Neutral Citation Number: [2013] EWCA Civ 1498

Case No: T3/2013/2636

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Cranston
[2013] EWHC 2512 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2013

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE SULLIVAN

- -

Between :

The Queen (on the application of Habib Ignaoua)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Stephanie Harrison QC and Amanda Weston (instructed by **Birnberg Peirce and Partners**) for the **Appellant**
Rory Phillips QC and Julian Blake (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 11 November 2013

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Approved Judgment

Lord Justice Richards :

1. The appellant is the subject of a direction by the Secretary of State of the Home Department excluding him from the United Kingdom on the ground that his presence here would not be conducive to the public good for reasons of national security. He was informed of that direction in July 2010 (a decision to maintain the exclusion was made in March 2011). There was no right of appeal. In October 2010 he brought proceedings against the Secretary of State for judicial review of the direction. Those proceedings were held up by problems arising out of the Secretary of State's reliance on closed evidence. There were still outstanding issues of disclosure when, on 16 July 2013, the Secretary of State certified the direction under section 2C of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), as inserted by section 15 of the Justice and Security Act 2013 Act ("the 2013 Act"), which came into force on 25 June 2013.

2. The certificate opened the way for an application to the Special Immigration Appeals Commission ("SIAC") to challenge the direction, though the procedural rules required for such an application to be progressed within SIAC did not exist at the date of the certificate and are still not in force.

3. At the same time, by virtue of article 4(3) of the Justice and Security Act 2013 (Commencement, Transitional and Saving Provisions) Order 2013 ("the 2013 Order"), the purported effect of the certificate was to terminate the existing judicial review proceedings.

4. The appellant wanted to press ahead with the judicial review proceedings. He challenged the lawfulness and effect of the certificate both within the context of those judicial review proceedings and by way of a separate application for judicial review of the certificate. The separate application in respect of the certificate remains on hold. The issues otherwise raised by the appellant came before Cranston J, who held that the intention of Parliament was that, if an exclusion direction is certified by the Secretary of State, a challenge to it must be advanced in SIAC, and existing judicial review proceedings are terminated without any court order or residual jurisdiction in the court: see his judgment at [2013] EWHC 2512 (Admin). The judge granted permission to appeal.

5. The primary focus of the submissions of Ms Stephanie Harrison QC at the hearing of the appeal was on issues concerning ouster of the court's supervisory jurisdiction and the court's inherent jurisdiction to regulate its own procedures. But Mr Rory Phillips QC for the Secretary of State accepted that, leaving aside the court's undoubted jurisdiction to determine the separate challenge to the lawfulness of the certificate, the court has inherent jurisdiction to consider, in the context of the judicial review proceedings relating to the exclusion direction, whether the Secretary of State had the power under the statute to terminate the proceedings by the issue of a certificate. That concession greatly simplifies matters.

6. In the event, the central issue in the appeal is whether the Secretary of State's certificate was effective to terminate the judicial review proceedings relating to the exclusion direction.

The facts

7. The full factual background is set out in Cranston J's judgment and is not repeated here.

8. In the judicial review proceedings relating to the exclusion direction the Secretary of State had made a public interest immunity ("PII") certificate resisting, on various public interest grounds, disclosure of material relevant to the challenge. A PII hearing listed for 20 May 2013 was adjourned by agreement between the Secretary of State and the special advocate appointed to act in relation to the PII issue. The hearing was re-fixed for 18 July. The Secretary of State then applied for a further adjournment of the hearing, on the ground that the new section 2C of the 1997 Act had come into force on 25 June and the Secretary of State had decided in principle to certify the exclusion direction, so that the appellant would be able to bring a challenge to it in SIAC. The appellant resisted an adjournment, arguing that there was no justification for further delay, there was in truth no substantive case against the appellant, and the interests of justice plainly favoured proceeding with the PII hearing. On 16 July, Ouseley J refused the application for an adjournment. On the same day the Home Office wrote to inform the appellant that the Secretary of State had certified the exclusion direction and that the certificate had the effect of terminating the judicial review proceedings. A letter to similar effect was sent by the Treasury Solicitor to the court on 17 July.

9. The result of this was that the hearing fixed for 18 July was adjourned to 1 August and converted into an *inter partes* hearing to consider the appellant's arguments concerning the lawfulness and effect of the certificate. A separate judicial review challenge to the certificate was lodged on 25 July. On 1 August, because of the limited time available on that day, Cranston J ruled that the hearing before him should be confined to "the issue of law as to the power to certify" and that the challenge to the exercise of the discretion to certify should be deferred to the hearing of the separate judicial review challenge to the certificate.

10. There was, however, some overlap between the matters considered by Cranston J and those that might be thought to fall more appropriately within the separate judicial review challenge. In particular, consideration was given to the implications of the fact that the necessary SIAC procedural rules for proceedings under the new section 2C of the 1997 Act had not been put in place and were not immediately in prospect at the time when the certificate was made: until such rules were in force, there could be no closed material procedure in proceedings under section 2C. The Treasury Solicitor's letter of 17 July to the court stated that the rules were likely to come into force "as soon as possible after the summer recess". At the time of the hearing before Cranston J, it was expected that the rules would be finalised before the end of October. By the hearing before us the draft rules had been laid before Parliament and were expected to be in force by the end of November or in early December if they received affirmative approval.

11. Following the adverse decision by Cranston J the appellant did make an application under section 2C to SIAC on a protective basis. A directions hearing was held in early October at which the Secretary of State undertook to serve in the SIAC proceedings the evidence already served in the judicial review proceedings, but little more could be done until the relevant rules came into force.

12. Part of the appellant's complaint about the certificate was that its effect in these circumstances was to leave him in a state of legal limbo, unable to pursue the judicial review proceedings yet without an effective alternative in the form of an application to SIAC.

The legislation

13. Section 2C of the 1997 Act, as inserted by section 15 of the 2013 Act, reads as follows:

> "2C(1) Subsection (2) applies in relation to any direction about the exclusion of a non-EEA national from the United Kingdom which -
>
> (a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the non-EEA national is conducive to the public good,
>
> (b) is not subject to a right of appeal, and
>
> (c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public –
>
> (i) in the interests of national security,
>
> (ii) in the interests of the relationship between the United Kingdom and another country, or
>
> (iii) otherwise in the public interest.
>
> (2) The non-EEA national to whom the direction relates may apply to the Special Immigration Appeals Commission to set aside the direction.
>
> (3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.
>
> (4) If the Commission decides that the direction should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings …."

14. Section 19 concerns consequential and transitional provision:

> "19(1) Schedules 2 and 3 (which make consequential and transitional provision) shall have effect.
>
> (2) The Secretary of State may by order made by statutory instrument make such transitional, transitory or saving provision as the Secretary of State considers appropriate in

> connection with the coming into force of any provision of this Act."

15. Further detail concerning transitional provision is contained in Schedule 3, in particular in paragraph 4 of that schedule:

> "4(1) An order under section 19(2) may, in particular, make provision about the application of section 15 … to any direction or decision of the Secretary which –
>
> (a) is of a kind falling within section 2C(1)(a) and (b) … of the Special Immigration Appeals Commission Act 1997, and
>
> (b) was made before the section 15 commencement day.
>
> (2) Provision of the kind mentioned in sub-paragraph (1) may, in particular, provide for –
>
> (a) the Secretary of State to certify under section 2C(1)(c) … of the Special Immigration Appeals Commission Act 1997, on or after the section 15 commencement day, any direction or decision falling within sub-paragraph (1),
>
> (b) the termination of any judicial review proceedings, or proceedings on appeal from such proceedings, which relate to a direction or decision which is so certified (whether such proceedings began before, on or after the section 15 commencement day).
>
> (3) In this paragraph 'the section 15 commencement day' means the day on which section 15 comes into force."

16. The 2013 Order states that it is made by the Secretary of State in the exercise of the powers conferred by, *inter alia*, section 19(2) of, and paragraph 4 of schedule 3 to, the 2013 Act. Article 4 of the Order makes provision in respect of the certification of directions made before the section 15 commencement day, 25 June 2013:

> "4(1) This article applies to any direction or decision of the Secretary of State which –
>
> (a) is of a kind falling within section 2C(1)(a) and (b) … of the Special Immigration Appeals Commission Act 1997, and
>
> (b) was made before 25th June 2013.
>
> (2) The Secretary of State may certify under section 2C(1)(c) … of the Special Immigration Appeals Commission Act, on or after 25th June 2013, any direction or decision to which this article applies.
>
> (3) A certificate issued under paragraph (2) terminates any judicial review proceedings, or proceedings on appeal from

> such proceedings, which relate to the direction or decision to which the certificate relates (whether the proceedings began before, on or after 25th June 2013)."

17. The 2013 Order was not required to be laid before Parliament and was not subject to Parliamentary scrutiny under either the affirmative or the negative resolution procedure.

18. The power to make relevant procedural rules for SIAC is conferred by section 5 of the 1997 Act, as applied to applications under section 2C by section 6A (inserted by paragraph 9 of schedule 2 to the 2013 Act). The details are unimportant, save to note that by section 5(9) no rules shall be made under the section unless a draft of them has been laid before and approved by resolution of each House of Parliament.

Was the certificate effective lawfully to terminate the judicial review proceedings?

19. Article 4(3) of the 2013 Order provides on its face that the effect of a certificate under section 2C(1)(c) of the 1997 Act in respect of an exclusion direction made before 25 June 2013 is automatically to terminate any existing judicial review proceedings which relate to that direction. If that is indeed the legal effect of such a certificate, it is a truly remarkable result, since it puts in the hands of the Secretary of State, as a party to (indeed, a defendant to) judicial review proceedings, the power to bring about the termination of those proceedings by her own act and without any intervention by the court; and to do so irrespective of the stage that the proceedings have reached, whether at first instance or on appeal. Mr Phillips accepted in argument that such a provision would be "most unusual" – he could not point to any equivalent – and that very clear language was required to show that this was Parliament's intention. But he submitted that the statutory language was clear and that Parliament can be seen to have intended this result.

20. The statutory language relied on is that of paragraph 4 of schedule 3 to the 2013 Act. That paragraph, which is set out at para [15] above, empowers the Secretary of State to make provision about the application of section 15 to a direction made before the commencement day. By paragraph 4(2)(a), such provision may provide in particular for the Secretary of State to certify such a direction under section 2C(1)(c); and by paragraph 4(2)(b) it may provide in particular for "the termination of any judicial review proceedings, or proceedings on appeal from such proceedings, which relate to a direction … which is so certified". The power to make provision for the termination of judicial review proceedings is couched in very general terms but that generality does not assist the Secretary of State. If it had been intended to empower the making of provision whereby the Secretary of State, by making a certificate, could cause existing judicial review proceedings against her to terminate automatically and without the intervention of the court, I would have expected specific, express language to that effect; and in the absence of such express language I do not think that paragraph 4(2)(b) should be read as conferring on the Secretary of State so striking a power.

21. Mr Phillips drew our attention to the approach adopted by Parliament in sections 97 to 99 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). He appeared to consider that that Act assisted him, but in my judgment it runs directly counter to his case. The sections in question make express provision for the

consequences of a certificate by the Secretary of State that a relevant immigration or asylum decision has been taken on national security or other public interest grounds or is based on information that should not be made public on such grounds. They read in material part (with emphasis added):

> "97(1) An appeal under section 82(1), 83(2) or 83A(2) against a decision in respect of a person *may not be brought or continued* if the Secretary of State certifies that the decision was taken –
>
> (a) by the Secretary of State wholly or partly on a ground listed in subsection (2) …
>
> …
>
> (3) An appeal under section 82(1), 83(2) or 83A(2) against a decision *may not be brought or continued* if the Secretary of State certifies that the decision is or was taken wholly or partly in reliance on information which in his opinion should not be made public ….
>
> 98(1) This section applies to an immigration decision of a kind referred to in section 82(2)(a) or (b).
>
> (2) An appeal under section 82(1) against an immigration decision *may not be brought or continued* if the Secretary of State certifies that the decision is or was taken –
>
> (a) by the Secretary of State wholly or partly on the ground that the exclusion or removal from the United Kingdom of the person to whom the decision relates is conducive to the public good …
>
> …
>
> 99(1) This section applies where a certificate is issued under section 97 or 98 in respect of a pending appeal.
>
> (2) *The appeal shall lapse*."

22. Thus, Parliament made express provision in those sections that, where a certificate is issued, any existing appeal against the decision "may not be continued" and "shall lapse". If the intention had been to produce a similar result in the present context in respect of judicial review proceedings relating to exclusion directions, the model of the 2002 Act was there to be followed. It was not followed. Parliament should not be taken to have intended to produce a similar result, or more accurately to empower the Secretary of State to produce a similar result, by the very general language of paragraph 4 of schedule 3 to the 2013 Act.

23. Mr Phillips argued that the transitional provisions of paragraph 4 of schedule 3 relating to the termination of judicial review proceedings were a corollary of the intention of Parliament, expressed in section 15 of the 2013 Act, that where an

exclusion direction is certified by the Secretary of State, a challenge to the direction *must* be advanced in SIAC rather than by way of judicial review. This way of putting it was in line with Cranston J's acceptance that "[a]s regards section 15, the clear Parliamentary intention is that where a person has been excluded from the United Kingdom on grounds of the public good, in reliance on information which in the Secretary of State's opinion should not be made public for national security or similar reasons, a challenge to the exclusion direction *must* be advanced in SIAC if the Secretary of State has certified the direction" (para [34] of his judgment, emphasis added). In my view, however, the terms of section 15 cannot be said to reveal a clear intention of that kind. Section 2C of the 1997 Act, as inserted by section 15, provides in subsection (2) that where a direction is certified "the non-EEA national to whom the direction relates *may* apply to the Special Immigration Appeals Commission to set aside the direction" (emphasis added). It opens the way to an application to SIAC but it does not provide that an application to set aside the certificate *must* be made to SIAC rather than to the court. It does not block an application to the court by way of judicial review. The language may be contrasted with the terms of sections 97(1) and 98(2) of the 2002 Act, quoted above, which provide that an appeal "may not be brought" if a decision has been certified.

24. In relation, therefore, to an exclusion direction made and certified after the commencement day (a direction to which the transitional provisions of paragraph 4 of schedule 3 do not apply), the statute does not preclude an application to the court by way of judicial review. In practice, once the relevant SIAC procedural rules are in force, it is likely that judicial review will be perceived as a less attractive or appropriate option than an application to SIAC under section 2C of the 1997 Act, especially in the light of the observations of Ouseley J in *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), in particular at paras [57]-[64], as to the impossibility or improbability of a claimant succeeding in a judicial review of this kind in the absence of a closed material procedure. In any event, the court itself is likely to refuse permission for judicial review in such a case on the ground that an application to SIAC provides an appropriate alternative remedy. That, however, is a discretionary decision for the court in the light of the circumstances of the individual case, and a different view might well be taken where, as has been the position to date, the relevant SIAC procedural rules are not in force and SIAC does not therefore offer an effective alternative. But the important point, irrespective of how the court's discretion might be exercised, is that the 2013 Act does not purport to remove the court's jurisdiction to entertain a judicial review application in relation to an exclusion direction made and certified after the commencement day.

25. Given that that is the position in relation to a direction made and certified after the commencement day, it would be all the more surprising if, in relation to a direction made before the commencement day, the 2013 Act empowered the Secretary of State to effect the automatic termination of existing judicial review proceedings by a certificate made after the commencement day. For the reasons I have given, I am satisfied that the statute confers no such power.

26. It follows that in purporting to provide, by article 4(3) of the 2013 Order, that a certificate under section 2C(1)(c) of the 1997 Act in relation to a direction made before the commencement day "terminates any judicial review proceedings, or

proceedings on appeal from such proceedings", the Secretary of State was acting outside the powers conferred on her by the 2013 Act.

27. A direct challenge by way of judicial review to the validity of article 4(3) of the 2013 Order would have succeeded on this basis, and Ms Harrison indicated that it formed part of the appellant's judicial review challenge to the certificate. But in view of Mr Phillips's acceptance that this court has jurisdiction to consider whether the Secretary of State had power to terminate the judicial review proceedings relating to the exclusion direction by the issue of a certificate (see para [5] above), it is open to us to hold here and now that the Secretary of State did not have power under the 2013 Act to make the provision contained in article 4(3) of the 2013 Order, and that article 4(3) is invalid and of no effect. This does not of itself prevent the Secretary of State from making a certificate; it simply means that a certificate, if made, does not have the effect of terminating any judicial review proceedings in existence at the time when the certificate is made.

28. That conclusion can be reached without needing to consider the detailed submissions advanced by Ms Harrison on the subject of ouster of the court's jurisdiction.

29. It is also unnecessary to consider what provision the Secretary of State could lawfully have made or could now make by Order for the termination of existing judicial review proceedings, save to note that it follows from the matters set out above that such provision must make proper allowance for the role of the court in deciding whether the proceedings are to terminate. The precise terms of any substitute for article 4(3) of the 2013 Order are a matter for the Secretary of State to consider.

30. In the absence of lawful provision for termination, the making of a certificate has no effect on existing judicial review proceedings. They continue in being unless and until the court orders otherwise. Once the SIAC procedural rules are in place, I think it likely that the court will decide to stay existing proceedings for much the same reasons as it is likely to refuse permission for a new judicial review application in a post-commencement case (see para [24] above). Again, however, that is a discretionary decision for the court in the light of the circumstances of the individual case.

31. Since the appellant's judicial review challenge to the exclusion decision has not been terminated by the making of a certificate, I would remit the case to the Administrative Court to determine, in the light of up to date information about the procedural position within SIAC, whether the judicial review proceedings should be stayed or be allowed to continue. The court's decision on that question may also be affected by whether the appellant chooses to pursue his separate judicial review challenge to the Secretary of State's certificate and, if so, what the outcome of that challenge is (though I cannot myself see what useful purpose could be served by pursuit of that challenge now).

Other issues

32. What I have said above relates to the legal *effect* of the Secretary of State's certificate, not to the validity of the certificate itself. But as I have mentioned above, another aspect of Ms Harrison's case is that the certificate itself was invalid because the Secretary of State acted contrary to the policy and purposes of the statute in making it at a time when there were no relevant SIAC procedural rules in place or immediately

in prospect, so that the effect of the certificate was to leave the appellant in a state of legal limbo. That argument, based on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, would sit more comfortably within the separate judicial review challenge to the certificate but is one that I would address here if necessary since it was considered by Cranston J and was developed in the submissions before us.

33. In the event, however, it seems to me that the argument falls away. It is premised on the proposition that the certificate has the effect of terminating the judicial review proceedings. If that really were the effect of the certificate, I can see considerable force in the argument that the Secretary of State acted contrary to the purpose of section 2C in terminating the existing judicial review proceedings at a time when an effective challenge to the exclusion direction could not be pursued in SIAC. But once it is found that the certificate did not have the effect of terminating the judicial review proceedings, the fact that an effective challenge could not be pursued at the time in SIAC does not give rise to the same cause for concern and it cannot be said that the appellant was placed in a state of legal limbo.

Conclusion

34. For the reasons given I would allow the appeal, declare that article 4(3) of the 2013 Order is outside the powers conferred by the 2013 Act and that the judicial review proceedings relating to the exclusion direction have not been terminated by the making of the certificate, and remit the case to the Administrative Court to decide on the future of those proceedings.

Lord Justice Sullivan:

35. I agree.

The Master of the Rolls:

36. I also agree.