IN THE UPPER TRIBUNAL

R (on the application of Amin) v Secretary of State for the Home Department IJR [2015] UKUT 00135 (IAC)

Field House
London

Wednesday, 7 January 2015

BEFORE

UPPER TRIBUNAL JUDGE CRAIG

Between

MD RUHUL AMIN

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr M Biggs, instructed by Universal Solicitors appeared on behalf of the Applicant.

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

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APPLICATION FOR PERMISSION

JUDGMENT

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JUDGE CRAIG: This is an application for judicial review by three people, all of whom are of Bangladeshi nationality although this is not entirely clear from either the grounds or the skeleton argument which has been prepared on their behalf. I shall deal with this aspect of the case in a moment. Before perfecting this judgement, I have taken account of a Note jointly signed by Mr Biggs and Mr Fortt, counsel for the respective parties, to which I shall refer below.

2. The proceedings were initially brought in the Upper Tribunal but they included a challenge to the validity of the Immigration Rules, it being argued within the grounds that these were *ultra vires*. For this reason the proceedings were transferred to the Administrative Court, it being stated within the transfer order that the proceedings as a whole were to be determined by a High Court Judge. There was, as in due course Mr Justice Ouseley held, obvious sense in that order because a High Court Judge has power to deal with the issues sitting as a High Court Judge or if this becomes necessary as a Judge of the Upper Tribunal.

3. What then happened is the application was put before His Honour Judge Blackett who granted permission it would seem on all grounds on the basis that the validity of the Immigration Rules would be considered by the High Court "before being passed back to the UT for a full appeal on the merits". The application then came before Mr Justice Ouseley sitting as a High Court Judge in the Administrative Court.

4. The case was argued before him, essentially with regard to the validity of the Immigration Rules only and Mr Justice Ouseley dismissed the application on this ground. At paragraph 4 of his judgement, which is reported at [2014] EWHC 2322 (Admin), Mr Justice Ouseley indicated as follows:

> "a judge granting permission for a non-mandatory transfer point to be considered ought to consider very carefully whether the convenient disposal of the entire proceedings would not be better achieved by the whole being dealt with by a High Court Judge in the Administrative Court, who has dual jurisdiction or competence should that be necessary".

He added that:

> "This is a case which, as the order transferring the case from the Upper Tribunal to the Administrative Court made clear, was just such a case."

5. The difficulty in this case was that the argument that the Immigration Rules were unlawful essentially because they prevented proper consideration of the applicants' Article 8 rights having been dismissed, the applicants' Counsel informed the court that he was not in a position to deal with the remainder of the claim because this aspect of the case had not been prepared and so the remainder of the proceedings were sent back to the Upper Tribunal for it to consider. I agree with Mr Justice Ouseley that it would be preferable for cases such as this to be determined by one judge at one time and I echo what he said at paragraph 67 of his judgment which was that "I do hope that judges who grant permission on a non-transfer point will not make an order of that sort without giving it very careful thought, because even if no time at all is saved through it being one judge, it avoids the case joining the queue twice". With this in mind he invited the Upper Tribunal to give this case priority so far as listing was concerned to avoid there being yet further delay in its determination.

6. It is relevant so far as the hearing before me today is concerned if I set out the reasons given by Mr Biggs who represented the applicant before Mr Justice Ouseley as well as before me as to why the case could not be disposed of fully by Mr Justice Ouseley. This is set out at paragraph 58 of the earlier decision of Mr Justice Ouseley (where the submissions on behalf of the parties subsequent to the substantive decision are set out). Mr Biggs said as follows:

> "My position is that it would not be right to deal with the remainder of the claim today. I appreciate that is unsatisfactory, broadly speaking, but my instructions were limited to deal with the *ultra vires* argument. There is no written argument, for example, dealing with the claim in its entirety. There are other aspects that would need to be looked at and would need to benefit from written argument. In submission, to deprive my clients of the benefit of that, and perhaps the benefit of a further bundle

of documents focused on the other aspects of my claim, in my submission would not be fair."

7. It is right also to refer to what Mr Justice Ouseley said with regard to the substantive case brought by the applicants which was set out at paragraph 6 of his judgment. This was as follows:

> "The claimants contend in the grounds, though, as I have said, without providing any of the relevant supporting material and it may not have been provided to the Secretary of State either in their application, that their private life would be infringed by a refusal of leave to remain."

8. As Mr Biggs accepted before me in the course of argument during the hearing, the reason why an adjournment was required and indeed a further hearing rather than it being possible to dispose of the entire application before Mr Justice Ouseley, was precisely in order to enable further evidence to be provided. Unfortunately no such further evidence was provided

9. It would be right to set out some observations with regard to the way the grounds of claim and also the skeleton argument prepared on behalf of the applicants which I did not receive until the day before the hearing, were drafted.

10. At paragraph 7 of the skeleton argument settled by Mr Biggs relating to "the facts" it is stated as follows:

> "7. The claimants are a family unit. Their details are as follows:
>
> (a) The first claimant, Md Ruhul Amin (d.o.b. 101/01/1976), arrived in the UK on 18 April 2003 with valid leave to enter and remain as a student. He is a national of Bangladesh. His leave was extended on a number of occasions to 30 November 2009. After his leave to remain expired he remained in the UK.
>
> (b) The second claimant, Rabeya Sultana, is also a national of Bangladesh. She met the first claimant in 2004. They formed a committed relationship and were married in January 2005.

(c) On 1 April 2008 Rabeya gave birth to the third claimant, Master Rahib Amin, in London. He is now 6 years old and has spent his whole life in the UK."

11. In the grounds, at paragraph 14, the position of the third applicant is put as follows:

"14. The third claimant has spent his entire life in the UK. It will not be possible or reasonable for him to settle anywhere in the world and it will be a disproportionate expectation to require the third claimant to relocate to Bangladesh.

15. We submit that the claimant's application should be allowed for protecting the permanence of the family unit as established by the case law and his deportation will cause the break-up of the family."

12. What is missing both from the grounds and also from the submissions contained within the applicants' skeleton argument is any statement as to how the second applicant came to be in this country, when she arrived or what her status is. At paragraph 7 of the respondent's skeleton argument/detailed grounds prepared for this hearing, it is stated on behalf of the correspondent that "the second applicant is alleged to be the first applicant's spouse. She does not appear to have had any valid leave to enter or remain in the UK (and no such leave is identified by the applicants)". Although it is correct that no such leave had been identified by the applicants, in fact, as has been agreed in the Note signed by both counsel referred to above, it is now accepted that the second applicant did in fact have leave to enter and remain, which leave expired on 30 November 2009. This was made explicit within the refusal letter of 15 June 2013, regarding the second applicant, which was contained within the applicants' bundle. The mis-statement in the respondent's skeleton argument occurred (according to the Note) by reason of an error on the part of the respondent's officer who was "responsible for confirming the stance taken in the defendant's skeleton argument". Although it is unfortunate that the second applicant's immigration history was not properly explained, this would not have made a material difference to the outcome of this application.

13. The applicants' skeleton argument is silent as to where the parties were said to have been married and no evidence was provided. In a later document which was subsequently put before the Tribunal during the course of the hearing, it would seem that it is now claimed that it was a religious ceremony but no more details have been provided than that.

14. With regard to the third applicant, from a quick reading of both the grounds and the skeleton argument it would seem that what was being submitted was that, while the first two applicants are nationals of Bangladesh, the third applicant might not be because all that is said on his behalf is that he was born in London, was now 6 years old and had spent his whole life in the UK. Indeed, it is argued in terms and underlined that it would be a disproportionate expectation to require him to relocate to Bangladesh. It is further said that "his deportation" (although it is not clear to which applicant reference is being made here) "will cause the break-up of the family". In fact as is accepted now on behalf of the applicants (Mr Biggs did not attempt to suggest anything other than this) the third applicant is of course a national of Bangladesh and the removal (this would not be a deportation as such) of these applicants would not cause the break-up of the family because they would return to Bangladesh as a family unit.

15. The next observation I have with regard to the way in which the applicants' case has been put is that there is reference both within the grounds and the skeleton argument to an application for further leave to remain having been made by the first applicant which was refused and an appeal having been subsequently dismissed by the First-tier Tribunal. However the determination of the First-tier Tribunal (which I have now seen because at my request it was handed to me by Mr Fortt representing the respondent) was never adduced in evidence in support of the claim. This was a relevant document which, on reflection, ought really to have been put before the Tribunal.

16. There is reference at paragraph 15 of Mr Biggs' skeleton argument to the applicants having appealed the judgment of Mr Justice Ouseley to which I have referred and it

is said that "it is understood that the appeal is pending". In fact it appears that grounds of appeal were settled and submitted but Mr Biggs does not know whether or not permission to appeal has been granted as he has not been instructed with regard to that point. (If permission to appeal had in fact been granted, it is likely that Mr Biggs would have been told). Again, it would have been better if this had been stated in terms although I accept that Mr Biggs did not make any deliberate attempt to suggest that the status was other than it was.

17. The next point I make with regard to the way in which the claim has been prepared on behalf of the applicants is that at paragraph 16 of the skeleton argument it is said that "On 29 December 2014 the claimants' solicitors served and filed further documents in support of the claimants' claims." The documents said to have been included are then set out. I make it clear that the following observations I make are not intended to suggest that Mr Biggs personally was aware that this was not in fact the case but as a matter of fact these documents do not appear to have been served on either the Treasury Solicitors representing the respondent or the Tribunal. Furthermore, the respondent's representatives wrote to the applicants' solicitors on two occasions, as I was informed by Mr Fortt, requesting sight of the documents and stating that they had not been sent to them and these letters appear to have been ignored. I saw these documents for the first time during the course of the hearing, because they were handed to me by Mr Biggs who, as I have already indicated, was under the impression that they had been served and did not appreciate that in fact they had not. However, they ought to have been.

18. I now deal with the substance of the claim and the history of this family's presence in this country can be summarised as follows. The first applicant came to this country in 2003 as a student and was thereafter here lawfully until about 2009. At some stage he met the second applicant, who (as I have already noted) had lawful leave to be in this country until 13 November 2009. It is not clear where they met. It is said that they were married in 2005 although no evidence has been produced with regard to that. The only further information regarding this marriage is contained in one of the documents referred to at paragraph 16 of the skeleton argument as having been

served (but which in fact had not been) which was a CYPS assessment report from Newham Borough Council and which refers to there having been a "religious marriage". The third applicant was born in London in 2008 and in 2009 the applicants made an application for "further leave to remain". This claim was refused and an appeal against this refusal was dismissed by the First-tier Tribunal in 2010.

19. As I have indicated I asked for a copy of this determination which was handed to me at the hearing; the appeal before the first-tier tribunal had been heard at Hatton Cross on 22 October 2010 before Immigration Judge Howard and the applicants had been represented at that hearing. It appears that no claim was made on that occasion either under Article 3 or 8 which may have some relevance in these proceedings. Subsequently the applicants were refused permission to appeal to the Upper Tribunal both by Senior Immigration Judge Martin sitting as a judge of the First-tier Tribunal and then by Senior Immigration Judge Warr, as a judge of the Upper Tribunal. Judge Warr's decision is dated 12 April 2011 and so the appeal rights of all applicants would have expired shortly afterwards. At that stage the first and second applicant should have returned to Bangladesh and should have taken their son, the third applicant with them. The applicants chose not to do so but instead made a further application in 2013 to be allowed to remain "exceptionally" outside the Rules but as I have already stated they supplied very little evidence as to why their case was sufficiently strong that they should be entitled to consideration beyond that to which they were entitled under paragraph 276ADE of the Rules. The application was considered by the respondent primarily under the relevant provisions within the Rules but also under her residual powers to consider applications under article 8 outside the Rules as follows:

> "I have also considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State for the grant of leave to remain in the United Kingdom outside the requirement of the Immigration Rules. I have decided that it does not. Your application for leave to remain in the United Kingdom is therefore refused."

In the next paragraph within the refusal letter, it is then stated as follows:

> "If you are in fear of being persecuted if you were to return to Bangladesh then this would constitute an asylum application under ECHR Article 3 and also under the terms of paragraph 327(b) of the Immigration Rules. This claim should therefore be made in person at an Asylum Screening Unit."

The contact information of the Immigration Enquiry Bureau was then set out.

20. As I have already noted, the substantive argument raised in the judicial review application was as to the validity of the Immigration Rules regarding consideration of Article 8 and that is not a matter which is now before me because that aspect of the application was dismissed by Mr Justice Ouseley. The only matters before me concern the substantive reasons why it is said the decision was unlawful.

21. Although I am grateful to Mr Biggs for the persuasive and attractive manner in which he presented his submissions, ultimately for the reasons which I shall give they were in my judgment quite hopeless. Mr Biggs' primary submission was that the third applicant had the right by statute to have his interests considered as a primary interest pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. Section 55 with which all who practise in this field are very familiar provides as follows:

> "55. *Duty regarding the welfare of children*
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

...

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

22. As made clear by the Supreme Court in *ZH (Tanzania) (FC) v SSHD* [2010] UKSC 4 in the judgment of Lady Hale, by virtue of Article 3(1) of the United Nations Convention on the Rights of the Child 1989, it is provided that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be a primary consideration."

23. Although it is now established jurisprudence (such that there is no need to cite any further authorities to this effect) that while the interests of a child are a "primary consideration" they are not a "trump card" and nor will they necessarily outweigh the countervailing factors, Mr Biggs submitted that nonetheless a decision maker needed to show that these interests had been properly considered. In this case, he submitted, it was not clear from the decision which was made that any consideration had been given to the best interests of the third applicant and accordingly the decision was not in accordance with the law.

24. While it is fair to say that Mr Biggs accepted that the evidence in support of the applications was weak, he nonetheless sought to argue that even though the respondent might have been able to justify her decision merely by saying "I have considered the best interests of the child but on the basis of the evidence before me consider that in light of all the factors he ought to go to Bangladesh with his parents who ought to be returned there", as this was not stated in terms the Secretary of

State had not complied with her obligations and her decision was accordingly unlawful.

25. On behalf of the respondent Mr Fortt invited the court to appreciate that there is reference to GEN 1.1 within the decision letter and as this part of the Rules deals with the best interests of the child it cannot properly be said that the respondent had not taken into account these best interests. Essentially it was clear that in formulating the Rules the respondent had taken the need to consider the best interests of children into account such that it was not necessary in every case involving a child to say in terms that specific regard had been had to the best interests of that child. This would only be necessary if something out of the ordinary was indicated in the evidence which would not necessarily be addressed within the Rules. Mr Fortt further invited the Tribunal to note (although it was not formally relied upon) the letter of 30 December sent by the respondent to the applicants' solicitors explaining the decision and making it clear that the best interests of the child had been considered but setting out in more detail why it was considered that nonetheless the proper decision refusing the applications had been made.

26. In response to this argument Mr Biggs submitted that it simply could not be right that in all cases the respondent should be deemed to have adequately considered Section 55 save in those circumstances where there were some additional features. Section 55 was not just concerned with immigration matters and it had to be considered fully.

27. This is a not unfamiliar argument before this Tribunal. Since the new Immigration Rules came into effect it has frequently been argued that a decision letter is not in accordance with the law unless it deals properly (by which it is usually meant more fully) with Article 8 arguments. The current jurisprudence which I shall summarise below does not support this proposition.

28. This argument came up before Mr Justice Sales as he then was in *Nagre* [2013] EWHC 720 in which the judge made it clear that the effect of the Rules was that there was a two-stage approach involving first consideration under the specific sections of the

Rules such as paragraph 276ADE but then where appropriate further consideration outside of those Rules where it could be said that "exceptional circumstances" (to which I will add a few words below) apply. However it would only be necessary to give detailed consideration to Article 8 beyond the first stage where there was an argument capable of succeeding. There has been considerable discussion regarding this approach in subsequent decision, including *Gulshan (article 8 -- new rules -- correct approach)* [2013] UKUT 640, a decision of this Tribunal (Cranston J and UTJ Taylor), *MF (Nigeria)* [2013] EWCA Civ 1192 in which the Court of Appeal agreed with the Upper Tribunal that there was a two-stage process in deportation cases (although so far as deportation was concerned that second stage was within the Rules rather than outside), *MM (Lebanon* [2014] EWCA Civ 985 (in which the Court of Appeal made her certain observations with regard to the judgement in *Nagre*) and very recently within a further judgment of Lord Justice Sales as he now is in *AJ (Angola)* [2014] EWCA Civ 1636. What the judgements in these cases have in common is that they all make it quite clear that where effectively there is no evidence capable of persuading a decision maker addressing his or her mind properly to the issues that leave should be granted under Article 8 outside the rules, it is not necessary to dot every 'I' and cross every 'T'; it is sufficient merely to state that this has been considered but that the argument cannot succeed. Subsequent to of the hearing, this approach has again been endorsed by the Court of Appeal in *Singh v SSHD and Khalid v SSHD* [2015] EWCA Civ 74, in which Underhill LJ also explained (at paragraph 64) why the judgement of Sales J in *Nagre* was not undermined by the observations of Aitkens LJ in *MM (Lebanon).*

29. Mr Biggs attempted to persuade the Tribunal to the contrary relying on two decisions given on the same day by Upper Tribunal Judge Jordan which were the decisions in *Bosomo* [2014] UKUT 492 and *Kerr* [2014] UKUT 493, in the second of which Mr Biggs apparently appeared, successfully, for the applicant. However he set out the reasoning of UTJ Jordan in the case of *Bosomo* at paragraph 7 of that judgment as follows:

> "The sole consideration therefore of whether the applicants' case had been properly considered was contained in the words, '*It has been decided that it does not*'. This is not reasoning at all but simply a conclusion that there was nothing exceptional in the applicants' case. That might well have been an appropriate response in many cases where the applicants' immigration history and her private and family life did not merit any more than such a cursory examination. However in the circumstances of this case and in particular the fact that there were some 50 pages of documentary material which had been submitted dealing with the overall circumstances of the case, no reference was made to this additional material nor to the fact, as I have pointed out, that there was prior consideration under the legacy programme which may have had consequences for the applicant."

30. It is clear in my judgment that what Judge Jordan was referring to in that decision was a case where the facts were such that clearly there may have been an arguable case which merited fuller consideration. I note in particular his observation that the response made that "it has been decided that it does not" "might well have been an appropriate response in many cases where the applicants' immigration history and a private and family life did not merit any more than such a cursory examination". As acknowledged on behalf of the applicants in this case there was not appropriate evidence put before the respondent capable of persuading any decision maker to allow the applications. I have independently considered the evidence which was before the decision maker and I am entirely satisfied that no decision maker applying his or her mind properly to this evidence could have done other than decide that the first and second applicants should be returned to Bangladesh and the third applicant, their young child, should go with them. The suggestion in the grounds that this would involve the break-up of the family is clearly not arguable because the family should return together.

31. I was shown at the hearing the assessment prepared by Newham Council and this does not make out any stronger case either. I have already noted earlier that there is reference to the religious marriage between the first and second applicant but it is interesting to note that it is said within this assessment that "Mr Amin reported that

he has been married to Mrs Amin for over eleven years, they have a religious marriage". That is inconsistent with his case that the couple married in 2005.

32. Reliance is placed on the fact that the applicant "expressed that it would not be possible to return home as his parents did not give their blessing of the marriage and do not approve of the relationship" but if that was the case it is extraordinary that this was not raised at the time of the appeal against the 2009 decision which was made in 2010. So far as the third applicant is concerned, the only concerns raised (stated as low risk factors) concern the immigration status of the family and the lack of a stable home environment, both of which are as a result of the decision of the applicants not to return to Bangladesh as they should but to remain in this country without leave and therefore without any right to work. As against that, the report indicates positive factors relating to the applicant which are particularly that he is well cared for by his parents and as is stated in terms "the assessment does not highlight any parenting concerns and there are no concerns in respect of this". Accordingly, even if further evidence was allowed to be adduced as to whether it would now be appropriate to allow the applicants to remain founded substantially on the best interests of the third applicant, clearly no decision maker considering the Rules properly including the obligation to consider Article 8 outside the provisions of paragraph 276ADE could possibly conclude other than that the applications would be bound to be refused.

33. It follows therefore that this application must be dismissed. Although it might be appropriate where arguably persuasive evidence has been adduced for the Secretary of State to deal with such evidence in sufficient detail to show that this evidence has been properly considered, in circumstances such as this where no such evidence has been advanced, it is sufficient (as Judge Jordan indicated in *Bosomo* in appropriate cases it might be) for the Secretary of State to indicate that having considered this evidence she has concluded that there is nothing out of the ordinary (in her words "exceptional") such as would effectively show that the consequences of the removal would be unjustifiably harsh.

34. Judicial review is a discretionary remedy and there is no reason in this case why the discretion should be exercised in favour of these applicants. The decision was not irrational but was inevitable on the basis of the evidence which was before the respondent and there is no arguable error of law in her decision.

Permission to Appeal

35. 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

36. The appropriate order is for the applicant to pay the respondent's costs. Because a schedule has not yet been prepared I give the following directions:

    (1) The Respondent must file with the Tribunal and serve on the applicant a costs schedule within 21 days of the date on which this judgement is sent out.

    (2) The applicants must file with the Tribunal and serve on the respondent any response to this schedule within 14 days thereafter.

    (3) I will thereafter summarily assess the costs.

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