JR-2023-LON-001753

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
Hamna Shahid, Muhammad Asif and Muhamad Yamaan Asif

Applicants

versus

Entry Clearance Officer

Respondent

ORDER

BEFORE Upper Tribunal Judge Blundell

HAVING considered all documents lodged and having heard Jemima Lovatt of counsel, instructed by GLD, for the respondent at a hearing on 8 May 2024

IT IS ORDERED THAT:

(1) The application for judicial review is struck out for the reasons in the attached judgment.

(2) The applicants shall pay the respondent's costs, summarily assessed at £3000.

(3) Permission to appeal is refused because it was not sought and the judgment contains no arguable legal error in any event.

Signed: M.J.Blundell

Upper Tribunal Judge Blundell

Dated: **17 May 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 17/05/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-001753

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

17 May 2024

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

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Between:

THE KING
on the application of
HAMNA SHAHID
MUHAMMAD ASIF
MUHAMAD YAMAAN ASIF

Applicants

- and -

ENTRY CLEARANCE OFFICER

Respondent

- - - - - - - - - - - - - - - - - - - -

No appearance by or on behalf the applicants

Jemima Lovatt
(instructed by the Government Legal Department) for the respondent

Hearing date: 8 May 2024

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J U D G M E N T

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Judge Blundell:

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1. The applicants are nationals of Pakistan. The first and second appellants are married. The third appellant is their son, who was born in 2021. They seek judicial review of the respondent's decision to refuse their applications for entry clearance, and to uphold those refusals on Administrative Review.

Background

2. On 13 December 2022, the first applicant applied for entry clearance as a Tier 4 (General) Student Migrant. Her husband and her son applied for entry clearance as her dependants. Amongst other documents which were submitted with the applications was a letter from the National Bank of Pakistan which stated that the first applicant's account at that bank had a balance of just under nine million rupees.

3. The first applicant was initially advised that her application had been successful, but she received a subsequent communication from the respondent on 27 January 2023 in which she was invited to return her passport with the vignette which had by that stage been issued to her. She did so, and on 2 February 2023, the applications were refused. The material part of the decision is in the following terms:

> In support of your application you have submitted a National Bank of Pakistan bank statement for account ****5154-5; however checks made by this office show that this document is not genuine. As a falsified or non-genuine document has been submitted now in relation to your application, it is refused under paragraph 9.7.2 of the Immigration Rules. These official enquiries have been documented on a Document Verification Report held by this office. I am satisfied that you have intended to use deception as you are aware this document does not portray an accurate representation of your personal or financial circumstances. You should note that because this application for entry clearance has been refused under paragraph 9.7.2 of the Immigration Rules, any future applications may also be refused under paragraph 9.8.1 or 9.8.2 of the Immigration Rules. A refusal under these paragraphs of the Immigration Rules attracts an automatic refusal period of up to 10 years. The period starts from the date of the previous event in which the deception or submission of falsified documents or information was employed.

4. The second applicant was refused in line. The third applicant was refused under paragraph ST31.1 on the ground that his parents' applications had been refused.

5. The applicants sought Administrative Review of the decisions. The respondent disclosed the Document Verification Report but was not persuaded to alter his stance. Pre-action correspondence also proved unsuccessful and, on 14 August 2023, the applicants issued this claim

for judicial review. (The claim was in-time because it was issued within three months of the Administrative Review decision: R (Topadar) v SSHD [2020] EWCA Civ 1525; [2021] 1 WLR 2307, at [47].)

6. The grounds were settled by counsel. There are two. The first is that the respondent misdirected himself in law and failed to follow his published policy by failing to follow a "minded-to refuse" process. The second is that the respondent failed to discharge the burden of proof or failed to give adequate reasons for concluding that the bank statement was not genuine.

7. Judge Sheridan gave permission on the papers, noting that the applicants' case on the first ground was supported to some extent by the decision of the Court of Appeal in Wahid v ECO [2021] EWCA Civ 346. Judge Sheridan made the usual case management directions. Pursuant to those directions, the respondent was to file detailed grounds of defence within 35 days of the date of Judge Sheridan's order. The applicants were then to file and serve any reply and any application to rely on further evidence within 14 days of the detailed grounds. Not later than 21 days before the scheduled date of hearing, the applicants were also to file and serve a skeleton argument, a trial bundle and an agreed authorities bundle.

8. On 5 January 2024, the respondent filed and served detailed grounds of defence. Appended to those grounds was the email correspondence between the Entry Clearance Officer and the National Bank of Pakistan, in which the bank stated that the "statement of account and maintenance certificate provided by the concern Branch Manager/Operations Manager are Fake."

9. On 19 January 2024, the parties agreed to extend time for complying with Judge Sheridan's directions. The applicants were permitted until 29 January 2024 to file and serve any reply to the detailed grounds and any further evidence.

10. On 29 January 2024, the applicants' solicitors notified the Upper Tribunal that they were no longer acting. On 2 February 2024, the respondent made contact with the applicants by email. There was no response.

11. On 25 March 2024, the parties were notified that the case had been listed to be heard on 8 May 2024. That notification was sent by email to the applicant's email address as provided on the claim form, which I note is the same gmail address which was provided to the Entry Clearance Officer. It was also sent by post.

12. On 23 April 2024, the Government Legal Department wrote to the applicants to note that they had not complied with the direction to

file a skeleton argument and trial bundle. There was no response to that email.

13. On 26 April 2024, the Government Legal Department wrote to the Upper Tribunal to note that the applicants had failed to file and serve a skeleton argument or trial bundle; that there had been no response to communications; that the respondent could not file a skeleton argument in the circumstances; and requesting that the hearing be vacated with directions.

14. I declined to vacate the hearing. I made a single direction which I ordered would supersede all previous directions. It was in the following terms:

> The applicants shall file and serve a skeleton argument by midday on 7 May 2024, failing which the proceedings may be struck out.

15. That order was sent on 3 May 2024, to the same gmail address to which the notice of hearing had been sent, and to the second applicant's separate gmail address.

16. There was no response to the direction of 3 May 2024, whether by way of a skeleton argument or any other communication from the applicants. The hearing remained in the list and I proceeded with the hearing in the absence of the applicants. They had been notified of the date of the hearing. At [8] of my order of 3 May, they had been notified that they might apply for the hearing to be conducted remotely so that they could make submissions from Pakistan. As I have noted, there was no response to that order and I considered that it was in the interests of justice to proceed.

17. I heard a short submission from Ms Lovatt, who invited me to strike out the whole of the proceedings under rule 8(3)(a). She addressed me briefly on the relevant considerations from Walsham Chalet Park Ltd v Tallington Lakes Ltd [2014] EWCA Civ 1607; [2015] CP Rep 15 and submitted that striking out was a proportionate course in the circumstances. I indicated that I would strike out the whole of the proceedings for reasons which would follow.

The Tribunal Procedure (Upper Tribunal) Rules 2008

18. Rule 8 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides as follows:

8 - Striking out a party's case

(1) The proceedings, or the appropriate part of them, will automatically be struck out—

(a) if the appellant or applicant has failed to comply with a direction that stated that failure by the appellant or applicant to comply with the direction would lead to the striking out of the proceedings or part of them; or
(b) in immigration judicial review proceedings, when a fee has not been paid, as required, in respect of an application under rule 30(4) or upon the grant of permission.

(1A) Except for paragraph (2), this rule does not apply to an asylum case or an immigration case.

(2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and
(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Upper Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant or applicant has failed to comply with a direction which stated that failure by the appellant or applicant to comply with the direction could lead to the striking out of the proceedings or part of them;
(b) the appellant or applicant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly; or
(c) in proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings, the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding.

(4) The Upper Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant or applicant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings have been struck out under paragraph (1) or (3)(a), the appellant or applicant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Upper Tribunal within 1 month after the date on which the Upper Tribunal sent notification of the striking out to the appellant or applicant.

(7) This rule applies to a respondent or an interested party as it applies to an appellant or applicant except that—

(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent or interested party from taking further part in the proceedings; and
(b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent or interested party taking further part in the proceedings.

(8) If a respondent or an interested party has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Upper Tribunal need not consider any response or other submission made by that respondent [F8or interested party, and may summarily determine any or all issues against that respondent or interested party.

Striking Out Judicial Review Cases in the Upper Tribunal (IAC)

19. Rule 8(1A) does not apply to judicial review cases brought before the Upper Tribunal (IAC). The definitions of “an asylum case” and “an immigration case” in rule 1 refer specifically to “proceedings before the Upper Tribunal on appeal”. It is therefore clear that rule 8 applies generally to proceedings before the Upper Tribunal (IAC) which are not appellate in nature.

20. The order which I issued on 3 May 2024 included a direction which provided that the proceedings *may* be struck out in the event of non-compliance. That is a direction to which rule 8(3)(a) applies, and is to be contrasted with a direction to which rule 8(1)(a) applies.

21. Where, as here, a party fails to comply with a direction which states that the proceedings may be struck out in the event of non-compliance, it is necessary for the Tribunal to consider whether the proceedings should be struck out in the exercise of its discretion. (Whereas, in the case of a direction to which rule 8(1)(a) applies, the proceedings or a part of them will be automatically struck out in the event of non-compliance.)

22. Corresponding provision for striking out appears in the Civil Procedure Rules at CPR 3.4 and it was accepted in R (Kumar) v Secretary of State for Constitutional Affairs [2006] EWCA Civ 990; [2007] 1 WLR 536 and R (Nine Nepalese Asylum Seekers) v IAT [2003] EWCA Civ 1892 that those powers apply to judicial review proceedings as they do to ordinary civil proceedings.

23. The proper approach to striking out for non-compliance with a court order was considered in Walsham Chalet Park Ltd v Tallington Lakes Ltd [2014] EWCA Civ 1607; [2015] CP Rep 15. At [44], Richards LJ (with whom McCombe and Sharpe LJJ agreed) held that the principles in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 WLR 795, as restated in Denton v TH White Ltd [2014] EWCA

Civ 906; [2014] 1 WLR 3926, applied in this context. Richards LJ added the following observations, however:

> It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see Mitchell , paragraphs 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out. Mr Buckpitt drew our attention to the recent decision of the Supreme Court in HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64 , at paragraph 16, where Lord Neuberger quoted with evident approval the observation of the first instance judge that "the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified".

24. It is with that guidance in mind that I turn to consider the application of the Mitchell principles to this case.

Application of the Mitchell Principles

25. There can be no doubt that the applicants are in serious breach of directions. No reply to the detailed grounds was received, whether by 29 January 2023 or at all. No skeleton argument or trial bundle was received, whether by 17 April 2024 or at all. No skeleton argument or other correspondence was received in response to the order which I issued on 3 May 2024. It seems that the applicants have decided to engage no further with the proceedings after service of the respondent's detailed grounds of defence and accompanying evidence.

26. There is no explanation from the applicants for the failure to comply with these directions. I take account of the fact that the first applicant is a litigant in person, her solicitors having ceased to act last year, but I note also that she is an educated person who sought admission to the United Kingdom in order to complete a Masters in Business Administration at a reputable university. There is no reason to depart from the general approach in Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119 that litigants in person are expected to comply with directions and may be penalised if they do not do so.

27. Despite the significant and unexplained breaches which have occurred, it is nevertheless necessary to consider all of the

circumstances of the case in order to ensure that justice is done: Denton, at [31]-[38]. The relevant considerations vary from case to case. In this case, the factors are as follows.

28. There is a need for appropriate procedural rigour in judicial review cases: Dolan & Ors v Secretaries of State for Health and Social Care and Education [2020] EWCA Civ 1605; [2021] 1 WLR 2326. The respondent and the Upper Tribunal are placed in difficulty by the failure to comply with directions, there being no skeleton argument or trial bundle. The hearing was listed for three hours. Were it to be adjourned to give the applicants further time to comply with the directions, further court time would be expended, and it seems very likely that there would continue to be no engagement with any amended directions. This is not a case in which the respondent is seeking to have a second bite at the cherry; the grounds for strike out have arisen after the date upon which permission was granted: R (Suleiman) v SSHD [2017] EWHC 1912; [2018] ACD 18

29. On the other hand, I take into account the fact that the applicants are litigants in person, although it is clear for the reasons given above that little latitude is in order on that basis. I also take into account the fact that a judge considered the claim to be arguable, although with the benefit of the detailed grounds of defence and the accompanying evidence, it seems unlikely that the applicants could prevail. I say that because, as noted in the detailed grounds, the content of the duty to act fairly is context-specific: R (Topadar) v SSHD [2020] EWCA Civ 1525; [2021] 1 WLR 2307, at [52]-[62], citing R v SSHD *ex parte* Doody [1994] AC 531 at 560d-g. The context-specific nature of the duty is also made clear in the published policy to which the grounds refer. Where, as here, the bank has confirmed that the document on which the applicant relied was 'fake', it seems highly unlikely that the applicants could have adduced any evidence in answer to the respondent's concerns if a 'minded-to' process had been followed. They have certainly not sought to do so in response to the email correspondence appended to the detailed grounds of defence.

30. In my judgment, having taken account of all of these considerations, it is proportionate and justified to order that the proceedings should be struck out under rule 8(3)(a). To do so is in furtherance of the over-riding objective of dealing with cases fairly and justly and the need to enforce procedural rigour in judicial review proceedings. The applicants have been given every opportunity to comply with the Tribunal's directions and have failed to engage with those directions in any way. It is in my judgment disproportionate to expend further time on the case where there has been such a wholesale failure to help the Tribunal to further the over-riding objective and to co-operate with the Tribunal generally.

Conclusion

31. The applicants' case is therefore struck out as a whole. I order that any submissions on costs or other consequential matters should be filed and served by 4pm on 13 May 2024.

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Postscript

32. This judgment was sent to the parties in draft on 9 May 2024. They were invited to make any corrections or submissions in relation to consequential matters by 4pm on 13 May 2024. The respondent sought his costs. No other submissions of any description were received.

33. The respondent is entitled to his costs because there is no reason to depart from the usual order that costs should follow the event. The respondent sought his costs in the sum of £5225. Paragraph 12 of the costs submissions contains a brief account of the costs incurred by the respondent but there is no full schedule.

34. I note that the costs claimed on the Acknowledgment of Service was £861. I note that the Detailed Grounds of Defence are comparatively brief and were settled by a GLD lawyer, as opposed to counsel. I also note that counsel's costs for preparation and attendance at the hearing are under £250.

35. In the circumstances, and despite the fact that this application for judicial review progressed to the substantive stage, I summarily assess the respondent's costs in the sum of £3000, representing (broadly) £861 for the AoS, £1000 for the Detailed Grounds of Defence and £1039 for other work undertaken by GLD and counsel in preparation for the hearing.

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