Case No: C2/2015/4069

[2018] EWCA Civ 3136

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 21 June 2018

Before:
LORD JUSTICE LONGMORE
LADY JUSTICE KING

Between:

QURESHI & ANOR

Appellants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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The **Appellants** appeared in person

Mr V Mandalia (instructed by the Government Legal Department) appeared on behalf of the Respondent

Judgment

APPROVED

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Lady Justice King:

1. This is an appeal by Mr Abdul Qureshi ("the appellant") from the order made on 29 September 2015 by Upper Tribunal Judge Rintoul, and whereby he refused permission for the appellant to apply for judicial review of the Secretary of State for the Home Department's ("SSHD") refusal to grant the appellant leave to remain in this country. The order was made on 16 August 2014.

2. The parties are in agreement that there was a serious procedural irregularity, a consequence of which the Upper Tribunal wrongly considered the appellant's application for permission to apply for judicial review in his absence. The issue before this court is whether the matter should be remitted to the Upper Tribunal in order for the appellant, and his wife (who is now a party to these proceedings), to make his application before the Upper Tribunal in the normal way or whether, as proposed by Mr Qureshi and his wife, the court should now grant him permission to take judicial review proceedings (opposed by the Secretary of State by way of a respondent's notice) by which it sought to uphold the decision of the Upper Tribunal, notwithstanding the absence of the appellant at that hearing.

Background

3. The appellant is a Pakistani national who was born on 1 January 1975 and, at the time of this hearing, is 43 years of age. He came to the UK on 17 December 2006 with entry clearance as a visitor valid for six months. This leave expired on 17 May 2007 and since that time, the appellant has remained in the UK as an overstayer. On 18 June 2010, the appellant applied for a certificate of approval to marry a Romanian national. This application was refused on 12 March 2011 on the basis that there was no evidence demonstrating that the couple were in a genuine and subsisting relationship. The following year, on 23 December 2011, the appellant married his current wife, Ms Debbie Jane Shakoor. Mrs Shakoor is a British national and has lived all her life in this country. There are no children of the marriage.

4. On 8 February 2012, the appellant's solicitor applied on his behalf for further leave to remain in the UK on the basis that the appellant was now married to a British citizen. The application and accompanying letter provides that the appellant sought leave to remain on the basis of his right to a private life and family life under Article 8. It says that this leave was sought outside the Immigration Rules. By a letter dated 23 April 2013, the SSHD refused the application. In short, the basis of refusal was that:

    i) The SSHD was not satisfied that there were "insurmountable obstacles" to continuance of his family life with his wife in Pakistan; and

    ii) That he did not meet the eligibility requirements for leave to remain on the grounds of private life in the UK, and the SSHD was not satisfied that he would experience significant hardship in reintegrating into life in Pakistan. The refusal further confirmed that it did not afford the appellant the right to appeal against this refusal, as he did not have leave to remain at the time he had made his application in February of 2012.

5. In July 2012, the Secretary of State put before Parliament a statement of changes to the Immigration Rules. A number of those changes took effect on 9 July 2012, that is to say after the date of the appellant's application for leave to remain but before the Secretary of State's decision. The changes brought about by these rules, for the purposes of this matter, relate to the provisions of family and private life. A number of transitional provisions govern the interaction between the amended rules and the existing rules. On 1 July 2013, the appellant filed his first application for permission to apply for judicial review. He sought to challenge the decision on these bases:

   i) That his application should have been considered under the Immigration Rules in force prior to 9 July 2012;

   ii) That there was a failure to provide sufficient reasons for the refusal under Article 8; and

   iii) That the refusal ought to be by way of an appealable immigration decision within the meaning of section 82 of the Nationality, Immigration and Asylum Act 2002.

6. On 3 February 2014, HHJ David Cooke granted permission in relation to the failure to consider the application under the pre-July 2012 Immigration Rules. He regarded the ground challenging the alleged failure to make an appealable immigration decision as unarguable. The hearing was duly listed, and the parties engaged in correspondence in the weeks leading up to the hearing. A consent order was consequentially approved by the court on 13 June 2014 whereby the Secretary of State agreed to reconsider the appellant's application for leave to remain within the next three months. Upon reconsideration by the Secretary of State, a further letter was sent to the appellant's solicitors dated 16 August 2014 whereby the Secretary of State maintained his decision. Again, in summary only, the reasons for refusal were:

   i) Once again the Secretary of State was not satisfied on the evidence that there were insurmountable obstacles to family life continuing with the appellant and his wife outside the UK and that, whilst such a relocation might cause a degree of hardship for the appellant's wife, it would not be classified as "very serious";

   ii) He did not meet the eligibility requirements for leave to remain on the grounds of private life, and the Secretary of State was not satisfied that the appellant would experience very significant obstacles to his integration in Pakistan;

   iii) The application did not demonstrate "exceptional circumstances" to warrant the grant of leave to remain outside the Immigration Rules and consistent with Article 8, as he had provided no evidence by then in relation to his father-in-law's alleged disability and failing health or as to his role as a carer in relation to him, matters upon which he relied in support of his application;

   iv) As with the previous decision, this decision did not afford the appellant a right of appeal.

7. As a consequence, on 11 September 2014 a pre-action protocol letter was sent to the Secretary of State to "genuinely reconsider the application under the pre-July 2012

rules in line with the spirit of the consent order which had been agreed". By a letter dated 26 September 2014, the Secretary of State rejected the request. The appellant, accordingly, filed an application in the Upper Tribunal on 15 November 2014 to apply for permission to apply for judicial review of the reconsidered decision. It is these proceedings that form the basis of the present appeal. Permission to apply for judicial review was refused on the papers on 11 June 2015 by Upper Tribunal Judge Perkins. The appellant therefore made an application to renew his application for permission at an oral hearing. For the purposes of this brief judgment it is not necessary to set out the competing arguments made by each of the parties on paper in anticipation of that hearing.

8. On 30 July 2015, the appellant's wife made an application to the Upper Tribunal to be joined as a party to the proceedings. The court returned that application seeking an explanation of her relationship with the appellant which was confirmed by letter and the application resubmitted. The application was once again returned on the basis that the application had to be made by the appellant on his wife's behalf. The appellant, however, was advised that this was not the case and accordingly the application was once again sent to the court explaining why it was being resubmitted. On 4 September 2015, Mrs Shakoor upon chasing the court in relation to her application was informed via a voicemail message that the application had not been received and that she would have to send it in again or, to be sure, she would need to travel down to London and file the application in person. Mrs Shakoor called the court again on 7 September supplying a recorded delivery tracking number, but no one was able to trace her application to become a party. The next day, on 8 September, she again received a voicemail message, this time advising her that the application had been received by the court some days ago on 2 September but that the court could not accept her application because the appellant was required to make it on her behalf.

9. It was against this frustrating backdrop that on 11 September 2015, the appellant wrote to the court requesting an adjournment of the oral hearing which was now listed for 24 September 2015. On 11 September 2015, therefore, the appellant made an application for an adjournment in order that his wife could be joined as an interested party. It does not appear that there was any response to that application, although it was, it would appear, brought to the judge's attention. According to the appellant's statement, during the days leading up to the hearing he was increasingly unwell as a consequence of experiencing side effects from medication that he was on. He telephoned the court on 18 September to ask that the proceedings be adjourned and to have the case relisted on medical grounds. He was advised to "put it in writing". The appellant, therefore, drafted a letter attaching medical evidence which was sent to the court manager the following day, 19 September, via first class post. The appellant was told that, as the hearing was still two weeks away, this letter would be put before the judge and directions would be issued. If more information were required, the court would contact him. No further contact was made, and only the initial letter of 11 September was put before the court.

10. By the time of the hearing, the Secretary of State believed that the appellant had been granted leave to remain in Ireland he, having been detected leaving the UK for Belfast, and his biodata had been detected following a query from the Republic of Ireland. It was said, therefore, to the Upper Tribunal that his whereabouts were unknown and that the application for permission to launch judicial review

proceedings was academic. The matter was, therefore, heard in the absence of the appellant. The judge gave a brief judgment:

> "1. This is JR/13821/2014. The applicant is not present but it appears from the correspondence handed up by Government Legal Department that the Home Office's records indicate that the applicant has left the United Kingdom, as he has been given leave to remain in Ireland. Whilst there was an application for an adjournment made in writing on 11 September, to which it does not appear there was any repsonse, the applicant or his representative should have attended here today as he could not have concluded that his adjournment request had been granted. The request to adjourn was so that his wife could be joined as an interested party, but there appears no purpose to that application in the circumstances of this case. It does not explain the absence of representation today.
>
> 2. In the circumstances, the challenge to the decision to refuse him leave to remain in the United Kingdom is now entirely academic, and further, and, in any event, even if he had not left the United Kingdom, the arguments put forward on his part are without merit or substance, given that the challenge is to the effect of the Immigration Rules. In the light of the decision of the Court of Appeal in *Singh & Khalid v SSHD* [2015] EWCA Civ 74, that argument is no longer in any way sustainable, and accordingly I refuse permission.
>
> 3. Permission to appeal to the Court of Appeal is refused. That concludes that matter."

11. The brief judgment translated into a summary of reasons contained within the order, which said:

> "1. I am satisfied that the applicant had due notice of the time, date and venue of the hearing. He has provided no reason for failing to attend. While he did request an adjournment in order that his wife be joined as an interested party, he received no indication from the Upper Tribunal that his request had been approved. Further, it appears from correspondence from the respondent's solicitors that the applicant has left the United Kingdom. In the circumstances, I was not satisfied that it would be in the interests of justice to adjourn the hearing.
>
> 2. I am satisfied that the applicant has voluntarily left the United Kingdom and no longer wished to pursue his application, which is now academic."

12. The appellant appealed this decision on 1 December 2016, and Sir Stephen Silber granted permission in these terms:

> "1. I have granted permission to appeal because of the evidence shown that on account of his health issues, the appellant had made efforts to get his case relisted before the hearing on 24 September 2015, and he

> had written to the court manager. These documents were not considered before the Upper Tribunal judge who heard the application on 29 September 2016.
>
> 2. I invite the parties to agree within 14 days to the remittal of the matter to the Upper Tribunal."

13. The appellant agreed to this course of action in an email to the Secretary of State and to the court on 7 December 2016 but received no response.

14. The Secretary of State sought clarification as to precisely the scope of the anticipated appeal. This was confirmed to be limited to an anticipated remitting of the matter to the Upper Tribunal for the hearing of the oral application only and not a state of affairs whereby the full judicial review would be listed. That clarification having been received, the Secretary of State sent a proposed consent order to the appellant on 6 January 2017, which provided for the appeal to be allowed and the application for permission to be remitted to the Upper Tribunal in due course. By that time, however, the appellant had received a letter from the Court of Appeal giving a listing window, informing them that the matter would now be listed for appeal. The appellant, through the medium of his wife, refused therefore to have the matter remitted and, as they explained in a letter to the Court of Appeal dated 14 February 2017, given the woeful procedural history to date they were pleased to anticipate that the Court of Appeal would now hear their application and determine their case.

15. The court's attention has been brought today to a further letter, sent to the parties on 22 March 2017, which seems to me to give some insight and understanding as to what is clearly a misunderstanding on the part of the appellants as to precisely what it is intended that this court could or should do today. The letter said as follows: "The Government Legal Department has filed an application seeking an order for remittal of the matter to the Upper Tribunal for an oral permission hearing. The application", said HM Courts and Tribunal Service, "is misconceived and will not be issued". The letter goes on to say:

> "The appellant is within his rights to choose not to agree to remit the question of granting permission to bring judicial review to the Upper Tribunal, and he has done so. This is currently a full appeal on the question of whether permission to bring a judicial review should be granted. If successful, the appeal will be allowed and permission to bring a judicial review will be granted, and the judicial review itself will be remitted to the Upper Tribunal."

16. Two things arise out of that letter. First of all, it is misleading in its substance because all that Sir Stephen Silber had given permission to was in relation to the procedural irregularity. The second matter is that Mrs Shakoor was under the misapprehension that what was being invited by the next part of the letter was that the Secretary of State should agree to permission being given, so that only the judicial review itself would be remitted because in the final part of the letter it says as follows, "The parties may however wish to consider approaching allowing the appeal by

consent and remitting the judicial review to the Upper Tribunal". One can easily see why that misapprehension was attained by the appellants, who are litigants in person.

17. On 24 July 2017, the matter not having been resolved, the Secretary of State filed a respondent's notice saying that the Secretary of State had proposed that the appeal be allowed, that the appeal is now in any event academic as the appellant is out of the country, and "Further, or in the alternative, the appellant's grounds for judicial review are not properly arguable".

18. Finally, in respect of the tortuous procedural route which has led to this matter coming to court today, on 24 April 2018, nearly three years after she first attempted to make her application, the wife was joined as a party.

Discussion

19. The Secretary of State wishes to dispose of the matter today. By their respondent's notice, they say the result is inevitable and that permission will be refused judicially to review the decision of the Secretary of State. As I indicated, they filed a respondent's notice and a skeleton argument in which they set out their reasons. The appellant and his wife have lost confidence with the process and in particular with the administration of the Upper Tribunal. They would like the Court of Appeal to make a decision that permission should be granted today. Further, they emphasise strongly the letter of 22 March 2017 which, they say, in clear terms says the Secretary of State was invited to remit the judicial review itself rather than just the oral permission to the Upper Tribunal.

20. We have unhesitatingly concluded, attractive though such a course may appear for expedience's sake, that that is not the appropriate outcome of this case. The appellant was denied the opportunity to have his case heard, a full judgment given and, if permission were refused, thereafter to apply for permission to appeal to this court. Through no fault of his or his wife, the wife's application to become a party was not properly before the court in a case where much of the Article 8 case rests on the adverse consequences on her private and family life should her husband be deported. Sir Stephen Silber took the unusual course of inviting the parties to agree to the appeal being allowed. The reasons for him taking that course remain valid, as can be seen by my recitation of the history in this matter. The Secretary of State has always accepted that the appeal should be allowed and the matter remitted for a fresh determination of the oral application for permission to launch judicial review proceedings. It is clear that the very late respondent's notice was issued out of frustration at the appellants' refusal to agree to the making of a consent order and was no doubt influenced by the somewhat misleading letter of 22 March 2017.

21. The Secretary of state and indeed the appellants are now asking this court in effect to act as a first instance court and to determine whether permission should be given. If we acceded to that request, not only would we be deciding the case without necessarily having all the evidence which might otherwise be adduced and deployed by the appellants in support of the application, but it would have the effect, if we found against the appellants, of depriving them of an appeal route, a further procedural injustice in a case already dogged with procedural irregularities.

22. In those circumstances, therefore, the appeal will be allowed in accordance with the permission given by Sir Stephen Silber and the matter be remitted for rehearing before the Upper Tribunal. It goes without saying that we make no comment or observations in relation to the merit or otherwise of the appellants' application.

LORD JUSTICE LONGMORE:

23. I agree.

Order: Remitted to the Upper Tribunal for rehearing of the application for permission for judicial review