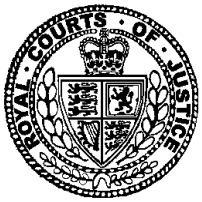

Neutral Citation Number: [2019] EWCA Civ 13

Case No: C2/2016/2912

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
Upper Tribunal Judge Jordan
JR/3123/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2019

Before:

THE SENIOR PRESIDENT OF TRIBUNALS

LORD JUSTICE IRWIN

- -

Between:

Moses Asiweh	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Mr. Michael Biggs (instructed by **Mayfair Solicitors**) for the **Appellant**
Mr. Eric Metcalfe (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 6 December 2018

- -

Approved Judgment

The Senior President:

Introduction

1. This is an appeal against the decision of the Upper Tribunal (Immigration and Asylum Chamber) which refused permission to the appellant to apply for judicial review of the decision of the Secretary of State made on 23 December 2015 by which his application for leave to remain in the United Kingdom was refused. Permission to appeal to this court was granted on 8 February 2018 following an oral hearing.

Background

2. The appellant is a national of Nigeria who is now aged 42.
3. On 12 September 2008 the appellant arrived in the United Kingdom with entry clearance as a student valid until 31 December 2009. His leave as a student was subsequently extended until 30 January 2011. On 11 February 2011 he was granted further leave to remain as a Tier 1 (Post Study Work) Migrant until 11 February 2013. On 28 February 2012, the appellant's wife and two sons entered the United Kingdom as the appellant's dependents. They are also Nigerian citizens. On 9 April 2013 the appellant was granted further leave to remain as a Tier 2 (General) Migrant until 14 February 2016.
4. On a date prior to 20 May 2014, the Secretary of State revoked the licence of the appellant's Tier 2 sponsor, Kimberly College Limited. Although there is some confusion over when this occurred nothing turns on the date of revocation for the purposes of this appeal.
5. As a result of the revocation of the licence the Secretary of State curtailed the appellant's leave on 20 May 2014 to expire on 26 July 2014. The appellant did not receive the curtailment decision. On 25 June 2015 the Secretary of State successfully served the appellant with a new notice curtailing his leave to 29 August 2015.
6. On 28 August 2015 the appellant applied to vary his leave. The Secretary of State refused the appellant's application and certified it as clearly unfounded under section 94 of the Nationality Immigration and Asylum Act 2002.
7. On 21 March 2016 the appellant applied for permission to judicially review the Secretary of State's refusal. Permission was refused by Upper Tribunal Judge Jordan following an oral hearing.

Decision Appealed

8. Judge Jordan held that no arguable case had been advanced that was sufficient to demonstrate that the judicial review claim could succeed. The appellant asserted that the application to vary leave to remain should have been considered by the Secretary of State under his residual discretion. Judge Jordan held that the Secretary of State was under no duty to make a separate decision under such residual discretionary powers as may exist but even if there was such a duty, no sufficient grounds had been advanced as to why this case would succeed on the facts. At paragraph [4] of his reasons he concluded that:

> "It is not enough to assert a bare failure if the applicant cannot also establish the exercise of discretion would have had some prospect, albeit remote, of

succeeding in a way that provided the applicant with a benefit not available under exceptional circumstances."

9. Judge Jordan found that the appellant had failed to put forward an arguable case for why he might have been granted leave had the Secretary of State exercised his residual discretion and therefore permission to apply for judicial review was refused.
10. The grounds of appeal assert that the appellant's claim for judicial review is properly arguable on one or more of the following bases:
    i. The Secretary of State had a residual discretion to grant leave.
    ii. The Secretary of State erred in failing to consider whether to exercise that discretion; and
    iii. The Secretary of State misdirected himself as to the test for certification under section 94 of the Nationality, Immigration and Asylum Act 2002.
11. For the purposes of this appeal, it is not necessary to examine whether or not a claim could have been made under the Immigration Rules. The appellant accepts that the 'gravamen of the appellant's application of 28 August 2015' was limited to the question of the Secretary of State's residual discretion.
12. The questions raised in this appeal involve no new issues of principle and the appeal only involves the application of settled principles to the facts of the case.

Discussion

13. The first issue that arises is whether the Secretary of State was under an obligation to consider whether to exercise his discretion outside of the Immigration Rules to grant leave to remain.
14. Judge Jordan at paragraph [3] of his reasons found that she was not:
    "…there is no duty to make a separate decision under such residual discretionary powers as may exist…"
15. The appellant submits the Secretary of State was under an obligation to consider whether to exercise his discretion in the circumstance that existed in this case, namely that the exercise of discretion was expressly requested by the applicant: *R (Behary & Ullah) v SSHD* [2016] EWCA Civ 702 .
16. The Secretary of State submits the court in *Behary* did not consider the nature of the Secretary of State's obligation in circumstances where the essence of the applicant's request and all material supporting it was a human rights claim that is capable of being determined within the Immigration Rules. In such a case, the Secretary of State submits, the failure to consider the exercise of his residual discretion to grant leave outside the Rules discloses no material error of law.
17. I have come to the conclusion that the Upper Tribunal erred in the conclusion to which it came on this issue. That the Secretary of State has a discretion to grant leave to remain outside of Immigration Rules is not in issue. The only question as respects the issue in this case is whether he is obliged to consider exercising it when requested to do so. At paragraph [39] of *Behary* Burnett LJ held that:
    "There is an obligation to consider such a grant when expressly asked to do so and, if but briefly, deal with any material relied upon by an applicant in support."

18. That is binding on us and was binding on the Upper Tribunal. It is clear that when the Secretary of State is expressly asked to exercise his discretion to grant leave to

remain outside of the Immigration Rules he is under a duty to do so. The appellant expressly asked the Secretary of State to exercise his discretion in his application to have his leave varied. It is clear from the Secretary of State's December 2015 decision letter that he did not consider exercising her discretion. That was an error.

19. The second issue is whether that error was immaterial in the sense that the Secretary of State would inevitably have reached the same conclusion had the error not been made.

20. It is common ground that this is the approach that the judicial review court should have adopted in this case in its consideration of whether there is a properly arguable claim. In *R (Smith) v North East Derbyshire PCT* [2006] EWCA Civ 1291 at [10], May LJ held that:

> "Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision."

21. The appellant submits it was at least possible that the Secretary of State might have granted leave to remain if he had considered the appellant's 28 August 2015 application and it is accordingly properly arguable that he might have granted leave to remain. He submits that the discretion could not be broader to the extent that there are well known examples in the reported cases of the Immigration Rules being waived in what can only be described as a generous although reasoned manner where the Rules could not be complied with (see for example, *R (Munir) v Secretary of State for the Home Department; R (Rahman) v Same* [2012] 1 WLR 2192 at [44]).

22. For that purpose, the appellant points to the broader merits relied upon in this case which included the appellant's length of residence in the UK, the study in which he was engaged, the existence of family life and the removal of the appellant's ability to complete his PhD after having paid the fees.

23. The Secretary of State submits that if he was bound to adopt the approach set out at [17] above, then given the material before him the conclusion would have been the same in any event. He submits that there was a wholesale absence of any other factors in the appellant's covering letter in support of the application beyond those relied upon for the purposes of articles 3 and 8 ECHR.

24. Inevitability is the test at common law. It is a demanding test. It is the test to be applied in this case because the claim was brought before 8 August 2016 when a new statutory test was introduced by section 84 of the Criminal Justice and Courts Act 2015.

25. If one considers the material available to the Secretary of State in the application documents, the only reasoning beyond the limited material I have outlined relating to article 8 ECHR was that which it was asserted engaged article 3, namely a) that the appellant had been unaware that his sponsor's license would be revoked so that he had paid his PhD fees, and b) there was a compelling compassionate ground which favoured the appellant being permitted to complete his studies.

26. Although the Secretary of State did not consider whether to exercise his discretion outside of the Rules he did consider the facts that would have underpinned the exercise of that discretion. The Secretary of State considered the article 8 issues raised by the appellant and concluded that because all members of the appellant's family were Nigerian citizens they could all return to Nigeria as a family and

enjoy their full rights of citizenship there. No exceptional circumstances were relied upon to suggest that they would be unable to do this. The family could remain together and the children could continue their education in Nigeria.

27. The Secretary of State also considered whether requiring the appellant to leave before completing his PhD and after having paid the fees amounted to degrading and inhumane treatment under article 3. The Secretary of State noted that the Tier 2 leave to remain was only valid to 14 February 2016. The earliest the appellant could have completed his PhD was 30 April 2019. He reasoned that there was therefore no guarantee that the appellant would be granted leave to remain for the entirety of his PhD.

28. Additionally, the Secretary of State noted that Tier 2 licenses are occasionally revoked and the appellant should have been aware of this. The Secretary of State notified the appellant that if he wanted to complete a PhD in the UK it was open to him to apply under the Tier 4 student route. The Secretary of State accordingly considered the fact that the appellant might not be able to complete a PhD programme but concluded that this did not amount to degrading and inhumane treatment as asserted by the appellant.

29. I have come to the clear conclusion that if the Secretary of State had turned his mind to deal with the limited material the appellant relies upon in support of his application for leave to be granted outside of the Immigration Rules it is inevitable that he would have come to the same conclusion. Judge Jordan was correct in coming to the conclusion that no case had been made which had any prospect of success, even remote, of the Secretary of State coming to a different conclusion on the facts.

30. The third issue is whether the Secretary of State asked himself the wrong question regarding certification.

31. The appellant submits that it is clear from the terms of the certificate and the December 2015 letter that the Secretary of State did not ask himself the correct question regarding certification and he has therefore acted unreasonably and / or on the basis of an error of law.

32. The Secretary of State submits that no error was made in relation to the certification. He concluded that the claim was unfounded after considering all the evidence available. He accepts that his reasoning on certification is terse and does not extend beyond the reasons given on the merits but, he submits, that is neither inadequate nor unclear. He submits that the conclusion that the appellant's claim could not succeed is unassailable.

33. The approach of a court or tribunal reviewing a certification decision is discussed by Beatson LJ at paragraphs [98] to [100] of *FR (Albania) and Anr v SSHD [2016]* EWCA Civ 605 and it helpful to set out what he says in full:

> "[98]…The decision letters in these appeals follow a pattern that is commonly used by those deciding applications of this sort. They deal with the applications for asylum in detail and at length, but deal with certification very briefly, in effect certifying for the reasons given for rejecting the asylum claim…
>
> [99] There is nothing wrong in the certification decision relying implicitly, as these decisions do, on the reasons for refusing the application for asylum. But, given the style of decision letter used, as I have stated, it is important that those considering certification keep in mind and give separate consideration to the different requirements of the decision on the application for asylum and the decision on certification…

> [100] In the present context, because of the structure of the decision letters, the analysis used in rejecting the application for asylum together with the other material before the Secretary of State and the court is all that is available to the court considering certification. The court will be concerned with the substantive integrity of the analysis displayed in the decision letter when giving the reasons for rejecting the application for asylum. If that is consistent with there being more than one view of the claim, or states only that the claim is "undermined" (as opposed to being one which no tribunal properly directing itself as to the law and as to the facts on the evidence before it could accept), or as simply being the Secretary of State's view, a court exercising the intensive review that (see [48] and [62] above) is undertaken in certification cases may conclude that the Secretary of State's own analysis has not shown that the claim is bound to fail in the tribunal. It has to be borne in mind that the presumption of regularity is an evidential presumption and, where the exercise of governmental power affects fundamental common law or Convention rights such as access to an independent court or tribunal, the decision-maker must demonstrate that account has been taken of relevant matters and the correct test has been applied: see *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514, 537-8 and the cases listed in Fordham's *Judicial Review Handbook* (6th ed.) at 42.2.2."

34. The Secretary of State's letter in this case conforms to the pattern identified in *FR (Albania)*. The reasons for rejecting the appellant's claim are dealt with in appropriate detail but the consideration of certification is dealt with very briefly. Similarly, all that is available to this court when considering certification is the analysis used in rejecting the merits of the claim. The key issue, as identified by Beatson LJ, is the substantive integrity of the analysis displayed in the decision letter. If it demonstrates that there is only one view that can be taken in relation to the claim then the court may accept that it is clearly unfounded.
35. In this case I am satisfied by the Secretary of State's analysis in the decision letter that the appellant's claim was clearly unfounded for the reasons described in respect of the article 8 and 3 merits. I accept that given that conclusion only one view could have been taken about the claim. It was accordingly appropriate for him to certify the appellant's application as clearly unfounded.
36. Given what I wish to say about the merits of this appeal, I place on record the fair way in which Mr Biggs pursued the appeal on behalf of the appellant. He did not appear below and has not pursued before this court technical arguments which dominated the written materials and that had less merit than those described. The court pushed him on the question of whether those representing appellants should advise them to bring appeals on the basis of a technical error when the case is very weak on its facts and unlikely to succeed. He appropriately conceded that technical errors divorced from the factual merits of a case are rarely an appropriate basis for an appeal although there may sometimes be a proper ancillary purpose if it is disclosed and reasoned. I agree. Technical errors should not be pursued when it is clear the case cannot succeed on its merits. It is a waste of both the appellant's and the public's resources.
37. For these reasons I would dismiss this appeal.

Lord Justice Irwin:

38. I agree, and as to the outcome of this case, I have nothing to add.
39. I firmly endorse the remarks of the Senior President in paragraph 36 of his judgment. Pursuit of technical points in cases devoid of merit represents a waste of time and cost, and has the effect of delaying the resolution of cases which may have more merit.