Neutral Citation Number: [2020] EWCA Civ 1461

Case No: C2/2019/2819

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
Upper Tribunal Judge Frances
JR/4227/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before :

LORD JUSTICE FLOYD
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEWIS

- -

Between :

THE QUEEN, ON THE APPLICATION OF PETER EMIANTOR	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Gordon Lee (instructed by **Advocate**) for the **Appellant**
David Mitchell (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 27 October 2020

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Approved Judgment

Lord Justice Floyd:

1. This is an appeal from the decision of Upper Tribunal Judge Frances dated 13 September 2019 refusing permission to the appellant, Mr Peter Emiantor, to bring judicial review proceedings to challenge the decision of the respondent, the Secretary of State for the Home Department, dated 3 July 2019 that he is liable to deportation as a foreign criminal. The appellant contends that the Secretary of State's prior agreement, or the public law doctrine of legitimate expectation, rendered that decision unlawful.

2. The appellant entered the UK as a student in 1999. On 16 November 2015 he was convicted at Southampton Crown Court of offences arising out of an attempted insurance fraud. He was sentenced to 18 months' imprisonment. This length of sentence meant that, under section 32(5) of the UK Borders Act 2007 ("the 2007 Act"), the Secretary of State was required to make a deportation order against him. On 18 January 2016 the appellant was served with a notice of a decision that he is liable to deportation ("the 2016 Notice").

3. The appellant appealed against his conviction. On 14 June 2016 his appeal was dismissed by the single judge. He renewed his application to the full court, but the renewed application was also not successful, and was dismissed on or about 14 February 2017. In the meantime, on 15 August 2016, the appellant had been placed in immigration detention at the end of his custodial sentence. This should not have happened, because section 34(2) of the 2007 Act prevents a deportation order being made under section 32(5) while an appeal or further appeal against the underlying conviction is pending. The appellant accordingly issued proceedings for judicial review of the 2016 Notice and of his detention in immigration detention which was based on that Notice, coupled with an application for urgent relief.

4. On 15 August 2016, the appellant's application for urgent relief came before Holgate J who directed the Secretary of State to file an acknowledgement of service by 23 August 2016, and to set out the justification relied on for the continued detention of the appellant. On 23 August 2016 there was a flurry of activity at the Home Office. First, the Secretary of State did serve a rudimentary acknowledgment of service on that day in which she explained that she:

   > "received confirmation of the Claimant's criminal appeal and withdrew [the 2016 Notice]. On that basis the Claimant has been invited to withdraw his JR application and an open letter (copy attached) was sent to the Claimant on 23 August 2016 [i.e. the same day as the acknowledgement of service]. A response is still awaited."

5. That a response had not been received from the appellant on the same day as the letter was sent is hardly surprising, particularly as the appellant was still in custody. The acknowledgment of service went on to say that if the matter was not settled the Secretary of State "reserved the right to serve further summary grounds". What the acknowledgement of service did not do is set out any justification for the continued detention of the appellant, as Holgate J had specifically required.

6. The attached letter dated 23 August 2016 from the Government Legal Department ("GLD") acting for the Secretary of State, addressed to the appellant in prison, sent the appellant a draft consent order and said:

> "Following further consideration of the issues my client has agreed to reconsider her decision to detain you in light of your ongoing criminal appeal and her withdrawal of [the 2016 Notice]."

7. There was a further letter on 23 August 2016, this time coming directly from an official at the Home Office. This letter stated:

> "… it has come to light that you had an outstanding appeal against your conviction/sentence, when the [2016 Notice] was serviced (sic). Therefore the [2016 Notice] has now been withdrawn until the outcome of your appeal is known. Pending the outcome of the appeal deportation decision will be considered if appropriate."

8. The matter came back before Phillips J (as he then was) on 30 August 2016. Phillips J noted that the Secretary of State had failed to respond to the contention that the appellant should be released because his continued detention was unlawful. He ordered the immediate release of the appellant, which took place later that day.

9. Also on 30 August 2016, the Secretary of State issued a Notice of Restriction on Form ICD 0343 under section 36(5) of the 2007 Act which required the appellant to report at Lunar House, Croydon within 24 hours of receiving the notice and then between 10 am and 2 pm every Monday thereafter. Section 36(5), as then in force, applied paragraph 2(5) of Schedule 3 of the Immigration Act 1971, which permits the imposition of reporting restrictions, to "a person who is liable to be detained under subsection (1)". We did not hear argument on whether the restrictions imposed on the appellant on 30 August 2016 were lawful, given the withdrawal of the 2016 Notice. Section 36(2) only authorises detention "(a) while the Secretary of State considers whether section 32(5) applies, and (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order."

10. On 31 August 2016, the GLD wrote to say that, following the appellant's release from detention, the judicial review proceedings had become academic, apart from the issue of damages which could be dealt with at the County Court. An amended consent order was attached. The GLD chased a response to that letter on 4 October 2016.

11. It appears that on 22 November 2016 Sir Stephen Silber made an order for further directions in the judicial review proceedings encouraging the parties to attempt to agree the disposal of the proceedings. This did not happen, and accordingly on 13 December 2016 the GLD filed and served on the appellant a detailed acknowledgement of service.

12. On 6 December 2016, the appellant says that he attended The Home Office centre at Lunar House, Croydon to report, and was told by an official that the case of deportation was closed, and that he was no longer subject to deportation. He further states that the notice of restriction on Form ICD 0343 was shredded.

13. The judicial review proceedings came before James Goudie QC sitting as a deputy judge on 1 February 2017. Mr Goudie refused permission to apply for judicial review, and remitted the outstanding issue of damages to the County Court, presumably on the basis that this was the only outstanding issue in the proceedings.

14. On 11 February 2017, the appellant wrote to the Secretary of State, care of the GLD, saying that he had no intention to make a claim against her. He said:

> "… having been informed by an Officer acting on her behalf on 06th of last December that I was no longer subject to deportation and no longer required to attend the centre H/O Lunar House, and that the case was closed, I am pleased that she has withdrew (sic) her deportation claim and restrictions, removing the pressure and burden it added on me beside my pursuit to clear my name. Therefore I have no intention to make a claim against her"

15. Apparently unaware of, or having forgotten, this letter, some two years later on 30 January 2019, the GLD enquired of the appellant whether he intended to proceed with a damages claim in the County Court.

16. On 8 February 2019, the appellant replied to the GLD, enquiring what terms the Secretary of State was prepared to offer, as he would like to settle out of court. It appears that this caused the Secretary of State to offer the sum of £3,000, because, on 2 April 2019, the appellant's solicitors, Huneewoth Solicitors, who had recently been instructed, wrote to the GLD asking for 7 days to consider the offer of £3,000 made to the appellant. It seems clear that that offer was also rejected, or at least not accepted, because on 11 April 2019 the GLD emailed the appellant's solicitors with a further offer to settle, this time for £5,000 plus reasonable legal costs, in full and final settlement of the claim. This elicited a counter-offer of £7,500 with £650 costs in a letter of 15 April 2019 from the appellant's solicitors as full and final settlement. On 17 April 2019 the GLD accepted this counter-offer. They said:

> "I am instructed to provide this written Notice of Acceptance of your client's settlement offer (dated 15 April 2019) to settle the whole of his claim for £7,500.00 plus legal costs of £650.00."

17. The letter went on to advise that the County Court should be notified of the settlement of the claim. The GLD asked to be copied in on any correspondence with the court. There was no mention up to this point of any agreement about the appellant's future liability to deportation.

18. On 18 April 2019, the appellant's solicitors wrote to the GLD confirming that the appellant had been informed of their acceptance of his counter-offer, and that they had been instructed that their client would notify the court of the settlement. On 3 May 2019, the appellant himself wrote to the GLD. He pointed out that he had never registered a claim at the County Court as he initially did not wish to make such a claim against the Secretary of State "*following her decision on 06 December 2016 that she will no longer seek deportation against me*". The letter contained this additional sentence:

> "There is no claim number as the claim was never registered or issued, other than to now inform the court of the accepted £7,500, £650 minimal legal fee and no longer subject to deportation as settlement of the whole claim" (emphasis supplied)

19. The appellant said that he would nevertheless advise the County Court once he was in funds from the settlement. There is nothing in the papers to suggest that the GLD reacted or responded in any way to this letter.

20. On 22 May 2019, the appellant wrote to the County Court. After setting out some of the history of his judicial review proceedings, the second paragraph of the letter was in these terms:

> "2. Terms of Settlement: Defendant requires Claimant to notify County Court of settlement agreed. The Defendant no longer seek[s] to pursue deportation claim against him, having informed Claimant on 06 December 2016 at her premises that he is no longer subject to deportation nor require[d] to report to the Defendant. *All restrictions subject to deportation having been cancelled*, in the circumstance the Claimant accept[s] Defendant's offer of Full and Final Settlement on 03 May 2019 in an out of court settlement of £7,500 plus a minimal legal fee of £650 of the whole claim and case closed" (emphasis supplied).

21. On 23 May 2019, the appellant wrote to the GLD confirming that he had written to the County Court to confirm the settlement and including a copy of his letter of the previous day to the County Court. There is nothing in the papers to suggest that the GLD responded or reacted to this letter.

22. On 3 July 2019, the Secretary of State issued a further Notice of a decision to make a deportation order, based on the same 2015 conviction ("the 2019 Notice"). This was met with a letter from the appellant's solicitors, which relied, amongst other matters, on the events at Lunar House in December 2016 and on the settlement agreement which was, they said, "duly completed in May 2019 as case closed". The Secretary of State responded on 19 July 2019 saying that the information given by the Lunar House official had been correct, in that it referred only to the requirement to report, "not the overarching decision to pursue deportation".

23. The appellant accordingly issued a fresh application for permission to apply for judicial review. On 13 September 2019 permission was refused by Upper Tribunal Judge Frances as totally without merit, and an application for permission to appeal to this court was refused on 23 October 2019. Males LJ subsequently granted permission to appeal to this court. In granting permission Males LJ pointed out that if the terms of settlement were indeed as the appellant had conveyed them in the letter to the County Court of 22 May 2019, there was at least an argument that the Secretary of State had agreed not to pursue deportation against the appellant at all, and not merely that the 2016 Notice had been withdrawn pending the appellant's appeal against conviction.

The appeal

24. At the outset of the appeal, the parties agreed, with some encouragement from the court, that the hearing of the appeal should not proceed as an appeal against the refusal of permission to apply for judicial review, but as the substantive hearing of the judicial review claim. That was a sensible approach, as there was little prospect of further helpful evidence emerging beyond the materials which were already before the court.

25. Mr Gordon Lee, counsel acting *pro bono* for the appellant, realistically accepted that he could not contend that there was an agreed contractual term of settlement that the Secretary of State would not pursue deportation of the appellant at all. What was under discussion, following the transfer of any damages claim to the County Court, was the settlement of that claim alone. The damages claim was settled by the exchange of emails of 15 and 17 April 2019, and no further terms were agreed thereafter, despite the Secretary of State's failure to comment on the various mentions of deportation in the letters. The letter to the County Court of 22 May 2019, written by the appellant, to the extent that it was suggesting that there was a further term in which the Secretary of State had agreed not to deport the appellant at all, did not represent the actual agreement between the parties. Mr Lee's concession was therefore an inevitable one.

26. The case which Mr Lee did present, in very attractive and well-constructed terms, was that the Secretary of State had, by the words and actions of her official, given a clear and unambiguous assurance to the appellant that he would not be deported. This assurance was such as to give rise to a legitimate expectation in the appellant that she had abandoned all her attempts to deport him.

27. The starting point was what the appellant alleged was said to him, and done by the Home Office official at Lunar House on 6 December 2016. We do not have any written record of what was said, but it is right that we should take the appellant's evidence at its highest. This is put in various ways, but the gist of it was that he was informed that the claim against him was closed, that he was no longer subject to deportation, and that when he asked for a letter confirming the same the officer took the appellant's copy of the ICD 0343 reporting restrictions and shredded it, saying that the case against him was over with no conditions attached and that he was free to go.

28. Mr Lee relied on three principal items of correspondence to show both that these words were used, and that the appellant genuinely believed that an assurance was being given that no future deportation case would be pursued against him. These were:

    i) The letter of 11 February 2017, quoted at [14] above. Mr Lee stressed the words "no longer subject to deportation" and that "the case was closed" which were more consistent, he submitted, with the appellant no longer being subject to deportation at all, rather than no longer being subject to deportation whilst his appeal against conviction was pending. He also submitted that it was significant that the appellant made it clear that he did not wish to claim compensation. That lent force to the appellant's understanding of the

assurance because he was more likely to give up valuable rights if he thought there was no prospect of deportation at all.

ii) The letter of 3 May 2019 quoted at [18] above. The letter again uses the expressions "no longer seek deportation against me" and "no longer subject to deportation".

iii) The letter to the County Court of 22 May 2019 quoted at [20] above which recorded as "Terms of Settlement" that the Secretary of State would "no longer seek to pursue deportation claim against him, having informed Claimant on 06 December 2016 at her premises that he is no longer subject to deportation nor require[d] to report to the Defendant… All restrictions subject to deportation having been cancelled, whole claim and case closed".

29. Taken as a whole, Mr Lee submitted that these letters presented a tolerably clear picture of what words had been used by the Home Office official at Lunar House. None of the letters had been contradicted by the Home Office or their representatives, despite ample opportunity for them to do so. Those words were sufficiently clear to create a legitimate expectation that the appellant would not be deported at all.

30. Mr Lee submitted that, if those submissions were accepted, the 2019 Notice should be quashed. Alternatively, as the Secretary of State had not considered the question of whether an assurance had been given before she decided to issue the 2019 Notice, she should be required by the court to do so now. He accepted, however, that a threshold requirement for either form of relief was that a case of legitimate expectation had to be established.

31. We were also provided with a written note of the submissions that the appellant would himself have made orally had he not secured Mr Lee's assistance at the hearing. I have read and understood those submissions as well. In them he refers to *Oceanbulk Shipping and Trading SA v TMT Asia Limited* [2010] UKSC 44, in which the Supreme Court considered the admissibility of representations for the purposes of construing contracts. He submits that, by way of analogy, the letters on which he relies throw light on what was meant by the Home Office Official. I would accept that the letters are evidence of what the appellant thought was meant, but no more than that.

32. Mr David Mitchell, who appeared for the Secretary of State, and who was responding with agility to a case with a rather different emphasis from that which had thus far been pursued, submitted that what was said by the Home Office was not sufficiently clear and unambiguous, or devoid of qualification to found a legitimate expectation. He emphasised the context in which the assurance was given. This included the Secretary of State's duty under the Act to deport foreign criminals except in closely defined circumstances, and correspondence in which the right to pursue deportation in the light of the outcome of the criminal appeal was reserved. Moreover, the statements made by the appellant in the subsequent correspondence were in a different context, namely the settlement of a damages claim. He made other more detailed submissions which would be relevant if we thought that a clear and unambiguous assurance had been given, but it is not necessary for me to consider those.

Discussion

33. It is plainly right, in the absence of any contradiction, to accept the appellant's evidence of what he was told by the Home Office official on 6 December 2016, and what that official did. Accordingly I proceed on the basis that the appellant was told that that he was no longer subject to deportation, that the case against him was closed and that the reporting restrictions were cancelled, as demonstrated by the official by shredding the ICD 3043. That however is only the first step in the argument.

34. The next question is how those words and actions would be understood by a reasonable person in the appellant's position. To state the obvious, that is not the same thing as what the appellant himself understood. For this purpose, the surrounding circumstances which would be known to a person in the appellant's position on 6 December 2016 are important. The appellant had been released from immigration detention at the end of August 2016, on the direction of Phillips J, but had been served with the reporting requirement at the same time. As a result, the appellant had been reporting on a weekly basis at Lunar House from September onwards. There were, however, no deportation proceedings any longer in being, the 2016 Notice having been withdrawn. A decision had apparently been taken within the Home Office to cancel the reporting requirement, for reasons which do not appear from the materials before us, but at least arguably were connected to a concern over its legality. It would certainly have been clear to a reasonable person in the appellant's position that he was no longer required to report.

35. What is less clear is how much further the official would be understood to be going. At one extreme, "case closed" and "no longer subject to deportation" could, as the appellant contends, mean that the Secretary for State had abandoned altogether her attempts to deport the appellant. Those words are, however, also capable of meaning that, in the light of the withdrawal of the 2016 Notice, there was no longer a current case of deportation against him.

36. I have come to the conclusion that the assurance relied on was not sufficiently clear, unambiguous and devoid of qualification to found a legitimate expectation that the Secretary of State had abandoned altogether her attempts to deport the appellant. My reasons follow.

37. First, there is a duty, imposed on the Secretary of State in mandatory terms by section 32(5) of the Act to deport foreign criminals, subject to only limited exceptions: see section 33. The Act emphasises that the deportation of foreign criminals "is conducive to the public good": see section 32(4). The appellant's interpretation of what was meant by the Home Office official is rendered significantly less tenable, given that it involves an acceptance of the notion that the Secretary of State had decided not to comply with a duty imposed on her in the public interest. It is inherently unlikely that that is what was meant.

38. Secondly, nothing which had happened between the giving of the 2016 Notice and 6 December 2016 was apt to suggest that the Secretary of State would be likely to have changed her mind as to the applicability of section 32(5). There were two matters which had changed since the giving of the 2016 Notice. First, the Secretary of State had accepted that she could not deport the appellant whilst an appeal against his criminal conviction was pending, and had decided that the 2016 Notice was to be withdrawn. Secondly, the Secretary of State had accepted that there had been a period where the appellant had been unlawfully detained, and for which compensation was

likely to be payable. It would not have been a natural response to these changes for her to decide that in no circumstances would she deport the appellant in the future, particularly as she was under a statutory duty to do so.

39. Thirdly, the Secretary of State's letter of 23 August 2016 in which she said "[P]ending the outcome of the appeal deportation decision will be considered if appropriate" put the appellant on notice that the withdrawal of the 2016 Notice was without prejudice to the right to make a further decision to deport once the outcome of the criminal appeal was known.

40. All this background suggests that the appellant's release, and the removal of his reporting requirement were a consequence of the withdrawal of the 2016 Notice in the light of the pending criminal appeal. It would have required a statement by the Home Office official at Lunar House in the very clearest terms to establish an expectation that there was no question at all of any *future* attempt to deport. As I have explained, however, the words and deeds of the official were also capable of relating solely to the *previous* attempt to deport. They were not so clear as to have the meaning advanced by the appellant.

41. In my judgment therefore, the case based on legitimate expectation, like that based on agreement, is not made out. I would add that we did not hear argument on whether it was possible for the Secretary of State to fetter the exercise of her statutory duty in the way contended for by the appellant. I have proceeded on the assumption that it is, but nothing in my judgment should be taken as endorsing the correctness of my assumption.

42. If my Lady and my Lord agree, whilst we grant permission to apply for judicial review, the substantive claim for judicial review will be dismissed.

43. I express my gratitude to counsel, both of whom were instructed at short notice for different reasons. The court is particularly grateful to Mr Lee, who provided his outstanding assistance to Mr Emiantor and to the court, not only at short notice, but *pro bono* as well.

Lady Justice Asplin:

44. I agree.

Lord Justice Lewis:

45. I also agree.