



Neutral Citation Number: [2024] EWHC 438 (Admin)

Case No: AC-2022-LON-003043

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 28th February 2024

Before:
FORDHAM J

Between:	
R (MD AYAZ KARIM)	<u>Claimant</u>
- and -	
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	<u>Defendant</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Interested Party</u>

The Claimant in person
The Defendant did not appear and was not represented
John-Paul Waite (instructed by GLD) for the **Interested Party**

Hearing date: 28.2.24
Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

FORDHAM J

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

FORDHAM J:

Adjournment

1. This is a permission-stage judicial review claim. The Claimant has appeared in person today and I have not needed to hear any submissions from him. I have been assisted by the submissions made by Mr Waite for the Interested Party (“SSHD”) but, having heard from Mr Waite, I am quite satisfied of two things. The first is that I need to start today with the question of whether to adjourn this hearing. The second is that the answer to that question is that it is in the interests of justice that I should adjourn today’s hearing. I have also ventilated with Mr Waite the possible ‘fallback’ position of directions with a view to a Judge, whether me or another Judge, considering further representations, in the first instance at least, on the papers. It is clear that the SSHD wants the “jurisdictional” issue in this case to be ventilated at a hearing. I have been urged to press on with that hearing today, but I am unwilling in the circumstances to take that course.

Fresh Claims and Amended Grounds

2. The reference number for this judicial review claim was CO/4040/2020 and is now AC-2022-LON-003043. Something that Mr Waite has, very fairly, drawn to my attention – in circumstances where the Claimant appears unrepresented – is this. There have been very recent attempts on the Claimant’s behalf to amend the judicial review grounds in this case. If the SSHD is right on the “jurisdictional” point that has been raised, one of the things that might be raised by Counsel on behalf of the Claimant – as I understood Mr Waite – is the question of a fresh judicial review claim with a new reference number, as a vehicle for the grounds that are said to arise in the proposed amendments. I interpose that Mr Waite has said that the Claimant’s Counsel might say that, instead of having to bring a fresh judicial review claim, permission to amend this existing claim might be appropriate. Mr Waite recognises this, or these, as points which the Claimant’s representative might raise. He does not accept that either course is one which is open. It is obvious that any attempted pursuit of a fresh claim would immediately raise serious question-marks. I can well imagine that it would be met with objections that such a course is wrong in principle, or even an abuse of the process of the court. All of that remains for consideration, should it be raised. But it could be raised, and that is Mr Waite’s point.

The Context

3. The ‘target’ for the existing judicial review claim is the refusal of permission to appeal on 20 September 2022 by the Upper Tribunal. The judicial review claim was commenced on 21 October 2022. The Claimant is represented by solicitors (Zyba Law), and the original grounds for judicial review were settled by Leading Counsel (Zane Malik KC).
4. On 8 March 2023, Lang J directed: (a) the SSHD to file an Acknowledgment of Service and Summary Grounds of Resistance (AOS/SGR), addressing the Claimant’s grounds for judicial review, and

in particular, the contention that the Court’s jurisdiction is not excluded by section 11A(2) of the Tribunals, Courts and Enforcement Act 2007, by application of the exceptions in section 11A(4).

Lang J also directed (b) permission for the Claimant to file a reply within a further 14 days. The SSHD's AOS/SGR were filed on 19 April 2023. I have not seen a reply.

5. On 23 August 2023, Sweeting J refused permission for judicial review on the papers. In his reasons, he said this:

This application for permission to apply for judicial review is a challenge to a decision of the Upper Tribunal. It is to be determined in accordance with the provisions of section 11A of the Tribunals Courts and Enforcement Act 2007. Generally, such challenges are excluded by reason of section 11A(2) of the 2007 Act. Permission to apply for judicial review will be granted only if the claim falls within any of the exceptions at section 11A(4) and/or (5) of the 2007 Act. This claim does not meet that requirement. It is not arguable that the refusal of permission by the Upper Tribunal involves or gives rise to any question as to whether the Tribunal has acted in a way which was procedurally defective ... so as to amount to a fundamental breach of the principles of natural justice...

6. On 23 August 2023, a purported Notice of Renewal was filed and served, with brief grounds under the name of Mr Malik KC. I have seen no response from the SSHD.

7. Then on 9 January 2024, the Administrative Court Lawyer made an Order giving directions relating to the oral hearing of the renewed application for permission for judicial review. The date of the hearing was not fixed at that stage. On 23 January 2024 the renewed application was then listed for hearing today on 28 February 2024 (for 30 minutes). That gave a one-month time-frame. The directions Order of 9 January 2024 had contained a note which said:

This order has been made of the court's own initiative pursuant to CPR3.3(4). Any party affected by may apply to have it set aside, varied or stayed. Any such application must be made not more than 7 days after the date on which this order was served on the party making the application.

8. On 25 January 2024 the SSHD filed an N244 Application in these proceedings: (a) to set aside the 'own initiative' directions Order, pursuant to CPR3.3(5)(a); (b) for an extension of time (the delay being said to be "predominantly attributable to the delay in receiving Counsel's advice on how to proceed"); and (c) asking for the application to be dealt with at a hearing (30 minutes). A supporting witness statement said that the judgment in LA (Albania) [2023] EWCA Civ 1337, delivered on 16 November 2023, had confirmed (at §29) that the High Court no longer has any jurisdiction. That is the "jurisdictional" point to which I have referred.

9. Mr Waite has drawn my attention to the simultaneous email sent by GLD on 25 January 2024, which said that the SSHD proposed that the 30 minute requested hearing should take place on 28th February 2024 "when the current oral permission hearing is already listed". Mr Waite submits that that was good sense for a number of legitimate and practical reasons. But it is not unfair to point out that that email went on to make the point that "SSHD's counsel has virtually no availability before then". This was an obvious reference to the SSHD's wish to retain Counsel who was acting in the case, and avoid a hearing at which that barrister would not be able to attend. All of that was entirely sensible and legitimate.

Adjournment Request

10. On 23 February 2024, the Claimant’s solicitors filed an N244 application for a “short adjournment” of today’s hearing, on this basis: (a) they had instructed new Leading Counsel (Sonali Naik KC); (b) she was not available today; (c) she and they needed more time to prepare; and (d) asking for that adjournment application to be dealt with at a hearing (30 minutes). At that stage the application for an adjournment was not accompanied, as it was yesterday, with draft amended grounds for judicial review and an application for permission to amend the grounds in that way. Nevertheless there was squarely notice, 5 days ago, of the basis on which the adjournment was being sought.
11. The adjournment request has been resisted by the SSHD. Yesterday morning at 09:39, the Administrative Court Lawyer sent an email to the parties. It said this:

Mr Justice Fordham has considered the papers and asked me to respond as follows. The SSHD has an application for a ruling the High Court has no jurisdiction, including an extension of time (because of time spent getting counsel’s opinion). The Claimant has an application for an adjournment (to get new counsel’s opinion) and asks for this to be dealt with at a hearing. This case is listed for 28th February 2024. Absent agreement between the parties, the Court will list the Claimant’s application for the adjournment to be heard on 28th February 2024, with the SSHD’s application to follow if the adjournment is refused and if there is court time. If there is any development, please let us know promptly.

12. I interpose that from the Claimant’s side the solicitors emailed yesterday evening to say they had been unable to secure Counsel to cover today.

Speaking Note

13. From the SSHD’s side the development was a “skeleton argument” setting out the resistance of the adjournment. I am told this was intended to be sent to the Court this morning but, by an error, was sent by Counsel’s Chambers to the solicitors instead of to the Court. These things happen. It was ultimately provided to the Court at 13:35. I refused permission for it to be relied on as a skeleton argument. But I allowed Mr Waite, who had provided a copy to the Claimant, to take me through it as a “Speaking Note” in lieu of oral submissions.

Resistance to the Adjournment

14. Mr Waite recognises the position in which the Claimant finds himself. But he says the Court should take a robust position. Viewed in the round, and objectively, the Claimant and his solicitors have had adequate time to secure new representation, if they wished to do so, and to identify someone who would be available for the hearing listed for today. They did not need to instruct new leading counsel who was unavailable. They should have instructed somebody else to assist who could attend today’s scheduled hearing. There has, viewed in that way, been plenty of time and it really is as simple as that. Moreover, says Mr Waite there is no purpose in an adjournment because “nothing can be achieved other than Counsel attending”, as he put it. He emphasises what he says is a short and straightforward point about “jurisdiction”, which he says is unanswerable. He submits that an adjournment will involve the incurring a further costs which are avoidable; and that it will engage further and unnecessary judicial resources.

Decision

15. In my judgment, as I have already indicated, what the interests of justice in this case require is that today’s hearing be adjourned rather than to proceed with the Claimant

unrepresented. The reality is that he and his solicitors have been able to engage Leading Counsel to assist, who wishes to make representations on the issue of “jurisdiction” and other aspects of the case if they arise. The idea that “nothing is achieved other than Counsel attending” the hearing is one with which I have difficulty. Oral hearings and the engagement which they bring are a central value to our legal system and there is all the difference in the world between any litigant – whether the SSHD or a claimant – appearing in person and being represented by specialist Counsel. The “jurisdictional” point and any related issues may prove to be very straightforward. But I am not prepared to proceed today into that territory in circumstances where an adjournment was requested for what, in my judgment, are legitimate reasons in the interests of justice.

16. It is not unfair, in my judgment, in this case to bear in mind that the SSHD’s own application (of 25 January 2024) requires an extension of time, was outside the clear timeframe given in the directions Order, and the reason given for that default – which the Court is being asked to forgive – is that time was needed to get Counsel’s opinion. Nor is it, in my judgment, unfair to have in mind the understandable anxiety on behalf of GLD (in the email of 25 January 2024) that that application, when belatedly made, should be listed for hearing which Counsel engaged by the SSHD was able to attend, rather than having to find alternative cover. These points do, in my judgment, bring into focus the question of whether it would be right to proceed today, knowing that the Claimant has secured new Leading Counsel, who is unable to attend.
17. It is obvious that at some stage subsequent to the application on 25 January 2024 there has been a change of team on the Claimant’s side. But there is no reason, in my judgment, to suppose that the Claimant’s solicitors have been dilatory in dealing with his case and seeking to instruct specialist Counsel in a position to assist him. I am not, in the circumstances of this case, prepared to criticise them: for choosing to instruct specialist Leading Counsel, who was able to assist but unable to appear today; and for then promptly raising the position, 5 days ago, including by making a formal application for the adjournment.
18. One thing that would have saved costs, and judicial resources, would have been the acceptance by the SSHD that a short adjournment was justified. That position was not adopted, nor was it adopted after yesterday morning’s email from the Court. I make no criticism of the SSHD for coming today and asking the Court to take a robust position. That was a matter for the SSHD and the invitation was properly made to proceed today. But I have not been able to accede to it.
19. It is in all the circumstances and for all these reasons that I am going to adjourn three of the four applications that are before the Court today. In chronological sequence they are (1) the renewal application (with its 30 minute time estimate); (2) the SSHD’s application for an extension of time and to set aside the directions (with its 30 minute time estimate); (3) the Claimant’s application for an adjournment (with its 30 minute time estimate); and (4) the Claimant’s application for permission to rely on amended grounds for judicial review. I have dealt with the third of those. The others remain to be dealt with. The first question will be the “jurisdictional” question and whether to grant the extension of time and set aside the directions, or take some other cause based on any absence of “jurisdiction”. It makes sense for that to be heard alongside the renewal application and any other application that is made relating to the amended grounds which have very belatedly been filed, so that the Court can – if appropriate – consider

the position “in the round”. I will say 60 minutes for the adjourned hearing. I will adjourn to the first available date after 28 days. I will make a direction for skeleton arguments: 14 days (Claimant) and 7 days (SSHD) before the hearing. Costs reserved.

28.2.24