



Neutral Citation Number: [2019] EWCA Civ 1216

Case No: C5/2018/0953

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(IMMIGRATION AND ASYLUM CHAMBER)**  
**Deputy Upper Tribunal Judge Eshun**  
**Appeal No: HU/13753/2015**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Thursday, 2 May 2019

**Before:**  
**LORD JUSTICE LONGMORE**  
**and**  
**SIR STEPHEN RICHARDS**  
**Between:**

**OB (UKRAINE)**

**Applicant**

**- and -**

**ENTRY CLEARANCE OFFICER**

**Respondent**

Transcript of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400 Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk) (Official Shorthand Writers to the Court)

*This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

*WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

THE APPELLANT'S DAUGHTER APPEARED IN PERSON ON HIS BEHALF

**Mr Jack Holborn** (instructed by the Government Legal Department, LONDON WC2B 4TS)  
appeared on behalf of the **Respondent**

**Judgment**

(Approved)

**SIR STEPHEN RICHARDS:**

1. The appellant is a national of Ukraine, now aged 78. In October 2013 he was granted a visa, valid for two years, to enter the UK as a visitor. During the period of validity of that visa he made two visits to the UK, each for a period of six months in accordance with the terms of the visa. An application for a further two-year visa was refused in November 2015 because of deficiencies in the information provided. A renewed application was then refused in December 2015 on the ground that the Entry Clearance Officer was not satisfied that the appellant was genuinely seeking entry as a visitor or that he met the requirement of the Immigration Rules that he would not live in the UK for extended periods through frequent or successive visits or make the UK his main home. The present proceedings relate to that refusal.
2. The appellant appealed to the First-Tier Tribunal ("the FTT") on human rights grounds, referring to his intention to visit his adult daughter and his teenage grandson for the period allowed by law and relying on Article 8 of the European Convention on Human Rights. The tribunal allowed the appeal. The FTT judge made various factual findings that led to the conclusion that the appellant had demonstrated that he intended to return to Ukraine and did not intend to make the UK his main home. The judge found that the refusal interfered with family life, as the appellant had become accustomed to visiting his daughter on an annual basis. In considering the proportionality of the refusal, he took into account that the appellant met the relevant requirements of the Immigration Rules. He concluded that the refusal was a disproportionate interference with the right to family life.
3. On further appeal by the Entry Clearance Officer to the Upper Tribunal ("the UT"), a deputy UT judge found that the FTT had applied a flawed approach in failing to follow the step-by-step principles in *R (Razgar) v SSHD* [2004] UKHL 27 and in failing to identify, in accordance with *Kugathas v SSHD* [2003] EWCA Civ 31, what was the relationship between the appellant, his daughter and grandson that warranted the protection of Article 8. The judge set aside the FTT's determination and remade the decision on the evidence before her. It was accepted that there was no financial dependency between the daughter and the appellant, though she was his only child and there was a strong emotional bond between them. The judge found that the social and educational support given by the appellant to his grandson formed part of the normal relationship between grandparent and grandchild and did not take the relationship beyond normal emotional ties such as to amount to family life for the purposes of Article 8. She concluded that Article 8 was not engaged and she therefore dismissed the appellant's appeal against the refusal of a visa.

4. The appellant applied for permission to appeal to this court against the UT's decision, on the ground that the UT had erred in relation to the Article 8 issue, failing in particular to give proper consideration to the relationship between grandfather and grandson and to the benefits of that relationship for the grandchild. Permission to appeal was refused by the UT but was granted in this court by Sir Stephen Silber, whose reasons pointed to the findings of fact by the FTT and considered it arguable that the UT judge did not properly deal with them.
5. Sir Stephen Silber's order granting permission to appeal was dated 31 October 2018. That order evidently led the Entry Clearance Officer to reconsider the refusal of a visa. The decision under appeal was withdrawn and entry clearance for a visit visa was granted on 10 December 2018. The appellant's passport was requested and obtained for the purpose of stamping it with a visa. There was some delay in returning it but by email on 4 March 2019 the appellant was informed that the passport was ready for collection from the visa application centre in Kiev. A follow-up email was sent on 8 April 2019, and a further email was sent by the Government Legal Department on 18 April, asking the appellant to pick up his passport and warning him that, if he continued to fail to collect it, the Entry Clearance Officer might be left with no option but to send it back to the British Embassy in Warsaw where the documentation had been processed. We are told today that the passport has still not been collected, apparently because of the appellant's wish to pursue this appeal. There is, however, no reason to doubt that the passport has been available for collection as stated in the emails.
6. In consequence of the decision to grant entry clearance, the Government Legal Department wrote to the appellant on 21 January 2019, stating that the appeal was now academic and sending a draft consent order providing for the withdrawal of the appeal and payment by the respondent of the appellant's reasonable costs. The appellant responded on 26 January, stating that he was prepared to start negotiations for settlement of the dispute but annexing a "compensation estimate" which included not only costs relating to the appeal to this court but also costs relating to the visa application and the FTT proceedings, together with a claim for compensation in the total sum of £9,000 for "moral damage due to inability to see my family" between 2016 and 2019.
7. The Government Legal Department replied on 7 February, agreeing to pay certain items of costs, requesting clarification as to certain items and highlighting that any claim for damages had to be pursued by way of a separate claim. No response was received at the time to that letter. Chaser letters were therefore sent to the appellant on 29 March and 9 April, adhering to the respondent's stated position and reserving the right to seek costs of preparation for, and attendance at, a hearing should the matter proceed to a hearing.

8. The letter of 9 April elicited a reply dated 13 April from the appellant's daughter, attaching a letter dated 13 February from the appellant to the Government Legal Department, which had not previously been received but which stated the appellant's intention to pursue a claim for:

"non-pecuniary damages in accordance of SCA s32A for harassment, delay, frustration, depression and loss of opportunity to achieve a better result caused by unlawful action of public authority."

In response to an enquiry from the court, the appellant confirmed in an email of 11 April that his daughter would attend the hearing on his behalf.

9. That, then, is the background to today's hearing.
10. For the respondent, Mr Holborn submits today that the appeal is academic and should be dismissed for that reason. He says that entry clearance has been granted and the appellant has achieved the only remedy possible by pursuit of these proceedings. He submits that any claim for compensation in the proceedings is misconceived.
11. The appellant's daughter, Miss SB, appears on his behalf on an informal basis, not as a legal representative. She submits that the issue is not academic. The application of the European Convention on Human Rights is very important. She points out that one tribunal judge said that human rights were engaged whereas another said that there was no human rights angle in this case. That, she says, should be clarified. In circumstances where an appeal against an entry clearance decision can only be brought on human rights grounds, it is important to resolve a difference of that kind, and she says that the Home Office is wrongly saying that no human rights were involved in this case. She complains, on the appellant's behalf, about the delay in securing what he was seeking. She said it took three years to get a visitor's visa. There was a further delay in returning the passport after the December 2018 decision to grant a visa. She refers to the effect of all this delay on the appellant and his family. As to compensation, she says that she presumes that the appellant should be entitled to compensation for the delay. But she did not advance any detailed submissions in support of that position.
12. For my part, I am satisfied that the course contended for by Mr Holborn is the correct one. All that the appellant was seeking, and the best that he could achieve by his appeal to the FTT against the December 2015 refusal of a visit visa, was the reversal of that refusal. But that is what the fresh decision in December 2018, confirmed by the availability of his passport stamped with a visa, has now given him in any event. The

appeal to this court could not give him more even if it were completely successful in securing a reinstatement of the FTT's decision in his favour.

13. I also agree with Mr Holborn's submission that the attempt to claim damages in these proceedings is misconceived. The FTT had no power to award damages on an appeal against an entry clearance decision. The subsequent appeal process did not alter the position in that respect. The right of appeal to the UT pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007 was limited to an appeal on a point of law arising from the FTT's decision, and the further right of appeal to this court pursuant to section 13 of the same Act is limited to an appeal on a point of law arising from the UT's decision. The powers of this court, if it finds a legal error in the UT's decision, are provided for by section 14 of the 2007 Act and do not include jurisdiction to make an award of damages.
14. There is, moreover, no general right of damages for administrative decisions found to have been unlawful. The normal remedy is by way of appeal or judicial review. The appellant has referred in correspondence to section 32A of the Senior Courts Act 1981, but that relates to orders for provisional damages for personal injuries in civil proceedings and has no relevance to the present case. The claim for compensation that the appellant has indicated he wishes to advance appears to be based on the contention that the refusal of a visa was in breach of Article 8. By section 8(2) of the Human Rights Act 1998, however, damages for breach of the Human Rights Convention may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings. Such a claim would have to be brought separately in the County Court or High Court, not in the FTT or in proceedings on appeal from a decision of the FTT.
15. I am far from encouraging such a claim. Even if an actionable breach of Article 8 were established, I think it probable that the right of appeal to the tribunal against the Entry Clearance Officer's decision would weigh heavily against a finding that an award of damages was necessary to afford just satisfaction to the appellant for such a breach.
16. The remote possibility that the appellant might bring such a claim is, moreover, not a good reason for allowing the present appeal to proceed so as to reach a determination on whether the UT erred in law in finding that Article 8 was not engaged. It will be clear from this judgment, if my Lord agrees with me, that the appeal against the UT's finding is being dismissed without any consideration of the substantive merits but on the basis that it has become academic within the legal context in which it arises.
17. On top of the points I have already made, I would add that, even if the tribunals and this court did have power to award damages in these proceedings, it would be inappropriate

for us to entertain such a claim for the first time in this court in circumstances where it has not been pleaded or argued below.

18. Finally, there is nothing else in the circumstances of the case or in the issues raised on the appeal to justify, in my view, the exercise of the court's discretion to hear an appeal notwithstanding that it has become academic as between the parties.
19. For all those reasons, I am satisfied that this appeal should have been withdrawn. I would dismiss it now on the simple ground that it has become academic and it is no longer appropriate to entertain it.

**LORD JUSTICE LONGMORE:**

20. I agree.

**Order:** Appeal dismissed.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Fumival Street, London EC4A 1JS  
Tel No: 020 7404 1400  
Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk)