IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 2180 (Admin)

No. CO/3657/2021

Royal Courts of Justice

Tuesday, 21 June 2022

Before:

MR JUSTICE LANE

B E T W E E N :

THE QUEEN
on the application of
ALVIN LLOYD REID

Claimant

- and -

THE UPPER TRIBUNAL
(Administrative Appeals Chamber)

Respondent

- and -

DISCLOSURE AND BARRING SERVICE

Interested Party

MR R DOWNEY (instructed by Clapham Law LLP) appeared on behalf of the claimant.

THE RESPONDENT did not attend and was not represented.

MS G NOLAN appeared on behalf of the interested party.

J U D G M E N T

MR JUSTICE LANE:

1 This is an application for permission to bring judicial review to challenge the decision of Upper Tribunal Judge Hemingway in the Upper Tribunal (Administrative Appeals Chamber) on 12 July 2021 to refuse the claimant permission to appeal against the decision of the interested party, the Disclosure and Barring Service, dated 16 June 2020, to include the claimant in the Children's Barred List and the Adults' Barred List, as provided for in s.2 of, and Schedule 3 to, the Safeguarding Vulnerable Groups Act 2015.

A. THE NATURE OF THIS JUDICIAL REVIEW

2 This oral hearing of the permission application was ordered by Bourne J on 18 February 2022, primarily because of the question raised by the interested party of whether the judicial review is governed by CPR 54.7A, as inserted into the Civil Procedure Rules following the judgment of the Supreme Court in *Cart v Upper Tribunal* [2011] UKSC 28.

3 The claimant, represented by Mr Downey, contends that the judicial review is not subject to CPR 54.7A, but is what I might categorise as the judicial review of the "ordinary" kind.

4 CPR 54.7A reads as follows:

> (1) This rule applies where an application is made, following refusal by the Upper Tribunal of permission to appeal against a decision of the First Tier Tribunal, for judicial review –
>
> (a) of the decision of the Upper Tribunal refusing permission to appeal; or
>
> (b) which relates to the decision of the First Tier Tribunal which was the subject of the application for permission to appeal.
>
> (2) Where this rule applies –
>
> (a) the application may not include any other claim, whether against the Upper Tribunal or not; and
>
> (b) any such other claim must be the subject of a separate application.
>
> (3) The claim form and the supporting documents required by paragraph (4) must be filed no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant.
>
> (4) The supporting documents are –
>
> (a) the decision of the Upper Tribunal to which the application relates, and any document giving reasons for the decision;
>
> (b) the grounds of appeal to the Upper Tribunal and any documents which were sent with them;
>
> (c) the decision of the First Tier Tribunal, the application to that Tribunal for permission to appeal and its reasons for refusing permission; and

(d) any other documents essential to the claim.

(5) The claim form and supporting documents must be served on the Upper Tribunal and any other interested party no later than 7 days after the date of issue.

(6) The Upper Tribunal and any person served with the claim form who wishes to take part in the proceedings for judicial review must, no later than 21 days after service of the claim form, file and serve on the applicant and any other party an acknowledgment of service in the relevant practice form.

(7) The court will give permission to proceed only if it considers –

(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and

(b) that either –

(i) the claim raises an important point of principle or practice; or

(ii) there is some other compelling reason to hear it.

(8) If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.

(9) If permission to apply for judicial review is granted –

(a) if the Upper Tribunal or any interested party wishes there to be a hearing of the substantive application, it must make its request for such a hearing no later than 14 days after service of the order granting permission; and

(b) if no request for a hearing is made within that period, the court will make a final order quashing the refusal of permission without a further hearing.

(10) The power to make a final order under paragraph (9)(b) may be exercised by the Master of the Crown Office or a Master of the Administrative Court.

5 It is common ground that there is no right of appeal to the Court of Appeal against Upper Tribunal Judge Hemingway's refusal of permission (*Safraz v Disclosure and Barring Service* [2015] EWCA Civ 544).

6 Although such a decision is not in terms an "excluded decision" within the scope of s.13(8)(c) of the Tribunals, Courts and Enforcement Act 2007, the principle in *Lane v Esdaile* [1891] AC 210 applies: namely, that decisions or applications for permission to

appeal are intended to be final unless a right of appeal against them is expressly given (paras.26 and 35 to 39 of *Safraz*).

7 I have taken account of the oral and written submissions of Ms Nolan regarding the standard and nature of the judicial review. I am, however, in no doubt that the interested party is wrong to contend that para.54.7A applies to this judicial review. 54.7A (i) states, in terms, that the rule applies:

> "where an application is made, following refusal by the Upper Tribunal of permission to appeal against a decision of the First Tier Tribunal …"

8 Upper Tribunal Judge Hemingway's refusal of permission was not against a decision of the First-tier Tribunal. It was against a decision of the DBS. There is nothing in the CPR that requires, or indeed permits, me to read the references in 54.7A to the First-tier Tribunal as including a reference to the DBS.

9 It is, however, necessary to examine the broader submission of the DBS; namely, that the judgments in *Cart*, properly read, mean that a judicial review of a refusal by the Upper Tribunal to grant permission to appeal against the decision of some other body than the First-tier Tribunal, such as the DBS, is nevertheless to be subject to the restriction which we find articulated in 54.7A(7), whereby permission to bring judicial review will be given only if (a) there is an arguable case with a reasonable prospect of success that both the original decision and the refusal of PTA were wrong in law; and (b) – this is the crucial matter upon which Ms Nolan relies – that either the claim raises some important point of principle or practice or that there is some other compelling reason to hear it. That last proposition comprises the so-called "second appeal criteria", which the Supreme Court in *Cart* determined should be the yardstick.

10 The question is whether that decision of the Supreme Court in *Cart* covers only refusals of permission to appeal by the Upper Tribunal against decisions of the First-tier Tribunal or whether it also covers cases where the Upper Tribunal's refusal of permission concerns a decision of the Upper Tribunal, following a challenge made to the Upper Tribunal against the decision of a body (such as the DBS), which is not itself judicial, although it may exercise some form of judicial function.

11 It is fair to say that the judgments in *Cart* are not consistently framed precisely by reference to the consideration by the Upper Tribunal of an application for permission to appeal from the First-tier Tribunal. There is, however, in my view, no doubt that both Lady Hale, who gave the leading judgment in *Cart*, and the other members of the Supreme Court in their concurring judgments, intended the test based on the second appeal criteria to apply only in respect of the judicial review of a refusal by the Upper Tribunal to grant permission to appeal against a decision of the First-tier Tribunal.

12 The judgments make multiple references to the Civil Procedure Rules Committee making changes to the CPR to reflect the Supreme Court's judgment (see paras.58, 93, 101, 106 and 132). It is, in my view, inconceivable that the Civil Procedure Rules Committee misunderstood its task arising from *Cart* so fundamentally as to have wrongly confined the new procedure to cases involving decisions of the First-tier Tribunal, rather than applying it to any decision which may be appealed to the Upper Tribunal.

13 This is underscored by the fact that the invocation of the second appeal criteria is, as Mr Downey points out, understandable in the context where there have already been two appeal decisions by judicial bodies, namely, the First-tier Tribunal and the Upper Tribunal; whereas

the same cannot be said where the Upper Tribunal conducts an initial appeal, which is what happens in the case of decisions of the DBS, where an appeal lies directly to the Upper Tribunal.

14 I agree with Mr Downey that, at para.56 of Lady Hale's judgment, we see an indication of what the Supreme Court considered it was about. There, Lady Hale makes reference, in the context of the second appeal criteria, to a second judge looking at the matter, who "should always be someone with more experience or expertise than the judge who first heard the case…". That is, in my view, impossible to reconcile with the interpretation that Ms Nolan seeks to place upon the judgments.

15 I find the position is put beyond doubt by the opening paragraph (97) of the judgment of Lord Brown:

> "The critical issue raised by these appeals is the scope of the High Court's supervisory jurisdiction over a particular but important category of unappealable decisions of the Upper Tribunal, namely those by which the Upper Tribunal refuses leave to appeal to it from a First-tier Tribunal decision. Having had the advantage of reading in draft the detailed judgments of Lord Phillips, Lord Hope (in *Eba*), Lady Hale and Lord Dyson, and respectfully agreeing with all of them as I do, there is singularly little that I wish to add."

It seems to me inconceivable that the Supreme Court would have let para.97 go unremarked upon, if other members of the court had disagreed with the scope of the judgments as articulated by Lord Brown.

16 Ms Nolan makes reference to the significance of the Upper Tribunal being – by s.3 of the Tribunals, Courts and Enforcement Act 2007 – a superior court of record. She says this means that all of its decisions, in whatever capacity, should be accorded respect and that, as a result, all its refusals of permission to appeal, of whatever kind, should be subject to the second appeal criteria.

17 I do not accept that the Upper Tribunal's status as a superior court of record means that the judgments in *Cart* should be read in such a counter-intuitive manner. It is plain that the Supreme Court was well aware of the fact that the Upper Tribunal is a superior court of record (see paras.24 and 30) and that this did not prevent the Supreme Court saying what it did about the susceptibility of the Upper Tribunal to judicial review.

B. THE FACTS

18 I can now turn to the facts of this case. They are set out by Upper Tribunal Judge Hemingway at para.5 of his decision. The applicant (now claimant) had been employed as a healthcare assistant. An incident had occurred in August 2015, when it was alleged that, amongst other things, he had used excessive force and struck a patient who had mental health difficulties, while that patient was being restrained. The claimant's then employer dismissed him after a disciplinary process. The claimant was unsuccessful in proceedings brought against his former employer in the Employment Tribunal in respect of unfair and wrongful dismissal. Notwithstanding the outcome of the various proceedings, the claimant has maintained his position that he acted appropriately during the course of the incident.

19 After the decision was handed down by the Employment Tribunal, the claimant successfully secured permission to appeal to the Upper Tribunal against the DBS's barring decision. The

DBS subsequently conceded that at that point it had erred in law due to a failure on its part to determine for itself whether the applicant had been guilty of the alleged conduct, rather than relying on findings of other bodies, including the Employment Tribunal.

20 The Upper Tribunal therefore remitted the matter to the DBS and directed it, in effect, to take the decision again. It was that later decision which formed the subject of the challenge before Upper Tribunal Judge Hemingway.

C. THE GROUNDS OF CHALLENGE

21 The challenge to that decision consisted of multiple grounds. They are set out at para.7 of Upper Tribunal Judge Hemingway's decision. I need not read through them all, but I do draw attention to ground 1(e), namely:

> "The DBS erred through failing to undertake any proper, thorough or independent evaluation of the evidence before it and, in particular, had failed to properly consider the evidence, had failed to base its findings of a balance of probabilities, had failed to have regard to representations made to it on behalf of the applicant, had failed to properly weigh the evidence, had placed undue reliance on the evidence of those who had viewed the CCTV footage, had failed to obtain the footage and view it for itself and had failed to set out all of its proposed findings in a minded-to bar letter when inviting representations."

22 An appeal to the Upper Tribunal from a decision of the DBS lies both in fact and in law.

23 Ground 2 of the grounds of challenge before Upper Tribunal Judge Hemingway related to alleged errors of fact.

24 Ground 2(a) submitted that the DBS had made an error of fact in concluding that the claimant had not followed relevant de-escalation protocols in his altercation with the patient.

25 Ground 2(b) contended that the DBS had made an error of fact in concluding that the claimant had used inappropriate restraint techniques.

26 Ground 2(c) was that the DBS had made an error of fact in concluding that the claimant had physically assaulted the victim.

27 Upper Tribunal Judge Hemingway held an oral hearing of the application for permission. Both the claimant and the interested party were represented by counsel. Mr Downey then as now, represented the claimant. Oral submissions were made.

28 Upper Tribunal Judge Hemingway's consideration of the grounds begins at para.8. At para.9 he said:

> "As to ground 1(d), I remind myself that this was confirmed by Mr Downey to be a ground alleging mistake as to law as opposed to mistake as to fact. The DBS had evidence before it which included a witness statement now contained from pp.62 to 63 of the Upper Tribunal's bundle, given by an individual who had viewed the CCTV footage and who said that he had been able to clearly see a punch thrown by the appellant land on the victim. A letter of 20 December 2016 signed by the Chair of the Internal Appeal Panel, which had upheld the decision to dismiss the applicant, in which it was said that

> after hearing the evidence and viewing the CCTV footage, the panel was satisfied that the applicant 'did strike the patient with excessive force' and that this was not acceptable behaviour in any circumstances and the findings of the Employment Tribunal (the Tribunal having viewed the CCTV footage for itself) 'that the claimant did deliberately strike Patient CC whilst the patient was being restrained by several members of staff'. I appreciate that the applicant says that the DBS was wrong to conclude as it did, but it cannot, in my judgment, be arguable with a reasonable prospect of success that there was no or insignificant evidence to enable the DBS to reach the conclusions it did reach with respect to relevant conduct. In other words, the DBS' finding that the applicant had indulged in relevant conduct was open to it. I refuse permission on this sub-ground."

29 Having gone through and rejected all the other error of law grounds, Upper Tribunal Judge Hemingway said this at paras.16 and 17:

> "16. That then brings me to ground 2(a) (b) and (c), all of which I will take together. Here, of course, we are in the territory of error of fact rather than error of law. Mr Downey argued that any evidence there was to support the DBS' relevant findings of fact was 'sketchy at best'. The evidence relied upon had been 'second or third hand'. He suggested that it would be 'better for the Tribunal to hear from the applicant and see him cross-examined' and suggested that, if it did that, the Upper Tribunal might well conclude that he had not struck the victim.
>
> 17. It seems to me, despite Mr Downey disagreeing with me, that all those persons who had viewed the CCTV footage had reached adverse conclusions with respect to the applicant's conduct. It is apparent from the barring decision process document that the views of some of those who had watched the footage was taken into account and such was permissible. A particular piece of troubling evidence from the applicant's point of view is the witness statement of a therapeutic management of violence and aggression trainer who had herself viewed the footage and who provided an assessment as to what she had perceived to be his failings with respect to various aspects of his conduct when setting aside what in her view might properly be expected. She had observed in her statement that in her view the applicant had taken a 'threatening position', that he had 'thrown two punches', that he had pushed down on the victim's back in a manoeuvre which she described as 'extremely dangerous', such that there was a resultant risk of positional asphyxia. The Employment Tribunal having heard evidence from the applicant had, as noted above, found that he had struck a patient, having viewed the CCTV footage and having rejected the claimant's explanations which he had offered to it. Against that background, I cannot detect any realistic prospect that the Upper Tribunal will conclude that there was a mistake as to any of the relevant factual findings made by the DBS. I conclude, therefore, that it has not been shown that the DBS might have made a relevant mistake of fact and I refuse permission in respect to ground 2".

30 The claimant's grounds of challenge are set out in the bundle before me, beginning at p.154. At p.155, they cite Article 6 of the ECHR and s.3(1) of the Human Rights Act 1998:

> "Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) provides that, in the determination

> of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Section 3(1) of the Human Rights Act 1998 requires primary legislation to be read and given effect in a way that is compatible with Convention rights."

31 The thrust of the challenge is then set out as follows at para.156:

> "By a decision sent to the parties on 29 July 2021, Judge M R Hemingway wrongly refused the claimant permission to appeal. Instead of simply considering whether the grounds of appeal contained reasonable grounds of appeal, the learned judge wrongly called for further documents to be supplied by the Disclosure and Barring Service before seeking to summarily determine the permission application by assessing the merits of each ground of appeal without (1), hearing any evidence, (2) hearing full argument on each ground in the light of such evidence and (3) evaluating the case based on all the relevant evidence presented to the Tribunal. For the avoidance of doubt, the claimant contends that the learned judge was wrong to conclude that the grounds of appeal did not raise arguable questions of law and fact".

32 I am satisfied that there is no arguable merit in those grounds. As for the document from the DBS, Upper Tribunal Judge Hemingway had made a direction in September 2020 for this to be filed. There is nothing before me to suggest that the claimant was prejudiced by this direction. The document does not, in any event, appear to have played any part in Upper Tribunal Judge Hemingway's decision.

33 The DBS was, in my view, entitled to rely on any evidence that it reasonably considered relevant to the decision that it was required to make. It was, in particular, not bound by the hearsay rules of evidence. As Upper Tribunal Judge Hemingway decided, the DBS was entitled to place weight on the views of those who had viewed the CCTV of the incident, especially the "therapeutic management of violence and aggression trainer".

D. WHEN CAN THE UPPER TRIBUNAL REFUSE PERMISSION TO APPEAL?

34 I turn to paras.17 and 18 of Mr Downey's skeleton argument. They read as follows:

> "17. The claimant submits that the requirement for permission reflects the fact that certain grounds of appeal are expressly excluded by statute (see s.4(3) of the SVGA 2006) or that it is impermissible to challenge findings of certain competent bodies (see Schedule 3. para.16(3) and 16(4)) and that the requirement for permission is simply intended to filter out appeals brought on such grounds.
>
> 18. While s.4(4) SGVA 2006 is silent as to the test to be applied, the claimant submits that the test which should not be applied is one requiring the claimant to demonstrate a reasonable prospect of success".

35 Section 4 of the 2006 Act provides:

> "(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
>
> (a) …

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake—

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that DBS**]** has made a mistake of law or fact, it must confirm the decision of DBS**]**.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must—

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b) —

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise."

36 I note, in particular, the statement in s.4(4) that an appeal under subsection (1) "may be made only with the permission of the Upper Tribunal".

37 As I pointed out in oral submissions, paras.17 and 18 of the skeleton argument do not feature in the grounds of claim. I have already dealt with and rejected the grounds that do feature.

38 There has been no application to amend the grounds. Nevertheless, given their potential significance, I shall engage with the points made by Mr Downey at paras.17 and 18 of the skeleton argument. I am sure that there is nothing in s.4 or elsewhere in the 2006 Act which supports the submission at para.17 of the skeleton. It is, in my view, an obvious implication of Parliament's decision to permit an appeal under s.4 to be made only with the Upper Tribunal's permission, that the Upper Tribunal should be able to weed out unarguable challenges of whatever kind. I do not accept that the implication of the words used by Parliament is to constrain the Upper Tribunal, so that it can have regard only to the matters mentioned by Mr Downey. If that had been Parliament's intention, it is plain that it would have said so.

39 In oral submissions, Mr Downey suggested that, as well as the statutory matters to which he said the Upper Tribunal could have regard in deciding whether to grant permission, it might also be possible for the Upper Tribunal to refuse permission if the application was totally without merit. Again, if that had been Parliament's intention, it could and, in my view, would have said so.

40 The consequence of accepting Mr Downey's submissions would be to compel the Upper Tribunal to grant a full appeal for cases that had no reasonable prospect of success. That is plainly to encourage a waste of precious judicial resources and it is not, in my view, arguable that Parliament intended any such thing. I say that, fully bearing in mind that this appeal is in the nature of a primary appeal against the DBS rather than an appeal against the decision of a judicial body, such as the First-tier Tribunal.

41 I also satisfied that it is unarguably the case that the statutory process, read as a whole, is fully compliant with s.3 of the Human Rights Act 1998 and Article 6 of the ECHR. There is, all things considered, appropriate access to justice. As Ms Nolan says, Article 6 confers no general right to an oral hearing, as opposed to some other form of scrutiny. In any event, as we have seen, Upper Tribunal Judge Hemingway did conduct an oral hearing and produced a detailed judgment, albeit in the context of a permission to appeal.

E. CONCLUSIONS

42 I conclude, as follows. First, in agreement with Mr Downey, the judicial review in this case is of the ordinary kind. It is not governed by CPR.54.7A. It is not otherwise to be determined by reference to the second appeal criteria, as described by the Supreme Court in *Cart*.

43 Secondly, there is no arguable merit in the grounds of challenge advanced at pp.154 to 157 of the bundle.

44 Thirdly, Mr Downey's submissions, articulated in paras.17 and 18 of his skeleton argument, that the Upper Tribunal can refuse permission to appeal only in the limited circumstances described by him or, additionally perhaps, if the appeal is totally without merit, finds no support in the legislation. Upper Tribunal Judge Hemingway was correct to approach

matters on the normal basis that permission fell to be refused if there was no reasonable prospect of any of the grounds succeeding at a full hearing. That conclusion is, I find, compatible with s.3 of the 1998 Act and Article 6 of the ECHR.

45 I, accordingly, dismiss the application.

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CERTIFICATE

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