IN THE UPPER TRIBUNAL

R (on the application of PE) v Secretary of State for the Home Department IJR [2015] UKUT 00139(IAC)

Field House
London

11 February 2015

BEFORE

UPPER TRIBUNAL JUDGE O'CONNOR

Between

P E

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr R Khubber, Counsel, instructed by Turpin Miller Solicitors, appeared on behalf of the Applicant.

Mr H Flanagan, instructed by the Treasury Solicitor, appeared on behalf of the Respondent.

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APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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Delivered orally on 11 February 2015

JUDGE O'CONNOR:

1. This is an application for judicial review brought with the permission of Upper Tribunal Judge Kopieczek on 10 December 2014.

2. In its original form, as lodged on 27 March 2014, this application sought to bring challenge to the Respondent's "failure to reconsider [the Respondent's] decision to impose a no recourse [to public funds] condition" on the leave granted to the Applicant.

3. Putting this claim in context, on the 27 February 2013 the Respondent made a decision to grant the Applicant 30 months' leave to remain pursuant to paragraph D-LTRPT 1.2 of the Immigration Rules, ostensible because it had been established that she had a parental relationship with "children who are under the age of 18, in the United Kingdom and are British Citizens". This decision puts the Applicant on a 10-year route to settlement. On the same occasion the Respondent imposed a condition on the Applicant's leave prohibiting her recourse to public funds ("NRPF condition).

4. A request was made for removal of the NRPF condition on 21 May 2013 and this was followed by further request, after interposing correspondence, on 5 February 2014 - this latter request being made specifically with reference to a policy maintained by the Respondent headed: "Request for a change of conditions of leave granted on the basis of family or private life" – such policy having been introduced on 20 January 2014.

5. This request was refused by the Respondent in a decision of 17 April 2014, i.e. after the date on which this application for judicial review was lodged. In light of this change in the underlying circumstances the Applicant sought to amend her grounds of judicial review.

6. Broadly speaking, whilst the application in its original form brought challenge to the Respondent's refusal to reconsider the decision to impose a NRPF condition on the Applicant's leave, the amended grounds brought challenge both to the original decision imposing the no recourse to public funds condition of 27 February 2013 and the subsequent decision of 17 April 2014 refusing to remove that condition.

7. When granting permission to bring these proceedings Upper Tribunal Judge Kopieczek said as follows:

> "Further taking into account the amended grounds, in respect of which permission to rely on those amended grounds is granted, it is arguable that on the facts of this case the refusal to remove the condition prohibiting recourse to public funds is unlawful

> in failing to take into account material evidence. Notwithstanding the decision in NS [2014] EWHC 1971, it is also arguable that that the respondent's policy unlawfully fails to take into account best interests considerations pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 and unlawfully acts as a fetter on the respondent's discretion. Further, the condition of no recourse to public funds in terms of the applicable policy criteria arguably amounts to a breach of the applicant's Article 8 rights."

8. Subsequent to this grant the applicant's solicitors wrote to the Tribunal observing that the case had also been pursued on Article 14 ECHR grounds and that they assumed that permission had also been granted in relation to such ground. The Tribunal has not responded to this correspondence, but I see no reason to disagree with the assumption identified therein given that the grant of permission did not specifically restrict the terms upon which the application could proceed.

9. Although not a point taken by Mr Flanagan before me, I observe that the challenge to the decision of 23 February 2013 was brought substantially out of time and without, as far as I can see, there ever having been a satisfactory explanation for the delay put forward. In case this matter ends up elsewhere I indicate at this stage that in my view Upper Tribunal Judge Kopieczek must have, by implication, extended time in relation to the bringing of such a challenge when he granted permission to proceed in relation to it.

10. Moving on in the chronology, on 21 January 2015 the Respondent agreed to remove the NRPF condition imposed on the Applicant's leave. It is agreed by the parties that this now leaves a situation whereby there is no live issue directly between them before this Tribunal. There is, however, a difference in view as to how this matter should now proceed.

11. The hearing of this application for judicial review was listed as long ago as 15 December 2014 for a full days hearing on today's date, it having been expedited into this slot as a consequence of the potential child welfare considerations that are in play in this case.

12. On 6 February I received a consent order signed by both parties stating *inter alia* that:

> "The hearing listed for 11 February 2015 be limited to consideration of whether the case should proceed after the agreement to remove the NRPF condition."

13. I refused to sign this consent order because there had already been a full day set aside for the hearing of the application and it seemed to me that to undertake the hearing in two parts, if that ended up being necessary, would cause a

significant waste of Tribunal time and public money. I sent out a brief response to the parties on 6 February indicating my refusal to sign the consent order. I am told that this response was, for reasons which are wholly unclear, not received by the parties until yesterday, the 10 February.

14. During the hearing I enquired of both parties whether they were in a position to immediately proceed with the hearing of the substantive judicial review should I accept Mr Khubber's submission that it would be appropriate to do so despite there now being no live issues between the parties.

15. Mr Flanagan indicated he was not ready to proceed. Mr Khubber reserved his position on this issue but with the rider that he was doing so only because he had been considerably hampered in his preparation of this matter by the failure of the Respondent to comply with any of the directions of the Tribunal - including her failure to provide Detailed Grounds of Defence or a Skeleton Argument relating to the substantive judicial review application. Although Mr Khubber was 'hampered' in his ability to prepare the case, I should observe that the Applicant also failed to produce a skeleton argument relating to the substance of this judicial review.

16. It is not for the parties to determine how the Tribunal will allocate its time; that is a matter for judges. Given that the parties did not receive any indication from the Tribunal that there had been an agreement to their attempts to restrict the issues for consideration in today's hearing, it must have been palpably clear that they should have prepared for the substantive judicial review proceedings to the best of their ability so that, if necessary, the Tribunal could have proceeded directly to consider the substance of this case, should that have been required.

17. The failure of the parties to properly prepare for the substantive hearing could have had serious consequences requiring this case to be relisted for a further day on a future date, thus not only wasting precious and valuable court time, but also public funds in the form of the Home Office budget and the Legal Aid Agency's budget.

18. I now turn to consider the preliminary issue - as it has turned out to be; that being, given that the issue directly between the parties has now been disposed of by the Respondent having removed the NRPF condition on the Applicant's leave, should the Tribunal nevertheless go on and determine the substantive legal issues raised in the application.

19. My attention has been drawn to a significant number of authorities relevant to such consideration: R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450;

R v BBC ex parte Quinatavelle [1998] 10 (Admin) LR 425; R (Omar) v SSHD [2012] EWHC 3448 (Admin), Nigatu v Secretary of State for the Home Department [2004] EWHC 1806; R (Zoolife etc) v Secretary of State for the Environment [2007] EWHC 2995 (Admin), R (NK) v Secretary of State for the Home Department [2012] EWHC 1896 and R (NK and TM) v SSHD [2010] EWHC 1007 (Admin).

20. I have carefully considered all of these authorities, however, it seems to me that I need only cite briefly from three of them. The first is the decision of the House of Lords in Salem and in particular the opinion of Lord Slynn of Hadley in which he opined at page 457A as follows:

> "[17] The discretion to hear disputes, even in the area of public law, must however, be exercised with caution and appeals which are academic between the parties should not be heard, unless there is a good reason in the public interest for doing so, as for example (but only by way of example) where a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

21. The second decision I cite from is the Zoolife case in which Mr Justice Silber, having himself cited *inter alia* from the speech of Lord Slynn in Salem, said as follows at paragraph 36:

> "... In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are *exceptional* circumstances, such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in Salem that 'A large number of similar cases exist or are anticipated' or at least other similar cases exist or are anticipated, and the second condition is that the decision in the academic case wiill not be fact sensitive. If the courts entertain academic disputes in the type of application now before which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary cost."

22. I finally cite from the decision of Mr Justice Beatson, as he then was, in Omar in which he said in paragraphs 45 and 46:

> "[45] The concern I then expressed, however, remains. Is it right that issues raising important points of principle which are in dispute between the defendant and those whose position in this country is regulated by the defendant and the UK Border Agency under the legislation, the Regulations and the defendant's rules and policies should not be resolved because they are continuously kicked into touch by individual decisions made after proceedings are instituted. It is said in these

proceedings that the decision dated 9 November 2011 granting the claimant discretionary leave had nothing to do with these proceedings and, in the absence of any other indication, I accept that this is so.

[46] If, however, it appears that *ad hoc* decisions are being made to preclude the determination of difficult questions where those advising the Secretary of State consider her position is difficult or because of the undoubted strains and stresses to which the system administered by the Secretary of State through the UK Border Agency is subject, the court may have to think again about the general policy. It cannot be an efficient use of resources to create situations in which individuals are forced, often at public expense, to institute legal proceedings and take up the time of a grossly overworked Administrative Court, only to find at a late stage in the proceedings that the Secretary of State has made a decision which arguably makes the issue moot."

23. In summary, Mr Khubber submits that the substantive judicial review should be heard because:

(i) the case raises important issues of law concerning the legality of the current policy as to when an NRPF condition should be removed;

(ii) resolution of the legal issues in the instant matter will likely assist in the determination of future cases, this being reflected in the amount of cases that are currently pending in the Tribunal or High Court or which are likely to be subject to future litigation;

(iii) the case involves the approach of the Secretary of State to the removal of NRPF conditions and its interface with the application of the ECHR and is not limited to a purely fact sensitive evaluation;

(iv) the case concerns issues relating to breaches of the ECHR bought about by the maintenance of the NRPF condition;

(v) the facts of this case are not particularly difficult and are suited for resolution of the underlying legal issues; and finally

(vi) the Secretary of State is currently undertaking a review of her policies following the earlier decision of the Upper Tribunal Judge O'Connor in the case of Fakih [2014] UKUT 513 and the current Home Office review would likely be assisted by the resolution of the extant issues in this case.

24. Having carefully considered the respective submissions and taken fully into account the fact that in this case the underlying issues involve matters of welfare and human rights, and having looked at the circumstances of this case and the polices as a whole, I conclude that it is not appropriate to proceed to hear this application for judicial review substantively. I come to this conclusion for the reasons which follow.

25. First, it is important to identify exactly what the general issues for consideration in this application are said to be. Mr Khubber identified the following as being the subject of challenge:

(i) The lawfulness of the 'no recourse public funds' policy relevant at the time the decision was made by the Respondent on 27 February 2013, that being the date the NRPF condition was first imposed in this case.

(ii) The lawfulness of the January 2014 policy headed "Request for a change of conditions of leave granted on the basis of family and private life".

(iii) The lawfulness of the 'no recourse to public funds' policy in place as of the date of the refusal to remove the NRPF condition in this case i.e. 17 April 2014.

26. The grounds of challenge in relation to each of the aforementioned policies are, it is said, founded on the following, which are pleaded in significantly more detail in the grounds of application:

(i) The Respondent has failed to comply with her obligations under Section 55 of the 2009 Act,

(ii) The policies breach Article 8 ECHR;

(iii) The policies are in breach Article 14 of the ECHR, when read with Article 8.

27. Turning to the decision of 27 February 2013 to impose the NRPF condition on the Applicant's leave, the relevant policy in place at that time did not include within it the possibility of the Respondent allowing recourse to public funds where there are "particularly compelling reasons relating to the welfare of the child of a parent in receipt of a very low income".

28. This material change to the exceptions in the NRPF policy was not added until 5 March 2013 and, consequently, any consideration of the lawfulness of the policy in place as of

27 February 2013 is highly unlikely to be of any real assistance to a 'significant number of cases', if indeed any cases at all. In such circumstances it would not be appropriate, in my view, to consider the lawfulness of such a policy in the context of a case in which there are no live issues between the parties.

29. As to the January 2014 policy, I can find no evidence before me that demonstrates that any, let alone a large number of, similar cases exist bringing challenge to this policy.

30. Reference is made in paragraph 3.14 of the Applicant's "Amended Grounds of Challenge" to three cases which were due to be heard by the Administrative Court substantively but which were eventually compromised upon the Respondent removing the NRPF conditions on the Applicants' leave. It appears from the information I have before me that each of these cases related to a challenge to the imposition of the NPRF condition and not to a refusal by the Respondent to remove such condition upon a request being made pursuant to the January 2014 policy. Nevertheless, I have taken the existence of these three cases, and the circumstances in which it is said that the cases were compromised, into account when coming to my conclusions.

31. I have also been provided with a statement authored by Miss Kathleen Cosgrove dated 5 February 201; Miss Cosgrove being a solicitor with particular expertise and practical experience in cases involving no recourse to public funds decisions. It is said by Ms Cosgrove that there are seven, possibly eight, cases in which she has been forced to issue judicial review proceedings, two of those, it appears, being included within the three cases referred to in this Applicant's Amended Grounds of Application.

32. From the terms of Miss Cosgrove's statement it can be seen that each of the aforementioned cases has been lodged as a consequence of the delay in the Respondent reconsidering the decision to impose a NRPF condition. There is nothing in the witness statement which suggests to me that the legality of the January 2014 policy was itself under challenge in those cases; indeed, having considered the dates on which the Respondent removed the NRPF conditions it appears that in at least some of these cases the Respondent has applied the January 2014 policy to the respective Applicant's benefit and removed the NRPF condition.

33. In paragraph three of her statement Miss Cosgrove also refers to their being 15 ongoing cases in which the Secretary of State has failed to consider whether to remove an NRPF condition placed on an Applicant's leave. In four of them a Pre-Action Protocol letter has been issued relating to the

Respondent's failure to make such a decision. Again, it is not said that any of these fifteen cases involve issue relating to the lawfulness of the 2014 policy but rather they involve the intensely fact sensitive circumstances of the rationality of the delay in applying the terms of the policy in any given case.

34. There are other difficulties in relying upon Miss Cosgrove's statement as an indicator that there are comparator cases involving the same issues that are said to be pertinent to the instant matter. In the instant case the children are British citizens; however, Ms Cosgroves' statement does not identify how many of the cases referred to therein, either in respect of those in which applications have been lodged with the Court or otherwise, involve British citizen children. The considerations in cases involving British citizen children will, in my view, inevitably be different to those involving non-British citizen children.

35. As to the policy applicable on 17 April 2014, as far as I can ascertain this must have been the policy introduced on 8 October 2013; the policy not changing after that date until some time in July 2014.

36. I have already found in Fakih that the October 2013 policy is unlawful for a number of reasons, including as a consequence of the failure of the Respondent to comply with her public equality duties. It seems to me as though there is little purpose in investigating whether this same policy is unlawful for other reasons, particularly in a case in which nothing turns on that point.

37. I have taken fully into account the fact that the Secretary of State is currently undertaking a review of the relevant policies as a consequence of my decision in Fakih and that that review will be, it is said in a public statement on the Home Office website of today's date, completed by the spring of 2015. This in my conclusion is a matter which I should view as being entirely neutral to my consideration of whether this case should proceed to substantive hearing. It is not a matter, as Mr Khubber submits, that weighs in favour of this application proceeding further. The judiciary are not advisors to the State in its formulation of policy, but rather the Courts act upon application to ensure the legality of such policies, and their operation, once they have been formulated.

38. There are also further reasons why, in my conclusion, the challenges to the October 2013 policy should not proceed to be determined substantively, given that there are no live issues between the parties.

39. First, it has not been demonstrated that there are a large number, or indeed any, similar cases that would benefit from a decision on the issues raised in this case, or that the Secretary of State has acted in a manner such as to try and prevent the issues raised herein from being litigated. Second, in my view the decision of Mr Justice Kenneth Parker in NS [2014] EWHC 1971 (Admin) is a decision which deals with and disposes of the Mr Khubber's submissions on the Section 55 issue. Although Mr Khubber made submissions as to why this was not the case, what he was asserting in reality was that Mr Justice Kenneth Parker's consideration of this issue was either wrong or otherwise inadequate. For my part I do not accept that to be the case, my preliminary view of the ground relying on section 55 being that it should be rejected as a consequence.

40. As to the grounds relating to Article 8 and Article 14 ECHR, I agree with Mr Flanagan's submission that the challenges made in this regard are intensely fact sensitive. I also observe that in the skeleton argument drawn by Mr Khubber for the permission hearing, at least on my reading of it, the Article 14 submissions were rooted firmly in the facts of this particular Applicant's case.

41. For these reasons I conclude that the requirements identified in the cases I have earlier cited have not been met in this case, and I conclude that it is not appropriate to proceed to hear the Judicial Review substantively given that there are no live issues between the parties.

42. Finally, I once again observe that this matter was listed today for the hearing of the substantive judicial review application. However, it would have impossible to proceed on today's date because the parties were simply not ready to do so. It is clear from a number of the cases cited to me that there is a growing practice in cases where the issues between the parties have become academic for the Courts to first determine whether there should be a substantive hearing of the issues and, even where it concludes there should not, to nevertheless consider such issues on a *obiter* basis in case the court is found to be wrong on the issue of whether the case should proceed substantively. Unfortunately, that is not a position I am able to follow given that the parties are not ready to proceed today. In my view it would not be a good use of judicial time or public money for this case to come back for such issues to be determined on a purely *obiter* basis.

43. Whilst this is not a matter I paid regard to when deciding whether I should proceed to determine the application substantively as a matter of law, I nevertheless observe that one of the overriding objectives set down by the rule 2 of the

Tribunal Procedure (Upper Tribunal) Rules 2008 is an obligation to avoid delay so far as is compatible with the proper consideration of the issues in play.

44. As a consequence of all that I have said above, and in particular the fact that there are no longer any live issues between the parties because the Applicant has obtained the remedy she sought, i.e. the removal of the NRPF condition on her leave to remain, I conclude, as is inevitable, that I should refuse to exercise my discretion to grant the Applicant the relief she seeks because to do so would be purely academic.

45. I therefore dismiss this application for judicial review ~~~~*0*~~~~