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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) TO REFUSE PERMISSION TO APPEAL ON 23 FEBRUARY 2017

KEEGAN J

[1] This is an application for leave to apply for judicial review of a decision made by the Upper Tribunal ("UT") to refuse permission to appeal to itself an immigration decision. The case has been anonymised with the consent of all parties as it involves a child. Mr Peters BL appeared for the applicant, Ms McMahon BL for the respondent. I am grateful to both counsel for their oral and written submissions.

Background

[2] The facts of this case are set out in the applicant's affidavit which I summarise as follows. She is a Nigerian national, 48 years of age. The applicant makes the case that she was trafficked from Nigeria to Italy in 2005. Subsequently she escaped from her captors and travelled to the Republic of Ireland in 2006. On 23 March 2006 the applicant claimed asylum in the Republic of Ireland. On 8 August 2006 the applicant gave birth to her son. The applicant states that she is not in a relationship with her son's father and that she does not know where he is or what he does. The applicant and her son relocated to Northern Ireland on 20 March 2013. The applicant claimed that she left the Republic of Ireland due to sub-standard conditions there. The applicant claimed asylum in Northern Ireland on 13 May 2013.

[3] The Secretary of State for the Home Department declined the asylum application and decided that the applicant should be returned to the Republic of Ireland pursuant to the Dublin II Regulation to have her claims dealt with there on safe third country grounds. That decision was appealed and First Tier Tribunal ("FtT") Judge Farrelly allowed the appeal on the basis of best interests of the child

applying section 55 of the Borders, Immigration and Citizenship Act 2009 ("section 55") and on the basis of a decision of Stephens J in *ALJ & Ors* [2013] NIQB 88.

[4] Following this decision the Home Office proceeded to consider the applicant's asylum claim. The chronology in relation to this is as follows:

13 August 2015	Asylum claim rejected.
11 October 2016	First Tier Tribunal appeal heard (Immigration Judge Grimes).
2 November 2016	First Tier Tribunal dismissed appeal.
21 November 2016	Application to First Tier Tribunal to appeal to the UT refused (Immigration Judge Easterman).
23 February 2017	Application to the UT for permission to appeal to itself refused (Immigration Judge Canavan).
23 May 2017	Judicial review lodged in relation to the decision of Immigration Judge Canavan.

[5] It is the final decision of the UT delivered by Judge Canavan that is the subject of this judicial review. That decision is an excluded decision and so it is not susceptible to appeal.

[6] The Order 53 statement at paragraph 15 sets out the three specific grounds for the judicial review as follows:

(i) Failure on the part of the UT to have regard to the relevant statutory law (section 55 of the Borders, Citizenship and Immigration Act 2009) and case law relating to the best interests of the child.

(ii) Failure to have due regard to the Article 8 ECHR rights of the applicant's child.

(iii) Failure to reasonably exercise discretion in favour of the applicant and her child.

The Previous Decisions

[7] It is clear from the above that the applicant's case has been considered at a number of levels and in substance by a number of decision-makers. In particular the first decision of the Home Office of 13 August 2015 is a substantial decision dealing with all of the heads of claim. That determination was appealed and a full oral hearing took place before the FtT Judge Grimes. I now turn to that decision.

[8] At the hearing the applicant was represented by Mr Peters BL. The judge issued a comprehensive written judgment which includes the following constituent elements. The judge begins her ruling by setting out the details of the appellant and the issues under appeal. In the second section of the ruling the judge refers to the fact that she heard oral evidence from the appellant and from her son in English. She states that although no witness statement had been submitted from the child she allowed Mr Peters to call him as a witness. The judge then sets out the law in relation to the only remaining ground which was the subject of the appeal namely the Article 8 ground. The judge describes the background and then she sets out her findings. Under the heading 'Immigration Rules' the judge refers to the fact that Mr Peters conceded that the applicant did not meet the requirements of the Immigration Rules in relation to private or family life. She refers to the fact that the appellant and her child could not meet the requirements of Appendix FM as they had only been in the UK since April 2013 a period of just over 3 years at that stage. The judge refers to the relevant provision being paragraph 276ADE (1)(vi) but she states that "on the basis of the evidence before me I am not satisfied that there would be very significant obstacles to her reintegration in Nigeria". The judge accepts that the child is under 18 but has not lived in the UK for 7 years and therefore cannot meet the requirements of the discretionary provision.

[9] The judge then refers to Article 8 of the ECHR and in the next section from paragraphs 13-17 she refers to the child's best interests. The judge makes a *Razgar* assessment in relation to proportionality. The judge refers to the interests of the child and the public interest in immigration control. At paragraph 21 the judge concludes as follows:

> "Weighing all of these factors I am satisfied that the decision to remove the appellant and her child is proportionate to the respondent's legitimate aim of the maintenance of an effective system of immigration control for the prevention of disorder or crime or to secure the economic well-being of the country."

[10] The applicant then sought permission to appeal to the UT and this application was determined by FtT Judge Easterman on the papers. In his decision this judge sets out the nature of the appeal point which he describes as reliance on a "rigid legal formula which can be summarised as his mother previously earned a living in Nigeria will be able to do so again; the UK and Republic of Ireland are different jurisdictions; the child has not spent 7 years in this jurisdiction". Further reference is made to the opinion that this is a "unique case worthy of further analysis/guidance at the UT level".

[11] The FtT judge decided as follows (sic):

> "The judge of the First Tier Tribunal established with the applicant's representative that the asylum element of the claim was abandoned. She then established that it was agreed that the applicant could not meet paragraph 276ADE. She then concluded there were no special reasons, the going outside the rules to look at Article 8, but made careful findings about the position under Article 8 if she was wrong about that. She directed herself in the best interests of the child, but concluded as he had only been in the UK for 3½ years, even while bearing in mind his best interests, they were outweighed by the considerations in section 117B of the 2002 Act. Thus the claim was rejected both within and without the rules. In my view the decision discloses no arguable error of law.'"

[12] This refusal was appealed to the UT. Having extended time in the applicant's favour the UT judge ruled as follows:

> "The grounds of appeal take the form of submissions on the substantive aspect of the claim but fail to particularise any arguable errors in the First Tier Tribunal decision. The judge made a separate assessment of the best interests of the child and considered relevant matters in a way that was consistent with the guidance given in cases such as *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) & Ors v SSHD* [2014] EWCA Civ 874.
>
> The appellant did not meet the requirements of the Immigration Rules. The only factor that was said to be compelling for the purpose of an assessment outside the rules was the fact that the child had lived in the Republic of Ireland for a period of 7 years before travelling to Northern Ireland. The fact that Northern Ireland forms part of the same geographical island as the Republic of Ireland is immaterial for the purpose of assessing UK immigration law. The judge was unarguably entitled to take into account the fact that time spent in a different jurisdiction did not give rise to strong ties to the UK, where the child had only lived for a period of just over 3 years. It is understandable that the appellant disagrees with the decision but it is not arguable that the judge's findings were outside a range of reasonable responses to the evidence."

Permission to appeal was therefore refused.

Submissions of the parties

[13] Mr Peters provided a skeleton argument for the hearing and I allowed him to submit additional submissions after the leave hearing on behalf of the applicant. In summary the arguments made by Mr Peters were as follows. Mr Peters accepted that the decision in the case of *R (Cart) v Upper Tribunal; R (MR Pakistan) (FC) v The Upper Tribunal (Immigration and Asylum Chamber)* [2011] UKSC 28 guided the Court in this area. He accepted that the circumstances in which decisions of the UT are open to challenge in judicial review proceedings were dealt with by the Supreme Court in this case and in the related case of *EBA v Advocate General for Scotland* [2011] UKSC 29. He accepted that the test was whether the intended challenge raises an important point of principle or practice or whether there is some other "compelling reason" to hear the claim.

[14] In this case the argument was made that the child of the applicant is now 11. It was submitted that although he was born in the Republic of Ireland he has no concept of the border with the United Kingdom. Mr Peters argued that the child's identity which started developing south of the border continued to develop north of the border. He submitted that the child has never known his father. He submitted that the child has never lived in Nigeria. Mr Peters stressed the fact that the child speaks with a distinct Northern Irish accent. Mr Peters also referred to the school reports which describe the child's progress since he came to Northern Ireland.

[15] Mr Peters argued that the authorities in the Republic of Ireland failed this child given the delay in determining the asylum claim. He referred to a report by a former judge of the Irish High Court Mr Justice McMahon which was published in 2015. Mr Peters accepted that the Irish authorities have not yet formally implemented the recommendations of the report but he submitted that there was informal application of it in terms of those who had accrued 5 years residence being granted discretionary leave to remain. Mr Peters submitted that the circumstances of this child are "exceptional, compelling and compassionate" and that these justify granting leave to remain outside the rules.

[16] Mr Peters submitted that this case could come within one of the categories contemplated in the *Cart* case because there had been a wholesale collapse of fair procedure regarding the mother's asylum claim in the Republic of Ireland and also the reasons in relation to this child were so compelling. Mr Peters also submitted that whilst the judge of the FtT had heard from the child that in her judgment she does not set out in detail how she defines the best interests of the child prior to conducting the proportionality exercise. In his additional submissions Mr Peters referred to the case of *EA & Ors v SSHD* [2011] UKUT 00315 (IAC). In particular he relied on paragraphs 39, 40 and 41 of that decision. He submitted that it is accepted that the appellants in *EA* failed, however their children were 4 and 5 years of age and the court concluded that "during the period of residence from birth to the age of

about 4, the child will be primarily focussed on self and the caring parents or guardian". Mr Peters argued this was in stark contrast to the case at hand which involves an 11 year old. Mr Peters also invited the court to consider the case of *MA (Pakistan)* [2016] EWCA Civ 705 which sets out the current law in relation to dealing with the best interests of the child in an immigration context.

[17] Ms McMahon argued that this case did not meet the test for leave as set down by the *Cart* decision. She referred to numerous cases subsequent to the *Cart* some of which are in this jurisdiction namely *A & Ors (Application)* [2012] NIQB 86, *DJ1 and DJ2's Application* [2013] NIQB 20, *Wu's (Jun) Application* [2016] NIQB 34, *Osmond's Application* [2017] NIQB 52. In essence Ms McMahon referred to the restrained approach to judicial review in this area. At paragraph 13 of her skeleton argument Ms McMahon summarised the law in an accessible format as follows:

> "In summary the legal principles are as follows –
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> (a) Recognition should be given to the enhanced tribunal structure, which fulfils the legislative intention of providing a self-contained and unified appellate immigration process.
>
> (b) This structure deserves a more restrained approached to judicial review whilst ensuring that important errors can be corrected.
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> (c) There cannot be a judicial review of the refusal of leave unless –
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> (i) the proposed judicial review raises some important point of principle or practice; the court must distinguish between establishing a principle or practice and applying a principle or practice correctly. Only the former would meet the test under *Cart*; or
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> (ii) there is some other compelling reason for the court to hear the application i.e. a case where the individual has suffered a wholly exceptional collapse of the procedure or a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences."

[18] Mr Peters took no issue with this analysis. In summary Ms McMahon argued that the applicant has pursued all available avenues within the immigration appeal system. She submitted that at each stage the matters concerning her child have been fully considered. As such Ms McMahon contended that this case did not raise an

important point of principle or practice or "compelling reasons" which would cause the judicial review court to grant leave. She submitted that there was no arguable case made out on the facts of this case.

Consideration

[19] The law flowing from the *Cart* case is now well established. It is clear that judicial review is subject to restraint in this area. This stems from recognition that the tribunal system is specialist and structured. There is a residual jurisdiction to allow appeals to progress in cases where the law has been misapplied or where some clear error has been made out which "cries out" for correction. The threshold is high. It seems clear that cases involving a refusal of permission to appeal will rarely succeed before the judicial review court. Mere disagreement with a decision such as where a judge conducts a proportionality exercise will not suffice. Something more is required.

[20] In *Wu's Application* Maguire J stated as follows:

> "[19] These criteria are now well established. They derive from the decision of the Supreme Court in the case of *R (Cart) v Upper Tribunal (Secretary of State for Justice) (and other interested parties)* [2011] UKSC 28. They are tailor-made to meet cases such as this where there has been a decision by the decision-making authority which has already been successful and of an unsuccessful appeal to the Lower Tier Tribunal and where leave to appeal to the Upper Tier Tribunal has been refused by both the Lower and Upper Tiers. In such cases, according to the decision in *Cart* what are described as second tier appeals criteria apply. What this means when translated to the issue now before the court is that there cannot be a judicial review of the refusal of leave unless (a) the proposed judicial review raises some important point of principle or practice; or (b) there is some other compelling reason for the court to hear the judicial review."
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> "[22] These words require little expansion or elucidation. Such an important point, it was said in Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60, must be one which is 'not yet established'. It will, moreover, not be one confined to the individual's personal interests, facts and circumstances: see the sister decision of the Supreme Court in Eba [2011] UKSC 29 at paragraphs [46]-[49]. In Eba, Lord Hope, referring to this category of case, said that underlying it `is the idea that the issue would require

> to be one of general importance, not confined to the petitioner's own facts and circumstances' (Eba paragraph [48])."

[21] At the leave stage of a judicial review challenge of this nature the question for the court is whether the UT's refusal of permission to appeal is arguably unsustainable in law. This must be by reason of its failure to acknowledge an important point of principle or practice or some other "compelling reason" which warrants the grant of permission to appeal.

[22] What is the important principle or practice at issue in this case? Given that the asylum claim was abandoned and it is accepted that this case cannot succeed under Immigration Rules, the issue raised by the applicant is an Article 8 point and how the best interests of the child was assessed. The law in this area is well-trodden and clear, reflecting the United Nations Convention on the Rights of the Child and the importance attached to the best interests of the child as a primary consideration. The law is set out in the cases of *Zoumbas* and *ZH (Tanzania)*. It is preferable that the best interests of the child are identified firstly and then balanced against other factors. In this case the FtT heard directly from the child. I asked Mr Peters whether or not that was a regular occurrence and he said it was not but it seems to me that the FtT took a proper approach to this issue, one that reflects the best interests of the child and one that clearly highlights the tribunal's understanding and appreciation of this primary consideration.

[23] The FtT then went on to refer to the other principles and it conducted an appropriate proportionality exercise. I accept the point that perhaps the judge did not expand overly in the reasoning but I must be wary not to be too critical of that. Reading the decision as a whole the consideration deals with all of the relevant issues and I cannot see that it is challengeable in relation to an area of policy or practice.

[24] I agree with the UT who dealt with the leave application that no arguable error of law satisfying the requirements of the first part of the *Cart* test has been established.

[25] What is the "other compelling reason" in this case? Numerous strands to this argument were developed at the hearing. Firstly, it was argued that the applicant had been failed by the immigration system in the Republic of Ireland and had lived in an intolerable situation there. Secondly, reliance was placed upon the school reports. Thirdly, Mr Peters argued that this child has never lived in Nigeria at all and he has no connection with this country. Mr Peters accepted that English would be spoken in Nigeria and so he was not grounding his case strongly on the issue of language. But he said that this child would suffer serious consequences if he had to return to Nigeria. Mr Peters accepted that the only family this child has is his mother given that he does not know his father and that this is not a case where there

would be any separation from her. But essentially Mr Peters said that cumulatively this all amounted to drastic consequences.

[26] In *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA 988 Carnwath LJ looked at the principles that emerged from *Cart* and *Eba*. In particular at paragraph 35 he referred to the issue of "compelling reasons" and that aspect of the test where he stated that:

> "In other words, compelling means legally compelling, rather than compelling perhaps from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments."

[27] In *JD (Congo)* [2012] EWCA Civ 327 the Court of Appeal considered the second tier appeals test and Sullivan LJ at paragraph 23 said that:

> "While the compelling reasons test is a stringent one, it is sufficiently flexible to take account of the particular circumstances of the case."

Following from this it appears that in the absence of a strongly arguable error of law on the part of the UT, extreme consequences for the individual could not in themselves amount to a freestanding compelling reason, however they are a relevant factor to be taken into consideration. When looking at this jurisprudence it is clear that the phrase "compelling reasons" must be read in that context.

[28] As I have said this case comes down to a human rights claim outside the rules applying section 55. The burden is upon the applicant. There are some inconsistencies in the history given by the applicant in this case. However, in terms of the Article 8 claim there was evidence about the effects of moving, the child's evidence and the school reports. That is what the judge had to assess in establishing the best interests of the child before weighing that in the balance against immigration control.

[29] Mr Peters relied on the decision of *MA (Pakistan) & Ors* v *The Upper Tribunal Immigration and Asylum Chamber & Ors* [2016] EWCA Civ 705. Those cases involved overstaying after permission for a temporary stay and so are distinguishable. However, there is some symmetry in terms of how children's interests are assessed albeit within the 7 years discretionary rule and the associated test of reasonableness. Mr Peters accepted that the applicant in this case cannot fall within the 7 year discretionary rule but he uses it as an analogy to say that a child of 11 should be treated in a particular way. In particular in the *MA* case younger children were seen to be able to adapt to life elsewhere. The case is highly fact sensitive in relation to the children involved e.g. their social life, their educational stage and the consequences of removal. In one case the court said that but for a child's autism,

there would be a strong case for saying that it would not be unreasonable to expect him to leave and live with his parents and younger brother in Pakistan.

[30] This case falls outside the Immigration Rules. There can be no question that the time spent in the Republic of Ireland should be added in because there are two different jurisdictions involved. I also cannot accept the argument that there has been a wholesale procedural failure as described by *Cart.* That must apply to a failure within the tribunal system in the United Kingdom. I note that in the decision of Walker J in *G &H v UT & SSHD* [2016] EWHC 239 significant failures were apparent which resulted in a successful challenge to a permission refusal. This is not such a case.

[31] The position of the child is the main factor in this case. Mr Peters relied on *EA & Others v SSHD* [2011] UKUK 00315 (IAC) in this regard. That case refers to the fact that the weight to be given to the child's established private life will depend on the facts of each case. The age of the child is not determinative in itself but it is a factor to be weighed in the balance. Mr Peters made the point that an analogy can be drawn with the 7 year discretionary rule because that must reflect the fact that the longer a child has stayed the more roots are laid down. However, each case will depend on its own facts and the evidence available to the court. In this case the judge took into account the applicant's position. She also considered the child's position having heard directly from the child. She considered the fact that the family would not be separated and the circumstances in Nigeria. She considered the issue of disruption to the child with particular reference to the school reports. All of this evidence was placed in the balance against immigration policy. This is an intensely fact sensitive exercise.

[32] Taking into account all of the above, it is my view that the facts of this case fall well short of establishing "compelling reasons" why a permission to appeal should be granted. In my view it is not arguable that this case meets the second part of the *Cart* criteria given the elevated nature of the "other compelling reason" standard.

Conclusion

[33] Accordingly, I have decided that an arguable case has not been established and so the application must be dismissed.