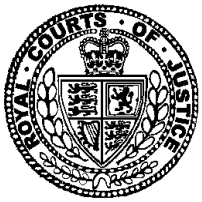

Neutral Citation Number: [2019] EWCA Civ 1014

Case No: C2/2016/0311

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE COKER
JR/386/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE LEGGATT
and
LORD JUSTICE COULSON

- -

Between:

The Queen (on the application of Harkirtan Singh)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Zane Malik (instructed by **Aws Solicitors**) for the **Appellant**
Mathew Gullick (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 11 June 2019

- -

Approved Judgment

Lord Justice Leggatt:

1. Unfortunately it sometimes happens that a claim entirely lacking in substantive merit gets into a procedural tangle which gives it an undeserved lease of life. The present case is an extreme example. As a result of a misunderstanding between counsel instructed previously in these proceedings, a hearing in the Upper Tribunal (Immigration and Asylum Chamber) on 11 September 2015 of an application for permission to bring judicial review proceedings went ahead, and permission was granted, in the absence of the counsel for the respondent. When the error was discovered, the Upper Tribunal judge set aside her decision and re-listed the application to enable the respondent to be heard. Since then, the proceedings – which involve an unmeritorious challenge to a decision refusing the appellant leave to remain in the UK – have been bogged down in procedural issues, preventing the appellant's removal from the UK for the best part of four years.

Background and procedural history

2. The appellant is an Indian national who came to the UK with entry clearance as a student in September 2005, when he was aged 21. His leave to remain expired on 1 October 2009 but he stayed in this country and has been in the UK unlawfully ever since.

3. In February 2012 the appellant was discovered working illegally in Northampton and was issued with notice of a decision to remove him from the UK. He claimed, wrongly, that his removal would violate his right to respect for his family and private life protected by article 8 of the European Convention on Human Rights. He was afforded an appeal on that issue to the First-tier Tribunal (Immigration and Asylum Chamber). That appeal was dismissed and on 2 July 2012 his appeal rights became exhausted. The appellant thereafter made two applications to the Secretary of State for leave to remain, again on the grounds of his family and private life. Both were refused. The second application was refused on 13 October 2014. The appellant then issued proceedings in the Upper Tribunal seeking judicial review of that decision.

4. On 20 July 2015, following consideration of the papers, Upper Tribunal Judge Gill refused the appellant permission to apply for judicial review. The appellant exercised his right under rule 30 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Upper Tribunal Rules") to have that decision reconsidered at an oral hearing. The hearing was listed for 11 September 2015.

5. It was on that day that the misunderstanding I have mentioned occurred and the hearing proceeded in the absence of counsel for the respondent after the judge had mistakenly been given the impression that the respondent did not intend to appear. By the time the error was discovered, counsel who was then instructed for the appellant had left the building. But on an application made without notice by counsel for the respondent, Upper Tribunal Judge Coker made an order to set aside her decision to grant permission and for the matter to be re-listed for a fresh hearing.

6. Before the re-hearing took place, the appellant issued a claim in the High Court for judicial review of the decision to set aside the grant of permission. The principal ground advanced was that, once permission to bring judicial review proceedings had been given

orally on 11 September 2015, the Upper Tribunal had no power to set aside the grant of permission. On 8 October 2015 this claim was considered on the papers by Edis J. He refused permission to proceed with the claim and certified it as totally without merit.

7. The re-hearing of the matter in the Upper Tribunal ultimately took place on 18 December 2015. This time, after hearing from both counsel, Upper Tribunal Judge Coker refused the appellant's application for permission to bring judicial review proceedings to challenge the respondent's refusal to grant him leave to remain in the UK.

8. The appellant did not seek to appeal from the order of Edis J. But he did apply for permission to appeal to the Court of Appeal from the decision of the Upper Tribunal made on 18 December 2015. That application was considered on the papers on 26 April 2017 by Irwin LJ, who refused it as being totally without merit.

9. Subsequently, however, Irwin LJ had a change of heart. On 26 June 2017 he reviewed his earlier decision. He noted that no skeleton argument had previously been supplied but that he had now been given a skeleton argument filed on behalf of the appellant. He considered that it might be arguable that the Upper Tribunal had no power to set aside the initial grant of permission to bring judicial review proceedings. On that basis he granted permission to appeal to the Court of Appeal.

Procedural objections

10. It does not appear that, in reviewing his earlier decision, the single Lord Justice had in mind or applied the criteria set out in CPR 52.30 which limit the jurisdiction of the Court of Appeal to re-open a final determination of an appeal (including for this purpose a final determination of an application for permission to appeal). Pursuant to that rule, such a determination will not be re-opened unless (a) it is necessary to do so in order to avoid real injustice, (b) the circumstances are exceptional and make it appropriate to re-open the appeal, and (c) there is no alternative effective remedy. There is no suggestion in the reasons given by Irwin LJ for re-opening his earlier determination and giving permission to appeal that these criteria were satisfied.

11. Another major procedural difficulty facing the appellant is the absence of any application for permission to appeal against the order of Edis J. The appellant wishes to argue that the decision made on 18 December 2015 refusing permission to bring judicial review proceedings was a decision which the Upper Tribunal had no power to make when it had already granted such permission on 11 September 2015. However, the grant of permission made on 11 September 2015 was set aside. Unless and until the decision which set aside the grant of permission is quashed or declared invalid, it therefore cannot be said that there was anything to prevent the Upper Tribunal from hearing and deciding the application for permission on 18 December 2015. Indeed, it was bound to do so. Furthermore, Edis J has ruled that the decision which set aside the grant of permission is not open to challenge. It follows that the attempt to argue on this appeal that the Upper Tribunal did not have power to decide the matter on 18 December 2015 must fail unless and until the order of Edis J is set aside – which could only be achieved by a successful appeal against that order.

12. Mr Zane Malik, who now represents the appellant, invites us to treat this as a technical difficulty which could, if the appellant's case that the Upper Tribunal acted outside its

powers is well founded, be overcome by allowing the appellant to file a notice of appeal against the order of Edis J out of time. Mr Malik points out that Irwin LJ, when giving permission to appeal, appears to have regarded this appeal as involving a challenge to the decision of Edis J, and urges us to approach this appeal in that way.

13. I see no good reason to exercise any discretionary powers in the appellant's favour. But there are more than enough procedural complications in this case and, as this appeal has now reached a full hearing, I think it simplest and most useful for future clarity about the extent of the Upper Tribunal's powers to cut to the chase and decide the question whether the Upper Tribunal judge had the power to set aside her decision to grant permission to bring judicial review proceedings and re-list the matter for a fresh hearing when she discovered that, as a result of a misunderstanding, the decision had been made without hearing from a party who was entitled and wished to be heard.

The powers of the High Court

14. There is no doubt that, if the proceedings had been in the High Court, the High Court would have had that power. CPR 23.11(2) confers an express power on the court, where the applicant or any respondent fails to attend the hearing of an application and the court makes an order at the hearing, to re-list the application. It is implicit in the power to re-list the application that the court can set aside the order made at the hearing, even after it has been perfected, re-hear the application in full and make such different order as the court thinks appropriate: see *Riverpath Properties Ltd v Brammall* (31 January 2000, unreported). Even without that rule, the High Court undoubtedly has power, as part of its inherent jurisdiction to manage its proceedings in a just and effective manner, to set aside an order made in a party's absence and re-hear a matter if it subsequently appears that the party's absence occurred as a result of a mistake for which it was not to blame. Indeed, to do otherwise in such circumstances would be to deny the absent party its fundamental common law right to participate in the proceedings in accordance with the principle of natural justice. It is a basic rule that the court must exercise its power to regulate its procedure in a way which respects that principle: see e.g. *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, para 22.

15. Although CPR 54.13 provides that neither the defendant nor any other person served with the claim form may apply to set aside an order giving permission to proceed with a claim for judicial review, this rule does not prevent the High Court from exercising its inherent power to set aside an order made in circumstances where an interested party has not had a fair opportunity to be heard: see *R (Webb) v Bristol City Council* [2001] EWHC 696 (Admin); *R (Enfield Borough Council) v Secretary of State for Health* [2009] EWHC 743 (Admin), para 3.

16. It was accordingly rightly accepted by Mr Malik that, if the present proceedings had been brought in the High Court, in the circumstances which occurred on 11 September 2015 the High Court would have had the power to set aside the grant of permission to apply for judicial review and to re-list the application for a fresh hearing.

Section 25 of the 2007 Act

17. It is not necessary to decide whether the Upper Tribunal has similar inherent powers to those of the High Court at common law or by virtue of its designation in section 3(5) of the Tribunals, Courts and Enforcement Act 2007 as a "superior court of record"

because section 25 of that Act expressly confers such powers on the Upper Tribunal. Section 25 provides:

> "**25 Supplementary powers of Upper Tribunal**
>
> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal–
>
> (a) has, in England and Wales …, the same powers, rights, privileges and authority as the High Court,
>
> …
>
> (2) The matters are –
>
> (a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions.
>
> (3) Subsection (1) shall not be taken –
>
> (a) to limit any power to make Tribunal Procedure Rules;
>
> (b) to be limited by anything in Tribunal Procedure Rules other than an express limitation."

18. I see no reason to give section 25 a restrictive interpretation. I agree with the following observations of Mr Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) in *William Hill Organization Ltd v Crossrail Ltd* [2016] UKUT 275 (LC), para 59:

> "Parliament was obviously aware of the powers of the High Court, both those which are inherent, and those specifically conferred by statute. Section 25 therefore seems to me to be intended to be read literally and applied generally, and to invest the Upper Tribunal with the powers of the High Court in relation to all matters incidental to its functions; the critical limitation in section 25(2)(c) is supplied by the reference to the functions of the Tribunal, and does not depend on the source of the power or the terms in which it has been conferred on the High Court. Parliament could obviously make explicit an intention that the Upper Tribunal was not to possess a particular power, but where it has not done so, and where no express limitation has been imposed by tribunal procedure rules as contemplated by section 25(3)(b), the Upper Tribunal must be taken to have the same powers as the High Court in relation to all matters incidental to its functions."

19. Pursuant to sections 15 and 16 of the 2007 Act, one of the functions of the Upper Tribunal is to deal with applications for judicial review and, as an aspect of that function, to decide whether or not to grant permission to bring judicial review proceedings. Considering whether to set aside a decision to grant such permission taken in the absence of the respondent and to re-hear the application is a matter incidental to this function. Pursuant to section 25 of the Act, therefore, the Upper Tribunal has the same powers in dealing with the matter as would the High Court. It would be anomalous if the position were otherwise and if the Upper Tribunal, when exercising a judicial review jurisdiction similar to that of the High Court, lacked a power which the High Court has as an essential part of its procedural repertoire to manage its proceedings in a just and effective manner.

20. As recorded in her order dated 11 September 2015, it was the powers of the Upper Tribunal under section 25 of the 2007 Act which Upper Tribunal Judge Coker was exercising when she set aside the grant of permission to bring judicial review proceedings and ordered that the matter be re-listed. In my view, this was a straightforward and proper exercise of those powers and Edis J was right to give the attempt to challenge that decision short shrift.

The section 10 power of review

21. For the appellant Mr Malik argued that the powers conferred on the Upper Tribunal by section 25 of the 2007 Act were not available in this case. His argument rested on the proposition that the only power that the Upper Tribunal has to set aside and re-make a decision it has made is the power to do this in the context of a "review" of a decision under section 10 of the Act. This provides:

> "**10 Review of decision of Upper Tribunal**
>
> (1) The Upper Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 13(1) …
>
> (2) The Upper Tribunal's power under subsection (1) in relation to a decision is exercisable–
>
> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 13(2) has a right of appeal in respect of the decision.
>
> (3) Tribunal Procedure Rules may–
>
> (a) provide that the Upper Tribunal may not under subsection (1) review (whether of its own initiative or on application under subsection (2)(b)) a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules;
>
> (b) provide that the Upper Tribunal's power under subsection (1) to review a decision of a description specified for the

> purposes of this paragraph in Tribunal Procedure Rules is exercisable only of the tribunal's own initiative;
>
> (c) provide that an application under subsection (2)(b) that is of a description specified for the purposes of this paragraph in Tribunal Procedure Rules may be made only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules;
>
> (d) provide, in relation to a decision of a description specified for the purposes of this paragraph in Tribunal Procedure Rules, that the Upper Tribunal's power under subsection (1) to review the decision of its own initiative is exercisable only on grounds specified for the purposes of this paragraph in Tribunal Procedure Rules.
>
> (4) Where the Upper Tribunal has under subsection (1) reviewed a decision, the Upper Tribunal may in the light of the review do any of the following–
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the Upper Tribunal sets a decision aside, the Upper Tribunal must re-decide the matter concerned.
>
> (6) Where the Upper Tribunal is acting under subsection (5), it may make such findings of fact as it considers appropriate.
>
> …"

22. It is common ground that, for reasons I will explain shortly, the power of review under section 10 was not available in the present case. It follows, Mr Malik argued, that the Upper Tribunal judge did not have the power to set aside her decision to grant permission to bring judicial review proceedings once that decision had been given orally at the hearing which took place in the respondent's absence.

23. It is notable that, although section 10 may appear at first sight to be broad in scope, its sphere of application is in fact narrowly confined by rules made pursuant to section 10(3). Rule 46(1) of the Upper Tribunal Rules provides:

> "The Upper Tribunal may only undertake a review of a decision pursuant to rule 45(1) (review on an application for permission to appeal)."

Rule 45(1) states:

> "On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if –
>
> (a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or
>
> (b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision.
>
> …"

The term "review" as it is used in these rules is defined by rule 41 to mean "the review of a decision by the Upper Tribunal under section 10 of the 2007 Act."

24. The effect of these rules is that the exercise of the power of review conferred by section 10 of the 2007 Act is limited to a situation where the Upper Tribunal is considering whether to give permission to appeal from its own decision and, even then, is limited to circumstances in which the decision from which permission to appeal is sought is potentially inconsistent with a legislative provision or binding authority.

25. If the power of review under section 10 were the only power of the Upper Tribunal to set aside and re-make a decision it has made, the ability of the Upper Tribunal to correct error would therefore be very restricted indeed. It would mean, as Mr Gullick for the respondent pointed out, that even, for example, in a case where a decision was procured by deliberately misleading the tribunal, the tribunal would be powerless to set aside its decision when the fraud came to light. The fact that such unreasonable consequences would follow if section 10 were to be interpreted as containing the only power of the Upper Tribunal to set aside and re-make a decision is a good reason to reject such an interpretation. But in fact such an interpretation has nothing to commend it in the first place. Nothing in section 10 says or implies that the power of review which it confers is intended to exclude the exercise of other powers and to provide the sole basis on which the Upper Tribunal may set aside and re-make a decision that it has previously made. In particular, section 10 cannot reasonably be read as excluding the operation of section 25 of the Act, which – as its heading explicitly indicates – gives the Upper Tribunal powers which are supplementary to the powers conferred by other provisions of the 2007 Act (such as section 10).

26. Other powers to set aside decisions are contained in the Upper Tribunal Rules (made pursuant to section 22 of the Act). For example, rule 6(5) empowers the Upper Tribunal to set aside a case management direction which it has previously given; and rule 43 gives the Upper Tribunal power to set aside a decision which disposes of proceedings, and to re-make the decision, if certain conditions are satisfied. It has not been suggested that either of these rules is applicable in the present case. But their existence further illustrates the fact that section 10 is not the only source of a power to set aside and re-make an earlier decision.

Limits imposed by the Upper Tribunal Rules

27. In the alternative to arguing that the only power of the Upper Tribunal to set aside and re-make a decision is that conferred by section 10, Mr Malik contended that the only such powers are those contained in the Upper Tribunal Rules – including therefore rule 6(5) and rule 43, as well as rules 45 and 46. He suggested that these rules cover the whole field and leave no room for the exercise of any supplementary powers conferred on the Upper Tribunal by section 25 of the 2007 Act. However, section 25(3)(b) provides in clear terms that section 25(1) "shall not be taken to be limited by anything in Tribunal Procedure Rules other than an express limitation." Mr Malik sought to argue that such an express limitation is to be found in rule 46(1) of the Upper Tribunal Rules. But, as discussed, rule 46(1) only limits the power of the Upper Tribunal to review a decision pursuant to section 10 of the 2007 Act. It does not purport to limit or affect any other powers which the Upper Tribunal has to set aside an earlier decision. In particular, it does not impose any limitation on the exercise of powers conferred by section 25.

28. There is nothing else in the Upper Tribunal Rules which could be said to constitute an express limitation on the power of the Upper Tribunal derived from section 25 of the 2007 Act to set aside a decision to grant permission to bring judicial review proceedings in circumstances where the decision was made without the respondent having had a fair opportunity to be heard. There is therefore no reasonable basis for the appellant's case that the Upper Tribunal lacks that power.

The *Patel* case

29. Mr Malik sought to draw support for the appellant's case from the decision of this court in *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175 and from the manner in which the *Patel* case was interpreted by the Vice-Presidential Panel of the Upper Tribunal (Immigration and Asylum Chamber) in *Jan v Secretary of State for the Home Department* [2016] UKUT 00336 (IAC).

30. In the *Patel* case a hearing took place before the Upper Tribunal (Immigration and Asylum Chamber) of an application for permission to appeal from a decision of the First-tier Tribunal. At the start of the hearing the Upper Tribunal judge granted permission to appeal and then began to hear the appeal itself. During the argument it emerged that the appeal had been brought substantially out of time – a fact of which the judge had not previously been aware. In those circumstances the Upper Tribunal judge purported to revoke his decision to grant permission to appeal and to substitute a decision refusing such permission.

31. On an appeal to the Court of Appeal it was held by Sir Richard Aikens (with whose judgment Lewison LJ agreed) that the Upper Tribunal judge had no power to reverse his decision, once uttered, to grant permission to appeal. It is apparent from the judgment that the appeal was argued and decided on the assumption that the only potentially relevant power of the Upper Tribunal in that case was its power of review under section 10 of the 2007 Act. The Court of Appeal rejected an argument that the oral grant of permission to appeal during the hearing was not a "decision" for the purposes of the 2007 Act and the Upper Tribunal Rules, noting that in the Upper Tribunal, unlike the High Court, it is "decisions" not "orders" that have legal force and from which an appeal may lie, and there is no mechanism equivalent to the drawing up

and perfecting of a formal order that qualifies or postpones when a decision becomes effective. The court further considered that the term "review" in section 10 of the Act embraces any revision, variation or reversal of a decision once made and was thus wide enough to encompass the reversal of the Upper Tribunal's decision to grant permission to appeal in that case. However, the power of review under section 10 does not apply if the decision in question is an "excluded decision" for the purposes of section 13(1) of the 2007 Act. Pursuant to section 13(8)(c), a decision of the Upper Tribunal on an application for permission to appeal to the Upper Tribunal from a decision of the First-tier Tribunal is an "excluded decision". On that basis the Court of Appeal concluded that the Upper Tribunal had no power to reverse its decision, once given orally at the hearing, to grant permission to appeal.

32. Although nothing turned on it, it does not seem to have been noticed that section 10 could not have applied anyway, even if the decision in question had not been an "excluded decision", because its field of application is limited by rules 45(1) and 46(1) of the Upper Tribunal Rules to the context of an application to the Upper Tribunal for permission to appeal to the Court of Appeal.

33. So far as appears from the judgment, no reference was made in the *Patel* case to section 25 of the 2007 Act and no argument was addressed to the Court of Appeal that the Upper Tribunal had power under section 25 to revoke its initial decision.

34. Despite this, the Upper Tribunal in the *Jan* case treated the Court of Appeal's decision as authority for the broad proposition that the powers of the Upper Tribunal to set aside its own decisions are limited to those in rules 43 and 45- 46 of the Upper Tribunal Rules. At para 27 of its judgment, the Upper Tribunal said this:

> "The judgment [of the Court of Appeal in the *Patel* case] is clearly binding on the Upper Tribunal in all its Chambers, and it is in our judgment of considerable importance as much for what it does not say as for what it does. The court was concerned to discover whether the Upper Tribunal had power to set aside a decision that, in the tribunal's view, had been reached in the absence of a full appreciation of the facts. In these circumstances the Court's concentration on the review power under s.10 of the 2007 Act and the absence of any reference to either the inherent power of a superior court of record or the powers given by s.25 must constitute a decision that those powers either do not exist or, if they do, were wholly irrelevant to the issue before the court."

35. I recognise that in the *Jan* case the Upper Tribunal was seeking loyally to interpret and give effect to what the Court of Appeal had decided in the *Patel* case. But I cannot accept that the judgment in the *Patel* case is authority for something that it does not say and which it did not address because the issue was not raised in that case. It may well be that on the particular facts which arose in the *Patel* case the Upper Tribunal did not have either an inherent power or a power conferred by section 25 to set aside its decision to grant permission to appeal. As mentioned above, and as Sir Richard Aikens explained at paras 50-52 of the judgment, the inherent power of the High Court to vary or revoke a decision at any time before the order recording the decision is perfected is not capable of transposition to proceedings in the Upper Tribunal, as the regime in the

Upper Tribunal is based on decisions and not orders. I express no view on whether any other inherent power of the High Court or of the Upper Tribunal itself was potentially applicable in the circumstances which occurred in the *Patel* case, as we have heard no argument on the point and none was addressed to the Court of Appeal in the *Patel* case itself.

36. What is clear is that the judgment of this court in the *Patel* case cannot properly be interpreted as having decided without saying so that the powers of the Upper Tribunal under section 25 to set aside and re-make a decision when the High Court has such a power do not exist. In particular, the *Patel* case was not concerned with the power to re-hear an application which was, as a result of a misunderstanding and in breach of the principle of natural justice, decided in the absence of a party. For the reasons given earlier, I consider it clear that the Upper Tribunal has under section 25 the same power as the High Court would undoubtedly have to set aside its decision in such a case and to re-list the matter for a fresh hearing.

Conclusion

37. It follows that the Upper Tribunal acted within its powers in setting aside its decision to grant permission to bring judicial review proceedings on 11 September 2015. No other challenge to the validity of that decision or to the validity or correctness of the subsequent decision on 18 December 2015 to refuse permission to bring judicial review proceedings is pursued on this appeal. The appeal must therefore be dismissed.

Lord Justice Coulson:

38. I agree.

Lord Justice Floyd:

39. I also agree.