EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 59
P529/19

Lord Glennie
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD GLENNIE

in the Appeal

by

WAQAR AHMED AND OTHERS

Petitioners and Appellants

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners and Appellants: Winter; Drummond Miller LLP
Respondent: Tariq; Office of the Advocate General

4 September 2020

[1] This is an appeal by the petitioners against the Lord Ordinary's refusal, after an oral hearing, to grant permission to proceed with their petition for judicial review.

[2] The first and second petitioners are husband and wife. They are the parents of the third and fourth petitioners, N and M, with whom, as is accepted by the Secretary of State, they have a genuine and subsisting parental relationship. The petitioners are all Pakistani nationals.

[3] The first petitioner entered the UK in December 2003 as a working holidaymaker with a visa valid until 24 October 2005. He applied for further leave to remain, but this was refused and his appeal against that refusal was unsuccessful. The second petitioner entered the UK in March 2010 in possession of a valid visit visa which expired by September 2010 at latest. Both of their children were born in the UK, M in 2011 and N in 2014. In April 2018 the petitioners made an asylum claim based on the fact that the first and second petitioners were from different castes and were at risk from their families in Pakistan who disapproved of their marriage. They also relied on Article 8 ECHR. That claim was rejected by the respondent in October 2018. An appeal to the First-tier Tribunal ("FtT") was refused in December 2018.

[4] The FtT judge did not accept the evidence given by the first appellant about the dangers faced by them in Pakistan. His evidence contained too many inconsistencies for it to be persuasive; and it was in many respects inconsistent with the relevant background materials. Further, he found that there was a sufficiency of protection in Pakistan and the option of internal relocation was also available to them if they were really in danger as alleged. He found that they were not refugees. That finding is no longer in dispute.

[5] So far as concerns the human rights claim, the FtT judge started from the position that in terms of section 117B of the Nationality, Immigration and Asylum Act 2002 the public interest was *prima facie* against the petitioners' claim to remain in the UK. But, as he recognised, the position of the children required to be taken into account. M was a qualifying child in terms of section 117D(1) of the 2002 Act by virtue of having lived in the UK for at least 7 years. In those circumstances the question arose under section 117B(6)(b) as to whether it would be reasonable to expect him to leave the United Kingdom – if not, then

there was no public interest in removing his parents. A similar argument was raised in respect of N though, as she was younger and had not been in the UK for at least 7 years, she was not a qualifying child. The argument in her case was advanced under reference to Article 8 ECHR (best interests of the child). Having considered evidence from a psychologist, Dr Jack Boyle, relating to the linguistic, social, educational and psychological difficulties which M (and his sister) would face if required to leave the UK, the FtT judge determined (at paragraphs 26-31) that although, like any other children of that age brought up in Scotland, M and N would face difficulties if required to leave the UK, they were both intelligent, gifted and charming children who had the unerring support of their parents and, as such, they would over time adapt to their new life in Pakistan. It could not be said to be unreasonable to expect them to leave the UK with their parents. That objection to removal also failed.

[6] The petitioners sought leave to appeal to the Upper Tribunal ("UT") on this aspect of the case. There is a right of appeal from the FtT to the UT on a point of law, but only with leave of the FtT or the UT. Leave to appeal was refused by the FtT. The application to the UT was also refused, essentially on the ground that it did not raise any arguable point of law but was simply an attempt by the petitioners to re-argue issues of fact which had been decided against them by the FtT judge.

[7] There is no right of appeal against the UT's refusal of leave. But it is susceptible of judicial review on conventional *Wednesbury* grounds. In this petition the petitioners seek to have the decision of the UT set aside and the application for leave to appeal sent back to the UT for reconsideration. They say that the UT erred in law in its consideration of the grounds of appeal submitted to it on behalf of the petitioners.

[8] In terms of section 27B of the Court of Session Act 1988, no proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court of Session (ie a petition for judicial review) unless the court has granted permission for the application to proceed; and the court may grant permission only if it is satisfied that the application has "a real prospect of success". That test has been the subject of authoritative analysis in *Wightman* v *Advocate General* 2018 SC 388 at para [9] and *PA* v *Secretary of State for the Home Department* [2020] CSIH 34 at para [29]. We need not repeat it here. In a case such as the present, however, which involves a challenge to the decision of the UT to refuse permission to appeal to itself, there is an additional hurdle set out in section 27B(3)(c) of the 1988 Act. The court may grant permission for the application to proceed only if it is satisfied (i) that the application would raise an important point of principle or practice or (ii) that there is some other compelling reason for allowing the application to proceed ("the second appeals test"). In this case the petitioners do not suggest that the application raises an important point of principle or practice, but they say that the point is strongly arguable; and that, combined with the "truly drastic consequences" to the petitioners if the decision is allowed to stand, amounts to a compelling reason for allowing the petition to proceed.

[9] In presenting this appeal, Mr Winter emphasised that he sought to focus attention on errors of law made by the UT in refusing leave to appeal, rather than go into the merits of the FtT decision. That is obviously right. A challenge on judicial review grounds must identify errors made by the UT, since it is their decision to refuse leave which is being criticised: *SA* v *Secretary of State for the Home Department* 2014 SC 1 at paragraphs 12 and 15. But this is often easier said than done. There may, of course, be cases where it is obvious from the face of its decision that the UT has adopted an approach or applied some reasoning

which is open to challenge without looking much further. But the UT's decision will usually be short and concise in its reasoning. In those circumstances it may be difficult to identify an error in the approach adopted by the UT. More often than not the contention will simply be that the UT has erred in law by failing to recognise that the FtT arguably fell into error in some important respect. This would, if established, be an error of law by the UT; but it would require some consideration of the FtT's decision to understand it and explain what the error is, albeit only to the point of arguability. In such cases, as has been pointed out on a number of occasions (most recently in *Khodarahmi* v *Secretary of State for the Home Department* [2020] CSIH 45), the focus of any discussion is likely to be on the reasoning in the FtT and the failure, as the petitioner would have it, of the UT to identify that the FtT had arguably made an error of law.

[10] In this case the petitioners' argument is premised on the contention that the FtT did not deal properly with the expert evidence given by Dr Boyle in his Report; and their criticism of the UT's decision refusing leave to appeal is, in essence, that the UT neither recognised that the FtT had failed in this respect nor gave an adequate explanation of its reasons for rejecting that complaint.

[11] In considering this argument it is unnecessary to go into the FtT decision in great detail. So far as concerned the treatment of Dr Boyle's evidence, the FtT judge summarised the gist of his Report (in paragraph 26) and then (in paragraphs 27-31) explained his reasoning and conclusions in respect of that Report and its impact on the case. In his view Dr Boyle added nothing to the appeal. What he had done was describe the difficulties likely to be encountered by any child moving from one country to another, establishing new routines, learning the language and integrating into a new culture. With the support of their

parents, these children would adjust to life in Pakistan. Admittedly their education and health care services which they had enjoyed in the UK would cease. But healthcare and education were available in Pakistan, albeit at a lower level. A return to Pakistan would not result in neglect or destitution. Housing, healthcare, education and family support were all available there. There was no reliable evidence which realistically indicated that it would be unreasonable to expect them to return with their parents to Pakistan. The FtT judge concluded this section of his reasoning by saying that it was well settled that the "better v worse" prism was the wrong approach in law.

[12] This decision was criticised principally under reference to the statement in it that Dr Boyle's Report added nothing to the appeal. The language used was perhaps somewhat opaque, but once the context is understood its meaning is plain. That context is an examination, in terms of section 117B(6)(b), of whether it would be unreasonable to expect the relevant child, M, to leave the UK. This has to be assessed against an assumption that the parents will be expected to leave the UK (*KO (Nigeria)* v *Secretary of State for the Home Department* [2018] 1 WLR 5273 at paragraph 18) and in light of an understanding that it is usually better for children to remain with their parents in a family unit. In those circumstances, the question to be answered is not simply whether it would be better or worse, all things being equal, for the child to remain in the UK (the "better v worse" prism referred to by the FtT judge), but whether in circumstances where his parents would be expected to leave the UK it would be unreasonable to expect him to go with them (*SA (Bangladesh)* v *Secretary of State for the Home Department* 2019 SC 451 at paragraph 31). This will usually require some evidence as to particular difficulties that the child might face if required to leave the UK. Dr Boyle's Report, once stripped of its reference to difficulties

likely to be encountered in Pakistan because of the alleged family feud (an allegation which the FtT judge rejected on the evidence), simply spoke in effect to the difficulties likely to be encountered by any child of a similar background who had been brought up in Scotland to regard himself as Scottish. It was for that reason that the FtT judge took the view that the Report added nothing to the appeal. Although we would not have expressed it in quite those terms, we can see nothing wrong with that reasoning.

[13] In light of this analysis, the petitioners' argument that the UT did not adequately explain why it rejected their criticism of the FtT judge's decision rather falls away. But we are satisfied, in any event, that the UT explained its reasoning adequately, bearing in mind that the reasons given are addressed to and intended to be understood by someone well versed in the facts of the case and familiar with the arguments. The UT stated that the FtT judge had noted that M was a qualifying child; that he had properly examined the impact of the decision upon all the appellants; that he had correctly observed that the family would be returned to Pakistan as a unit; and that he had concluded that it had not been shown that it was unreasonable for M to leave the UK and move with his family. In other words, he had had regard to the relevant factors and had reached certain conclusions on the appeal in light of them. In those circumstances the UT concluded that the application for leave to appeal raised no arguable point of law but was in substance simply a disagreement with the FtT judge's assessment of the evidence. That reasoning cannot be faulted.

[14] It follows that the petitioners cannot show that they have a real prospect of success on the merits of the petition. In those circumstances it is unnecessary for us to address the "second appeals test" set out in section 27B(3)(c) of the 1988 Act. We should note, however, that once the FtT judge rejected the first petitioner's evidence relating to the family feud

endangering the family if they were returned to Pakistan, it would have been very difficult for us to have accepted the submission that to require the family to leave the UK was one which would have "truly drastic consequences" so as to give rise to a legally compelling reason for allowing the petition to proceed.

[15] The appeal is refused. All questions of expenses are reserved.