IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 2778 (Admin)

No. AC-2022-LON-003512

Royal Courts of Justice

Tuesday, 12 September 2023

Before:

MR CMG OCKELTON
Vice-President of the Upper Tribunal
(Sitting as a Deputy High Court Judge)

B E T W E E N :

THE KING
(on the Application of BRYCE) — Applicant

- and -

MINISTRY OF JUSTICE — Respondent

- and -

(1) TRINITY HALL ASSOCIATION
(2) DAVID BILLETT — (Interested Parties)

MR T TABORI (instructed by Direct Access) appeared on behalf of the Applicant.

THE RESPONDENT did not appear and was not represented.

MR L DAVIDSON (instructed by Birketts LLP) appeared on behalf of the Interested Parties.

J U D G M E N T

(Transcript prepared without access to documentation)

THE DEPUTY JUDGE:

1 This is a renewed application for permission to apply for judicial review following refusal on the papers by Clare Padley, sitting as a Deputy Judge of this court.

2 The claimant was a member of Trinity Hall, Cambridge, and as a result was enrolled in the Trinity Hall Association, one of the interested parties in these proceedings. She has, over a considerable period of time, brought proceedings against the Association and against its Secretary, and against other defendants as I understand. I am concerned with the claim against the Association and its Secretary, Dr David Billett, the other interested party.

3 That claim, the subject of extensive written material, was assigned to the small claims track in the County Court, and after a one day hearing was dismissed in all its numerous grounds by an oral decision given on 23 November 2021.

4 The claimant then sought permission to appeal against the Court's decision. She challenged three aspects of it, that is to say she challenged it in full, dividing the challenge into three chapters. She challenged, first, the dismissal of her substantive claim. She challenged, secondly, the Judge's order that she pay costs on the basis of her conduct (costs would not normally be the subject of an order in the small claims track); and, thirdly, she challenged the marking of certain procedural applications during the course of the proceedings as totally without merit.

5 Her grounds of appeal were extensive, and appeared in three successive versions. Following the original grounds there was an interim version consisting of 18 separate grounds, and a final version in which the number was reduced to 16, although the basic headings of the areas of grounds were the same as before.

6 The application for permission to appeal against the County Court's decision was determined on the papers by HHJ Walden-Smith. She dismissed all but one of the matters before her and regarded them as totally without merit. She granted permission in relation to one matter described as 'Ground 16'. That was one of the grounds which, in the original version of the grounds, had gone to the question of the marking of the procedural applications as totally without merit. That sole ground she regarded as arguable, she so determined thus granting permission to appeal, and she went on to allow the appeal and remove the marking. So far as the other grounds were concerned, all the other grounds before her, she marked them as totally without merit and ordered no oral renewal be permitted on those grounds. That decision was made on 5 September 2022; it was delayed in its promulgation but that is the date on it, and it is not subject to further appeal. There being no right of appeal against it, the claimant brought this claim for judicial review of Judge Walden-Smith's decision on 5 December 2022, that is to say the last day of the three months following the date of the decision.

7 There are two grounds for seeking judicial review. The first is that there was a defect of justice in the proceedings before Judge Walden-Smith in that she did not, as it is alleged, determine the application put to her, that is to say the third version, which she had, in fact, specifically permitted to be submitted. The second ground is that she should not have ordered that there be no oral reconsideration of the application for permission because, in the circumstances, she had no jurisdiction to do so.

8 Following the commencement of these proceedings there have been other procedural steps of which the one to which I need to make reference is a consideration on the papers by Lang J on 27 February 2023. The order made by Lang J allowed the claimant to rely on her reply as, again, amended. Paragraph 2 of the order is in this form to the court. It directs the defendant, that is to say the Ministry of Justice and HHJ Walden-Smith, to inform the court whether HHJ Walden-Smith mistakenly failed to consider the claimant's amended grounds of appeal, and/or whether that is the inference that should be drawn from the email dated 8 November 2022, sent by the Clerk of Cambridge Hearing Centre, such information to be filed as served within 35 days of the date of [Lang J's] order.

9 The background as set out in Lang J's Order is as follows:

> "(a) Ground 1 of the claim as set out in the statement of facts and grounds alleges that HHJ Walden-Smith, when determining the application for permission to appeal on the papers, on 5 September 2022 in the County Court at Peterborough, sitting at the Cambridge Hearing Centre, mistakenly considered the claimant's original grounds of appeal instead of her amended grounds of appeal.
> (b) HHJ Walden-Smith had, herself, granted the claimant permission to amend her grounds of appeal on 7 February 2022.
> (c) On 8 September 2022, the claimant emailed Victoria Rodwell, Judge's Clerk Support Administrative Officer, Cambridge County Court, asking:
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> > "Would it be possible for you to check which version of the grounds of appeal Her Honour Judge Walden-Smith was using in my hearing on the papers of this application? The date of the document is probably best to determine this, this is shown at the very end. Copy email attached to this order".
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> (d) On 8 November 2022 Ms Rodwell replied to the claimant stating:
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> 'In response to your query, from what I can tell, according to the paperwork on the file, the appellant's stated grounds of appeal is dated 30 November 2021. I hope this helps. Copy email attached to this order.'"

The claimant then pleads in her statement of facts and grounds:

> "On 8.1.22 I received confirmation from the County Court that the Judge did not use the amended grounds of appeal that she had granted me permission to rely on."

10 That is the relevant part of Lang J's order, and it is that that results in the next important step in these proceedings, which that was that HHJ Walden-Smith prepared a note for the court as a response to that direction.

11 The note is dated 12 March 2022. I do not need to set it out in full. It begins: "This note is written for the purpose of answering the query of Lang J, raised in her order." The note goes on to say that the explanation for the response email lies in the fact that the case was proceeding on physical papers, whereas the email could only have been sent by a person who had access not to the papers but to the court's case management database. The original grounds of appeal were, as Judge Walden-Smith puts it, dated 8 January 2022, not 30 November 2021. That, I think is, in fact, a mistake by the Judge. The date of 8 November

2022 was not correct. Whether 8 January 2022 was correct I doubt, because there is no doubt that that was the date of the second version of the grounds of appeal. The final version, however, was dated 14 January 2022, that is the version of which I have had the advantage of having, and it is the amended grounds of appeal to which the Judge then referred.

12 The Judge sets out the physical state of the papers in question, and the files in question which, needless to say, were not easily available through being in a different hearing centre from the one where she was at the time she was asked the question. Picking her note up at para.16, she writes this:

> "16. In the indexed and paginated claimant's appeal bundle the claimant included the original grounds of appeal. In my determination I dealt with all 18 grounds that had been raised by the claimant over both documents. Given the lengthy history of this matter I considered it necessary to deal with everything that the claimant had put before the court in the course of her appeal in order that it could not be said by the claimant that any point had not been dealt with.
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> 17. I am satisfied from a review of the court's paper file, which was not before the clerk when she gave the answer she did, that both the original grounds of appeal, 8 January 2022, and the amended grounds of appeal, 14 January 2022, were before me and that I considered all the grounds in an effort to avoid the claimant raising further issues. The fact that there is the document 'Appellant's Grounds of Appeal' perfected in light of the transcripts in red, green denotes amendment to the version originally filed in green dated 14 January 2022, on the court file which has been annotated by me, establishes that I did see it, and I did take it into account in my determination.
>
> <u>The Answer</u>.
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> 18. In answer to the query raised by the claimant as to which grounds of appeal the court had before it on determining whether permission to appeal should be granted, the answer is both the documents."

13 I summarise, all 18 grounds of appeal raised by the claimant across the two documents were dealt with in order that the claimant could not say that the court had failed to deal with all the points that she had raised.

14 As I have said, that note is dated 12 March 2022. Following its receipt, the application for permission on the basis of those grounds which I have summarised came before Clare Padley who, as I have said, refused permission on the papers.

15 In dealing with the matter today, the first thing I ought to consider is the jurisdiction of this court to determine an application for judicial review in circumstances such as this where the decision under challenge is that of a court, and where the decision is one which is specifically subject to provisions preventing an appeal from it. The jurisdiction is the supervisory jurisdiction of the court, as is apparent in, as it might be said, any other judicial review. But, the extent of that jurisdiction in cases of this sort is subject to certain limits expressed in the authorities, derived principally from *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 (CA). The subsequent cases include a decision by Turner J, *R (Watkins) v Newcastle upon Tyne County Court & Anor* [2018] EWHC 1029 (Admin).

In the course of his judgment, Turner J reviewed some of the authorities, and set out a summary from a decision of Jay J in *R (Oluwole Ogunbiyi) v Southend County Court* [2015] EWHC 1111 (Admin) as follows:

> " [26] I remind myself of the principles governing an application for judicial review of this nature. This court axiomatically is not exercising an appellate jurisdiction, it is in fact exercising a highly attenuated review jurisdiction. The courts have explained, on a number of occasions, the extremely restricted exercise that may be undertaken in cases of this sort, namely cases involving judicial decisions made by County Courts.
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> [27] The leading cases in this area are *R (Mahon) v Taunton County Court* [2001] EWHC (Admin) 1078, *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475, *Gregory v Turner* [2003] 1 WLR 1149, *R (Strickson) v Preston County Court* [2007] EWCA Civ 1132 and *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).
>
> [28] In my view it is unnecessary to set out all the relevant citations, but I refer to just two of these for present purposes. At paragraph 32 of his judgment in *Strickson* Laws LJ said this:
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> > 'How should such a defect be described in principle? I think a distinction may be drawn between a case where the judge simply gets it wrong, even extremely wrong (and wrong on the law, or the facts, or both), and a case where, as I would venture to put it, the judicial process itself has been frustrated or corrupted. This, I think, marks the truly exceptional case. It will or may include the case of pre-Anisminic jurisdictional error, where the court embarks upon an enquiry which it lacks all power to deal with, or fails altogether to enquire or adjudicate upon a matter which it was its unequivocal duty to address. It would include substantial denial of the right to a fair hearing, and it may include cases where the lower court has indeed acted 'in complete disregard of its duties' (*Gregory*), and cases where the court has declined to go into a point of law in a particular area which, against a background of conflicting decisions of a lower tribunal, the public interest obviously requires to be decided (*Sinclair*). The *Sinclair* type of case is perhaps a sub-class of the *Gregory* case. Both, in any event, may be less hard-edged than the pure pre-Anisminic jurisdictional error case. The courts will have to be vigilant to see that only truly exceptional cases – where there has indeed, as I have put it, been a frustration or corruption of the very judicial process – are allowed to proceed to judicial review in cases where further appeal rights are barred by section 54(4).'
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> In *Cart* Laws LJ sought to clarify what he had said in *Strickson*. At paragraph 99 of his judgment he said this:
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> > 'I hope it is clear from the context that the reference there to a 'substantial denial of the right to a fair hearing' was intended only to denote the case where there has been a wholly exceptional

> collapse of fair procedure: something as gross as actual bias on the part of the tribunal.'
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> [29] Having regard to these authorities, the hurdles surmounting the claimant today are formidable. This is not enough to demonstrate that the Circuit Judge got it 'extremely wrong'. In order to succeed on this application the claimant has to demonstrate something truly egregious or outrageous as to amount to a complete abrogation of the judicial process in the context of the right to a fair trial."

16 That summary is one which I adopt with gratitude, and it is right to say that the phrase 'a highly attenuated judicial review jurisdiction' is one which sums up the restrictions on the jurisdiction of the court in a case such as this, without necessarily providing any more than a guide. What is noticeable is that in his judgment in *Strickson*, Laws LJ sets out a number of types of case of which a complete denial of the process is, in fact, only one. Some of the other examples are the court failing altogether to enquire or adjudicate on a matter which it was its unequivocal duty to address, and it may be that if Ground 1 were made out in this case it would be an example of that type of reviewable error. Further, where the court embarks upon an enquiry which it lacks all power to deal with, that is to say the excess of jurisdiction, might have implications for Ground 2 in this case if it were made out.

17 The parties were right, of course, to raise the nature of the jurisdiction in this case. The authorities show that there must be cases where the threshold for judicial review would be passed if the scope for interference were not restricted by the *Sivasubramaniam* line of cases. It seems better in this case, and perhaps generally, to see what can be said in favour of the grounds before deciding whether that line of cases excludes the court's jurisdiction.

18 I turn then to the grounds. Ground 1, as I have said, is the ground that there was a failure by the judge to consider the grounds which were put to her and, indeed, which she had specifically allowed to be put to her by way of a third revision. I need to summarise the parties' position on this; in particular, I need to summarise the claimant's position. It is, as a starting point, a wholly reasonable position. It is this: the claimant received Judge Walden-Smith's decision. She knew the background. She knew the documents that she had submitted. She thought, from reading the decision, that her final version was not the basis for the decision the Judge had made. She made enquiries to see if that could be right. She got the response from the clerk at the Cambridge County Court, the response which has subsequently been the subject of explanation but which, at the time it was received by the claimant, seemed to suggest that quite without any fault by the Judge what had happened was that the grounds that had been put in had not been those that the Judge had considered. Her reading of the Judge's decision also gave some weight to her view that the Judge could not have been looking at the final version of the grounds for, amongst others, the obvious reason that the Judge appeared to be dealing with 18 grounds and there were 18 grounds in the preceding versions of the grounds, but the final version had had only 16 grounds.

19 Matters become, if anything, worse, when one appreciates that the Judge gave particular consideration, as I have said, to ground 16, which was the one on which she granted permission and allowed the appeal, a ground which had been withdrawn by the time of the final version. There was, therefore, at that stage every reason to suppose that there was something in what the claimant said, and that the Judge had, in fact, not had – or at any rate had not dealt with – the final version of the grounds. To put that in an even shorter summary, the claimant's position, reading the decision, was the Judge cannot have been working on the last version of the grounds.

20 The Judge's response to Lang J's order is that she was relying on the final version, those grounds were before her. The email was, as I have said, by a court clerk who had no access to the papers, and was responding only on the basis of the court's database, which was wrong, for reasons explained by the Judge. The Judge says that the final version, dated 14 January, was before her and that she had, indeed, annotated the paper copy on the file. She had dealt with all the grounds that had ever been pleaded in an effort to secure finality in proceedings which had been going on for a considerable time. In that context, this ground or claim depends on the Judge simply being wrong. There could be no basis for a judicial review of the substantive refusal of permission to appeal by the Judge on the ground pleaded as ground 1 in this case unless there was a real reason for thinking that, indeed, the Judge did not consider the finding on the later grounds dated 14 January 2022.

21 Mr Tabori's approach, on behalf of the claimant, is to point to certain features of the wording used by the Judge as not fully asserting that she had the revised grounds in mind when she made her decision. He suggests that the real position is that they may have been formally before her, that is to say available to her as a paper on the file, and that she may have forgotten version three and her reading and marking of it when she made the decision some months later. That, however, is not a viable reading of the note. The note was, as it says at the beginning, a response to a direct question in the order of Lang J. The Judge did not say she could not remember. She did not give a response indicating a lack of certainty. The response must be read as an affirmative answer to the question, without reservations. The question was whether she mistakenly failed to consider the claimant's amended ground of appeal. The answer clearly has to be read as: no, she did not fail to consider them; she did consider them.

22 The only basis on which this claim on this ground could be maintained then is that the Judge is not telling the truth. There is no proper reason for thinking that. The Judge had no interest in the case, other than that of a Judge. There is no basis for supposing that she would do anything other than state exactly what happened or, if she could not remember, say that she could not remember. The decision she made may have defects, but that is not the point. This is not an appeal against it. The ground that there was an error of law by a procedural defect in justice cannot be made out.

23 I turn then to Ground 2. The starting point is Part 52.4 of the Civil Procedure Rules. It is headed: "Determination of applications for permission to appeal to the County Court and High Court":

> "(1) Where an application for permission to appeal is made to an appeal court other than the Court of Appeal, the appeal court will determine the application on paper without an oral hearing, unless the court otherwise directs, or as provided for under paragraph (2).
>
> (2) Subject to paragraph (3) and except where a rule or practice direction provides otherwise, where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at an oral hearing.
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> (3) Where in the appeal court a judge of the High Court, a Designated Civil Judge or a Specialist Circuit Judge refuses permission to appeal without an oral hearing and considers that the application is totally without merit, the judge may make an order that the person seeking

permission may not request the decision to be reconsidered at an oral hearing.

Paragraph 4 defines "Specialist Circuit Judge" for these purposes, and Her Honour Judge Walden-Smith is one. As I have said, she ordered that there be no oral reconsideration. The claim is that she was not entitled to do so based on the procedure set out in those paragraphs of the Civil Procedure Rules.

24 It seems to me that it is arguable that paragraph 3, the power to exclude an oral reconsideration hearing, did not apply here. The following factors lead me to that conclusion:

(1) The Judge did not refuse permission to appeal: in fact she granted permission to appeal on one limited ground within the application and, indeed, dealt with the matter straight away.
(2) She did not consider the application, that is to say the application for permission to appeal as a whole, as totally without merit, but only certain grounds, admittedly most of them – all but one of them.
(3) In the order that she made, purportedly in the exercise of her jurisdiction, in paragraph 3 she does not restrict oral consideration of her decision, but in four only of certain grounds; that does not appear to be a form of order recognised by paragraph 3.
(4) Although the purpose of the rule is to prevent time being wasted on oral hearings of unmeritorious claims, the restrictions on right of access to the court must be construed conservatively.

25 So, in my judgment, that point taken by itself is arguable; and a order made in excess of jurisdiction is probably not limited by any of the *Sivasubramaniam* principles. But that does not mean that in this case there is any good reason for allowing the matter to proceed. All the grounds of appeal were, as the Judge said, totally without merit, save for Ground 16. She dealt with what had been Ground 16, but in fact that is a ground which was withdrawn by the claimant. The effect is that every ground that the claimant did raise as a current ground for the Judge to consider was a ground that the Judge regarded as totally without merit, that is to say a ground which could not, on any legitimate basis, succeed.

26 The judge could properly have made the order that she did make in relation to the grounds which were, in fact, before her, and it is clear from her decision that she thought it appropriate to make such an order. No useful purpose would be served by allowing this judicial review of the 'totally without merit' marking to proceed, merely so that if it succeeded on judicial review the claimant could raise, in a renewed permission to appeal application, grounds that are totally without merit. For those reasons, despite my identification of an arguable error of law in this aspect of the Judge's decision it is not a matter which I regard as suitable for a grant of permission to proceed.

27 I must deal finally with time. Judicial review claims, such as this, have to be made promptly and, in any event, within three months. As I have said, this claim was filed on the last day of the three months after the decision. It was not prompt. The facts provide some, but not much, explanation. The claimant did seek further information from the court and received information which appeared to support her suspicion about whether her final grounds had been considered. But, on the other hand, there does not seem to be much suggestion of prompt action after that, and the entire lack of a pre-action protocol procedure does not help a claimant's case. All those are factors which need to be taken into account in determining whether this claim should be regarded as time barred.

28 The interested parties have referred me to *C-Care (Mauritius) Ltd v Employment Relations Tribunal and five others* [2022] UKPC 58, a Mauritian case. In that case Lord Sales, giving the judgment of the Board, mentions considerations which it is right to say might be regarded as considerations of principle in relation to a judicial review challenge to an unappealable court decision. Those considerations are set out at [19]:

> " In addition, the Board observes that in the circumstances in which the award was produced quickly after the conclusion of the hearing before the Tribunal, the parties and their legal representatives were clearly well aware of the legal issues arising in relation to it. This means that the appellant should have had no difficulty in obtaining legal advice and considering it in order to decide whether to bring a judicial review claim. There is no obvious reason why that should have taken as long as six weeks. . ."

And the court goes on to compare the time taken by the claimant in that case with the time that would have been available for an appeal against the judgment.

29 Although of course I accept everything that is said there, it is said in the context of a rather different type of claim in, of course, a different jurisdiction. This was a claim which did not arise specifically out of – or did not wholly arise specifically out of – a decision which had been made, and which all the parties were fully aware of. Ground 1 in particular arose out of what might be regarded as external aspects of the decision. It seems to me that, although the claim can be criticised for not being prompt and in other circumstances might be, that is not a matter which I need to decide on this occasion. The purpose and effect of an exclusion of an application for delay (or refusal to extend time) would at this stage be limited to the question whether a claim that might otherwise be allowed to proceed be regarded as time-barred. This is not such a claim.

30 For the reasons I have given permission is refused.

CERTIFICATE

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This transcript has been approved by the Judge.