Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Miah) v Secretary of State for the Home Department IJR [2016] UKUT 00023 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
Date of Hearing 17 November 2015

BEFORE

MR JUSTICE BLAKE

Between

MOHAMMED AZMOOL MIAH

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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J Rendle instructed by Capital Solicitors appeared behalf of the Applicant.

Z Malik instructed by the Government Legal Department appeared on behalf of the Respondent.

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JUDGMENT 18 NOVEMBER 2015

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MR JUSTICE BLAKE

Introduction

1. The applicant is a national of Bangladesh born on 18 February 1989. He came to the UK in September 2009 with a Tier 4 student visa and has been resident here since.

2. Until 30 April 2014 he was allowed to take part time work under the applicable Tier 4 rules; between April 2011 and April 2013 he did so work at an Indian restaurant called the Sesame Restaurant in Kingston Road, New Malden.

3. In April 2014 he was granted leave to remain for one year to continue his studies for an extended diploma in business and administrative management at the London Regal College. His extension of stay was subject to the condition 'No work except work placement'. At this time he was living with a cousin and his family.

4. In early June 2014 the applicant returned to live at the Sesame restaurant. He says that he was looking for somewhere quiet to study, away from his cousin's children. He was offered a room above the restaurant premises rent free.

5. On Saturday 28 June 2014 the restaurant was visited by a team of immigration officers on suspicion that people were working there without authority. The applicant was seen behind the bar area. The manager of the restaurant was interviewed as was the applicant and a note of that conversation was recorded. In substance the applicant is recorded as saying "I come here to help them recently I moved upstairs and I come down" and he agreed that he got reward in terms of free food and accommodation when he helped them (i.e. the restaurant owners). The manager told the officers that the applicant helped out Fridays and Saturday between 6.00 and 8.30 pm in return for free food and accommodation.

6. On the basis of that information a Chief Immigration Officer was satisfied that the applicant had been working at the restaurant part -time and was in breach of his prohibition on taking employment. A decision was made that he was liable for removal under s.10 (1)(a) Immigration and Asylum Act 1999 (IAA) (prior to amendment by the Immigration Act 2014 (IA)). A notice was served to that effect with the consequence that s.10 (8) operated to invalidate his existing leave to remain. He was detained with a view to removal. A civil liability notice was served on the restaurant in the sum of £40,000 in respect of breaches of the employer's obligations by employing people who were not entitled to work in the UK. Subsequently it was decided not to pursue enforcement of this notice.

7. On 5 July 2014, the applicant was served with removal directions for 9 July 2015. On 7 July he issued proceedings for judicial review. These were served 8 July and resulted in the deferral of his removal. On 30 July summary grounds in opposition to the application were filed. In substance they join issue with the applicant's assertion that he was not working. On 31 July he was granted bail pending the

determination of the judicial review hearing. This has removed any challenge to his continued detention and there is no claim in respect of his past detention.

8. Permission was refused by Upper Tribunal Judge McGeachy on 16 February 2015 on the basis :

    i. the respondent was entitled to make the removal decision on the evidence;
    ii. the applicant had the benefit of an alternative remedy namely an out of country appeal.

9. The applicant renewed the application for permission that was heard before UT Judge Warr on 24 April 2015. He granted permission on the basis that the decision was arguably *Wednesbury* unreasonable. He noted that the alternative remedy point had not been taken in the summary grounds or in the oral argument on the renewed application. He issued standard directions requiring detailed grounds to be lodged within 35 days of the permission decision and for lodging of skeleton arguments. The directions invited the respondent to raise the alternative remedy point if so advised.

10. Detailed grounds were lodged (it would appear out of time) on 1 September 2015. These grounds were entirely silent on the alternative remedy point. They were confined comments on the evidence to support the proposition that the applicant was working in breach of his conditions.

11. On 27 October the applicant lodged his skeleton argument in accordance with the directions. It was directed to the proposition that the applicant could not be said to be working and a decision of the European Court of Justice was relied on in support of the proposition that "purely marginal and ancillary activities" did not amount to economic activity for the purpose of Community Law (Case C 197/86 Brown v Sec State for Scotland ECR 1988-0305 at 21]).

12. On 5 November 2015, the respondent lodged her skeleton argument. This document did, for the first time, take the alternative remedy point and cited the relevant authorities. The skeleton also drew attention to paragraph 6 of the Immigration Rules that defines employment generally (unless the contrary appears elsewhere) as including "paid and unpaid employment, paid and unpaid placements undertaken as part of a course or period of study , self employment and engaging in business or any professional activity".

The hearing

13. A properly paginated bundle was lodged as directed. Unfortunately it did not include the skeleton argument of either party. The skeleton arguments did not make their way on to the court file or the log of documents received. It was only at the hearing that they were made available to me. This would appear to be an error in the Tribunal's administration, but it would be helpful for the future that such skeleton submissions were included in the bundle as that forms the judge's pre-reading for the application. It was nevertheless apparent from the bundle of

authorities prepared by the parties that, with the exception of Brown, each was concerned with the issue of alternative remedy and ranged from R (Lim) v SSHD [2007] EWCA Civ 773 to R (Mehmood and Ali) v SSHD [2015] EWCA Civ 744, a judgment handed down on 14 July 2015.

14. At the outset of the proceedings I raised the issue of alternative remedy with Mr Rendle. He said that he first became aware of the issue when it was raised in the respondent's skeleton of 5 November. Nevertheless, he was not prejudiced by the late raising of the issue and was able to address it.

15. Mr Malik accepted that the matter had been raised late and then only in the skeleton argument and not the detailed grounds. Following exchanges with the court he applied to formally amend the detailed grounds to raise the issue. In the light of Mr Rendle's stance, I granted him permission to do so.

16. The amendment proved decisive at the hearing because I did not accept Mr Rendle's submissions that there were here exceptional circumstances to justify proceeding by way of judicial review despite the existence of an out of country appeal.

17. Both advocates were agreed that this right of appeal was preserved for decisions taken prior to October 2014 when the amendments made to s.10 IAA by the IA 2014 came into effect as the transitional provisions made by the order bringing it into effect preserve the right of appeal. It was thus still available to Mr Miah to exercise.

18. It was also common ground that if such a decision had been made after the coming into force of the new regime laid down in the IA 2014, there would no longer be an alternative remedy as:

    i. There was no appeal at all (in country or out of country) in the absence of a human rights or asylum point.

    ii. The appellate jurisdiction was confined to decisions on human rights and asylum and no longer included whether immigration decisions were made in accordance with the law.

Conclusions:

19. This litigation has been unfortunate and generated unnecessary costs for both sides.

20. In the case of Lim (above) a person subject to immigration control was said to have worked in breach of permitted periods. He challenged the decision to remove him without an in country right of appeal by judicial review. Lloyd-Jones J (as he then was) [2006] EWHC 3004 (Admin) decided two preliminary issues:

    i. The challenge was to the existence of a statutory power to remove the applicant and detain him pending removal. The precedent fact jurisdiction established by Khawaja and Khera [1984] I AC 74 applied. The question was

whether the applicant had worked in breach of conditions and not whether a reasonable immigration officer properly directing himself could so conclude.

ii. There were sufficient reasons to proceed by judicial review rather than an out of country appeal: the breach alleged was venial and removal seemed disproportionate; a genuine period of study with a view to qualification would be interrupted; the appellate remedy provided by statute would not be able to restore the applicant to the position he previously enjoyed if the respondent failed to demonstrate that there was a breach of conditions.

21. The Secretary of State appealed to the Court of Appeal. Sedley LJ giving the principal judgment of the court upheld the judge on the first issue but reversed him on the second (see at [17]-19] and [22]).

22. On the second issue, it was pointed out that judicial review is a discretionary remedy of last resort and was not appropriate were there was an alternative remedy provided by Parliament, even if that remedy was not as convenient for the applicant as a pre-removal decision. It would only be exceptional circumstances that such a challenge should proceed by way of judicial review.

23. The Lim decision has been consistently followed in the Court of Appeal ever since: notably in RK (Nepal) v SSHD [2009] EWCA Civ 359 and the recent decision in Mehmood and Ali (supra) at [49] to [72] where at [68] Lord Justice Beatson noted that it was common ground that if the appeal succeeded on the facts it was the Secretary of State's obligation to give proper effect to the findings of the tribunal.

24. There is a helpful decision of this Tribunal in Bilal Jan [2014] 00265 (IAC) given in a constitution where Bean J (as he then was) presided. The UT at [35] to [43] noted that the wide scope of the Tribunal's powers to decide whether a decision was in accordance with the law included the law or policy that should have applied when the primary facts were found and the requirement to act fairly. The appellate jurisdiction was thus wide enough to determine: whether there had been a breach; whether the decision to remove was taken fairly and whether proper regard had been had to any relevant policy on the question.

25. In these circumstances, there is clearly a remedy that can address any legitimate contention in fact or law made by the applicant, and that means that leave to bring judicial review should normally be refused as a matter of judicial discretion where a challenge is brought to such a decision on grounds such as in the present case.

26. I would add that the time to take a point about an alternative remedy is at the permission stage when costs will be modest and a full examination of the merits is not required. Once the court has granted permission, then it would not be a sound exercise of discretion to refuse to entertain the application on its merits at the substantive hearing on the basis that there was an alternative to judicial review. I appreciate that in a number of the authorities permission had been granted but that was on the basis that the alternative remedy point was specifically reserved to be argued at the full hearing.

27. I, therefore, agree with the conclusion of Judge McGeachy in refusing permission on this ground, and consider that it is a matter of regret that the point and the relevant authorities were not raised either in the AOS or the oral submissions at permission hearing. In my judgement, it is more than a matter of regret that the point was not raised in the detailed grounds lodged in response to the grant of permission by Judge Warr. The applicant was, as a consequence, significantly misled as to the case he had to meet until 5 November 2015. This is a consequence that can be reflected in the costs order made at the conclusion of the case.

28. I disagree with Judge Warr that if the application had proceeded by way of judicial review, as opposed to statutory appeal under the old s.10 regime, that the relevant test would have been the *Wednesbury* reasonableness of the decision that the applicant was statutorily liable to removal. The power to remove is given in respect of those who are in breach and not those who are reasonably believed to be in breach; the power to detain could in theory be challenged by *habeas corpus*, which is not a discretionary remedy and where the court determines for itself whether the power exists on the particular facts.

29. All of the above is now by way of aside. Once the grounds of opposition were amended to raise alternative remedy, in my judgement there is no answer to it. The marginal nature of the employment claimed to be in breach is not the answer in this case just as it was not in Lim, despite the understandable sense of disquiet at the disproportionate consequence visited on the applicant. The decision of the ECJ in Brown is nothing to the point; this court is not concerned with whether the applicant was a worker within the meaning of EU law but whether he worked within the meaning of the Immigration Rules. The fact that a civil penalty notice did not proceed is not a relevant consideration to the existence of exceptional circumstances. Given the marginal nature of the work claimed, contested proceedings over the proportionality of the fixed penalty might have been lengthy and costly and the result uncertain; the same might be said if the applicant had been charged with a criminal offence of working in breach.

30. Having raised the matter with Mr Malik, it is pertinent to add three further observations to this judgment that may be relevant in future cases.

31. First, although they have not been the subject of detailed submissions, I repeat the common ground that the transitional provisions to the changes made in 2014 will mean that the conclusions reached in this judgment should apply to any other pending case of this sort; in the absence of truly exceptional circumstances permission to bring judicial review of similar challenges should be refused.

32. Second, that in a case subsequently arising to which the transitional provisions do not apply, there will generally be `no appeal capable of being an alternative remedy and no jurisdiction in the appellate body to determine the kind of issues that may arise in judicial review proceedings: fairness, policy and public law proportionality. In those circumstances, the second proposition in Lim will no longer bite. Judicial

review is the only available remedy and will be appropriate to examine arguably unlawful acts.

33. Finally, it appears to me that Mr Malik is right to contend that the new statutory regime makes the decision to curtail leave on the basis of a breach, of conditions an immigration decision taken under the rules. Such decisions can only be challenged on conventional public law principles rather than by way of precedent fact. The first proposition in Lim will thus also disappear and the unhappy harnessing together of the twin stallions of Khawaja precedent fact and declining jurisdiction as a matter of discretion will be a thing of the past and with it the quixotic search for the exceptional case. The owl of Minerva flies by night. The law appears to me to be clearly stated in the recent decision of the Court of Appeal in R (ota Giri) v SSHD [2015] EWCA Civ 784 (28 July 2015) per Richards LJ at [14] to [32] reviewing the relevant principles and case law.

34. I , therefore, dismiss this application for judicial review. The respondent seeks costs in the sum of £2200. Having succeeded in defeating the application, in principle proportionate costs should be payable by the applicant. I propose to drastically reduce what would otherwise be reasonable by reason of the failure to take the point the AOS, the argument before Judge Warr and in the detailed grounds (served late). Significant costs could and should have been avoided if this had been done. I will award costs in the sum of £500. Mr Miah will have to pay his own costs of the application, but doubtless his advisers will have to consider whether a discount is appropriate by reason of their own apparent failure to grapple with the decided law and advise him appropriately