



Neutral Citation Number: [2019] EWHC 3050 (Admin)

Case No: CO/2547/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2019

Before :

MR JUSTICE NICOL

Between :

Keith Connell

Claimant

- and -

Director of Legal Aid Casework (Legal Aid Agency)

Defendant

Philip Rule (instructed by **Swain and Co**) for the **Claimant**
Malcolm Birdling (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 5th November 2019

Approved Judgment

Mr Justice Nicol :

1. This is an application for permission to apply for judicial review of a refusal of the defendant to fund an appeal to the Supreme Court.
2. There has not been a decision on the papers. On 12th September 2019 Freedman J. ordered that the application for permission should be adjourned to an oral hearing.
3. The background to the claim is that the Claimant, who is an Irish national, in 2011 was sentenced to 11 years imprisonment for sexual offences against a child. In 2015 the Secretary of State for the Home Department ('SSHD') told the Claimant that he was considering deporting him to Ireland. Not only did the Claimant not oppose that deportation, he positively welcomed the prospect and he stated that to the SSHD. However, in December 2015, the SSHD told the Claimant that he would not be deported because he did not meet the test of exceptional circumstances which apply for Irish citizens to be deported.
4. In August 2016 the Claimant was released on licence from prison. The effect of the licence is that he is required to remain in the UK until 2022 when his licence will expire.
5. The Claimant sought judicial review of the 2015 decision. The claim was dismissed by Robin Purchas QC sitting as a Deputy High Court Judge on 2nd February 2017. Mr Purchas gave the Claimant permission to appeal to the Court of Appeal on one ground, namely whether the policy or practice regarding the deportation of Irish nationals was *ultra vires* the UK Borders Act 2007.
6. The Court of Appeal (Sharp and Flaux LJJ and Sir Stephen Richards) dismissed the appeal on 15th May 2018 – see (*R (Connell) v SSHD* [2018] EWCA Civ 1329). It also refused permission to appeal to the Supreme Court.
7. On 23rd June 2018 the Claimant's counsel, Philip Rule, wrote a positive advice on appealing to the Supreme Court. He characterised the prospects of success as 'good'. That term has a precise meaning under the Civil Legal Aid (Merits Criteria) Regulations 2013 ('the Merits Regulations') regulation 5(1)(b). It means that Mr Rule considered that the prospects of an appeal succeeding were greater than 60% but less than 80%.
8. Mr Rule identified the questions which the Supreme Court would be asked to consider as follows:
 - i) Whether it is inconsistent with or incompatible with EU law to have a system of deportation that is automatically triggered by a criminal conviction for an offence that attracts a sentence of imprisonment of 12 months or more, if, before taking the decision to deport in an individual case, consideration is given to the matters required to be considered by the transposed Directive 2004/38/EC and regulation 21 of the applicable Regulations.
 - ii) Whether it is the intention of Parliament contained within its enactment of the United Kingdom Borders Act 2007 that the automatic deportation provisions are inapplicable to all EEA nationals and whether the exception in section 33(4) of the UK Borders Act 2007 means that the duty to make a deportation order is disappplied in the case of *all* EEA nationals [Mr Rule's emphasis].

- iii) Whether an EEA national present in the member state by process of law (bail condition to reside in the UK; sentence of imprisonment; and licence condition imposed after the conclusion of the custodial element of the sentence requiring residence in the UK) is exercising EU Treaty rights (of freedom of movement and residence); and, if so, whether he may not waive any reliance upon such rights.
 - iv) Whether it is permissible and compatible with EU law to have differential treatment of Irish nationals as compared to other EEA nationals, on account of nationality, in determining the application of the Regulations transposing the Directive and in the imposition of a sanction engaging protections of EU law. [Although the Court of Appeal has not addressed this matter, the Supreme Court is empowered to grant permission to appeal ‘to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment’ (Constitutional Reform Act 2005 s.40(5)).
 - v) Whether the Court of Appeal has properly declined to follow and apply the ratio of the decision in *Kluxen* [2011] 1 WLR 218 (CA).
9. On 11th August 2018 Hugh Southey QC also provided a Note in support of the application for legal aid funding. He considered that the prospects of an appeal succeeding were ‘moderate’. The Merits Regulations regulation 5(1)(c) defined this to mean greater than 50% chance of succeeding, but less than 60%. Mr Southey thought that the essential question was whether the discrimination against Irish and other EU nationals who are not UK nationals is compatible with EU law.
 10. When an application is made for civil legal aid, it must be determined by the Director of Legal Aid Casework – see Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) s. 11. That involves two issues: (a) whether the applicant satisfies the means requirements; and (b) whether he satisfies the merits test as prescribed by regulations. The Merits Regulations are made under this provision. By s.11(3)(g) the factors which the Lord Chancellor can take into account in making the regulations expressly include the prospects of success. In the case of an appeal (which, of course was what the Claimant was asking the Director to fund), the ‘prospects of success’ mean the prospects of success in relation to that appeal – see Merits Regulations regulation 4(3). Thus, what is in issue is the likelihood of the appeal eventually succeeding, not simply whether permission to appeal would be granted.
 11. On 1st August 2018 an initial decision was taken on behalf of the Director. He refused the application because he considered that the prospects of an appeal to the Supreme Court succeeding were ‘poor’.
 12. That, too, is a term of art under the Merits Regulations. It means that the prospects of success are less than 45%. On that basis, the Director was indeed obliged to refuse the application for funding – see the Merits Regulations regulation 56(3).
 13. Where an applicant for civil legal aid of the present kind is dissatisfied with the Director’s decision, he may appeal to an Independent Special Controls Review Panel (‘SCRIP’) – see Civil Legal Aid (Procedure) Regulations 2012 (‘the Procedure Regulations’) regulation 58. That is what the Claimant did here.

14. In this case the SCRP comprised Gabriella Bettiga (chair), Lynda Reid and Adam Tear. The SCRP gave its decision in this case on 26th February 2019.
15. After summarising Mr Rule's questions and (in brief) his reasons for them and after referring to Mr Southey's Note, the SCRP gave its conclusions that the prospects of success were poor.
16. The Panel explained that it found the Court of Appeal's analysis of the UK Borders Act 2007 and the EEA Regulations clear and detailed. It agreed with the Court of Appeal's conclusion that Parliament considered that the assumption that deportation of EEA nationals would be conducive to the public good would be in breach of the Treaty rights.
17. It did not agree that reliance on *Kluxen* would be of assistance. There was no discrimination in the different treatment of Irish nationals because the Common Travel Area was expressly permitted by the EU Treaties. It concluded that there was no point of law of general public importance in which the Supreme Court would be interested.
18. Since the Panel had concluded that the prospects of success were poor, there was no need to consider proportionality or whether the case raised issues of any wider public interest.
19. By the Procedure Regulations regulation 58(1)

'A determination by the Panel about the prospects of success made in accordance with the criteria set out in regulations made under s.11 of the Act is binding on the Director.'
20. The Claimant asked the Director to refer the matter to another SCRP and an oral hearing, but the Director refused and formally adopted the decision of the Panel on 26th March 2019.
21. This claim for judicial review was issued on 1st July 2017. The Acknowledgement of Service was received by the Court on 26th July 2017. The Claimant lodged a reply to the AoS on 30th July 2019. I have already explained that the application for permission was adjourned to an oral hearing as a result of the order of Freedman J.
22. Mr Rule's grounds for seeking judicial review are that the Director erred in law in following the decision of the SCRP in that
 - i) he abdicated the duty to address the lawfulness of the SCRP decision and/or the application for funding because by adopting the SCRP's decision he repeated its flaws.
 - ii) There was a breach of Article 6 of the ECHR or the common law rights of access to justice.
 - iii) There were material errors of law.
 - iv) There was an inadequacy of reasons.
 - v) There was a failure to take account of relevant factors.

- vi) The decision of the SCRP was irrational.
 - vii) There was procedural unfairness in failing to consider and convene an oral hearing.
23. I recognise that my task is not to determine the application for judicial review but simply to consider whether all or any of the grounds are reasonably arguable. I am well familiar with the threshold test for the grant of permission and it is not necessary to cite authority elaborating on it.
24. I also proceed on the basis that LASPO and the Merits Regulations place responsibility on the Director as the primary decision maker. In his invocation of Article 6 ECHR and/or the common law principle of access to justice, Mr Rule suggested that some different approach was required. However, as Mr Birdling for the Defendant observed, the Merits Regulations have been held to be lawful, notwithstanding their adoption of a merits test – see *R (S) v Director of Legal Aid Casework* [2016] 1 WLR 4733. Of course, the decision regarding the merits test must be lawful, but I do not accept that, in reaching that decision, the Court must depart from a conventional review of legality. Thus, if the Director’s decision as to merits was otherwise lawful, I do not accept that it was unlawful because of the requirements of Article 6 or the common law principles as to the access to the courts. In my view, Ground 2 is not reasonably arguable.
25. I take next the seventh ground which I have listed above: the failure to commission an oral hearing. There are three substantial obstacles in the Claimant’s path on this ground. The first is that by the Procedure Regulations regulation 58(5),
- ‘Appeals and issues referred to the Panel must be considered without a hearing unless the Panel considers that it is in the interests of justice for the individual, the Director or any person authorised by the individual or the Director to make oral representations before the Panel.’
- Thus, the default position is for the Panel to reach its decisions on the basis of written submissions.
26. As the regulation makes clear there can be a departure from this default and an oral hearing can be held. However, the second obstacle for the Claimant is that he did not request an oral hearing before the Panel considered the matter. There may be exceptional cases where the Panel ought to consider whether to have an oral hearing, even though none was requested, but in my judgment, the present is not arguably one such case.
27. The third obstacle for the Claimant is, as I have already shown, by the Procedure Regulations regulation 58(10), the determination of the Panel is binding on the Director. Mr Rule is correct to observe that the regulation provides that this consequence only applies to a determination by the panel ‘about the prospects of success made in accordance with the criteria set out in [the Merits Regulations].’ However, this observation adds nothing of substance to the Claimant’s case. If the Panel’s decision was arguably unlawful, I would grant permission for that reason. If the Panel’s decision was not arguably unlawful, Mr Rule’s observation is of no effect.

28. In his oral submissions, Mr Rule focussed his challenge to the SCRP's decision on two matters:
- i) The Panel's dismissal of the argument concerning *Kluxen*.
 - ii) The Panel's dismissal of the argument based on discrimination against Irish nationals.

I shall take these in turn.

The Panel's treatment of the argument concerning *R v Kluxen*.

29. In *Kluxen* there were three appellants: a Ghanaian and two Romanians. The latter two were EU nationals. The Court of Appeal Criminal Division decided that, if the sentence passed was over 12 months so that the defendant was a 'foreign criminal' for the purposes of the 2007 Act, the SSHD would anyway be obliged to deport the defendant pursuant to s.32(5) of the 2007 Act unless one of the exceptions in s.33 of the 2007 Act applied. It was therefore superfluous for the criminal court to recommend deportation - see *Kluxen* at [9]. This was the position whether or not the defendant was an EU national. That conclusion was apparent from s.33(4) which created an exception to the obligation of the SSHD to deport a foreign criminal if deportation would then breach the Treaty rights of EU nationals. The Court of Appeal allowed all three appeals and, in each case, quashed the recommendation for deportation. The Court added at [51],

'We are aware that this outcome will not have any practical effect. For the reasons which we have explained the Secretary of State must in any event make a deportation order in respect of *Kluxen* unless he considers that one of the exceptions in section 33 applies in her case. We have been that Rostas [one of the Romanians] has already been deported and that Adam [the other Romanian] has been informed by the UK Border Agency, for reasons of which we are unaware, that he will not be deported.'

30. In the Court of Appeal in *Connell*, Sir Stephen Richards, who gave the leading judgment, observed that *Kluxen*, as a decision of the Court of Appeal Criminal Division, was concerned with the circumstances in which a criminal court when passing sentence, should make a recommendation for deportation pursuant to the Immigration Act 1971 s.3(6) and s.6. He noted that *Kluxen* had said that the UK Borders Act 2007 applied to all convicted persons who are not British Citizens whether they are EU Citizens or not (*Kluxen* [2]) and it was no longer appropriate for a court to make a recommendation for deportation in view of the provisions for automatic deportation in the UK Borders Act 2007 s.32, subject to the exceptions in s.33 (*Kluxen* [9]). As Sir Stephen said in *Connell* [38],

'The entire focus was on the court's role in relation the making of a recommendation for deportation, not on the making of a deportation order by the Secretary of State and although section 33(4), the exception relating to breach of rights under the EU treaties, was raised in the grounds of appeal, its application did not fall for consideration by the court.'

31. Mr Rule would wish to argue in the Supreme Court that this takes too narrow a view of *Kluxen*. The Panel was unimpressed. The Panel made a mistake about the number of

EEA nationals in *Kluxen* but that is not material. It regarded the decision as not providing support for the contention which the Claimant wished to advance.

32. In my judgment, that was a conclusion to which the Panel was entitled to come. The Court of Appeal Criminal Division could only be concerned with the sentence passed by the criminal court as Sir Stephen Richards said in *Connell*. In *Kluxen* that was the recommendation for deportation. The CACD had no need and no authority to address the powers of the SSHD to make a deportation order.

Discrimination against Irish Citizens

33. I turn to the argument based on discrimination.

34. Article 18 of the TFEU provides,

‘Within the scope of the application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

35. The difficulty for the Claimant is those opening words. When the UK became a member of what is now the EU, there had for many years been what is called the ‘Common Travel Area’. For present purposes it is sufficient to say that this covers the UK and Ireland. By a Protocol to the TFEU the UK and Ireland may make arrangements between themselves relating to the movement of persons between their territories. It also provides that nothing in any provision of the Treaty shall affect those arrangements.
36. The Court of Appeal did not address the discrimination argument because it had not been raised before them. I am prepared to accept (at least for present purposes) that that may not be an insuperable obstacle to taking the point in the Supreme Court in view of that Court’s powers to do justice in the appeal – see Constitutional Reform Act 2005 s.40(5). The Panel did consider the point. It said at paragraph 22 of its decision,

‘With regard to the discrimination point, the differential treatment of Irish nationals compared to other EEA nationals is justified. Discrimination on grounds of nationality is prohibited “within the scope of the application of the Treaties and without prejudice to any of their specific provisions.” (Article 21) [The Panel is here referring to Article 21 of the Charter of Fundamental Rights, but this is immaterial because Article 21(2) of the Charter is in the same terms as Article 18 of the TFEU]. Due to the Common Travel Area, the treatment of Irish nationals is different under various aspects and reliance on the discrimination point appears misconceived.’

37. Mr Rule submits that, if the Claimant was deported, he would have no right to return under the Common Travel Area arrangements, since they exclude deportees - see Immigration Act 1971 s.9(4). That, though, is beside the point. The present issue concerns the earlier stage namely, the criteria for making a deportation order in the first place and whether the UK is entitled to distinguish between Irish nationals on the one hand and other EU nationals on the other.

38. In my judgment, the Panel’s conclusion was one to which it was entitled to come.

39. It also accords with the recent decision of Supperstone J. in *R (James Foley) v Secretary of State for the Home Department and Secretary of State for Justice* [2019] EWHC 488 (Admin) which is of significance, even though Mr Rule (who also acted for the claimant in that case) told me that an appeal against Supperstone J's decision had been lodged.
40. This view of the impact of the Protocol also accords with the Supreme Court's decision in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11 especially [54]-[61]. I became aware of this authority after the hearing. Had it been critical to my decision I would have invited further argument on it, but that was unnecessary since it simply underlined a decision to which I would anyway have come.

Reasons

41. Mr Rule argued that the SCRP had not adequately addressed the detailed arguments set out in his and Mr Southey's advices.
42. I do not consider this to be a reasonably arguable challenge to the legality of the Director (or the Panel)'s decision. Reasons do not have to be lengthy. They must show that the decision maker understood and grappled with the issues before it. The Panel's reasons satisfied those criteria. I would add that Mr Rule referred me to the Minutes of the Panel's meeting. These were disclosed by the Defendant as part of its duty of candour. However, that should not detract from the status and importance of the decision itself.

Wednesbury irrationality

43. While not at the forefront of his submissions, Mr Rule did maintain that the Panel's decision was irrational.
44. That is a high hurdle for a Claimant to surmount, especially when the decision maker comprises those who are chosen as independent and expert in their field.
45. The Panel's task was also to make a prediction of the prospects of success. As everyone familiar with litigation is only too aware, that cannot be an exact science. I put to Mr Rule that the task was not dissimilar to that performed by the Criminal Cases Review Commission. Mr Rule was right that the Commission only becomes involved once the appeal process has run its course. I accept that difference, but nonetheless I consider that there is an analogy. Parliament has entrusted both decision-makers with a difficult task. On a *Wednesbury* challenge the courts must acknowledge an appropriate latitude to them both.

Conclusion

46. I have approached the Claimant's whole argument with some puzzlement. At its heart appears to be the premise that the Claimant has a *right* to be deported. I find this curious. The purpose of deportation is to protect the public of the UK; it is not to confer a benefit on the deportee. I recognise that, by the terms of his licence, the Claimant must remain in the UK when he would rather go to Ireland. Yet the underlying litigation has been a challenge to the decision of the SSHD not to deport him; it has not been to the terms of his licence (for which, presumably, the Secretary of State for Justice is ultimately responsible). I have though, not allowed this bafflement to affect my decision on the

present application. After all, neither Robin Purchas nor Sir Stephen Richards, Sharp or Flaux LJ considered this an obstacle to Mr Connell's claim.

47. However, essentially for the reasons advanced by Mr Birdling, I conclude that none of the grounds for seeking judicial review is reasonably arguable and it must follow that the application for permission is refused.