In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/4073/2019

In the matter of an application for Judicial Review

The Queen on the application of
Zurius

Applicant

versus

Entry Clearance Officer

Respondent

ORDER

BEFORE Upper Tribunal Judge Stephen Smith

HAVING considered all documents lodged and having heard the applicant in person and Mr M. Wall of counsel, instructed by GLD, for the respondent at a remote hearing at Field House on 21 September 2021

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached transcript of the extempore judgment given at the hearing.

(2) The Secretary of State may make an application for costs within 7 days of the substantive hearing, that is by 28 September 2021. The applicant may serve submissions in response within 14 days of the substantive hearing, that is by 5 October 2021. The Tribunal will then take a decision concerning costs on the papers.

(3) Permission to appeal is refused. I have considered the proposed grounds of appeal advanced by the applicant at the hearing. I refuse permission to appeal because, in my view none of them have a realistic prospect of success and there is no other compelling reason why permission to appeal should be granted.

Signed: Stephen H Smith

Upper Tribunal Judge Stephen Smith

Dated: **22 Sep. 21**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *22 September 2021*

Solicitors:
Ref No.
Home Office Ref:

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 point 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 sent (Civil Procedure Rules Practice Direction 52D 3.3).

IAC-FH-CK-V1

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/4073/2019

Field House,
Breams Buildings
London
EC4A 1WR

21 September 2021

THE QUEEN
(ON THE APPLICATION OF ZURIUS)

Applicant

and

ENTRY CLEARANCE OFFICER

Respondent

BEFORE

UPPER TRIBUNAL JUDGE STEPHEN SMITH

- - - - - - - - -

The Applicant appeared in person.

Mr M Wall, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE STEPHEN SMITH: The appellant is a citizen of Mauritius. He appeared before me as a litigant in person. He seeks judicial review of a decision of the respondent dated 17 May 2019 to refuse entry clearance to him as a visitor, in order to conduct business for the company for which he worked at the time in Mauritius.

Procedural history

2. On 11 November 2019 Upper Tribunal Judge Reeds granted permission to bring this claim, in relation to only one of the multiple grounds advanced by the applicant. That ground was on the basis that the decision was Wednesbury unreasonable. Against that background, the Secretary of State offered to compromise the proceedings on the basis that she would withdraw the impugned decision, take a fresh decision and meet the applicant's reasonable costs. The applicant refused that offer and these proceedings were maintained.

3. On 26 January 2020 the applicant applied to this Tribunal for an order mandating the respondent to grant a four month visit visa. That application was refused by Upper Tribunal Judge Lindsley in terms to which I will return.

4. On 8 July 2020 the respondent took a fresh decision in any event. She did so of her own motion. The fresh decision withdrew the earlier impugned decision and re-refused the entry clearance, albeit on different grounds. Throughout the period from the grant of permission up until this hearing, those representing the Secretary of State have sought, on multiple occasions, to invite the applicant to withdraw this claim for judicial review on the basis that it has become academic. The applicant refused to do so. It was in those circumstances that the matter came before me for a substantive judicial review hearing.

5. Despite being a litigant in person, the applicant demonstrates a knowledge of many areas of immigration law and practice. So much is clear from the detailed correspondence in which he has engaged with the Secretary of State and also from his skeleton argument prepared for these proceedings, which I have considered.

6. On behalf of the Secretary of State Mr Wall of Counsel appeared. I am grateful to both parties for their clear and helpful oral and written submissions. Mr Wall prepared a skeleton argument and in addition both parties at my request prepared chronologies setting out their view of the essential and salient steps in the history to these proceedings.

Submissions

7. The applicant submits that the Secretary of State should not have purported to treat his challenge to the 17 May 2019 decision as being academic. In his submission, nothing less than a mandatory order compelling the Secretary of State to grant him entry clearance, or a decision by the respondent granting him entry clearance, would be sufficient to render these proceedings academic. Mr Zurius accepts that he has not brought a challenge to the subsequent decision, and that the decision that formally is before this Tribunal by way of this judicial review application remains that of 17 May 2019. He explained that he had not sought to expand the grounds for judicial review to encompass the July 2020 decision as, in his view, it was necessary to "balance the proceedings". He further contends that the second decision, while not formally being the subject of this challenge, was corrupted by bad faith. For that reason the respondent's submission that the application is academic must be refuted, he submits.

8. On behalf of the respondent, Mr Wall submits that this is unquestionably an academic claim. The decision under challenge no longer exists, and pursuant to the settled concerning challenges to academic claims, there is no basis upon which this Tribunal may properly entertain this application for judicial review any further.

The law

9. Judge Reeds granted permission to the applicant to pursue only a single ground, namely that the decision of 17 May 2019 was arguably irrational or unlawful on Wednesbury unreasonableness grounds. Pursuant to that doctrine the task for this Tribunal is to determine whether the decision reached by the Secretary of State was outside the range of decisions that were reasonably open to the Secretary of

State. Was this decision one which no reasonable Secretary of State could have reached?

10. Also relevant to this claim are the now established authorities concerning the need for procedural rigour in public law proceedings. In R on the application of Talpada [2018] EWCA Civ 841 at [67] to [69] the Court of Appeal emphasised the need for public law litigation to be conducted with an appropriate degree of "procedural rigour".

11. In R on the application of Spahiu v The Secretary of State for the Home Department [2018] EWCA Civ 2604 the Court of Appeal outlined the principles with which courts and Tribunals should approach the issue of so-called rolling review. Rolling review is sometimes the name given to the phenomenon of extant judicial review proceedings being used to challenge developments in the decision originally under challenge, whether by way of subsequent decisions or amendments to it. For example, a rolling review situation may arise where "Decision A" is the subject of a judicial review challenge, but during the currency of the proceedings and before their resolution, the Secretary of State takes a further decision concerning the same issue, "Decision B". Bringing Decision B within the scope of judicial review proceedings challenging Decision A is a practice that would amount to what is called "rolling review". In Spahiu, the Court of Appeal quoted Lord Justice Lloyd-Jones (as he then was) in R on the application of Tesfay v Secretary of State for the Home Department [2016] EWCA Civ 415 at [78] where His Lordship said:

> "Rolling or evolving judicial review of this kind does, in my view, give rise to difficulties both in principle and in practice. … The impact of the reviewing court scrutinising post-decision material is likely to be particularly significant in contexts in which there will frequently be a change of circumstances or in the evidence available between the time of the original decision and the time the matter comes before the reviewing court."

12. Then at [63]:

> "It will usually be better for all parties if judicial review proceedings are not treated as 'rolling' or 'evolving', and it is generally simpler and more cost-effective for the reviewing court to avoid scrutinising post-decision material. But there will also be a need to maintain a certain procedural flexibility so as to do justice as between the parties."

13. At [15] of his skeleton argument Mr Wall outlines the approach of the higher courts to the issue of academic claims. In R on the application of Zoolife International Ltd v The Secretary of State for Environment, Food & Rural Affairs [2007] EWHC 2995 (Admin) the High Court said:

> "32. The starting point for considering whether a court should permit a party to pursue an academic point in a public law case is the classic statement of Lord Slynn of Hadley in R v The Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450 in a speech with which other members of the Appellate Committee agreed when he explained that:
>
> > '… I accept, as both Counsel agree, that in case where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House, there is no longer a list to be decided which will directly affect the rights and obligations of the parties inter se ... The discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard **unless there is good reason in the public interest for doing so** as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the facts, and where large numbers of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'" (Emphasis original)

There are a number of additional authorities to similar effect.

Discussion

14. Against that background I turn to my analysis of this application for judicial review. I will address first the scope of the present

challenge and secondly the submissions made by Mr Wall concerning the academic status of this claim.

15. First, the scope of the challenge. As Mr Zurius accepted during submissions, this application for judicial review relates only to the decision of 17 May 2019. While Mr Zurius explained that, in his words, he sought to "balance" the proceedings by not formally applying to amend his statement of facts and grounds so as to encompass the July 2020 decision, that approach does not make sense. The submission that a claim for judicial review may be "balanced" by virtue of a deliberate decision by an applicant not to challenge the only operative decision is, in my judgment, deeply flawed. In view of the importance of the principle of procedural rigour, it is vital that the parties to public law proceedings, and the Tribunal, have the utmost clarity as to the scope of the challenge and in particular the decision that is being challenged. Grounds for judicial review should target the operative decision, not an earlier, withdrawn, decision. Maintaining a judicial review challenge to a withdrawn decision, while omitting to apply to expand a challenge to an extant decision is not "balance"; if anything, it is lopsided.

16. Had Mr Zurius sought to expand his challenge to encompass the July 2020 decision, he would have been able to apply to do so at the relevant time, by means of an application to amend his statement of facts and grounds. Alternatively, this claim could have been withdrawn, he could have recovered his reasonable costs by virtue of the Secretary of State's offer to meet them, and he could have brought separate proceedings against the 8 July 2020 decision.

17. Mr Zurius did not apply to amend his statement of facts and grounds, and it follows, therefore, that the only decision that is before this Tribunal is that of 17 May 2019. In any event, it would be unfair on the respondent and would offend the principles of procedural rigour were I to permit a substantive challenge to the July 2020 decision within the confines of these proceedings at this late stage. To do so would be to permit litigation by ambush. The respondent has not attended the Tribunal ready to defend the 8 July

2020 decision. That decision has not been challenged in any event, due to the applicant's desire to "balance" the claim.

18. I turn now to the question of whether the claim is academic. It appears that the applicant misunderstands the objective and scope of the judicial review jurisdiction. As he confirmed to me during oral submissions on multiple occasions, in his view a judicial review application may only be described as "academic" if the underlying impugned decision was re-taken in such a way as to meet his objectives.

19. So, applied to the facts of this case, in the applicant's view this judicial review application would only be academic if either the Secretary of State had already agreed to grant entry clearance to him, or if she had already done so. Mr Zurius relies on OB (Ukraine) v Secretary of State for the Home Department [2019] EWCA Civ 1216. An unsuccessful appellant to an entry clearance human rights claim appealed from this Tribunal to the Court of Appeal. In parallel to the proceedings taking place before that court, the Secretary of State reconsidered her position and granted entry clearance to the appellant. The appellant nevertheless wanted to succeed in his statutory appeal, and did not take the necessary steps to provide his biometric details, instead preferring to prosecute the appeal. The appeal was dismissed on the basis it was academic.

20. In Mr Zurius's submission, OB (Ukraine) is authority for the proposition that a decision may only be categorised as academic if it is one that is favourable to an applicant. In my judgment that submission is misconceived. It so happens that on the facts of OB (Ukraine) the Secretary of State had granted entry clearance to the applicant, thereby rendering the human rights appeal proceedings academic. That was a case-specific decision which, on the facts of the proceedings before the Court of Appeal, meant that the challenge was academic. While I accept that in OB (Ukraine), had entry clearance not been granted, it may have been harder to say that the appeal was academic, it does not follow that in all other cases where entry clearance has not been granted the proceedings are incapable of being categorised as academic. Such a stark

proposition of cause and effect cannot follow. Indeed, it would make a mockery of the judicial review jurisdiction, for it would result in the courts and this Tribunal being littered with unmeritorious claims concerning decisions which no longer exist in relation to which there could only be one outcome which is capable of satisfying the requirement for finality in the proceedings, namely an outcome in which the applicant succeeds. That is as much a misunderstanding of OB (Ukraine) as much as it is a broader misunderstanding of the nature of the judicial review jurisdiction.

21. Turning to the criteria for an academic claim, the 17 May 2019 decision no longer exists. It has been withdrawn. I can identify no good reason in the public interest for continuing to examine the underlying decision of the Secretary of State. There is not a broader point of statutory construction raised by the challenge, indeed, it is a case-specific Wednesbury unreasonableness challenge, nor are there many other cases of this nature likely to require resolution in light of the decision of this tribunal. Although the criteria in Salem were non-exhaustive, not one of the reasons advanced by Mr Zurius for entertaining this claim further demonstrate any good reason to examine the claim further.

22. I must address a submission made by Mr Zurius that the mandatory nature of the order he seeks is a further reason that means that it is incapable of being categorised as academic. In addition to misunderstanding the nature and scope of the judicial review jurisdiction as I have already outlined, Mr Zurius's insistence that this Tribunal grant a mandatory order against the Secretary of State misunderstands the judicial review jurisdiction in another significant respect. The nature of a judicial review application is that it reviews an underlying decision. There must always be a decision which is capable of being subjected to scrutiny. It is not a forum for an applicant to seek mandatory relief without the proceedings being anchored to an underlying decision. For the reasons already given, there is no underlying decision in these proceedings. It follows that it would not be appropriate for this court to entertain this submission any further.

23. In any event, mandatory orders are highly exceptional. I respectfully endorse the reasons given by Upper Tribunal Judge Lindsley for refusing the applicant's application of 26 January 2020 for a mandatory order in these terms:

> *"1. On 26th January 2020 the applicant applied for an order mandating the respondent to grant a 4 month visit visa to enter the UK.*
>
> *2. I refuse the application for the following reasons. The respondent is offering to consent to the withdrawal of the judicial review and to pay the reasonable costs of the applicant, and to make a further decision on the application within 3 months of the date of the consent order.*
>
> *3. The making of a mandatory order that something should happen is very seldomly part of the relief in successful judicial review proceedings, and is only normally utilised to put the applicant back in the same position he or she was in prior to the contended unlawful decision.*
>
> *4. The most common form of relief for a successful applicant would be quashing (removing) of the unlawful decision and the payment of his or her costs. The applicant has an offer by the respondent which effectively covers these two forms of relief as the applicant is guaranteed a further decision on his application to come to the UK, which will put him in the same position as he would be if the things he has complained about had not happened.*
>
> *5. It would not therefore be just to make the order requested.*
>
> *6. The applicant should consider that if he proceeds with a full judicial review hearing rather than agreeing the consent order proposed by the respondent that he may be liable for the respondent's costs from the date of the proposed consent order if he does not succeed in gaining anything further from that hearing.*
>
> *7. Costs reserved."*

24. Mr Zurius did make an allegation of bad faith against the respondent in relation to the second decision. There are several difficulties with that allegation. First, it was not brought in a timely fashion in relation to the decision when it was made. For the reasons I

have already given it would be unfair and inappropriate for this Tribunal to permit Mr Zurius to advance significant allegations of that nature at this late stage. Secondly, on the basis of the materials before the Tribunal, I see no basis to conclude that such an argument would be arguable in any event.

25. Drawing this analysis together, this application is dismissed. The challenge has been brought in relation to a decision that no longer exists, and there has been no application to amend the facts and grounds so that judicial consideration may have been given to expanding the scope of the challenge to encompass the 8 July 2020 decision. The substantive claim before the Tribunal is wholly academic. Nothing turns on the facts of this case for any wider cohort of litigants or applicants (although I do not underestimate the disappointment that my decision will be to Mr Zurius personally).

26. The applicant has already been offered by the respondent the relief which he could do no more than hope to receive in these proceedings, namely for his decision to be reconsidered and a fresh decision taken. The respondent offered to do that for the applicant as early as 24 December 2019. The applicant refused that offer as he did all subsequent offers to resolve the proceedings while avoiding the need for this hearing to take place.

27. For those reasons this application for judicial review is dismissed.

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