EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 10
XA87/17

Lady Paton

OPINION OF LADY PATON

in the application for leave to appeal

by

(FIRST) CARRIE MCKENDRY; and (SECOND) DOUGLAS MCKENDRY

Applicants

against

a decision of the Upper Tribunal

Applicants: No appearance
Respondent: McGregor; Office of the Advocate General

30 January 2018

[1] Today there is no appearance for the applicants. There has been no communication from them to explain their absence, whether by letter, email, text, telephone or other means. The applicants are well aware of the hearing which has been fixed for today. In particular they have received a letter dated 30 December 2017 intimating the date of this hearing. They have also received a copy of the relevant interlocutor. The clerk of court today took the trouble to telephone a home telephone number which he had. He spoke to Mr Douglas McKendry's wife who stated that her husband was attending hospital for x-rays. What we do have in court today

is a typed note of the applicants' note of argument lodged in process. Also Mr McGregor for the respondent (the Advocate General) is in court today, and adheres to the answers and note of argument lodged on behalf of the Advocate General. Mr McGregor invites the court to make a decision.

[2] Having considered the papers and the notes of argument, I have formed a view about the application for permission to appeal against the decision of the Upper Tribunal. As that view is, in my opinion, one which could not be challenged, I propose to give my decision now. The decision will be tape-recorded, extended and placed in process where it will be available to both parties.

[3] In terms of Rule of Court 41.57(2), permission to appeal will not be granted unless the court considers that (a) the proposed appeal would raise some important point of principle or (b) there is some other compelling reason for the court to hear the appeal. At the outset, it may be helpful to reiterate the well-accepted principle that questions of credibility and reliability of witnesses are entirely matters for the first instance judge, in this case the Commissioner. Any inferences which may be drawn from the evidence are also matters for the Commissioner. Only if the Commissioner can be demonstrated to have gone "plainly wrong" in the sense explained by the Supreme Court in *Henderson* v *Foxworth Investments Limited* 2014 SC 203 may a higher court interfere with the lower court's ruling.

[4] In the present case, the Commissioner heard evidence from several witnesses, including James McDonald, Douglas McKendry, Carrie McKendry and Nicola McCallum. Productions were referred to and studied. Submissions were made. In that context, I am not satisfied on the material before me that the applicants have made out any stateable case that Mr McDonald was given insufficient opportunity to present an argument arising from the Partnership Act 1890

(ground of appeal 1). Nor am I satisfied that the applicants have made out a stateable case of a breach of Article 6 of the ECHR (ground of appeal 2).

[5] The Commissioner's conclusions were that: (a) the two buses were owned by a partnership comprising Douglas McKendry and Ann McKendry; and (b) even if that was incorrect, and even if one bus was owned by Douglas McKendry and the other by Carrie McKendry, each of these people (ie each of the applicants) knew that his or her bus was being used to transport passengers to T in the Park without the necessary PSV licence, thus failing to satisfy Regulation 10(3)(c) of the Public Service Vehicles (Enforcement Powers) Regulations 2009/1964.

[6] The second conclusion reached by the Commissioner, concerning the knowledge of the applicants, was one which was clearly open to the first instance court on the basis of the evidence led by way of witnesses and productions. As the Upper Tribunal point out at paragraphs 54 and 55:

> "...even if a partnership was dissolved by the sequestration of Mrs McKendry's estate...we do not see how this would have helped [Mr McKendry]. ... The Commissioner's rejection of [Mr McKendry's] case on statutory ground (c) for recovery of an impounded vehicle would still have defeated his application. This scenario would not have helped Miss McKendry either... We make the above points simply to satisfy ourselves that section 31 of the 1890 Act, even if taken into account by the Commissioner, would not have made a difference to the outcome."

Thus even if additional submissions had been made concerning the Partnership Act 1890 that would not have resulted in success for the applicants.

[7] Ultimately, the Upper Tribunal detected no error in the Commissioner's approach and conclusions. I agree. Nothing which could be said by the applicants in court today, so far as I am aware, would persuade me that either the Commissioner or the Upper Tribunal erred in any way. Moreover I am not satisfied that the proposed appeal would raise some important point of

principle, or that there is some other compelling reason for the court to hear the appeal. Thus Rule of Court 41.57 is not satisfied.

[8] In the result, I refuse permission to appeal. I award expenses in favour of the respondent.

Addendum

[9] After the above *ex tempore* judgment had been read out in court, Mr McGregor reminded the court of *Smith* v *Scottish Ministers* 2010 SLT 1100. That case dealt with a failure to attend court, said to be attributable to medical reasons, and the need to provide supporting documentation for such an assertion.

[10] As noted earlier, during the telephone call with Mrs McKendry, the clerk was told that Mr McKendry was attending hospital for x-rays. This court would have expected a soul and conscience certificate or some other form of validation or support advising of medical treatment such as x-rays before being able to accept it as a reason excusing failure to attend today's formal court hearing, of which due notice had been given (see *Smith* v *Scottish Ministers, cit sup*). No such certificate, validation or support was available to the court in this case.

[11] Once the court had adjourned, the clerk of court advised that he had received an email from McKendry Coaches, stating that they had got the date of the court hearing wrong, and had diaried it for 31 January 2018. I noted that information, but nevertheless adhered to my view that there was no merit in the application for permission to appeal, for the reasons given above.