Neutral Citation Number: [2022] EWHC 3212 (Admin)

Case No: CO/2744/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2022

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

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Between :

The King on the application of Derani Karthikeya	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Ms Jegarajah (instructed by **K T Solicitors Ltd**) for the **Applicant**
Mr Smith (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 29 September 2022

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Approved Judgment

C. M. G. Ockelton :

1. This is an application for permission to apply for judicial review. Permission was refused by Linden J following a hearing before him on 5 August 2022. That brief introduction is sufficient to indicate that the claimant is likely to be in some difficulty.

2. The facts are as follows. The claimant, a national of India, was on 5 July 2022 detained by the Secretary of State in the purported exercise of powers under the Immigration Act. He seeks to challenge his detention as unlawful on three separate grounds. The first is that at the time of the detention he had extant leave, which had (contrary to the Secretary of State's assertion) not been validly curtailed; the second is that in any event the detention is arbitrary; the third is that the detention is in breach of the Hardial Singh principles.

3. Proceedings challenging the determination by way of judicial review were issued on 29 July 2022. They were accompanied by an application for urgent consideration and interim relief. That application came before Morris J, who made his Order on 1 August. He noted the claimant's assertion that there had been no response to a letter before action, but also that the documentation of the bundle did not appear to be complete, and that the claimant's factual assertions about the dates of his leave did not appear to be consistent. His observations end as follows:

> "Thus, on the material before the Court, the position is not clear. The defendant now has the opportunity to clarify the position. If not satisfactorily clarified, then the application will be heard at an oral hearing"

The substantive part of his Order was as follows:

> "1. The defendant shall, by 4pm on Wednesday 3 August 2022, file and serve her response to the claimant's application for interim relief.
>
> 2. The claimant's application for interim relief to be listed for an inter partes oral hearing with a time estimate of one hour on Friday 5 August 2022 or on the first available date thereafter."

There was liberty to apply and costs were reserved.

4. There was a hearing before Linden J on 5 August. Although the parties have made assertions, in correspondence to the Court to which I shall refer, there is no evidence before me about what happened at that hearing. The outcome was the Order by Linden J to which I have already referred. There was a delay in sealing the order, but it was available in draft very shortly after the hearing, reading as follows:

> "UPON hearing Mr Steadman, Counsel for the Claimant, and Ms Highnam, Counsel for the Defendant
>
> AND UPON the Court considering the Claimant's application for interim relief and the Claimant's application for permission to apply for judicial review

> IT IS ORDERED THAT
>
> 1. The claimant's application for interim relief is refused.
>
> 2. Permission is refused.
>
> 3. The claimant is to pay the defendant's costs to be subject to detailed assessment if not agreed."

5. That draft is dated 5 August 2022. The Order was sealed on 30 August 2022. In the Order as sealed, the date of the hearing and the date of the Order are both entered as 5 August 2022.

6. On 12 August the claimant's solicitors filed form 86B, headed, in standard form, "Notice of RENEWAL of Claim for Permission to Apply for Judicial Review (CPR 54.12)." It was accompanied by a letter from the solicitors, referring to the form being submitted "following the interim relief hearing on 05 August 2022 in which Mr Justice Linden refused permission to apply for judicial review". The letter also indicated that the "draft Order yet to be sealed by the Court" was attached, as were the grounds for the renewal of the application for permission to apply for judicial review and interim relief. Those grounds repeat the grounds already advanced. They do not deal with any difficulty arising from Linden J's refusal of permission at the hearing before him.

7. The Order was, as I have said, sealed on 30 August 2022. On 31 August the Court gave notice of the hearing of the application made by form 86B. When preparing the papers for the hearing, the Court lawyer noticed the Order of Linden J and, on my instruction, sought the parties' comments. The claimant's solicitors replied as follows:

> "We draw your attention to the order of Mr Justice Morris dated 01 August 2022. It can be seen that the judge directed an oral hearing to address the application for an interim order, that application being concerned with the release of our client from detention. The order does not make reference to oral submissions to be made in respect of the permission hearing. Consequently the parties prepared for the hearing listed on 05 August 2022 date only in respect of the application for an interim order.
>
> We were surprised that the judge had refused permission given the parties had not made submissions in respect of the permission application. We have discussed the hearing again with Counsel who has attended on 05 August 2022 date, Mr Steadman. He had prepared the case solely in terms of the interim order application as opposed to the application for permission. Counsel for the defendant was asked if she had any observations about the permission application and she stated that she did not have any. This was because the AoS had not been submitted. In fact we have only recently received the AoS which we attach herein. The judge then refused

> permission despite the fact that there had been no permission hearing and despite the fact that Morris J had not directed that there be an oral hearing of the permission application. In light of the above we respectfully submit the most proportionate and pragmatic approach would be to resolve this at a renewed oral hearing."

The defendant's solicitor replied as follows:

> "We disagree with the claimant's assertion that the parties did not make submissions on the issue of permission at the oral hearing on 5 August 2022. We understand that after dismissing the application for interim relief, Linden J indicated that he would also refuse permission, and the claimant resisted that. Nevertheless, the SSHD is content for the oral permission application to proceed today."

For completeness I should add that the notice of the hearing on 5 August 2022, as sent to the parties, does not appear to limit the matters to be considered at it.

8. By the time the hearing before me began, there were no written arguments addressing the difficulty that permission had already been refused by Linden J at a hearing, nor, as I have said, was there any evidence of what happened at that hearing. Ms Jegarajah proposed to present her case that permission should be granted. I drew her attention to the difficulty. Ms Jegarajah submitted that Linden J's Order refusing permission suffered from at least one of the following three defects. First, it was a mistake, because the hearing was not intended to consider the question of whether permission should be granted. Secondly, Linden J had no jurisdiction to refuse permission at a hearing which had been set up to consider only the issue of interim relief, and for which the parties had prepared on that basis. Thirdly, to have refused permission would be a breach of the Order made by Morris J, which envisaged that permission would be dealt with on another occasion. For these reasons, or one or more of them, Ms Jegarajah suggested that I should either ignore Linden J's Order refusing permission or set it aside. She cited no authority indicating that I had any power to do either of those things.

9. If I were to consider either of those suggestions on their merits, I would have to take into account also the following factors. First, as I have said, there is no evidence of what happened at the hearing before Linden J, and the parties' positions differ on whether there was any reference to the question of permission. Secondly, that permission was refused by Linden J is the unquestioned starting-point of the form 86B submitted by the claimant's solicitors. Thirdly, and closely related to that, there has been no previous suggestion that Linden J's Order was defective in any way. There appears to have been no objection to the draft in the long period before it was sealed, and the grounds for renewal do not raise any issue about its accuracy or the power to make it.

10. I do not, however, need to consider Ms Jegarajah's argument on their merits. I have no power to comply with either of her suggestions. As to the first, the Order of the Court remains in force until it is set aside by some valid procedure, including an appeal. There has been no such procedure. The Order stands. I cannot ignore it.

Secondly, I have no perceptible power to set Linden J's order aside. The amendment which would be needed, that is to say the deletion of a substantive part of the relief, is not within the scope of r.40.12 (the "slip rule"). Even if it had been, there has, again, been no application; and the relevant part of the order has, again, not merely been ignored as an error but cited by the claimant's solicitors. There is no other general power for this Court to set aside an Order of this Court. Such powers are available only in limited circumstances, not including any identified by Ms Jegarajah.

11. Ms Jegarajah argued further that if I declined to ignore or set aside Linden J's Order, I nevertheless could hear her application for permission. She submitted that there is no restriction on the number of times that an application for permission may be made orally, following refusal on the papers. She cited r.54.12, which provides, so far as relevant, as follows;

> "54.12 – Permission decision without a hearing.
> (1) This rule applies where the Court, without a hearing –
> (a) Refuses permission to proceed;
> …
> Subject to paragraph (7) [which has no application in this case] the claimant may not appeal but may request the decision to be reconsidered at a hearing"

12. This is not a case where permission has been refused "without a hearing". Putting that difficulty aside for a moment, Ms Jegaragah is, of course, right to say that there is no specific restriction on the number of times that the procedure in paragraph (3) may take place, save perhaps that to be found in the singular "a hearing". It is, however, not easy to envisage a coherent judicial review jurisdiction in which the refusal of permission could never be regarded as final. In my judgment the answer is to be found in r.52.8:

> "Judicial Review Appeals from the High Court
>
> (1) Where permission to apply for judicial review has been refused at a hearing in the High Court, an application for permission to appeal may be made to the Court of Appeal."

13. The jurisdiction to provide the remedy Ms Jegarajah seeks is in the Court of Appeal, not this Court.

14. I have no power to hear an application for permission to apply for judicial review in this case. The matter has been concluded by the Order of Linden J. I indicated that conclusion at the hearing. It has subsequently become apparent that the claimant's solicitors seek an Order from me, and that they intend to apply to the Court of Appeal for permission to appeal against it. As I indicated at the hearing and above, the only appropriate procedure is a challenge to the Order of Linden J, which would, even at the date of the hearing, presumably have to be coupled with an application for extension of time.