R. v. Secretary of State for the Home Department, ex p. Urmaza

CO/4080/95 July 11, 1996

Sedley J.

European Convention on Human Rights, art. 8—Immigration Act 1971, s.8(1)—Immigration Rules (H.C. 395), paras. 364, 365—rights to family life —seaman jumping ship and marrying before deportation—extent to which unpublished departmental policy is amenable to judicial review—principle of consistency—irrationality—duty to give reasons for departure from policy.

In March 1993 the applicant, a Filipino seaman, jumped ship in the United Kingdom. By April 13, his details as a seaman deserter were being circulated on the police national computer. Within a few weeks he had met a Ms Estrada, a Filipino woman settled in the country with indefinite leave to remain, and by December 1993 they were cohabiting. In June 1994 an immigration consultancy wrote to the Home Office to seek asylum on behalf of the applicant. In August 1994, the consultants wrote to the Home Office withdrawing his asylum application and giving notice of an intention to submit an application for leave to remain on the basis of marriage. The applicant and Ms Estrada married on October 1, 1994.

In June 1995 the applicant was interviewed in relation to his illegal entry. His wife gave birth to a daughter in August 1995. A decision was taken in November 1995 to authorise the applicant's detention pending his removal from the United Kingdom. Shortly afterwards he was detained and a removal date was set. The applicant applied for judicial review. The case raised a novel question about the extent to which departmental policy was amenable to judicial review. In particular it concerned the meaning an application of the Home Office's internal policy document DP/2/93 on marriage and children which provides as follows:

SECTION A: MARRIAGE POLICY

1. All deportation and illegal entry cases must be considered on their individual merits. Where enforcement action is under consideration or has been initiated and the offender is married a judgment will need to be reached on the weight to be attached to the marriage as a compassionate factor.

2. As a general rule deportation action under section 3(5)(a) or section 3(5)(b) (in non-criminal cases), or illegal entry action should not be initiated or pursued where the subject has a genuine and subsisting marriage to a person settled in the United Kingdom if:

(a) the marriage pre-dates enforcement action; and
(b) the marriage has lasted 2 years or more or, in the case of a common-law relationship (see paragraph 7 below), the couple have cohabited for 2 years or more. It does not automatically follow, however, that deportation/removal is the right course where this test is not met. Full account should be taken of any evidence that a strong relationship has existed

for more than 2 years (this will include any reasons why the couple did not marry earlier, eg waiting for a divorce to be finalised, saving to buy their own home); or

(c) the settled spouse has lived here from an early age or it is otherwise unreasonable to expect him/her to accompany on removal; or

(d) one or more children of the marriage has the right of abode in the United Kingdom, most commonly as a result of having been born in the United Kingdom to a parent settled here. It should be noted that an illegitimate child born in the United Kingdom only obtains British citizenship under the British Nationality Act 1981 if the mother is a British citizen or is settled in the United Kingdom. Under the 1981 Act the status of the father of an illegitimate child has no bearing on the nationality of the child unless he subsequently marries the mother and legitimises the child.

Note: (i) The subject's immigration history is of little relevance once it has been concluded that the marriage is genuine and subsisting.

(ii) Enforcement action may be inappropriate where the spouse or the foreign national is pregnant with a child who would have the right of abode here even if born outside of the United Kingdom.

(iii) The presence of the settled spouse's children by a former relationship will also be an availing factor provided that the children have the right of abode in the United Kingdom, are still dependent and that we can be satisfied that they either live with or have frequent contact with the settled spouse.

3. In considering whether it is reasonable for a spouse to accompany on removal under paragraph 2(c) above, whilst the onus is on the United Kingdom settled spouse to make out a case for why it is unreasonable for him/her to join the family outside the United Kingdom, in general terms cases should be conceded if the United Kingdom settled spouse:

(a) has strong family ties in the United Kingdom; or
(b) has lengthy residence in the United Kingdom; or
(c) suffers from ill health such that his/her quality of life would be significantly impaired if he/she were to accompany his/her spouse on removal.

4. There will be a presumption to proceed with section 3(5)(a), 3(5)(b) (in non-criminal cases) or illegal entry action (subject to consideration of other relevant factors) in marriage cases where there are no children with the right of abode in the United Kingdom if:

(a) neither partner is settled in the United Kingdom; or
(b) the marriage is one of the convenience: that is, the couple do not intend to live together permanently as husband and wife; or
(c) the couple are separated.

Divorced or separated parents

5. The fact that the European Court is strongly disposed to find a breach of Article 8 of the European Convention where the effect of an immigration decision is to separate a parent from his/her child is also relevant in cases involving divorced or separated parents. Where one parent is settled in the United

Kingdom and the removal of the other would result in deprivation of frequent and regular access currently enjoyed by either parent, section 3(5)(a), 3(5)(b) (in non-criminal cases) or illegal entry action should be abandoned. Reliance cannot be placed on the argument that the United Kingdom settled parent can travel abroad to continue access.

6. Cases will arise where a person to be deported/removed has custody of a child with the right of abode in the United Kingdom by a previous partner who is no longer in contact with the child. Here, the crucial question is whether it is reasonable for the child to accompany the parent to live abroad. The factors to be considered are:

(a) the age of the child (in most cases a pre-school age child could reasonably be expected to adapt to life abroad);
(b) the strength of the child's ties with the United Kingdom, including other United Kingdom resident family members;
(c) any medical conditions which would be better treated here;
(d) the standard of living (including educational facilities) in the country to which the parent is being removed.

Common-law relationships

7. Where there is conclusive evidence that a genuine and subsisting common-law relationship akin to marriage exists, it should be considered under this instruction as if it were a marriage. The onus rests firmly on the individual who seeks to benefit to provide conclusive evidence of the nature of the relationship.

Criminal convictions

8. The test in cases where someone liable to immigration control has family ties here which would normally benefit him/her under paragraphs 1–6 above yet has criminal convictions is whether removal can be justified as "necessary in the interests of a democratic society". This is usually interpreted by the European Court as serious crime punished with imprisonment (for example, crimes of violence, drug offences (other than possession), murder, terrorism) but minor offences (even where the individual has a long criminal record) or a poor immigration history do not carry much weight. What is reasonable in any particular case will depend not only on the nature of the offence but also on the settled spouse's strength of ties with the United Kingdom. Where action is deemed to be in the interests of a democratic society it would normally be capable of being taken under section 3(5)(b) or 3(6) deportation powers.

Marriages of convenience to EC nationals

9. Foreign nationals who contract a valid marriage to an EC national exercising Treaty rights in the United Kingdom (for example by working) have hitherto been accepted as benefiting from the provisions of Community law in line with his/her spouse, effectively preventing enforcement action (barring serious criminal convictions) at least while the spouse continues to exercise Treaty rights. It has become clear, however, that immigration offenders can exploit this approach by entering into marriages of convenience with EC nationals.

10. Current legal advice is that the removal of a person who has married an EC national exercising Treaty rights may be justified where there are *exceptionally strong grounds for suspicion* that the marriage is one of convenience, ie that the couple do not intend to live together permanently as man and wife and the marriage was contracted for immigration purposes.

SECTION B: CHILDREN

Part 1: Adoption, wardship, custodianship and residence orders

11. This part of the instruction provides guidance on handling cases where there is reason to believe that the purpose of adoption, custodianship, wardship or residence order proceedings is to frustrate enforcement action.

Definitions

12. Adoption:

A child adopted by order of a court in the United Kingdom is a British citizen (and thus not liable to immigration control) from the date of the order if an adoptive parent is a British citizen at that date. An adoption by order of a foreign court may not be recognised in United Kingdom law: in such cases advice should be sought from B2 Division.

Custodianship:

This represents a less final relationship than adoption and vests legal custody of the child in the adult(s) caring for him/her. Where a custodianship order is made the child's immigration status is unchanged but he/she should not be removed from the jurisdiction of the court while the order remains in force.

Wardship:

Children who are wards of court should not be removed from the United Kingdom without the court's leave.

Residence Orders:

Residence orders are very similar in effect to wardship and children subject to residence orders should not be removed from the United Kingdom without the leave of the court.

Intervention

13. The Family Court will generally attach much more weight to the child's welfare than to irregularities surrounding the immigration status of the child or a parent. Where however it is clear that the court proceedings are designed purely to enable the child or the parent to evade immigration control consideration may be given to instructing the Treasury Solicitor with a view to intervention in the proceedings. *There must be evidence, not just a suspicion, that there has been a serious attempt to circumvent the immigration control* and decisions to intervene must be taken at not less than SEO level.

14. Where intervention has been agreed the papers should be copied to the Treasury Solicitor's office as soon as possible. Their normal practice is then to

apply for the Secretary of State to be joined as a respondent, and to file an affidavit setting out the child's and/or parents' immigration history and the Secretary of State's objections.

Part 2: Abandoned children

15. Enforcement action against children and young persons under the age of 16 who are on their own in the United Kingdom should only be contemplated when the child's voluntary departure cannot be arranged. In all cases removal must not be enforced unless we are satisfied that the child will be met on arrival in his/her home country and that care arrangements are in place thereafter. To this end, caseworkers should contact the Welfare Section of the appropriate Embassy or High Commission as well as the local Social Services Department. If there is evidence, not just a suspicion, that the care arrangements are seriously below the standard normally provided in the country concerned or that they are so inadequate that the child would face a serious risk of harm if returned, consideration should be given to abandoning enforcement action.

16. Where deportation or removal remains the right course, consideration will need to be given to whether an escort is necessary on the journey.

Enforcement Policy Group
January 1993

Held, granting the application:

(1) The first question is whether the Secretary of State was correct to say that the policy set out in DP/2/93, applying as it does to "all deportation and illegal entry cases", does not apply to a person whose illegal entry has been effected by deserting from a ship. This throws up a fundamental question about the reach of the jurisdiction of a court of judicial review when asked to enforce adherence by the executive to a departmental policy. There is a coherent line of authority to the broad effect that a policy means what it says, and that its meaning can ordinarily be established by the court and the decision-maker be held to it: see *R. v. Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 Q.B. 864, *per* Diplock L.J. at p. 866; *R. v. Criminal Injuries Compensation Board, ex p. Schofield* [1971] 1 W.L.R. 926; *R. v. Secretary of State for the Home Office, ex p. Lancashire Police Authority* [1992] C.O.D. 161; and *E.C. Gransden and Co. Ltd v. Secretary of State for the Environment* [1986] J.P.L. 519. It will accordingly be subject to the applicable principles of public law. In some cases this means that regard must be had to the policy as a material factor; in other cases, that discretion must not be exercised arbitrarily or partially (which is why policies are needed); in other cases, that policy must not be applied with such rigidity as to exclude consideration of special cases (in other words, so as to forfeit all discretion); and in yet other cases, that effect is to be given to legitimate expectations which policy or practice have generated. These legal controls upon the deployment of discretion and the implementation of policy demonstrate that the courts do not limit themselves to a bare rationality test. In some cases, without doubt, only this test is arguable: see for example *R. v. Ministry of Defence, ex p. Smith* [1966] 1 W.L.R. 305.

The High Court and the Court of Appeal have accordingly on more than one occasion exercised their jurisdiction in relation to DP/2/93 by considering whether the decision in question had been taken without proper regard to the

policy and whether any departure from it has been explained with satisfactory reasons (see *see ex p. Amankwah* [1994] Imm. A.R. 204 at p. 245) or whether the decision and the reasons for it are in conformity with the policy (*ex p. Hastrup*, November 28, 1995 (unrep.)). In *R. v. Secretary of State for the Home Department, ex p. McInerny* (Court of Appeal, July 27, 1995, (unrep.)) Sir Thomas Bingham M.R. said:

> "I would for my part readily accept that the Secretary of State, having announced the policy contained in DP/2/93, is in ordinary circumstances obliged to act in accord with what he has there laid down as his policy."

Such an approach, adopted without resort to the doctrine of legitimate expectation, is logically continuous with the conceded power of the court to intervene where a minister interprets or applies his own policy irrationally. If interpretation is truly for him alone, then even an irrational interpretation ought to be unobjectionable in law, at least so long as it is adopted throughout his department. But if, as is conceded, the court can correct such irrationality, it has to be because the reach of public law extends in proper cases to ministers' interpretations of their own policies. Such cases, as authority demonstrates, are not limited to irrationality: they include cases where an international policy has been disregarded or misapplied by one or more of a minster's officials.

In the light of the foregoing, the modern approach to a departmental policy document, whether published or not, ought to be as follows.

(a) The legal principle of consistency in exercise of public law powers (see *Kruse v. Johnson* [1898] 2 K.B. 91 and de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed., paras. 13–036 to 13–045) creates a presumption that in the ordinary way the Secretary of State, through his officials, will follow his own policy. This presumption corresponds with the practical purpose of such an internal policy, which is precisely to secure consistency of approach, in this case among officers administering paragraphs 364 and 365 of the Immigration Rules (H.C. 395). If there is to be a departure from the policy, there must be good reason for it (*British Oxygen Ltd v. Minister of Technology* [1971] A.C. 610). The impact of the departure in a case otherwise within this particular policy is almost certainly such as to demand that reasons be given (*R. v. Secretary of State for the Home Department, ex p. Doody* [1994] 1 A.C. 531).

(b) In this situation the meaning of policy cannot be a matter for the Secretary of State to decide subject only to the broad limits of rationality. Where, as is nowadays almost always the case, it is couched in ordinary English, it is not open to the Secretary of State to give it other than its plain and ordinary meaning. In the case of an unpublished policy, to do otherwise would be to invite inconsistency of application where the principal purpose of the policy is to produce consistency. But consistency, in the eye of the law, does not extend to being consistently wrong.

(c) Where the policy is explicitly or implicitly predicated upon legal categories, the court may hold the decision-maker to these.

(d) Where departmental jargon is used, the court must respect the evidence of its special meaning, but not to an extent which will subvert the object of the policy.

(e) It follows that those cases in which the challenge has been predicated upon pure irrationality (for example *ex p. Ozminos* [1994] Imm.A.R. 287 and *ex p. Smith* [1996] 1 W.L.R. 305) are illustrative but not exhaustive of the grounds of challenge.

(2) *The position of seaman deserters.* Whatever else he is, a seaman deserter is in law an illegal entrant. This on the face of it, brings the seaman deserter within the statutory meaning of illegal entrant, since, albeit he has already entered the United Kingdom, he is to be treated as seeking to enter and is doing so in breach of the immigration laws, his statutory leave to enter under section 8(1) of the Immigration Act 1971 having expired with the departure of his ship. DP/2/93 begins with the guiding rule "All deportation and illegal entry cases must be considered on their individual merits". The plain and ordinary meaning of this sentence, particularly in the legislative context in which it is set, is that it includes seaman deserters. It is not open to the Secretary of State to decide that it does not. In addition to abandoning the plain meaning of the policy, one of its principal purposes is thwarted if seamen deserters are excluded from it. It is the United Kingdom's treaty obligation, enforceable in the European Court of Human Rights, to respect article 8 of the Convention in favour of family life that has manifestly led to the introduction of this policy guidance. There is nothing in the particular status of a seaman deserter which deprives him of the protection of article 8.

(3) *The meaning of "enforcement action" in DP/2/93.* This is not a term of statutory art. Nor, in the context of the policy, does it have a plain and ordinary meaning. It is an internal departmental description of a state of affairs; in other words, a piece of jargon. For the Secretary of State it was submitted that whereas overstayers and those in breach of a condition of leave to enter, or whose removal is conducive to the public good may not face any action to deport them until long after the ground of deportation has arisen, and whereas other forms of illegal entry are often discovered only long after they have occurred, in the case of a seaman deserter (and similarly of someone who absconds during temporary admission or while on bail) the search begins as soon as the Home Office learns of the breach, so that there is nothing eccentric in treating this as the commencement of enforcement action.

If this argument stood alone, Sedley J. would have acceded to it: the character and content of internal policy guidance of this kind requires the court to respect language conventionally used to describe procedures and practices which are the department's own. But it does not end here, because what is said by the Home Office to be the conventional usage of "enforcement action" is incompatible with the plain meaning of "illegal entry" and the entire purpose of the policy. It would mean that what the policy gives with one hand, it takes away with the other, for there will be effectively no time in which a seaman deserter can ever attain what can be called article 8 protection. The only circumstance in which it would be feasible is if were already married to a person settled here before he jumped ship.

One then had to look at the rationale for the principal cut-off point of the policy. Why does marriage contracted before enforcement action is initiated afford such relatively strong protection from removal while a marriage contracted after the commencement of enforcement action falls outside the policy and leaves the applicant only exceptional compassionate grounds to fall back on? There was a distinction without a difference in the context of the policy and its purposes.

(4) Leave to appeal was granted to the Secretary of State.

Editor's note: In his judgment, Sedley J. explained the ancestry of the internal policy document DP/2/93. He noted that in 1994 the Home Office declined to make available a copy of this guidance to the editor of the *Immigration Appeal Reports*: see *Iye v. Secretary of State for the Home Department* [1994] Imm. A.R. 63. He said that: "Since 1993 variously legible copies, circulating among practitioners, have been produced to this court and referred to without objection. A print of the policy can also now be found in a least one practice manual. Mr Tam, appearing for the Home Secretary in the present case, has helpfully put before the court a pristine copy of the document, which for ease of reference is attached as an appendix to this judgment". This has been included in the digest, above. Sedley J. commented that "nobody who values openness of government can regard as satisfactory a process whereby a departmental policy of real importance to many people's lives, although not covered by any form of public interest immunity, is not published by the government but leaks out and, acknowledged now as authentic, becomes the subject of adjudication in the courts". He stated that he understood that DP/2/93 has been superseded as from March, 1996.

Cases considered: *British Oxygen v. Minister of Technology* [1971] A.C. 610; *E. C. Gransden and Co. Ltd v. Secretary of State for the Environment* [1986] J.P.L. 519; *Iye v. Secretary of State for the Home Department* [1994] Imm.A.R. 63; *Kruse v. Johnson* [1898] 2 Q.B. 91; *R. v. Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 Q.B. 864; *R. v. Criminal Injuries Compensation Board, ex p. Schofield* [1971] 1 W.L.R. 926; *R. v. Secretary of State for the Home Department, ex p. Amankwah* [1994] Imm.A.R. 240; *R. v. Secretary of State for the Home Department, ex p. Doody* [1994] 1 A.C. 531; *R. v. Secretary of State for the Home Department, ex p. Harstrup*, November 28, 1995 (unrep.); *R. v. Secretary of State for the Home Department, ex p. McInerny*, Court of Appeal, July 27, 1995 (unrep.); *R. v. Secretary of State for the Home Department, ex p. Ozminnos* [1994] Imm.A.R. 287; *R. v. Ministry of Defence, ex p. Smith* [1996] 1 W.L.R. 305; *R. v. Secretary of State for the Home Department, ex p. Lancashire Police Authority* [1992] C.O.D. 161.

D. Jones (Stewart & Co., London) for the applicant; *R. Tam* (Treasury Solicitor) for the respondent.

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A.P. Le S.