IN THE UPPER TRIBUNAL

RESERVED JUDGMENT GIVEN FOLLOWING HEARING

JR/9000/2017

Field House,
Breams Buildings
London
EC4A 1WR

Heard at Birmingham Civil Justice Centre

24 January 2019

THE QUEEN
(ON THE APPLICATION OF)
VERNON MALCOLM

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PERKINS

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Mr A Mackenzie, Counsel, instructed by T R P Solicitors appeared on behalf of the Applicant.

Mr R Dunlop, Counsel, instructed by Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE PERKINS:

1. I am grateful to both counsel for their assistance at the hearing and in response to a draft of my decision.

2. The applicant has asked for an order declaring that he cannot be removed from the United Kingdom until either any application for permission to appeal has been determined by the Supreme Court or any application for public funding for the purpose of such application has been finally refused and, in the interim, an order prohibiting his removal pending the determination of this application. The challenge is framed as a challenge to the respondent deciding on 24 October 2017 to remove the applicant. The claim was issued for service on 27 October 2017. On that day HHJ McCahill QC stayed the removal of the applicant pending the outcome of the application for judicial review. On 4 May 2018 HHJ Carmel Wall granted permission on the papers. On 19 November 2018 the respondent applied for permission to rely on amended grounds of challenge which application was granted by HHJ McKenna on 7 January 2019. There was also an application to rely on an amended defence. That came before HHJ David Cooke with an application for adjournment which was refused. The application to amend the grounds was not considered and was left over for the hearing.

3. The history of this case is relevant only to set in context. In outline, the appellant is subject to deportation proceedings. In a decision dated 13 April 2015 the respondent decided it was conducive to the public good to deport the applicant because of his criminal activity although his criminal career seems to have peaked in 2005 when he was sent to prison for a total of eighteen months for diverse criminal acts. An appeal against deportation was dismissed by the First-tier Tribunal but that decision was set aside by a

decision of the Upper Tribunal and the Upper Tribunal's decision came before the Court of Appeal. In a judgment dated 11 April 2017 the Court of Appeal allowed the Secretary of State's appeal with the result that the applicant was liable to be deported. I appreciate that I have simplified this analysis. There is enough potential error here without introducing elements that do not need to be resolved or explained. There is evidence to suggest that there is a possibility of harm coming to the British citizen children of the applicant in the event of separation from their father and it was argued that it was wrong to require them to leave the United Kingdom. The Court of Appeal refused permission to appeal its decision and the applicant took advice about appealing to the Supreme Court. It is not suggested by anyone that the applicant's representatives had been other than expeditious but they could not immediately apply to the Supreme Court because they did not have the necessary funding. This is a well-recognised problem and, in broad terms and certainly here, the Supreme Court permits the 28 day time limit in which to make an application for permission to appeal to start to run only when the outcome of a public funding application has been received.

4. It is common ground that by operation of statute a person who appeals from the Upper Tribunal to the Court of Appeal cannot be removed until the outcome of permission to appeal to the Court of Appeal is known. It is also common ground that there are no comparable express provisions governing the status of a person who wishes to appeal a decision from the Court of Appeal to the Supreme Court.

5. The procedural history is somewhat confusing. The original detailed grounds of defence were based on a misconception and amended detailed grounds of defence were served with permission as explained. The applicant had to reconsider his

position and accepted that some of the points on which he intended to rely were no longer appropriate. This led to the amended grounds. The nature of the proposed amendment of the applicant's case is quite far reaching. It puts the whole case on a rather different basis from the one originally indicated. Mr Dunlop resisted the application to amend. However, I do not accept his description that this is a further and unattractive example of a "rolling review". The essential remedy has not changed. The decision complained of has not changed. The amended grounds are a better formulated attack on the decision that has been in dispute all along. Mr Dunlop was able to point to the short timescale causing the respondent to have some difficulty in considering what, if any, evidence would be necessary to deal with the case and that is something I would need to bear in mind when deciding the application for judicial review but there was nothing in the legal points in the amended grounds that could not have been anticipated and addressed in the time available and, with respect to Mr Dunlop, plainly were. I do not accept there has been any significant unfair disadvantage to the respondent in the late application to amend and it is an application that I permit.

6. Mr Mackenzie's grounds are detailed and full and helpful but the essential point is that it is his case that the applicant is left in a difficult position. Unlike a person who seeks to appeal a decision of the Upper Tribunal the applicant is vulnerable to removal even though he might be seriously contemplating an application for permission to appeal to the Supreme Court and even though that application might be encouraged by the advice of experienced practitioners. Where, as is the case here, the respondent has shown a positive interest in removing someone then there must be a mechanism to prevent that person's removal. The applicant argued that the

mechanism is an order from the Upper Tribunal. He argued that the Upper Tribunal has all necessary powers to give effect to the judicial review of immigration decisions and that it was clearly right that an order was made. He emphasised that he was not so crass as to suggest that the Upper Tribunal should be looking at the merits of an appeal from the Court of Appeal to the Supreme Court but that the Upper Tribunal should use its powers to ensure that the status quo is preserved while steps were taken to make an application to the Supreme Court. The application was made to sound exceedingly sensible. It required only a continuation of the status quo that has been established without complaint for some time following an interim order of the Upper Tribunal, that there was no reason to think that extending the applicant's stay just until an application to the Supreme Court could be properly funded and presented and organised was in any way contrary to the public interest, especially given the time that had already elapsed, and that when all was said and done the application was about the best interests of three British children.

7. This argument is flawed. I do not accept that there is no other route. There was an obvious route. The applicant could have asked for a stay when he knew the decision of the Court of Appeal. He did not do that. However, that was not the end of the matter. He could have asked and can still ask the Supreme Court for an order. Neither of these things are denied. The applicant has asked the Court of Appeal for a stay but it was refused. It was heard by Hickinbottom LJ on 18 January 2019. He refused the application and refused it for two reasons although, if I may say so respectfully, he indicated that he was not impressed with the apparent underlying merits of the application. The two reasons identified were that the application was going to be heard by the Upper Tribunal (a reference to the hearing before me) and

that bringing the application before the Court of Appeal at this late stage, nearly two years after the judgment and fifteen months after commencing discrete proceedings to test the point duplicated in the application to the Court of Appeal for a stay, appears to be close to abusive. He refused. I note that Hickinbottom LJ did not suggest that the Upper Tribunal did not have power to make an order but rather implied that the Upper Tribunal at this stage at least was the best place to deal with the application that had been made but by then the application to the Upper Tribunal was at an advanced stage.

8. There is no evidence before me about exactly why the application for a stay could not be made to the Supreme Court. I fully accept that the application for permission to appeal would be done better by the applicant's representatives being properly funded and understand why they would want to wait until they were funded even though that necessarily involves delay. I accept too (there is direct evidence on this) that the Supreme Court will not entertain a free standing application for a stay pending service of an application for permission to appeal. This does not alter the fact that an application can be made, perhaps with "holding grounds". It is not the case that there is no remedy. It is a remedy that is hard to achieve but it is a remedy that only becomes necessary after the Court of Appeal has refused to grant a stay.

9. Mr Dunlop argued that this was not a deficiency but the clear result of considered policy. He drew my attention to the relevant Civil Procedure Rules, particularly paragraph 52.16. "Stay". This states:

> "Unless

– (a) the appeal court or the lower court orders otherwise; or

– (b) the appeal is from the Immigration and Asylum Chamber of the Upper Tribunal, an appeal shall not operate as a stay of any order or decision of the lower court."

10. The Rules of the Supreme Court 2009 support Mr Dunlop's argument. Rule 37 provides under the title "Stay of Execution":

"Any appellant who wishes to obtain a stay of execution of the order appealed from must seek it from the court below and only in wholly exceptional circumstances will the Court grant a stay."

11. As Mr Dunlop pointed out the relevant lower court here is the Court of Appeal and so an appeal shall not operate as a stay unless the appeal court (Supreme Court) or the lower court (Court of Appeal) otherwise orders. This does not completely answer the point. It is not the applicant's case that the existence of an appeal operates as a stay but that there should be a stay while appeal is being considered. Nevertheless the terms of the Rule do suggest to me strongly that the proper avenue for seeking a stay is from the court that is being appealed or the court that is going to receive the appeal and nowhere else.

12. I have reminded myself of Mr Mackenzie's submissions and his skeleton argument and grounds and I appreciate that the applicant is only seeking a stay until such time as his application for permission to appeal to the Supreme Court has decided an application for permission that the applicant wishes to present in a seemly and professional way. For all of that I refuse the application. The applicant has two remedies. The first is to seek permission from the Court of

Appeal for a stay. He has done that and been unsuccessful. That almost makes the point that it should be wrong to come to the Upper Tribunal. The next port of call is the Supreme Court. That may be difficult to organise before a properly considered application for permission can be prepared but that does not mean that the Upper Tribunal should provide the relief that is the proper concern of the Court of Appeal or the Supreme Court.

13. Further, although I am not asked to order a stay beyond the time when the Supreme Court has determined the application for permission to appeal, it is impossible to carry out a proper consideration of an application for a stay without paying some regard to the underlying merits of the case and it is plainly not my role to consider the merits of an appeal from the Court of Appeal to the Supreme Court.

14. In all the circumstances I doubt this Tribunal has jurisdiction to make the order but if it does then this is clearly not a case in which to exercise it.

15. The short point is that the application is not suitable for this Tribunal. There is a remedy to be used elsewhere and it should be used. I dismiss the application and therefore the application for all associated remedies and interim relief comes to an end.

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