Neutral Citation Number: [2014] EWCA Civ 1091

Case No: C4/2013/2851

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT LIST
(MR JUSTICE KENNETH PARKER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 9th June 2014

B E F O R E:

MASTER OF THE ROLLS
(Lord Dyson)

LORD JUSTICE MAURICE KAY

LORD JUSTICE SULLIVAN

THE QUEEN ON THE APPLICATION OF PAMELA ALBURTHA GRACE	**Appellant/Claimant**
-v-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/Defendant**

(DAR Transcript of
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Mr Z Malik (instructed by Malik Law Chambers Solicitors) appeared on behalf of the Appellant
Ms C McGahey (instructed by Treasury Solicitors) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE MAURICE KAY: The only issue in relation to which permission to appeal has been granted in this case concerns the approach which a judge of the Administrative Court or the Upper Tribunal must adopt when considering whether to certify an application for permission to apply for judicial review as "totally without merit" ("TWM").

2. By CPR 54.12(7) and its sister provision in the Upper Tribunal Rules rule 30(4A), a claimant whose application has been considered on the papers by a judge who has found it to be TWM is debarred from renewing his application at an oral hearing in the Administrative Court or the Upper Tribunal. His only recourse is to a judge of the Court of Appeal who will decide whether or not to grant permission to apply for judicial review or permission to appeal. That decision is confined to a consideration on the papers. The judge has no discretion to adjourn the application to an oral hearing. If the judge in the Court of Appeal, having considered the papers, refuses the application, that is the end of the matter: the application for permission to apply for judicial review will have been finally refused without its ever having been the subject of an oral hearing. The purpose of this recent innovation is to ensure that hopeless cases do not take up more of the time of respondents and of the court and the tribunal than is reasonable and proportionate.

3. Because we are concerned only with the TWM criteria and not with the facts of this particular case, I do not propose to set them out in detail. However, it will provide some context to the case if I summarise them briefly. They are not at all untypical.

4. The appellant was born on 14th December 1958. She entered the United Kingdom when aged 43 or thereabouts on 22nd October 2002. She was given temporary leave subject to conditions, but absconded almost immediately. She then lived here illegally for about ten years before making any attempt to regularise her immigration status. She finally made an application for leave to remain on 6th November 2012, when she would have been aged 53. At some time during her residency here she began a relationship with Mr Alton Maynard. It is assumed that that relationship is a genuine and subsisting one. The appellant has no children in this jurisdiction.

5. The Secretary of State considered the application, both under and outside the Immigration Rules. She considered that the appellant could not establish her case under the Rules or by reference to Article 8 of the ECHR and she refused the application with no right of appeal accorded to the appellant. The appellant issued a claim form on 13th May 2013. On 1st July 2013 the Secretary of State acknowledged service. The acknowledgement has annexed to it some 18 pages of grounds of resistance to the application which are set out in a detailed and cogent way.

6. The application was then considered on the papers by Kenneth Parker J, who, on 29th August 2013, refused permission to apply for judicial review. His reasons were stated as follows:

> "1. You entered the UK on temporary admission on 22 October 2002. You were required as a condition of your temporary admission to report on 30 October 2002. You did not report but absconded. As an illegal

> entrant you apparently formed a relationship with a British citizen, knowing full well that you had no right to be in the UK. On 6 November 2012, that is, 10 years after you illegally entered the UK, you applied for leave to remain.
>
> 2. You were 41 [that is slightly in error] when you arrived in the UK and you have therefore spent most of your life (including your formative years) in Jamaica. There is no apparent reason why you could not readily reintegrate into the social and cultural life of Jamaica. There is no obvious impediment to your partner, who knew or ought to have known of your precarious immigration position, returning with you.
>
> 3. In these circumstances, the decision to refuse you leave to remain is not an arguable interference with any right to private life under Article 8 ECHR."

Underneath that there are two bullet points, the second of which states: "Case is considered to be totally without merit".

7. An application was made for permission to appeal to this Court raising issues under the Immigration Rules and Article 8, together with a request that this Court clarify the TWM test, but when granting permission Longmore LJ limited the grounds to the issue of providing appropriate guidance on the meaning of TWM.

8. The phrase TWM first came into the lexicon of civil procedure in the context of civil restraint orders: see, for example, Bhamjee v Forsdick [2004] 1 WLR 88. It was first taken up soon after that in amendments to the CPR, where it now appears in a number of places. Its origin within the jurisprudence of civil restraint orders is acknowledged by paragraph 2.1 of the Practice Direction, which provides:

> "A limited civil restraint order may be made by a judge of any court where a party has made 2 or more applications which are totally without merit."

9. There the mischief sought to be addressed is that of the litigant who commences a plurality of hopeless cases. Its concern is to prevent further abusive or vexatious claims by placing a restriction in the form of a civil restraint order in relation to future litigation. It does not prevent the bringing of subsequent meritorious cases, for which permission can be sought and obtained.

10. At the same time there was an amendment to the CPR empowering a judge of the Court of Appeal to certify an application for permission to appeal to this court as TWM, but its sole purpose at that time was to provide material for the making of a civil restraint order on that or a future occasion. It did not then prevent the applicant from renewing his application to an oral hearing: see Perotti v Collyer-Bristow [2004] EWCA Civ 639. However, by a later amendment to the CPR, a judge of the Court of Appeal who refuses permission to appeal on paper can prevent a subsequent renewal to an oral hearing by

marking the application as TWM regardless of any civil restraint order implications: see CPR 52.3(4A) which was introduced by amendment in 2006.

11. The provision with which we are concerned, CPR 54.12.7, and its tribunal equivalent, are based on CPR 52.3(4A) in the sense that they are not expressly linked to civil restraint orders or repetitive or multiple applications. Moreover, the existence of the power in the different context of permission to appeal only arises when the applicant has had his case fully considered at first instance, even if not at a trial. The new limitation in relation to permission to apply for judicial review extends to a claimant with no previous history of abusive or vexatious claims being refused permission without his application ever being allowed to be pursued to an oral hearing. I apprehend that it is this novelty which prompts the present appeal.

12. The essential submission of Mr Zane Malik, which reflects a view expressed in a journal article by Mr Paul Bowen QC, is that the use of the concept of TWM, in circumstances which may totally deny a non-abusive claimant the opportunity to make oral submissions, must require that a stringent meaning be given to TWM. In the words of his skeleton argument, repeated to us in his oral submissions:

> " ... finding of TWM should not be made unless the claim is so hopeless or misconceived that a civil restraint order would be justified if such applications were persistently made."

This seeks to introduce into the present context the hallmarks of abusiveness or vexatiousness which underlie the civil restraint order jurisprudence. Mr Malik then emphasises the acknowledged potential of oral advocacy to enhance persuasiveness: see Sengupta v Holmes [2002] EWCA Civ 1104 per Laws LJ at paragraph 38.

13. I return to the purpose of CPR 54.12.7. It is not simply the prevention of repetitive applications or the control of abusive or vexatious litigants. It is to confront the fact, for such it is, that the exponential growth in judicial review applications in recent years has given rise to a significant number of hopeless applications which cause trouble to public authorities, who have to acknowledge service and file written grounds of resistance prior to the first judicial consideration of the application, and place an unjustified burden on the resources of the Administrative Court and the Upper Tribunal. Hopeless cases are not always, or even usually, the playthings of the serially vexatious. In my judgment, it would defeat the purpose of CPR 54.12.7 if TWM were to be given the limited reach for which Mr Malik contends. It would not produce the benefits to public authorities, the Administrative Court or its other users which it was intended to produce. I have no doubt that in this context TWM means no more and no less than "bound to fail". There is no reason to suppose that the judge did not apply that test in that way or that he applied it erroneously in the present case.

14. Some additional support for this view can be found from the recent Scottish authority Law Society of Scotland v Scottish Legal Complaints Commission [2012] Scot CS CSIH 79, although I acknowledge that the context there was slightly different.

15. The adoption of this approach does contain within it two important safeguards. First, no judge will certify an application as TWM unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case. Secondly, the claimant still has access to a judge of the Court of Appeal who, with even greater experience and seniority, will approach the application independently and with the same care. To my mind, these safeguards are sufficient. CPR 54.12.7 so applied does not detract from the vital constitutional importance of the judicial review jurisdiction. Moreover, it is consistent with the overriding objective of the CPR.

16. For these reasons, I would dismiss the appeal.

17. LORD JUSTICE SULLIVAN: I agree.

18. MASTER OF THE ROLLS: I also agree.

19. The phrase "totally without merit" is now firmly embedded in our Civil Procedure Rules. It is perhaps unfortunate that the word "merit" is included in the phrase. We are familiar with the notion of a claim being meritorious or having merit, connoting the idea that the claim is just or "is in accordance with the merits", but the word "merit" in the phrase "totally without merit" does not have this meaning. Although the court always seeks to do justice, the purpose of "totally without merit" is to enable the court to root out claims which are bound to fail, and, for the reasons given by my Lord, I would construe that phrase as meaning "bound to fail".