EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 32
P438/19

Lord Brodie
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD BRODIE

in the appeal by

by

(1) ASFANDYAR SALEEMI; (2) MUHAMMAD IQBAL SALEEMI and
(3) BUSHRA SALEEMI

Petitioners and Appellants

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners and Appellants: Parties; Lay Representative M Kashif
Respondent: J Gardiner; Office of the Advocate General

10 June 2020

Summary

[1] This is an appeal in terms of section 27D of the Court of Session Act 1988. It proceeds as a reclaiming motion in terms of RCS 38.8(d) and 58.10. The petitioner appeals against the interlocutor of the Lord Ordinary, dated 24 October 2019, refusing permission to proceed in a petition for judicial review of a decision of the Upper Tribunal (UT),

promulgated on 9 January 2019, refusing permission to appeal to itself from a decision of the First-tier Tribunal (FTT), promulgated on 6 August 2018. With the agreement of parties, it has been considered on the basis of the submitted documents. The petitioners appear as party litigants. On 3 December 2019 the procedural judge allowed the appeal to be made out of time. On 10 December 2019 the procedural judge granted the application for Muhammed Kashif to act as the petitioners' lay representative in the appeal.

[2] As parties have recognised, the jurisdiction that the Lord Ordinary was exercising when considering whether to grant permission to proceed, is that prescribed by section 27B(3)(b) and (c) of the Court of Session Act 1988. The Lord Ordinary could only grant permission if he was satisfied that the application had a real prospect of success, and, as the second part of the test, either (i) the application would raise an important point of principle or practice, or (ii) there is some other compelling reason for allowing the application to proceed. This is the "second appeals test", discussed in *Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1.

[3] The Lord Ordinary was addressed on both parts of the second appeals test but as he accepted the argument of the respondent that the petitioners had no prospects of success, he did not give separate consideration to the second part (important point of principle or other compelling reason). The petitioners contend that the Lord Ordinary erred in deciding as he did. Their position is that he failed to identify the errors in law on the part of the FTT and the errors and failure to engage with the petitioners' grounds of appeal on the part of the UT. He did not properly understand and apply the relevant provisions: paragraph 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002. He failed to take into account what had been said by the

Court of Appeal in *R (on the application of MA (Pakistan))* v *Upper Tribunal* [2016] 1 WLR 5093 at para 46.

[4] The respondent contends that neither part of the second appeals test is met. The petition for judicial review has no prospects of success. The FTT made no error. Contrary to what the petitioners assert, the FTT had accepted that the age requirement for paragraph 276ADE(1)(iv) had been satisfied. Specifically, it had recognised that what was relevant was the first petitioner's age at the date of application for leave to remain. For the reasons it gave, the FTT was entitled to find that it was reasonable to expect the first petitioner to return to Pakistan. The Lord Ordinary had been correct to find that as the petition did not address the question of reasonableness, the petitioners' challenge failed as a simple matter of pleading. In any event no important point of principle arose. The second appeals test was not satisfied.

[5] We have had regard to all the papers with which we have been provided. In the light of that material we consider that the second appeals test is met. It appears to us that a point of law has been identified by the petitioners' representative, and repeatedly argued by him, which, although we do not purport to determine it, has real prospects of success. While the point may be found to be available only to the first petitioner, for present purposes we do not exclude the possibility that it may assist the second and third petitioners. That is a matter which can be further considered in the course of these proceedings for judicial review. In so far as we have not had our attention drawn to any directly applicable authority, we are prepared to treat the point as one of principle but even if we are wrong about that, it appears to us that there is sufficient force in the petitioners' contention that the FTT and then the UT failed properly to engage with the petitioners' applications for permission to appeal, to suggest something of the nature of a collapse or

breakdown in fair procedure and that therefore there is a compelling reason to grant permission.

[6] We accordingly propose to grant permission to all three petitioners to proceed with their petition for judicial review. Our further analysis and reasoning are as follows.

The petitioners and their circumstances

[7] The petitioners are nationals of Pakistan. They are members of the same family; the second and third petitioners are married, the first petitioner is their adult child. He was born on 18 May 1999. The first petitioner has two elder siblings, a sister who is studying medicine at Glasgow University, who has leave to remain in the UK; and a brother who lives in Pakistan where he qualified as a doctor.

[8] The petitioners entered the United Kingdom on 23 August 2009 with leave to remain until 22 November 2013. On 11 November 2013 each of the petitioners applied for indefinite leave to remain. Their applications were refused. They were served with notices of liability to removal on 7 September 2016. However they continued to reside in the UK. They claim to subsist on the charity of friends.

[9] The first petitioner has excelled academically at school. He has been offered a place to study medicine at the University of Dundee which he has had to defer by reason of the question-mark over his immigration status.

[10] On dates in May 2017 the petitioners each again applied for leave to remain on the basis that their removal would contravene their rights to private life, as guaranteed by article 8 of the European Convention on Human Rights. The first petitioner relied on paragraph 276ADE(1)(iv) of the Immigration Rules. The claims by the second and third petitioners were outside the Rules but they sought to "piggy-back" on the first petitioner's

claim by virtue of section 117B(6) of the Nationality, Asylum and Immigration Act 2002. The respondent refused these applications in terms of decision letters dated 26 September 2017. The petitioners appealed these decisions to the FTT under section 82 of the Nationality, Immigration and Asylum Act 2002.

The provisions relied on by the petitioners

[11] The relevant parts of the provisions relied on by the petitioners in making their applications to the respondent and in presenting their appeals to the FTT were as follows:

Immigration Rules paragraph 276ADE(1)(iv)

> "276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant: ...
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK".

Nationality, Immigration and Asylum Act 2002

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and …
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest…

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom. …

117D Interpretation of this Part

(1) In this Part—

'Article 8' means Article 8 of the European Convention on Human Rights;

'qualifying child' means a person who is under the age of 18 and who- …

(b) has lived in the United Kingdom for a continuous period of seven years or more;".

The point of law

[12] The appeal was heard by the FTT (as constituted by FTT Judge Doyle) in Glasgow on 31 July 2018. A matter which assumes importance is that, as is accepted by the respondent, the first petitioner made his application for leave to remain on 17 May 2017, the day before his 18th birthday. Thus, as at the date of his application he was under 18 years of age (and therefore a child in terms of section 55 of the Borders, Citizenship and Immigration Act 2009) whereas, as at the date of the hearing before the FTT he was 19 years of age (and therefore an adult). The proceedings before the FTT were an appeal in terms of section 82 of the 2002 Act but such appeals are by way of a hearing of evidence at which the Tribunal can consider any matter which it thinks relevant to the substance of the decision including a matter arising after the date of the decision (see 2002 Act, section 85(4)). In carrying out its independent assessment of the first petitioner's claim should then the FTT have treated the first petitioner as the adult he was at the date of the hearing, or as the child that he had been at the date of his application? That appears to us to be an arguable point of law which may

be material. We will say more about this below, but first it is convenient to note how matters proceeded before the FTT.

The FTT decision

[13] The petitioners' separate appeals and that of the first petitioner's elder sister (which was to succeed on the basis that she had already begun her university studies in Glasgow and that accordingly to require her to leave the UK was disproportionate) were heard together by the FTT. The first petitioner and his sister gave oral evidence; the second and third petitioners did not. In presenting his appeal, the first petitioner claimed that he met the requirements of paragraph 276ADE(1)(iv) in that as at the date of his application he was under 18 years of age, that he had lived in the United Kingdom for 7 years and that it would not be reasonable to expect him to leave the UK. It was accepted on behalf of the second and third petitioners that they could not meet the requirements of the Immigration Rules. They claimed however that to remove them from the UK would be a disproportionate interference with their article 8 rights, given that section 117B(6) of the 2002 Act was engaged by reason of their parental relationship with a qualifying child (the first petitioner). In these circumstances, the public interest did not require their removal from the UK. It was the respondent's case that it would be reasonable for the first petitioner to return to Pakistan and accordingly neither paragraph 276ADE(1)(iv) nor section 117B(6) provided a basis for leave to remain. The respondent did not accept that there were circumstances in any of the petitioners' cases which merited consideration outside the Immigration Rules.

[14] The petitioners state in their grounds of appeal (para 1) that the FTT dismissed their appeal because the first petitioner did not meet the requirements of paragraph 276ADE(1)(iv) in that he was 19 years of age. That assertion is repeated in the

written submission by Mr Kashif (at paras 1 and 16) with the elaboration that the matter was the subject of a specific submission which the FTT rejected.

[15] That is not how the FTT's decision reads, at least at first blush. As appears from para 11(a) of the Decision and Reasons of 6 August 2018, the FTT noted that it was accepted by the respondent that the first petitioner was under 18 years of age at the date of his application and that he had lived in the UK for seven years. However, the FTT continues:

> "That concession is not sufficient to meet the requirements of paragraph 276ADE(1)(iv). It is for the [first petitioner] to establish that it would not be reasonable to expect him to leave the UK."

The FTT goes on to discuss the evidence and then at para 11 (f) concludes:

> "The [first petitioner] fails to establish that it would not be reasonable to expect him to leave the UK. The weight of reliable evidence indicates that the [first petitioner] has family members in Pakistan with whom he remains in contact. His own brother qualified as a doctor in Pakistan. He has had the benefit of secondary education in the UK. He can take the benefit of his education and experience in the UK and apply those benefits to his future in Pakistan."

Did the FTT err?

[16] Accepting the submission of counsel for the respondent (adopting the same position as he takes in his note of argument before this court) the Lord Ordinary saw nothing wrong with the reasoning of the FTT: it was for the first petitioner to establish that it would not be reasonable to expect him to leave the UK; the FTT had considered the evidence; whereas it accepted that it would contravene his sister's article 8 rights to disrupt her university studies which were nearly halfway through, that was not the position with the first petitioner; it was not unreasonable to expect a 19-year-old to return to Pakistan and begin university there. We accept that all that might well be so (and would be conclusively a matter of fact for the FTT) if "reasonable to expect" is regarded as being free of presumptions and implicit weight, as the FTT would appear to have thought. We would suggest that whether the FTT was

correct depends on whether the first petitioner is to be taken to be an adult as at the date of the FTT decision or whether, and this appears to us to be the position adopted consistently on behalf of the petitioners by their representative Mr Kashif, he was to be treated as if he was still a child or, if that is not quite the correct way of putting it, by reference to the same approach to decision-making as must be adopted in the case of a person who is under the age of 18 years and who has lived continuously in the UK for the immediately previous seven years.

[17] Normally a tribunal's decisions are to be made by reference to the circumstances at the time of decision (see 2002 Act, section 85(4)). However, read short, Immigration Rule 276ADE(1) provides that the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that:

> "*at the date of application*, the applicant: ...is under the age of 18 years and has lived continuously in the UK for at least 7 years … and *it would not be reasonable to expect* the applicant to leave the UK". (emphasis added)

Given that wording, it is at the very least arguable that the question as to whether it "would not be reasonable to expect" should be looked at from the perspective of the date of application. As at that date the first petitioner was still 17 years of age.

[18] The FTT gave no indication that it was treating the first petitioner as if he were a child who had spent the last 7 years in the UK nor, to the extent that this is a different point, that it had regard to the first petitioner's age and previous UK residence in determining whether "it would not be reasonable to expect" the first petitioner to resettle in Pakistan. Arguably that was an error and arguably it was material. In the petitioners' note of argument and in the written submissions it is submitted that the test of reasonableness cannot be applied in isolation, and that error on the part of the FTT deprived the first petitioner of the benefit of the "narrow approach" to the assessment of reasonableness. In

support, the petitioners refer to the decision of the Court of Appeal in *R (on the application of MA (Pakistan))* v *Upper Tribunal* [2016] 1 WLR 5093 and that of the Supreme Court in *KO (Nigeria)* v *Secretary of State for the Home Department* [2018] 1 WLR 5273 (somewhat confusingly *KO (Nigeria)* designates much the same group of cases which in the Court of Appeal had been designated *MA (Pakistan)*).

[19] In *MA (Pakistan)* Elias LJ, in a judgment with which the other members of the Court of Appeal agreed, discusses the approach to be adopted in determining whether it is "reasonable to expect" a child to leave the UK for the purposes of paragraph 276ADE(1)(iv) of the Immigration Rules or section 117B(6) of the 2002 Act, in terms of a "narrow approach" and a "wider approach". These are shorthand expressions. The "narrow approach" is where the tribunal is concerned only with the position of the child, and not with the immigration history and conduct of the parents, or any wider public interest factors in favour of removal. The "wider approach" is to require a balancing exercise, weighing any adverse impact on the child against the public interest in proceeding with removal or deportation of the parent. *KO (Nigeria)* may be taken to have endorsed the narrow approach. The judgment of the Supreme Court in *KO (Nigeria)* had not been issued as at the date of the decision of the FTT in the present case, but at para 16(a) of its Decision and Reasons the FTT records that *MA (Pakistan)* was cited to it.

[20] As already indicated, we consider that the first petitioner is arguably correct to argue that the FTT deprived him of the benefit of the "narrow approach" to the assessment of reasonableness, that this was an error and that it was material. The matter is not discussed in the FTT's Determination and Reasons but, although notionally applying the terms of paragraph 276ADE(1)(iv,) the FTT appears to have undertaken what was a broad brush article 8 assessment on the basis of the disruptive effects of removal as against the implicit

public interest in immigration control. There is no mention of giving significant weight to the fact that the first petitioner had been in the UK for seven years, as referred to at para 46 of *MA (Pakistan)*, or the best interests of the child being a primary consideration as is required, in appropriate cases, by section 55 of the 2009 Act. How the FTT dealt with the appeal had the look of the "wider approach" or, alternatively, an approach which gave no weight whatsoever, when assessing what it was reasonable to expect, to the first petitioner's status as a child who had lived in the UK for seven years. Had the FTT adopted a "narrow approach" it does not follow that the first petitioner's appeal would necessarily have succeeded but it cannot be said that it would not have made a difference to the outcome. It certainly would have been of significance if, by reason of following the "narrow approach", the public interest in immigration control were to have been left out of the balance.

The UT decision

[21] On 6 August 2018, the FTT dismissed the petitioners' appeal. On 15 October 2018, the FTT refused permission for a further appeal to the UT (promulgated 6 November 2018). On 3 January 2019, the UT refused permission to appeal to itself (promulgated 9 January 2019). The reasons given by the UT were as follows:

> "The grounds argue that the judge erred by concluding that [the first petitioner] could not succeed as a qualifying child who has been in the UK for 7 years because at the date of the hearing which was considerably delayed he was no longer a child. Rule 276ADE(1)(iv) provides that the relevant date is the date of application when he was a minor.
>
> This argument has some merit on its face. However, at paragraph 11(e) and (f) the judge considers the question of reasonableness and gives cogent reasons why in this particular case it would not be unreasonable for him to return to Pakistan. Accordingly any possible error is not material."

The petition for judicial review draws attention to the observation by the UT that the ground on which the petitioners proposed to appeal against the decision of the FTT had "some merit on its face" as demonstrating that the appeal has real prospect of success. We are not however persuaded that the UT had more success in identifying the possible ground of appeal here than the Lord Ordinary had. Had it done so it would not have gone on to describe the reasons given by the FTT for it not being unreasonable for the first petitioner to return to Pakistan as "cogent". We consider that there is a real possibility that the UT did not understand the issue and therefore can be said not to have engaged with it. On no view did the UT demonstrate that it had recognised and addressed the point raised by the petitioners' ground of appeal. To that extent there can be said to have been a breakdown in proper procedure.

The second part of the second appeals test

[22] As we have foreshadowed, we consider that the second part of the second appeals test is met in this case. There is something which approaches an important point of principle here and if procedure has not quite broken down, on one view an arguable legal point which has been consistently put forward on behalf of the petitioners seems to have been ignored or misunderstood.

Conclusion

[23] We shall grant the motion for review (allow the appeal); recall the Lord Ordinary's interlocutor of 24 October 2019 and grant permission to each of the petitioners to proceed with their petition for judicial review. We would end however with a note of caution. There is enough here to suggest that the petitioners consider that their claims, including their

applications to the supervisory jurisdiction of the Court of Session go hand-in-hand; success for one means success for all, and an application on behalf of one is an application on behalf of all. We would not wish to encourage the petitioners in such an approach, either in relation to the substance of the legal argument or to matters of procedure. Counsel for the respondent begins his note of argument by stating that although there are three petitioners, the grounds of appeal relate entirely to the first petitioner. That is not our reading of the grounds of appeal and the other documents with which we have been provided. We would understand all three petitioners to complain of error of law on the part of the FTT in refusing their respective appeals, further error on the part of the FTT and UT in refusing permission to appeal to the UT, and error on the part of the Lord Ordinary in refusing permission to proceed with a petition for judicial review which is at each of their instance. However, we understand that the reclaiming motion (appeal) was marked only in the name of the first petitioner. That point is not taken against the second and third petitioners by the respondent, perhaps because they are party litigants with a lay representative, but it might have been. We do not propose to take the point on our own motion, but the petitioners should bear in mind that they have separate interests, each of which requires to be separately considered in the course of these proceedings for judicial review. The court will make some allowance for party litigants who are not familiar with court procedure, but there is not one rule for those who are legally represented and another for those who are not legally represented.