Case No: C7/2016/3677

Neutral Citation Number: [2018] EWCA Civ 901
IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 6 March 2018

Before:

LORD JUSTICE MCFARLANE

Between:

HOSSAIN AND OTHERS

Applicant

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

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Mr Zane Malik (instructed by Londonium Solicitors) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

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Judgment

(Approved)

LORD JUSTICE MCFARLANE:

1. This is an application for permission to appeal brought in relation to a failed application for judicial review made to the upper tribunal in relation to an immigration decision. The background to the matter is that the claimant came to the United Kingdom as long ago as September 2008, initially as a student and ironically, given the facts of the case, he studied and succeeded in obtaining a master's degree in financial management. After that various extensions were granted to his status of a migrant lawfully in this jurisdiction so that in the end he had a grant of leave to remain on the basis of being a Tier 1 (General) Migrant, that status was due to expire on 3 June 2016. The application for that status, which was granted by the Home Secretary in 2013, was based upon the points based system and involved the Secretary of State relying upon the claimant's assertion that he had made a profit of some £19,000 or so from a business of selling clothes over the Internet through eBay and that finances of that level entitled him to the requisite number of points and hence the grant of leave was made.

2. In September 2015 the claimant and his wife went out of the country back to Bangladesh for a short holiday but on their return to Heathrow in October 2015 they were questioned by the Border Force officers and, in particular, asked why, given the profit that the claimant had claimed he had made in relation to the clothing business, his income tax return had shown only a profit of some £915 with respect to that business. That initial interview led to a sequence of interviews at the conclusion of which the Secretary of State was satisfied that the figures that had been put forward by the claimant to support his points based application in no way tallied with the documentation produced or the income tax return that had been submitted. The claimant asserted that the income tax payment had been determined by his accountants and they had been in error and, indeed, he

subsequently paid the correct amount of tax as part of his case presented to the Border Force that their original decision was sound and his finances were in order.

3. In January 2016, the Secretary of State issued a notice of cancellation of leave to enter, that would have expired six months later in June and arrangements were made to deport the claimant and his wife. The process that has now been before the courts for over two years has been the claimant's attempt to set aside the Secretary of State's decision through judicial review proceedings. The original application for judicial review was refused on paper by Upper Tribunal Judge McGeachy on 16 May 2016. That decision was sent out to the solicitor's acting for the claimant by the tribunal on 23 May. The rules, that is rule 30 of the Upper Tribunal Rules 2008 affords some nine days in which an application can be made for an oral renewal hearing. The request for an oral renewal hearing was not filed by the solicitor's for the claimant until 20 June, some three weeks or so after the nine day window for making such an application had closed. In the notice requesting an oral reconsideration, the solicitor's asserted that they had not received the notice of the Upper Tribunal decision until 17 June.

4. The matter came before Upper Tribunal Judge Goldstein for determination on 24 August at an oral hearing. At the conclusion the judge gave a short judgment in which he first of all refused an application to amend the grounds for judicial review and he then refused to extend time to allow the application for the oral renewal to be considered by the court. He rightly referred to the leading authority R (Hysaj) v SSHD [2014] EWCA Civ 1633 and he held that the delay was not trivial and could be described as "inordinate" and he held that there had been no satisfactory explanation put forward. In particular, he stated in paragraph 3 that the application in relation to the relaxation of the time limit had

been "unsupported by any evidence to support the contention that it was received three weeks after it was posted and without any statement from the caseworker." The judge went on at paragraph 8 to say the following:

> "In any event, and as pointed out by Judge McGeachy in refusing permission, the decision of the respondent was, he concluded, one which she was unarguably entitled to make on the evidence put before her, given that it was clear the applicant had not declared his income on which he relied for his application to the Inland Revenue."

In the circumstances, the application to extend time was refused and permission for the judicial review was refused.

5. Notice of appeal to this court was issued promptly on 21 September 2016. It was considered by Gross LJ on 11 December 2017. In the course of his written decision refusing permission to appeal, Gross LJ held that the Upper Tribunal judge was entitled to refuse the renewed application on the basis that it was out of time and he says this:

> "The handwritten note was not itself evidence, was manifestly unsatisfactory and was unsupported by any evidence until the written witness statement of Mr Nasi Buller was produced after the decision of the Upper Tribunal judge."

Gross LJ went on to say in line with Upper Tribunal Judge Goldstein's own observations that the application was doomed to fail on the merits.

6. The application for permission to appeal has been renewed at this oral hearing. This morning the applicant is represented by Mr Zane Malik of counsel, who tells me that he was only instructed on Friday of last week and only received the papers in the case yesterday so he has not been able to prepare a written advocate's statement identifying the reasons why, despite Gross LJ's decision, permission should be granted. However,

he has been able to martial in succinct and attractive terms three points before the court today. The first is that the Upper Tribunal judge should not have disregarded entirely, as he seems to have done, the written annotation on the application form to effect that the notice from the upper tribunal was only received by the solicitor's office on 17 June. Mr Malik argues that that was plainly a statement, albeit not in the form of a witness statement, but a statement made by a firm of solicitors and it should have been afforded due weight by the tribunal.

7. Secondly, it is submitted that the Upper Tribunal judge failed to go through the three stages identified in the case of Hysaj, in particular in the third stage looking at whether in the round an extension of time should be granted. That is to look in round terms at the merits of the application.

8. Thirdly, it is submitted that the determination made by the Home Secretary was confined to her analysis of the financial information and the conclusion that the financial information was fabricated and therefore the necessary finances needed to establish the number of points under the Immigration Rules was not sound and the leave the enter was therefore cancelled. In undertaking that process, it is submitted, the Secretary of State ignored her own policy, which requires in cases such as this, the determining officer to look at the circumstances of the claimant outside the rules to determine whether or not any factors relevant to article 8 of the European Convention of Human Rights are engaged and if so, whether or not outside the rules the leave to remain or leave to enter should be upheld.

9. Taking each of those points in turn shortly, it seems to me that the Upper Tribunal judge did regard the statement of the solicitor on the form but rightly afforded it no weight because it is simply an assertion. It gives no explanation at all for why, given that the court records showed that the notice had been sent out on 23 May, it was not received. The court now has a statement from the solicitor who completed the form and it turns out that the individual who completed the form is a pro bono caseworker working in the office at the time and once again simply, it is asserted, that the notice was not received on 17 June. No records of postage receipt are maintained. No explanation of the system in the office is put forward. It is simply an assertion. Of course the Upper Tribunal judge did not have that material but it seems to me entirely open to the judge to have said that, without more than a simple assertion, that the letter was not received on 17 June, the application for an extension was not justified or explained reasonably and adequately by the claimant.

10. In any event, the second ground advanced by Mr Malik today seems to me to be a misunderstanding of the Upper Tribunal judge's judgment. Immediately after the Upper Tribunal judge has dealt with the first two stages of the Hysaj analysis, he goes on immediately to say what he says in paragraph 8 about the overall merits of the decision. That is not a separate statement by the judge on a different topic. It is an account of his evaluation under the third stage of Hysaj. But in any event, a court is required to look at the overall merits of the case and insofar as the finances are concerned, Mr Malik rightly accepts, on behalf of the applicant this morning, that the evidence of finances were such that the Secretary of State was entitled to come to the view that she did about the fabrication of the figures that had been originally put forward to support the Tier 1 Migrant grant of leave to this claimant.

11. The only point that has given me cause for concern is the argument about article 8. It is right that the determination letter sent by the Home Office does not refer to any evaluation under article 8. However, that point did not surface as one of the grounds of judicial review originally relied upon by the claimant. It does appear as a ground in the amended grounds for which permission was sought before the Upper Tribunal judge but it does not appear in terms in the skeleton argument or the grounds of appeal to this court. It is a shadowy argument at best and it has never formally, in terms of the pleadings, formed part of the claimant's case. The assertion about it this morning is simply a bald technical assertion that the Secretary of State failed to undertake an evaluation of the article 8 element of the case. I know nothing of the claimant's circumstances or what features would or would not be part of any article 8 evaluation of his claim. He was, in any event, in this jurisdiction on a limited basis, which was due to expire in six months' time after the determination, which is now the subject of this challenge.

12. Looking at the matter in the round, I share the view that has now been taken by two Upper Tribunal judges and by Gross LJ as to the overall merits of this case and, despite what is said about article 8, I cannot see, on the information before me, that, technical though it may be, the merits of the case are altered in any way whatsoever by what is now pointed out as being an error in regard to article 8. So for those reasons variously given by me, I can see no merit in this proposed appeal, particularly on the extension of time ground and I therefore refuse permission to appeal.

Order: Application refused.