Neutral Citation Number: [2023] EWCA Civ 870

Case No: CA-2022-000721

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE MACMILLAN
CASE NUMBER UA-2022-00803-PIP
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 20 July 2023

Before:
LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LORD JUSTICE SNOWDEN

- -

Between:

MIRELA PLESCAN	**Appellant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -
- -

The **Appellant** did not appear and was not represented.
The **Respondent** did not appear and was not represented.
Colin Thomann (instructed by **Government Legal Department**) as **Advocate to the Court**

Hearing date: 18th July 2023

Approved Judgment

This judgment was handed down remotely at 2pm on 20 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE LEWIS:

INTRODUCTION

1. This judgment concerns the question of whether the Court of Appeal has jurisdiction to consider an appeal against one category of decisions of the Upper Tribunal, that is decisions refusing applications made under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") to set aside a decision of an Upper Tribunal refusing permission to appeal to the Upper Tribunal from a decision of the First-tier Tribunal.

THE FACTS AND PROCEDURAL HISTORY

2. The issue arises in this way. By a decision dated 27 September 2021, the Secretary of State for Work and Pensions refused the claim by the appellant, Ms Mirela Plescan, for a personal independent payment or PIP. Ms Plescan appealed against that decision to the First-tier Tribunal. By a decision dated 18 January 2022, a three-member First-tier Tribunal allowed the appeal in part. They held that Ms Plescan was entitled to the daily living component of the PIP but found that she did not qualify for an award of the mobility component.

3. Ms Plescan wished to appeal to the Upper Tribunal against the First-tier Tribunal decision pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007 ("the Act"). The First-tier Tribunal refused permission to appeal by a decision dated 19 May 2022. On 23 May 2022, Ms Plescan applied to the Upper Tribunal for permission to appeal against the First-tier Tribunal decision. On 9 August 2022, the Upper Tribunal (Upper Tribunal Judge Macmillan) refused permission to appeal. The Upper Tribunal Judge held that the First-tier Tribunal had properly directed itself on the law and made appropriate findings of fact which were reasonably open to it on the evidence before it. Ms Plescan was sent the decision accompanied, it seems, by a standard letter explaining that she could not seek to appeal against the decision refusing her permission to appeal to the Upper Tribunal but she could apply to set it aside on the grounds that there had been a procedural irregularity in the proceedings before the Upper Tribunal.

4. On 22 August 2022, Ms Plescan did apply under rule 43 of the Rules to the Upper Tribunal to set aside its decision refusing permission. On 31 August 2022, the Upper Tribunal (Upper Tribunal Judge Macmillan) refused the application and refused to set-aside its earlier decision refusing permission to appeal. The Upper Tribunal found that the application in part was founded on complaints about the procedure before the First-tier Tribunal (not the procedure by which the Upper Tribunal had dealt with the application for permission) and in part was an attempt to re-argue the merits of the decision of the First-tier Tribunal. Those were not grounds upon which a decision could be set-aside under rule 43 of the Rules and, further the interests of justice did not require that the decision refusing permission to appeal should be set aside.

5. Ms Plescan sought to appeal against the decision of 31 August 2022 of the Upper Tribunal refusing to set-aside its decision of 9 August 2022. I ordered that the question of whether the Court of Appeal had jurisdiction to consider an appeal against a decision of the Upper Tribunal refusing to set aside a decision refusing permission to appeal to it against the decision of the First-tier Tribunal be considered at an oral hearing.

6. An oral hearing was held on 18 July 2023. Ms Plescan was informed of the date of the hearing. She sent a number of e-mails, including one on the afternoon of 17 July 2023, setting out her views of the process. Ms Plescan did not attend the hearing and was not represented. An advocate to the Court, Mr Colin Thomann, was appointed to assist the Court. His written submissions, and copies of the legislation and cases upon which he relied were provided to Ms Plescan in advance of the hearing. In the course of his submissions, Mr Thomann very properly set out the arguments that Ms Plescan would have been likely to have put forward to demonstrate that the Court does have jurisdiction to hear her application for permission to appeal as well as setting out the alternative arguments. We are grateful to Mr Thomann for the assistance that he provided to the Court.

THE LEGAL FRAMEWORK

7. The legal framework is as follows. Section 3 of the Act creates a First-tier Tribunal and an Upper Tribunal. Appeals to the Upper Tribunal from decisions of the First-tier Tribunal are conferred and regulated by section 11 of the Act which, so far as material, provides:

> "**11 Right to appeal to Upper Tribunal**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal, subject to subsection (8).
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by–
>
> (a) the First-tier Tribunal, or
>
> (b) the Upper Tribunal,
>
> on an application by the party.

8. Section 13 of the Act deals with appeals to the Court of Appeal. It provides so far as material that:

> "**13 Right to appeal to Court of Appeal etc**.
>
> (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.

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers–

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an "excluded decision" is–

…

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10–

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

(iii) to set aside an earlier decision of the tribunal,

> (e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or
>
> (f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor."

Powers of the Upper Tribunal to Review its Decisions

9. Section 10 provides a power for the Upper Tribunal to review its decisions other than excluded decisions under section 13. Section 10 of the Act, so far as material, is in these terms:

> "**10 Review of decision of Upper Tribunal**
>
> (1) The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) (but see subsection (7))."

10. A decision refusing permission to appeal to the Upper Tribunal under section 11(4) of the Act is an excluded decision (see section 13(8)(c) of the Act). The Upper Tribunal does not, therefore, have power to review its decision refusing permission to appeal to it by virtue of section 10.

11. The Court of Appeal also does not have power to entertain any appeal against any purported decision of the Upper Tribunal to refuse to review a decision refusing permission to appeal to it by virtue of section 13(8)(d)(i). That was confirmed by this Court in *Samuda v Secretary of State for Work and Pensions* [2014] EWCA Civ 1, [2014] 3 All ER 201, at paragraph 12.

Power of the Upper Tribunal to Set-aside its Decisions.

12. Section 22 of the Act provides that there are to be rules governing, amongst other things, the practice and procedure to be followed in the Upper Tribunal. Schedule 5 to the Act makes further provision about the content of such rules. Paragraph 15 of Schedule 5 provides:

> "**15 Correction of errors and setting-aside of decisions on procedural grounds**
>
> (1) Rules may make provision for the correction of accidental errors in a decision or record of a decision.
>
> (2) Rules may make provision for the setting aside of a decision in proceedings before the First-tier Tribunal or Upper Tribunal–
>
> (a) where a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party to the proceedings or a party's representative,
>
> (b) where a document relating to the proceedings was not sent to the First-tier Tribunal or Upper Tribunal at an appropriate time,

(c) where a party to the proceedings, or a party's representative, was not present at a hearing related to the proceedings, or

(d) where there has been any other procedural irregularity in the proceedings.

(3) Sub-paragraphs (1) and (2) shall not be taken to prejudice, or to be prejudiced by, any power to correct errors or set aside decisions that is exercisable apart from rules made by virtue of those sub-paragraphs.

13. Part 7 of the Rules deals as its heading indicates with "Correcting, setting aside, reviewing and appealing decisions of the Upper Tribunal". Rule 43 of the Rules provides a power for the Upper Tribunal to set-aside its decisions. It provides:

"43.— Setting aside a decision which disposes of proceedings

(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—

(a) the Upper Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

(3) Except where paragraph (4) applies, a party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Upper Tribunal sent notice of the decision to the party.

(4) In an asylum case or an immigration case, the written application referred to in paragraph (3) must be sent or delivered so that it is received by the Upper Tribunal—

> (a) where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application is made, no later than twelve days after the date on which the Upper Tribunal or, as the case may be in an asylum case, the Secretary of State for the Home Department, sent notice of the decision to the party making the application; or
>
> (b) where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application is made, no later than thirty eight days after the date on which the Upper Tribunal sent notice of the decision to the party making the application.
>
> (5) Where a notice of decision is sent electronically or delivered personally, the time limits in paragraph (4) are ten working days."

Other Powers

14. For completeness, I note that the Upper Tribunal has other powers. Rule 42 of the Rules provide that the Upper Tribunal may correct any clerical mistake or accidental slip or omission in a decision. Section 25 of the Act confers on the Upper Tribunal the powers of the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents and all other matters incidental to the Upper Tribunal's functions. These other powers are not relevant to the issue to be determined in this case.

THE SCOPE OF THE JURISDICTION OF THE UPPER TRIBUNAL TO SET ASIDE ITS DECISIONS.

15. The Upper Tribunal may under rule 43 of the Rules set aside a decision which disposes of proceedings and re-make the decision. Although not defined in the Rules, the concept of "proceedings" in rule 43(1) includes an application for permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal. A decision refusing permission to appeal to the Upper Tribunal would, according to the ordinary meaning of the words used, determine those proceedings (i.e. the application for permission to appeal).

16. The power to set aside a decision is exercisable only in limited circumstances: it has to be in the interests of justice to do so *and* there has to have been a procedural error in the proceedings before the Upper Tribunal when dealing with the application. That follows from the context and purpose of rule 43. I agree with the decision of Upper Tribunal Judge Jacobs in *SK v Secretary of State for Work and Pensions* [2016] UKUT 529 (AAC), [2017] AACR 25 where the judge said at paragraph 7:

> "… the rule is concerned with how the Upper Tribunal handed the claimant's application for permission to appeal. It does not provide a means of challenge to the decision itself or the reason on which it is based."

THE JURISDICTION OF THE COURT OF APPEAL TO HEAR APPEALS

17. Against that background, I consider the issue that arises in this case. For the reasons set out below I consider that the Court of Appeal does have jurisdiction to hear an appeal against a refusal by the Upper Tribunal to set aside its decision refusing permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal.

18. As a matter of statutory language, the provisions of the Act confer a right of appeal to the Court of Appeal in these circumstances. Section 13(1) and (2) confer a right of appeal to any party on any point of law arising from a decision of the Upper Tribunal unless that decision is an excluded decision. Excluded decisions are defined in section 13(8) of the Act. A decision on an application to set-aside an earlier decision refusing permission to appeal to the Upper Tribunal is not included within those definitions and is not, therefore, an excluded decision. Consequently, as a matter of language, a party has a right of appeal on a point of law arising out of a decision of the Upper Tribunal not to set aside its decision refusing permission to appeal to it against a decision of the First-tier Tribunal.

19. I consider next the submissions of Mr Thomann. He recognises that the fact that section 13 of the Act does not expressly exclude decisions taken under rule 43 of the Rules from the Court of Appeal's jurisdiction could be taken as an indication that, in principle, a right of appeal is available. He puts forward a number of arguments as to why that is not the case.

20. First, he submits that a decision not to set aside the refusal of permission to appeal to the Upper Tribunal is one taken "on an application under section 11(4)(b)" as it is part of an application for permission to appeal. Decisions taken under section 11(4)(b) are excluded decisions and there is no right of appeal. I do not consider that an application to set aside a decision under rule 43 is an application for permission to appeal under section 11. There are two separate statutory powers in play. Section 11 deals with rights of appeal. Section 22 and Schedule 5, and the rules made under it, deal with applications to set aside. An application to set aside a decision of the Upper Tribunal refusing permission to appeal to it is an application made under rule 43 of the Rules. It is not an application for permission to appeal under section 11(4)(b) of the Act.

21. Secondly, Mr Thomann submitted that the decision not to set aside a refusal of permission to appeal to the Upper Tribunal forms a part of, and merges with, the decision-making process of determining an application for permission to appeal. In that regard, he relies on part of the reasoning of the Court of Appeal in *DJ (Pakistan) v Secretary of State for the Home Department* [2022] EWCA Civ 1057, [2022] 1 WLR 5381.

22. Again, I do not consider that a decision of the Upper Tribunal refusing to set aside a refusal of permission to appeal to it merges with or becomes part of its earlier decision to refuse permission to appeal. They are separate decisions reached pursuant to separate processes.

23. Further, the factual situation and the decision under challenge in this case is different from that in *DJ (Pakistan)*. That case involved a situation where the appellant had been granted permission to appeal to the Upper Tribunal. On hearing the substantive appeal, the Tribunal found that the decision of the First-tier Tribunal did not display any error of law and dismissed the appeal. That hearing was conducted on the papers without an oral hearing because of the coronavirus pandemic. The appellant applied to set aside

the substantive decision dismissing the appeal on the grounds that there had been a procedural irregularity in that there had not been an oral hearing. That application was refused. The appellant then applied for permission to appeal against the refusal to set aside the decision dismissing the appeal. The Court of Appeal held that he could not appeal that decision as it was an excluded decision. Section 13(8)(f) provided that the Lord Chancellor could by order specify descriptions of decisions which were excluded decisions. The Appeals (Excluded Decisions) Order 2009 ("the Order") provided that certain decisions were excluded decisions including:

> "any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 50A of the British Nationality Act 1981, section 92 of the Nationality, Immigration and Asylum Act 2022 or regulation 26 of the Immigration (European Economic Area) Regulations 2006".

24. The Court in *DJ (Pakistan)* held that the decision refusing to set aside the decision dismissing the appeal was a "procedural, ancillary or preliminary" decision within the meaning of the Order and so was an excluded decision. As part of its consideration of whether the decision in that case fell within that description, Macur LJ, with whom the other members of the Court agreed, considered that the decision was what she described as an intermediate decision. As Macur LJ explained, the decision not to set aside the substantive decision would merge the final decision on the substantive appeal. If the application succeeded, the substantive decision would be set aside and the appeal would be re-determined and a new substantive decision taken. If the application was unsuccessful, the original decision of the Upper Tribunal upholding the decision of the First-tier Tribunal would remain in place. In either case, there would be a substantive decision on the appeal which could be the subject of further appeal to the Court of Appeal. In those circumstances, it is understandable that Macur LJ considered at paragraph 38 that the decision on the set-aside application would merge with the final decision on the appeal and that it was "the remaining or remade substantive decision that potentially carries an appeal".

25. The present case is different. There is no equivalent statutory instrument to the Order providing that procedural, ancillary or preliminary decisions in cases involving appeals against decisions refusing PIPs are excluded decisions. More fundamentally, the decision in the present case would not merge with a decision of the Upper Tribunal which was appealable. Here, the decision of the Upper Tribunal was to refuse to set aside the decision refusing permission to appeal to it. That left in place the refusal of permission to appeal – and that was an excluded decision and could not be the subject of appeal to the Court of Appeal. The decision refusing to set aside the earlier decision did not therefore merge with that earlier decision and there was no prospect of the earlier decision being appealable. The decision in *DJ (Pakistan)*, and the concept of intermediate decisions, do not, therefore, assist in the resolution of the question at issue in this appeal.

26. Finally, Mr Thomann submitted that it cannot have been the intention of Parliament that a person challenging a refusal to set aside a decision should be in a better position in jurisdictional terms (with a right of appeal to the Court of Appeal) than a person challenging a refusal of permission who had no right of appeal.

27. That analysis conflates two separate situations. It is correct that the Act provides that decisions by the Upper Tribunal on whether to grant or refuse permission to appeal to it against decisions of the First-tier Tribunals are, as a matter of substance, decisions for the Upper Tribunal. There can be no appeal to the Court of Appeal against that decision: see section 13 of the Act. There will have been an opportunity for consideration of the correctness of the original decision of the First-tier Tribunal by the Upper Tribunal. However, the assumption is that the Upper Tribunal will consider that application for permission in a procedurally proper and fair manner. An applicant can seek to have the Upper Tribunal set aside a refusal on the basis that the Upper Tribunal has not determined the application to set aside the earlier decision in a procedurally correct way. If the Upper Tribunal is said to have determined that application in a procedurally incorrect way, there is no reason why the appellant should be precluded from appealing to the Court of Appeal on that basis. There will, otherwise, have been no oversight of the decision of the Upper Tribunal by another court to ensure that it is procedurally correct.

28. Finally, I note that there may be arguments as to whether or not it is an appropriate use of resources to provide for appeals against decisions of the Upper Tribunal refusing to set aside refusals of permission to appeal to it on the basis that the jurisdiction to set aside decisions is limited in nature, or that the likelihood is that the Upper Tribunal would rarely if ever make procedural errors of this nature when dealing with applications for permission to appeal, and the amount of resources that would be devoted to dealing with such appeals would be disproportionate. Those, however, are matters for the Lord Chancellor to consider in deciding whether it is appropriate to make an order specifying that such decisions should be excluded decisions and not subject to any appeal to the Court of Appeal. They are not matters that affect the proper interpretation of the right of appeal conferred by section 13 of the Act.

CONCLUSION

29. For those reasons, I am satisfied that section 13 of the Act confers jurisdiction on the Court of Appeal to consider an appeal against a decision of the Upper Tribunal refusing to set-aside its earlier decision refusing permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal. Any such appeal would, however, have to be based on arguable grounds that the Upper Tribunal erred in considering that that it was not in the interests of justice or in finding that there was no procedural error or irregularity in the proceedings in the Upper Tribunal as specified in rule 43. The appeal would not be an appeal against the refusal of permission. It would be an appeal against the refusal to set aside.

30. In the present case, therefore, the Court of Appeal has jurisdiction to consider Ms Plescan's application for permission to appeal against the decision of the Upper Tribunal of 31 August 2022. That matter will be considered by a judge of the Court of Appeal. If my Lords agree, I would give Ms Plescan 14 days from the date on which this judgment is handed down to make any further representations she wishes on why she should be granted permission to appeal. In addition, Ms Plescan has, in correspondence, raised the issue of seeking to adduce evidence of blood tests that she has taken. If any application to rely on further evidence is to be made, that application must also be made within 14 days of the date on which this judgment is handed down. In making any representations, or in applying to rely on new evidence, Ms Plescan ought to bear in mind the limits of the appeal jurisdiction of this Court: it is concerned

with the procedure that was followed by the Upper Tribunal when refusing permission to appeal to it on 9 August 2022. The appeal will not be concerned with any challenge to the findings or the reasons of the First-tier Tribunal nor any challenge to the procedure in the First-tier Tribunal.

31. As this Court is determining a question of jurisdiction, I would grant permission for the judgments to be cited despite the fact that this is an application for permission pursuant to paragraph 6.1 of *Practice Note (Citation of cases: restrictions and rule)* [2001] 1 WLR 1011.

LORD JUSTICE SNOWDEN

32. I agree.

LORD JUSTICE BAKER

33. I also agree.