IAC-FH-CK-VI

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/1339/2020 (V)

Field House,
Breams Buildings
London EC4A IWR

9 November 2020

THE QUEEN
(ON THE APPLICATION OF JOAN SAMUELS GREEN)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE L SMITH
SITTING AT FIELD HOUSE, VIA SKYPE FOR BUSINESS

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Mr M Symes, instructed by Barnes Harrild & Dyer Solicitors, appeared on behalf of the Applicant.

Mr J Jolliffe, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED

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JUDGE SMITH: This is an application for judicial review challenging the Respondent's decision dated 27 January 2020 refusing the Applicant entry clearance to settle as the spouse of a British national. That decision followed a decision made as long ago as 1 October 2008 to exclude the Applicant from the UK.

2. The Applicant's application for judicial review was issued on 4 May 2020. Permission to apply for judicial review was refused on the papers by Upper Tribunal Judge Kekić on 19 June 2020 but granted following an oral hearing on 5 August 2020 by Upper Tribunal Judge Keith largely on the basis that the refusal of entry clearance was procedurally unfair because the Applicant was unaware of the exclusion decision on which the refusal was based and had no opportunity to challenge it.

3. The decision under challenge was also a refusal of a human rights claim and therefore generated a right of appeal. At the time of the making of the decision, the Respondent had not addressed the Applicant's representations made about exclusion as she could not have made those before she knew of the exclusion. The Respondent has since made a decision refusing to revoke the exclusion order in reply to the Applicant's representations. Although the Respondent agreed that she would do this in a response to the pre—action protocol letter, she did not in fact do so until September 2020. The Respondent argues that there is a complete alternative remedy such that the application for judicial review should be refused.

4. I can deal with the facts of the case very shortly. The Applicant is a national of Jamaica. She came to the UK as a visitor in December 1999 with leave to June 2000. She was granted an extended period of leave to March 2001. Whilst in the UK she met her partner, now her husband. She overstayed and, in 2007, was encountered working unlawfully. As I understand it, she had obtained her employment using a genuine passport, but it contained falsified details of her leave to remain. The Applicant was charged and convicted of a criminal offence in relation to her use of false documents. She was sentenced to a period of six months in prison and recommended for deportation.

5. The Applicant voluntarily left the UK thereafter in May 2008. She married her partner in Jamaica in 2008. He returned to the UK and they have maintained their relationship since via visits and remote regular contact. The couple were unable to make an application for the Applicant to join her husband until 2019 as he could not, till then, meet the financial requirements of the Immigration Rules ("the Rules").

6. Although entry clearance was also refused on the basis that the Applicant could not satisfy the financial requirements of the Rules, due to a failure to provide the correct documents, I understand that the Applicant is now in a position to satisfy an Entry Clearance Officer as regards the financial requirements with the correct documents and therefore, if the exclusion order did not exist, would be in a position to make a further application rather than relying on the appeal which was generated by the decision under challenge.

7. Through no fault of the Applicant's solicitors, the revised judicial review hearing bundle did not reach me before the hearing and therefore I have not seen either the original exclusion decision or the later refusal to revoke the exclusion order. The Applicant has made an application to amend the grounds to challenge the later decision. I obviously could not deal with that application without seeing the decision which the Applicant seeks to challenge.

8. Both representatives agreed however that I would not reach that point if I decide that the appeal against the entry clearance decision is a complete alternative remedy, which is the Respondent's position. That is based, as I say, on the refusal of a human rights claim which has generated a full Article 8 appeal before the First-tier Tribunal. That has been lodged and remains pending. It was agreed therefore that I would hear submissions on the alternative remedy issue first before moving on, if necessary, to consider the application to amend.

9. Having heard very helpful submissions from both Mr Symes and Mr Jolliffe, who have both put their cases extremely succinctly, I have concluded that the appeal is an alternative remedy and that I should therefore refuse the Applicant for judicial review on that basis. I turn to set out my reasons.

10. The Respondent relies on the case of R (oao Zoolife International Ltd v Secretary of State for Environment, Food & Rural Affairs [2007] EWHC 2995. That is not entirely on point as it concerns academic challenges rather than ones where there is an alternative remedy. It is though trite law, and Mr Symes does not dispute, that judicial review is a remedy of last resort and should not be exercised until any alternative remedy is exhausted. I accept of course that there are some cases where parallel judicial review and appeal proceedings are necessary because the appeal is unable to determine the essential issues but that is not this case.

11. Mr Symes relied on the case of Ahsan v The Secretary of State for the Home Department (2017) EWCA Civ 2009 in support of his proposition that there is no full alternative remedy. He points to [116] of the judgment which he says contains conditions which are of general application and which are required to be satisfied to show that an appeal is an alternative remedy:

    (1) The first condition is that on appeal the First-tier Tribunal must be able to determine the central issue. In the Ahsan cases that issue was whether there had been dishonesty in the taking of the English language test. Mr Symes says that the First—tier Tribunal cannot decide the central issue in this case which is whether the Applicant should continue to be excluded because the exclusion order is not an appealable decision.

    (2) Second, the Applicant must not be in a worse position in the appeal than she would be in judicial review if the central issue is determined in her favour. In this case, it is said that she is in a worse position because, if the Tribunal were to conclude via the judicial review that the exclusion decision is unlawful then all objections to entry clearance fall away and the Applicant could simply make another application rather than continue with her appeal. It is said that an appeal is more costly and more protracted particularly in the current climate of the pandemic.

    (3) Third, there must be a refusal of a human rights claim so as to generate an appeal.

12. The third condition is of course satisfied. I agree with Mr Jolliffe that, insofar as what is said in Ahsan amounts to a statement of principle applicable to all cases, those principles are satisfied in any event.

13. The First—tier Tribunal can decide the central issue. As Mr Jolliffe points out, in Ahsan there was a disputed issue of fact which had to be determined. Here there is no dispute as to the facts which are that there was a criminal conviction, a recommendation for deportation and an exclusion order remains in place. True it is that the exclusion order is itself not appealable. However, as is evident from the case of Campbell (exclusion; Zambrano) [2013] UKUT 147 (IAC) (on which the Applicant placed reliance), the Tribunal can still consider(indeed is bound to consider) the effect of the exclusion order when considering the public interest. That would include whether the exclusion can properly be maintained after

this passage of time. The Tribunal in Campbell made just such a decision (see [48] and [49] of the decision).

14. As I also observed in the course of the hearing, this situation is no different to there being a deportation decision in place at the time of an appeal. It cannot sensible be suggested that a Tribunal dealing with a deportation case cannot decide that deportation is disproportionate notwithstanding the existence of a deportation order. Indeed, in this case I understand that the reason for the initial exclusion order, even though I have not seen it, was based on the court's recommendation for deportation and that the Applicant departed the UK before the deportation order was served.

15. Nor can it be said that the Applicant is in this case in a worse position in the appeal than in her judicial review. As I pointed out to Mr Symes, and he agreed, I could only consider the lawfulness of the exclusion decision in terms of whether it accords with guidance and whether it is "Wednesbury unreasonable". I could not determine the proportionality issue because that is a matter of which the First—tier Tribunal is seized in the appeal. The Applicant will be able to carry out a more intensive review of the lawfulness of the exclusion decision when the First—tier Tribunal looks at the public interest and proportionality in the context of the merits of the entry clearance refusal.

16. Furthermore, now that the Respondent has made a further decision refusing to revoke the exclusion order, the Applicant would have to apply to amend her grounds to challenge that - as she has done - and would need the Tribunal's permission to proceed. That would put her back to square one and if anything would lead to further cost and delay. The Applicant points to the case of Caroopen & Myrie v The Secretary of State for the Home Department [2016] EWCA Civ 1307 in support of a submission that I would have to look at the exclusion decision when considering the lawfulness of the entry clearance refusal whether or not permission to amend was given. Caroopen is not on point precisely because there is, in this case, an alternative remedy in relation to the first decision which is currently being exercised. That was not the position in Caroopen.

17. I did wonder at one point if there was a distinction to be drawn between the outcome for the Applicant in the appeal and the judicial review. That would be relevant to whether the second of the Ahsan conditions is satisfied. If the suitability finding falls away and the Applicant meets the financial requirement she would be entitled to enter under the Rules in the five—year

category to settlement. As Mr Jolliffe pointed out, though, as in a deportation case, where the Tribunal can decide that deportation is disproportionate which would lead to the removal of the deportation decision, so the Tribunal can decide in this case that exclusion is disproportionate which would also lead to the same result. So I cannot see that the Applicant is in any worse position and is probably in a much better position in her appeal as the Tribunal will be able to consider the case on its merits and substitute its own view which is something I cannot do.

18. For all of those reasons, even if Ahsan is intended to set out conditions which apply to all cases when considering the availability of alternative remedies, those conditions are satisfied in this case. It follows that the Applicant's appeal is an alternative remedy and for that reason I refuse the application for judicial review.

Application for permission to appeal to the Court of Appeal

19. Mr Symes makes an application for permission to appeal but does not particularise his grounds. In essence, he repeats his case as put before me. I refuse permission to appeal for the same reasons as I have refused the application for judicial review. There is no arguable error in my decision.

Costs

20. I am going to order that the Respondent pay 50% of the Applicant's costs to the end of September 2020. The challenge to the entry clearance refusal was on two grounds. The first was a procedural unfairness challenge in relation to the earlier exclusion decision and the Respondent's failure to communicate that in accordance with her policy, prior to the making of the entry clearance decision, in order that the Applicant could challenge it. That was the main basis for the grant of permission. Whilst that ground of challenge fell away following the making of the refusal to revoke decision in September 2020, it was extant both at the time of the claim and the grant of permission. Although the Respondent had indicated that she would consider the Applicant's representations in response to the PAP letter in April 2020, she did not do so until after the grant of permission. The Applicant's case in this regard was found to be arguable and she has achieved what she sought by that ground by the decision in September 2020. She is entitled to recover her costs of that ground until a reasonable time after the making of that decision.

21. However, in relation to the challenge to the January decision itself, the Respondent's position has remained the same throughout, namely that there is an alternative remedy. Her position in that regard is vindicated by my judgment. She is therefore entitled to recover her costs of that ground of challenge. I therefore order that the Applicant pay 50% of the Respondent's costs for the entirety of the proceedings.

22. It may be that there is little point in seeking to have those costs assessed or agreed if the net result would be that the costs cancel each other out. However, I do not have schedules of costs which enable me to see if that would be the result. It is for the parties to decide whether to enforce the order I have made or leave the case in the position of each side bearing its own costs. I will make an order for detailed assessment by a Costs Judge in the event of non-agreement in case of need.

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JR/1339/2020 (V)

Upper Tribunal
Immigration and Asylum Chamber
Judicial Review Decision Notice

The Queen on the application of
Joan Samuels Green

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Smith

Application for judicial review: substantive decision

Having considered all documents lodged and having heard from Mr M Symes of Counsel instructed by Barnes, Harrild Dyer solicitors on behalf of the Applicant and Mr J Jolliffe of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London via Skype for Business on Monday 9 November 2020

Decision: the application for judicial review is refused
For the reasons contained in my decision given orally at the end of the hearing on 9 November, an approved transcript of which is attached hereto

Permission to appeal to the Court of Appeal
I refuse permission to appeal. There is no arguable error of law in my decision.

Costs
The Respondent shall pay 50% of the Applicant's costs to 30 September 2020. The Applicant shall pay 50% of the Respondent's costs of this application for the entirety of the proceedings. My reasons are set out in the approved transcript.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: **9 November 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 12/11/2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).