of appeal under s.84(1)(e) of the Nationality, Immigration and Asylum Act 2002. For the Home Secretary it was argued that what mattered was that at the date of the hearing the policy was defunct; but the AIT held that the belated withdrawal of the policy could not retrospectively make the initial decision lawful. They remitted the decision to the Home Secretary to retake it on the basis of up-to-date facts.

4. Before this court Robert Palmer, on behalf of the Home Secretary, begins by submitting that the policy was "in legal error". He bases this on the full text of §12.3:

> **Those exempt from deportation**
>
> The following are exempt from deportation:
>
> - British citizens – This includes:
>
>   (a) anyone born in the UK or the Falkland Islands prior to 1 January 1983;
>
>   (b) anyone born in the UK or the Falkland Islands on or after 1 January 1983, or in any other qualifying territory (see below) on or after 21 May 2002, whose father (if legitimate) or mother is a British citizen or settled in the UK or relevant territory (as the case may be);

> Note: An illegitimate child whose father is British does not automatically qualify for British citizenship, but may be legitimated by the subsequent marriage of his parents.
>
> (c) anyone who was a British overseas territories citizen immediately before 21 May 2002 by connection with a "qualifying territory" (i.e. a British overseas territory other than the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus)
>
> - those with the right of abode in the UK;
> - under section 7 of the 1971 Act, Irish and Commonwealth citizens who have been ordinarily resident in the United Kingdom and Islands for the last 5 years at the date of any decisions to deport;
> - those who are exempt from control by virtue of their diplomatic status (section 8(3) of the 1971 Act as amended by section 4 of the 1988 Act and section 6 of the 1999 Act).
> - those who are exempt from control by virtue of their consular status (section 8(4) of the 1971 Act);
> - anyone born outside the UK prior to 1 January 1983 who is a Commonwealth citizen whose mother was a citizen of the UK and Colonies by birth at the time of the birth. Such people have the right of abode under section 2(1)(b) of the 1971 Act but are not British citizens;
> - Enforcement action should not be taken against nationals who originate from countries which are currently war zones. Country Information Policy Unit (CIPU) or Enforcement Policy Unit (EPU) will provide advice in this.

5. All the bullet points, Mr Palmer points out, except the crucial last one describe people who are legally exempt from deportation. The final category does not therefore belong in the list. By putting it there, he argues, the Home Secretary fettered his own discretion "by creating a new class of 'exempt' individuals, contrary to the public interest". The anomaly, he says, is compounded by the fact that the coming into force in 2000 of the Human Rights Act 1998 rendered it obsolete, and by the fact that it ignored possibilities of internal relocation.

6. Although this scorched-earth submission is not advanced as a discrete ground of appeal, it merits a response. Whether or not, as Mr Palmer goes on to suggest, it was adopted chiefly to protect others from risk, it has been known for many years that the Home Office, for entirely intelligible reasons, does not return foreign nationals to

parts of countries where war is raging or uncontrolled violence is endemic. This court has recently noted as much in its decision on the interpretation of article 15 of the Qualification Directive in *QD (Iraq)* [2009] EWCA Civ 620: see §21. But to announce such a policy may well have been thought a potential magnet for nationals of such states who had no affirmative entitlement to enter or remain here, and it may well be for this reason that, as Mr Palmer puts it, the OEM policy "lay unnoticed over a number of years until this appeal, and is not known to have been applied, at least in recent years". What undoubtedly can be said is that since the coming into effect of the Qualification Directive, the practice of the UK and many other European states in this regard has in large part acquired the force of law.

7. Mr Palmer's first substantive ground is that, even if one takes the policy at face value, "enforcement action" cannot include the decision to make a deportation order. Since the Home Secretary does not know when or how his own policy originated, Mr Palmer is unencumbered by any instructions about its intent. He relies instead, not directly but by way of guidance or analogy, on s.24A of the Immigration Act 1971, which was added by the Immigration and Asylum Act 1999 and so postdates the policy. It says in its material part:

> **24A Deception**
>
> (1) A person who is not a British citizen is guilty of an offence if, by means which include deception by him—
>
> > (a) he obtains or seeks to obtain leave to enter or remain in the United Kingdom; or
> >
> > (b) he secures or seeks to secure the avoidance, postponement or revocation of enforcement action against him.
>
> (2) "Enforcement action", in relation to a person, means—
>
> > (a) the giving of directions for his removal from the United Kingdom ("directions") under Schedule 2 to this Act or section 10 of the Immigration and Asylum Act 1999;
> >
> > (b) the making of a deportation order against him under section 5 of this Act; or
> >
> > (c) his removal from the United Kingdom in consequence of directions or a deportation order.

8. It is immediately apparent that the definition of "enforcement action" contained in subsection (2) is carefully confined to elements essential to the criminal offence which the section creates in support – as Mr Palmer has shown us – of a statutory regime of immigration control. In my judgment it gives very little help in construing a policy which has other and larger purposes.

9. What does happen under the 1971 Act is that, where a liability to deportation has arisen (s.3), before exercising his power (s.5) to order deportation the Home Secretary will, customarily, give the potential deportee notice of the proposal to make an order. If he then decides to make an order, he must notify the potential deportee (under regulation 4 of the Immigration (Notices) Regulations 2003) of his decision to make the order and of the potential deportee's right to appeal against that decision under s

82(2)(j) of the 2002 Act. Only if an appeal is not lodged or fails can the order be made. None of this, as it seems to me, points to a meaning of "enforcement action" in the policy which excludes the decision to make an order: rather the contrary.

10. Moreover, as Rabinder Singh QC for HH points out, one of the potential consequences of a decision to make a deportation order is administrative detention. Thus such a decision can have physical as well as legal consequences. In both senses, it seems to me, it is an initiation of action to enforce removal. It also seemed so to the AIT, whose sense of such things, given their daily experience of Home Office procedures, counts for a good deal.

11. Beyond this lie the legal consequences of Mr Palmer's interpretation. If a decision to make a deportation order cannot be appealed for ignoring departmental policy, any failure to have regard to policy in making the order will be susceptible only to judicial review. How, Mr Singh asks, does this sort with Parliament's "one-stop" policy?

12. If Mr Palmer's first submission is wrong, as I therefore think it is, he submits that the admitted failure to have regard to the policy did not mean that the decision to make a deportation order was "not in accordance with the law".

13. Mr Palmer accepts that the decision of this court in *Abdi* [1996] Imm AR 148 is authority for the proposition that a policy, while lacking the status of law, so that a departure from it will not by itself make a decision unlawful, may nevertheless give rise to a decision which is "not in accordance with the law" if the policy is wholly overlooked: see §22. But this, he submits, is only the case if the oversight was material – that is to say, if a different outcome was possible had the policy been taken into account. Here, he says, it could have made no possible difference because, had the Home Secretary at any material stage had the policy drawn to her attention, the only effect would have been to accelerate its abandonment.

14. This is, with respect, a remarkable submission. It implies that policies may be torn up whenever the policy-maker finds them inconvenient or embarrassing. For my part I do not believe that the important power of government to make and remake policy is exercised in this way, and I am not willing to decide this appeal on an assumption that it would have been in the present case.

15. What is rather more to the point is that, as Mr Palmer next points out, the respondent has two further elements of his appeal, both largely overlapping with what was once the policy and both still undetermined by the AIT. These are his claims that deportation would violate his rights under article 8 of the ECHR and article 15(c) of the Qualification Directive.

16. The AIT did not consider it necessary to decide that aspect of the appeal because of their decision that the making of the decision to deport HH was unlawful. However it is clear that there remain issues under article 8 of the ECHR and article 15(c) of the Qualification Directive which are likely to have to be determined. Both parties suggested that in these circumstances the most practical way ahead was to remit this issue to the AIT for determination. Although the policy statement which led to the success of HH's appeal before the AIT has now been withdrawn, I do not think that it can properly be said that there is no point in quashing the Secretary of State's decision to make a deportation order since the same decision is bound to be re-made, because

time has passed and any decision on the issues under article 8 of the ECHR and article 15 of the Qualification Directive would fall to be made on the facts as they now are. If, as may be likely, the Home Secretary does make the same decision, it would be open to HH to raise his arguments under article 8 of the ECHR and article 15 of the Qualification Directive on his appeal against that decision. I think that this would be a simpler way forward than to remit the present case to the AIT for further hearing of an appeal which it determined in HH's favour on grounds which we consider to have been right.

17. I would accordingly dismiss the Home Secretary's appeal.

Lord Justice Toulson:

18. I agree. I would only add that even if Mr Palmer were right in his submission that "enforcement action" begins with the making of a deportation order, I do not think that this would assist him. For it is trite public law that a decision maker must take into account all material considerations, and it must be a material consideration when deciding whether to make a deportation order that the making of such an order would contravene the minister's stated public policy.

Lord Justice Rimer:

19. I agree with both judgments.