



Neutral Citation Number: [2018] EWCA Civ 2758

Case No: C2/2016/2832

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Upper Tribunal Judge Roger

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2018

Before :

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE MOYLAN

Between :

MIZANUR RAHMAN
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

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The **Appellant**, Mr Rahman, appeared in Person

Mr D Sternberg (instructed by the **Government Legal Department**) appeared on behalf of the **Respondent**

Approved Judgment

LORD JUSTICE HICKINBOTTOM: I will ask Lord Justice Moylan to give the first judgment.

LORD JUSTICE MOYLAN:

1. The Appellant, Mr Mizanur Rahman, appeals from Upper Tribunal Judge Rogers' decision on 9 December 2015 to refuse the Appellant's application for permission to bring judicial review proceedings against the Secretary of State's decision on 23 April 2015. By that decision, the Secretary of State rejected the Appellant's application for leave to remain and certified his claim as clearly unfounded.
2. When refusing the Appellant's application, UTJ Rogers found that the claim was wholly without merit. On 7 June 2016, His Honour Judge Purle QC, gave the Appellant permission to appeal to the Court of Appeal. It is not clear to me why permission was given. In his reasons, Judge Purle says that the "appeal faces obvious difficulties", but nevertheless considered that the Appellant "should have the opportunity to renew his application to the Court of Appeal". My Lord, Hickinbottom LJ will deal further with this aspect of the process in his judgment.
3. At today's hearing, the Appellant has appeared in person. His submissions have previously been set out in a number of documents, the most recent being his skeleton dated 24 January 2018. We did not call on Mr Sternberg, who appears on behalf of the Secretary of State, but we have been provided with a comprehensive skeleton which was updated on 23 November 2017 and was prepared on behalf of the Secretary of State by Miss Catherine Brown.
4. The Appellant was born in Bangladesh on 1 January 1985. He lived there until 12 February 2008 when he entered the United Kingdom on a student visa valid until 31 May 2010. He was granted further leave to remain as a student on 18 June 2010 until 31 December 2013. Two further grants of leave to remain were given, the last on 9 October 2014 until 20 December 2014.
5. On 14 January 2015, the Appellant applied for leave to remain on human rights grounds. On 2 February 2015, he was served with a Form IS 151A informing him that he was liable to removal and detention as an overstayer. On 23 April 2015, as referred to above, his Application for leave to remain was refused and, as I have said, was certified as clearly unfounded.
6. As set out in the decision letter, the Appellant had said that he had come to the United Kingdom as a student in order to escape adverse social circumstances in Bangladesh and to improve his quality of life. Whilst in the United Kingdom, he has completed a Bachelor

of Law degree. He has also completed the Bar Professional Training Course and been called to the Bar.

7. The Appellant's claim was based on his health under Article 3 and his private life under Article 8. The decision letter considered the relevant provisions of the Immigration Rules and determined that the Appellant did not meet the requirements of rule 276ADE(1). This was in part because he had not lived in the United Kingdom in circumstances which satisfied any of sub-paragraphs (iii) to (v).
8. The first part of sub-paragraph (vi) was satisfied, in that the Appellant was aged over 18 and had lived continuously in the United Kingdom for less than 20 years. However, the Secretary of State determined that the Appellant would not face very significant obstacles to his integration into Bangladesh if he was to be returned there. He had lived there until he was aged 23, which was the majority of his life. His mother and younger brother continued to live in Bangladesh and it was to be expected that he had cultural and social ties there.
9. The letter made a number of other observations, including, inaccurately, that the Appellant had developed his private life in the UK "whilst residing here illegally". The Appellant had in fact been residing here lawfully. This was acknowledged on the same page of the decision letter when the issue of exceptional circumstances was being addressed. It is there stated that the Appellant had adhered to the conditions of his visa and had only recently become an overstayer.
10. The decision letter addressed whether leave to remain should be granted outside the rules on the basis of the presence of exceptional circumstances. After an extensive analysis of the Appellant's circumstances, it was determined that there were no exceptional circumstances. This included the Appellant's claim that he "might suffer permanent psychiatric harm due to social neglect, rejection, unemployment, poverty, unhealthy environment and poor accommodation", in respect of which it was noted that he had provided no evidence to substantiate that claim.
11. The Appellant had also relied on the following medical conditions, namely depression, high blood pressure, stress, occasional panic attacks and possible kidney disease because of the presence of blood in his urine. The Appellant's medical issues were taken into account. The letter refers to them as not being life-threatening, to the availability of treatment in Bangladesh and to there being nothing to suggest that his family would not be able to support and assist him.
12. The Appellant's medical conditions were also considered under Article 3. The decision letter noted that the Appellant had been discharged from the care of a hospital following normal results for his urine. There was no evidence that he was currently receiving or required any treatment for certain of his conditions, namely those in respect of which he had been discharged from the care of the hospital.

13. In respect of the Appellant's mental health, the availability of treatment in Bangladesh was set out based on the Country of Origin Information Service. It was concluded that treatment would be available if required and that any differences in the nature and extent of the treatment available in Bangladesh as against in England, was not sufficient to establish the Article 3 threshold.
14. The Secretary of State determined that the claim was clearly unfounded and certified it as such. It was noted that the Appellant failed to meet the requirements of paragraph 276ADE(1), that there were no exceptional circumstances, and also that there were no other compassionate factors justifying the grant of leave. The application was considered to be "clearly without substance and cannot succeed on any legitimate view".
15. The Appellant issued his claim for judicial review on 8 July 2015. He challenged the decision to refuse his application for leave to remain. The Secretary of State's rejection or refusal of his application was said to be unlawful "on the grounds of illegality and procedural impropriety". The grounds focused on the reasons for the Appellant not making his claim until after the expiry of his leave to remain, and on the fact that the Secretary of State had acted, it was asserted, unlawfully by breaching the Home Office policy that any period of overstaying by no more than 28 days would be disregarded. Further, it was stated that the medical evidence had been misunderstood. Accordingly, it was claimed that the decision was unlawful because the Secretary of State took irrelevant matters into account and failed to take relevant matters into account.
16. The Appellant's claim was considered on the papers and determined by UTJ Rogers on 9 December 2015. His reasons for rejecting the claim included that the application had been "considered in depth and under all relevant headings in the comprehensive decision letter of 23 April 2015"; that it did not "appear that the decision maker was unduly influenced by ... the overstay of under 28 days as alleged. The decision was taken on the wider merits (or lack of them) of the case as a whole"; and that it was unarguable that the Appellant's medical condition had not received "adequate care and reasonable consideration". The further reasons given were that "the decision letter is full and detailed and cannot be said to display an irrational or unlawful approach"; that the comparative situations in the United Kingdom and Bangladesh were given full and proper consideration; and, finally, that the certification of the claim as clearly unfounded was also justified and a decision open to the maker.
17. The Appellant's grounds of appeal are long and diffuse. Today he has, however, presented his arguments in a far more structured and focused manner. He has argued his case persuasively and comprehensively. However, some of the matters he raises are new and there is nothing which would justify them being considered by this court. I also do not address matters which go outside the scope of this appeal.
18. I propose to summarise the Appellant's case as follows:

(1) the Secretary of State's decision was irrational as matters were considered in isolation and not as a whole;

(2) The Upper Tribunal Judge wrongly concluded that the Secretary of State had not been unduly influenced by the fact that the Appellant was an overstayer, although his application had been made less than 28 days after the expiry of his leave to remain. In this respect, the Upper Tribunal Judge failed properly to take into account that the Secretary of State had wrongly considered that the Appellant had developed his private life in the United Kingdom whilst residing here illegally;

(3) The Secretary of State had been wrong to determine that the Appellant would not encounter very significant obstacles to his integration into Bangladesh. His family are unable to support him, either financially or with his medical problems, and his private life could not continue in Bangladesh for health and other reasons;

(4) Article 3. The Upper Tribunal Judge was wrong when he said that the Appellant's medical problems had been given adequate and reasonable consideration by the Secretary of State. In particular, the comparative situations in the United Kingdom and Bangladesh had been given inadequate consideration, including as to the availability of medication and as to the impact on the Appellant's health if he were to return to Bangladesh. He would be likely to relapse and suffer serious harm. The Secretary of State had misunderstood the Appellant's continuing health problems for which he was receiving treatment in the form of medication for depression and regular reviews of his kidney function;

(5) The Secretary of State failed properly to consider the health issues under Article 8;

(6) Accordingly, the decision was unlawful and the Appellant's removal would breach both Article 3 and Article 8;

(7) The Appellant's claim was not clearly unfounded and should not have been certified as such.

19. The Appellant relies on a number of authorities, including *Razgar v SSHD* [2004] 2 AC 368 and *Samir v SSHD* (2016) EWCA Civ 82.
20. As referred to above, the Secretary of State's case has been set out in very full written submissions for which I am grateful. However, given the clear view I have formed as to the merits of this appeal, I do not propose to lengthen this judgment by referring to them.
21. In determining this appeal, I will address each of the points made by the Appellant as summarised above.

22. (1) Was the Secretary of State's decision irrational? This is, in my view, an argument devoid of merit. As expressed by UTJ Rogers, the application was considered in depth and under all relevant headings. The Secretary of State took a properly structured approach when determining the application as required by the rules and the law. It was, indeed, a comprehensive decision letter.
23. I take points (2) and (3) together. Reference to the Appellant having resided here illegally is contained in the section of the decision letter dealing with paragraph 276ADE(1)(vi) of the rules. This was not correct but, in my view, it was an immaterial error. Sections 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 are to like effect in respect of private life. The Secretary of State could equally have referred to the Appellant's immigration status as being precarious.
24. It is, in any event, clear to me that the evidence before the Secretary of State had no prospect of establishing that the Appellant would face very significant obstacles to his integration into Bangladesh so as to make this error of any consequence. The Appellant had spent the majority of his life in Bangladesh. His general assertions as to the difficulties he would encounter if required to return do not come close to establishing very significant obstacles. These include the matters he raised in respect of his health.
25. (4) I next address the Appellant's case under Article 3. This Article was considered in the recent decision of *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64, which dealt in particular with the impact of the European Court of Human Rights decision of *Paposhvili v Belgium*, decided on 13 December 2016. In paragraph 16, Sales LJ set out the "overall legal burden" on an applicant, namely, "by showing that there are substantial grounds for believing that he would face a real risk of being subject to torture or to inhuman or degrading treatment in (the) other country". In *Paposhvili*, the Grand Chamber clarified the approach which should be taken to what are referred to as "other very exceptional circumstances". The court said:
- "The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (s 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."
26. Sales LJ analysed the extent to which *Paposhvili* had changed the law and decided that it had, but only to a very modest extent (paragraph 37). Further, however, it remains the

position that Article 3 is only engaged when there is evidence which establishes that the court is concerned with “a seriously ill person”.

27. There was no evidence before the Secretary of State which came close to establishing that the Appellant was a seriously ill person, let alone which might demonstrate substantial grounds for believing that he would face a real risk, as to bring him within Article 3. None of the matters raised by the Appellant in support of his appeal are of any greater weight.
28. I also do not accept that the Secretary of State misunderstood the medical evidence. The passage relied upon by the Appellant refers simply to the "same conditions", namely the conditions mentioned in the discharge letter and not to all his medical problems.
29. (5) Did the Secretary of State properly consider the Appellant's case under Article 8? This submission relates particularly to the medical issues he relies upon, but includes other matters as well. Despite the Appellant's submissions to the contrary, the Secretary of State gave express consideration to whether the Appellant's removal would breach Article 8, including because of his health issues, in particular his mental health. The Secretary of State was, in my view, clearly entitled to conclude that the Appellant's removal would not conflict with his rights under Article 8 because of the nature of the medical issues relied on, the availability of treatment in Bangladesh and the presence of family members there.
30. The Appellant has submitted that he will not receive proper or adequate treatment in Bangladesh and, as a result, might experience acute mental suffering. However, he accepts that medication for depression, albeit of a different type, is available in Bangladesh. Further, beyond his assertions, there is, in my view, no evidence which supports his claim as to the potential consequences of his being returned to Bangladesh.
31. The Secretary of State also considered the other matters raised by the Appellant and undertook an overarching assessment.
32. In my view, the Appellant has no basis for challenging this aspect of the Secretary of State's decision. I would add that, based on the information available to this court, this aspect of his claim was also wholly without merit.
33. (6) In conclusion, none of the matters relied on by the Appellant demonstrate that the Secretary of State's decision to reject his application for leave to remain was flawed in any material respect. Her decision that his removal would not breach either Article 3 or Article 8 was plainly justified.
34. Finally, can the Appellant successfully challenge the Secretary of State's decision to certify the claim as clearly unfounded? Was the Secretary of State entitled to conclude

that his claim was so wholly lacking in substance that an appeal would be bound to fail? In my view, it is clear that the Secretary of State applied the right test and addressed all the relevant material and all the relevant issues. The Appellant's claim was, in my view, indeed so lacking in substance that an appeal will be bound to fail. The Secretary of State was, accordingly, entitled to certify the claim as such.

35. The arguments deployed by the Appellant do not undermine UTJ Rogers' decision in any respect. The judge was right to decide that permission to bring judicial review proceedings should be refused and he has succinctly, but sufficiently, explained his reasons for so deciding. He was, in my view, right when he said that the Appellant's application had been considered in depth and under all relevant headings in a comprehensive decision letter. It was manifestly an application for permission to bring judicial review proceedings which was totally without merit.
36. I have not referred to all of the points made by the Appellant, but I have considered them all when reaching the conclusion that this appeal is, indeed, wholly without merit and must be dismissed.

LORD JUSTICE HICKINBOTTOM:

37. For the comprehensive reasons given by my Lord, Moylan LJ, I agree that this appeal be dismissed. I would only wish to add a few observations of my own on the procedure which has – in my view, most unhappily – led to this substantive appeal being before us today.
38. As Moylan LJ has described, by an order made on 9 December 2015 and sealed on 22 December 2015, UTJ Rogers refused the Appellant permission to proceed with his judicial review claim and, in paragraph 2 of the order, declared the claim to be "wholly without merit". That was clearly intended to be a record of the fact that the judge considered the claim was "totally without merit", there being no sensible distinction between "wholly" and "totally" without merit.
39. A finding on the papers that a claim is totally without merit has the effect of removing the appellant's right to request a reconsideration of the refusal of permission to proceed at an oral hearing (see rule 30(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No 2698), as amended). That Judge Rogers intended to exclude any reconsideration appears to be confirmed by the fact that he struck out the standard notes at the foot of the order which deal with the mechanics of a request for reconsideration.

40. It is, however, curious and unfortunate that the order contained, as paragraph 3, a provision that "renewal of this application is no bar to removal" and, as paragraph 5, a direction that the time limit for applying for a reconsideration was nine days, which are, on their face, inconsistent with a declaration that the claim was totally without merit. In effect, they purport to re-insert the provisions of the Tribunal Rules which were the subject of the deleted note at the foot of the order.
41. The Appellant applied to the Upper Tribunal for permission to appeal Judge Rogers' order. When that application came before HHJ Purle QC sitting as a Judge of the Upper Tribunal on the papers, he considered that Judge Rogers' order was ambiguous. That is understandable. Whilst other judges may have considered that paragraphs 3 and 5 were simply standard paragraphs that had been accidentally and inappropriately included in the order and taken steps to correct the order to reflect Judge Rogers' true intention – if necessary, by referring the matter back to Judge Rogers himself for clarification – given the internal inconsistency on the face of the order, Judge Purle cannot be criticised for considering the order to have been ambiguous.
42. However, in my respectful but firm view, it was incumbent upon the judge to resolve that ambiguity. There were several ways in which he could have done so. As I have said, he could have referred the matter back to Judge Rogers for clarification. He could have given the Appellant the benefit of the doubt and directed that there be reconsideration of Judge Rogers' refusal of permission at an oral hearing. In any event, any ambiguity neither required nor warranted the grant of permission to appeal to this court without consideration of the merits of the claim or any attempt to curtail the scope of any appeal, in circumstances in which (i) as Judge Purle said, an appeal "faced obvious difficulties", and (ii) contrary to the judge's view, there is no appeal as such against a declaration that a claim is totally without merit (*R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82 at [28]). At no time did this appeal ever have any real prospect of success.
43. The result of the grant of permission to appeal by the Upper Tribunal has been extremely unfortunate. This court has had to deal with a substantive appeal, rather than an application for permission to appeal which would have been more modest and would not have concerned the Secretary of State at all. Speaking for myself, I do not see any ground upon which this court would have granted permission to appeal, the merits of any appeal being hopeless. As it is, this court has had to devote scarce judicial resources on hearing the full appeal. More importantly still, both parties have had to prepare and present full submissions, with the result that the Appellant has been exposed to a heavy burden in costs.
44. The Appellant is acting in person; and I emphasise that he cannot be criticised for pursuing the appeal for which he was given permission. Before us, he presented his case moderately, with all courtesy, and to the best of his ability. He cannot be criticised either for the manner in which he has pursued this appeal. However, in the event, he pursued fourteen grounds of appeal, some legally misconceived and none with any prospect of success.

45. Although the Appellant has not expended any costs on his own case, the grant of permission has resulted in him being exposed to an order to pay the Secretary of State's costs. No statement of those costs has been filed, but they must be substantial. The Secretary of State's skeleton argument responding to all of the grounds upon which the appeal has been brought, comprises 28 pages. That skeleton did no more than properly respond to the grounds of appeal upon which permission has been granted. The liability of the Appellant for the Secretary of State's costs was, in my view, all but inevitable, given that his appeal was never going to succeed.

46. Furthermore, the grant of permission to appeal led to the ultimate determination of matters relating to the Appellant's immigration status being delayed by many, many months, with the accompanying unhappy uncertainty for the Appellant that that involved. Given that he was refused leave to remain as a student, it is fortuitous that he has used his temporary leave to remain whilst this appeal has run its course to study and add to his qualifications; but he was entitled to a more prompt resolution to his immigration status, denied him by the grant of permission to appeal.

47. In my view, this case exemplifies the need for the Upper Tribunal to consider with particular care whether it grants permission of appeal to this court. Leaving aside the additional work created for this court, far from being a kindness to a claimant appellant for permission to be granted for an appeal which, for practical purposes, is doomed to ultimate failure from the start, it imposes further and unnecessary burdens upon those who seek to remain in the United Kingdom, burdens which they are often ill-equipped and can often ill-afford to bear.