IN THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

R (on the application of Vassell) v Secretary of State for the Home Department (s.96 NIAA 2002, test; merits) IJR [2015] UKUT 0404 (IAC)

Field House
London

30 March 2015

In the matter of an application for judicial review

BEFORE

UPPER TRIBUNAL JUDGE LATTER

Between

THE QUEEN ON THE APPLICATION OF

ADRIAN VASSELL

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr P Bonavero, Counsel, instructed by Kilby Jones Solicitors appeared on behalf of the Applicant.

Mr D Mitchell, Counsel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

In J v Secretary of State for the Home Department [2009] EWHC 705 (Admin), Stadlen J set out a four stage process that must be undertaken by the Secretary of State before she could certify a claim under s.96 of the Nationality, Immigration and Asylum Act 2002. The merits of any new matter raised by an applicant are not relevant to this process.

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JUDGMENT

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JUDGE LATTER: This is an application for judicial review of the respondent's decision dated 5 March 2014 refusing to revoke a deportation order and to certify that decision under s.96 of the Nationality, Immigration and Asylum Act 2002. In outline it is argued on behalf of the applicant that the decision to certify was unlawful because the application raised a matter which could not have been raised in an appeal against the decision to make a deportation order and secondly, when considering whether to exercise her discretion to certify the claim under s.96 the respondent failed to take into account the best interests of the applicant's son, a British citizen born on 13 January 2011, which should have been a primary consideration and in particular the report from an independent social worker submitted with the application.

2. To set the application and the submissions in context I need briefly to summarise the factual background. The applicant is a citizen of Jamaica, born on 13 June 1979. He claims to have arrived in the UK in June 1991 and the following year, on 22 October 1992, he was granted indefinite leave to remain as the dependant of his mother, a British citizen. On 9 June 1997 he was convicted of robbery and sentenced to three years' detention in a Young Offenders Institute. From 1996 to 2012 he had eleven further convictions for seventeen offences including theft, burglary, robbery, handling stolen goods, possessing a Class A drug, destroying or damaging property, driving whilst disqualified and battery.

3. On 25 May 2012 he was convicted of burglary and theft at Wood Green Crown Court and sentenced to fifteen months' imprisonment. He was considered by the respondent to be a foreign criminal within the meaning of s.32(1) of the UK Borders Act 2007 and on 24 September 2012 a deportation order was made against him. He appealed against this decision but his appeal was dismissed by the First-tier Tribunal on 24 January 2013. He was refused permission to appeal by the First-tier Tribunal but permission was granted by the Upper Tribunal on 28 April 2013. However, on 5 July 2013 the Upper Tribunal dismissed his appeal, permission to appeal being refused by both the Upper Tribunal and the Court of Appeal. His appeal rights were exhausted on 2 September 2013. The following day the Jamaican High Commission agreed to issue emergency travel documentation and on 15 January 2014 the applicant was detained pending removal and removal directions were served on 28 January 2014. On 20 February 2014 the applicant made further representations and a stay on removal was granted by Foskett J for the following reasons:

> "The claimant was involved in a high profile piece of criminal activity which undoubtedly tells against him. However, Ms Brown's [the independent social worker] report on the effect that deportation would have on his young son is arguably powerful and it seems only appropriate that consideration should be given to it."

4. The applicant's further submissions were set out in a letter dated 20 February 2014 and relied in substance on the report prepared by the independent social worker, arguing that it provided evidence demonstrating that the applicant's deportation would directly harm the best interests of his son and that as his interests were of primary importance, it followed that previous decisions made on the basis of an

erroneous understanding of his interests could no longer be sustained.

5. In the decision of 5 March 2014 the respondent rejected this argument. She specifically considered the provisions of para 399A. It was accepted that the applicant had lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision but it was not considered that he had no connection with Jamaica, the country to which he was to be deported.

6. The applicant could not therefore meet the requirements of para 399A. The respondent went on to consider exceptional circumstances and took into account the findings made by the Upper Tribunal which in its determination had considered the position of the applicant's child. It was her view that the further representations and the contents of Ms Brown's report offered nothing new for consideration but were merely a different interpretation of the same circumstances previously addressed by the Tribunal. The respondent went on to consider the issue of certification under s.96 of the 2002 Act referring to J v Secretary of State [2009] EWHC 705 (Admin) and, taking into account the four stage process identified by Stadlen J, concluded that the application to which the new decision related relied on a matter that could have been raised in an appeal against the previous decision and that in the exercise of her discretion the proper course was to certify the application.

7. In the Pre-action Protocol letter of 11 March 2014 the point was explicitly taken about the applicant's length of residence and the fact that it was his argument that he could meet the requirements of para 399A(a). This argument was rejected by the respondent in her letter dated 19 March 2014.

8. The relevant parts of the Rules relating to this application are as follows:

> "399A - This paragraph applies where paragraph 398(b) or (c) applies if –
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> (a) the person has lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
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> (b) the person is aged under 25 years, and he has spent at least half his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

9. Section 96 of the 2002 Act provides as follows:

> "(1) an appeal under Section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an Immigration Officer certifies –
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> (a) that the person was notified of a right of appeal under that section against another immigration decision ('the old decision') (whether or not an appeal was brought and whether or not any appeal brought has been determined);
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> (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision; and

(c) that in the opinion of the Secretary of State or the Immigration Officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision."

10. In J v Secretary of State, Stadlen J set out the following four stage process to be undertaken by the respondent before she could certify a claim under s.96:

> "Under s.96(1) and (2) before the Secretary of State can lawfully decided to certify, she has to go through a four stage process. First, she must be satisfied that the person was notified of a right of appeal under s.82 against another immigration decision (s.96(1)) ... Second, she must conclude that the claim or application to which the new decision relates relies on a matter that could have been raised in the appeal against the old decision (s.96(1)(b)) ... Third, she must form the opinion that there is no satisfactory reason for that matter not having been raised in an appeal against the old decision (s.96(1)(c)) ... Fourth, she must address her mind to whether, having regard to all relevant factors, she should exercise her discretion to certify and conclude that it is appropriate to exercise the discretion in favour of certification."

Submissions

11. Mr Bonavero submitted that it had not been open to the applicant to rely on para 399A at the hearing of his appeal against the decision to make a deportation order either before the First-tier or the Upper Tribunal as by that stage he had not completed twenty years' residence within para 399A(a). However, by the time of the decision on his application to revoke the deportation order he had completed twenty years. That point had been conceded in the decision letter at [36A] even though that concession had been revoked in the response

to the Pre-action Protocol letter on 19 March 2014. The argument in that letter that in fact twenty years residence had not been completed was ill-founded, so he argued, as the respondent had miscalculated the effect of the applicant's periods of imprisonment. He submitted that this was therefore clearly a matter which could not have been pursued or raised in the appeal against the previous decision.

12. So far as his second ground was concerned, he submitted that the respondent had failed when considering whether to exercise her discretion, to take properly into account the best interests of the applicant's child. Although the decision did refer to the independent social worker's report, no consideration was given expressly to that issue when considering certification and it followed, so he argued, that a relevant matter had been left out of account in deciding whether certification was the proper course to take.

13. Mr Mitchell submitted that the four stage process set out in J v Secretary of State had been properly followed. The initial representations had focused on the applicant's relationship with his son and the issue about twenty years' residence was only raised substantively in the Pre-action Protocol letter. The decision under challenge had not dealt with the issue of continuity of residence as that point had not been put forward in the representations. The respondent had not erred in her application of s.96(1)(b) in circumstances where there had been no reliance on the issue of length of residence. Even if the respondent had misunderstood the position about the actual length of residence, that did not undermine the decision if the point was not a live one in issue between the parties.

14. So far as the second point was concerned, Mr Mitchell pointed out that the report from Ms Brown had been referred to

extensively in the decision letter in paragraphs 14, 17, 18, 19, 34, 40, 43, 45, 46 and 53. It was simply not arguable, so he submitted, that it could be inferred that the respondent had closed her mind to this evidence when considering the issue of certification. On the issue of whether the applicant had ties to Jamaica, the respondent was entitled to take the view that he was unable to show that he had no such ties.

15. In reply, Mr Bonavero emphasised that a concession had been made to length of residence in the decision letter and even if the point had not been raised substantively at that stage, it was dealt with, albeit inaccurately, in the response to the Pre-action Protocol letter. If the respondent chose to go down the route of using s.96, she was not entitled in this context to consider the merits of a ground not raised before. This would be a matter for a Tribunal on appeal.

Assessment of the Issues

16. The first challenge to the respondent's decision to certify under s.96 is that the provisions of s.96(1)(b) were not met because the application to which the new decision related relied on a matter that could not have been raised in an appeal against the old decision. The argument put simply is that the applicant was entitled to rely on the provisions of para 399A(a) but had not been able to do so at the hearing of his original appeal against the decision to make a deportation order because he had not by that stage accrued twenty years' continuous residence as required by para 399A(a). It was agreed by Counsel that the length of the period of imprisonment to be deducted from continuous residence was the total of the two periods actually served. The applicant served eighteen months in custody in 1997 and 7 months and 14 days in 2012, a total of 25 months and 14 days.

17. There is no evidence to contradict the appellant's evidence that he arrived in the UK in June 1991. The respondent's decision was on 5 March 2014, a period of 22 years and 8 months after his arrival from which has to be deducted 25 months and 14 days. Discounting this period, he had lived continuously in the UK for more than twenty years immediately preceding the date of the decision.

18. The substantive argument against this being a new matter falling within s.96(1)(b) is that it was not a matter on which the applicant relied as his representations were based on the evidence relating to his son, the effect on him of the applicant being removed and generally on their relationship. The point about twenty years' continuous residence was, so it was argued, only picked up substantively in the Pre-action Protocol letter and the fact that the matter was dealt with in the response to that letter, even if inaccurately, does not alter the fact that it was not relied on so far as the decision under challenge was concerned. Even if it was, so the argument goes, the respondent had been entitled to take the view that the applicant had failed to show that he had no ties with Jamaica.

19. I am satisfied that by the date of the new decision it was open to the applicant to rely on the provisions of para 399A(a) by reason of the passage of time when he had not been able to do so when the decision against the deportation order was under challenge. This clearly amounts in my judgment to a new matter and would mean, subject to the argument about whether the issue had been raised and relied on, that the decision could not be certified.

20. I do not accept the respondent's submission that no reliance was placed on para 399A and the issue of continuity of residence when the further representations were made. It is true that the thrust of the submissions on the applicant's behalf went to the independent social worker’s report but the respondent's decision conceded there had been twenty years’ continuous residence and specifically considered para 399A, rejecting the argument on the basis that the respondent did not accept that the applicant had no ties with Jamaica. In the present case it would wholly artificial to exclude from consideration of the lawfulness of the decision issues raised in the Pre-action Protocol and responded to in the respondent's subsequent letter. The fact remains that a new matter had been raised and this prevented certification regardless of the view the respondent took on the merits of the applicant’s ties to Jamaica and accordingly the respondent was not entitled to certify this decision under s.96.

21. For the sake of completeness I will also deal with the second submission that when exercising her discretion the respondent failed to take into account the best interests of the applicant's child. On this issue the applicant fails to make out his case. The decision clearly identifies the thrust of the representations being made on the applicant's behalf in [17]. As Mr Mitchell rightly pointed out, the report was specifically considered and referred to in at least ten paragraphs of the report. Whilst it is correct that when considering the issue of discretion at [55] the respondent did not refer in terms to the report, nonetheless it is impossible to infer that the respondent either closed her mind to what had been the substance of the applicant's case or that she left it out of account when considering her discretion. To take such a view would be to fail to read the decision as a

whole. Therefore, the challenge to the certification at the fourth stage of the process identified by Stadlen J fails.

22. However, as the first challenge is made out, on that basis I am satisfied that the respondent's decision was unlawful. Accordingly I quash the decision to certify the application to revoke the deportation order under s.96. ~~~~*0*~~~~