Neutral Citation Number: [2023] EWCA Civ 913

Case No: CA-2022-001818

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
KING'S BENCH
ADMINISTRATIVE COURT (ASYLUM AND IMMIGRATION)

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

Tuesday, 11 July 2023

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWEY
LORD JUSTICE STUART-SMITH

Between:

THE KING ON THE APPLICATION OF ELISANGELA BATISTA DIAS — **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondent**

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR JAY GAJJAR and **MS STEPHANIE ALVAREZ** (instructed by SAJ Legal solicitors) and **MR MUHAMMAD ZAHAB JAMALI** (of SAJ Legal solicitors) appeared on behalf of the **Appellant**.

MR WILLIAM IRWIN (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**

Judgment
(Approved)

LORD JUSTICE UNDERHILL:

1. The appellant is a Brazilian national aged thirty-nine. She is employed in Brazil by a Mr Rodrigo Leal da Silva, to whom I will refer simply as "Mr da Silva", as his housekeeper. Mr da Silva has a business in the UK and apparently lives here part of the time.

2. In March 2022 Mr da Silva was due to have a knee operation in the UK, which would leave him partially incapacitated during the recovery period. By ill fortune, his partner had herself to be in Brazil for an operation of her own during that period, so he needed someone to look after him. He asked the appellant to come to the UK to perform that role. He did not propose to pay her any remuneration in the UK, since she would be receiving her ordinary salary from him in Brazil.

3. On 12 March 2022, which was a Saturday, the appellant and Mr da Silva arrived in the UK on a flight from Sao Paolo to Heathrow, which landed just after 2.00 pm. Brazilian nationals wishing to enter the UK as visitors for no longer than 180 days do not generally have to obtain entry clearance in advance, and will be granted a visa on entry, but the immigration officials who questioned the appellant on arrival took the view that she was not coming as a visitor but in order to work, that is by looking after Mr da Silva. Since she had not obtained the appropriate visa she was refused entry and removal directions were issued at 5.00 pm for her to be returned to Brazil on a flight due to leave at 8.25 pm that evening. The decision letter reads, so far as material:-

> "You have asked for permission to enter the United Kingdom to work for Mr Rodrigo Leal da Silva as a housekeeper. You have stated that you are employed by Mr Leal Da Silva as a housekeeper in Brazil and are paid 1200.00 Reals.
>
> You have asked for permission to enter the United Kingdom to take care of him and continue your duties as a housekeeper. In addition to this you have stated that Mr Leal Da Silva will pay you for you for your services whilst you are in the United Kingdom but under the Immigration Rules you are required to have an entry clearance/visa to enter the United Kingdom and you have no Entry Clearance/Visa.

> You have not sought entry under any other provisions under the immigration rules.
>
> I therefore refuse you permission to enter the United Kingdom under paragraph 9.14.1 of the Immigration Rules."

4. I should perhaps identify the relevant provisions in slightly more detail. Appendix 5 to the Immigration Rules sets out the rules governing visitors to the UK. As far as material, they provide that:

   (a) Visitors cannot work in the UK, unless expressly allowed under "Appendix Visitor: permitted activities". Caring for an employer is not a permitted activity within that appendix.

   (b) Visitors must be genuine visitors: see rule V4.2. Rule V4.2(d) provides that a genuine visitor must not undertake any of the prohibited activities set out in V4.4-4.6.

   (c) Rule V4.4(a) provides that an applicant must not intend to work in the UK. The examples of work given in that sub-paragraph of the rule include the provision of services.

   We were also referred to the appendix covering overseas domestic workers, which applies to, among other categories, "those providing personal care for the employer and their family". Overseas domestic workers are required to obtain entry clearance in advance. There are various requirements for the grant of entry clearance on this basis, including to satisfy the Secretary of State that the employer intends to pay the applicant at least the national minimum wage throughout their employment in the UK.

5. Mr da Silva was dissatisfied with that decision. He urgently instructed a firm of solicitors called Ashton Ross Limited ("ARL"). Mr Jamali, a barrister employed by that firm, sent an email to what he believed was the correct Home Office address (in fact he sent it to three email addresses), containing representations to the effect that the

appellant was entitled to leave to enter. There is a dispute as to whether any of the addresses was correct and thus as to whether the emails were delivered. That is a dispute which we do not have to resolve for the purposes of this appeal, but they were certainly not read at that stage. I need not give the details of what happened thereafter, but in due course Mr Jamali attempted to make an application to the out-of-hours judge, Saini J, for an interim injunction in support of a judicial review application to be filed on the Monday morning.

6. The judge's clerk made inquiries in the usual way with the relevant Home Office unit and was told that attempts were being made to take the appellant off the flight because of the threat of judicial review proceedings. In those circumstances the application was not determined by the judge. In the event, the relevant unit was unable to take the appellant off the plane, and she was returned to Brazil. There is a dispute of no real significance about exactly when the flight departed, but the appellant accepts that it was "pushed" at 8.26 pm. Saini J was informed of what had occurred and directed that if the appellant wanted to seek an order that the Secretary of State facilitate the appellant's return she should apply to the High Court on the Monday morning. She duly issued judicial review proceedings that day, and made an urgent interim application, but the application was dismissed by Mostyn J on the basis that no notice had been given to the Secretary of State.

7. The Secretary of State filed summary grounds of defence in the usual way. In response, and in the light of the changed circumstances, the appellant applied for permission to amend the claim form and grounds. Permission was granted by Wall J on 15 June 2022, and the Secretary of State duly filed amended summary grounds of defence.

8. Permission to apply for judicial review was refused on the papers by HH Judge Dight sitting as a High Court Judge on 12 July 2022. At an oral renewal hearing on 8 September Deputy Chamber President Tudur, sitting as a High Court Judge, again refused permission.

9. The appellant applied for permission to appeal to this court on five grounds. Asplin LJ granted permission to appeal as regards grounds 1, 2 and 5. The appeal came before us

this morning. The appellant was represented by Mr Jay Gajjar of counsel, leading Mr Jamali of ARL and Ms Stephanie Alvarez. The Secretary of State was represented by Mr William Irwin of counsel.

10. I should briefly explain the grounds. The background is the Secretary of State's policy that where there are less than seven days before a proposed removal, she will defer removal if she receives a written threat of judicial review: see her published General Instructions on Judicial Review and Injunctions, version 21, at page 28. It was part of the appellant's case below that even if Mr Jamali's original emails had not been received Home Office officials had been notified orally by the judge's clerk at 7.27 pm that an out-of-hours application was being made, and were sent a written copy of the application at 8.03 pm. It was her case that the first of those communications should have triggered deferral of her removal under the policy, even though it was not in writing, but in any event that the second should have done so.

11. The judge at the renewal hearing held that the appellant could not rely on the earlier communication, because it was not in writing, and that although the later communication did fall under the terms of the policy the Secretary of State could only use best endeavours and the communication was received too late for it to be practicable to take the appellant off the plane. It is fair to record, though it does not directly affect the outcome, that the evidence appears to establish that attempts to remove the appellant from the flight did in fact begin some time before 8.00 pm.

12. Ground 1 challenges the judge's reasoning as regards the earlier communication, contending that, on a rational reading or application of the policy, written notice was not required in the particular circumstances of this case. Ground 2 challenges the judge's finding that there was insufficient time to effect the appellant's removal. Ground 5 is of a different character. In her amended claim form the appellant had challenged the original decision of the immigration officer to refuse leave to enter. The basis of the challenge was that, although the interview notes from the interviews of both the appellant and Mr da Silva might suggest that she had been intending to work in the UK, they did not fully record what they had told the immigration officer, and that the evidence in the witness statements from both of them, which were lodged in support of

the claim, established that she clearly did not intend to do so. The judge is said to have been wrong to discount the evidence in those witness statements.

13. We asked Mr Gajjar to address us first on ground 5, and specifically on the question whether, even on the basis of the witness statements of the appellant and Mr da Silva, it was arguably irrational for the immigration officer to form the view that he did. I have in my summary of the facts at the beginning of this judgment proceeded entirely by reference to those statements, and not to the interview notes. Because of their centrality, I will reproduce them in full. The appellant's witness statement (as translated from the original Portuguese) reads:

> "I, ELISANGELA BATISTA DIAS, herby solemnly and sincerely state the following:
>
> 1. I am a Brazilian national having date of birth 11 August 1983. I entered the UK on 12 March 2022 from Sao Paulo, Brazil to look after my employer in Brazil, Mr Rodrigo Leal Da Silva as he was to undergo knee surgery and would be required to be bed-bound as he recovers.
>
> 2. I currently work as a housekeeper for Mr Da Silva in Brazil for nearly 3 years. I am on a fixed income of 1200 Brazilian reals a month.
>
> 3. In February 2022, Mr Da Silva asked me to come to UK for just under 3 months because his partner had to travel for some important work to Brazil. I therefore, landed on 12 March 2022, just around the time his partner was to fly out to Brazil for her own surgery.
>
> 4. I have been provided with my interview notes from 12 March 2022. I was asked will I be paid for these months and I confirmed yes I will be paid in Brazil. The answer mentions that I will be paid but does not mention 'in Brazil'.
>
> 5. I was asked if I planned to work for Mr Da Silva's cleaning company and I answered 'no'. I was asked if I had anything else planned in the UK and I answered 'no'. I was asked if I will work for anyone else in UK to which I answered 'no'.

6. I was also asked if I was forced to come to UK, to which I answered 'no'. I was also asked if I was being forced to work in UK, to which I answered 'no'.

7. I was regularly being paid my salary in Brazil. I would not have been paid anything in UK. There had been no discussion regarding this with Mr da Silva at all. He asked me in February 2022 to fly to UK, as his partner will have to be in Brazil for her own surgery. He said he will pay for my air ticket (which he did) and as my employer was asking for help and needed it because he was about to have an operation, I accepted to come to UK to look after him."

14. Mr da Silva's witness statement reads:

"I RODRIGO LEAL DA SILVA, hereby solemnly and sincerely state the following:

1. I am the employer of Ms Elisangela Batista Dias in Brazil. I currently own a cleaning service company here in the UK. Ms Dias works for me in Brazil as housekeeper for nearly 3 years now. For this job, I pay her 1200 Brazilian reals a month as a fixed salary.

2. I had a planned surgery for my knee from NHS. This had been delayed by NHS multiple times due to Covid-19. When I got the confirmation for the surgery this time, my partner had her own surgery *already* booked in Brazil, so she could not stay. It is at that time that I asked Ms Dias, if she could come to United Kingdom to look after me, till the time my partner was away.

3. I have seen the interview transcript provided by the Border Force. It is not accurate. At question 3 it asks how much will I pay her and the answer mentioned is 'No'. The answer was that '*as I am already paying her in Brazil every month, no, I will not be paying her in the UK*'. From this complete answer they have only written no, which is wrong.

4. At question 4, I was then asked who was going to pay for her expenses in UK and I informed 'yes, I will'.

5. I have not mentioned at anytime that I would pay her for looking after me in UK. I was already paying her in Brazil and continue to do so. It is a fixed salary. Asking her to come to UK only

materialised around mid February 2022 because my partner had to fly out for her own surgery. Else I would not even have called Ms Dias.

6. Further, there was many other questions asked, they do not seem to be part of this interview transcript. I was asked who else lives with me, to which I had answered that I live with my partner only and she would have looked after me, if she was not required to fly out.

7. I was also asked why I was calling Ms Dias for three months to which I had stated that this the time I have been prescribed by the Doctors, will take me to properly recover and I specifically remember answering that if my Partner returned earlier then I will send Ms Dias back as she is required in Brazil. It is concerning that limited record of interview has been provided by the Defendant.

8. I can once again confirm, Ms Dias was not in UK for a job. She was here to help. She was not being employed to work in UK, because she was (and is) already employed by myself in Brazil. Circumstances were such that I had to call her for a short while and if my partner did not have to fly out to Brazil, I would not have called Ms Dias in the first place."

15. In my opinion it is entirely clear from those witness statements that the appellant was indeed intending to work in the UK, namely by "looking after" Mr da Silva, and that she was to be paid for that work. Mr Gajjar submitted that it was unclear whether the work in question fell within the scope of her Brazilian contract of employment. It may well be that it did not, but I do not see why that matters. It is clear that throughout the period that she would be in the UK looking after Mr da Silva she would be receiving her salary in Brazil but not performing any duties there. The only realistic analysis is that that pay was in respect of the work that she was doing for him in London. It does not matter whether that is described as an agreed variation of her Brazilian contract, or as some more flexible arrangement outside the contract. All that matters is that she was evidently not working gratuitously or as a friend. Although the appellant and Mr da Silva appear to attach importance to the question of where the money was paid, I cannot see how that is relevant. In truth, the immigration officer's decision seems to me not only rational but inevitable.

16. I should add that there is no reason to suppose that Mr da Silva, and still less the appellant, were deliberately trying to evade the rules, and I am sure that the appellant will have found the whole episode very distressing. It may well be that Mr da Silva simply assumed that a short-term visit of this kind, by someone who worked for him in Brazil, did not require a visa: that seems to be the attitude expressed in paragraph 8 of his statement. But the rules are quite clear, and that has to be the end of the matter.

17. In his skeleton argument Mr Irwin submitted that if the appellant failed on ground 5, she could not succeed on grounds 1 and 2. The substance of his point was that if she was unarguably not entitled to leave to enter, and was thus liable to removal, it was wrong that she should be entitled to any relief in respect of a potential breach of a policy designed to protect an entitlement which she did not enjoy. She was in fact liable to removal throughout and would have been removed as soon as a court had had an opportunity to consider the arguability of the case. He used the label "academic" to describe this point, but he acknowledged to us that it might more aptly be put simply under the heading of discretion: judicial review is a discretionary remedy, and in a case of this unusual kind it would be unjust for the court to make it available.

18. After we heard his submissions on ground 5, we asked Mr Gajjar to address that submission. He did not challenge the premise as such, but he contended that the court should nevertheless consider grounds 1 and 2 because they raised an important point of general application about whether it was rational for the Secretary of State to have a policy of deferring removal only where she had received a written threat of judicial review proceedings, particularly in the circumstances of port removals of this kind, where timescales are very short. I do not accept that submission. If indeed the appellant should not be entitled to any relief, for the reason already given, I do not believe that we would be justified in nevertheless considering the issues raised by grounds 1 and 2. I am not convinced that there is any point of general importance here. It is hard to see much wrong with a general policy of requiring a written threat of judicial review as a precondition for deferring removal directions: requiring a degree of formality on the part of a claimant would seem entirely appropriate. (It does not follow that the Secretary of State would, or indeed should, rigidly insist on that requirement in every case, and we have seen that she did not in fact do so here.) Further, even if,

arguably, there ought to be some qualification of the published policy, this case does not seem to me to offer a good opportunity for considering that question. The issue is not, as Mr Gajjar acknowledged, clearly identified in the pleadings. Further, although the point may be said to be a general one, it is not usually a good idea to decide a point of principle in the context of an individual case where very little is at stake for the claimant, and where the facts are not entirely straightforward and do not, at least on the face of it, suggest that any serious injustice has been done.

19. For those reasons, I would dismiss this appeal on all three grounds.

LORD JUSTICE NEWEY

20. I agree.

LORD JUSTICE STUART-SMITH

21. I also agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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