Neutral Citation Number: [2024] EWCA Civ 1211

Case No: CA-2022-000756

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
UPPER TRIBUNAL JUDGE OWENS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

ARIFUZZAMAN RANA	**Applicant**
- and -	
FIRST-TIER TRIBUNAL (IMMIGRATION & ASYLUM CHAMBER)	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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Michael West and Mansoor Fazli (instructed by **Liberty Legal Solicitors**) for the **Appellant**
William Hansen (instructed by **Government Legal Department**) for the **Interested party**

Hearing date : 3 October 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 18.10.2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans :

Introduction

1. This is my judgment after the hearing of an application for an extension of time to apply for permission to appeal and, if the extension is granted, the hearing of an application for permission to appeal. Stuart-Smith LJ ordered that it was necessary to have an oral hearing of the applications to determine them fairly given the length of delays which had occurred in dealing with the applications.

2. The applicant, Arifuzzaman Rana, seeks permission to appeal against a decision in the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) by Upper Tribunal Judge (UTJ) Owens dated 30 July 2020. UTJ Owens had refused the applicant permission to apply for judicial review to challenge a decision of the First-tier Tribunal Judge (FTTJ) Cameron dated 5 February 2020. In the decision dated 5 February 2020 FTTJ Cameron had refused to hear an appeal from a decision of the interested party Secretary of State for the Home Department dated 22 June 2018. This was because FTTJ Cameron held that the decision dated 22 June 2018 was not an appealable decision to the First-tier Tribunal (Immigration and Asylum Chamber) (FTT).

3. There are two issues before the Court. The first is whether an extension of time should be granted to the applicant. The second, which arises if an extension of time is granted, is whether there is a real prospect of success on the appeal, or some other compelling reason to hear the appeal. The issue on the proposed appeal is whether the interested party's decision dated 22 June 2018 was, because of the way the decision letter had been expressed, an appealable decision, notwithstanding that the interested party had stated that the further representations made by the applicant did not amount to a fresh claim pursuant to rule 353 of the Immigration Rules.

Procedural background

4. The applicant submitted an appellant's notice on 5 August 2020 challenging the decision of UTJ Owens. Practice Direction 52C at paragraph 3(4) identified documents which needed to be filed with the appellant's notice. These included the sealed order being appealed and the skeleton argument in support of the appeal. These documents did not accompany the appellant's notice.

5. There were delays in the registry of the Court of Appeal office because the appellant's notice was filed during the COVID-19 pandemic, and the appellant's notice was not issued. On 14 October 2020 an application for an extension of time to file a Skeleton Argument was made. On 29 October 2020 lawyers in the Court of Appeal office noted that the application raised a point about how to deal with requests for an extension of time where the appellant's notice had not yet been issued. On the same day counsel filed the Skeleton Argument. On 30 October 2020 the Court of Appeal Office emailed the applicant's solicitors informing them that they had 14 days to file the appeal bundle after receipt of the sealed appellant's notice. In fact the appellant's notice was still not sealed, and the solicitors did not receive a sealed appeal notice. The solicitors lodged an appeal bundle on 18 November 2020 in any event.

6. On 8 March 2022, so some 15 months later, counsel for the applicant emailed the Court of Appeal office to find out whether there had been a decision by the Court. The Court of Appeal office undertook a search but could not find any record of the application having been sealed. The applicant was asked to file a new appellant's notice, with the documents, and request an extension of time. In response the applicant's solicitors sent documents showing that the appellant's notice had been lodged in time on 5 August 2020.

7. On 21 March 2022 the Court of Appeal Office responded noting that the original appellant's notice filed on behalf of the applicant did not meet the minimum requirements because there was no order attached, and that the order, Skeleton Argument and bundle had then been filed some three months later than the times provided by the Civil Procedure Rules. The Court of Appeal Office stated that the appellant's notice should be e-filed.

8. The appellant's notice was filed on 20 April 2022. The appellant's notice was then overlooked and further delays occurred. It appears, from the appellant's notice supplied to the court after the conclusion of the oral hearing on 3 October 2024, that the appellant's notice was actually issued and sealed on 15 May 2024. The papers were then referred for directions on 5 June 2024, which was over two years after the second appellant's notice had been filed by the applicant's solicitors, and nearly four years after the filing of the first appellant's notice. It was because of these delays that Stuart-Smith LJ directed an oral hearing of the applications.

Extension of time and an apology

9. Mr West, on behalf of the applicant, applying the relevant tests from *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926, submitted that: there was a serious failure on the applicant's behalf to comply with the rules relating to the filing of documents for the appeal; for which there was no good reason; but where, having regard to all the circumstances of the case, it was appropriate to grant an extension of time. Mr Hansen, on behalf of the interested party, noted the relevant chronology and submitted that it was a matter for the court to determine what to do.

10. There was a serious failure on the part of the applicant's legal representatives to comply with the rules relating to the filing of documents for the appeal. It is never enough simply to send in an appellant's notice and leave the office to chase for missing documents. Such an approach creates extra work for the office, and leads to delays in dealing with other appeals. Further, there was no good reason for the failure to file the documents.

11. However, when considering all of the circumstances of the case, it is necessary both to acknowledge, and to apologise on behalf of the Court of Appeal for, the failures to seal the appellant's notice in or around November 2020, and for the failures to seal the refiled appellant's notice from April 2022 to May 2024.

12. These failures to seal the appellant's notice either in November 2020 or in April 2022 mean that the serious failings on the part of the applicant's legal representatives would not have made any material difference to the progress of the application. In these very particular circumstances, in my judgment it would be fair and just, and in

accordance with the overriding objective, to grant the applicant an extension of time for filing the appellant's notice and bundle.

Factual background

13. The applicant is a national of Bangladesh who arrived in the UK in May 2007. He had leave and further leave to remain until 22 December 2015.

14. On 21 December 2015 the applicant applied for leave to remain under the family/private life route. That application was refused on 9 September 2016 with an out of country appeal. This was a previous human rights claim, for the purposes of rule 353 of the Immigration Rules.

15. The refusal of 9 September 2016 was sent to the applicant on 28 September 2016. This meant that the applicant's leave to remain expired on 30 September 2016, at a time when he had completed 9 years and some 4 months continuous lawful residence. The applicant did not leave the UK and did not pursue an out of country appeal.

16. On 20 October 2016 the applicant submitted an application for indefinite leave to remain on the basis of 10 years continuous lawful residence pursuant to paragraph 276B of the Immigration Rules. The applicant also relied on his human rights pursuant to article 8 of the European Convention on Human Rights (ECHR) in support of his application. This was the second time that the applicant had relied on his human rights, because he had made a human rights claim on 21 December 2015 which had been rejected. In the application made on 20 October 2016 reference was made to: the time that the applicant had spent in the UK; the qualifications that he had obtained in the UK and his work in the UK; the time he had spent in the UK as a child when his father had worked for the Bangladesh High Commission; the fact that his sister had died in the UK and he visited her grave in the UK; and a relationship with a Polish national who had returned to Poland but who the applicant hoped might return to the UK.

17. Further representations were submitted on behalf of the applicant on 25 April 2017.

The letter dated 22 June 2018

18. By letter dated 22 June 2018 the interested party wrote stating that "your application has now been unsuccessful. You should now leave the United Kingdom". The letter recorded that "on 20 October 2016 you made a human rights application for indefinite leave to remain in the United Kingdom on the basis of 10 years continuous lawful residence. Your application has been considered under those rules, and with reference to article 8 of the … ECHR."

19. The application on the basis of 10 years' continuous lawful residence was rejected on the basis that the applicant had failed to meet the requirements of the rules. That conclusion is not challenged in these proceedings, and the law in this area has subsequently been clarified, see generally *Hoque v The Secretary of State for the Home Department* [2020] EWCA Civ 1357; [2020] 4 WLR 154 and *Afzal and Iyieke v Secretary of State for the Home Department* [2023] UKSC 46; [2023] 1 WLR 459.

20. The letter dated 22 June 2018 referred to the appellant's family life, the lack of barriers to the applicant returning to live in Bangladesh, and the absence of exceptional circumstances which would render refusal a breach of article 8 of the ECHR. Leave outside the rules was not granted. Compassionate factors were considered, but the interested party was satisfied that there were no exceptional compassionate and compelling factors to warrant a grant of leave.

21. The interested party then, under a heading "Repeat claim/application" recorded that the applicant had previously had an asylum or human rights claim refused with a right of appeal. Paragraph 353 of the Immigration Rules was then set out. The interested party then concluded that the submissions were not significantly different from the evidence previously considered, and therefore did not amount to a fresh claim, and that consideration of submissions not previously considered, taken together with the previously considered material, did not create a realistic prospect of success before an immigration judge. The interested party stated that the submissions "do not amount to a fresh claim".

The first challenge to the decision dated 22 June 2018

22. The applicant brought proceedings in UTIAC for judicial review of the decision dated 22 June 2018 relying on 10 years' continuous lawful residence. During the course of the hearing before UTJ Keith it was suggested by counsel then acting for the interested party that the applicant had an alternative remedy of attempting to bring a statutory appeal. UTJ Keith dismissed the claim for judicial review in a decision dated 19 December 2019. The applicant sought permission to appeal to the Court of Appeal, but permission was refused by Macur LJ in an order dated 13 October 2020.

The second challenge to the decision of 22 June 2018

23. The applicant then attempted to bring the statutory appeal. This led to the decision by FTTJ Cameron to the effect that there was no jurisdiction to hear an appeal.

24. The applicant then made the application for permission to apply for judicial review of the judgment of FTTJ Cameron, which was refused after a hearing by UTJ Owens. Having set out the relevant background, UTJ Owens held that the interested party rationally decided that the second claim made in October 2016 did not amount to a fresh claim, and referred to the UTIAC decision in *Sheidu v Secretary of State for the Home Department (Further submissions; appealable decision)* [2016] UKUT 412 (IAC) (*Sheidu*) and the judgment of the Supreme Court in *R(Robinson) v Secretary of State for the Home Department* [2019] UKSC 11; [2020] AC 942 (*Robinson*).

No real prospect of success or any other compelling reason to hear the appeal

25. Mr West, on behalf of the applicant, submitted that the applicant has a real prospect of showing that the interested party's decision dated 22 June 2018 was an appealable decision. This is because, when the decision was carefully read, it was apparent that the interested party had refused a human rights claim made by the applicant. This was similar to the situation of the appellant in *Sheidu*. Therefore the interested party's attempt to apply paragraph 353 of the Immigration Rules later in the decision added nothing, because the applicant already had a right of appeal. There was a compelling reason to hear the appeal because the legal question of the status of *Sheidu* following

the judgment of the Supreme Court in *Robinson* was still a matter of importance, as appeared from the decision in *R(Akber) v Secretary of State for the Home Department* [2021] UKUT 260 (*Akber*).

26. Mr Hansen, on behalf of the interested party, submitted that *Sheidu* was wrongly decided because it focussed on form and not substance and was inconsistent with the later decision of the Supreme Court in *Robinson*, in particular at paragraph 64. In any event, *Sheidu* had been effectively confined to its particular facts in the subsequent UTIAC decision in *Akber*. The letter dated 22 June 2018 could not be read as being a refusal of the human rights claim giving an appeal. It was a necessary consideration of the representations made by the applicant, together with a decision not to treat them as a separate claim pursuant to paragraph 353 of the Immigration Rules. There was no compelling reason to hear the appeal, because the appeal was bound to fail.

Relevant statutory provisions

27. Section 82(1) of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014 now provides:

> "Right of appeal to Tribunal
>
> "(1) A person ('P') may appeal to the Tribunal where— (a) the Secretary of State has decided to refuse a protection claim made by P, (b) the Secretary of State has decided to refuse a human rights claim made by P, or (c) the Secretary of State has decided to revoke P's protection status."

28. Paragraph 353 of the Immigration Rules now provides:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas."

Not a refusal of a human rights claim

29. In my judgment the applicant has no prospect of showing that the letter dated 22 June 2018 amounted to a refusal of a human rights claim for the purposes of section 82 of the 2002 Act, as amended. This is apparent from the wording of the letter which began by recording that the applicant's application "has now been unsuccessful". The letter referred to consideration of the matters referred to by the applicant, recorded that there were no matters to justify the grant of leave, and then determined that the

further representations did not amount to a fresh claim. The approach taken by the interested party in the letter followed the scheme of paragraph 353. It was necessary to consider the further submissions fairly before they were rejected and it was only "if rejected" that the interested party had then to "determine whether they amount to a fresh claim". The decision in *Sheidu* was a very different case. In that case the interested party had headed the relevant decision letter "decision to refuse a protection claim and human rights claim" before deciding that the claim did not amount to a fresh claim. I should also record that I derived no assistance from the unreported decision in *Secretary of State for the Home Department v Islam*, to which Mr West had referred this court. This is because the factual situation in *Islam* was very different, and it did not establish any principle of law.

30. In these circumstances there is, in my judgment, no need to decide whether any part of *Sheidu* can survive paragraph 64 of the judgment in *Robinson*, and therefore there is no other compelling reason to hear the appeal. In paragraph 64 of *Robinson* Lord Lloyd-Jones referred to the interested party first accepting further submissions as being a fresh claim in accordance with paragraph 353, if a decision was to attract a right of appeal. In *Akber,* UTIAC did not interpret *Robinson* to mean that it was a requirement in every case where the appellant contended that the appellant's new human rights submissions amounted to a fresh claim, so giving rise to a right of appeal, for the Secretary of State to accept in terms that the new human rights submissions amounted to a fresh claim. If UTIAC had taken that approach it would have meant that *Sheidu* was wrongly decided, because the reasoning in *Sheidu* was expressly linked to the unusual language and structure of the decision letter in that case. It is only fair to point out that it does not seem to have been submitted in *Akber* that that had been the effect of the judgment in *Robinson* and that UTIAC should find that *Sheidu* was wrongly decided. It is sufficient for the purposes of this application to say that the effect of *Robinson* and *Akber* is that decisions by the interested party giving rise to an appeal where the interested party has not expressly accepted the further submissions as amounting to a fresh claim, are likely to be very rare indeed.

Conclusion

31. For the reasons given above I would grant an extension of time to the applicant, but refuse permission to appeal.

Lady Justice Elisabeth Laing :

32. I agree.

Lord Justice Baker :

33. I also agree.