



Neutral Citation Number: [2021] EWCA Civ 1515

Case No: C5/2021/1494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Macleman
EA/06513/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2021

Before :

LORD JUSTICE DINGEMANS
and
LORD JUSTICE LEWIS

Between :

MR ASIF KHURSHID

Appellant

- and -

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

**Zane Malik QC and Zeeshan Raza (instructed by Marks and Marks Solicitors) for the
Appellant**
**Jack Holborn (instructed by Government Legal Department)
for the Respondent**

Hearing date : 14 October 2021

Approved Judgment

Lord Justice Dingemans:

Introduction

1. These applications were heard on Thursday 14 October 2021. At the end of the hearing the Court announced that it would: (1) dismiss the application for a review of the decision of Master Meacher declaring that the Court of Appeal in England and Wales did not have jurisdiction to consider the appellant's application for permission to appeal the decision of Upper Tribunal Judge ("UTJ") Macleman sitting in the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") promulgated on 22 April 2021; and (2) refuse the application for this Court to reconstitute itself as a Divisional Court to hear an application for permission to apply for judicial review of the decision of UTJ Macleman dated 22 April 2021; with written reasons to follow. These are the written reasons.

Proceedings in the FTT and UT

2. By a decision dated 14 November 2019 the respondent refused the appellant admission to the United Kingdom, and revoked his residence documentation on the grounds that he had ceased to be dependent on his cousin and had no right to reside as a dependent extended family member of an EEA national. At the time that the decision was made the appellant was living in England and had been represented since 2015 by Marks and Marks, solicitors in England and Wales.
3. The appellant moved to Scotland, and he appealed to the First-tier Tribunal ("FTT") against the respondent's decision, but the FTT dismissed the appeal by a decision promulgated on 23 April 2020. The appellant appealed to UTIAC but following a remote hearing in Glasgow on 14 October 2021, UTJ Macleman dismissed that appeal on 22 April 2021. Both the hearing of the FTT and UTIAC were in Scotland.
4. The appellant then sought permission to appeal from UTIAC. By a decision dated 23 June 2021 UTJ Macleman refused to grant permission to appeal. The order produced by UTJ Macleman was headed "Application for permission to appeal to the Inner House of the Court of Session (being the relevant appellate court for the purpose of section 13(11) of the Tribunals, Courts and Enforcement Act 2007)". At paragraph 5 of the reasons it was stated: "This application is presented as one for permission to appeal to the Court of Appeal, but the appropriate Court is as above. The application is treated as if so made."

The application for permission to appeal

5. On 2 August 2021 the appellant applied, by his English legal representatives Marks and Marks Solicitors, to the Inner House of the Court of Session. The Court of Session replied by email stating: "as previously advised you must have a right of audience should you wish to appeal to the court of session. As you do not you must therefore instruct Scottish solicitors to lodge on your behalf". It is apparent that there must have been a pre-existing telephone conversation between Marks and Marks and the Court Office at the Court of Session.
6. The appellant did not instruct Scottish solicitors to file the appeal on his behalf, nor did he seek to act in person. Instead, on the same day (2 August 2021), the appellant by his

legal representatives Marks and Marks Solicitors filed an Appellant's Notice seeking permission to appeal from the Court of Appeal of England and Wales and an extension of time.

- 7 In a Skeleton Argument dated 13 August 2021 seeking permission to appeal, it was submitted on behalf of the appellant that although UTJ Macleman had specified the appellate court as being the Court of Session, this was not the appropriate court, it was simply specified because the hearing in UTIAC had been in Glasgow. It was submitted that the Court of Appeal should determine for itself what was the appropriate Court, which was the Court of Appeal because the appellant's solicitors are based in London and the appellant had dealt with them for a long time and had confidence in them. He would be inconvenienced if he was forced to instruct alternate representation in Scotland.
- 8 Master Meacher considered the application and decided that the Court of Appeal in England and Wales did not have jurisdiction to hear the appeal. The appellant's solicitors were notified by way of email dated 3 September 2021 that the Court of Appeal did not have jurisdiction to entertain the notice of appeal. The appellant sought a review of this decision pursuant to CPR 52.24(5). The matter was referred to Lewis LJ and me as the supervising Lord Justices for public law, and we directed that there should be an oral hearing of this application before Lord Justice Lewis and me.
- 9 In the course of preparing for the hearing my judicial assistant located the case of *KP(Pakistan and another) v The Secretary of State for the Home Department* [2019] EWCA Civ 556; [2019] 1 WLR 5631. In that case an appeal was listed before the Court of Appeal and the issue of jurisdiction was raised just before the hearing of the appeal. The Court of Appeal considered that the proper interpretation of a letter from UTIAC was that the UT had specified the Court of Session as the appropriate court for the appeal. Having then considered the terms of the 2007 Act the Court held that the Court of Appeal of England and Wales had no jurisdiction to hear the appeal. In *KP(Pakistan)* reference was made to *Gardi v Secretary of State for the Home Department (No.2)* [2002] 1 WLR 3282 where, under a slightly different statutory framework, an earlier completed judgment was later declared to be a nullity for want of jurisdiction. The parties were invited to make submissions on this authority.

Respective submissions

- 10 Mr Malik QC and Mr Raza accepted that in the light of the decision in *KP(Pakistan)* the Court of Appeal did not have jurisdiction to hear the appeal from UTIAC, although Mr Malik reserved the appellant's right to challenge the correctness of the decision in *KP(Pakistan)*. They submitted, however, that the substantive decision of UTIAC dismissing the appeal from the FTT was susceptible to judicial review, that the decision of UTJ Macleman dated 22 April 2021 dismissing the appellant's appeal from the FTT was unlawful for the reasons given in the grounds of appeal, that this Court should reconstitute itself as a Divisional Court, and this Court should adjourn the hearing for a rolled up hearing of an application for permission to apply for judicial review and for judicial review of the decision of UTJ Macleman. Mr Malik submitted that there were exceptional circumstances which justified this Court, rather than the Courts in Scotland, exercising the supervisory jurisdiction. He referred to the development of the jurisprudence recognising the rights of the High Court in England and Wales to exercise supervisory powers over UTIAC appeals in judicial review proceedings even where

UTIAC had been sitting in Scotland under the test of “exceptional circumstances” as set out in paragraphs 17 to 20 of the judgment of the House of Lords in *Tehrani (AP) v Secretary of State for the Home Department* [2006] UKHL 47; [2007] 1 AC 521. Mr Malik submitted that the exceptional circumstances in *Tehrani* were similar to the situation in this case.

- 11 Mr Holborn submitted on behalf of the respondent that the wording of section 13 of the 2007 Act was clear. It was for UTIAC to specify the court that was to be the relevant appellate court, and the decision in *KP(Pakistan)* was right and should be followed. Although the decision of UTJ Macleman in specifying the Court of Session as the appellate Court might be challenged by way of judicial review, there were no grounds in this case on which the decision could be challenged and the appellant had not sought to do so. As to the proposal that the Court should reconstitute itself as a Divisional Court and consider the challenge to the lawfulness of substantive decision to dismiss the appeal from the FTT, Mr Holborn noted the absence of any claim form setting out the grounds of challenge and submitted that the application should be dismissed. He submitted that there were no exceptional circumstances because the appellant could always apply to the Court of Session for permission to appeal using either Scottish solicitors or acting in person. The appellant’s proposed course of action would undermine the routes of appeal set out in statute.
- 12 I am very grateful to Mr Malik, Mr Raza and Mr Holborn for their helpful written and oral submissions. It was apparent at the conclusion of the submissions that there were two matters to determine: (1) whether Master Meacher was right to determine that the Court did not have jurisdiction to hear the appeal. It seems to me that as Mr Malik has reserved his position as to the correctness of the decision in *KP(Pakistan)* I should address it; and (2) whether this Court should constitute itself as a Divisional Court and adjourn the application for judicial review to a rolled up hearing.

No jurisdiction (issue one)

Relevant statutory provisions

- 13 Section 13(11), (12) and (13) of the 2007 Act provide:

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.

(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate –

- (a) the Court of Appeal in England and Wales;
- (b) the Court of Session;
- (c) the Court of Appeal in Northern Ireland.

(13) In this section except subsection (11), ‘the relevant appellate court’, as respects an appeal, means the court specified as respects that appeal by the Upper Tribunal under subsection (11).

- 14 The Court of Appeal of England and Wales has no jurisdiction to hear the proposed appeal. This is because UTJ Macleman specified the Court of Session as “the court that is to be the relevant appellate court as respects the proposed appeal” pursuant to section 13(11) of the 2007 Act. This was one of the three courts which could have been specified pursuant to section 13(12) of the 2007 Act. Section 13(11) provides that “the Upper Tribunal must specify ...”. The UT has a choice of three Courts pursuant to section 13(12) and the UT chooses “whichever of the ... courts appears to the UT to be the most appropriate ...” before it decides an application for permission to appeal. The effect of the specification by the UT is that the Court of Session is the “relevant appellate court” pursuant to section 13(13) of the 2007 Act.
- 15 In my judgement, even if the Court of Appeal of England and Wales considered that another court might have been “the most appropriate”, the conjoint effect of sections 13(11), (12) and (13) of the 2007 Act is to make it clear that the relevant decision is for the Upper Tribunal. As UTJ Macleman has considered the Court of Session to be the most appropriate court and specified it, the Court of Appeal of England and Wales has no jurisdiction. This conclusion is consistent with the decision in *KP(Pakistan)* with whose reasoning we agree.

Not sit as a Divisional Court (issue two)

- 16 I accept that this Court does have jurisdiction to reconstitute itself as a Divisional Court and consider, in certain limited circumstances, an application for judicial review of the decision of UTIAC refusing permission to appeal, see *R(Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663. I also accept that, in exceptional circumstances, the Courts in England and Wales could exercise this supervisory jurisdiction even though UTIAC was sitting in Glasgow when UTJ Macleman made his decision dated 22 April 2021, see *Tehrani*. However I do not consider that there are good reasons, let alone the exceptional circumstances as required by *Tehrani*, to justify such a course of action. This is because there is an existing alternative remedy which has always been available to the appellant, namely to seek permission to appeal from the Court of Session in Scotland, and which the appellant is able to use if he chooses to do so. The appellant has already engaged with this route of appeal and there is nothing to prevent him from applying to the Court of Session for an extension of time and permission to appeal.
- 17 In my judgement the circumstances in this case are not similar to those in *Tehrani*. In that case Mr Tehrani had acted in accordance with the (as it turned out mistaken) understanding about the appropriate court to which to apply for a judicial review challenge. In this case the appellant and his legal advisers have known that the Court of Session was the appropriate appellate court, but they did not comply with the relevant procedural rules about representation. The appellant may have trust and confidence in his current solicitors in England and Wales built up over many years, notwithstanding recent mistaken advice about the jurisdiction of the Court of Appeal in England and Wales, but that does not justify ignoring the routes of appeal set out in the 2007 Act and specified in this case by UTIAC, and it does not justify applying to the Courts in England and Wales to exercise a supervisory jurisdiction over UTIAC sitting in Glasgow. If this court sat as a Divisional Court and entertained an application for an

extension of time and permission to apply for judicial review of the decision of UTJ Macleman dated 22 April 2021 the Court would be acting inconsistently with the statutory scheme for appeals from UTIAC as set out in the 2007 Act.

- 18 I also record that there is no judicial review claim form. The importance of complying with procedure in judicial review claims has been emphasised by the Courts on a number of occasions. In this case a claim form would have assisted in identifying the decision said to be unlawful (it was the decision dated 22 April 2021, not the decision dated 23 June 2021) and identified all of the grounds on which it was said that the decision of UTJ Macleman was unlawful and why the Court should exercise its supervisory jurisdiction.

Conclusion

- 19 For these reasons the court made the order set out in paragraph 1 above. This does not leave the appellant without a remedy. As was recognised in the oral submissions the appellant may apply back to Court of Session either with appropriate representation or acting in person, seeking an extension of time for permission to appeal and permission to appeal.

Lord Justice Lewis:

- 20 I agree.