Neutral Citation: [2016] NIQB 96 | *Ref:* **MAG10125**

Judgment: approved by the Court for handing down | *Delivered:* **5/12/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

S's Application 2016 NIQB 96

IN THE MATTER OF AN APPLICATION BY 'S'
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) TO REFUSE PERMISSION TO APPEAL TO ITSELF MADE ON 8 NOVEMBER 2016

_____

MAGUIRE J

Introduction

[1] This application for judicial review was filed with the court on 15 November 2016. It concerns a 25 year old female ("the applicant"). The applicant is a citizen of Nepal.

[2] The essential facts may be described as follows:

(i) On 6 October 2009 the applicant arrived in the United Kingdom on a student visa. She was accompanied by her then husband who travelled with her as a dependent.

(ii) The husband, it is asserted, abandoned the applicant on arrival in the United Kingdom. Later in August 2013 the couple divorced.

(iii) On the same day as the applicant arrived in the United Kingdom she met a man called'K'. He is an Indian citizen and a Hindu. It appears that within a short time she began a relationship with him dating at least from December 2010. They are the court understands still in a partnership.

(iv) Following her arrival in the United Kingdom the applicant began a course of study at Malvern House College in London. While at this college she obtained a certificate but she failed to obtain a diploma as (she says) that she failed one examination out of eight.

(v) In March 2014 she began a course at CECOS London College in Business Studies. Throughout she remained in the United Kingdom.

(vi) The applicant's original student visa was to expire on 10 November 2011. It appears that upon application it was extended to 30 March 2014. However no further extension of her visa was sought.

(vii) On 20 May 2016 the applicant with her partner was encountered by the immigration authorities at Belfast Docks and she was detained as an over stayer.

(viii) Her response to this was to claim asylum on 6 June 2016.

(ix) On 16 June 2016 a screening interview was arranged. Later on 23 June 2016 the applicant refused to be interviewed, proffering instead a pre-prepared statement. At this time she was advised that Rule 339(m) might be applied to her case. A further interview was arranged for 11 July 2016 but again she refused to be interviewed.

(x) The decision on her asylum application was made by the Home Office on 18 July 2016. Rule 339(m) was not invoked in her case. The decision declined to grant her asylum. The decision is a lengthy one of some 15 pages.

(xi) As was the applicant's entitlement, she appealed this decision to the Lower Tier Tribunal. In advance she supplied a written statement to the Tribunal. The Tribunal sat to hear her appeal on 6 September 2016. The applicant gave evidence before the Tribunal and was cross-examined by the Home Office's presenting officer. At the hearing the applicant was represented by counsel.

(xii) The decision of the Tribunal was provided on 12 September 2016. It is some 12 pages in length.

(xiii) Thereafter the applicant sought leave to appeal the decision to the Upper Tier Tribunal. However this application was unsuccessful. Upper Tribunal Judge Lindsley refused to grant leave on 8 November 2016.

The judicial review application

[3] The target of these proceedings is the decision of the Upper Tier Tribunal refusing to grant leave as aforesaid. The grounds of judicial review are stated somewhat pithily in the Order 53 statement as follows:

- Procedural irrationality: taking irrelevant considerations into account and/or failing to take relevant considerations into account.

- Substantive irrationality: as no reasonable decision-maker could have come to that decision.

- Human rights.

[4] Some elucidation of these grounds is provided at paragraphs 27 to 30 of the Order 53 statement. These state:

> "27. Failure on the part of the Upper Tribunal to rationally consider the First Tier Tribunal's decision along with the subsequent application for permission to appeal to the Upper Tribunal.
>
> 28. Failure on the part of the Upper Tribunal to rationally consider whether the First Tier Tribunal decision may have been based upon/influenced by mistakes of fact highlighted within the application for permission to appeal to the Upper Tribunal.
>
> 29. Failure on the part of the Upper Tribunal to rationally consider whether the First Tier Tribunal's decision may have been based upon errors of law meriting further enquiry by the Upper Tribunal.
>
> 30. Furthermore the impugned decision is unlawful as contrary to Section 6 of the Human Rights Act 1998 insofar as it:
>
> - Deprives the applicant of substantive consideration of her appeal by the Upper Tribunal contrary to Section 6 ECHR, and
>
> - Triggers the applicant's immediate removal to Nepal as putting her in a position where she would face -

(i) Real risk of unlawful killing contrary to Article 2 ECHR, and/or

(ii) Inhuman or degrading treatment contrary to Article 3 ECHR."

The decision of Immigration Judge Herlihy – Lower Tier Tribunal

[5] Judge Herlihy's decision first describes the position of the parties and the grounds of appeal. It refers, in particular, to the appellant's evidence before the Tribunal. At paragraph 29 *et seq* there is reference to findings of the Tribunal in relation to the appellant's credibility. It is clear from these that the judge did not regard the applicant's claims as credible. A series of reasons is offered for this conclusion:

- At paragraph 31 it is noted that both the appellant and her then partner refused a substantive asylum interview. In respect of this the judge said:

> "I find that the actions of the appellant in refusing on two occasions to be interviewed and requiring that the Home Office submit in writing to her any questions they wish to put, which her solicitor will answer, to be wholly inconsistent with someone who claims to be a genuine refugee in need of international protection. The appellant has demonstrated that she is only prepared to co-operate in the asylum process on her own terms and her actions seriously damage her credibility in that she has failed to provide an oral account of her claim which would allow the respondent to undertake a detailed examination of the same so that its veracity could be tested/examined in an interview format."

- At paragraph 34 the judge stated that in her view the appellant's account lacked detail and was vague. In particular, in this paragraph, the judge found the appellant's claim to be the victim of trafficking not credible. She said:

> "I do not find her claim to be the victim of trafficking credible. She clearly applied for entry as a student and when her visa expired in 2011 sought and obtained a further student visa. At no time did she approach the authorities in the United Kingdom to claim she had received any threat from her husband or that she had been the victim of trafficking. She says she was tricked into coming to the United

> Kingdom by her husband who exploited her merely for the purpose of securing entry to the United Kingdom as her dependent. I find that if the applicant had been a genuine victim of trafficking and had received threats from her husband as she claims that she would have approached the authorities and if her husband's intention was to remain illegally in the United Kingdom as she suggests that it would have been more credible for her to have sought to have left the United Kingdom to escape his threats rather than seek to extend her leave as she did in 2011."

- At paragraph 36 the judge dealt with fears the applicant professed to have about how her father and brothers back in Nepal might treat her on return. On this issue also the judge felt that the appellant's account was incredible. At paragraph 36 the Immigration Judge stated that:

> "The appellant says that she fears that her father and brothers will kill her on her return as she has brought dishonour due to her divorce and because she entered into a relationship with another man which is aggravated due to the fact that her partner is from a lower caste. Again I do not find the appellant's claim to be credible as the appellant has given an inconsistent account which lacks any detail."

[6] Later at paragraph 37 of the decision the Immigration Judge went on to say that:

> "I find that the appellant has given an inconsistent account of her claim which seriously undermines her credibility. It is clear from her oral evidence that her parents told her that it was okay for her to return to Nepal as a divorced woman if she remarried. This is inconsistent with her claim that they wanted to kill her."

[7] In addition to the above points the Immigration Judge also noted that while the appellant's partner attended court he gave no evidence before the Tribunal. On this matter the judge said:

> "It is claimed that he and the appellant had been in a relationship from December 2010 and it is reasonable to assume he could have given evidence as to the threats that the appellant claims she received from her family and also evidence regarding their respective

> castes. There was no objective evidence before me to establish that the appellant and her partner were from different castes or indeed which caste they belonged to other than the appellant's oral evidence. There was no evidence submitted as to the earlier human rights claim made by the appellant's partner in which it is claimed that he mentioned their relationship, or what he said in respect of the relationship and why it could not continue outside the United Kingdom. I find that the failure of the appellant's partner to provide any evidence which it was reasonable for him to have done in support of the appellant undermines the credibility of her claim."

[8] Later at paragraph 40 the Immigration judge indicated that she was not satisfied that the appellant had established that she would be at risk of suffering ill-treatment on her return to Nepal. In simple terms the judge indicated that she did not believe the applicant's account of threats from her family or her ex-husband. She found that the appellant has had and continues to enjoy the support of her family in Nepal.

[9] The judge also held that there were no substantial grounds for believing that there was a real likelihood that she would be at risk of persecution from her in-laws in Nepal. She did not find that the appellant would be at risk in her home area or elsewhere in Nepal. Consequently she held that the appellant would be able to return to her home in Nepal and live as she had done in the past without any fear of persecution. Accordingly the appellant, in the judge's view, had not discharged the burden of proof to establish that she was entitled to the grant of asylum. Accordingly the appellant's removal, the judge reasoned, would not cause the United Kingdom to be in breach of its obligations under the Qualifying Regulations.

[10] Similar findings were made in respect of the issue of humanitarian protection and human rights.

The Upper Tribunal's decision

[11] As indicated above the Upper Tribunal judge refused permission to appeal. In her decision she set out the various contentions made by the applicant. At paragraphs 4 to 9 of her decision she dealt with the main points which had arisen. However none of the points found favour with her. Ultimately her conclusion was that the Lower Tier Tribunal's decision was neither perverse nor irrational and did not identify any arguable error of law.

The leave hearing

[12] At the leave hearing Mr Peters BL for the applicant, challenged the findings of the Lower Tier Tribunal. In particular, he emphasised that the applicant had been trafficked into the United Kingdom and was the victim of same. He also led stress on the fact that the judge had been wrong to take the view that her failure to undergo interviews with the Home Office damaged her credibility. Thirdly the applicant maintained, contrary to the judge's findings, that the applicant would be at risk from her father and brothers if returned to Nepal.

[13] Mr Sands BL on behalf of the notice party *viz* the Home Office submitted that the applicant's judicial review was without merit. Her case had been given, he argued, careful consideration before the First Tier Tribunal and that there was nothing to suggest that Immigration Judge Herlihy had erred in law. The judge's decision, moreover, had been carefully considered by the Upper Tribunal judge who detected no arguable error of law.

The court's assessment

[14] The court has read the decision of Judge Herlihy and the leave decision of Upper Tribunal Judge Lindsley carefully. Both judgments, in their ways, are unequivocal in their conclusions.

[15] As regards the Lower Tier Tribunal's decision it seems to the court that Mr Peters' arguments in reality are arguments directed at the merits of Judge Herlihy's conclusions. They seek to undermine the judge's conclusions on the basis that the facts of the case were more favourable to the applicant than the judge had assessed.

[16] However that might be, for its own part the court does not consider that it has been demonstrated that there was any significant error of law on the part of Judge Herlihy. Consequently the court is of the opinion that the conclusion reached by Upper Tribunal Judge Lindsley was a perfectly sustainable one.

The Cart Criteria

[17] Even if the court is wrong in its assessment above it is agreed between the parties to this application that in order for leave to be granted the Cart criteria must be overcome.

[18] These criteria are well established. They derive from the decision of the Supreme Court in the case of R (Cart) v Upper Tribunal (Secretary of State) for Justice (and Other Interested Parties) [2011] UKSC 28. They are tailor made to meet cases such as this where there has been a decision by the decision making authority which has already been the subject of an unsuccessful appeal to the Lower Tier Tribunal and where leave to appeal to the Upper Tier Tribunal has been refused. In

such cases, according to the decision in Cart, what are described as "the second tier appeal's criteria" apply. What this means when translated to the issue now before the court is that there cannot be a judicial review of the refusal of leave unless:

(a) the proposed judicial review raises some important point of principle or practice; or

(b) there is some other compelling reason for the court to hear the judicial review.

[19] The adoption of these criteria recognises the importance of the enhanced Tribunal structure which, in the words of Lady Hale, "deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected" (see paragraph [57] of her judgment in Cart).

[20] The approach in Cart has been applied equally to this jurisdiction: see A and Others Application [2012] NIQB 86 and DJ1 and DJ2s Application [2013] NIQB 20.

Important Point of Principle or Practice

[21] These words require little expansion or elucidation. Such an important point, it was said in Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60, must be one which is "not yet established". It will, moreover, not be one confined to the individual's personal interests, facts and circumstances: see the sister decision of the Supreme Court in Eba [2011] UKSC 29 at paragraphs [46]-[49]. In Eba, Lord Hope referring to this category of case, said that underlying it "is the idea that the issue would require to be one of general importance, not confined to the petitioner's own facts and circumstances" (Eba paragraph [48]).

Some other compelling reason

[22] Likewise, these words are self-explanatory. However, in Cart Lord Dyson observed that this category would be engaged by a case "which cries out for consideration by the court". He went on:

> "Care should be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case. But they might include:
>
> (i) a case where it is strongly arguable that the individual has suffered what Laws LJ referred to … as 'a wholly exceptional collapse of the procedure'; or

(ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences." (Paragraph [131] Cart).

[23] In PR (Sri Lanka) v Secretary of State for the Home Department [2011] EWCA Civ 988 Carnwath LJ emphasised the narrowness of this category. To overcome the test, the prospect of success should normally be 'very high' and might apply where the decision was "perverse or otherwise plainly wrong" (paragraph [35]). Compelling, moreover, means legally compelling rather than compelling, perhaps from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments: see paragraph [36]. Extreme consequences for the individual could not in themselves amount to a freestanding compelling reason: Sullivan LJ in JD Congo [2012] EWCA Civ 327 at paragraph [26].

[24] In Re A and Others Treacy J at paragraph [44] said:

> "The circumstances in which permission to appeal refusals by the Specialist Upper Tribunal could appropriately come before the judicial review court should, in the light of the guidance in Cart, be exceedingly rare."

The application of the Cart Criteria

[25] The court has explained the matrix in which the present application before the court has been made. It seems to the court that the issues which potentially arise in the applicant's judicial review application are specific to the applicant's own facts and circumstances and do not raise any new issues of general importance or issues involving any important point of principle or practice. The case, therefore, in the court's opinion, does not fall within the first criterion or category.

[26] Nor, in the court's view, does it fall within the second criterion or category. There has been no wholly exceptional collapse of procedure; it is not a case, furthermore, where there is a compelling reason for the court to hear it; and the application before the court could not be viewed as one with high prospects of success or one where there appears to be perversity or plain wrongness. On the contrary, the points raised at the leave hearing, appear to the court to be far from convincing. There is, in the court's judgment, no compelling reason which would support the grant of leave to apply for judicial review in this case.

Conclusion

[27] In the above circumstances, the court does not consider that the Cart criteria have been met. It therefore dismisses the applicant's application for judicial review.