Neutral Citation Number: [2019] EWCA Civ 1504

Case No: C5/2018/2424

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE JACKSON
Appeal No IA/33331/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/08/19

Before :

LORD JUSTICE HICKINBOTTOM

- -

Between :

BALWINDER SINGH

Applicant

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

- -
- -

Alex Burrett (instructed by **Lawise Solicitors**) for the **Applicant**
Andrew Bershadski (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 22 August 2019
- -

Approved Judgment

Lord Justice Hickinbottom:

1. This is an application to reopen a final determination of this appeal by Sir Stephen Silber sitting as a judge of this court who, by an Order dated 11 March 2019 and sealed on 13 March 2019, refused permission to appeal.

2. Under CPR rule 52.30(1), despite a final determination, this court may reopen an appeal where:

    (a) it is necessary to do so to avoid real injustice;

    (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

    (c) there is no alternative effective remedy.

    These are pre-conditions to the jurisdiction arising. Rule 52.30(2) makes clear that, for these purposes, "appeal" includes "application for permission to appeal".

3. This is an exceptional jurisdiction, to be exercised rarely: "The injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation" (Lawal v Circle 33 Housing Trust [2014] EWCA Civ 1514; [2015] HLR 9 at [65] per Sir Terence Etherton VC, as he then was). The jurisdiction will therefore not be exercised simply because the determination was wrong, but only where it can be demonstrated that the integrity of the earlier proceedings has been "critically undermined" (R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] EWCA Civ 860; [2018] 1 WLR 5161 at [10]-[11]); and then only where there is "a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined" (*ibid* at [15]).

4. The claim out of which this application arises concerned Part 5A of the Nationality, Immigration and Asylum Act 2002, headed "Article 8 of the ECHR: Public Interest Considerations". That was inserted by section 19 of the Immigration Act 2014 with effect from 28 July 2014. By section 117A, it is to apply where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under article 8, and so would be unlawful under section 6 of the Human Rights Act 1998. "The public interest question" is defined as the question whether such an interference is justified under article 8(2).

5. Section 117A(2)(a) provides that, in considering the public interest question, the court or tribunal must in particular have regard to the considerations listed in section 117B. The considerations listed in that section include the public interest in "the maintenance of effective immigration controls" (subsection (1)); the public interest in those seeking to enter being able to speak English (subsection (2)), and be financially independent (subsection (3)); the little weight to be accorded to private life or relationships established when a person was in the country unlawfully (subsection (4)), or when immigration status was precarious (subsection (5)); and, directly relevant in this case, as subsection (6):

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

6. The Applicant is an Indian national, born on 15 July 1990, who first arrived in the United Kingdom on 9 January 2010 with leave as a Tier 4 (General) Student until 10 February 2012. On 24 March 2012, he made a further application for leave to remain on the same basis, supported by an accredited Test of English for International Communication ("TOEIC") certificate. That application was refused on 17 July 2012. The Applicant remained in the UK without leave.

7. On 13 February 2015, he applied for leave to remain on the basis of family life. His wife is also an Indian national, but, following the death of her parents in a car crash, she moved to the UK at the age of four and has resided here since. By the time of her marriage to the Applicant, she had indefinite leave to remain in the UK. The Applicant and his wife had a first child born on 12 November 2013. A second child was born later, on 29 July 2016. Both children are British citizens, and "qualifying children" for the purposes of section 117B of the 2002 Act. It is uncontroversial that the Applicant has a genuine and subsisting parental relationship with them.

8. The February 2015 application for leave to remain was refused by the Secretary of State on 12 October 2015, on several grounds including that the Applicant failed to meet the suitability requirement in paragraph S-LTR.1.6 of Appendix FM of the Immigration Rules, because the TOIEC certificate submitted with the March 2012 application was false and fraudulently obtained by use of a proxy such that the Applicant's presence in the UK was considered not to be conducive to the public good due to his conduct. It is that refusal decision which underlies the application now before the court.

9. The Applicant appealed that decision. The resulting proceedings have been regrettably lengthy and convoluted although not, I hasten to add, as the result of the manner in which the Applicant (or, indeed, the Secretary of State) has conducted them.

10. The Applicant's appeal was initially dismissed by First-tier Tribunal Judge Parker on 23 November 2016; but, on 25 July 2017, that decision was set aside by Upper Tribunal Judge Craig and the appeal remitted to the First-tier Tribunal for redetermination. On 2 March 2018, First-tier Judge Ross allowed the Applicant's appeal on human rights grounds, concluding that it would not be reasonable to expect either the Applicant's wife or their two British citizen children to leave the UK to enable them to enjoy a family life with the Applicant in India. The Secretary of State then appealed that determination on the basis that Judge Ross had materially erred in applying section 117B(6) of the 2002 Act by effectively equating the best interests of the children with the different question of whether it would be reasonable for them to leave the UK with their parents which involved a balancing exercise of (amongst other things) their best interests against the public interest of removing foreign

nationals whose conduct makes their presence in the UK not conducive to the public good.

11. On 6 July 2018, following an oral hearing at which both parties were represented, Upper Tribunal Judge Jackson effectively agreed with that submission, concluding that the decision of Judge Ross involved an error of law which required it to be set aside, which he did. He then proceeded to remake the decision of the First-tier Tribunal, by dismissing the Applicant's appeal against the Secretary of State's refusal of his application for leave on article 8 grounds.

12. Following judgments of this court in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 and AM (Pakistan) v Secretary of State for the Home Department [2017] EWCA Civ 180 (in which this court considered itself bound by the earlier authority of MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617; [2016] Imm AR 954), Judge Jackson proceeded on the basis that section 117B(6) was a self-contained provision in which the wider public interest comes into play within the concept of reasonableness in the section itself. Therefore, to ascertain whether it would be reasonable to expect the child to leave the UK requires the interests of that child to be balanced against the public interest (e.g.) in removing a particular foreign national parent whose conduct means that his presence in the UK is not conducive to the public good. Judge Ross erred in not approaching the issue on that basis. Having set aside the decision of the First-tier Tribunal, Judge Jackson remade it, concluding that it was reasonable to expect the two children to move with their parents to India and thus remaking the decision by dismissing the Applicant's appeal from the initial refusal decision.

13. Judge Jackson refused the Applicant's application for permission to appeal further; and the Applicant renewed that application to this court.

14. Judge Jackson's determination was promulgated on 6 July 2018. On 24 October 2018, the Supreme Court handed down its judgment in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; [2018] 1 WLR 5273, which reversed the previous generally-held understanding of section 117B(6) by holding that the question of whether it would not be reasonable to expect the child to leave the UK is focused exclusively on the child and what is "reasonable" for the child – albeit the child "in the real world" – and that assessment does not require, and in fact precludes, any balancing of the child's interests against (e.g.) the public interest in removing foreign nationals on the basis of their conduct (see, e.g., at [17] per Lord Carnwath of Notting Hill with whom the other justices agreed).

15. On 24 November 2018, in the Applicant's appeal, Sir Stephen Silber directed that the application for permission to appeal be adjourned for 42 days to enable the parties to make written submissions on the effect of KO (Nigeria) on the issues before the court.

16. On 20 December 2018, in response to Sir Stephen Silber's direction, the Applicant sent to the court, by recorded delivery, a supplementary skeleton argument dated the previous day, understandably relying on KO (Nigeria) and forcefully submitting that Judge Jackson had erred in law by not applying the approach to section 117B(6) it required. There is no doubt that that skeleton argument was received by the court, because the Applicant's solicitors have produced a tracking signature of one of the Court of Appeal (Civil Division) staff acknowledging receipt on 21 December 2018 –

but, unfortunately, it did not find its way to the Appeals Office lawyer administering the case or on to the file. I shall return to the consequences of that shortly. The Secretary of State made no further submissions in respect of KO (Nigeria).

17. On 28 December 2018, the Secretary of State applied for a stay of this appeal pending the outcome of other appeals in this court, namely Secretary of State for the Home Department v AB (Jamaica) and AO (Nigeria) (eventually heard and reported as [2019] EWCA Civ 661), in which the issue arose as to whether section 117B(6) of the 2002 Act applies at all in circumstances in which there is no realistic prospect of a qualifying child leaving the UK as a consequence of the removal of one of their parents. The application for a stay was opposed by the Applicant.

18. On 21 January 2019, in correspondence with the Applicant's solicitors, the Secretary of State accepted that, in the light of KO (Nigeria), the appeal should be allowed and (the Secretary of State suggested to the Applicant) the matter should be remitted to the Upper Tribunal for redetermination. However, the Applicant was not prepared to agree to remittal, arguing that this court should hear the appeal and determine the correct approach to the statutory test when British citizen children were involved. Therefore, although agreed between the parties that, after KO (Nigeria), the determination of Judge Jackson in the Applicant's case was wrong, there was nevertheless an issue between the parties as to what should happen in the appeal.

19. As a result, the parties agreed a Consent Order, approved by Master Bancroft-Rimmer on 28 February 2019, which recited this background and dismissed the application for a stay, to allow "the substantive application… to be referred for judicial determination".

20. The application for permission to appeal was consequently still extant. It came before Sir Stephen Silber as a paper application on 11 March 2019. For the reasons I have given, the papers did not include the Applicant's 19 December 2019 submissions. The judge dismissed the application; but, unfortunately, he did so in ignorance of the recent material including submissions and the stance the parties had taken with regard to (amongst other things) KO (Nigeria).

21. That leads me to the application now before the court.

22. On 10 June 2019, the Applicant made an application under CPR rule 52.30 to reopen the final determination of the appeal by Sir Stephen Silber on the ground that there was a real possibility that he had not considered key submissions of the Applicant, notably in the 19 December 2018 document, as evidenced by the fact that, in his quite lengthy ruling, the judge did not refer to any of these key submissions, including those in relation to KO (Nigeria). In particular, he made no mention of the fact that the Secretary of State had conceded that, following KO (Nigeria), the approach of Judge Jackson below was wrong in law. Indeed, he did not refer to KO (Nigeria) at all. On the other hand, the judge had referred to matters, such as the negative TOIEC findings, which the later submissions made clear were no longer being challenged. That too suggested that the judge had not seen the recent submissions.

23. As I have already indicated, the court file makes clear beyond all doubt that, when refusing permission to appeal, Sir Stephen Silber did not have before him the recent material to which I have referred. He did not know that the Secretary of State had –

in my view, rightly, and clearly so – accepted that Judge Jackson's approach to section 117B(6) was wrong in law, and was willing to consent to an order that the appeal be allowed and the matter remitted to the Upper Tribunal for redetermination. As a result, the judge failed to consider the effect of KO (Nigeria) on this appeal, properly or (apparently) at all. It is perhaps noteworthy that, he had no submission before him that that case had any effect on this claim or appeal.

24. In my view, the fact that, when refusing permission to appeal, Sir Stephen Silber did not have before him important and compelling submissions from the Applicant – with most of which the Secretary of State apparently agreed – which had been filed properly and in good time, at the request of the court, critically undermined the proceedings. Whilst it cannot be said that, if Judge Jackson had approached section 117B(6) properly, he would necessarily have allowed the Applicant's appeal against the refusal of his application for leave to remain, there is a very good chance that on the evidence he would have done so. In those circumstances, the appeal was arguable. Indeed, in my view, the prospects of success on an appeal were high.

25. Although the Upper Tribunal had remade the decision on the appeal before the First-tier Tribunal coming to a different conclusion, before this court it was of course a second appeal to which the second appeal criteria of CPR rule 52.7(2) applied, i.e. permission could be granted only if the appeal had a real prospect of success and raised an important point of principle or practice, or there was some other compelling reason for this court to hear it. However, it seems to me that, although every case must turn on its own facts, it may be a compelling reason to allow a second appeal to proceed where, due to a misinterpretation of the law by the first appeal court/tribunal as recently clarified, there may be a high risk of the applicant's article 8 rights being infringed. That is the case here; and, in my judgment, on the facts of this case that would provide a compelling reason to allow a second appeal to proceed. This is not a case in which the appeal should not be reopened because, if reopened, the Applicant would likely not be granted permission to appeal in any event. Indeed, the Secretary of State concedes that, if the appeal is reopened, the Applicant should be granted permission to appeal, a matter to which I shall shortly return.

26. In opposing the application, Mr Andrew Bershadski for the Secretary of State initially relied upon three particular submissions. First, he submitted that there was no evidence that the judge did not have the crucial new submissions before him. I have already dealt with that: there is no doubt that he did not have them. Mr Bershadski, rightly, did not pursue that submission before me. Second, he submitted that the circumstances of this case are not exceptional, and no injustice would be caused by refusing the application. However, (i) that important submissions were requested and then filed with this court, but not considered by the judge dealing with the relevant application, is exceptional; and (ii) there would in my view be real injustice in refusing the application to reopen, in circumstances in which, had those submissions been considered, the judge dealing with the application for permission to appeal may well have granted it. Third, he submitted that, if the appeal is not reopened, the Applicant would have an effective alternative remedy, because he is not facing imminent removal and it remains open to him to make a fresh application for leave to remain on human rights grounds. However, in all the circumstances, I am unpersuaded that it would be just to leave the Applicant to proceed on that course, when his appeal to this court has been wrongly dismissed at permission stage. It

seems to me that such a new application may face hurdles that his current application, on appeal, does not.

27. In those circumstances, I consider each of the criteria in CPR rule 52.30(1), is satisfied; and that, in all the circumstances, the Applicant's application should be granted and the appeal reopened.

28. That restores the Applicant's application for permission to appeal. Although the parties were not agreed as to whether the appeal should be reopened, they were agreed upon the proper procedural course if it were, namely that permission to appeal should be granted, the appeal allowed, the decision of Judge Jackson of 6 July 2018 set aside, and the matter remitted to the Upper Tribunal for reconsideration of the appeal before it.

29. Therefore, I shall order that:

i) The Applicant's application under CPR rule 52.30 be granted.

ii) The final determination and Order of Sir Stephen Silber dated 11 March 2019 be set aside.

iii) The appeal be reopened.

Further, by consent, I shall order that:

iv) Permission to appeal be granted.

v) The appeal be allowed.

vi) The decision of Upper Tribunal Judge Jackson dated 6 July 2018 be set aside.

vii) The matter be remitted to the Upper Tribunal (Immigration and Asylum Chamber) for the appeal from the decision of the First-tier Tribunal (Immigration and Asylum Chamber) dated 2 March 2018 to be redetermined.