Neutral Citation Number: [2018] EWCA Civ 2810

Case No: C2/2018/1499

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE RINTOUL
Claim No JR/7866/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/18

Before :

LORD JUSTICE HAMBLEN
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF
(1) KIRAN SHRESTHA
(2) SULAKSHANA SHRESTHA

Applicants

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

- -
- -

Sharaz Ahmed and **Devendra Shrestha** (instructed by **12 Bridge Solicitors**) for the **Applicant**
Colin Thomann (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 14 December 2018

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Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This application raises the following issue: if an applicant for leave to remain raises a human rights ground for the first time after the refusal of his application on other grounds and in response to a request by the Secretary of State under section 120 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), does the Secretary of State have an obligation to treat and determine that response as an application for leave to remain on human rights grounds even absent any further form of application? The Applicants submit that he does. The Secretary of State denies any such obligation.

2. The issue arises in the context of an application for permission to appeal to this court against the decision of the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal Judge Rintoul) dated 4 June 2018 refusing the Applicants' application for permission to proceed with a judicial review of the Secretary of State's decision of 20 July 2017 not to consider the Applicants' further submissions on his human rights claim without him making an application in the required form.

3. Although an application for permission to appeal, we have in effect heard full argument on the issue. I thank Sharaz Ahmed and Devendra Shrestha, both of Counsel, who appear for the Applicant, and Colin Thomann of Counsel for the Secretary of State, for their helpful submissions.

The Law

The Form of Application

4. Section 50(1) of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") provides:

> "Rules under section 3 of the Immigration Act 1971–
>
> (a) may require a specified procedure to be followed in making or pursuing an application or claim (whether or not under those rules or any other enactment),
>
> (b) may, in particular, require the use of a specified form and the submission of specified information or documents,
>
> (c) may make provision about the manner in which a fee is to be paid, and
>
> (d) may make provision for the consequences of failure to comply with a requirement under paragraph (a), (b) or (c)."

5. The relevant rules made under that section are the Immigration Rules (HC 395) as amended from time-to-time ("the Rules"). Paragraph 34 of the Rules sets out the

procedure for applications for leave to remain, so far as relevant to this application, as follows (emphasis added):

> "An application for leave to remain **must** be made in accordance with sub-paragraphs (1) to (9) below.
>
> (1) (a) …[T]he application **must** be made on an application form which is specified for the immigration category under which the applicant is applying on the date on which the application is made.
>
> (b) An application form is specified when it is posted on the visa and immigration pages of the gov.uk website.
>
> (c) An application can be made on a previous version of a specified paper application form (and shall be treated as made on a specified form) as long as it is no more than 21 days out of date.
>
> (2) All mandatory sections of the application form **must** be completed.
>
> (3) Where the applicant is required to pay a fee, this fee **must** be paid in full in accordance with the process set out in the application form…".

6. The gov.uk website provides that, in order to make an application for leave to remain on the basis of family and private life, the form that must be used is Form FLR(FP) or Form FLR(HRO) (but, at the relevant time, Form FLR(O)).

Rights of Appeal

7. The term "human rights claim" is defined for the purposes of Part 5 of the 2002 Act in section 113(1), as "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the [European Convention on Human Rights ('the ECHR')]) as being incompatible with his [ECHR] rights". An application for leave to remain on the basis of family and private life is therefore a "human rights claim" for these purposes. The Explanatory Notes at paragraph 273 state: "[T]he definitions of 'asylum claim' and 'human rights claim' reflect the intention that a claim can only be made in person at a designated place."

8. By section 82(1)(b) of the 2002 Act, under the heading "Right of appeal to the Tribunal", a right of appeal is provided for in these terms:

> "A person ("P") may appeal to the [First-tier] Tribunal where… the Secretary of State has decided to refuse a human rights claim made by P…".

9. In respect of an appeal under that provision, under the heading, "Place from which an appeal may be brought or continued", section 92 of the 2002 Act, so far as material, reads:

> "(1) This section applies to determine the place from which an appeal under section 82(1) may be brought or continued.
>
> (2) …
>
> (3) In the case of an appeal under section 82(1)(b) (human rights claim appeal) where the claim to which the appeal relates was made while the appellant was in the United Kingdom, the appeal must be brought from outside the United Kingdom if—
>
> > (a) the claim to which the appeal relates has been certified under section 94(1) or (7) (claim clearly unfounded or removal to safe third country) or section 94B (certification of human rights claims)….
>
> Otherwise, the appeal must be brought from within the United Kingdom."

10. Therefore, in summary, now, where a person has made a human rights claim that has been refused by the Secretary of State, that person will be entitled to a statutory appeal prior to removal (i.e. "in-country") unless the claim is certified by the Secretary of State.

Section 120 of the 2002 Act

11. Part 6 of the 2002 Act concerns "Immigration Procedure". Under the heading, "Requirement to state additional grounds for application etc", section 120 provides (so far as relevant to this application):

> "(1) Subsection (2) applies to a person ("P") if —
>
> > (a) P has made a… human rights claim,
> >
> > (b) P has made an application to enter or remain in the United Kingdom, or
> >
> > (c) a decision to... remove P has been taken or may be taken.
>
> (2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out —
>
> > (a) P's reasons for wishing to enter or remain in the United Kingdom,
> >
> > (b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

> (c) any grounds on which P should not be removed from or required to leave the United Kingdom.
>
> (3) A statement under subsection (2) need not repeat reasons or grounds set out in —
>
> (a) P's… human rights claim,
>
> (b) the application mentioned in subsection (1)(b), or
>
> (c) an application to which the decision mentioned in subsection (1)(c) relates."

Subsection 5 concerns changes of circumstances after a section 120 request and response have been made, requiring the applicant to serve a supplementary statement. Subsection (6) states:

> "In this section —
>
> 'human rights claim'… [has] the same [meaning] as in Part 5; references to 'grounds' are to grounds on which an appeal under Part 5 may be brought…".

12. The statute sets out various consequences that may arise where an individual makes, or does not make, a proper section 120 statement.

13. Where there is a right of appeal, section 85(2) applies. That provides:

> "If an appellant under section 82(1) makes a statement under section 120, the tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84 against the decision appealed against."

In other words, where there is an appeal pending, the Secretary of State has to treat any further grounds upon which the appellant may have the right to leave to remain as grounds in the appeal which he (the Secretary of State) must defend.

14. Section 96(2) provides that the incentive for an individual to comply with a section 120 request. It provides:

> "A person may not bring an appeal under section 82 if the Secretary of State or an immigration officer certifies —
>
> (a) that the person has received a notice under section 120(2),
>
> (b) that the appeal relies on a ground that should have been, but has not been, raised in a statement made under section 120(2) or (5), and
>
> (c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that

> ground not having been raised in a statement under section 120(2) or (5).”

The Facts

15. The Applicants are Nepalese nationals. The Second Applicant is the minor daughter and a dependent of the First Applicant. Her claim is dependent upon that of her father. For the purposes of this application, I shall refer to the First Applicant as simply “the Applicant”.

16. The Applicant arrived in the United Kingdom on 13 August 2007 with entry clearance as a student. His leave to remain was renewed until 13 February 2016, first as a student and then as a Tier 1 (Highly Skilled) Migrant. His wife joined him as a dependent in November 2007, and his daughter (then aged 5) joined them in December 2009.

17. On 28 January 2016, the Applicant applied for indefinite leave to remain as a Tier 1 (General) Migrant. On 11 February 2016, that application was refused under paragraphs 245CD and 322(2) and (5) of the Immigration Rules, because his self-employed earnings as declared in his application (nearly £40,000 for the year to 5 February 2013) was inconsistent with his declarations to HM Revenue and Customs for the two tax years 2010-12 of just under £9,000 in total. The refusal letter said:

> “If you wish to apply for leave to remain in another capacity you must do so on the appropriate application form with the appropriate fee”;

and it referred to the gov.uk website link which had further information and the relevant application forms.

18. The Applicant sought administrative review; but, on 22 March 2016, the Secretary of State issued a further decision letter maintaining the refusal. That letter contained a notice in the following form:

> “IF YOU HAVE FURTHER REASONS FOR WANTING TO STAY IN THE UNITED KINGDOM
>
> If you have reasons to stay in the United Kingdom that were not part of your recent application, you must state them. This requirement is being given under section 120 of the [2002 Act]. If you do not tell us as soon as practicable and you tell us later without good reason, you will lose any right of appeal you may have otherwise qualified for if we refuse your claim.
>
> What you must do now:
>
> > You must now tell us about any reasons or grounds you have for wishing to remain in the United Kingdom. You do not need to tell us about any reasons or grounds which you have already told us in your claim or application.

> Where you have something new to raise now, you should do so straight away or at least within 14 days of receipt of this notice.
>
> Where you do have a reason or grounds for wishing to stay in the United Kingdom you should submit an application using the relevant form. You can find the application form on our website: gov.uk/ukvi.
>
> Where you do not have a reason or grounds for wising to stay you must leave the UK."

19. On 30 March 2016, new solicitors for the Applicant responded to the section 120 notice on his behalf, setting out various grounds upon which the Applicant, his wife and daughter had built up a family and private life in the United Kingdom, based notably on the interests of the Applicant's daughter and the health of his wife. The letter contended that (i) they satisfied paragraph 276ADE(v) of the Immigration Rules because they were unable to return to Nepal, and (ii) in any event, the Secretary of State should exercise her discretion to grant them leave to remain on article 8 grounds outside the Rules.

20. On 6 April 2016, the Secretary of State refused to consider the representations on the basis that the administrative review route had been exhausted, and in any event, insofar as the representations suggested that the Applicant had a right to family and private life and that removal would breach article 8 of the ECHR, which could not be assessed under the Tier 1 route and a new application would need to be made under the appropriate route.

21. After the usual pre-action protocol correspondence, on 9 May 2016 the Applicant lodged a claim for judicial review against the refusal decision, submitting that (i) the refusal of the Tier 1 application was unlawful, and (ii) the refusal to consider the human rights claim was unlawful. However, on 30 June 2016, Upper Tribunal Judge Macleman refused permission to proceed with the claim, which he certified as totally without merit. That meant that there was no right to request a reconsideration. No application to appeal that refusal of permission was pursued.

22. On 17 July 2017, through his solicitors, the Applicant submitted further representations to the Secretary of State in response to the section 120 notice dated 30 March 2016. That notably included further submissions in relation to the Applicant's daughter and his wife's health. On 20 July 2017, the Secretary of State refused to consider these. The refusal letter said:

> "In the Further Representations you suggest you have a right to private and family life and that removal would infringe your rights under article 8 of the ECHR, this cannot be assessed under the Tier 1/2/5/4 route and a new application would need to be made under the appropriate route.
>
> As advised in the section 120 notice, where your client has reasons or grounds to stay in the United Kingdom, you should

> submit an application using the relevant form. Application forms can be found on our website gov.uk/ukvi."

That is the decision which is the subject of this application.

The Proceedings

23. Again following the usual pre-action protocol correspondence, the Applicant issued judicial review proceedings seeking to challenge the Secretary of State's refusal to consider his further human rights representations made (it was said) under section 120 of the 2002 Act. There was a single ground of challenge (see paragraph 10 of the Detailed Statement of Grounds). It was submitted that the Applicant had already paid a fee in respect of his application for indefinite leave to remain; and section 120 did not require a further fee-paid application to be made. It was said that to require the Applicant to pay a fee to make the further representations was unlawful.

24. On 4 January 2018, Upper Tribunal Judge Gleeson refused permission to proceed on the papers, on the basis that the Applicant had an alternative remedy in the form of a paid family and private life application for leave to remain on human rights grounds.

25. The Applicant sought a reconsideration of that decision; and, at a hearing 4 June 2018, Judge Rintoul again refused permission to proceed. In relation to the human rights claim, he said:

> "It is simply not arguable that the [Secretary of State] has acted irrationally in requiring the Applicant to make a human rights claim in the proper form and upon payment of the required fee. This has been the [Secretary of State's] consistent position since 2016, and the decision challenged is in reality in substance simply confirming the earlier position."

26. Judge Macleman refused permission to appeal to this court. The application for permission to appeal is now renewed.

27. In his written submissions, the Applicant purported to rely upon several grounds of appeal; but Judge Rintoul could not have erred in law by not dealing with issues that were not pleaded as grounds of challenge before him. There was only one ground of challenge pleaded and relied upon, namely that the Secretary of State erred by requiring the Applicant's human rights claim had to be made in proper form and on payment of the required fee. Mr Ahmed, rightly, did not actively pursue those other grounds before us. He submitted that Judge Rintoul erred in concluding that the Secretary of State was entitled to require a new application in proper form. It is said that section 120 does not require any particular form for new grounds for leave to remain to be advanced. Further, it is said that this court in Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009 confirmed that to be the case.

Discussion and Conclusion

28. I am entirely unpersuaded by those submissions.

29. As I have described, to promote consistency and administrative efficacy, section 50 of the 2006 Act and paragraph 34 of the Rules mandate a particular form for an

application for leave to remain on human rights grounds. No doubt the Secretary of State has a discretion to waive those requirements – and, in certain circumstances, may be obliged to do so (see Ahsan, referred to at paragraphs 31 and following below) – but there are no such circumstances here. The Secretary of State was unarguably at least entitled to require the Applicant to make such an application in respect of his human rights claim.

30. Section 120 of the 2002 Act does not suggest that the requirements of section 50 of the 2006 Act and paragraph 34 of the Rules are waived where an applicant make a statement in response to a section 120 request. The section does no more than require an applicant to provide a statement setting out his reasons for wishing to remain, and any grounds upon which he considers he should be permitted to remain, in the United Kingdom. It does not require, or in itself even enable, an applicant to make an application for leave to remain on human rights grounds. The relevant provisions for such an application are found elsewhere. Those provisions, of course, include section 50 and paragraph 34.

31. Ahsan does not assist the Applicant. The applicants in Ahsan were in the United Kingdom and, under the appeal regime in operation at that time, they were entitled to an out-of-country appeal against a decision to remove them in the face of submissions that removal would breach their article 8 rights. The court concluded that they were entitled to an effective appeal; and such an appeal could not be afforded from their home country.

32. In those circumstances, the Secretary of State made this concession, summarised in [14] of Ahsan:

> "Although it appeared from her initial correspondence that the Secretary of State's position might be something different, Ms Giovannetti [Leading Counsel for the Secretary of State] accepted before us that in order to fall within the terms of section 113 a 'claim' does not require to be made in the form of a fee-paid application under the Immigration Rules. She made it clear that it is still the Secretary of State's position that a human rights claim ought to be made by a formal application, in the interests of orderly decision-making, and that priority may be given to claims so made; but she acknowledged that that was not a statutory requirement and she said that even if a claim was made in some other form a claimant would not be removed from the UK until it had been considered."

33. In this case, Mr Thomann accepts that the Secretary of State cannot remove the Applicant without considering his claim that to do so would breach article 8 of the ECHR. But, as he submits, the use of removal powers is a last resort. On the basis that the Applicant needs leave to remain and does not have it, he would be expected to leave the United Kingdom voluntarily. It is, of course, open to him to make an application for leave to remain on human rights grounds, in the required form and on payment of the required fee. If he considers that he has such a claim, that is the course required by the statutory scheme. If, in the meantime, the Secretary of State issues removal directions, then, at that stage, the Applicant will be able to rely on any human rights claim that he and/or his daughter have; and, reflecting the passage from Ahsan which I have quoted, subject to certification, he will be entitled to a right of

appeal to the First-tier Tribunal to assess the merits of that claim whether or not a formal claim for leave to remain has been made because, otherwise, his removal would breach article 8. Therefore, the Applicant will suffer no possible unfairness or injustice as a result of the Secretary of State refusing to consider his human rights claim at this stage.

34. Nor does TY (Sri Lanka) v Secretary of State for the Home Department [2015] EWCA Civ 1233, upon which Mr Ahmed relied, assist him. That case concerned an application for leave to remain under the Immigration (European Economic Area) Regulations 2006 (SI 2006 No 1003) which was refused, and no section 120 notice was served on him. There was a right of appeal against the refusal. The court held (at [26]-[27] that the appellant could only have advanced his asylum and human rights claims in the context of his appeal against the EEA decision if a section 120 notice had been served: but that is simply the effect of section 85(2) of the 2002 Act (quoted at paragraph 13 above. In this case, there was no right of appeal and there was a section 120 notice served. TY (Sri Lanka) is not to the point.

35. For those reasons, I would answer the question I posed at the beginning of this judgment, "No": if an applicant for leave to remain raises a human rights ground for the first time after the refusal of his application on other grounds and in response to a request by the Secretary of State under section 120 of the 2002 Act, the Secretary of State has no obligation to treat and determine that response as an application for leave to remain on human rights grounds in the absence of the required form of application and payment. Indeed, I do not consider the contrary to be arguable.

36. For those reasons, subject to my Lord, I would refuse permission to appeal.

37. Given that the application raises an issue of wider importance, I consider that this decision should have a neutral citation so that it can be reported (and, where appropriate, referred to in other cases) in accordance with Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

Lord Justice Hamblen:

38. I agree.