



Case No: C2/2014/2665, C2/2014/2664
C2/2014/2666

Neutral Citation Number: [2017] EWCA Civ 2715
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 21 March 2017

Before:

LADY JUSTICE HALLETT
LORD JUSTICE IRWIN

Between:

JOGEE AND MANDERSON

Applicant

- and -

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Transcript of Epiq Europe Ltd 165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Email: TTP@epiqglobal.co.uk (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.)

Mr Paul Turner (instructed by Duncan Lewis Solicitors) appeared on behalf of the **Applicant**

Dr Christopher Staker (instructed by Government Legal Department) appeared on behalf of **Respondent**

Judgment

(As Approved)

Crown Copyright©

LADY JUSTICE HALLETT:

1. The first appellant applied on behalf of herself, her partner the second appellant and their child, the third appellant for leave to remain outside the immigration rules in the United Kingdom under article 8 of the European Convention on Human Rights. This was refused. The appellants have permission to appeal against the decision of the upper tribunal dismissing the appellants' renewed application for permission to apply for judicial review.
2. The primary ground for judicial review before is that the three appellants are a family unit and because the first appellant is a national of Jamaica, the second appellant a national of Zimbabwe, refusal to grant them leave to remain will, it is said, inevitably lead to the break-up of the family and a breach of their article 8 rights and a breach of the Secretary of State's duty to protect the best interests of the child.
3. The first appellant, born in 1982, came to the United Kingdom from Jamaica, where she had grown up, as a visitor in 2001. She subsequently changed to a student visa and extended her student leave on a number of occasions. A final application for an extension was refused. Her leave expired in 2010 and she stayed on in the United Kingdom unlawfully. The second appellant, born in 1980, came to the United Kingdom from Zimbabwe on a student visa in 2003. An application to extend his visa was refused. His leave expired in 2008 and he stayed on unlawfully. In 2010 the first and second appellants met and formed a relationship. In January 2012, the third appellant, their child, was born two and a half months premature.
4. On 20 November 2012, the appellants applied for leave to remain in the United Kingdom outside the immigration rules. In the first appellant's application she named the second appellant as her partner and the third partner as her dependent child. In the application she stated:

"I am applying for an extension of stay in the United Kingdom due to the private and family life me, my partner and my daughter have developed in the UK. Please see the letter from my solicitor for further information.

The letter was very full and detailed. In it the appellant's solicitors contended that removing them from the United Kingdom would be a disproportionate interference with their private and family life for the purposes of article 8. Having regard, in particular, to the following:

- i) The length of time that each of them had been in the United Kingdom and had enjoyed family life with each other with cousins and friends.

- ii) The fact the first appellant has no family left in Jamaica.

- iii) The fact that the first and second appellants have integrated into British society and are no longer familiar with their own home country.

- iv) The fact the third appellant has lived in the United Kingdom since birth.

- v) The fact that the third appellant was born prematurely and was on a programme and required medical treatment that would not be available to her in Jamaica or Zimbabwe.

- vi) The fact that the first appellant is from Jamaica and the second appellant is from Zimbabwe so that, "Removal would break up the family unit and sever the relationship the parents have with each and with their daughter."

- vii) In giving a decision on the application, section 55 of the Borders Citizenship and Immigration Act 2009 and the Secretary of State's guidance thereunder, required the Secretary of State to treat the best interests of the child as a primary consideration.

- viii) It would be disproportionate to require the first and second appellants to return to their respective countries in order to make an application for entry clearance from there.

5. The Secretary of State issued three decision letters dated 3 July 2013, one in respect of each appellant. Dr Staker, on behalf of the Secretary of State, invited us to read them as a whole. The Secretary of State found that the appellants did not qualify under the immigration rules and did not raise any exceptional circumstances which, consistent with the rights under article 8, might warrant consideration by the Secretary of State of a grant of leave to remain outside the requirements of the rules. In the decision relating to the first appellant, the Secretary of State specifically found that the claim concerning the medical treatment for the third appellant did not justify grant of leave outside the immigration rules under article 8 and provided reasons why that was so.

6. On 14 October 2013, the first appellant issued a judicial review claim in the administrative court challenging the Secretary of State's decisions. This claim was transferred to the Upper Tribunal and for technical reasons has been joined with claims by both the other two appellants. Upper Tribunal Judge Kobedi(?) refused permission on the papers on 21 December 2013. A renewal application was not made in time but on 9 April 2014 the Treasury's solicitor made the appellants' solicitors aware of the decision to refuse permission and of the date. On 14 April the appellants' solicitors received an opinion from counsel on the merits of renewal. On 16 April an out of time application to renew was filed.

7. On 31 July 2014, Upper Tribunal Judge Warr refused permission to bring judicial review because it was out of time and the explanation for the delay (unspecified illness on the part of the first appellant) was inadequate. Upper Tribunal Judge Warr considered the merits of the claim in any event. He found that the best interests of the child had been taken into account in the decisions, in which reference was specifically made to the medical research programme as opposed to treatment programme on which the third appellant was taking part. He rejected the assertion that the separate nationalities of the appellants had not been taken into account, having noted that each decision begins with a statement of the nationality of the individual appellant. He particularly noted that the first and second appellants commenced their relationship when neither had a right to reside in the United Kingdom, knowing that they came from different countries and he, "found that the material in support of the submission that it would be impossible for family life to continue elsewhere is very thin." He concluded there was nothing wrong with the procedure adopted or the substance of the decision taken.

8. Permission to appeal was refused on paper but granted by Richards LJ, as he then was, at an oral renewal hearing on 16 July 2015. He expressed the hope that the matter would not need to proceed to an appeal. The appellants' solicitors requested a transcript of the hearing, presumably because they wished to use some of Richards LJ's remarks to persuade the Secretary of State to reconsider. Yet for reasons that remain unexplained, they did not serve the transcript they received in August 2015 on the Secretary of State until prompted by the Secretary of State in November 2016.

The Grounds of Appeal and Response

9. The grounds are essentially four fold:

Ground 1: Upper Tribunal Judge Warr erred in refusing to extend time and properly engage with the reasons advanced. The decision letters were dated 3 July but not received until 10 July 2013. The first appellant was unwell at that time and was able to provide instructions to her solicitors in sufficient time to get the claim lodged within the three-month deadline. The delay in submitting the claim was short. The claim involved the rights of a protected child and therefore the extension of time should have been granted. The explanation for the delay in lodging the renewal of the judicial review claim lay in the fact that the appellants' solicitors did not receive the refusal of permission on the papers and only became aware of it when contacted by the Treasury's solicitor. Mr Turner for the appellants did not accept, as the judge found, that it is surprising that the appellants' solicitors did not receive the Upper Tribunal's decision when the Secretary of State did. Mr Turner observed succinctly "post goes astray". At the time, we are told that there was a significant delay between claims being lodged and decided and on that basis Mr Turner maintained it was not unreasonable for the appellants' solicitors not to make enquiries of the tribunal as to the progress of the claim. Furthermore, it was said that the appellants seek to challenge the decisions of 3 July and the on-going failure to make an appealable immigration decision, in which case timeliness should not be an issue.

10. I can deal with the submissions on the next two grounds together.

Grounds 2 and 3: The Secretary of State for the Home Department failed to have any regard to section 55 of the BCIA 2009 and the best interests of the child and failed to have regard to the appellants' article 8 rights and the fact the first two appellants have different nationalities. Both grounds raise a number of important principles. First Mr Turner phrased the questions to be addressed in relation to the general article 8 claim in this way:

- i) Will the proposed removal in this case (said to be the inevitable consequence of refusal of leave to remain) be an interference by a public authority with the exercise of the appellant's right to respect his or her private or family life?

- ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

- iii) If so, is such interference in accordance with the law?

- iv) If so, is such interference necessary in a democratic society in the interests of national safety, public safety or the economic wellbeing of a country for the prevention of disorder or crime for the protection of health or morals or for the protection of the rights and freedoms of others?

- v) If so, is such interference proportionate for the legitimate public ends sought to be achieved?

11. Second, Mr Turner pays very considerable emphasis on the provisions of section 55 of the BCIA. That places on the Secretary of State a positive duty to have regard to the wellbeing of children within the United Kingdom. I do not intend to rehearse the provisions because they are so well known. We were taken in addition to those provisions to the Secretary of State's own guidance, which provides under the heading, "The Best Interests of the Child", that decision makers must consider carefully all of the information and evidence provided concerning the best interests of a child in the United Kingdom when assessing whether there are exceptional circumstances that warrant a grant of leave outside the rules. The decision letter should demonstrate that such careful consideration has taken place.

12. Third, we were invited to read this duty alongside the Secretary of State's policy in relation to those who fail to make a legitimate claim under the rules that fall to be considered under the heading, "Exceptional Circumstances". In summary that policy reads:

"Leave can be granted outside the rules where exceptional circumstances apply. Exceptional means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family, such that refusal of the application would not be proportionate. That is likely to be the case only very rarely. Relevant factors include the circumstances of the applicant's entry into the United Kingdom and the proportion of the time they have been in the UK legally as opposed to illegally and whether they have formed their relationship with their partner at a time when they had no immigration status or it was precarious."

13. Bearing that guidance and those principles in mind, the question posed for us by Mr Turner is whether the three decisions taken together or alone amount to a lawful decision. Mr Turner was critical of the contents of the letters, starting as they do with rejections of possible claims under the immigration rules when no claim was ever made under the immigration rules. He was particularly critical of the lack of focus on the inevitable break up of the family, as he described it, and on the best interests of the child as result.
14. The Secretary of State accepted that the three appellants formed a family unit but it was his submission that she failed to address satisfactorily what the best interests of the child would be if her mother returned with her to Jamaica and her father returned to Zimbabwe. There is no evidence before this court and there was no evidence before the Upper tribunal that the second appellant would be admitted to Jamaica or the first appellant and third appellants would be admitted to Zimbabwe and no evidence it would be reasonable to expect them to relocate. Mr Turner took us to the contents of the letter written by the appellants' solicitors to highlight the fact that the issue of the break up of the family unit had been raised by the appellants' solicitor and therefore should have been addressed.
15. Further he maintained that given the positive duty imposed by section 55 and the acceptance of an established family life, the burden has shifted to the Secretary of State to show that any interference with that family life by refusing leave to remain is proportionate. If the Secretary of State wished to establish that the family could live in Zimbabwe or Jamaica it was the appellant's contention that it was for the Secretary of State to show that family life could actually be enjoyed there.
16. Ground 4: Mr Turner complained about what he described as the Secretary of State's on going failure to grant a right of appeal. He submitted that failure is unlawful. He maintains the judge fell into error in the Upper Tribunal in failing to find that the on going delay is now unlawful. He accepted, as he must, that pursuant to decisions such as Daley-Murdoch [2011] EWCA Civ 161 and Patel [2013] UKSC 73, the Secretary of

State does not have to make an enforcement decision as at the date of refusal. However, he referred us to passages in the judgments of various Supreme Court justices in Patel, in particular at paragraph 29 which provides that where there is no obligation to issue a removal decision as at the same time as the refusal, a relevant factor is whether there is personal hardship. In this case, personal hardship is inevitable, it is said, for as long as the appellants remain in a state of limbo. The law and policy of the Secretary of State have now changed and decisions to refuse leave to remain and enforcement are taken together and give a right of appeal. The appellants should be entitled to a decision they can appeal without paying an additional fee for another application.

Conclusions

17. It was a matter for Upper Tribunal Warr J's discretion whether or not to extend time. Time limits are imposed for good reason and the appellants seeking extension of time should provide good reason. The explanations tendered here were far from satisfactory. However, conscious of the positive duty to consider the best interests of the child under section 55 and as explained by Lady Hale in ZH (Tanzania) v The Secretary of State for the Home Department [2011] UKSC 4, like Upper Tribunal Judge Warr, I shall address the merits of the claim before reaching a final conclusion on the extension of time applications.
18. First the content of the letters themselves. Dr Staker had no instructions to concede the point but in my view they were poorly drafted. Knowing the importance to the appellants and the amount of litigation such letters can generate, I am surprised that greater care was not taken. I see no objection to the decision maker addressing any possible claims under the rules before turning to the article 8 claim, if that is the Secretary of State's current policy, but in my view the decision maker must make clear that they have separately and fully addressed the article 8 claim in clear terms. In this case, one has to read them together and read the passages dealing with a possible claim under the immigration rules to ascertain the substance of the decision.
19. Nor is there any express reference to the provisions of section 55 of the BCIA in the decision letters. All three of the letters and the third appellant's letter, in particular, could and, in my view, should have made explicit that the decision maker was focusing on the best interests of the child and the possible consequence of refusal of leave. The decision maker has very carefully and properly addressed the child's medical needs and rejected any claim based on them. But the decision maker could have gone further, in my view for example, by stating, as Mr Turner conceded would have been acceptable, the claim that refusal of leave would lead to the break up of the family was mere assertion. No evidence has been adduced that the three applicants cannot continue their family life in another country and therefore that refusal of leave to remain is contrary to the best interests of the child.
20. However, as Dr Staker observed, the absence of any express mention of section 55 is not fatal to a decision. The question for this court or for a tribunal is whether the

substance of the duty has been discharged. (See for example The Queen (Aladdin) v Secretary of State for the Home Department [2014] EWCA Civ 1334). In my view the substance of the duty here has been discharged and has been made sufficiently clear in the letters when they are read with care and together. The effect of the decision is clear. The adult appellants are both in the United Kingdom unlawfully. Having grown up in their respective countries, they came to the United Kingdom as adults and they formed a family unit knowing their status in this country was more than precarious. They had no immigration status in this country. They did not make their present applications for leave to remain until two years after leave had expired and their child had been born. They did not claim they could not live together as a family unit in Jamaica or Zimbabwe.

21. In essence their claim was based on the fact they wished to continue living what they said was their established family life in the United Kingdom and that the third appellant required medical treatment here. In fact, the third appellant does not require medical treatment here and certainly not medical treatment that could not be obtained in, for example, Jamaica. The child was on a research programme that is now finished. And as the Secretary of State for the Home Department found, the kind of treatment she requires would be available elsewhere.
22. There is, as it seems to me, nothing particularly exceptional in the fact that the family unit consists of people with different nationalities. That cannot be sufficient to warrant grant of leave to remain even where, as here, there is a child involved. The challenged decisions do not expressly consider the question whether the appellants could live together in Jamaica or Zimbabwe but that is because it has not been raised in terms. In giving a decision on an application for leave to remain, the Secretary of State is not, in principle, required to consider matters that have not been raised and the Secretary of State certainly is not required to investigate the position for herself. The appellants relied on mere assertion that the family unit would be broken up on leaving the United Kingdom but did not explain why or adduce any evidence to support that assertion. They failed to satisfy the burden on them. There was therefore nothing before the decision maker or the Upper Tribunal to suggest that the appellants could not live together in Jamaica or Zimbabwe where at least one and possibly two of the three family members would be a citizen of that country. There is no reason to assume the immigration law of the country in question would not grant the other family members a residence permit.
23. Absent evidence to the contrary, the Secretary of State for the Home Department was, I am satisfied, entitled to proceed on the basis that if leave to remain was refused, the family could leave the United Kingdom together voluntarily and set up their family life elsewhere. I reject the proposition in support of which Mr Turner could provide no authority that as a matter of law, section 55 imposes a duty on the Secretary of State to act on mere assertion and shifts the burden on her to investigate and generate evidence in relation to a claim that has never satisfactorily been made.
24. For those reasons, even if this court was minded to allow the appeal because the letters were poorly drafted, and direct the Secretary of State to reconsider the applications, I

am also satisfied that the result would be the same. If the appellants wished the Secretary of State to consider fresh material they will have to make a fresh claim in any event, which is apparently something they have been using these proceedings to try to avoid, given the size of the fee to be paid on the issue of another claim. Alternatively, the adult appellants could continue to live here unlawfully and refuse the help that would be on offer for them to leave the United Kingdom as they would be required to do if my Lord agrees with this judgment. If so, the Secretary of State for the Home Department maybe forced to take enforcement action to remove them. It may well be the case that the Secretary of State can only remove each appellant to a country of which he or she is a national. But at that state, we have been assured that the appellants will have a right of appeal, either in country or out of country depending on whether the claim is certified as wholly unfounded. However, they should be well aware that there would still be a burden upon them to establish what they have yet to establish that their family unit would be destroyed by their having to leave the United Kingdom. In the meantime, they do not have a right to remain.

25. I turn briefly to the fourth ground. On this ground the failure to grant a right of appeal, I find Dr Staker's arguments unassailable. Even prior to significant amendments made to the law by the Immigration Act 2014, when there was a right of appeal against a removal decision, the Secretary of State was under no obligation to make a removal decision at the time of making a decision to refuse an application for leave to remain. (See again Patel, also reported at [2014] AC 651). Furthermore, the appellants cannot bring themselves within the old policy pre the Immigration Act 2014 whereby the Secretary of State exercised the discretion to make an appealable removable decision in certain circumstances nor, we are told, can they bring themselves within the terms of the new policy. In my view, there is nothing on the particular facts of this case to establish that the Secretary of State's failure to make a removal decision or take enforcement action at the time of the decision letters or the failure to take action during the time between the decision letters and lodging of the judicial review claim, is unlawful. Following the lodging of the claim, it would have been unwise, to say the least, for the Secretary of State to take any action or issue removal directions pending the resolution of this litigation. Accordingly, in my view, there is nothing in this ground either.

26. However, given the time that has now elapsed, I would expect that a decision will be made promptly after this hearing, particularly given the best interests of the young child involved. I would hope that this litigation, having gone on for so long, that decision could be taken within the period of approximately three months as was requested by Mr Turner. Accordingly, for all those reasons, I would, for my part, dismiss the appeal on all four grounds.

Order: Application dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: TTP@epiqglobal.co.uk