Neutral Citation Number: [2012] EWHC 2415 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/2131/2012

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 9 August 2012

B e f o r e:

MR TIMOTHY STRAKER QC

(Sitting as a Deputy Judge of the Queen's Bench Division)

The Queen on the Application of

DIDIER GALLY

Claimant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Mr Graham Denholm (instructed by Wilson & Co, London N17 8AD)
appeared on behalf of the Claimant

Mr Pilal Rawat (instructed by the Treasury Solicitor)
on behalf of the Defendant

J U D G M E N T
(As Approved)

Thursday 9 August 2012

THE DEPUTY JUDGE:

1. By section 4(1)(c) of the Immigration and Asylum Act 1999 the Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons released on bail from detention under any provision of the Immigration Acts. However, by paragraphs 5(a) and 1(1)(l) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002, if someone has the nationality of an EEA state other than the United Kingdom, then he is not eligible for support or assistance under section 4(1)(c) of the Immigration and Asylum Act 1999. Consequently, if Mr Didier Gally, who is the claimant in these proceedings, has the nationality of an EEA state other than the United Kingdom, he is not eligible for the provision of, or the arrangement of the provision of, facilities for his accommodation if released on bail from detention under the Immigration Acts. That want of eligibility would plainly affect any request he might make for bail.

2. There is no doubt but that the claimant is detained under the Immigration Acts. An EEA state is, by virtue of paragraph 17 of Schedule 3 to the 1999 Act, a state which is a contracting party to the agreement on European Economic Area signed at Oporto on 2 May 1992. One such state is France.

3. The parties before me formulate the issue rather differently. Mr Rawat (for the Secretary of State) says, amongst other things, that the legal issue on this application for judicial review is whether a person who says that he is a natural of an EEA state is entitled to support under section 4(1)(c). On other hand, Mr Denholm (for the claimant) says that the question is whether it is open to the Secretary of State to decline to use section 4(1)(c) in particular circumstances which can be summarised as being that the claimant's nationality has not been established, ie. can one decline to use section 4(1)(c) when in effect one says: "I do not know whether or not you are an EEA national"?

4. Underpinning this application for judicial review, which is made pursuant to permission granted by Mr Ian Dove QC on 30 March 2012, is what may be described as a continuing application made of the Secretary of State for consideration of the claimant under section 4 ("section 4 support"). Such a request was refused on 23 August 2011, but given that the fact is continuing, given that an application could again be made tomorrow, and given that I am concerned with a matter of liberty, I do not consider that any question of delay arises in this case.

5. It is common ground that the claimant has been in the United Kingdom since at least 2005. He considers that he was born on 11 June 1979 in France, which is an EEA State within the 1999 Act. Although the common ground is that the claimant has been here since at least 2005, he was plainly within the United Kingdom earlier, because he came to the attention of the police in 2000. Since 2005 he has generated an appalling criminal record, including in 2009 offences of robbery which warranted sentences of imprisonment for four years. The claimant has, therefore, had considerable contact with the authorities. Throughout such contact he has claimed to be French. He stated that he was born in Toulouse, where he first went to school. He

later went to school in Courbevoie, near Paris. He claims first to have arrived in the United Kingdom using a French passport whose loss was reported to the French Embassy in about 2007.

6. On 21 December 2010 the claimant was told of a deportation order which had been made in respect of him. This order was under regulation 21 of the Immigration (European Economic Area) Regulations 2006. These regulations are principally used for nationals of EEA countries. It is clear that the arrangements under which the European Economic Area operates, which have been sanctioned by Parliament, assign to EEA nationals a particular status, which status is different from that assigned to nationals of the rest of the world.

7. Regulation 21 enables decisions to be taken on public policy, public security and public health grounds. However, there are protective provisions in connection with those enjoying EEA status, whereby relevant decisions may not be taken, for example of a person with a permanent right of residence under regulation 15, except on serious grounds of public policy or public security. In certain instances regulation 21(4) provides that a relevant decision may not be taken except on imperative grounds of public security in respect of EEA nationals who have been here for given lengths of time. Furthermore, by regulation 21(5), where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with certain preceding paragraphs of the regulation, be taken in accordance with principles which are then set out at (a) to (e). It is quite clear that this regime provides for the EEA national -- a better position than obtains in connection with those nationals from those countries which I have characterised as "the rest of the world".

8. The regulations to which I have just referred provide for certain appeal rights. It was the exercise of those appeal rights which brought before the Immigration Judge the question of the claimant and his position in this country. His appeal, which was brought pursuant to regulation 26, came to be decided on 23 June 2011. It was preceded by a Notice of Decision dated 21 December 2010, which was headed "Decision to Make a Deportation Order", under which was stated "The Immigration (European Economic Area) Regulations 2006". It was addressed to "Didier Gally, France, 11 June 1979". It went on to indicate that the Secretary of State proposed to give directions for his removal to France. It drew attention to the fact that he had been convicted of robbery. It drew attention to the fact that the Secretary of State considered the offence of which he had been convicted and his conduct fell within regulation 21 of the 2006 Regulations, and that she was satisfied that he would "pose a genuine, present and sufficiently serious threat to the interests of public policy/public security" if he were to be allowed to remain in the United Kingdom and that his deportation was therefore justified under regulation 21.

9. The Notice of Decision document can be taken to go alongside and to supplement a document dated 2 February 2011, headed "Reasons for Deportation", which records of the claimant that he claimed first to have arrived in the United Kingdom in 1993 with his mother to live here and that as an EEA national he would not have been subject to immigration control. The end of the letter drew attention to a right of appeal against the decision under regulation 26 of the 2006 Regulations. It is clear that that material expressed an approach of the Secretary of State predicated upon the claimant's nationality of an EEA state, namely France.

10. A reasoned decision was given on 23 June 2011 by the Immigration Judge of the First Tier

Tribunal (Immigration and Asylum Chamber). The Secretary of State had been represented at the appeal. The decision records:

> "1. The [claimant] says that he was born on 11 June 1979 and that he is a citizen of France. He purports to appeal under regulation 26 of the 2006 regulations .... He says that the respondent's decision is not in accordance with regulation 21 of the Regulations, and that his removal would breach his rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms....
>
> ....
>
> 6. In her closing submissions, Ms Barrow [on behalf of the Secretary of State] raised for the first time the fact that, according to the [Secretary of State's] records, the [claimant] had never produced a valid national identity card or passport to establish his claimed French nationality. There was no evidence that his mother was here in exercise of her Treaty rights and no EEA family permit or other proof that the [claimant] was related to an EEA national. In the circumstances, by reason of the provisions of Regulation 26(2) and (3), the [claimant] had no right of appeal under the Regulations."

It is worthwhile interposing at this point that regulation 26(2) says that if a person claims to be an EEA national he may not appeal under the 2006 Regulations unless he produces a valid national identity card or passport issued by an EEA state. Regulation 26(3) contemplates the person appealing claiming to be a family member or relative of an EEA national, in which case one or other of a number of documents must be produced.

11. Paragraph 9 of the Immigration Judge's reasoned decision records that the claimant said that the police took his passport years ago. They returned it, but he lost it when he as attacked in 2007. He had reported his lost passport to the French Embassy. No one had explained how he could obtain a replacement. In paragraph 10 the Immigration Judge records that the Secretary of State had treated the claimant for some time as though he were a French citizen. Certain details are given as to that.

12. At paragraph 11 the decision says:

> "We have considered the Regulations. It seems to us to be clear that, by virtue of Regulation 26(2) the [claimant] has no right of appeal under the Regulations: he has not produced a valid national identity card or passport. It was suggested at the hearing that a right might arise by reason of his claim to be the family member or relative of an EEA national. However, he has not produced an EEA family

> permit either, and there is no evidence, other than his bare assertion, that he is related as claimed to an EEA National, or indeed that his mother is (or was) a French national, and there is certainly no 'proof' to this effect. Whilst it is unfortunate that the respondent has appeared to accept the [claimant's] claim as to his nationality, going so far as advising him in the refusal letter that he had a right of appeal under the Regulations, this does not alter the situation. We accordingly advised the [claimant] that he had no right of appeal under the Regulations."

It is pointed out in the decision that, had the claimant been able to make an appeal under those regulations, it might have stood some prospect of success. No findings were made one way or another in relation to that.

13. Later the Immigration Judge said this:

"78. In light of our uncertainty as to the accuracy of the [claimant's] account of his circumstances, and what appears to be an attempt to generate evidence to support his claims, we find ourselves in difficulty establishing just what his nationality is. He does appear to have some familiarity with France. The names he has given us are clearly French and he spoke confidently of places in France in which he said he had lived. However, this would be just as consistent with the [claimant] being, for example, of Ivorian nationality, having lived in France (legally or illegally), as with being of French nationality.

79. As with all our findings in this case, we remind ourselves that it is up to the [claimant] to discharge the burden of proof to show that what he says is more likely to be true than not. We do not consider he has done so. We regret -- because we realise that it will make matters more complicated for the future conduct of this case -- that we are unable to make a positive finding in relation to nationality in this case."

14. Finally, immediately before the formal record of the decision, the Immigration Judge said:

"97. The [Secretary of State] must now decide on the future conduct of this case. It seems to us unlikely to be lawful for the respondent to seek to remove the [claimant] as though he were not a French national without first taking a decision to do so under section 32 of the Borders Act 2007 and/or paragraphs 362-364 of the Immigration Rules HC 395 (as amended). If she attempts to remove him as

> though he were a French national and succeeds in obtaining clearance to do so from the French Embassy, the [claimant] may successfully reassert his claim to a right of appeal under the 2006 Regulations. For the reasons we give above, such an appeal, if permitted, might well have a good prospect of success."

15. It is clear from what I have recited that the Secretary of State at the very least drew the attention of the First Tier Tribunal to the question of nationality, whether or not the question taken before the Immigration Judge was limited to the solitary issue of whether the claimant had the relevant documents. It is also clear from other documents that, whilst the claimant may consistently have claimed to be French, in her consideration of this matter the Secretary of State has raised serious questions as to the claimant's nationality. Counsel for the Secretary of State accepts that it cannot be the case that simply because X claims to be French (or any other nationality), it follows X is French (or any other nationality). Indeed, it is recorded on 30 August 2011 that the claimant had been refused a travel document by the French Embassy. It is recorded that, according to their scrutiny, the French Embassy were not in a position to issue the claimant with a travel document as he is not a French national. A detention review, concurrent with that information, records that a signed deportation order would be obtained once the claimant's French nationality was confirmed.

16. Thus at that time the Secretary of State clearly recorded the French authorities as saying that, because he is not French, the claimant could not have a travel document. Further, there are other documents (not all of which I need recite) which make it plain that nationality remains for consideration.

17. A document dated 2 February 2011 records:

> "Nationality has not been established via a document. However, we have considered subject as a French national on two previous occasions. Please now pursue confirmation of his nationality."

That reference preceded the hearing of the appeal before the Immigration Judge, to which I have referred. Subsequent to that appeal, a note dated 2 August 2011 records that its author had read the appeal determination and given special attention to paragraph 97 (to which I have referred earlier in this judgment) which gives direction to the further actions regarding removal. It is open to interpretation owing to the manner in which it is written:

> "What we need to do is to establish his nationality because para 97 warns that if the S of S attempts to remove him as though he were a French national and succeeds in obtaining clearance to do so from the French Embassy, the [claimant] may successfully re-assert his claim to a right of appeal under the 2006 Regulations.

As I read it, if we can establish his nationality we can proceed with deportation action as the S of S will not be removing him as though he was French. She will know that he is French. In light of this, I advise you to wait until we have a response to our request for an ETD [a travel document]. It would be a good idea to prepare the DO [deportation order] and place on file in readiness for a positive response from the French Embassy."

18. Those two documents to which I have just referred can be taken as framing the decision of the Immigration Judge from which I have cited. A document at page 279 of the bundle records that the appeal had been adjourned for certain reasons. It states:

"The judge asked the [claimant] a lot of questions about how he came to the UK, who he lived with, where he went to school and any employment he had undertaken. She indicated that if evidence of his residency was produced the Secretary of State was unlikely to succeed on grounds that it is imperative to public security to remove him from the UK.

....

The Secretary of State was directed to produce all reports into the [claimant's] likelihood of re-offending."

Page 280 records that the appeal was adjourned until 13 June 2011 so that there could be documentary evidence in support of length of residence and ties to the United Kingdom. It goes on to say that bail had been withdrawn as the claimant was not entitled to section 4 support/accommodation as he is an EEA national.

19. Discussion over what precisely was put in issue before the tribunal occurred in this hearing. For the Secretary of State it was indicated that there was a very limited jurisdictional issue. I am not convinced that the precise characterisation of what occurred is strictly necessary for the purposes of this judgment. It was plainly unsatisfactory for a jurisdictional point to be raised when it was. In any event, the discussion plainly ranged beyond merely the question whether the claimant had an identity card or a passport. Questions of nationality were considered. The simple fact is that both before and after the hearing of the appeal the Secretary of State has indicated that nationality is in effect unknown. This is something which persists. Very properly detention reviews (the claimant being in detention) occur on a regular basis. There was a detention review on 30 May 2012. In the review some background is given as to the claimant's assertion that he came to this country in 1993. The history records the refusal of a travel document by the French Embassy as the claimant "is not a French national" (that is underlined). The document continues that in an attempt to identify the claimant's nationality, a request had been sent to Interpol on 15 May 2012 for checks to be conducted in France, Spain, Italy and

Germany. It was said that once the results of the checks were known further action could be taken.

20. At page 333 of my bundle it is recorded:

> "[The claimant] is a prolific offender who has been assessed as a high risk of harm by his offender manager. He has claimed to be a French national. However, the French authorities are not willing to verify him as a French national with the scant information given."

21. The following day, in a document (at page 334) dated 30 May 2012, its author agreed with the preceding comments and records:

> "We are making considerable efforts to substantiate [the claimant's] claims to French nationality and are clearly committed to deportation."

22. In those circumstances the following points seem to me to be indisputable:

(1) It cannot be correct for the Secretary of State to hold simultaneously two entirely variant views as to nationality, especially in circumstances when one asserted view as to nationality of an EEA state precludes an opportunity for consideration of support which bears on the question of liberty, and the other asserted view precludes, or assists in precluding, an ability to appeal under regulations giving effect to the status of EEA nationals.

(2) The question of support under section 4 is contingent on the nationality of the claimant, not his claimed nationality, which may be different or may be wrong. It is worth bearing in mind the particular statutory words. Paragraph 1 applies to a person if he <u>has</u> the nationality of an EEA state other than the United Kingdom. This is not a matter of the statutory words indicating that paragraph 1 applies to a person if he <u>claims to have</u>. Further, it is not a question of the statutory words applying to a person who <u>may have</u> the nationality of an EEA state. Paragraph 1 applies to a person if he <u>has</u> the nationality of an EEA state.

(3) It is possible that support can be withheld or withdrawn. The relevant schedule of the Nationality, Immigration and Asylum Act 2002 is headed "Withholding and Withdrawal of Support". In other words, it is perfectly possible that someone's status could change, leading to (if the circumstances were such as to allow this to occur) the possibility of a withdrawal of support which might otherwise have been forthcoming. Thus, a non-EEA national may become an EEA national, or vice versa, with consequential effects upon the support which is provided.

(4) The Secretary of State cannot at the moment, in the light of the expressed and

> recorded position, contend that the claimant is precluded from using section 4 by virtue of being an EEA national, when that is questioned by the Secretary of State and effectively repudiated by the only EEA state under consideration, namely France.

23. Accordingly, I consider it plain that, when granting permission, Mr Dove (sitting as a Deputy High Court Judge) put his finger on the nub of the matter when he observed:

> "... in order to have exercised the power in the way that she did, the [Secretary of State] had to be satisfied that the claimant 'has the nationality of an EEA State other than the United Kingdom'.... In the light of the conclusions of the First Tier Tribunal and the submissions in .... the Acknowledgement of Service it is at least arguable that it is difficult to see on what evidential basis the [Secretary of State] reached that conclusion other than relying on the uncorroborated assertion of the claimant that the First Tier Tribunal had rejected."

24. Indeed, having heard that argument now, it appears to me clear that the circumstance is one whereby the Secretary of State had not and has not arrived at any definitive view as we sit here today in August 2012. It follows that the application for judicial review must therefore succeed. There is a clear, prejudicial error of law, namely reliance on French nationality for one purpose whilst simultaneously questioning such nationality when such nationality has, in fact, been denied by the French, and utilising, or at least appearing to utilise, the want of nationality to undermine a statutory appeal.

25. Declaratory relief is sought. Some discussion occurred in the course of argument as to the character of that declaratory relief. I cannot decide the nationality of the claimant; it is still to be determined. However, it cannot presently be said by the Secretary of State that he has the nationality of an EEA state other than the United Kingdom. The statutory words are as I have read out. They do not embrace the possibility of the statutory words being interpreted as he may have the nationality of an EEA state, which is in effect the character of the reading of these words by the Secretary of State.

26. Accordingly, I propose to make the following declaration, which has been agreed by counsel:

> (1) The defendant acts unlawfully in treating the claimant as an EEA national for the purposes of his application for support under section 4(1)(c) of the Immigration and Asylum Act 1999, in circumstances where his nationality has yet to be established for the purposes of his proposed deportation.
>
> (2) Unless and until such time as the defendant has confirmed that the claimant is a national of France (or, if it be the case, another EEA state) she acts unlawfully in asserting that the claimant is precluded from support under section 4(1)(c) on the

grounds that he has the nationality of an EEA state other than the United Kingdom.

(3) The decisions of 19 April 2011 and 23 August 2011 refusing the claimant support on the basis identified at (2) above were unlawful.

That declaration will be put into the formal order. Is it proposed that you will draw up the order and hand it in to the associate?

MR DENHOLM: My Lord, I am entirely in the court's hands. If that is convenient to the court, I will do that.

THE DEPUTY JUDGE: It might be convenient for the court, especially as you have on your machine the proposed declaration. Thank you.

MR DENHOLM: My Lord, might I raise two other consequential matters? We seek our costs, simply on the basis that costs follow the event.

THE DEPUTY JUDGE: Yes.

MR DENHOLM: And we would also seek an order for a detailed assessment of the claimant's costs.

THE DEPUTY JUDGE: Yes. Subject to what your learned friend says about that, I would have thought that that follows.

MR RAWAT: Yes, it does.

THE DEPUTY JUDGE: Thank you very much. That is all very straightforward then. Thank you. Is there anything else which arises?

MR RAWAT: I think not.

THE DEPUTY JUDGE: Very well. Thank you very much.
