IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
IN THE ADMINISTRATIVE COURT
Sitting at Cardiff

Neutral Citation No. [2019] EWHC 785 (Admin)

Case No: CO/4516/2018

Courtroom No. 14

Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

11.34am – 11.56am
Wednesday, 6th March 2019

Before:

THE HONOURABLE MR JUSTICE ANDREW BAKER

B E T W E E N:

THE QUEEN ON THE APPLICATION OF RB

and

THE FAMILY COURT AT CARDIFF AND ORS

MR GRIFFITHS QC appeared on behalf of the Claimant
NO APPEARANCE by or on behalf of the Defendants

JUDGMENT
(Approved)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Andrew Baker:

1. This is a renewed application for permission to seek a judicial review of a decision in the Family Court sitting here in Cardiff. The decision sought to be impugned in judicial review proceedings is that of HHJ Parry made on 17 August 2018. That decision in turn was her refusal upon oral renewal of the applicant Mother's application for permission to appeal against decisions of DJ Regan in the Family Court, made on 29 May 2018.

2. As I observed in the course of the detailed and forceful submissions of Mr Griffiths QC on behalf of the applicant, HHJ Parry's judgment on the application for permission to appeal runs to some 11 pages and 60 paragraphs. It both is itself, and is evidence of, a most thorough and careful review of the possibility said before HHJ Parry to be reasonably arguable that DJ Regan's underlying original exercise of discretion had been erroneous.

3. This original exercise of discretion was a decision not to grant permission to the applicant Mother in the underlying family proceedings to adduce and rely upon a report by way of proposed expert evidence from a Dr Mirza. Dr Mirza is a London-based psychiatrist consulted by the applicant Mother in the aftermath, effectively, of the decision of DJ Regan back in December 2017, by which he granted residence of the children of the now failed marriage to the applicant's former husband. This underlying decision is ultimately the decision the applicant would wish to have reconsidered.

4. Amongst the many and detailed grounds, sufficient on their face and in substance, upon which HHJ Parry declined to grant permission to appeal against the refusal to admit Dr Mirza's evidence was that, she having considered that report:

> "Its evidential flaws were unlikely to be capable of being cured by providing Dr Mirza with further material. Therefore, I am satisfied that in terms of the District Judge's decision to refuse to admit Dr Mirza's report, his decision was absolutely correct as a matter of law and therefore there are no real prospects of success in persuading the court that he was wrong in that decision."

5. HHJ Parry, in fairness to the applicant, considered additionally whether, albeit it was wholly unarguable in her view that the District Judge could be regarded as wrong not to have admitted Dr Mirza's report, the existence of Dr Mirza's report considered *de bene esse* for the purposes of the permission to appeal process should have sufficiently alerted the District Judge to the possibility of a need to reconsider the basis of his original December 2017 judgment that the proceedings before him should have taken a different course.

6. For carefully expressed reasons, again on their face and in substance sufficient reasons, HHJ Parry came to the conclusion that, even if looked at in that way, the application ultimately to seek to have the December 2017 decision reopened or revisited was not one that had any realistic prospect of success by way of an appeal against the decision of DJ Reagan on 29 May.

7. Although not cited, and not in any way grappled with, by the applicant's statement of facts and grounds in support of the asserted claim for judicial review, the test for a successful judicial review in this particular context is a very specific one. It is established by the

Court of Appeal authority of *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1WLR 475. In the judgment of the court handed down by Lord Phillips of Worth Matravers, MR, as he was then, at [52] his Lordship dealt with a particular case of permissions to claim judicial review in asylum cases. At [53]*ff*, his Lordship turned to deal more generally with the position of an attempt to challenge by way of judicial review:

> "[53] … decisions of District Judges in respect of which appeals lie, if permission is given, to a Circuit Judge. There is a right to seek permission to appeal against such decisions, and to renew the application at an oral hearing if it is refused on paper. The decision challenged will, in this way, be open to review by a judge. That review can consider any challenge that is made to the jurisdiction of the judge below. It can also consider the merits of any attack that may be made on the conclusions of the judge below in relation to any matter, be it fact, law or the basis upon which a discretion has been exercised. If grounds for appeal are held to exist, a full appeal will follow.
>
> [54] This scheme we consider provides the litigant with fair, adequate and proportionate protection against the risk that the judge of the lower court may have acted without jurisdiction or fallen into error. The substantive issue will have been considered by a judge of a court at two levels. On what basis can it be argued that the decision of the judge of the appeal court should be open to further judicial review? The answer, as a matter of jurisprudential theory is that the judge in question has limited statutory jurisdiction and that it must be open to the High Court to review whether that jurisdiction has been exceeded. But the possibility that a Circuit Judge may exceed his jurisdiction, in the narrow pre-Anisminic sense, where that jurisdiction is the statutory power to determine an application for permission to appeal from the decision of a District Judge, is patently unlikely. In such circumstances an application for judicial review is likely to be founded on the assertion by the litigant that the Circuit Judge was wrong to conclude that the attack on the decision of the District Judge was without merit. The attack is likely to be misconceived, as exemplified by the cases before us. We do not consider that judges of the Administrative Court should be required to devote time to considering applications for permission to claim judicial review on grounds such as these. They should dismiss them summarily in the exercise of their discretion. The ground for doing so is that Parliament has put in place an adequate system for the reviewing the merits of decisions made by District Judges and it is not appropriate that there should be further review of these by the High Court. This, we believe, reflects the intention of Parliament when enacting s.45(4) of the 1999 Act [that is to say the Access to Justice Act 1999]. While Parliament did not legislate to remove the jurisdiction of the High Court judicially to review decisions of County Court judges to grant or refuse permission to appeal, we do not believe that Parliament can have anticipated the spate of applications for judicial review that s.54(4) appears to have spawned.
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> [55] Everything that we have said should be applied equally to an application for permission to claim judicial review of the decision of a Judge of the County Court granting permission to appeal. We are not aware that such an application has yet been made.
>
> ***Exceptional circumstances***
>
> [56] The possibility remains that there may be very rare cases where a litigant challenges the jurisdiction of a Circuit Judge giving or refusing permission to appeal on the grounds of jurisdictional error in the narrow, pre-Anisminic sense,

> or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing. If such grounds are made out we consider that a proper case for judicial review will have been established."

8. At this stage of course, I am concerned only with whether the applicant's proposed judicial review is arguable, that is to say, discloses some realistic prospect of success.

9. There is no suggestion nor could there be that there has been here any jurisdictional error in what Lord Phillips described as 'the narrow pre-Anisminic sense'. The application for permission for a judicial review must therefore stand or fall on whether it is arguable that there has been a procedural irregularity of such a kind as to constitute a denial of this applicant Mother's right to a fair hearing.

10. In my judgment, the suggestion that that is so is wholly misconceived. It is suggested that it is made out by the proposition that because the upshot of the decision-making of DJ Reagan, in respect of which HHJ Parry did not give permission to appeal is that the report of Dr Mirza is not to be admitted into the family proceedings, the applicant has been done a fundamental injustice. As it seems to me, there is no seriously arguable basis for the making of that submission, even put in that general or non-specific way. However, it is wholly misconceived in my judgment, if intended as a submission that the injustice that the applicant has allegedly been done is the denial of a right to a fair hearing.

11. The fair (full and thorough) hearing the applicant Mother had was initially that in front of DJ Reagan to consider whether, including by reference *de bene esse* to a consideration of the content of the proposed new evidence and the circumstances in which it was obtained, the interests of justice required that report to be admitted. The further and more than ample fair hearing that the applicant then was given was by way of an application dismissed initially on the papers but renewed, it would seem at some length and with great thoroughness orally, to seek permission to appeal from that ruling.

12. Mr Griffiths QC in my judgment is as wrong as he can be in the circumstances to submit, as he nonetheless does, that the applicant has never got to a court able to or willing to consider and examine the proposed new evidence. What of course he means by that is, in substance, neither more nor less than that his client's application for the exercise of a discretion in her favour to admit the new evidence failed and as a result it will not be the case that the report she obtained from Dr Mirza will become evidence to be considered in any substantive application that was before the District Judge or might in the future be made in the underlying family proceedings.

13. As it happens, and for completeness, I note that since the decision of DJ Reagan in May, ultimately sought to be impugned by way of this attempt to challenge the refusal of permission to appeal against that decision, there has been a further decision and order of his. This was in the family proceedings on 31 July 2018, under Section 91(14) of the Children Act 1989, and it requires the leave of the court for any further Children Act application to be made at any time prior to 1 August 2020. It may therefore be in practice that there cannot be any further substantive applications in the family proceedings, although there is a gateway of permission to bring such applications if the interests of justice require them, for some time. However, that is a separate matter and no application, as I understand it, has been made to seek to appeal that ruling and order and in any event that is not a matter before me today.

14. The end result is that, upon the basis of a considered exercise of discretion in the interests of justice, DJ Regan did not accede to an application to admit the evidence of Dr Mirza into the proceedings. The applicant cannot now appeal against that decision because upon a full and thorough consideration of the matter, she did not persuade HHJ Parry that there is a realistic prospect for a successful appeal. This does not mean that the applicant has never got to and will never get to a court that can in a materially relevant way consider the question of the possible impact of that evidence and whether, in the interests of justice, it ought therefore to be looked at in the substantive proceedings.

15. With respect to the detailed submissions made by Mr Griffiths QC on the applicant's behalf, that is precisely what DJ Reagan and in turn HHJ Parry have done. As it seems to me, from start to finish the suggestion that this is a suitable matter for intervention by this court, by way of judicial review, was and is misconceived and wholly without merit.

16. This is not in any way to diminish any sense of disappointment it may be the applicant feels (and through her counsel, Mr Griffiths QC, she effectively does say to the court that she feels very disappointed) about the outcome as things now stand of the underlying substantive family court proceedings. Nothing in the judgment should be understood to be any attempt to criticise her as an individual. This court has had no direct dealings with her nor does it make any assessment of her, although I have seen reference in the papers to other stages of the proceedings in which a range of findings have been made.

17. The fact is that the jurisdiction now sought to be invoked is one that is only exercised or capable of being exercised in extreme and exceptional circumstances, as described by the leading judgment in the Court of Appeal from which I have quoted, and – to coin a phrase I used during the course of the discussion of the case with Mr Griffiths QC during his submissions – the applicant's application did not come within a country mile, with respect, of satisfying that test.

18. This application is therefore refused. There will be no order as to costs.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.