



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 92

P117/23

OPINION OF LORD RICHARDSON

In the Petition of

(FIRST) RS (FE/LA); (SECOND) LK (FE/LA); and (THIRD) BSK (FE/LA)

Petitioners

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Petitioner: Winter; Drummond Miller LLP**

**Defender: Pirie KC; Office of the Advocate General**

14 December 2023

**Introduction**

[1] The petitioners are a Sikh family. The first and third petitioners are the sons of the second petitioner. The petitioners claim to be Afghan nationals. This is disputed by the respondent. The respondent contends that the petitioners are Indian nationals.

[2] The petitioners arrived in the UK on 24 March 2018 and claimed asylum on that date. That claim was refused and the petitioners then appealed to the First-tier Tribunal. By decision dated 5 July 2022, the First-tier Tribunal refused the petitioner's appeals. The petitioners then made an application to the First-tier Tribunal for permission to appeal to the Upper Tribunal. This was refused on 30 August 2022. The petitioners then sought

permission to appeal from the Upper Tribunal. That application was refused on 13 November 2022.

[3] In the present proceedings, the petitioners seeks judicial review of the Upper Tribunal's decision. The respondent submits that such judicial review is incompetent standing the terms of section 11A of the Tribunals, Courts and Enforcement Act 2007 which came into force on 14 July 2022. For present purposes, section 11A provides as follows:

"11A - Finality of decisions by Upper Tribunal about permission to appeal

(1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).

(2) The decision is final, and not liable to be questioned or set aside in any other court.

(3) In particular—

(a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;

(b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

(4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—

(a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),

(b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or

(c) the Upper Tribunal is acting or has acted—

(i) in bad faith, or

(ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

(5) Subsections (2) and (3) do not apply so far as provision giving the First-tier Tribunal jurisdiction to make the first-instance decision could (if the Tribunal did not already have that jurisdiction) be made by —

(a) an Act of the Scottish Parliament, or

(b) an Act of the Northern Ireland Assembly the Bill for which would not require the consent of the Secretary of State.

[...]

(7) In this section —

‘decision’ includes any purported decision;

‘first-instance decision’ means the decision in relation to which permission (or leave) to appeal is being sought under section 11(4)(b);

‘the supervisory jurisdiction’ means the supervisory jurisdiction of —

(a) the High Court, in England and Wales or Northern Ireland, or

(b) the Court of Session, in Scotland”

[4] There is no dispute in the present case that the provisions of section 11A(2) and (3) are applicable. Accordingly, in these proceedings, essentially as a preliminary step, the petitioners seek declarator that section 11A of the 2007 Act is unlawful and, separately, null and void. Thereafter, on the basis that it is competent, the petitioners seek reduction of the Upper Tribunal’s decision dated 13 November 2022.

[5] I heard this petition at the same time as another petition (P1018/22) in which the same challenge to section 11A was raised. On the question of the competency of the two petitions, the same arguments were advanced, both on behalf of the petitioners and of the respondent.

[6] In these proceedings, as in the related petition to which I have referred (P1018/22), at the outset of the hearing before me, senior counsel for the respondent made clear that the petition was only contested on the question of competency. While the underlying merits of

the petition were not conceded, no opposition to them was advanced by the respondent.

Having heard both counsel on the issue of competency, counsel for the petitioners advanced submissions in respect of the merits of the petitioners' case.

[7] For reasons which I set out in my decision in the related petition (which is published concurrently with this Opinion), I reject the arguments advanced by the petitioners in support of the declarator. Accordingly, I will refuse the petitioner's first plea in law.

Thereafter, the petition being incompetent in terms of section 11A of the 2007 Act, I will sustain the respondent's second plea in law and will refuse the petition. In these circumstances, section 11A(2) of the 2007 Act requires that I do not consider the merits of the petition.

[8] I will reserve all questions of expenses in the meantime.