Neutral Citation Number: [2021] EWCA Civ 1655

Case No: C6/2019/0776A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON AN APPLICATION TO RE-OPEN A REFUSAL OF PERMISSION TO APPEAL AGAINST A DECISION OF THE UPPER TRIBUNAL (ASYLUM AND IMMIGRATION CHAMBER)
LORD JUSTICE McCOMBE
C6/2019/0776

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 November 2021

Before:

LADY JUSTICE CARR

and

LORD JUSTICE LEWIS

- -

Between:

THE QUEEN (on the application of SHAZIA MUNAWAR KHAN)	**Applicant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Michael Biggs (instructed by **Sky Solicitors**) for the **Applicant**
Leon Glenister (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 28 October 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be at 10:30am on 9th November 2021.

Lord Justice Lewis:

INTRODUCTION

1. This is an application made pursuant to CPR 52.30 to re-open a decision of McCombe LJ refusing permission to appeal against a decision of the Upper Tribunal which had dismissed the applicant's claim for judicial review.

2. In brief, on 6 August 2015, the applicant applied for leave to remain in the United Kingdom as a Tier 2 (General) Migrant relying on a certificate of sponsorship issued by a putative employer, Fisher Ash Ltd. The sponsor's licence was suspended on 5 May 2016 and revoked on 3 June 2016. The applicant's application for leave to remain was refused on 6 June 2016 as her certificate of sponsorship had been cancelled once the sponsor's licence had been revoked. She claimed judicial review of the decision refusing her leave to remain. The Upper Tribunal dismissed that claim and ordered the applicant to pay the respondent's costs.

3. The applicant sought permission to appeal on seven grounds. For present purposes, the applicant seeks to re-open the refusal of permission in relation to one ground only, namely that it was procedurally unfair for the respondent not to inform her that the sponsor's licence had been suspended. The Upper Tribunal had considered that issue and concluded that, on the facts of this case, there had been no procedural unfairness. Permission to appeal was refused as McCombe LJ agreed with the decision of the Upper Tribunal and considered that there was no realistic prospect of an appeal succeeding.

4. The applicant submits that it is necessary to re-open the decision of McCombe LJ to avoid a real injustice as it was properly arguable that, in the light of the decision of the Supreme Court in *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41, [2020] 1 WLR 4506, the decision of McCombe LJ was wrong. She submits that McCombe LJ was influenced by the decision of the Court of Appeal in the case of *R (Pathan and Islam) v Secretary of State for the Home Department* [2018] EWCA Civ 2103. That decision was, however, overturned by the Supreme Court. The respondent submits, in essence, that the legal and factual situation in this case is different from that in *Pathan.* The *Pathan* case concerned a decision to revoke (not suspend) a licence. Further, it involved a person who had leave to remain which, if he had been notified of the decision to revoke, would have given him time to address the consequences of revocation. The applicant, however, was an overstayer who was in the United Kingdom unlawfully. Permission to appeal in the case of Mr Islam (who, like the applicant, was an overstayer) was refused by the Supreme Court. The respondent submits that there is no basis in those circumstances for concluding that it is necessary to re-open the decision to refuse permission to appeal because of any real injustice, nor are the circumstances exceptional. Consequently, the respondent submits that the criteria for re-opening a final determination of the Court of Appeal are not met.

THE FACTUAL BACKGROUND

The Applicant Arrives in the United Kingdom as a Student

5. The applicant is a national of Pakistan. On 5 April 2011, the applicant entered the United Kingdom with entry clearance as a Tier 4 (General) Student valid until 29 April 2011. Her leave to remain in the United Kingdom was subsequently extended until 28 December 2015. The applicant was a student at the West London Business College in 2014. That college's licence to sponsor students was revoked on 14 August 2014. On 10 December 2014, her leave to remain as a Tier 4 (General) Student was curtailed so that it would expire on 13 February 2015.

6. On 12 February 2015, the applicant applied for leave to remain as a Tier 2 (Genera) Migrant relying on a certificate of sponsorship issued by Fisher Ash Ltd. As the application was made during the period of her current leave to remain (which was not due to expire until 13 February 2015), her leave to remain was extended by virtue of section 3C of the Immigration Act 1971 ("the Act") until the application was determined or, in certain circumstances, until an administrative review of the decision was completed.

The Applicant Becomes an Overstayer

7. The application for leave to remain was refused on 29 July 2015. The applicant did not challenge that decision as, it seems, she accepts that the information provided by Fisher Ash Ltd. was not correct and would not justify the grant of leave to remain on the basis set out in the certificate of sponsorship. The applicant did not seek an administrative review of the decision of 29 July 2015. Rather, on 3 August 2015, she completed a form waiving her right to a review and confirming that her leave to remain (extended by section 3C of the Act) had come to an end. The applicant accepts that she was an overstayer, that is someone who remained in the United Kingdom unlawfully, from either 3 August 2015 (or, at the latest, 5 August 2018 which was the day before she made a further application for leave to remain and which would have brought her leave to remain to an end in any event).

The Applicant Applies Again for Leave to Remain as a Tier 2 (General) Migrant

8. On 6 August 2015, the applicant made a further application for leave to remain in the United Kingdom as a Tier 2 (General) Migrant relying on a further certificate of sponsorship issued by Fisher Ash Ltd. As the applicant was an overstayer, and did not have leave to remain as the time that she made that application, she remained a person who was in the United Kingdom unlawfully.

9. On 8 October 2015, the application was refused. The respondent considered that the details of the prospective employment provided in the certificate of sponsorship most closely corresponded to the role performed by a qualified chartered account and the applicant was not qualified to perform that role. An administrative review upheld that decision on 29 October 2015. Fisher Ash Ltd. wrote to the respondent on 12 November 2015 stating that the role described corresponded to the role of client accountant and business officer for which the applicant was qualified. Judicial review proceedings were commenced. By a consent order signed on 8 March 2016 and sealed on 17 March 2016, and upon the respondent agreeing to withdraw the decision of 8 October 2015 and to issue a new decision within 3 months of the sealed consent order, the applicant was granted permission to withdraw her claim for judicial review. The respondent was ordered to pay costs.

The Decision of 6 June 2016

10. On 12 April 2016, the offices of Fisher Ash Ltd. were visited by officers of the respondent. A number of concerns were raised about the company's suitability to be a sponsor. On 5 May 2016, Fisher Ash Ltd.'s licence to act as a sponsor was suspended. It was given the opportunity to make submissions and evidence to address the concerns raised. The applicant was not informed of the suspension.

11. On Friday 3 June 2016, Fisher Ash Ltd. was removed from the register of licensed sponsors and detailed reasons were given for that decision. On Monday 6 June 2016, the respondent refused the applicant's application for leave to remain as a Tier 2 (General) Migrant as the certificate of sponsorship had been cancelled by the respondent as the sponsor had been removed from the register of sponsors. An administrative review upheld that decision on 20 July 2016.

The Claim for Judicial Review

12. By a claim form filed on 14 October 2016, the applicant applied for judicial review of the decision of 6 June 2016. Permission was ultimately granted to apply for judicial review and to file amended grounds. These were filed on 1 February 2018.

13. Upper Tribunal Judge Canavan dismissed the claim for judicial review and ordered the applicant to pay the respondent's costs. For present purposes, it is necessary only to summarise those aspects of the reasoning relating to the allegation that it was procedurally unfair not to notify the applicant of the suspension of Fisher Ash Ltd. from the register of suitable sponsors on 5 May 2016. The Upper Tribunal summarised this ground of challenge at paragraph 19 and following of its judgment, noting the reliance on the decision of the Upper Tribunal in *R (Pirta) v Secretary of State for the Home Department* JR/1194/2016, judgment given on 19 December 2017. The Upper Tribunal considered that there had been no undue delay in this case. The respondent had considered the application on the evidence available on 8 October 2015 and reviewed the position when further evidence became available in the judicial review proceedings. The Upper Tribunal noted that no authority had been provided to suggest that the respondent had a duty to inform the applicant of the suspension of the sponsor's licence. It considered carefully the *Pirta* case, noting that the applicant's case was very different. In *Pirta*, the claimant was not an overstayer and had several months of existing leave remaining, he had paid for a premium service to have a decision within 10 days, the respondent twice wrote to him stating there would be a delay in processing the application but did not give the reasons or refer to the investigation into the sponsor. Here, the applicant was an overstayer, the respondent agreed to reconsider the refusal of leave, and a fresh decision was made within the three months agreed in the consent order. The Upper Tribunal considered that the circumstances were closer to those in the case of Mr Islam (whose case was heard by the Court of Appeal at the same time as those of Mr Pathan). Like the applicant, Mr Islam was an overstayer who had made an application within the period of grace allowed for that purpose. Neither the applicant, nor Mr Islam, would benefit from the policy applied to those who did have leave and whose sponsor's licence was removed, namely that their period of leave to remain would be curtailed so that would have only 60 days of leave to remain in the United Kingdom in which time they could try to find another sponsor. That difference in treatment between overstayers and

those with leave was justified as the Court of Appeal held in *Pathan*. The Upper Tribunal concluded that:

> "32. The applicant may feel that the procedure was 'unfair' in the general sense of the word, but the procedure followed for refusing the application for leave to remain did not elevate any perceived unfairness to a level whereby it became 'procedurally unfair' within the legal meaning of the phrase given the strict terms of the immigration rules, which require a valid [certificate of sponsorship] and the respondent's lawful policy relating to Tier 2 migrants."

The Application for Permission to Appeal

14. The applicant applied for permission to appeal putting forward seven grounds. Only one is now relied upon, namely that Upper Tribunal Judge was wrong to find that the respondent did not act unfairly by failing to inform the applicant of the suspension of her Tier 2 Sponsor's licence.

15. By an order dated 6 July 2021, McCombe LJ refused permission to appeal for the following reasons:

> "In my judgment, the Upper Tribunal's decision on the substantive judicial review application was correct for the reasons given.
>
> I agree with Judge Canavan that the grounds of appeal before him (essentially the same as now produced to this Court) amount to more disagreements with the Upper Tribunal, without raising any arguable errors of law. Each of the arguments raised is, in reality, precluded by this court's decision in *Pathan & Islam* [2018] EWCA Civ 2103. As Judge Canavan says, the facts of this case are similar to those of *Islam*/ Further, for the reasons given, the case of *Pirta* JR/1194/2016 is distinguishable.
>
> There are no real prospects of success on the proposed appeal."

16. For completeness the applicant gave birth to a child on 3 December 2016. On 16 December 2020, the applicant applied for and was granted leave to remain for herself and her child until 15 June 2023.

THE LEGAL FRAMEWORK

17. The Court of Appeal has power in exceptional circumstances to re-open final determinations, including decisions refusing permission to appeal. The material provisions are contained in CPR 52.30 and provide that:

> "Reopening of final appeals
>
> 52.30

> (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal
>
> (3) This rule does not apply to appeals to the County Court."
>
> (4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.
>
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.
>
> (6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
>
> (8) The procedure for making an application for permission is set out in Practice Direction 52A."

18. The principles governing the exercise of this have been summarised by this Court in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council and another* [2018] EWCA Civ 860, [2018] 1 WLR 5161 as follows:

> "29 ….. The court's jurisdiction under CPR r 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". It is "exceptional" in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated—or corrupted—the very process itself. It follows that the CPR r 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered "Yes", the decision will only be

> reopened if the court is satisfied that there is a powerful probability that it was wrong."
>
> 30. These principles apply to all applications under CPR r 52.30, and with equal force to both applications to re-open substantive appeals and applications to reopen applications for permission to appeal. The authorities cited in argument before us have all concerned the application of the *Taylor v Lawrence* principles in cases where there has been a substantive decision of the court in the preceding litigation, rather than a decision to refuse permission to appeal from a decision in a lower court. It would be wrong, however, to suppose that the rigour of the principles applying to *Taylor v Lawrence* applications is in any way relaxed where the decision under consideration is a decision, on the papers, to refuse permission to appeal to the Court of Appeal rather than a substantive decision of this court on an appeal itself.
>
> 31. In the context of an application for permission to appeal whose consideration is said to have been critically undermined or corrupted, the first question will be whether the judge whose decision is the subject of the application to reopen has sufficiently confronted and dealt with the grounds of appeal. Secondly, if the conclusion is reached that the process has been critically undermined it will still be necessary for the court to consider whether, had that not been so, that it is highly likely, in the sense of there being a powerful probability, that the decision on the application for permission to appeal would have been different and that permission to appeal would have been granted."

19. The Court cited with approval earlier decisions of the courts observing that, on an application to re-open an earlier decision, an important issue is whether the integrity of the earlier litigation process has in some way been "critically undermined". Thus, in *In re Uddin (A Child)* [2005] 1WLR 2398, Dame Butler-Sloss P, in giving the judgment of the Court on CPR 52.17, the predecessor to CPR 52.30, observed that:

> 22…"In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r 52.17(1) . It is to be remembered that apart from the requirement of no alternative remedy, 'The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations': *Taylor v Lawrence [2003] QB 528* , para 55. Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the

> integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

20. Similarly, in *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, Sir Terence Etherton, then Chancellor of the High Court, with whom the other members of the Court agreed, said at paragraph 65 of his judgment that:

> "The following principles relevant to [the] application [of CPR r 52.17, as the relevant rule then was] to this appeal appear from *In re Uddin (A Child)* … and *Guy v Barclays Bank plc* … First, the same approach applies whether the application is to reopen a refusal of permission to appeal or to reopen a final judgment reached after full argument. Second, CPR r 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to reopen an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in *Taylor v Lawrence* … Accordingly, third, the jurisdiction under CPR r 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR r 52.17 . The broad principle is that, for an appeal to be reopened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."

21. The principles governing the exercise of the power conferred by CPR 52.30 have recently been confirmed and subsequent case law reviewed by this Court in *Municipio de Mariana and others v BHP Group* [2021] EWCA Civ 1156.

THE APPLICATION AND THE SUBMISSIONS

The Application

22. On 29 October 2020, the applicant applied to re-open the determination refusing permission to appeal on ground 1 of the grounds of appeal, namely that the Upper Tribunal wrongly held that the respondent did not act unfairly by failing to inform the applicant of the suspension of Fisher Ash Ltd.'s sponsor's licence.

23. The ground for seeking to re-open the decision is that the decision of the Supreme Court in *Pathan* which reversed the decision of the Court of Appeal in that case provides a proper basis for re-opening the appeal.

24. On 6 July 2021, Dingemans LJ ordered that the application be considered at an oral hearing before a two-judge court.

The Submissions

25. Mr Biggs for the applicant submitted that the Supreme Court in *Pathan* had held that it was procedurally unfair for the respondent to revoke a sponsor's licence without notifying an applicant whose application for leave to remain was dependent on a certificate of sponsorship issued by that sponsor. Mr Biggs accepted that the Supreme Court in *Pathan* was dealing only with the question of revocation - not suspension of a sponsor's licence as is the case here. He further accepted that Mr Pathan was a person who had leave to remain in the United Kingdom unlike the applicant who was an overstayer. He recognised that Mr Islam, whose case was heard at the same time as Mr Pathan but who was an overstayer, was not granted permission to appeal to the Supreme Court. Nevertheless, he submitted that it was at least arguable that, in the light of the decision of the Supreme Court in *Pathan*, the decision of McCombe LJ refusing permission to appeal was wrong. Revocation and suspension were legally analogous states of affairs. On one reading, the reasons why procedural fairness was important was not restricted to those who had leave to remain and could extend to overstayers. He accepted that the requirements of procedural fairness depend on the specific facts of the case but submitted that the Upper Tribunal had been substantially influenced by the absence of any relevant authority on suspension and now, in the light of *Pathan*, there was authority in the case of revocation.

26. Further, he submitted that there would be real injustice to the applicant if she were not able to re-open the refusal of permission. In oral submissions, he submitted that, had the applicant been told about the suspension, she could have varied her 6 August 2015 application to make a claim for leave on some other basis such as that refusal of leave would be incompatible with her rights to private and family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") or because she had found a new sponsor. That option was not open to her as she had made the 6 August 2015 application when she was an overstayer but within 14 days of the earlier refusal and she was only permitted under the immigration rules to make one such application. Mr Biggs accepted that in fact the applicant had made an application for leave to remain in December 2020 and had been granted leave, it seems on human rights grounds.

27. In oral submissions, Mr Biggs relied most heavily upon the fact that the applicant would now be able to obtain indefinite leave to remain on the basis of 10 years continuous lawful residence if she were able to re-open the refusal of permission, succeeded on appeal and had the 6 June 2016 decision quashed. The reasons are complex but, in essence, the steps in the argument were as follows. The applicant was permitted to make one application within 14 days of the refusal of the first (13 February 2015) application. The applicant did that on 6 August 2015. If the 6 June 2016 decision refusing that application were quashed, the application would be undetermined. The applicant had been granted discretionary leave to remain in about December 2020. The applicant would, therefore, be able to combine her earlier

periods of leave to remain (up to the end of that leave on 3 or 5 of August 2016), and the later period of discretionary leave, and the fact that she was an overstayer between those periods would be disregarded and those periods would count towards the 10 years continuous lawful residence required for the grant of indefinite leave, relying on the decision of the Court of Appeal in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357 and the observations of Underhill LJ in particular at paragraph 50 of his judgment. .

28. Further, Mr Biggs submitted that the applicant had been ordered to pay substantial costs in the judicial review which, as a single parent, she could not afford to pay. Those costs would remain outstanding and could, conceivably, affect any immigration application that she might bring.

29. In all the circumstances, Mr Biggs submitted that the circumstances were exceptional and it was necessary to allow the re-opening of the refusal of permission to appeal. No other remedy was available.

30. Mr Glenister for the respondent contended that the circumstances were not exceptional and there would be no real injustice in refusing to re-open the application for permission to appeal. The facts and the legal situation in *Pathan* and the present case were different and the decision of the Supreme Court in *Pathan* did not justify re-open the refusal of leave to appeal in the present case. The *Pathan* case concerned revocation not suspension of a sponsor's licence. Further, Mr Pathan was a person with leave to remain in the United Kingdom and notice of revocation would enable him to address the consequences of revocation or address his affairs during the period of leave that he had. The applicant was an overstayer and would not have the ability to address the situation in the way that Mr Pathan had. Rather, the applicant's case was akin to that of Mr Islam as both were overstayers. Mr Islam had not been granted permission to appeal to the Supreme Court. The Court of Appeal had recognised that there was a fundamental difference between a person who has leave to remain and is applying to vary that leave and a situation where a person is an overstayer making a fresh application for leave to remain. In the latter case, the refusal of the application did not change the applicant's status from a lawful resident to an unlawful resident: see *R (Raza) v Secretary of State for the Home Department* [2016] EWCA Civ 36. Further, Mr Glenister submitted that the fact that the applicant would remain liable for the costs of the judicial review claim would not amount to exceptional circumstances justifying re-opening the refusal of leave to appeal, relying on the decision in *London Borough of Richmond-upon Thames and others v Secretary of State for Transport* [2006] EWCA Civ 193.

ANALYSIS AND CONCLUSION

31. The issue is whether the criteria in CPR 52.30 are satisfied and, in particular, whether it is necessary to re-open the refusal of permission to avoid a real injustice and whether the circumstances are exceptional and make it appropriate to do so. It is accepted that there is no other alternative remedy available.

32. First, the Upper Tribunal considered whether the fact that the applicant had not been notified of the suspension of her sponsor's licence was procedurally unfair on the facts of her case. The Upper Tribunal decided that there was no procedural unfairness

in the legal sense. McCombe LJ considered the grounds of appeal (including the ground that failure to notify of the suspension of the sponsor's licence was procedurally unfair) and agreed that Upper Tribunal Judge Canavan was correct to dismiss the appeal for the reasons she gave. McCombe LJ noted that the facts were similar to those in *Islam* and the case of *Pirta* could be distinguished. In those circumstances, McCombe LJ "sufficiently confronted and dealt with the grounds of appeal" to use the language of this Court in *Goring* at paragraph 31. The integrity of the litigation process was not critically undermined. Rather, McCombe LJ reached a conclusion on the facts and the law in relation to the grounds of appeal put forward on behalf of the applicant.

33. Secondly. in truth, what the applicant seeks to do now is to establish that the decision on whether to grant permission would be different in the light of the decision in *Pathan*. However, *Pathan* dealt with the effect of revocation of a sponsor's licence on an application for leave to remain and Mr Pathan was a person who had leave to remain and would have had time (whilst being lawfully in the United Kingdom) to address the consequences of the revocation on his application. The applicant claims that it was procedurally unfair of the respondent not to notify her of the suspension (not revocation) of the sponsor's licence and she was an overstayer with no right to remain in the United Kingdom when she made her application. The legal and factual situation in *Pathan* is different from that in the applicant's case. In addition, the Supreme Court in *Pathan* did not suggest that procedural fairness might require notification of the suspension of a sponsor's licence or, as a minimum, did not deal with that issue. Further, the Supreme Court did not grant permission to appeal to Mr Islam who was an overstayer.

34. In those circumstances, the applicant is not able to argue that the decision of the Supreme Court in *Pathan* is directly applicable to her case. Rather, she is seeking to argue that the decision of McCombe LJ is wrong because suspension is sufficiently analogous to revocation and, on one reading of the decision in *Pathan*, some of the factual consequences for Mr Pathan could be said to apply to her even though she was an overstayer and was in the United Kingdom unlawfully. It is not sufficient for the purposes of CPR 52.30, however, that the earlier decision might have been wrong (or more accurately, might be differently decided in the light of developments in analogous areas). Here, the integrity of the litigation process has not been critically undermined in the present case and the fact that a different decision might, arguably, have been reached in the light of subsequent developments does not satisfy the criteria for re-opening a final decision.

35. Thirdly, there is no real injustice and it is not necessary to re-open the refusal of leave to appeal to avoid an injustice. The applicant relies upon the fact that she would have been able to vary her 6 August 2015 application if she had been notified of the suspension of the sponsor's licence in May 2016 before the application for leave to remain was refused. There is in truth no realistic prospect that she would have been able to obtain a new employer able to act as a sponsor in the month between suspension on 5 May 2016 and the refusal of the application on 6 June 2016. Indeed, her own evidence (and the nature of the claim for judicial review as framed) indicates that she would need more than one month to achieve that. Similarly, there is nothing to indicate that she would, during that period, have been able to make a claim for leave to remain on any other basis. And, on the evidence, when she was able to make

a claim (on 16 December 2020), she did so, it was considered and leave to remain was granted.

36. In oral submissions, Mr Biggs relied most heavily upon the argument that, if the applicant were able to re-open the refusal of permission to appeal and succeeded in having the decision of 6 June 2016 quashed, she could because of subsequent events claim indefinite leave to remain in the way outline above.

37. The purpose of CPR 52.30 is, in exceptional circumstances, to enable the correction of a real injustice arising out of, or consequential upon, the fact that the final determination was wrong. What the applicant is principally seeking to do, however, is to combine what is said to be an arguable error in the original decision, together with subsequent events, to obtain indefinite leave to remain. She seeks to argue that the refusal of permission to appeal was wrong, together with the possible quashing of the decision of 6 June 2016 if any appeal succeeds, and the fact she remained in the United Kingdom, albeit unlawfully, for over four years and was subsequently granted discretionary leave to remain in about 2020 or 2021, will be sufficient now to entitle her to claim indefinite leave to remain. CPR 53.20, however, is intended to deal with real injustice arising out of the error in the initial decision-making process – not to enable the applicant to rely on that error together with a combination of subsequent, unconnected events to obtain the benefit of being able to claim a particular legal status (i.e. indefinite leave to remain) years later. Re-opening the appeal is not necessary to remedy any real injustice arising out the initial decision.

38. Finally, it is correct that the applicant is liable to pay the costs of the judicial review. The award of costs, however, was the consequence of the litigation and the fact that her claim for judicial review was dismissed. The fact that she wishes to argue that there have been developments or changes in the understanding of the law and that she might (or might not) succeed on any appeal, and that might have a bearing on the cost order made, do not amount to exceptional circumstances justifying re-opening the decision to refuse permission. That, in my judgment, is consistent with the decision of this Court in the *Richmond-upon-Thames* case. There, the Court refused permission to re-open a costs order made at the conclusion of a claim for judicial review because there had been subsequent developments in the case law of the European Court of Human Rights which might have rendered the litigation unnecessary and avoided costs being incurred; see paragraphs 58 to 60 of the judgment of the Master of the Rolls with whom the other members of the Court agreed.

39. I accept that the applicant acted promptly in seeking to apply to re-open the decision. That would not, of itself, justify re-opening a final determination unless, in all the circumstances, the criteria in CPR 52.30 were met.

40. In the present case, therefore, none of the factors relied upon by the applicant, considered individually or cumulatively, establishes that the decision of McCombe LJ to refuse permission to appeal was wrong or that there was any critical undermining of the litigation process. Nor do they individually or cumulatively amount to exceptional circumstances making it appropriate to re-open the refusal of permission to appeal. Nor is it necessary to do so to avoid any real injustice. The circumstances are not such as to suggest that the strong interest of achieving finality in litigation is overborn. I would therefore refuse the application to re-open the refusal of permission to appeal.

Lady Justice Carr

41. I agree.