IN THE UPPER TRIBUNAL

R (on the application of Singh and another) v Secretary of State for the Home Department IJR [2015] UKUT 00134(IAC)

Field House
London

19 February 2014

BEFORE

UPPER TRIBUNAL JUDGE CRAIG

Between

MALKIT SINGH
JASPAL KAUR

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms F Shaw, instructed by Khans appeared on behalf of the Applicants.

Mr R Harland, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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APPLICATION FOR PERMISSION

JUDGMENT

(as approved by Judge)

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JUDGE CRAIG: The applicants in this case are a married couple who claim to have been in this country since 1995. They have never had valid leave to be in this country lawfully. In 2010 they made an application to be allowed to remain on the grounds of long residence and if it had been accepted at that stage that they had indeed been in this country since 1995 there is no reason why that application should not have succeeded. However, the respondent refused the application because those acting on her behalf were not satisfied on the basis of the evidence which had been provided that the applicants had been in this country for as long as they claimed.

2. It is accepted on behalf of the applicants that the respondent was not obliged at that stage to make a removal decision and she did not do so. This was not an immigration decision and accordingly the applicants were not entitled to an in country right of appeal; if the decision had been one which was wholly unreasonable it would have been open to them at that stage to have brought judicial review proceedings in respect of this decision but they did not do so.

3. Thereafter on 2 April 2013 the applicants made a fresh application to be allowed to remain in which they asked for their claim to be considered under Article 8. This was refused by the respondent on 22 May 2013 by reference to the Rules then in force. In that decision letter it is clear that the respondent gave consideration to the applicants' claim under Article 8 in accordance with the provisions set out within the Rules but also in accordance with normal Article 8 principles as set out within the House of Lords decision in *Razgar* [2004] UKHL 27. Subsequently, on 25 June 2013 the respondent gave a further decision in which she certified that the claim which had been made was one to which section 94(3)

of the Nationality, Immigration and Asylum Act 2002 applied. This decision was made in the following terms at paragraph 25:

> "In addition, your clients' human rights claim is one to which Section 94(3) of the Nationality, Immigration and Asylum Act 2002 applies. This requires the Secretary of State to certify that the claim is clearly unfounded unless she is satisfied that it is not clearly unfounded. After consideration of all the evidence available, it has been decided that your clients' claim is clearly unfounded. Therefore, it is hereby certified under Section 94(2) of the Nationality, Immigration and Asylum Act 2002 that your claim is clearly unfounded. This means that your client may not appeal while in the United Kingdom."

4. Within this letter it is clear that the respondent gave consideration to the provisions within the Rules but also had consideration to the personal factors applicable to these applicants. In particular it was noted at paragraph 20 that they had claimed to have entered the UK illegally in September 1995 "therefore allegedly accruing long residence within the UK". The respondent did not consider on the basis of the evidence supplied that there was any proper basis upon which a different decision should now be reached with regard to whether or not the applicants had been in the UK as long as they claimed from that already reached when the original application had been refused on 25 February 2011. Moreover, at paragraph 23 it was noted that "there are no known circumstances beyond their control which have prevented their return to India" and that it was "only through their choice of remaining here without permission that has allowed them to allegedly accrue UK residence since September 1995"; accordingly it is clear that the respondent also gave consideration to the applicants' claim on the alternative basis that they might have been here as long as they asserted. However, even on this basis the respondent found at paragraph 24 that:

> "All your client and his spouse's circumstances, including family and private life have been considered in the round but there are insufficient factors to justify allowing them to remain in the UK".

5. It was after consideration of these factors that the respondent made the decision to certify the claim as clearly unfounded and as the respondent has noted the Secretary of State is required so to certify "unless she is satisfied that it is not clearly unfounded". Subsequently the applicants made renewed applications which were again refused but the applicants no longer rely on the contents of the decisions in respect of these applicants to advance their case.

6. Within section 3 of the claim form it is said that the decision of 26 June 2013 which is sought to be judicially reviewed is:

> "[A] decision dated 26/06/2013 by which the defendant refused the claimant and his dependant application for leave to remain in the UK and decision to remove them from the UK".

There is not contained within this a specific challenge to the decision to certify the claim as clearly unfounded although it might be said that that is implicit within the claim.

7. Permission to bring this application was granted by Upper Tribunal Judge McKee and the application is now before me today. Although within the grounds challenge had been brought to the decisions made subsequent to the decision of 26 June 2013, on the basis that they had not themselves been certified, on behalf of the applicants Ms Shaw properly accepted that as the original decision of 26 June 2013, which is the only one which has formally been challenged, was certified the subsequent decisions could be justified on the basis that they had been considered under paragraph 353 of the Rules and they did not raise any substantially different

grounds. Her submission was a commendably brief one. It was that the threshold which had to be satisfied before a decision could properly be certified under Section 94(2) was a high one and in the circumstances of this case, having spent on their case over fifteen years continuously within the UK (by the time of this decision they would on the applicants' case have been in this country around eighteen years), it could not properly be said that their case did not have "a realistic prospect of success". In Ms Shaw's own words:

> "the PAP does refer to substantial evidence submitted in support of the applicants having spent by then fifteen years' continuous stay in the UK, and this therefore must have amounted to a realistic prospect of success and so should not have been certified".

8. Ms Shaw referred to what was said in the decision of the House of Lords in *ZT (Kosovo)* [2009] UKHL 6; although the court in that case had been considering whether or not there might be a distinction to be drawn between the test under section 94 of the 2002 Act and that under paragraph 353 of the rules, nonetheless it was made clear that cases should not be certified under either test unless they were clearly unfounded. In this case, she submitted, essentially because of the applicants' arguably long residence in the UK it could not be said that this case was bound to fail or that it was clearly unfounded. For the purposes of this judgment it is not necessary to consider whether there is any meaningful distinction between the tests set out at paragraph 353 of the rules and section 94 of the 2002 Act. It was not suggested on behalf of the applicants that other than with regard to their lives with each other they enjoyed any family life in this country which could be relied upon and nor was it suggested that there were any particular factors regarding their private life beyond their claim to have been here for a period which

while long was less than the twenty years which is now required under the Rules. Certainly no evidence of any such factors was put before the respondent before she made her decision to certify the claim as clearly unfounded and none has been put before this Tribunal either.

9. On behalf of the respondent Mr Harland made three very brief points. His first was that the case now advanced was not the case as pleaded because the challenge initially had been made on the basis that the later decisions had not been certified and there had not been a specific challenge to the decision to certify the decision now under challenge. His second point was that there was simply no evidence on which it could possibly be said that the applicants had any significant private life in this country and moreover there was not even sufficient evidence on which they could argue that they had been here since 1995. The only evidence referred to was of people who had claimed to have known the applicants and a letter from one person who says that they had been a tenant since 2000. Much more evidence might have been expected. Mr Harland's third point is perhaps his strongest which is that in the decision letter of 26 June 2013 it is clear that the respondent understood properly the implications of Section 94(3) of the 2002 Act, which was that the respondent was required to certify the claim as clearly unfounded unless she was satisfied that it was not clearly unfounded. On the basis of the evidence which had been advanced, given that the Rules had been changed since the applicants had first applied, the respondent was effectively bound to find that the claim was clearly unfounded. Ms Shaw did not reply.

Discussion

10. I have of course had regard to the considerable body of jurisprudence following the implementation of the changes to

the Rules in July and September 2012 and in particular to the various decisions of the Court of Appeal in *Edgehill v SSHD* [2014] EWCA Civ 402, *Haleemudeen v SSHD* [2014] EWCA Civ 558 and *Singh and Khalid v SSHD* [2015] EWCA Civ 74, in the most recent of which the court summarises the various decisions which have been made since the changes in the Rules and in particular discusses the application of the decisions in *Edgehill* and *Haleemudeen*, the latter decision having been made without *Edgehill* having been cited and being arguably inconsistent with the decision in *Edgehill*.

11. Prior to the decision in *Singh and Khalid* it might just have been possible for the applicants to have mounted an argument that as the original application had been refused under the old Rules a removal decision which was substantially founded on that decision should by virtue of the transitional provisions which originally took effect in July 2012 have been considered under the old Rules also and not under the Rules which had subsequently come into force. Certainly it seems that this was the argument which in the grounds the applicants were seeking to advance because their case was put on the basis that the removal decision made subsequent to the 2011 decision should have been considered under the old Rules. Whether or not this submission would have been considered arguable is not something I have to consider because it is quite clear now following the Court of Appeal decision in *Singh and Khalid* that a removal decision made subsequent to the further change in the Rules in September 2012 must be considered on the basis of the new Immigration Rules and not those which had previously applied. This is accepted on behalf of the applicants by Ms Shaw.

12. Accordingly the only basis upon which the respondent's decision could properly be challenged is that her decision to certify the claim on 26 June 2014 as clearly unfounded was not

a rational one. In my judgment this cannot possibly be said on the facts of this case. The only basis upon which the claim has been advanced is that because the applicants have been here so long it cannot be said that the claim is clearly unfounded. That simply cannot be correct. The Rules make provision as to how the respondent will consider applications made under Article 8 and the courts from *Nagre* [2013]EWHC 720 (Admin) onwards have consistently made it clear that unless there is something out of the ordinary (the word used in the Rules is "exceptional") beyond the type of situation envisaged in the Rules it is not necessary for a decision maker to dot every i or cross every t when considering a claim under Article 8 outside the rules. In this case, there has been no evidence put either before the respondent or before the Tribunal which is or could be capable of persuading a decision maker that the claim should be allowed outside the Rules. The Rules, which have been approved in Parliament, set out circumstances in which an Article 8 claim can succeed where an applicant has been in this country for over twenty years or in certain other prescribed circumstances. None of these circumstances apply in this case and there is no other reason advanced (beyond the fact that they have been in the UK for a long time, but on any view less than 20 years) as to why these applicants should nonetheless be allowed to remain.

13. In these circumstances the decision of the respondent to certify this claim as clearly unfounded was one which was clearly open to her. In my judgement, not only was this a rational decision, but no decision maker properly applying his or her mind now to the evidence which has been put before the Tribunal could consider other than that the applicants' claim is clearly unfounded. It follows that this application must be dismissed and I so order.

Permission to appeal

14. Although no application has been made for permission to appeal, I am nonetheless obliged to consider whether or not to grant permission to appeal pursuant to rule 44 (4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I refuse permission to appeal because there is no error of law in my judgment.

Costs

15. I summarily assess costs in the sum of £3,350.

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