Neutral Citation Number: [2012] EWCA Civ 1362

Case No: C4/2012/0201

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
His Honour Judge Bidder QC (sitting as a Deputy High Court Judge)
[2011] EWHC 3247 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2012

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE STANLEY BURNTON
SIR STEPHEN SEDLEY

- -

Between :
The Queen on the application of

FITZROY GEORGE	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Stephen Knafler QC and **Gordon Lee** (instructed by **Sutovic & Hartigan**) for the **Appellant**
Jonathan Moffett (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 19 July 2012

- -

Approved Judgment

Lord Justice Stanley Burnton:

Introduction

1. This is an appeal against the judgment of His Honour Judge Bidder QC, sitting as a Deputy High Court Judge, dismissing the Appellant's claim for judicial review of the refusal of the Secretary of State for the Home Department, in a letter dated 18 February 2010, to reinstate his indefinite leave to remain ("ILR") following his successful appeal against the refusal of the Secretary of State to revoke his deportation order.

2. The case raises a question of general importance as to the duty of the Secretary of State and the rights of the deportee on the revocation of the deportation order. The question is one of statutory interpretation.

The facts

3. The Appellant is a citizen of Grenada. He has lived in this country since 1995. In 2000, when he was aged 16, he was granted ILR. Since that time he has been involved in serious criminal conduct having been sentenced to four terms of custody. In January 2002 he was convicted and sentenced to 3 years' detention in a Young Offender Institution for five counts of supplying class A drugs on separate occasions. In April 2005 he was convicted and sentenced to 4 years' imprisonment for three counts of possession of controlled drugs (two of which were class A) with intent to supply.

4. On the basis of this misconduct, not surprisingly the Secretary of State concluded that the Appellant's deportation was conducive to the public good. On 30 January 2007 the Claimant was notified that the Defendant had decided to make a deportation order pursuant to section 3(5) of the Immigration Act 1971 ("the 1971 Act"). In a determination prepared on 19 December 2007 (which was never successfully appealed) the Claimant's challenge to the decision in which he relied upon his Article 8 rights arising from his relationship with his daughter and partner was dismissed.

5. The Secretary of State signed a deportation order on 24 April 2008.

6. Following some further representations and a judicial review claim, which was compromised, the Defendant issued a further decision rejecting the Claimant's further human rights representations and granting him a right of appeal.

7. There ensued various legal proceedings the details of which are not relevant to this appeal. Ultimately, the Appellant came before Immigration Judge Neuberger sitting in the Asylum and Immigration Tribunal who in a determination dated 31 March 2009 held that the Appellant had indeed been liable to deportation on the basis that although the Secretary of State had lawfully deemed his deportation to be conducive to the public good his deportation would breach his rights under Article 8. The Immigration Judge did not direct that the Defendant should reinstate the Appellant's ILR.

8. Following that perhaps surprising determination, the Secretary of State granted the Appellant 6 months' discretionary leave to remain. On 20 May 2009 the Appellant

was convicted of driving while uninsured and driving while disqualified, but no deportation action was taken as a result of this. The Secretary of State has refused to grant the Appellant ILR or to reinstate the ILR granted to him in 2000, and instead has made successive grants of 6 months' discretionary leave to remain. It is this refusal that is the subject of the claim for judicial review.

The Legislative Framework

9. Sections 3, 3D and 5 of the 1971 Act provide, so far as relevant:

> 3. *General provisions for regulation and control*
>
> (1) Except as otherwise provided by or under this Act, where a person is not a British citizen -
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in United Kingdom) either for a limited or for an indefinite period;
>
> (2) …
>
> (3) In the case of a limited leave to enter or remain in the United Kingdom,—
>
> (a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and
>
> (b) the limitation on and any conditions attached to a person's leave [(whether imposed originally or on a variation) shall], if not superseded, apply also to any subsequent leave he may obtain after an absence from the United Kingdom within the period limited for the duration of the earlier leave.
>
> (4) A person's leave to enter or remain in the United Kingdom shall lapse on his going to a country or territory outside the common travel area (whether or not he lands there), unless within the period for which he had leave he returns to the United Kingdom in circumstances in which he is not required to obtain leave to enter; but, if he does so return, his previous leave (and any limitation on it or conditions attached to it) shall continue to apply.
>
> (5) 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; or

(b) another person to whose family he belongs is or has been ordered to be deported.

3D. *Continuation of leave following revocation*

(1) This section applies if a person's leave to enter or remain in the United Kingdom-

(a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or

(b) is revoked.

(2) The person's leave is extended by virtue of this section during any period when-

(a) an appeal under section 82 (1) of the Nationality Immigration and Asylum Act 2002 could be brought, while the person is in the United Kingdom, against the variation or revocation (ignoring any possibility of an appeal out of time with permission), or

(b) an appeal under that section against the variation or revocation, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act.

5. *Procedure for, and further provisions as to, deportation*

(1) Where a person is under section 3(5) … 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.

(2) A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes a British citizen.

(3) A deportation order shall not be made against a person as belonging to the family of another person if more than eight weeks have elapsed since the other person left the United Kingdom after the making of the deportation order against him; and a deportation order made against a person on that ground shall cease to have effect if he ceases to belong to the family of

> the other person, or if the deportation order made against the other person ceases to have effect.
>
> (4) For purposes of deportation the following shall be those who are regarded as belonging to another person's family—
>
> > (a) where that other person is a man, his wife [or civil partner,] and his or her children under the age of eighteen; and
> >
> > (b) where that other person is a woman, her husband or civil partner, and her or his children under the age of eighteen;
>
> and for purposes of this subsection an adopted child, whether legally adopted or not, may be treated as the child of the adopter and, if legally adopted, shall be regarded as the child only of the adopter; an illegitimate child (subject to the foregoing rule as to adoptions) shall be regarded as the child of the mother; and "wife" includes each of two or more wives.
>
> (5) The provisions of Schedule 3 to this Act shall have effect with respect to the removal from the United Kingdom of persons against whom deportation orders are in force and with respect to the detention or control of persons in connection with deportation.

10. Section 67 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is as follows:

> 67 *Construction of reference to person liable to detention*
>
> (1) This section applies to the construction of a provision which—
>
> > (a) does not confer power to detain a person, but
> >
> > (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.
>
> (2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that—
>
> > (a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,
> >
> > (b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or

(c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.

(3) This section shall be treated as always having had effect.

11. Section 76 of the 2002 Act provides, so far as relevant:

76 *Revocation of leave to enter or remain*

(1) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person—

(a) is liable to deportation, but

(b) cannot be deported for legal reasons.

(2) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if—

(a) the leave was obtained by deception,

(b) the person would be liable to removal because of the deception, but

(c) the person cannot be removed for legal or practical reasons.

(3) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the person, or someone of whom he is a dependant, ceases to be a refugee as a result of -

(a) voluntarily availing himself of the protection of his country of nationality,

(b) voluntarily re-acquiring a lost nationality,

(c) acquiring the nationality of a country other than the United Kingdom and availing himself of its protection, or

(d) voluntarily establishing himself in a country in respect of which he was a refugee."

(4) In this section—

"indefinite leave" has the meaning given by section 33(1) of the Immigration Act 1971 (c 77) (interpretation),

> "liable to deportation" has the meaning given by section 3(5) and (6) of that Act (deportation),
>
> "refugee" has the meaning given by the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, and
>
> "removed" means removed from the United Kingdom under—
>
> > (a) paragraph 9 or 10 of Schedule 2 to the Immigration Act 1971 (control of entry: directions for removal), or
> >
> > (b) section 10(1)(b) of the Immigration and Asylum Act 1999 (c 33) (removal of persons unlawfully in United Kingdom: deception).
>
> (5) A power under subsection (1) or (2) to revoke leave may be exercised—
>
> (a) in respect of leave granted before this section comes into force;
>
> (b) in reliance on anything done before this section comes into force.
>
> …

12. Paragraph 392 of the Immigration Rules makes provision as to what should happen in cases where the Defendant revokes a deportation order in circumstances where the person has been deported. It states:

> 392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.

The judgment below

13. Before the Judge, it was submitted on behalf of the Appellant:

    (1) As a matter of statutory interpretation, the revocation of his deportation order automatically revived the ILR that he had been granted in 2000.

    (2) Alternatively, the failure to grant the appellant ILR and the Secretary of State's decision to limit his temporary leave to one of only 6 months' duration was a wrongful exercise by the Secretary of State of her discretionary power or a failure by her to comply with the order of the Tribunal of 31 March 2009.

14. The judge rejected both of these contentions. On the first issue, he said:

> 38. In my judgment, the wording of section 5 is tolerably clear and the other statutory or regulatory provisions touching on the question of deportation and revocation strongly suggest that had it been Parliament's intention that an appeal against the refusal to revoke a deportation order should automatically restore ILR it would have been a straightforward matter to achieve that. Instead, I am satisfied that, analogously to the position under rule 392, following a successful appeal, ILR remains revoked giving a discretion to the Secretary of State to determine whether to re-grant ILR or to give shorter discretionary leave.

15. On the second issue, he stated:

> 66. Thus, having concluded that the words of section 5 are clear and that there is no reason to imply that the effect of a successful appeal of a decision to refuse to revoke a deportation order is to revive ILR, neither do I find, either on principle, or in the particular circumstances of this case, that the Secretary of State was bound, once Immigration Judge Neuberger had allowed the Claimant's appeal, to grant ILR. Indeed, having regard to the "borderline" nature of that decision and the manifold uncertainties in and unpredictability of the Claimant's private and family life and the question marks over his resolution to lead a law abiding life, the same policy reasons distinguished by successive judges in the cases I have cited above, convince me that the Secretary of State was acting lawfully and sensibly to confine her grant of leave to a discretionary six months in this case.

16. Sir Richard Buxton granted permission to appeal in relation to the first issue, of statutory construction, but refused it in relation to the second.

The submissions before this Court

17. For the Appellant, Mr Knafler QC submitted that the 1971 and the 2002 Acts are *in pari materia*, i.e., concern the same subject matter, and should be construed consistently with each other. Words used in the one Act should if possible be construed as having the same meaning in the other. "Revocation" of a deportation order involved setting it aside, with the consequence that its effect on the deportee's ILR was similarly set aside. The Secretary of State could, if she considered it appropriate, revoke his ILR in the exercise of her power under section 76 of the 2002 Act.

18. For the Secretary of State, Mr Moffett submitted that "revoke" is used in the legislation to refer to termination with effect from the date of revocation, but not retrospectively. The power in section 76 could only be exercised in relation to a person who remained in this country, but like the Appellant could not be removed because his removal would breach the obligations of Her Majesty's Government under the European Convention on Human Rights or other international instruments, or under our domestic law. It could not be exercised in relation to a person who had

been deported, and sought to return to this country. It would be irrational for Parliament to have provided that in such as case the revocation of the deportation order so as to permit, for example, the person in question to make a temporary visit to this country, would automatically result in the revival of his ILR, or in an obligation on the part of the Secretary of State to grant ILR.

Discussion

19. I accept unhesitatingly that the 1971 Act and the 2002 Act should so far as possible be construed consistently with each other. They concern the same subject matter. Moreover, the 2002 Act amends the 1971 Act, for example by the enactment of section 67 and the repeals in Schedule 9 of the later Act. It follows that, if possible, words such as "revoke" and cognate words should be interpreted as bearing the same meaning and having similar effects in both statutes.

20. The legislation uses a variety of words and expressions to describe the ending (to be as neutral as possible) of something: "revoke", "invalidate", "cease to have effect". In their ordinary meanings, these words have different meanings. Revocation involves an act that brings something to an end. Invalidation is apt to describe a consequence of an act. To "cease to have effect" is similarly apt to refer to a consequence of an act or event.

21. It is common ground that "invalidate" in section 5(1) is not used in the sense of having retrospective effect. Parliament would not sensibly have provided that the consequence of a deportation order is to render what was a lawful presence in this country, by virtue of a leave to remain, retrospectively unlawful, at least in a case in which the leave was not obtained fraudulently or by misrepresentation. I think that section 5(1) invalidates leave given after a deportation has been made to cater for the possibility of leave to enter or to remain being given in ignorance of the existence of the order.

22. I do not consider that section 5(1) can or should be construed as providing that revocation of a deportation order returns the person in question and the Secretary of State to the situation they were in as regards leave immediately before the deportation order was made. Revocation causes the order to cease to exist for the future; having been revoked, the order cannot invalidate any leave to enter or to remain given on or after its revocation. There are a number of reasons for my conclusion.

23. First, the revocation of an order is not inconsistent with a person having been liable to deportation. For convenience, I shall refer to a person liable to deportation as a deportee. His liability to deportation will normally, though not necessarily, result from his criminal offending, as in the present case. I see no good reason for him to be entitled as of right to the leave granted to him, we may assume, before his offending made him liable to deportation in circumstances where his removal is conducive to the public good but for reasons such as the risk of breach of his Convention rights he cannot lawfully be deported. The Secretary of State should be able to determine what leave is to be given to the deportee on the basis of his history and the facts at the date she comes to decide on the question of leave, i.e., when the deportation order is revoked. Those facts are bound to be very different from the facts as the Secretary of State perceived them to be when she granted the original leave to enter or to remain.

In essence, the deportee, through his conduct, has forfeited the leave to remain that he had when the order was made.

24. Secondly, any different construction creates a lacuna in the powers of the Secretary of State to revoke a deportation order. Section 76(1) of the 2002 Act, which I consider must be construed consistently with the 1971 Act, confers a power that may be exercised to revoke ILR, but only when the deportee cannot be deported for legal reasons. It does not apply to a person who has actually been deported or left the country. It is not therefore exercisable in the case of, for example, a person who having been deported seeks leave to enter temporarily, for example for medical treatment, for tourism, or to visit a relative. In order to enable a valid leave to enter or temporary leave to remain to be granted in such a case, the Secretary of State must revoke the deportation order. On the Appellant's case, that would revive his original ILR. Parliament could not sensibly have so intended.

25. Thirdly, I think it clear that revocation of ILR in section 76 does not have retrospective effect. In section 76(1), the fact that the deportee cannot be deported for legal reasons may arise after he has become liable for deportation, as where he has a child the interests of which necessitate his father remaining in this country. In this connection, I note that section 85 of the Nationality, Immigration and Asylum Act 2002 expressly authorises the Tribunal, on an appeal, for example under section 82(2)(k) against the Secretary of State's refusal to revoke a deportation order, to consider evidence concerning a matter arising after the date of the decision. More obviously, Parliament would not have legislated to render unlawful retrospectively the deportee's presence here during the period of his valid ILR. The requirements of policy are less obvious in section 76(2), but they are clear in section 76(3). There is no possible reason why Parliament should have provided to render unlawful retrospectively the presence here of a person who was given leave to remain as a refugee, but has ceased to require international protection. Given that in section 76(1) and (3) revocation has no retrospective effect, revocation under section 76(2) must be similarly construed. If revocation in section 76 is not retrospective in effect, it should not be construed as having such an effect in section 5 of the 1971 Act.

26. Fourthly, I think it clear that revocation is used elsewhere in the 1971 Act in the sense of termination for the future. For example, section 3(3) authorises the Secretary of State to vary a person's limited leave to enter or to remain by revoking conditions. This does not mean that the leave is to be regarded as never having been subject to the revoked condition.

27. Lastly, it is no objection to this interpretation of section 5 that the Act uses the expression "cease to have effect" with the same non-retrospective consequence as revocation. "Revoke" is a transitive verb. It involves an act by the Secretary of State. The expression "cease to have effect" is intransitive, and refers to an automatic consequence, for example of the acquisition of British citizenship under section 5(2), having no requirement of any terminating action on the part of the Secretary of State. So too in section 5(3) a deportation order automatically, without more, ceases to have effect if the person in question ceases to belong to the family of the deportee, for example by divorce in the case of a spouse or by reaching the age of 18 in the case of a child of the deportee (as to which see subsection (4)).

28. In my judgment, therefore, the editors of Macdonald's Immigration Law & Practice (8th edition) at paragraph 15.1 correctly describe the effect of the making of a deportation order as cancelling the leave to remain.

Conclusion

29. In my judgment, the Judge was right to reject the Appellant's construction of the legislative provisions. I would dismiss the appeal.

Sir Stephen Sedley:

30. Section 5(1) of the Immigration Act 1971 spells out the prospective effect of the making of a deportation order on the deportee's existing leave to enter or remain: the leave ceases to be valid. Section 5(2) then provides for revocation of a deportation order, but it does not say what is to happen in that event to the individual's leave to enter or remain: does it remain invalid or does it revive?

31. The answer is given by s.76 of the Nationality, Immigration and Asylum Act 2002: where a foreign criminal cannot be deported for legal reasons (as here), the Home Secretary is given power to revoke any indefinite leave which has previously been granted. This provision has two unspoken but in my view inescapable premises. The first is that, unless the Home Secretary decides to use the s.76(1) power, the foreign national's leave to enter or remain continues in being. Were it otherwise, there would be no need for the provision at all, save to the limited extent that it also covers people who could be but have not been made subject to a deportation order . The second is that the existence of legal reasons for withholding deportation need not require a tribunal determination since in clear cases the Home Secretary herself can decide that for human rights reasons a deportation order should not be made.

32. The provision also has the important consequence that an appealable immigration decision comes into being. This is orderly and respects the rule of law. The automatic collapse of leave for which the Home Secretary contends leaves the individual without any status whatever: he can neither lawfully stay nor lawfully be deported. It may be that officials find it convenient in this way to put pressure to depart on someone they cannot deport, but it is not the way that law and legality work, even in the case of as bad an offender as the present appellant.

33. For these reasons I find persuasive Mr Knafler's straightforward propositions that, although the deportation order while it lasted automatically invalidated the appellant's leave to remain (1971, s.5(1)), the revocation of the order (1971, s.5(2)) consequent on the tribunal's determination logically meant that it could no longer have that effect; but (2002, s.76(1)) that it was and still is open to the Home Secretary, if she thinks right, to revoke the appellant's leave to remain, giving him a right of appeal. The alternative is the state of legal limbo which I have described.

34. With great respect to Lord Justice Stanley Burnton, I do not think it matters that one can construct a relatively marginal scenario which this scheme of things does not address (see for example paragraph 24 of his judgment). As we are frequently reminded, it is not the job of judges to legislate.

35. Nor am I am able, with respect, to follow Lord Justice Stanley Burnton's semantic reasoning about the issue we have to decide. Revocation, invalidation and ceasing to have

effect all mean much the same thing. That is why s.5 (l) of the 1971 Act has to make specific provision to backdate the effect of a deportation order on leave to remain. But none of the verbs used by the drafter seems to me to cast any light on the question for the court, which is not whether revocation, invalidity or ceasing to have effect is retrospective, but whether the natural and logical effect of revoking a deportation order is to nullify its legal consequences. Parliament plainly legislated in 2002 on the premise that it was; and, while the construction of statutes is for the courts and not for the legislature, it would take a much stronger case than this to persuade me that Parliament in 2002 was stopping a gap in its own legislation which in reality did not exist. That the stopper may not have been a perfect fit would surprise neither a legislator nor a plumber.

36. In short, there appears to me to be in the provisions of s.5(1) and (2) of the 1971 Act and s. 76(1) of the 2002 Act a simple and intelligible logic which gives the last word to the Home Secretary even where legislation prevents her from deporting someone who otherwise deserves it, but ensures that her decision is subject to independent adjudication. I can find nothing in the language or configuration of the legislation which demands or implies a different conclusion.

Lord Justice Maurice Kay:

37. Yet again we find ourselves trying to give meaning to complex provisions in immigration legislation which are expressed in language which seems more adventitious than carefully designed. The particular difficulty is whether the revocation of a deportation order by the Secretary of State (following a successful challenge to her refusal to revoke it), causes an earlier grant of ILR to revive.

38. It is clear that, at the point when the Secretary of State made the deportation order, the ILR which had been granted previously was "invalidated": Immigration Act 1971, section 5(1). At that point, the ILR could no longer be relied upon to provide continuing immigration status. However, the invalidation did not affect the lawfulness of the ILR prior to revocation. Any benefits which had been enjoyed as a consequence of ILR prior to revocation were not rendered retrospectively unlawful.

39. The revocation of a deportation order may occur in a variety of circumstances, not all of which are consequent upon a successful legal challenge by the deportee. For example, the Secretary of State may voluntarily accede to further representations. Ultimately, the question at the heart of this case is whether the statutory language, properly construed, means that (1) the revocation has given rise to a *tabula rasa* awaiting inscription by the Secretary of State as she considers appropriate (for example, by the grant of short periods of discretionary leave); or (2) there is without more a revival of the original ILR but in circumstances in which the Secretary of State may make a fresh decision revoking the ILR pursuant to section 76 of the 2002 Act, which is susceptible to appeal pursuant to section 82(2)(f) of that Act.

40. My Lords have demonstrated by their disagreement that the answer is not straightforward. Sir Stephen Sedley's analysis is founded on construing section 5(2) of the 1971 Act by reference to section 76 of the 2002 Act. At first I wondered whether section 76 could be the key in view of the fact that its concern is with a person who is "liable to deportation" and that concept is used in the 1971 Act in relation to the period before a deportation order is made (sections 3(5) and 5(1) of the 1971 Act). However, I am satisfied that its use in section 76 of the 2002 Act must

extend to a person in the position of this appellant. Section 76 embraces a person who was liable to deportation pursuant to section 3(5); who was then made the subject of a deportation order pursuant to section 5(1); whose deportation order was later revoked pursuant to section 5(2); but whose removal is still considered conducive to the public good, albeit unachievable "for legal reasons". If this is a correct interpretation of section 76, then it seems to me to justify Sir Stephen's conclusion. Essentially for the reasons given by him, I too would allow this appeal. It is for the Secretary of State, if she wishes, to revoke the appellant's ILR pursuant to section 76. If she were to do so, nothing in this short judgment should be taken as indicative of any view of the merits of any appeal which the appellant might then pursue.