R (on the application of Sultana) v Secretary of State for the Home Department (mandatory order – basic principles) IJR [2015] UKUT 00226 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

In the matter of an application for judicial review

The Queen on the application of

Nighat Sultana

Applicant

V

Secretary of State for the Home Department

Respondent

Decision of The Honourable Mr Justice McCloskey,
President of the Upper Tribunal:
the application for judicial review is refused.

Having considered all documents lodged, and having heard the parties' respective representatives, Mr Sarwar, of Counsel, instructed on behalf of the Applicant and Mr Serr, of Counsel, instructed by the Treasury Solicitor, on behalf of the Respondent, at a hearing at Manchester Civil Justice Centre on 08 April 2015.

1. *In the great majority of cases where the court decides that the impugned decision is contaminated by some public law misdemeanour, the remedy granted is a quashing order whereby the respondent is obliged to make a fresh decision, taking into account the judgment of the court.*

2. *The remedy of a mandatory order is rarely granted. It is appropriate only in cases where it is clear to the court that the respondent is legally obliged to take a certain course of action, normally involving the conferral of some benefit or advantage on the challenging party, with no choice or discretion. The course that the respondent is ordered by the court to take in a mandatory order must be "the sole result that is legally permissible".*

Approved Ex Tempore Judgment

[1] The Applicant in this matter is a national of Pakistan who, together with her three children, the oldest of whom is aged 14 years together with twins aged four years, applied, unsuccessfully, for entry clearance to enter the United Kingdom under the Tier 1 (Entrepreneur) regime of the Points Based System enshrined in the Immigration Rules. The application was refused by the Respondent's Entry Clearance Officer ("ECO") on the sole ground that the Applicant qualified for an award of zero points in respect of the "maintenance" requirement. Whereas she was awarded full points for the other requirements in respect whereof points are awardable, the decision letter included the following passage:

> "*As claimed, however, your application has not been considered under subparagraphs (f) and (i) of paragraph 245DB as you have not met all of the other requirements of paragraph 245DB of the Immigration Rules.*"

I shall revisit the significance of this statement presently.

[2] It was not in dispute that, as rehearsed in the Respondent's decision, it was incumbent upon the Applicant under the Rules to demonstrate access to total funds of £8,500 during a consecutive 90 day period, as specified. Nor was there any dispute about the accuracy of the Respondent's calculation that the funds demonstrated in the Pakistani bank statement submitted with the application evidenced a balance of £8,037. The issue which was in dispute between the parties concerned the Respondent's failure to take into account the evidence of a Post Office account also submitted with the application. This was the stimulus for a request for administrative review by the Entry Clearance Manager. This, in turn, resulted in the initial decision being affirmed, for the following reason, in summary:

> "*This evidence is very ambiguous and for the reasons cited above I am not satisfied can be relied upon.*"

In the immediately preceding passage the decision maker outlined certain asserted obscurities and ambiguities in the Post Office account statement in question.

[3] Sequentially, the application for judicial review was then initiated, no pre-action protocol letter having been written. This stimulated an admirably prompt response on behalf of the Respondent by the Treasury Solicitor who, by letter dated 11 April 2014, signified the following:

> "*I am instructed that my client will agree to reconsider your application for entry clearance, subject to you agreeing to be reinterviewed in connection with that application.*"

This letter attached a draft consent order the terms whereof were that in consideration of the judicial review application being withdrawn and each party bearing their respective costs, the Respondent would reconsider the entry clearance applications. On the issue of costs, the accompanying letter highlighted the failure to comply with the pre-action protocol. Permission to apply for judicial review was then granted on the papers.

[4] Regrettably, one year has elapsed since the Treasury Solicitor's letter was written. Ultimately, this case was listed for substantive hearing on 08 April 2015. Three issues continued to separate the parties. First, the Applicant contended that, in light of the concession signalled on behalf of the Respondent at an early stage, she was entitled to the remedy of a mandatory order (formerly mandamus). Second, the Applicant contended that she should not have to undergo any further interview by the ECO.. Third, the Applicant asserted an entitlement to costs.

[5] I conclude that this application must fail, for the following reasons, in summary:

(a) There is no demonstrable illegality in the Respondent's wish to interview the Applicant further, if so desired. This does not infringe any known legal rule. Nor can it be condemned as irrational in the Wednesbury sense.

(b) The remedy of a mandatory order is rarely granted. The reason for this is that this remedy is appropriate only in cases where it is clear to the court that the Respondent is legally obliged to take a certain course of action, normally involving the conferral of some benefit or advantage on the challenging party, with no choice or discretion. In the great majority of cases where the court decides that the impugned decision is contaminated by some public law misdemeanour, the remedy granted is a quashing order whereby the Respondent is obliged to make a fresh decision, taking into account the education and guidance provided by the judgment of the court. Where the court finds that the impugned decision cannot be sustained in law, a mandatory order is the appropriate remedy only rarely. See, for example, the decision in R (O) v Hammersmith LBC [2011] EWCA Civ 925, together with the instructive formulation that "… there was only one way in which the Secretary of State could reasonably exercise his discretion …" in R (S) v SSHD [2007] EWCA Civ 546 at [46]. It must be "the sole result that is legally permissible": Supperstone & Goudie, Judicial Review (Fifth Edition), paragraph 16.6.2

(c) The Applicant's contention that the Respondent should be ordered to grant the entry clearance applications is, in my view, confounded by one of the cornerstone principles of public law, namely the inalienable duty imposed upon every public authority to make its decision taking into account all material facts and considerations. This, in my estimation, entails a current assessment based on the present evidence. There is no scope for any assumption that information which is now of some vintage remains unchanged and, indeed, no evidence was laid to this effect. To grant the mandatory order sought would, in my opinion, run contrary to this fundamental principle, for which citation of authority is otiose.

(d) This assessment is reinforced by the consideration that the benefit sought by the Applicant and her three children involves the formation of a series of evaluative assessments, or judgments, on the part of the Respondent. To qualify for the grant of entry clearance under paragraph 245DB of the Rules does not involve a tick box assessment with bright luminous lines.

(e) Finally, as I have highlighted above, the Respondent has not yet carried out any assessment of the series of factors and requirements contained in subparagraphs (f) and (i) of paragraph 245DB. These sound mostly on the important issue of genuine plans and intentions on the part of the Tier 1 applicant. The rule states unequivocally that the Entry Clearance Officer "*must*" be satisfied of the matters in question.

[6] For the reasons elaborated above, I conclude that the grant of the mandatory order sought by the Applicant is inappropriate. No other remedy was actively pursued, having regard to the terms of the Respondent's concession. The judicial review application must be dismissed accordingly.

Costs

[7] The dull and slavish application of the general rule that costs follow the event would entitle the Respondent to an order in its favour. However, exercising my discretion, I have decided against this course, taking into account the following factors. Firstly, it seems highly likely that if the error conceded on behalf of the Respondent had been avoided initially, the entry clearance applications would have succeeded. Secondly, at the time when the failure to compile a pre-action protocol letter occurred, it appears that the Applicant did not have the benefit of legal representation. Thirdly, this failure had no consequence of any import, given the Respondent's subsequent stance. Fourthly, the Respondent's insistence, maintained throughout the greater part of these proceedings, that the Applicant must undergo a further interview by the ECO, come what may, was, in my view, misconceived. There is no legal rule of which I am aware imposing such a requirement in mandatory terms. Rather, the Respondent has a discretion which must be exercised in accordance with established public law principles. This misplaced insistence was not withdrawn until a very late stage: significantly, it was withdrawn. If one had stopped the clock at that point, on the hypothesis of the duly revised consent order being executed, I consider that if adjudication of the issue of costs had been required the Applicant would have been granted all or most of her costs. Viewing everything in the round, I conclude that it is fair and appropriate to make no order as to costs *inter partes*.

Permission to Appeal

[8] I consider it inappropriate to grant permission to appeal since the determination of this application for judicial review has entailed the application of well settled principles to its particular matrix and does not give rise to any point of law of broader significance.

Order

[9] In the result:

(a) The application for judicial review is dismissed.

(b) There is no order as to costs *inter partes*.

(c) Permission to appeal to the Court of Appeal is refused.

Signed :

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: **10 April 2015**