Neutral Citation Number: [2019] EWCA Civ 1040

Case No: C1/2019/0444

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MRS JUSTICE CUTTS)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 10 May 2019

Before:

SIR TIMOTHY LLOYD

Between:

THE QUEEN ON THE APPLICATION OF SIDDIQUI

Applicant

- and -

LORD CHANCELLOR AND OTHERS

Respondent

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Mr N Davidson QC and **Mr R O'Brien** (instructed by the Applicant) appeared on behalf of the **Applicant**

Ms Shaheed Fatima Q.C. and Mr Eesvan Krishnan (instructed by **the Government Legal Department**) appeared on behalf of the **Respondent**

Judgment

(Approved)

SIR TIMOTHY LLOYD:

1. This is an application for permission to appeal against the refusal by Cutts J on 19 February this year of permission to apply for judicial review. That judgment was given following a hearing at which counsel were heard for the applicant, Mr Siddiqui, and for the respondent, the Lord Chancellor. In accordance with the normal procedure on judicial review permission applications the matter had first been considered on the papers. That was by Dingemans J, who refused permission on 17 January.

2. The subject of the judicial review for which permission was sought, and is sought by way of the proposed appeal, is Rule 52.5 of the Civil Procedure Rules as it was amended in 2016 by the Civil Procedure (Amendment No.5) Rules of 2016, SI 2016/768. Prior to that amendment it had been the case for a long time that, if permission to appeal was refused by a judge of the Court of Appeal on a consideration of the application on the papers, the applicant was entitled in almost all cases to an oral hearing at which the application could be renewed. The only exception was of cases in which the application was stated by the judge dealing with it to be totally without merit, in which case there was no right to an oral hearing. The effect of the amendment in 2016 was to remove the right to an oral renewal hearing. That is the result of Rule 52.5(1), which says that, where an application for permission to appeal is made to the Court of Appeal, the Court of Appeal will determine the application on paper without an oral hearing except as provided for under paragraph (2). Paragraph (2) is as follows:

> "(2) The judge considering the application on paper may direct that the application be determined at an oral hearing, and must so direct if the judge is of the opinion that the application cannot be fairly determined on paper without an oral hearing."

Then there are ancillary provisions including that the oral hearing is to be listed no later than 14 days from the date of the direction unless the court otherwise directs.

3. So, whereas previously the disappointed applicant, refused permission on the papers, had a right within (if I remember right) seven days to request an oral hearing, which would take place in due course, now there is no such right. The judge who looks at the matter on paper may direct that an oral hearing take place and must so direct if he or she is of the opinion that a fair determination requires an oral hearing. The applicant, Mr Siddiqui, contends that the position resulting from this change is unlawful for one or both of two reasons: first that it is incompatible with Article 6 of the European Convention on Human Rights and therefore the Human Rights Act 1998; and, secondly, that it involves a breach of the common law principle of ensuring access to justice.

4. Given that the application is in the context of judicial review and of permission to apply for judicial review, Mr Davidson for Mr Siddiqui has reminded me of rule 52.8 whereby, if I consider that there is merit in the application, I can, instead of granting permission to appeal, grant permission to apply for judicial review so that the matter can go to a hearing

at first instance, rather than going to a substantive appeal which might then lead to a reference back to first instance.

5. The challenge in the present instance arises from a refusal of permission to appeal to Mr Siddiqui on the papers by Irwin LJ in relation to an appeal against orders of Foskett J, first of all dismissing his claim that he had brought to trial against Oxford University [2018] EWHC 184 (QB) and secondly in relation to the judge's order for costs following that trial [2018] EWHC 536 (QB). Nothing for present purposes turns on those proceedings beyond the fact of the refusal of permission to appeal without there being an oral hearing of the application for that permission in the Court of Appeal following Irwin LJ's decision to deal with the matter in the way that he did on the papers. Given that the challenge is to an amendment of the rules which has had a significant impact on the workload of the Court of Appeal, the applicant's representatives asked the court to consider listing the case before someone who had not been a member of the court at the time of the 2016 amendment. That is why the case is listed before me, because I had retired from judicial office before that date. Also, given the nature of the issue in the proceedings, it seemed to me appropriate to exercise my discretion under rule 52.5(2) to direct that the matter proceed to an oral hearing.

6. For Mr Siddiqui, Mr Davidson accepts that although Article 6 applies to an application for permission to appeal, it does not justify a general proposition that there must always be an oral hearing of a permission to appeal application. Whether the requirements of Article 6 are met in any given case depends on consideration of the nature of the filtering procedure and its significance in the context of the civil proceedings as a whole: see *Hansen v Norway* (application no. 15319/09), judgment of the European Court of Human Rights on 2 October 2014, and *R (Dunsford) v SSHD* [2006] 1 AC 245. Mr Davidson relies on material from the consultation process which preceded the rule change in order to show that in the present instance the provisions of Article 6 do require that there should be a right to a hearing. The rule change was proposed in order to alleviate the burden on the Court of Appeal at a time when there was no prospect of the number of the members of court being increased sufficiently to cope with the relevant workload without such a change. I shall refer to the material in that respect in a moment.

7. The consultation which preceded the rule change generated a range of views in response, some of which, including from then sitting judges, were seriously concerned about the removal or attenuation of the provision for an oral hearing on a permission to appeal application, especially in cases where the applicant is in person, and many of the respondents to the consultation were therefore opposed to the proposed change being made. Mr Davidson showed me statistics calculated in the course of that consultation exercise, which showed that a proportion of successful appeals were cases in which permission to appeal had been refused on paper but was granted at the oral renewal hearing. A number of figures emerge from those statistics, but he said there was a small but significant percentage of appeals which would have succeeded but which would be stifled by the change. Of course, it may be that in some cases the member of the Court of Appeal considering a permission to appeal application on paper, knowing that that it is the end of the road if permission is refused, would scrutinise the merits more closely than had been the case when there could be an oral renewal. So, the statistics as they were

before the 2016 change cannot be translated directly to a position as it is since that change.

8. He pointed to the undeniable fact that the oral hearing procedure lies at the heart of English civil procedure, much more so perhaps than in the case of some continental jurisdictions, and he referred to observations on the value of oral argument and its ability to change a judge's mind, in particular in *Sengupta v Holmes* [2002] EWCA Civ 1104, what was said by Laws LJ at paragraph 38 and by Keene LJ at paragraph 47. He noted that the Lord Chancellor, through his representatives, in the Summary Grounds of Resistance to the judicial review claim, had accepted that it was possible that judges considering the permission to appeal application on the papers may fail to identify all cases in which the merit of the appeal has not emerged from the papers alone. He also referred to pertinent observations about oral renewals in the judicial review context, rather than the permission to appeal application context, in *Wasif v SSHD* [2016] 1 WLR 2793, especially at 16-17. He submitted that a measure which blocks access to a hearing of an appeal, knowing that it will prevent the hearing of a significant number of appeals which if heard would succeed, cannot be said to comply with Article 6.

9. He also relies on the common law right of access to justice, as discussed in a number of recent cases, above all *R (Unison) v Lord Chancellor* [2017] UKSC 51, the successful challenge to the imposition of application fees for access to employment tribunals, particularly the passage in the judgment of Lord Reed at paragraph 65 and following, and he also relied on the observations of this court in *R (Detention Action) v First-Tier Tribunal* [2015] 1 WLR 5341 in which the fast-track regime applying to asylum and immigration appeals in the First-Tier Tribunal and Upper Tribunal was struck down as being structurally unfair. In that case, words were cited of Sedley LJ in an earlier case, *R (Refugee Legal Centre) v SSHD* [2005] 1 WLR 2219 at paragraph 8, on which Mr Davidson relies. Sedley LJ recognised that the choice of an acceptable system (in those cases it was under the Tribunals, Court and Enforcement Act 2007, section 22) was in the first instance a matter for the executive, which was entitled to take into account perceived political and other imperatives for speedily dealing with asylum applications. But he went on to say that, " it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency, and whether it has done so is a matter for the courts."

10. Mr Davidson's point on the statistics is good so far as it goes, although as I have mentioned it cannot be translated directly into the position prevailing since the rule change because judges considering what is known to be the last possibility of an application for permission to appeal may well take a different position from that which they would have done when they knew that an oral renewal was available. That cannot be tested or verified in practice. Nevertheless I accept his proposition to this extent, that there are likely to be some cases in which permission to appeal is refused on the papers under the present rule and in which, if an oral renewal had taken place or indeed an oral hearing under the present 52.5(2), permission to appeal would be granted and that among those cases there will be some in which the eventual appeal would succeed. The question is whether the change in the rule which prevents those cases from proceeding to a hearing of the appeal is one which is incompatible with Article 6 or with the common-law right of

access to justice. Before me today the question is of course whether Mr Davidson has shown there is a real prospect of success on those arguments. He does not have to show that they are right.

11. I should say that the respondent is represented before me, but I have not invited or allowed submissions from the respondent. I do of course have material from the respondent, which I have taken into account, both documents emanating from the proceedings at first instance and a Statement of Reasons under Civil Procedure Rules PD 52C, paragraph 19, to which the applicant replied in writing. I should also mention that the applicant very recently added to the material before me a short note about a very recent decision of Lady Carmichael in the Outer House of the Court of Session in a case called *The Petition of AP v Lord Advocate* [2019] CSOH 23 concerned with the limited and special provision for oral hearings in the Scottish judicial review procedure. That is an interesting decision itself, and it led Mr Davidson to cite to me a number of passages which he submitted encapsulate an appropriate attitude of the court.

12. At paragraph 46 Lady Carmichael said that she was satisfied that the provisions under consideration represented a proportionate limitation on the right of access to the court. She went on:

> "I do not reach this conclusion unimpeded by a sense of unease about a scheme which could theoretically permit a challenge, even on a matter of very great public importance, to be brought to an end without a hearing in open court. It is, however, proportionate because it recognises that there are some cases in which an oral hearing will be required for the fair and proper determination of whether permission should be granted, and others in which it will not. There will be cases in which there will be nothing to be gained from an oral hearing. Such cases will include cases which are, on examination of the papers, totally without merit. In such cases there is no point in prolonging the proceedings or incurring expense by having an oral hearing."

Later in the paragraph she said:

> "The effect of the measure should not be, having regard to those features, to deprive a litigant of an oral hearing in any case in which it is required for the proper determination of whether or not to grant permission. On that basis I do not consider that the impact of the measure is disproportionate to its likely benefit."

13. That, as I say, was concerned with a procedure at first instance under which the matter was considered first on the papers by one of the Lords Ordinary and then could be

considered again by another Lord Ordinary, who had to address in terms the question of whether an oral hearing should be granted. It is, therefore, not a precise analogy to the present, but I accept that it is an interesting, and maybe helpful, example of judicial reasoning in this area.

14. The context of the rule change that I am considering appears from the interim and final reports of the Civil Courts Structural Review carried out by Briggs LJ, as he then was, in particular from chapter 9 of the interim report. This recorded that the incoming work of the Court of Appeal had increased by over 54% in the previous six years and that, by the last two years of that period, the proportion of appeals failing to be heard by the "hear by" target dates had begun to rise, steeply and increasingly. The doubling of expected waiting time for appeals was found to be attributable to an ever-increasing need to redeploy members of the Court of Appeal away from full appeals and towards the determination of applications for permission. The interim report reviewed the problem and a range of possible solutions. In paragraph 9.31, in words relied on by Mr Davidson in his written submissions, the report said:

> "In the present context, if the process of analysis of ways in which to address the current and increasing workload of the Court of Appeal leads to the conclusion that nothing short of an element of abrogation of the right to oral renewal will bring waiting times back to an acceptable level, then there may have to be a straight trade-off between delay and a narrowing or abrogation of that right, which simply cannot be avoided."

15. The equivalent chapter in the final report reviewed the responses to the consultation exercise, recorded that there was no prospect of an increase in the number of members of the court, and proposed, after approval at a meeting of the entire Court of Appeal, the rule change that is at issue in the current proceedings. The report recognises that this change would contradict many of the written consultation responses on this point and at paragraph 9.8 it said:

> "careful time-costing of the available proposals, set alongside the evidence derived from the Genn/Balmer report demonstrated that, without an increase in the number of its judges, the court simply could not even stem the annual excess in its workload (currently running at over 9,400 hours per annum) let alone make any inroad into the unacceptable delays caused by the backlog (of more than 46,000 hours) without at least replacing the right of oral renewal of PTA applications. The highlights of that time-costing analysis are set out in Annex 4, section 1. Accordingly, the court faced an inevitable increase in the delays in its handling of appeals, with no other available means of stemming, let alone reducing them."

16. For Mr Siddiqui Mr Davidson argues that these considerations are not in any way an adequate basis for the change, with its consequence that some appeals which would

succeed if they were to allow to go ahead will not be able to be heard because permission to appeal will be refused on paper, whereas it would have been granted if it had received an oral hearing and would succeed if reargued. He contends that it is insufficient for the respondent to rely on the refusal to increase the numbers of judges in the Court of Appeal and he also now submits that it is also insufficient to rely on any proposition to do with balancing the limitations on the justice system at the stage of permission to appeal and the limitations on the justice system in terms of timely disposition of substantive appeals. In particular, Mr Davidson put up what seems to me to be a tendentious comparison between domestic appellants who are thwarted from their meritorious appeals being heard because of this rule change and, on the other hand, foreign litigants in the Commercial Court whose concern for delay of the hearing of their appeals should not be regarded as an adequate reason justifying the rule change that I have to consider. The point seems to me to be tendentious because plainly delays in the disposition of appeals affect not only foreign litigants in the Commercial Court but all litigants from all courts and tribunals coming to the Court of Appeal and the ability of the members of the Court of Appeal to deal with what is after all their main task, which is to hear and determine appeals.

17. It seems to me that Mr Davidson's position in itself points up the fallacious nature of his submissions, which seem to proceed on the footing that nothing less than the closest possible approximation to perfection in the process of filtering for appeals can satisfy Article 6, or the common law right of access to justice. Delays in the hearing of appeals do cause injustice, as explained in the interim and final reports. Given the constraints on the number of judges, a balance had to be struck between the modification of the procedure for permission to appeal and the need to reduce so far as possible the delays in hearing and determining appeals. That, as it seems to me, is a paradigm case for the exercise of an executive decision within the range of the margin of appreciation as to how to ensure a proper, fair, just and efficient system for the administration of justice in civil appeals. In my judgment, this case is miles away from those in which a change of practice or procedure has been found to infringe the common law right of access to justice. The claimant had a hearing at first instance. In the present proceedings he had a consideration on paper followed by an oral hearing and an opportunity to apply for permission to appeal following that hearing. In the substantive proceedings, of course, he had a trial and he had an opportunity to apply to the judge, which he took, to apply for permission to appeal. And he had the opportunity to put the matter before the Court of Appeal on an application for permission to appeal. Any appeal is necessarily concerned with the same points and materials as were considered at first instance and is confined to a point of law. The would-be appellant has the right to apply for permission and to support that application not only by grounds of appeal and a skeleton, but also by other relevant material. The only issue is as to whether there should be an unfettered right to an oral hearing after a consideration on the papers or there should be the more nuanced position secured by the present rule under which an oral hearing may take place, but it is up to the member of the Court of Appeal considering the papers whether it does.

18. The position as to an oral hearing at first instance, as it seems to me, is likely to be materially different. As regards permission to appeal, I can see no arguable basis for saying that limiting the availability of an oral hearing in the way done by Rule 52.5 infringes the common law right of access to justice.

19. As far as Article 6 is concerned, relevantly providing that, in the determination of his civil rights and obligations, everyone is entitled to a fair hearing of an appeal, the jurisprudence of the European Court of Human Rights shows, as I have mentioned, that this does not mean that an oral hearing has to take place at every contested stage of civil proceedings. In my judgment, given the context in which the issue arises, which I have described, it is not necessary to afford would-be appellants the right to an oral hearing on a permission to appeal application. Mr Davidson's argument goes too far in contending that this is necessary in order to reduce to a minimum the number of cases in which permission to appeal is refused but which, if allowed to proceed, would result in a successful appeal. No system of justice can be perfect. While I can well understand the opposition that was expressed in the consultation process to the change then proposed and now implemented, it seems to me that it was clearly legitimate and proportionate for the rule-makers to make this change, bearing in mind the need to take serious steps to reduce the growing delay in the disposition of substantive appeals. Those delays were the source of injustice in themselves. Mr Davidson's proposition, put forward below and in the papers, that there could have been a less drastic change is unconvincing. The change did not eliminate hearings altogether, although they will no doubt be rare. His argument that the government should have devoted additional resources to the appeals system by funding an increase in the number of Court of Appeal judges seems to me not to be sustainable.

20. For those reasons, as it seems to me, this is an application which has no prospect of success and I therefore dismiss the application.

Order: Application refused

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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