SUTHENDRAN V. IMMIGRATION APPEAL TRIBUNAL [1977] AC 359; [1976] 3 ALL ER 611

COURT: House of Lords

DECIDED ON: 27th October, 1976

BENCH: Lord Russell of Killowen

FACTS:

The appellant, a citizen of Sri Lanka was granted leave to enter the United Kingdom and to remain for twelve months, on the condition that he did not enter into any employment. On 23rd July 1973, the appellant entered the United Kingdom in order to study an engineering course at South East London Technical College. However, he did not attend the college but started working. In June 1974, he became a nursing assistant at Princess Marina Hospital, Northampton. On 23rd July 1974, the hospital applied for a work permit for him. The application was refused by the Secretary of State and on 13th May 1975 the appellants appeal under s 14(1) of the Immigration Act 1971 was dismissed by an adjudicator. On 20th May the hospital asked that the appellant should be allowed to remain in order to complete his training as a pupil nurse. On 17th June the Secretary of State refused that application and gave the appellant leave to stay till 17th July so that he could make arrangements to leave. On 18th June, the appellants' application for leave to appeal against the dismissal of his appeal by the adjudicator was refused by the Immigration Appeal Tribunal. On 16th January 1976 an adjudicator allowed the appellants appeal against the Secretary of State's decision on 17th June 1975 but in June 1976 his decision was reversed by the tribunal which allowed an appeal by the Secretary of State on the grounds that since the appellants limited leave had expired on 23rd July 1974, he was not within s 14(1) of the Act and therefore did not have right of appeal under s 14(1) to the adjudicator. The appellant applied for an order of certiorari to quash the tribunals decision, contending that the words 'person who has a limited leave' meant anyone who has been given limited leave to enter the United Kingdom, even though the period of leave had subsequently expired.

ISSUE:

Appellant Jayaratnam Suthendram appealed pursuant to leave granted on 7th July 1976 by the appeal committee of the House of Lords against the decision of the Court of Appeal (Lord Denning MR, Orr and Walter LJJ) dated 25th June 1976 whereby they the appellants application was dismissed for an order of certiorari to quash the determination of the Immigration Appeal Tribunal given on 4th June allowing an appeal by the Secretary of State for Home Affairs against a decision of the adjudicator (W Parker Esq) on 16th January whereby he allowed the appellants appeal against the Secretary of States refusal on 17th June 1975 to vary the appellants leave to remain in the United Kingdom.

RULES:

IMMIGRATION ACT 1971, S 14(1)

Subject to the provisions of this Part of this Act, a person who has a limited leave under this Act to enter or remain in the United Kingdom may appeal to an adjudicator against any variation of the leave (whether as regards duration or conditions), or against any refusal to vary it; and a variation shall not take effect so long as an appeal is pending under this subsection against the variation, nor shall an appellant be required to leave the United Kingdom by reason of the expiration of his leave so long as his appeal is pending under this subsection against a refusal to enlarge or remove the limit on the duration of the leave.

The words 'a person who has a limited leave' in s 14(1) applied only to a person who at the time he lodged his appeal was lawfully in the United Kingdom. There was nothing in s 14(1) or the other provisions of the 1971 Act which required or indicated that the word 'having' should be read as 'having had', and accordingly, if an application to vary a limited leave were refused after the leave had expired, the applicant would have no right of appeal. The Secretary of State had no powers in in relation to a person whose limited leave had expired before making an application, although he could grant a new leave to remain. Since the appellant's application was made nearly a year after his limited leave had expired, his purported appeal from the refusal to vary it had no standing and the appellant for certiorari would accordingly be refused

CASES REFERRED IN THE JUDGMENT

- Becke v Smith (1836)[1]
- Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG[2]
- R v Immigration Appeal Tribunal, ex parte Subramanian p 604, ante,[3]
- R v Inhabitants of Banbury[4]

APPLICATION:

- The Immigration Act 1971 regulates the entry into and stay in the United Kingdom of persons who do not have the right of abode in the United Kingdom. That right may be acquired by a citizen of the United Kingdom and Colonies who has at any time been settled in the United Kingdom and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last years or more (s.2(1)(c)). The power of give or to refuse leave to enter the United Kingdom is exercised by immigration officers and the power to give leave to remain in the United Kingdom or to vary any leave to remain in the United Kingdom (whether as regards duration or conditions) by the Secretary of State (s 4(1)). A would-be immigrant refused leave to enter may appeal to an adjudicator against a decision that he requires leave or against the refusal of leave (s 13(1)).

- Section 14 deals with appeals against conditions and s 14(1) reads allows: 'Subject to the provisions of this Part of this Act, a person who has a limited leave under this Act to enter or remain in the United Kingdom may appeal to an adjudicator against any variation of the leave (whether as regards duration or conditions), or against any refusal to vary it; and a variation shall not take effect so long as an appeal is pending under this subsection against the variation, nor shall an appellant be required to leave the United Kingdom by reason of the expiration of his leave so long as his appeal is pending under this subsection against a refusal to enlarge or remove the limit on the duration of the leave.

[1] 2 M & W 191, 2 Gale 242, 6 Lex 54, 150 ER 724, 44 Digest (Repl) 213, 270.
[2] [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, [1975] 2 Lloyd's Rep 11, HL, Digest (Cont Vol D) 108, 1591a.
[3] [1976] 3 WLR 630, CA; [1976] 1 All ER 915.
[4] (1834) 1 Ad & El 136, 3 Nev & MKB 292, 2 Nev & MMC 210, 3 LJMC 76, 110 ER 1159, 31(2) Digest (Reissue) 870, 7216.

- From the decision of an adjudicator an appeal lies to the Immigration Appeal Tribunal only with the leave of the adjudicator or of the tribunal (s 20(1), and the Immigration Appeals (Procedure) Rules 1972

- The appellant not having right to abode in the UK, could only – "live, work and settle in the United Kingdom by permission and subject to such regulation and control of his entry into, stay in and departure from the United Kingdom as is imposed by this Act"

- Section 3(1) provides that – Except as otherwise provided by or under this Act, where a person is not partial (a) he shall not enter the United Kingdom unless given leave to do so in accordance with this Act (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period (c) if he is given a limited leave to enter or remain in the United Kingdom, it may be given subject to conditions restricting his employment or occupation in the United Kingdom, or requiring him to register with the police, or both.

- It was argued that under s 14 if "having" in these subsections had to be construed as meaning 'having had', then 'having' in s 14(1) should be similarly construed. In both these subsections the context clearly shows that for them to operate, 'having' must be read as including 'having had'. The Judge see's nothing in s 14(1) that requires or indeed indicates that a similar inference should be drawn. It would indeed be surprising if a person not a partial who was liable to deportation and to prosecution for remaining in this country beyond the period for which he had expired against a refusal to extend it. If s 14(1) applied to such a person, proceedings for deportation would by virtue of that subsection be held up so long as the appeal was pending.

- It was pointed out in argument that though a person who had a limited leave might apply for its extension during the currency of his leave, the refusal of his application might not occur until after his leave had expired, in which case on this construction of s 14(1) he would not have a right of appeal. It did not happen in this case. If it did happen the person concerned would have a legitimate grievance. Failure to provide for this possibility is a flaw in the 1971 Act, but the existence of this flaw does justify

reading s 14(1) so as to give all those who had leave to be in this country, but whose leave has expired and who are consequently illegally here, a right of appeal against a refusal to extend the period for which leave was granted, however long ago it was that that period expired. There is nothing in s 14 as there is in ss 3(5) and 24(1) to indicate that any meaning other than the literal one has to be given to the word 'has'. To read that word in that subsection as meaning 'has or had' might well be ascribing to Parliament an intention quite contrary to that which Parliament in fact had and would not be interpreting the language of a statute, but, to remedy a flaw in the 1971 Act, encroaching on the province of the legislature.

- If a case occurs when the Secretary of State's decision is given after have has expired though the application to vary was made during the currency of the leave, there is nothing to stop the Secretary of State from granting the applicant leave to remain in this country for a period sufficient to enable him to lodge his appeal. Such a grant would bring the applicant within s 14(1). The consequence of the Secretary of State doing this would give the applicant a right to apply for an extension of the leave granted and to appeal if that is refused, but that does not seem of great moment if the application was made during the currency of the leave first granted.

- The judge held that he see's nothing in the other provisions of the 1971 Act to lead to the conclusion that the view formed on conclusion of s 14(1) by itself is wrong; so, thus the appellant whose leave to be here expired on 23rd July 1974 was not entitled to appeal against the Secretary of State's decision of 17th June 1975 to refuse the application made on his behalf on 20th May 1975.

- Therefore, the decisions of the Divisional Court n1 and of the Court of Appeal n2 in R V Immigration Appeal Tribunal, ex parte Subramanian were right and this appeal should be dismissed.

CONCLUSION

The words 'a person who has a limited leave' in s 14(1) applied only to a person who at the time he lodged his appeal was lawfully in the United Kingdom. There was nothing in s 14(1) or the other provisions of the 1971 Act which required or indicated that the word 'having' should be read as 'having had', and accordingly, if an application to vary a limited leave were refused

after the leave had expired, the applicant would have no right of appeal. The Secretary of State had no powers in relation to a person whose limited leave had expired before making an application, although he could grant a new leave to remain. Since the appellant's application was made nearly a year after his limited leave had expired, his purported appeal from the refusal to vary it had no standing and the appellant for certiorari would accordingly be refused. No further extension for stay was granted.