C4/2004/1117

Neutral Citation Number [2004] EWCA Civ 1468
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE COLLINS)

Royal Courts of Justice
Strand
London, WC2

Monday, 11 October 2004

B E F O R E:

LORD JUSTICE MUMMERY

LORD JUSTICE MAURICE KAY

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THE QUEEN ON THE APPLICATION OF "D"

Claimant/Appellant

-v-

SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant/Respondent

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(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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MR R DE MELLO (instructed by Twigg Farnell Burton & Burton of Nottingham) appeared on behalf of the Appellant
MR T WARD (instructed by Treasury Solicitor) appeared on behalf of the Respondent

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

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1. LORD JUSTICE MAURICE KAY: On 4 May 2004 Mr Justice Collins refused the applicant permission to apply for judicial review. The proposed challenge was to Regulations which affect the position of nationals of certain States which had acceded to membership of the European Union on 1 May 2004.

2. The applicant is a citizen of Latvia. He arrived in this country on 25 May 2002 and claimed asylum. His claim was refused by the Secretary of State for the Home Department and a subsequent appeal to an adjudicator was dismissed on 23 September 2002. He has remained here. On 1 May 2004 Latvia became a member of the European Union. The applicant wished to avail himself of the assistance of EU law in his search for work. At the time of the hearing before Mr Justice Collins the applicant had not succeeded in finding employment but since 2 July 2004 he has been in work. The present dispute relates to the interplay of EU law and domestic legislation passed shortly before 1 May which is designed to modify the application of EU law during a transitional period following the enlargement of the Union.

3. In order to understand the context, it is necessary to begin with some of the basic provisions of EU law which led to the transitional modification. By Article 12 of the EC Treaty, formerly Article 6, it is provided:

> "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

Article 39, formerly Article 48, then provides as follows:

> "1 Freedom of movement for workers shall be secured within the Community.
>
> 2 Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3 It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
>
> (b) to move freely within the territory of Member States for this purpose;
>
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
>
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission."

4. That basic provision is augmented by Council Regulation (EEC) No 1612/68. The first six articles of the Regulation come under the title "Eligibility for Employment". They include this provision in Article 1.1:

> "Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State."

Article 1.2 states:

> "He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that member State."

Article 7 of the Regulation comes within a title headed "Employment and Equality of Treatment". Its subject matter is "The Workers". Article 7 provides:

> "1 A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.
>
> 2 He shall enjoy the same social and tax advantages as national workers."

5. Ten new Member States acceded to membership on 1 May. Eight of them were formerly part of the Eastern Bloc and are referred to as the "A-8 countries". They include Latvia.

6. I turn to the Treaty of Accession. The relevant transitional provisions are to be found in Annex V. The appropriate parts of that Annex read as follows:

> "1 Article 39 ..... of the EC Treaty shall fully apply only, in relation to the freedom of workers and the freedom to provide services involving temporary movement of workers ..... between ..... on the one hand ..... Latvia ..... and the United Kingdom on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 14.
>
> 2 By way of derogation from Articles 1 to 6 of Regulation (EEC) No 1612/68 and until the end of the two year period following the date of accession, the present Member States will apply national measures, of those resulting from bilateral agreements, regulating access to their labour markets by [Latvian] nationals. The present Member States may continue to apply such measures until the end of the five year period following the date of accession.

[Latvian] nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures.

> [Latvian] nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights .....
>
> ..... "

7. In anticipation of transitional difficulties, domestic secondary legislation was passed in the days leading up to accession. By the Social Security (Habitual Residence) Amendment Regulations 2004, provision is made in relation to State benefits including Jobseeker's Allowance. Regulation 4 inserts into the Jobseeker's Allowance Regulations a new paragraph (4B) which is in these terms:

> "In paragraph (4), for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland."

Thus only a person who is in this country by virtue of a grant of leave to enter or remain under the immigration legislation, and in respect of which there is a correlative right to work, may qualify.

8. By the Accession (Immigration and Worker Registration) Regulations 2004, an accession state worker, that is one who has obtained employment, is required to register and pay a £50 fee. The relevant provisions are to be found in Regulations 2 and 4 of those Regulations.

9. The applicant's position is that prior to 1 May his continuing presence here was in the status of a failed asylum seeker who had not been removed. He did not have leave to remain or the right to work. After 1 May he was here as a national of a Member State. What is first said on his behalf is that when seeking work he was entitled to do so on the same basis as other citizens of the EU and that that includes access to State benefits, in particular Jobseeker's Allowance, to assist him in his quest. Mr de Mello submits that the domestic measures go beyond the permitted scope for derogation and that they are discriminatory, disproportionate and contrary to EU law.

10. In support of these submissions reliance is placed on the recent decision of the European Court of Justice in <u>Collins v Secretary of State for Work and Pensions</u> (23 March 2004), Ref. C-138/02. Mr Collins had dual American and Irish citizenship and was therefore a national of a Member State. He returned to the United Kingdom after a gap of many years and sought employment. He applied for, but was refused,

Jobseeker's Allowance. In answering one of the questions posed by the reference, the European Court of Justice said in paragraphs 59 to 63:

> "59 Article 2 of Regulation No 1612/68 concerns the exchange of applications for and offers of employment and the conclusion and performance of contracts of employment .....
>
> 60 It is true that those articles do not expressly refer to benefits of a financial nature. However, in order to determine the scope of the right to equal treatment for persons seeking employment, this principle should be interpreted in the light of other provisions of Community law, in particular Article 6 of the Treaty .....
>
> .....
>
> 63 In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48 (2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State."

11. Mr Justice Collins refused permission to apply for judicial review in the circumstances that were before him. He described the submission made to him and his response to it in these terms:

> "27 So, Mr Gill submits, ... that once it is accepted that members of the eight states are entitled to access the labour market they cannot be discriminated against in connection with benefits of a financial nature which are intended to facilitate access to employment. Those, it is said, must include support which enables them to remain in this country in order to seek that employment, because if they do not have that support they will not be able to exercise their right, so it is said, to seek employment.
>
> 28 With individuals who are not able to be discriminated against in their access to the labour market, that is undoubtedly correct. It is far from clear to me that the meaning of the word 'worker', particularly when one looks at the 1612/68, has a meaning that necessarily extends in all circumstances to cover a person who is seeking work. Assuming that it does and assuming that <u>Collins</u> extends it that far still, as it seems to me, the fundamental principle is that the annex permits discrimination against access to the labour market of this country and that must include discrimination which relates to the provision of benefits in order to entitle that access to be carried out. It is, quite apart from anything else, a perfectly permissible means of avoiding benefit tourism. Thus, it is clearly proportionate.

> 29 Accordingly, the permission for discrimination must extend, in my view, to that discrimination. Article 7.2 will come into play if employment is achieved. Then there must be no discrimination because the persons become, once they are in the labour market, formally members of that labour market.
>
> 30 Once one accepts that there is discrimination that can be put in place in relation to access, then it seems to me the argument raised by Mr Gill, important though it no doubt is, really falls away."

12. The second complaint sought to be advanced on behalf of the applicant in this court, which was not considered by Mr Justice Collins, is that now that the applicant has employment the Regulations still discriminate against him unlawfully. The present application to this court is put in a number of ways but they all raise the central question of whether the domestic legislation, that is to say the 2004 Regulations, is more discriminatory than is permissible under the EC Treaty (Regulation 1612/68) and the Treaty of Accession. Mr de Mello made a number of submissions to this court dealing with the factual position as it existed before Mr Justice Collins and with the present factual position where the applicant is now employed.

13. In my judgment, those submissions do not raise any point with a real prospect of success for the following reasons. First, as regards the period 1 May to 1 July when the applicant was seeking work, it is abundantly clear, as Mr Justice Collins held, that the position fell four-square within the permitted derogation. At that stage the applicant could not bring himself within Article 7.2 of Regulation 1612/68 because he was not "a worker". The European Court of Justice decided as much in Collins. When the present case was before Mr Justice Collins Article 12 of the EC Treaty did not feature in the oral submissions although it had been foreshadowed in the pleadings. I do not consider that it avails the applicant in relation to the period 1 May to 1 July. Article 12 is stated to be "without prejudice to any special provisions contained in" the Treaty. Article 39 is one such special provision. It, in turn, has given birth to Regulation 1612/68. The Treaty of Accession permits derogation from Articles 1 to 6 of that Regulation. The domestic Regulations of 2004 are a permissible derogation. The contrary is simply not arguable. I entirely agree with the passage from the judgment of Mr Justice Collins which I have set out earlier.

14. Secondly, the position which arises now that the applicant has employment is equally clear. So long as he retains that employment he is not the subject of any discrimination. He has the same employment rights and rights to benefits - for example income support as appropriate - as others. I shall return to the point about registration later. If he remains employed for an uninterrupted period of 12 months he will receive the benefit of that time qualification. Mr de Mello's complaint is that if he ceases to be employed before the expiration of the 12 months he will be discriminated against on the grounds of his nationality. Mr de Mello again seeks to rely on Article 7.2 of Regulation 1612/68 and Article 12 of the EC Treaty.

15. As to Article 7.2, there is an obvious fallacy in Mr de Mello's submission. If the applicant ceases to be employed he will no longer be "a worker" within the meaning of

Article 7.2; if it is within the 12-month period he will revert to the position which applied in May and June. In other words, he will fall expressly within the permitted derogation. So far as Article 12 of the EC Treaty is concerned, it is powerless to protect him for the same reasons to which I have already referred.

16. Thirdly, although I have seen fit to consider and reject the submission relating to the possibility of a loss of employment within the 12-month period, it was perhaps somewhat generous to consider it at all. Not only was it outside the scope of what Mr Justice Collins was asked to consider, it is a wholly hypothetical question. Mr de Mello submits that the applicant has "sufficient interest" within the meaning of Section 31 (3) of the Supreme Court Act 1981. I am unconvinced about that. If the applicant remains in uninterrupted employment for 12 months he will have no grievance to litigate. I am unpersuaded that he should be permitted to litigate now when the apprehended circumstances are so hypothetical. However, I have said my primary concern is that the application has no arguable merit.

17. Fourthly, I acknowledge that the complaint about registration and the accompanying fee is not hypothetical. It arose when the applicant obtained employment on 2 July. Undoubtedly it is discriminatory on grounds of nationality. However it has to be viewed in context. The purpose of the registration scheme is to enable the Secretary of State to monitor and control those falling within the derogation. Until he has worked for an uninterrupted period of 12 months, the Secretary of State has a continuing interest in the circumstances of the applicant. At the end of such a 12-month period the registration requirement will cease to apply; (see Regulation 2.4 of the Accession (Immigration Worker Registration) Regulations 2004). The registration scheme is a reasonable and proportionate concomitant of the permitted derogation. The contrary is not arguable.

18. For all these reasons I consider the present application to be unarguable, nor do I find any other compelling reason for granting permission.

19. I would therefore refuse the application.

20. LORD JUSTICE MUMMERY: I agree for the reasons given by my Lord.

Order: Application refused with the costs subject to detailed assessment.