Neutral Citation Number: [2021] EWCA Civ 1615

Case No: C5/2020/1131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)
Lane P and UT Judge Norton-Taylor
[2020] UKUT 89 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE CARR

- -

Between :

MY (PAKISTAN)	**Claimant/ Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Sonali Naik QC and **Lucy Mair** (instructed by **Greater Manchester Immigration Aid Unit**) for the **Appellant**
Rory Dunlop QC and **William Hansen** (instructed by **the Treasury Solicitor**) for the **Respondent**

Written submissions: 21 & 28 October 2021

- -

Approved Supplementary Judgment

Lord Justice Underhill :

1. We handed down judgment in this appeal on 15 October 2021. I need not summarise the issues. As appears from paras. 30-38 of my judgment ("the main judgment"), with which Baker and Carr LJJ agreed, part of our decision was that grounds 2 and 3 of the grounds of appeal constituted, when properly analysed, a challenge to the lawfulness of the Secretary of State's "one-application-at-a-time policy" which could not be determined in the context of a statutory appeal. As recorded at para. 35 of the main judgment, Ms Naik on behalf of the Appellant invited us, if that were our view, to treat the present proceedings as being in the relevant respects an application for judicial review and to reconstitute ourselves as a Divisional Court in order to determine that application. In our order dismissing the appeal we directed written submissions on that question, which we have now had the opportunity to consider.

2. It was common ground between the parties that we had power to take the course proposed: see such cases as *Mirza v Secretary of State for the Home Department* [2011] EWCA Civ 159 and *Sandip Singh v Secretary of State for the Home Department* [2014] EWCA Civ 438, [2014] 1 WLR 3585. Ms Naik acknowledged, in accordance with Sir Richard Aikens' observation at para. 58 of his judgment in *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175, that it would be necessary for the Appellant to file a formal judicial review application under CPR 54 (and pay the appropriate fee), which had not yet occurred; but she made it clear that he would submit to directions requiring him to do so.

3. The real issue is thus whether we should exercise the power in question in the circumstances of the present case. I do not believe we should do so. My reasons are as follows.

4. Ms Naik submits that we should take the course proposed because the question of the lawfulness of the Secretary of State's one-application-at-a-time policy is one of general importance. The policy is applied in a large number of cases, in relation to a number of different bases of application for leave to remain, and is, she submits, liable to have an unfairly prejudicial effect on applicants in the way on which she relied in the appeal: see para. 47 of the main judgment. She points out that Elisabeth Laing LJ in her grant of permission to appeal clearly regarded the underlying issue raised by ground 2 and 3 as arguable. This Court had acquired a good knowledge of the background, and it was in accordance with the over-riding objective that we should decide the issue of the lawfulness of the policy now without requiring the Appellant, or some other applicant, to go back to square one.

5. Mr Dunlop objected to our taking this course on a number of grounds, but I need not review them all. The decisive objection to my mind is that this Court is not in a position to determine the lawfulness of the one-application-at-a-time policy, either generally or as applied to the Appellant, on the basis of the pleadings or the evidence before us. So far as the pleadings are concerned, neither the Appellant's grounds of appeal nor his skeleton argument set out a properly formulated public law challenge – unsurprisingly, since these are not at present judicial review proceedings and that is not how his case was being put: that is indeed one of Mr Dunlop's objections. No doubt Ms Naik would say that that could be cured by the filing of a judicial review claim form, as she accepts is necessary, since that would include fully pleaded grounds; but it is hardly satisfactory that we should be invited to reconstitute ourselves to sit as a Divisional Court to

determine a challenge which has even now not been properly articulated. But the more fundamental problem is that, whether the case is advanced on the basis that the policy involves a risk of breach of applicants' Convention rights or as a pure rationality challenge, it will be necessary for it to be supported by evidence of the adverse impacts relied on and for the Secretary of State to have the opportunity to adduce evidence of her reasons for adopting the policy and/or applying it in a particular case or class of case. No such evidence has been filed in this case – again unsurprisingly, since it is a statutory appeal. If we were to accede to Ms Naik's invitation, it would not simply be a question of requiring the filing of formal papers and the fixing of a fresh hearing: the parties would need to prepare the case again from the beginning.

6. That being so, there is no advantage in our taking the exceptional course which the Appellant proposes. On the contrary, it would be positively disadvantageous, because we would be depriving ourselves of the benefit of the view of the first-instance court or tribunal. On no view are we in the same position as the Court in *Sandip Singh*, where, as Sharp LJ put it at para. 27 of her judgment, "the matter was raised in the grounds of appeal, the issues raised were straightforward, and the Respondent did not object".

7. That is a sufficient reason for declining Ms Naik's invitation. But I would note two further points made by Mr Dunlop which relate to the Appellant's particular circumstances. First, the Secretary of State has, as noted at para. 27 of the main judgment, agreed to consider his human rights claim notwithstanding that he has not made a further application: the issue would therefore appear to be academic so far as concerns his case. Second, any challenge would be out of time, and it is, to put it no higher, far from self-evident that he would be entitled to an extension.

8. The Appellant has also sought permission to appeal to the Supreme Court. I do not believe that the criteria for the grant of permission by this Court (which is only appropriate in very rare cases) are satisfied.

Baker LJ:

9. I agree.

Carr LJ:

10. I also agree.