Case No:C2/2015/4305(B)

Neutral Citation Number: [2018] EWCA Civ 1259
IN THE COURT OF APPEAL (CIVIL) DIVISION
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
UPPER TRIBUNAL JUDGE PETER LANE

The Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday, 1 May 2018

Before

LORD JUSTICE DAVIS

The Queen on the application of
AA (Pakistan)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR ARFAN KHAN (instructed by CHIPATISO ASSOCIATES) appeared on behalf of the **Applicant**
MR ZANE MALIK (instructed by GOVERNMENT LEGAL DEPARTMENT) on behalf of the **Respondent**

Judgment
(Approved)

1. LORD JUSTICE DAVIS: It is very regrettable that what is now an issue in trying to save costs has generated so much in the way of written and oral argument. At all events, the matter comes before me today on the footing that the applicant says that she has the right to an oral hearing by way of reconsideration of the order as to costs made on the papers by Hickinbottom LJ on 12th February 2018. By that order, Hickinbottom LJ, having considered the lengthy written submissions of the parties, made, in effect, no order as to costs, save for a limited order for costs in favour of the Secretary of State in respect of an application to strike out the then appeal of the applicant to the Court of Appeal.

2. There has been a very lengthy immigration history and litigation history in this case. It seems that, after a period of time in the United Kingdom, the applicant, a national of Pakistan, was granted leave to remain as a student until 19th May 2015. It seems that her student sponsorship was, for whatever reason, discontinued and her leave was curtailed as from 14th June 2013. At all events, she remained in the United Kingdom and, on 2nd February 2015, applied for leave to remain.

3. By a decision letter, ostensibly dated 5th February 2015, but (so it is said) actually made in April 2015, leave was refused by the Secretary of State. By reference to paragraph 276ADE of the Immigration Rules, it was decided that there was no sustainable claim to private life justifying leave to remain. It was further decided that there were no exceptional circumstances (by reference to Article 8) for leave to remain outside the rules; and it was also said that, if the applicant had a genuine fear of returning to Pakistan (as apparently she is saying, referring to the risk of an "honour killing" and so on) then she could apply for asylum. At all events, the overall decision was to refuse her leave to remain.

4. However, no removal directions were set. If the position was that the decision antedated the amendments to section 82 of the Immigration Act 2002, then she would, in any event, have had no in-country right of appeal, in that there was no appealable decision. The position would have been different if the relevant decision was made after the relevant date of the amendment applicable to this particular applicant. At all events, the Secretary of State was saying in the decision letter that she had no right of appeal in-country.

5. Judicial review proceedings were commenced on 18th May 2015. It is sufficient for present purposes only to refer expressly to the remedies sought, although I have had regard to the grounds of the application. The remedies sought were these:

> "1. An order quashing the Defendant's decision of 5th February 2015.
>
> 2. An order that the Claimant should be granted leave to remind.
>
> 3. An order that the refusal of leave/removal of the claimant would amount to a dis-appropriate breach of Article 8 of the ECHR and in breach of the immigration rules.
>
> 4. An order in the alternative that the defendant make an appealable

> immigration decision with an in-country right of appeal in respect of the claimant in the light of his human right claim.
>
> 5. An order for the Claimant's costs."

6. Permission to apply was refused by Upper Tribunal Judge Kopieczek on the papers.

7. On oral renewal, permission was also refused by Upper Tribunal Judge Peter Lane (as he then was) by a decision given on 26th November 2015. Upper Tribunal Judge Lane gave substantial reasons for refusing permission to apply. Amongst other things, he had said:

> "That decision is plainly one that can be judicially reviewed precisely because it does not give rise to an in-country right of appeal."

He concluded by saying:

> "I do not consider that any good reason at all has been put for keeping these judicial review proceedings in motion. Indeed, the longer that they continue, the longer may be the delay in having that international protection claim properly put and substantively considered by the respondent."

8. The applicant was nevertheless still dissatisfied and sought permission to appeal to the Court of Appeal, notwithstanding the seeming cogency of Upper Tribunal Judge Peter Lane's reasoning. At all events, permission to appeal was granted by Arden LJ on 25th August 2016. In giving permission to appeal on the papers and without, I apprehend, having received any written argument on behalf of the Secretary of State, she shortly said that "sufficient grounds" were shown to justify an appeal. It is not entirely clear to me just why the grounds advanced were sufficient to justify permission to appeal; but that is beside the point because Arden LJ decided that they were.

9. At all events, that being the position, on 23rd January 2017 the Secretary of State then issued a fresh decision, which, on any view, attracted the right of an in-country right of appeal. It can be inferred - and Mr Khan on behalf of the applicant would say - that that decision to issue a fresh decision had been prompted, at least in part, by the fact that Arden LJ had granted leave to appeal.

10. Nevertheless, a fresh decision having been now issued with an in-country right of appeal, the current judicial review proceedings and appeal proceedings had, in effect, become academic, because the appellant could now advance all her relevant arguments in respect of an appeal from the fresh decision.

11. However, the applicant refused to abandon her appeal proceedings at that stage, although invited to do so by the Secretary of State, and insisted at the time on maintaining the date fixed for the substantive appeal. This stance then prompted the Secretary of State, on 23rd August 2017, to issue an application to strike out the appeal, on the ground that it no longer served any purpose and had become academic. It is to be noted that the strike out is not on the footing that Arden LJ's decision was not

sustainable; it was on an entirely different basis, namely that the appeal had become academic. It is, of course, well understood that, in the ordinary way, the Court of Appeal will refuse to hear substantively appeals which had become academic.

12. At all events, the matter then was placed before Hickinbottom LJ on the papers. He made a robust order, dated 3rd October 2017. He referred to the background and then said this:

> "Given the weight of work with which this court has to deal, it is not acceptable for the parties to maintain a substantive hearing date in this court, in circumstances in which the substantive issues between them have been resolved. This risks denying parties to other appeals an earlier hearing date. I hope - and fully expect - the parties in this appeal to agree an order bringing the substantive appeal to an end. If there is a real issue concerning costs - and I see that there might be - then they should be able to agree a mechanism for determining costs that does not entail keeping a lengthy substantive hearing date fixed.
>
> ... As and when the parties have agreed a consent order for the disposal of the substantive appeal, they should lodge it with the Civil Appeals Office ..."

13. In the light of that direction or indication by Hickinbottom LJ, the parties then did indeed - and sensibly so - agree on the position. There was a consent order lodged (and sealed on 13th October 2017) which, amongst other things, said this:

> "By consent, it is ordered that:
>
> 1. The Respondent's strike-out application is withdrawn.
>
> 2. The Appellant's appeal is withdrawn.
>
> 3. The issue of costs to be determined by the Court of Appeal on the papers on the basis of the costs submissions made by the parties within 21 days from the date of this order unless the Court of Appeal orders that a hearing is necessary to determine the issue of costs."

The hearing dates for the substantive appeal were accordingly vacated.

14. In due course, in November 2017, the applicant's solicitors asked for an oral hearing on the issue of costs. By direction of Hickinbottom LJ, given in November 2017, he refused to direct an oral hearing, stating that it was neither necessary nor appropriate.

15. Thereafter, Hickinbottom LJ made the order which I have indicated on 12th February 2018, he having considered the parties' lengthy written submissions on costs. Hickinbottom LJ gave detailed reasons in his order as to costs. Amongst other things, Hickinbottom LJ said that there was no right of appeal available under the then legislation when the Secretary of State made the challenged decision, which it is said was in fact made on 4th April 2015. Hickinbottom LJ then dealt further with the

process. He noted that the appeal had become empty. He considered cases such as M v Croydon LBC [2012] EWCA Civ 595, and decided that the appropriate order to make was that there be no order as to costs, save that Hickinbottom LJ took the view that the Secretary of State had been justified in the circumstances in issuing the strike-out application and ordered 75% of the costs of that application to be paid by the applicant. In making the new decision, the Secretary of State was adjudged by Hickinbottom LJ to "have clearly taken a pragmatic course, not a course that conceded the merits of the judicial review".

16. Now it is that the applicant seeks a reconsideration of that costs order by reference to the rules that were in place before October 2016 and which, on the face of it, would apply here.

17. However, this gives rise to a potential problem as to jurisdiction. I fully accept that, under the rules as they then stood, there is a right to renewal at an oral hearing of the previous decision. But that is necessarily subject to the parties having not expressly agreed to the contrary. In this particular case, the parties, as I see it, had expressly agreed to the contrary. They had expressly agreed to the contrary by virtue of the terms of paragraph 3 of the consent order. That had explicitly said that the costs were to be determined on the papers, unless the Court of Appeal order that a hearing was necessary to determine the issue of costs. But the Court of Appeal, having been so asked, decided that it was not necessary to have a hearing to determine the issue of costs; and that particular decision was not then further challenged. Thereafter, Hickinbottom LJ did deal with the matter on the papers. In such circumstances, as it seems to me, the parties have precluded the right to renew to an oral hearing.

18. Mr Khan, on behalf of the applicant, says that one can only oust the express entitlement under the rules by clear and explicit language, citing cases such as Gilbert Ash and Bahta for that purpose. I agree with that. But here, as I see it, there was clear and explicit language. The terms of paragraph 3 are wholly plain. Here, the judge decided that it was not necessary to have an oral hearing to determine costs and thereafter dealt with the matter on the papers. That, then, is final, and there is now no right to an oral hearing.

19. It seems to me that that is also in line with the decision and observations of the court in the case of RS (Sri Lanka). The critical point, however, is that it all depends on what the parties have expressly agreed; and here that had been the subject of express agreement.

20. Mr Khan sought to rely on certain observations of Hickinbottom LJ in the case of Fayad, in particular at paragraph 33. But not only are those observations dealing with a different context, but Hickinbottom LJ had himself said that all depended on the express agreement between the parties. Here, as I see it, the parties' agreement is too plain for argument.

21. Consequently, as I see it, I have no jurisdiction to entertain this renewed application with regard to costs. Indeed, I would be surprised if, had the costs order been adverse to the Secretary of State and the Secretary of State had then sought a reconsideration,

the applicant would not immediately have vigorously protested that that would have been contrary to the consent order. So on that ground, I would reject this application.

22. But in case the applicant were to think that she has lost out through a technicality - and I make clear my view that it is not a matter of technicality at all; rather it is a matter of the consequences of an express agreement - I would, in any event, say that I would refuse this application because I think that it has no true substance in it. As Hickinbottom LJ said: the Secretary of State had made a fresh decision for pragmatic reasons. It would be completely wrong to say, in the circumstances of this particular case, that the applicant had achieved entire success. One only has to look at the remedies sought in her initial judicial review claim form, and indeed the basis on which they were sought, to see that only partial success, at best, can be achieved. I fully understand Mr Khan's point, he relying on paragraph 67 of the decision in Tesfay, that reconsideration very often can be substantial success for parties in the immigration and asylum context. But that was by no means all that the applicant had been seeking; and, as Hickinbottom LJ pointed out, the decision to make a fresh decision was done on a pragmatic basis, without any concession whatsoever that the applicant's grounds had been well founded. Consequently, this case could certainly properly be adjudged to fall within the second category of Lord Neuberger MR in the case of M v Croydon BC. At all events, I can see no basis for saying that Hickinbottom LJ had reached a decision not properly open to him as a matter of discretion; indeed, on the papers I have seen, it is the same decision that I would have made myself.

23. So far as the costs of the strike-out are concerned, Hickinbottom LJ was entitled to take a robust view, given that the applicant seemed to be intent on pursuing a substantive appeal hearing when the appeal, on any view, had become academic. The Secretary of State was not seeking to go behind Arden LJ's reasoning; rather, the Secretary of State was seeking to bring to an end an appeal that did not merit a full substantive hearing. That is why Hickinbottom LJ ordered as he did, and he was entirely justified in taking such a robust step.

24. Consequently, for each and both of these reasons, I would reject this application now before me. Not only do I not have jurisdiction to entertain it, but in any event, even if I did, I would have rejected it on the proposed merits.

25. Mr Khan referred to what he said was the 'justice' of the situation and said that it would be wholly wrong for the Secretary of State to "walk away" with no loss liability. I do not agree with that appraisal of the matter at all. I do not think it would be wholly wrong at all. In any event, it is quite inappropriate to invoke the provisions of Taylor v Lawrence in a case of this kind. It is inappropriate, first, because one has to give effect to what the parties have in fact expressly agreed - even if they do not like the consequences - and secondly, and in any event, because I do not consider the outcome as to the costs to be unjust at all.

26. Those, therefore, are my observations in rejecting this application.

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