Case No: C2/2015/4302/JRTRF

Neutral Citation Number: [2018] EWCA Civ 188
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
[2015] UKUT 676 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2018

Before :

LORD JUSTICE MCFARLANE
LADY JUSTICE SHARP
and
SIR JOHN LAWS

- -

Between:

	The Queen on the application of JM (Zimbabwe) (by his parent and litigation friend SM)	**Appellant**
	- and -	
	The Secretary of State for the Home Department	**Respondent**

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- -

Adrian Berry (instructed by **Turpin Miller Solicitors**) for the **Appellant**
Joanne Clement (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 1 February 2018

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Judgment**Sir John Laws :**

Introduction

1. This is an appeal, with permission granted by Vos LJ on 4 May 2016, against the decision of the Upper Tribunal (the UT) of 18 November 2015. The UT dismissed the appellant's claim for judicial review of the decision of the Secretary of State to refuse his application for leave to remain in the United Kingdom as a stateless person under paragraph 403 of the Immigration Rules. The UT's decision is reported at [2015] UKUT 676 (IAC). The issue in the case concerns the proper interpretation of paragraph 403(c)

of the Rules which I will set out shortly.

2. After the grant of permission by Vos LJ the decision under challenge was withdrawn by the Secretary of State, who proposes to redetermine the case. At paragraph 6 of the replacement skeleton argument the respondent "recognises that the decision under challenge… was made on the (erroneous) basis that the appellant was a Zimbabwean citizen…" In the light of the first decision's withdrawal Singh LJ was asked to give directions. He indicated that the case should proceed "subject to any contrary view that may be taken by the Full Court". The Secretary of State (replacement skeleton argument paragraph 8) is neutral as to whether this court should now proceed to hear the appeal. The appellant desires that we should indeed proceed, as was made clear in representations of 27 November 2017 which were before Singh LJ as they are before us. It is there submitted, first, that we should do so in order that the appellant may understand the basis on which the Secretary of State will reconsider the case, and secondly and in any event, that the public interest requires that the appeal be heard: *Ex parte Salem* [1999] 2 AER 42. For my part I am sceptical as to the first of these points but my Lord, my Lady and I are agreed that the appeal should go forward on the footing that there is a degree of public importance in the issue relating to paragraph 403(c) of the Immigration Rules. It is unnecessary to recite the reasoning in the *Salem* case.

The Facts

3. The essential history is succinctly described by the UT as follows:

> "2 . The applicant is a child, born on 20 March 2013 in the United Kingdom. His mother is a Zimbabwean national. His father is a Portuguese citizen, a Mr F. When Mr F learnt that the applicant's mother was pregnant with the applicant he wished the pregnancy to be terminated but she did not agree and this led to a breakdown in the relationship. He is said to have made it clear that he does not wish to be involved in his son's life and will not assist in obtaining his registration as a Portuguese citizen.
>
> 3. The application under paragraph 403 of HC 395 was made under cover of a letter of 6 December 2013. Reference was made to the terms of the Zimbabwean Constitution, noting that a child born to a Zimbabwean parent outside Zimbabwe was required to register in order to be a Zimbabwean citizen by descent. The writer of the letter said that they had contacted the Zimbabwean High Commission to request confirmation of the terms of the Constitution but had received no response. It was said that it was clear that the applicant was not a Zimbabwean national, and nor did he have any right to Portuguese nationality as under the Portuguese Constitution registration was a requirement for nationality and as set out above the father refused to assist in making any application to the Portuguese authorities and without his consent the applicant could not register as a Portuguese national. It was said that as the applicant was not entitled to any nationality there was no prospect that he would be admitted to another country if

removed from the United Kingdom."

An expert witness statement made by Dr Alex Magaisa was put before the UT by the appellant, though it had not been produced to the Secretary of State before she made her decision. Dr Magaisa is a law lecturer at the University of Kent. He has practised law in Zimbabwe and conducts research and writes on Zimbabwean law, in particular its constitutional and administrative law. He describes the process by which a person may acquire citizenship by descent (the category applicable to the appellant as he was born outside Zimbabwe and his mother is a Zimbabwean citizen):

> "4.3.1…[H]is or her birth must be registered in Zimbabwe in accordance with the country's birth registration laws…
>
> 4.3.3…[T]his administrative process involves certain steps taken at the country's embassy/consular service in a foreign country and completed at the national offices in Zimbabwe. Once these steps are fulfilled and the birth is duly registered, one becomes entitled to the benefits of citizenship…"

4. Mr Berry for the appellant was inclined to submit that his client's mother (or someone acting for him) would have to travel to Zimbabwe to complete the registration process. But Dr Magaisa does not say as much, and it is not vouched by any other evidence. As a matter of fact it may or may not be the case. At all events there is no contest but that in principle it is entirely open to the appellant's mother to register her son's birth so that he would acquire Zimbabwean citizenship. It is however common ground that no steps have been taken on the appellant's behalf to do so. Moreover at paragraph 9 of the respondent's skeleton, in the context of the Secretary of State's withdrawal of the earlier decision, it is said (and again I understand there is no dispute) that "[t]he appellant has been invited to present any further evidence he wishes in support of his application. On 15 January 2018 the appellant's mother provided permission for contact to be made with the Zimbabwean authorities, but confirmed that no further information would be submitted in support of the application". References to the relevant documents are given.

The Rules

5. I should cite paragraphs 401, 403 and 405 of the Immigration Rules:

> "401. *For the purposes of this Part a stateless person is a person who:*
> (a) satisfies the requirements of Article 1(1) of the United Nations Convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any State under the operation of its law;
>
> (b) is in the United Kingdom…
> 403. The requirements for leave to remain in the United Kingdom as a stateless

person are that the applicant:

(a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;

(b) is recognized by the Secretary of State as a stateless person in accordance with paragraph 401;

(c) is not admissible to their country of former habitual residence or any other country; and

(d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless.

405. Where an applicant meets the requirements of paragraph 403 they [*sic*] may be granted limited leave to remain in the United Kingdom for a period not exceeding 30 months."

Mr Berry for the appellant rightly accepted that the burden – the "legal burden" as he called it – was on his client to demonstrate that paragraph 403 applied in his favour.

The Secretary of State's decision

6. I may take the Secretary of State's decision from the summary provided by the UT at paragraph 5. She concluded that the appellant

> "had failed to demonstrate that he was a person who was not considered as a national by any state under the operation of its law and had failed to satisfy the requirements of Article 1(1) of the 1954 United Nations Convention relating to the Status of Stateless Persons and paragraphs 403(b), (c) and (d) of HC 395. It was not accepted that he was a stateless person as defined within the Rules and he had not met the requirements to be granted limited leave to remain as a stateless person."

The issues

7. Granting permission to appeal Vos LJ said this:

> "There is a real prospect of success in this appeal on two grounds only, namely (i) as to the proper meaning of [paragraph] 403(c) imposing the requirement that the appellant 'is not admissible to… any other country', and (ii) whether (depending on the term's proper meaning) there was sufficient evidence for the SSHD to conclude that the appellant was admissible to Zimbabwe."

The primary issue, then, is whether the Secretary of State was on the facts and the proper construction of paragraph 403(c) of the Rule entitled to hold that the appellant was admissible to Zimbabwe; or, more accurately, that he had not demonstrated the contrary. However the respondent served a respondent's notice sealed on 8 June 2016, asserting that it was open to the Secretary of State to:

i) refuse to recognize the appellant as a stateless person for the purpose of paragraph 403(b) of the Rule, and

ii) conclude that the appellant did not obtain and submit all reasonably available evidence under paragraph 403(d) to enable her to determine whether or not he was stateless.

8. There was in the parties' skeleton arguments a somewhat arid argument as to whether the respondent is entitled to advance these points by way of a respondent's notice rather than a notice of appeal. At the hearing Mr Berry sensibly accepted that it was open to the respondent to do so. As for the substance of the respondent's notice, Miss Clement did not "abandon" the first point, but advanced no oral submissions to support it. On the second, she submitted that the UT was wrong to take the view that "the appellant has fulfilled the requirements of [paragraph 403(d)] in approaching the Zimbabwean authorities and ascertaining the position under the Constitution…" These points are in practical terms very closely linked to the primary issue relating to the proper construction of paragraph 403(c). I shall refer to them briefly in due course.

9. As regards paragraph 403(c) it is not, I think, necessary to revisit at any length the general learning on the interpretation of the Immigration Rules. They are to be construed "sensibly according to the natural and ordinary meaning of the words used, recognizing that they are statements of the Secretary of State's immigration policy" (*Mahad* [2010] 1 WLR 48, *per* Lord Brown at paragraph 10). I have never quite understood how this differentiates the construction of the Rules from the construction of statutes, where the court is just as concerned with a "sensible" construction "according to the natural and ordinary meaning of the words used, recognizing that they are statements of [Parliament's] policy" on the subject-matter in hand.

10. The general intent of paragraph 403 is clear enough. It is to give rights of residence (at least for a limited period – see paragraph 405) to stateless persons within the meaning of Article 1(1) of the 1954 UN Convention relating to the Status of Stateless Persons, who find themselves in the United Kingdom. The Convention definition – "a person who is not considered as a national by any State under the operation of its law" – is as I have shown replicated in paragraph 401, to which paragraph 403(b) cross-refers.

11. This general intent is qualified in two respects. First, recognition as a stateless person under 403(b) will be withheld in certain circumstances enumerated in paragraph 402 which I need not describe. (Leave to remain as a stateless person will also be refused if the claimant is reasonably considered to be a danger to national security or the public order of the United Kingdom: paragraph 404.) Secondly, even though he may satisfy 403(b), the claimant must show that he is "not admissible to their country of former habitual residence or any other country": 403(c).

12. Given this second qualification it is clear that the distinction between paragraph 403(b) and 403(c) is critical to a proper understanding of the Rule as a whole, and indeed lies at

the core of this appeal. How was the issue confronted by the UT?

The decision of the Upper Tribunal

13. The UT addressed the application of paragraph 403(b) to the case at paragraphs 36 – 37 of its determination as follows:

> "36…It cannot be right that the Respondent is entitled at whim to decide whether or not to recognise a person as stateless, which might be seen to be an implication of Mr Malik's [sc. then counsel for the Secretary of State] argument. His argument, as we understand it, is rather that there is a proper basis for non-recognition, in that… there is no reason why the applicant's mother cannot register his birth in accordance with the requirements of the Zimbabwean Constitution; he would be recognised as a citizen of Zimbabwe as soon as his birth is registered; and his mother has no basis for remaining in the United Kingdom and has taken a deliberate decision to continue to reside here instead of registering his birth.
>
> 37. A difficulty with this argument is that the wording of paragraph 403(b) strongly suggests that, in effect, choice is taken away from the Secretary of State where it is clear that, under paragraph 401, the person in question is a person who is not considered as a national by any state under the operation of its law, which, it may be said, as matters stand is the position of the applicant. Where that is the case, it is difficult to see a basis on which the Respondent could decline to recognise the person. Paragraph 403(b) essentially takes its tone from paragraph 401."

14. I think with respect that this reasoning is correct. At least by the time the case came before the UT, when the expert's report was available, the Secretary of State ought to have recognised that the appellant was stateless within the meaning of paragraph 401. Any other view would, certainly at that stage, have been unreasonable. I would reject the first point in Miss Clements's respondent's notice to the extent that it asserts the contrary. As regards her second point – "the appellant did not obtain and submit all reasonably available evidence under paragraph 403(d) to enable her to determine whether or not he was stateless" – that too falls away so far as it relates to the position before the UT.

15. But the case turns on paragraph 403(c). The UT said this:

> "38. It is however clear in our view that the requirements set out in paragraph 403 are cumulative and hence, even if the Secretary of State recognises a person as stateless, he will still have to show that he meets the criteria set out in paragraph 403(c). This very much turns on the meaning of the word 'admissible' in that provision. We agree with Mr Malik that it is proper to interpret this as meaning that a person is either a national of the country or entitled to be a national of the country rather than reading the word 'admissible' as meaning that it could apply only to nationals of the state in question. On the applicant's own case he is entitled to be a national of Zimbabwe subject to fulfilling the registration requirement. The fact of recognition of a person as being stateless

> can be distinguished from the situation of a person who is recognised as stateless and is not admissible to any other country. Hence it is open to the Respondent in our view to recognise a person to be stateless but to refuse them as she is not satisfied that the person is not admissible to another country, in this case Zimbabwe…"

The proper interpretation of Paragraph 403(c)

16. Mr Berry submits that this reasoning is wrong. He says that whether someone is "admissible" is a purely practical question. He or she is "admissible" if he or she "would be admitted to a State when presenting himself or herself for admission at a border" (skeleton argument 17 January 2018 paragraph 20). He accepts, as I understand it, that a national of a State (as opposed to a *potential* national) would be admissible in that State absent specific evidence to the contrary. But, he submits, his client is not a national of Zimbabwe. He is not admissible there on account of his nationality (or on any other basis).

17. The Secretary of State's fundamental objection to this line of argument is (to use my own words) that it would allow a claimant in the appellant's position to purchase a right to remain in the United Kingdom, at least for a limited period, at no greater price than his own inactivity. "[I]t would be open to foreign nationals to come to the United Kingdom, give birth to children, and then rely on their inaction or refusal to register these children as nationals of the states where they have nationality entitlement, simply in order to obtain leave to remain under paragraph 403 of the Immigration Rules" (respondent's skeleton paragraph 24). The argument would of course be the same if the claimant were an adult acting on his own behalf.

18. Mr Berry's riposte was essentially twofold. First he drew attention to the Home Office Guidance relating to applications for leave to remain as a stateless person, current at the relevant time, which shows (see for example paragraphs 2.2, 3.2) that in processing such an application Home Office officials will assist in making helpful enquiries. But this – no doubt in general terms desirable for good administration – is simply irrelevant to the proper interpretation of 403(c).

19. Mr Berry's second point engaged paragraph 405, which provides as I have shown that where 403(c) is satisfied the Secretary of State may grant leave for up to 30 months. Mr Berry's submission was that where the Secretary of State considered (notwithstanding, on Mr Berry's case, the claimant's compliance with 403(c)) that the case was fragile, she might give leave under 405 for a truncated period, perhaps 6 months, perhaps to allow for further enquiries. But this does no more to assault the respondent's position on paragraph 403(c) than Mr Berry's first argument. A claimant either does or does not satisfy paragraph 403(c) at the date of decision. It would no doubt be open to the Secretary of State to postpone her decision, or the UT to adjourn the proceedings, so that some aspect or aspects of the case might be clarified; but there is no suggestion that that should have been done in this case.

20. The approach of the UT and the respondent to the construction of paragraph 403(c) is

correct in principle. If it lies within a claimant's power to obtain admission (here by registration of the appellant's birth which would confer Zimbabwean citizenship) then absent any evidence to the contrary he is admissible under 403(c). That is the case here. Mr Berry can therefore draw no comfort from the second limb of Vos LJ's grant of permission: "whether… there was sufficient evidence for the SSHD to conclude that the appellant was admissible to Zimbabwe." On the principal issue Mr Berry's argument amounts to no more nor less than an entitlement to manipulate the Rule so as to obtain a limited leave to remain. Clearly that was no part of the Rule's intention.

21. I should add that the decision of the Supreme Court in *Al-Jedda* [2014] AC 253 to which the UT refers at paragraphs 25 – 29 takes the case no further, as I understand both parties to accept: it played no part in the oral argument.

22. I would dismiss the appeal.

Postscript: Drafting deficiencies

23. The true sense of paragraph 403(c) is not as apparent as it should be. Its language lends superficial credence to Mr Berry's submission that a person "is admissible" if, on the facts as they stand and without more, he or she "would be admitted to a State when presenting himself or herself for admission at a border", whereas the true question, as I have put it, is whether it lies within a claimant's power to obtain admission.

24. There is a further difficulty with the wording of 403. 403(d) requires a claimant to "[obtain and submit] all reasonably available evidence to enable the Secretary of State to determine whether they [*sic*] are stateless". As regards the fulfilment of 403(b), well and good. But as Mr Berry accepted it must also be open to a claimant (and indeed the Secretary of State – consistently with the 403 burden being always on the claimant) to adduce evidence, where it is required, in relation to 403(c). The point is not contentious, but it would be better if the Rule made the position clear.

Lord Justice McFarlane

25. I agree

Lady Justice Sharp

26. I also agree