Neutral Citation Number: [2019] EWCA Civ 556

Case No: C7/2014/4188/AITRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION ASYLUM
OCKELTON VP AND UTJ MACLEMAN
IA/21232/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2019

Before :

LORD JUSTICE BEAN
and
LORD JUSTICE PETER JACKSON

- -

Between :

KP (PAKISTAN) & ANR	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Asad Maqsood (instructed by **David Wyld & Co**) for the **Appellant**
Katherine Apps (instructed by **GLD**) for the **Respondent**

Hearing date : 2nd April 2019

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JUDGMENT

Lord Justice Bean :

1. The Claimant is a Pakistani national. In 2010 she arrived in the UK as a student. She was granted leave to enter on 14 July 2010 and later was granted a student visa which expired on 9 October 2012. On 9 October 2012 she submitted an application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based scheme. That application was refused by the Home Office with a right of appeal in a decision dated 15 May 2013, the grounds being that the evidence in support of the application did not comply with the rules.

2. The Claimant lodged a notice of appeal (as did her husband, whose application was dependent on hers) to the First Tier Tribunal. The appeal was heard by Judge McGrade in Glasgow on 7 January 2014. By a determination promulgated on 23 January 2014 the judge allowed the appeal.

3. The Home Office sought and were granted permission to appeal to the Upper Tribunal. The appeal was heard, again in Glasgow, by the Vice President, Mr Ockleton, and Upper Tribunal Judge McLeman. In a determination promulgated on 21 July 2014 they allowed the appeal, set aside the determination of the First Tier Tribunal and substituted a decision that the appeals of the Claimant and her husband as originally brought to the First Tier Tribunal were dismissed.

4. The covering letter to the Claimant's then solicitors, with copies to the Claimant herself (at a Glasgow address) and to the Home Office, was sent from the office of the Upper Tribunal at Field House, London. It stated;-

> "To the Appellant and Respondent,
>
> Enclosed is the Upper Tribunal's determination of the above appeal.
>
> Either party may apply to the Upper Tribunal for permission to appeal to the relevant appellate court (the Court of Appeal or, where the appeal was decided in Scotland, the Court of Session) on a point of law arising from the Tribunal's decision.
>
> Any application must be made in accordance with the relevant Procedure Rules (extract enclosed). Please note the time limits for making an application.
>
> All applications must be sent to:
>
> Upper Tribunal:
>
> Field House, 15 Breams Buildings, London, EC4A 1DZ."

5. The Appellant's solicitors duly submitted to the Upper Tribunal at Field House a lengthy document containing grounds of appeal. On 16 October 2014 the Upper Tribunal office at Field House sent two identically worded notices in Form IA 157 (one in respect of the Claimant, the other in respect of her husband) in the following terms:-

> "To the Appellant and Respondent.
>
> Enclosed is the Tribunal's determination of the application for permission to appeal to the Court of Appeal (*or, in Scotland, the Court of Session*). A further application may be made to the court itself.
>
> If you have been refused permission to appeal and you wish to apply to the Court of Appeal for permission to appeal, you MUST now file an Appellant's Notice with the Civil Appeals Office of the Court of Appeal **within 28 days** (Civil Procedure Rules Specific Direction 52D 3.3(2)).
>
> Where the jurisdiction for you onward appeal lies with the Court of Session or with the Court of Appeal in Northern Ireland, different rules apply.

6. At the foot of the letter is the rubric in capitals "ALL CORRESPONDENCE SHOULD BE SENT TO THE ADDRESS AT THE TOP OF THIS NOTICE QUOTING THE APPEAL NUMBER AND ANY HEARING DATE."

7. The enclosure with each letter was Judge McLeman's determination of the application for permission to appeal. It was headed:-

In the Upper Tribunal

(IMMIGRATION AND ASYLUM CHAMBER)

APPLICATION FOR PERMISSION TO APPEAL TO THE

COURT OF SESSION

8. Judge McLeman's reasons were that the grounds relied on case law which was irrelevant and some of which had been superseded; that they failed to show that the Claimants were arguably entitled to an opportunity to remedy their defective applications to the Home Office; and that they contained no point suitable for the attention of the court.

9. The Claimant's then solicitors lodged an application for permission to appeal with this court (the Court of Appeal of England & Wales). A court stamp records the Appellant's notice has having been received on 18 December 2014. It does not appear that any Respondent's notice was served by the Home Office. By a decision on the papers sealed on 12 May 2015, Christopher Clarke LJ refused permission to appeal.

10. The Claimants applied to renew the application to an oral hearing. This was listed on 28 June 2016 before Lindblom LJ but counsel for the Claimants requested an adjournment which was granted. Unfortunately no further steps appear to have been taken to re-list the oral application. In late 2017 the solicitors firm then acting for the Claimants was closed down following intervention by the Solicitors Regulation Authority.

11. On 28 February 2018 a letter with a notice of acting was received from a new representative, a Mr Bajwa. It later appeared that Mr Bajwa was not a person authorised to conduct litigation under Section 18 of the Legal Services Act 2007. On 4 June 2018 the applicants confirmed that they were now acting in person and wished to pursue the application.

12. At an oral hearing on 10 July 2018 at which Mr Michael West of counsel appeared instructed by a new firm of solicitors, Irwin LJ granted permission to renew to an oral hearing and to appeal out of time. He held that it was "just arguable" that the defects in the information supplied by the Claimants to the Home Office were comparable to those considered by the Supreme Court on the case of *Mandalia*.

13. After further administrative mishaps the case was listed for today. Ms Apps of counsel has very recently been instructed on behalf of the Home Office. Her skeleton argument of 29 March 2019 (expanding on a brief Note of 27 March 2019) takes the simple but crucial point, overlooked by everyone involved in the case for the last five years, that this court has no jurisdiction to hear an appeal because the decision of the Upper Tribunal was given in Scotland and the Court of Session had been specified as the relevant appellate court for the purposes of any application for permission to appeal. Ordinarily this court would give short shrift to any point raised by a party for the first time a few days before the hearing, especially where the matter has been before the court for several years. But since the point goes to jurisdiction we have no discretion in the matter: we must decide whether we have jurisdiction before we do anything else.

14. There is no right of appeal from the Upper Tribunal other than that conferred by statute. The relevant statute is Section 13 of the Tribunals, Courts and Enforcement Act 2007. So far as relevant, this provides:-

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (14).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by—
>
> (a) the Upper Tribunal, or
>
> (b) the relevant appellate court,
>
> on an application by the party.
>
> (5) An application may be made under subsection (4) to the relevant appellate court only if permission (or leave) has been refused by the Upper Tribunal.

> …
>
> (11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.
>
> (12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—
>
> (a) the Court of Appeal in England and Wales;
>
> (b) the Court of Session;
>
> (c) the Court of Appeal in Northern Ireland.
>
> (13) In this section except subsection (11), "the relevant appellate court", as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11)."

15. Rule 45(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended provides (and, we are told, provided at the relevant time):-

> "(4) if the Upper Tribunal refuses permission to appeal it must provide with the record of its decision-"
>
> (a) statement of its reasons for such refusal; and
>
> (b) notification of the right to make an application to the relevant appellate court for permission to appeal and the time within which and the method by which, such application must be made."

16. Mr Maqsood, in his able submissions on behalf of the Appellant, submits that the letter in Form IA 157 is at best ambiguous. The letter was sent from a London office and was therefore naturally to be read as indicating that any onward appeal should be to this court. That interpretation is reinforced by the fact that the letter only complies with the mandatory requirement of Upper Tribunal Rule 45(4)(b) to state "the time within which and the method by which" an application for permission to appeal (PTA) is to be made in respect of England and Wales. He submits that therefore the Civil Appeals Office was right to regard the Upper Tribunal as having specified this court as the relevant appellate court, and to have accepted jurisdiction accordingly.

17. Ms Apps submits, correctly, that under section 13 the Upper Tribunal must specify one court as the relevant appellate court: it cannot give the Appellant a choice. The letter in Form IA 157 must be read together with Judge Macleman's determination of the previous day which makes it clear that he was determining an application for PTA to the Court of Session.

18. Form IA 157 in the version shown to us seems to me, in relation to appeals heard in Scotland or Northern Ireland, to be both a trap for the unwary and defectively drafted. It is a trap for the unwary in a Scottish or Northern Irish case, being sent from London but without words such as "The Court of Session is specified as the relevant appellate court in this case". It is defectively drafted because it does not comply with the requirement of Rule 45(4)(b) to state the time within which, and the office to which, applications for PTA to the Court of Session or the Court of Appeal in Northern Ireland should be made.

19. Nevertheless I would hold, however reluctantly, that the Upper Tribunal specified the Court of Session as the relevant appellate court for the purposes of sections 13(1), 13(4)(b) and section 13(5). This is seen most clearly from the heading of Judge McLeman's decision in October 2014 headed "Application for Permission to Appeal to the Court of Session". That constitutes in my view the Upper Tribunal's specification of the court to which a renewed application for PTA should be brought. This is supported by the fact that in the covering letter of 16 October 2014 the Tribunal informs the parties that it is enclosing a determination of the application for permission "to the Court of Appeal or, in Scotland, the Court of Session". This is also consistent with the earlier letter of 23 July stating that either party could apply to the Upper Tribunal for permission to appeal to "the relevant appellate court, the Court of Appeal (or, where the appeal was decided in Scotland, the Court of Session)…".

20. I sympathise with the Claimants because of the fact that it has taken so long for this point to be taken. The Civil Appeals Office should not have accepted the application for permission to appeal in December 2014. But since it had no jurisdiction to accept the application, the fact that an official applied a court stamp to it cannot alter the position. Nor can the fact that the case was considered on the papers by Christopher Clarke LJ and at an oral hearing by Irwin LJ without the point being taken then. Indeed in *Gardi v SSHD (No. 2)* [2002] 1 WLR 3282, under a slightly different statutory framework, this court realised months after giving judgment in a substantive appeal that the original decision had been given in Glasgow and this court had had no jurisdiction. The earlier judgment was declared to be a nullity.

21. In these circumstances I would declare that we have and have always had no jurisdiction to hear this appeal.

22. The Government Legal Department submitted a schedule of costs. Given that it has taken them more than four years to raise this point we indicated that we did not consider this a case for costs and Ms Apps, after taking instructions, did not pursue that application.

23. I record my gratitude to both Ms Apps and Mr Maqsood for their valuable assistance.

Lord Justice Peter Jackson

24. I agree.