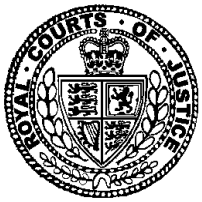

Neutral Citation Number: [2021] EWCA Civ 704

Case No: C2/2019/2289

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE OWENS
JR/941/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 May 2021

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LORD JUSTICE STUART-SMITH

- -

Between:

THE QUEEN
on the application of
SAMIA AKTER

Appellant

- and -
SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- -
- -

Sonali Naik QC and **Rajiv Sharma** (instructed by **Saint Martin Solicitors**) for the **Appellant**
Zane Malik QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 6 May 2021

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10.30 am on 13 May 2021.

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Approved Judgment

Stuart-Smith LJ:

Introduction

1. On 19 December 2018 the Respondent refused the Appellant's application for indefinite leave to remain ["ILR"] in the United Kingdom. This is an appeal against the decision of Upper Tribunal Judge Owens, made on 9 August 2019, by which she refused the Appellant permission to bring judicial review ["JR"] proceedings challenging the Respondent's decision.

2. The Appellant is represented by Ms Naik QC and Mr Sharma. The Respondent is represented by Mr Malik QC. One of their more optimistic submissions at the outset was that this court might feel able to determine the substantive issues that would arise on the appeal if the refusal of leave was to be overturned. It became increasingly clear that this was not a feasible suggestion, not least because, even after a confetti of additional documents were produced in the course of the hearing, it is apparent that there may be other relevant documents outstanding and that there could be relevant evidence that is not before us. In these circumstances, the issue is whether the Appellant's proposed appeal is reasonably arguable; and we must decide that issue on the (limited) information that is now available.

The Respondent's decision of 19 December 2018

3. The Appellant's application for ILR was submitted on 12 November 2018 on the basis of long residence. It was considered by the Respondent by reference to Paragraph 276B of the Immigration Rules, which is agreed to be the appropriate and relevant rule. The relevant provisions of the rule for present purposes are as follows:

> "The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> …
>
> (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where -
>
> (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; …"

4. The Respondent's decision letter set out the Appellant's immigration history as follows:

> "You entered the United Kingdom on 7 March 2008 with a student visa valid from 11 February 2008 until 31 May 2011.

> On 20 May 2011 you applied for leave to remain as a tier 4 general student, you were granted leave to remain valid until 31 January 2013.
>
> On 31 January 2013 you applied for leave to remain as a tier 4 general student, on 15 May 2013 this application was refused with a right of appeal. On 3 June 2013 you lodged an appeal, on 13 June 2014 your appeal was refused. On 13 August 2014 your appeal rights were exhausted.
>
> On 9 September 2014 you applied for leave to remain on the basis of family and private life, on 24 November 2014 this application was refused with no right of appeal.
>
> On 24 February 2015 you applied for leave to remain on the basis of human rights - article 3&8, on 11 May 2015 this application was refused, on 27 May 2015 you lodged an appeal, on 18 May 2016 your appeal was allowed. On 9 June 2016 you were granted leave outside the rules valid until 8 December 2018.
>
> On 12 November 2018 you applied for indefinite leave to remain on the basis of long residence (10 years)."

5. The Respondent's reasons for refusal were concisely set out:

> "Consideration has been given to your application and it is noted from your immigration history that you had lawful leave following your arrival in the United Kingdom on 7 March 2008 until 31 January 2013.
>
> You did seek to vary your leave on 31 January 2013 however this application was refused with a right of appeal, following an unsuccessful appeal your appeal rights were exhausted on 13 August 2014. It is noted you made a further attempt to vary your leave on 9 September 2014 and 24 February 2015 however these applications were submitted out of time. It must be pointed out that any time spent following the submission of an out of time application awaiting for consideration of the application is not considered lawful even if that application is subsequently granted. Therefore you were without valid leave from 13 August 2014 when your appeal rights were exhausted, until your next grant of leave to remain on 9 June 2016, a period of 665 days. As such your period of continuous lawful residence is considered to have been broken at this point.
>
> As you have remained without any leave to enter or remain between 13 August 2014 and 9 June 2016 you cannot demonstrate 10 years continuous lawful residence in the UK and cannot meet the requirements of the Immigration Rules with reference to Paragraph 276B(i)(a)."

6. Having reached that conclusion on the application of the Rule, the Respondent considered whether there were grounds for exercising a discretion in favour of a grant of ILR and decided that there were none. ILR was refused but limited leave granted.

7. These judicial review proceedings were issued on 18 February 2019. With the leave of the court the Appellant's grounds have been amended. The central feature of the Appellant's case is an attempt to demonstrate an unbroken chain of events and decisions starting with the Appellant's earlier application for leave to remain on 9 September 2014 and ending with a grant of limited leave to remain on 9 June 2016. For the purposes of this hearing, Mr Malik conceded that, if the Appellant could arguably show an unbroken line between these two events, her Appeal should succeed and the case should be remitted to the Upper Tribunal; but he argued trenchantly that the Appellant's case was unarguable. I would accept his concession as properly made.

8. In order to see if the case is arguable and to explain the issues that arise on this appeal it is necessary to trace the links that are said to constitute the Appellant's chain.

The factual background

9. It is convenient to take as the starting point the fact that a previous application by the Appellant for leave to remain was made in January 2013 and refused with a right of appeal on 15 May 2013. The Appellant exercised her rights of appeal but became appeal rights exhausted, so that her leave to remain expired on 13 August 2014. That is the first critical date, from which all else flows.

10. On 9 September 2014, less than 28 days after her leave had expired, the Appellant applied for leave to remain for herself and for her young son. It is common ground that this application was a valid application in proper form that was brought within the rules and relying upon the applicants' human rights pursuant to Article 8. It was refused on 24 November 2014. That refusal did not give rise to a right to appeal to the Tribunal, with the result that the Appellant's attempt to do so was struck out for want of jurisdiction. It did not give rise to a right of appeal to the Tribunal because it was not an "immigration decision" within the meaning of the version of s. 82 of the Nationality, Immigration and Asylum Act 2002 that was then in force.

11. By a Pre-action Protocol letter dated 5 December 2014 ["the 2014 PAP Letter"] the Appellant challenged the decision of 24 November 2014. The 2014 PAP Letter alleged that the Respondent's refusal of the application made on 9 September 2014 was illegal because the Respondent had not considered her discretionary powers and was irrational because the Respondent had failed to have regard to the Appellant's compassionate circumstances.

12. The Respondent replied to the 2014 PAP Letter on 29 January 2015 by a letter (wrongly) dated 18 December 2014, which treated the 2014 PAP Letter as a request for reconsideration of her 24 November 2014 decision and a grant of leave. The letter rejected the allegations made in the 2014 PAP Letter and did not alter the Respondent's decision. But it stated that the Appellant's case met the criteria for requesting a removal decision (which would carry with it a right of appeal) and stated that "[t]his will therefore be referred to a removals casework team who will contact you in due course." This was done on the Respondent's initiative as the Appellant had not requested a removal decision, though the Respondent's letter incorrectly said that she had. She did

not request a removal decision at any stage - the most that can be said is that she went along with the steps that the Respondent instituted. The potential significance of a removal decision was that it would give rise to a right of appeal to the Tribunal under the statutory provisions then in force.

13. First, however, on 23 February 2015 the Appellant issued JR proceedings challenging the Respondent's 24 November 2014 decision as "wrong, unreasonable and disproportionate" and an unlawful infringement of her Article 8 rights. I shall refer to these proceedings as "the First JR Proceedings" to distinguish them from the present proceedings.

14. On 24 February 2015, again on her own initiative, the Respondent sent the Appellant a form IS.76, requesting any further grounds upon which the Appellant wished to rely. We have not seen the letter of 24 February 2015 but it appears from the reply to it that it asked whether the Appellant had any other grounds on the basis of which the applicant should be allowed to stay in the United Kingdom. On 12 March 2015 the Appellant's advisers replied that there were no further grounds to submit. They enclosed a copy of the 2014 PAP Letter and requested the Respondent to take the PAP letter into consideration "while assessing the applicant's circumstances in regards to her application …". Since the Appellant had only made one outstanding application, namely her application of 9 September 2014 and the 2014 PAP Letter was written in support of that application and in opposition to its rejection by the Respondent's decision on 24 November 2014, the reference to "her application" can only have been a reference to the application of 9 September 2014, which she was also attempting to progress by the First JR Proceedings.

15. We were told, and I would accept, that one purpose and effect of the issuing of a form IS.76 is that, if the applicant raises new matters that may amount or contribute to a human rights claim, the Secretary of State will review them and take them into account both in relation to the decision to refuse leave and the removal decision that may follow if the decision to refuse leave is maintained.

16. According to a chronology attached to the Acknowledgement of Service in the present proceedings, on 17 March 2015 the Respondent informed the Appellant that the removal unit was deferring consideration pending the outcome of the First JR Proceedings. We have not been provided with any document setting out this communication or any evidence relating to it; but, for present purposes, I would accept the bare outline fact as stated in the Acknowledgement of Service.

17. On 5 May 2015 Upper Tribunal Judge Pitt refused the Appellant permission to bring the First JR Proceedings. In doing so the Judge included as one of the reasons that "the respondent has undertaken to provide the [Appellant] with a removal decision so that issue can go no further here." On 11 May 2015 (stamped by the Tribunal on 12 May) the Appellant applied for an oral reconsideration of her application for permission to bring the First JR Proceedings; and by letter dated 20 May 2015 the Tribunal listed the oral hearing to be heard on 1 July 2015.

18. Meanwhile, on 11 May 2015 the Respondent made the decision that lies at the heart of this appeal. Its timing is consistent with the suggestion (to which we have referred above) that the removal unit was deferring consideration of the Appellant's case pending the outcome of the JR proceedings. The letter dated 11 May 2015 included a

decision that the Appellant must leave the country if she did not appeal and had no other legal basis to remain; but in form and substance it also considered the question of the Appellant's right to remain. This was made expressly clear by the covering letter which stated that "We have considered your application for leave to remain and have refused it. Your human rights claim has therefore been refused. … If you do not appeal and do not have any other legal basis to remain in the United Kingdom you must leave the country."

19. The reasons for the decision set out in Annexe A to the letter stated that the Appellant had made on "24 February 2015" a human rights application for leave to remain in the United Kingdom on the basis of her family and private life as well as the complex medical conditions afflicting one of her two children. It is now accepted by the Respondent that the Appellant made no such application on that day: the only relevant application she had made was her application of 9 September 2014[1]. The reasons addressed all of the submissions that had been advanced by the Appellant in the application that she had made on 9 September 2014 and in the 2014 PAP Letter and the JR proceedings. The reasons for the 11 May 2015 decision included express statements that the Appellant had applied for leave to remain, that her application failed to meet the requirements of the rules, and that her application did not fall for a grant of leave outside the Rules. Annexe B provided information including information about her liability to removal if she did not appeal the decision refusing her leave to remain or when any appeal was finally determined.

20. On 24 June 2015, the First JR Proceedings were brought to an end by a consent order which stated that "upon the [Appellant] having an alternative remedy, namely an appeal in the First Tier Tribunal … it is agreed … 1) the Applicant have leave to withdrawn (sic) her judicial review claim; and 2) there be no order for costs."

21. It is to be remembered that the First JR Proceedings were in form and substance a challenge to the Respondent's decision of 24 November 2014, which was the Respondent's decision rejecting the Appellant's application for leave to remain made on 9 September 2014 i.e. less than 28 days after the expiry of her previous leave to remain. Neither the consent order nor any other document that we have seen says that the Respondent withdrew her decision of 24 November 2014; however, the terms of the consent order state expressly that the consent order was made on the basis that the Appellant now had "an alternative remedy." The First JR Proceedings were intended to provide a remedy against the Respondent's decision of 24 November 2014, refusing the Appellant's application of 9 September 2014. On its face, therefore, the consent order supports the inference that the Respondent had provided an alternative remedy for the Appellant's challenge to the decision of 24 November 2014. This might seem strained if the decision of 11 May 2015 had only addressed the question of removal; but it did not. As I have said, it went further in expressly addressing the Appellant's claim for leave to remain as made in her 9 September 2014 letter, and pursued by her 2014 PAP Letter and her First JR Proceedings.

22. The Appellant duly brought her appeal against the decision of 11 May 2015 by appeal to the First Tier Tribunal ["FTT"]. The hearing was on 26 April 2016 and on 18 May

[1] This mistaken reference to an application being made by the Appellant on 24 February 2015 was repeated by the Respondent in her decision of 19 December 2018: see [3] and [4] above.

2016 the appeal was allowed. It is material to note the FTT's summary of the procedural position. In setting out the background, the Judge said:

> "3. … On 9 September 2014 she applied for leave to remain based on her family and private life, with Yeaish Bari named as her dependant, however her application was refused on 24 November 2014 with no right of appeal. On 10 December 2014 she attempted to lodge an appeal however this was struck out on 23 December 2014 and her appeal rights became exhausted.
>
> 4. On 23 February 2015 the appellant lodged an application for Judicial Review to the Upper Tribunal. On 24 June 2015 a consent order was made by the Upper Tribunal whereby the parties agreed an alternative remedy, namely an appeal to the First-tier Tribunal.
>
> 5. This appeal is therefore an in country appeal against the decision made on 11 May 2015.
>
> 6. The respondent's reasons for refusing the application were set out in a letter to the appellant dated 11 May 2015. It refers to the application made on the appellant's behalf for further leave to remain in the United Kingdom on the basis of her family and private life.
>
> 7. Her application was considered on the basis of family and private life in the United Kingdom under Appendix FM and paragraphs 276ADE(1) - CE of the Immigration Rules, and outside the rules on the basis of exceptional circumstances."

23. The approach of the FTT was consistent with this summary of the background in treating the Respondent's decision under review as being essentially a response to the claim first made by the Appellant by her application made on 9 September 2014. Having reviewed all the evidence, including evidence of the enhanced immigration status of the Appellant's husband and elder child, the FTT allowed the appeal on Article 8 Human Rights Grounds.

24. It is common ground that the decision of the FTT did not quash the Respondent's decision of 11 May 2015. However, and predictably, in the light of that decision, on 9 June 2016 the Respondent granted the Appellant leave to remain until 8 December 2018. On 12 November 2018 the Appellant made her application for ILR on the basis of 10 years residence. As set out above, her application for ILR was refused on 19 November 2018, because the Respondent took the view that the Appellant cannot demonstrate lawful residence between the expiry of her previous leave on 13 August 2014 and the grant of limited leave on 9 June 2016.

25. By way of a chronological footnote, on 27 December 2018 the Home Office UK Visas and Immigration Department wrote a letter to the Appellant's MP in which it said that the Appellant "lodged [the First JR Proceedings] on 24 February 2015 *and won*." We have not seen any contemporaneous documents evidencing negotiations that led to the consent order of 24 June 2015 other than the original draft proposed by the Appellant,

which was in materially different terms from the final sealed consent order. Nor do we have any other information that explains why it was said in the letter to the MP that the Appellant had "won" the First JR Proceedings.

26. These proceedings were lodged on 18 February 2019. The Acknowledgement of Service and Summary Grounds for contesting the claim were filed on 27 March 2019. Permission was refused on the papers on 20 May 2019. On 9 August 2019 UTJ Owens refused leave after an oral permission hearing.

27. Having set out some of the chronology that I have summarised above, UTJ Owens concluded that the Respondent had not withdrawn the decision made on 24 November 2014 "but rather maintained that decision and agreed to make a fresh decision giving the applicant a right of appeal." The Judge restated essentially the same reason in saying that

> "… the Respondent maintained the original decision dated 24 November 2014 but sent out a notice asking the [Appellant] to provide information on any other further circumstances she wanted to be taken into account prior to making a fresh removal decision which would generate a right of appeal. The [Appellant] applicant responded by stating that she wished to rely on those matters that had already been raised on the pre-action protocol letter. The respondent then took a new, fresh decision on 11 May 2016 which generated a right of appeal. It is manifestly unarguable that the original decision was not withdrawn. The original decision was unarguably maintained and a further decision was made."

28. On this basis, the Judge concluded that the Respondent was unarguably entitled to reach the conclusion that the Appellant had not completed 10 years lawful residence in the United Kingdom.

The parties' submissions

29. The Appellant's case in these proceedings can be distilled into three short propositions:

    i) The Appellant's application of the 9 September 2014 was not determined by the Respondent until the 11 May 2015;

    ii) The Appellant successfully appealed against that decision such that the application of 9 September 2014 was not lawfully determined until the 9 June 2016 when leave to remain was granted; and

    iii) Because of (i) and (ii) above, the Appellant has established continuous lawful residence for the purposes of paragraph 276B and is entitled to ILR.

30. The Respondent submits that:

i) The decision of 11 May 2015 was not a reconsideration of the decision of 24 November 2014 but was a consideration of the Applicant's submissions in the 2014 PAP Letter;

ii) The Respondent never withdrew the decision of 24 November 2014. It is submitted that, if she had done so, the First JR Proceedings would have been academic. In those circumstances it is submitted that the First JR Proceedings would not have been concluded on the terms of the consent order of 24 June 2015 but would have been concluded on terms that stated the original decision had been withdrawn and that the Appellant should have her costs;

iii) The response to the Appellant's PAP letter (which was sent on 29 January 2015) maintained the decision of 24 November 2014

Discussion and conclusion

31. I remind myself that the test to be applied is whether the Appellant's proposed appeal is reasonably arguable. Beyond that, nothing I say should be construed as expressing a view on the merits of the proposed appeal.

32. Mr Malik concedes that, if it is reasonably arguable that the decision of 11 May 2015 involved and included a reconsideration of the Appellant's 9 September 2014 application, the appeal should be allowed and the case remitted to the Tribunal for determination of these JR proceedings. In my judgment, that concession is correctly made because, if the Respondent reconsidered the Appellant's original application on 11 May 2015, it is reasonably arguable that there is an unbroken line of decisions and actions by the Respondent that are founded on the Appellant's original application and which continue with the successful appeal in April 2016 against the 11 May 2015 decision and lead directly to the grant of limited leave on 9 June 2016. If that is the correct view of what happened, then it is reasonably arguable that the decision to grant limited leave on 9 June 2016 marks the real conclusion of the original Application made on 9 September 2014.

33. The Respondent says that is not the correct interpretation of what happened. Mr Malik submits that the decision taken on 11 May 2015 is to be seen solely as a decision on removal. So, he submits, the Appellant's challenge to the Respondent's decision of 24 November 2014 finished with the withdrawal of the First JR Proceedings by the consent order on 24 June 2015. He points to the fact that, on present information, the Respondent did not at any stage state that she was withdrawing her decision of 24 November 2014 and that, had that been her intention, she would have said so. He also points to the fact that what was intended to generate the "alternative remedy" of appeal to the Tribunal was the removal decision and not the underlying decision that had previously been taken on leave to remain, and that the appeal to the Tribunal that the Appellant brought was, as a matter of fact, an appeal against the decision of 11 May 2015.

34. These submissions are persuasively advanced and may succeed if these proceedings are permitted to proceed to full resolution. In particular, I accept that, on the plain words of the relevant provisions, it was the decision in May 2015 which generated the right of appeal to the FTT. I also accept the submission that consideration of the Appellant's human rights grounds would be a necessary part of the process for making a removal

decision. But that submission was accompanied by an acceptance that, if review of the Appellant's human rights grounds had justified or compelled it, it would at least be open to the Respondent to reverse her decision on leave to remain even though the primary purpose of the process was intended to be reaching a removal decision.

35. While taking into account the submissions I have summarised above, it is in my judgment reasonably arguable that, interpreted objectively, the decision of 11 May 2015 went beyond simply providing a decision on removal and did, in fact, include and involve a reconsideration of the underlying application for permission to remain. I reach this conclusion because of the features I have identified in [18] and [19] above.

36. I am strengthened in this view by the Respondent's submission, which I accept, that the 11 May 2015 decision should be seen as a response to the 2014 PAP Letter because it is plain that the 2014 PAP Letter was an integral part of the Appellant's challenge to the 24 November 2014 refusal of her 9 September 2014 application. On this basis, therefore, and without the need to analyse the terms of the 11 May 2015 letter, I would conclude it to be reasonably arguable that the 11 May 2015 decision should be seen as an integral part of the Respondent's continuing review and assessment of the Appellant's September 2014 application for leave to remain.

37. That being my conclusion on the function and interpretation of the decision of 11 May 2015, it would be both unnecessary and wrong to go further and to consider the subsidiary questions that may arise on the full hearing of these proceedings. A number of such questions were raised during the hearing, such as whether thought was given to what the effect of the apparently benign course of giving the Appellant an "alternative remedy" might be for the future. However, such issues only need to be stated for it to be obvious that this court hearing this appeal does not have full or sufficient information to enable it to reach valid or reliable conclusions on them. I therefore say nothing about them.

38. I would therefore allow the appeal on the narrow basis that the Appellant's three propositions that I have set out at [29] above are reasonably arguable because the decision of 11 May 2015 covered both the underlying right to remain and liability to removal. If my lords agree, I would remit the case to the Tribunal with leave to the Appellant to bring the proceedings. Nothing I say should be taken as limiting the issues for determination when the proceedings come to be decided.

Coulson LJ

39. I agree.

Newey LJ

40. I also agree.