IN THE UPPER TRIBUNAL

R (on the application of Dang) v Secretary of State for the Home Department IJR [2015] UKUT 00133 (IAC)

Field House
London

Thursday, 19 February 2015

BEFORE

UPPER TRIBUNAL JUDGE CRAIG

Between

MS TAN THI DANG

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr R Hussain, instructed by Nasim & Co appeared on behalf of the Applicant.

Ms J Anderson, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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APPLICATION FOR PERMISSION

JUDGMENT

(as approved by Judge)

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JUDGE CRAIG: The applicant in this case is a national of Vietnam who was born on 30 April 1975. She arrived in this country in October 2002 and claimed asylum on arrival. Her claim was refused by the respondent and her appeal rights were exhausted on 23 April 2003. Thereafter a One-Stop Notice was served and although there was some correspondence received from the applicant's representative she disappeared from sight for a number of years. Then in February 2011 further representations were received and it appears the file was allocated to that department of the respondent's which was considering legacy cases and what happened thereafter is a matter which is disputed between the parties. What is certainly the case is that on 12 February 2014 the respondent wrote two letters to the applicant informing her that her case had been fully reviewed, that she did not qualify for a grant of leave to remain and that she had no basis on which she could lawfully remain in the UK.

2. The applicant seeks to challenge that decision and her claim is founded essentially on a letter which she claims was sent on behalf of the respondent to her former solicitors (which I understand was a sole practitioner firm) dated 26 August 2011, in the following terms:

> "I am writing to provide an update on your client's case which is being dealt with by the Case Assurance and Audit Unit.
>
> We have now reviewed your client's case and **subject to final security** checks our decision is to grant your client leave in line with current Immigration Rules.
>
> Before we despatch the details and confirmation of your client's leave, to ensure that we have the correct details, we require confirmation of certain details on the attached pro-forma and return to the address at the bottom of this form.
>
> **If you or your client supplied these details in response to our letter dated 31 July 2011 you do not need to return the pro-forma**."

There is a stamp at the bottom of this letter which purports to show that it was received presumably by the applicant's former solicitors on 6 September 2011.

3. Permission to bring these proceedings has been granted and the basis of the application is that because this letter was sent the applicant had a "legitimate expectation" that she would be allowed to remain in the UK and that the respondent cannot now lawfully resile from the indication which was given in that letter.

4. The grounds are in the following terms at paragraphs 16 to 18:

> "16. The claimant further submits that, having been informed that she was to [be] granted leave, subject to security checks, she had a legitimate expectation that such leave would be granted within a reasonable period thereafter. It is submitted that 30 months is not such a reasonable period and that this expectation has therefore been unlawfully thwarted. There has been a miscarriage of justice and the respondent's decision dated 12 February 2014 is unreasonable to the extent of being unlawful and flawed.
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> 17. At the very least, it is submitted, the claimant is entitled to an explanation as to why having decided earlier that subject to the purported security checks, leave would be granted, there was a u-turn by the respondent and as to why she was not granted leave to remain.
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> 18. It is submitted that the respondent's letter dated 26 August 2011 cannot be withdrawn because a decisive step was taken by communicating the decision to the claimant and the respondent did not have the *locus poenitentiae* to withdraw it after 2½ years and issue a fresh decision refusing her leave to remain in the UK."

5. The argument which is now before me can be summarised very briefly indeed. It is submitted on behalf of the applicant first that the Tribunal should accept that the letter of 26 August 2011 was a genuine letter which had been sent by the respondent to the applicant's then solicitors and secondly, if this is right, that that in itself gave rise to a legitimate expectation that the applicant would be allowed to remain such that the respondent's fresh decision is unlawful.

6. It is accepted on behalf of the applicant that unless the Tribunal accepts that the letter of 26 August 2011 was a genuine letter actually sent, her case cannot get off the ground. It is not suggested that she has a good case otherwise on the merits and it is

clear, particularly following the decision of the Court of Appeal in *SH (Iran) & Others v SSHD* [2014] EWCA Civ 1469, that she does not have any general grounds under the legacy policy on which she could properly argue that the decision in 2014 was an unlawful one. Indeed it is clear on the facts of this case that subject to the letter said to have been sent in August 2011 to which I will refer in more detail below, her claim is entirely unmeritorious insofar as it is founded on what is said to have been the respondent's then "legacy policy". Accordingly, the two questions before the Tribunal now are first whether it has been established that the letter of 26 August 2011 is a genuine one which was actually sent and secondly, even if it was, whether the applicant could succeed in any event.

7. So far as the first issue is concerned the respondent submitted a witness statement from a Mr Bray in which Mr Bray gave his reasons for considering that the letter was not a genuine letter actually sent by someone in the Home Office. This letter was exhibited to the Acknowledgement of Service and Mr Bray's reasons for considering that the letter was not genuine are contained within paragraph 12 of his witness statement. Mr Bray is a Senior Executive Officer in the UK Visas and Immigration Department of the respondent and has considerable day-to-day knowledge of dealing with letters of this type. Mr Bray states as follows at paragraph 12 of his witness statement when considering whether or not the letter was genuine:

> "12. Notwithstanding that there is no necessity for a final decision as to whether the Letter was genuinely sent to be made by the Tribunal [sic], it is possible to conclude on the evidence that it was not sent by the Home Office. There are a number of factors that weigh against the Letter being considered to be genuine that have led the Respondent to conclude that it was not sent by the Home Office. These include –
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> a. The sending of the Letter is inconsistent with the internal records – in particular the recording of the case as a refusal case on the relevant mail merge records and the corresponding absence of any record of the Letter being sent or inclusion of the case in the 'potential grant' spreadsheet of the 'Mail Merge' exercise that could have generated such a Letter. It is not

impossible for the Letter to have been sent without being recorded on the relevant GCID database but if a potential grant letter were sent it should have been on the appropriate 'Mail Merge' list unless it was a total aberration and not on the refusal list;

b. The absence of any proof of posting or other provenance provided by the Applicant;

c. Although the original of the Letter belatedly sent to the Treasury Solicitor by the Applicant's representatives on 6 October 2014 has a wording consistent with the templates, the appearance of the Letter does not ring true – in particular, the offsetting of the letter head; and

d. The Applicant's behaviour appears inconsistent with receipt of such a letter and the formation of any legitimate expectation that it was a grant of leave to remain or a potential grant of leave to remain. Remarkably, the Applicant made a paid application for leave to remain after the date of stated receipt of the Letter, on 8 January 2013, under Article 8 of the European Convention on Human Rights. The cost of that application was £561. This shows that the Applicant did not rely on the Letter in any relevant way as a resolution of her immigration status. If the applicant thought she was being granted leave to remain by reason of the Letter some 5 months earlier it would be expected that she would chase up that letter rather than pay to make an application for limited leave to remain on a different basis."

8. I should state that Mr Bray does not seek to suggest (and this is clear from paragraph 13 of his witness statement) that the applicant herself was personally responsible for the deception which he believes occurred and remarks in this respect that "there are a number of other ways that a letter of this nature may have come into being that do not involve the complicity of the applicant or any involvement of the Home Office". That may be a rather discreet way of suggesting that the applicant's former solicitors might have created this letter because it is hard to see how otherwise a letter which is not a genuine letter of this type could be said to have come within that solicitor's custody.

9. In support of the applicant's claim with regard to the letter being genuine Mr Hussain dealt with the reasons given on behalf of the respondent by Mr Bray in his witness statement as follows. With regard to the reason given at 12.a he emphasises that Mr Bray had said that it was "not impossible" for that letter to have been sent. He makes the point that relying on internal records, it was at least possible that that letter could have been sent.

10. Regarding the objection made at 12.b which was the absence of any proof of posting or other provenance provided by the applicant he says that as the applicant's solicitors received this letter it would have been very unlikely for them to have been able to provide any proof of posting.

11. Then with regard to c. it is submitted that while Mr Bray says that the letter "does not ring true", it did nonetheless have wording consistent with the templates and this was a subjective comment. He complains that the respondent had not provided any forensic report or a document verification report and on this basis there was insufficient evidence on which the Tribunal could on this ground find that the letter was not a genuine one. Also he says that Mr Bray's statement that "the appearance of the letter does not ring true" in which Mr Bray refers in particular to the offsetting of the letter heading is "far too vague to cast doubt on the document".

12. Finally, with regard to the reason given at d., which is that the applicant's behaviour in subsequently making an application to be allowed to remain under Article 8 at a cost of £561 was inconsistent with her having received this letter, his explanation is that the applicant was not aware of the significance of this letter until her current solicitors became engaged which was not until after the 2014 decision of which complaint is now made. In answer to a question from the Tribunal as to how if this was right the applicant could be said to have had any expectation, legitimate or otherwise, that she would be allowed to remain, Mr Hussain said that he would have to address that point "when we get to it". It is also right to record in this regard that Mr Hussain accepted throughout the hearing that there was no evidence (other than that she made the application to be allowed to remain on article 8 grounds, which is

discussed below) that the applicant at any time acted in reliance on what is said to have been in that letter.

13. With regard to this aspect of the case Ms Anderson first of all invited the Tribunal to note that there had been no application made on behalf of the applicant to cross-examine Mr Bray which was the proper course which should have been taken in circumstances where his evidence was to be challenged. In this regard she relied in particular on the judgment of Mr Justice Silber in *R (on the application of Westech College) v SSHD* [2011] EWHC 1484 (Admin) which itself relied on a previous decision made by the same judge in *R (McVey) v SSHD* [2010] EWHC (Admin) 437. At paragraph 27 Mr Justice Silber set out what should be regarded as the proper approach to be taken when evidence is disputed on a judicial review application as follows:

> "27. I did not understand Counsel to disagree with the view, which I stated in the *McVey* case [35], which was that the proper approach to disputed evidence on a judicial review application is that:-
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> '(i) the basic rule is that where there is a dispute on evidence in a judicial review application, then in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct;
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> (ii) an exception to this rule arises where the documents show that the defendant's evidence cannot be correct; and that
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> (iii) the proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies'."

14. Accordingly Ms Anderson submits it is very difficult now to challenge the evidence given by Mr Bray, particularly with regard to the feel and look of the letters. Although this was not said in terms, in effect Mr Bray was giving expert evidence

based upon his undoubted experience in this field and if a challenge was to be made to this evidence, this should have been done properly which it was not.

15. As to the reasons which were given by Mr Bray, Ms Anderson properly drew the attention of the Tribunal to the restrained manner in which the reasons were set out. Mr Bray did not suggest as he could have done that it would be "impossible" for this to be a genuine letter but nonetheless gave compelling reasons why it was very unlikely that it was. What was important in this case is that this is not a situation where records were not kept, because records were kept of what letters were sent to all people whose cases were being considered under legacy provisions. In this case, if a letter had been wrongly sent, there should have been an audit trail showing that such a letter had been sent. The fact that there was not was a factor which could legitimately be considered by Mr Bray as indicating that such a letter was not sent out. As to the layout and typesetting for the letter, again this is a matter regarding which Mr Bray was in a good position on which to advise because he had day-to-day experience of the letters which were sent. There was really no realistic explanation as to why, if the file had wrongly travelled by mistake from the group in which it should have been kept, which was a group concerning which a decision had not been taken provisionally to allow the claim, to the group where a provisional decision had been taken that the claim would be allowed, this would not have been recorded. It would be highly unusual for this not to show up in an audit trail. That was the effect of Mr Bray's evidence. He did not say that it was impossible but he did say that there was only a very small chance of this having occurred.

16. It was common ground before me that the Tribunal has to consider the issue of whether or not this was a genuine letter on the balance of probabilities. The respective representatives are not however agreed as to precisely what burden there is on the applicant to establish this. Mr Hussain on behalf of the applicant sought to persuade the Tribunal that although the burden was originally on the applicant to show that a letter was sent, having produced a letter which was said to have been genuine the burden somehow shifts to the respondent to establish that the letter was not genuine. I agree with Ms Anderson that the burden does not shift merely

because the applicant has produced a letter which she claims is a genuine one; in my judgement, the burden was on the applicant not just to establish on the balance of probabilities that a letter was sent but that it was a genuine letter which was sent. However, even if I had considered that Mr Hussain's submission on this point was arguable, the respondent would still only have to satisfy the Tribunal on the balance of probabilities that the letter was not genuine and so I turn to consider this issue on the basis of the evidence which is now before me.

17. In my judgment it is far more likely than not that the letter said to have been forwarded to the applicant by her former solicitors was not a genuine letter actually sent by the respondent. With regard to the fourth reason given by Mr Bray for considering that the letter was not a genuine one, while I accept that it is at least arguable that even if such a letter had been sent the applicant was not aware that it had been sent (and in this regard I also take note of Mr Bray's observation that he does not seek to argue that the applicant herself was personally involved in any deception) this does not mean that those advising the applicant were not. Athough I would prefer not to have to make a specific finding on this point, deceptive conduct by professional advisers is not unknown and I have to weigh what I choose to believe is the inherent unlikelihood of professional people being involved in deception of this kind against, and in the context of, all the other reasons why it is believed that the letter is not a genuine one.

18. In this regard, even if the applicant herself might genuinely have been unaware that an indication had been given on behalf of the respondent that the respondent was minded to grant her leave to remain, if such a letter had indeed been sent to her previous solicitor, it is surprising, to say the least, that that solicitor should not have informed the applicant regarding this indication and further advised that she did not need to spend the sums she subsequently spent on pursuing her article 8 application.

19. While I accept it is "not impossible" for a letter to have been sent without being recorded on the correct database, it is also the case, as Mr Bray has stated, that this would have been very unlikely.

20. Although Ms Anderson has submitted that a competent solicitor would have kept the envelope containing a letter of this type because proof of when such a letter was received is frequently necessary, in this case I would not rule out the possibility that the absence of such an envelope could be explained by the chaotic nature of this particular solicitor's offices (and in this regard I take note of the fact that the date stamp put on the letter is some eleven days after the letter was apparently sent). However, I cannot disregard the evidence given by Mr Bray that because of, in particular, the offsetting of the letter head and the appearance of the letter generally as compared with genuine letters which he has seen, "the letter does not ring true" because he is in a position to know about this. As I have remarked earlier, had the applicant wished to challenge his evidence on this point in accordance with the guidance given by Mr Justice Silber in *Westech College* she should have applied to cross-examine him which she did not.

21. There is one final point which must be made regarding my finding on this point and it is this. If and to the extent that the applicant wished to assert that the letter was genuinely received by her former solicitor, steps should have been taken to obtain at the very least a witness statement from him giving his account of how it was that he says that letter came into his possession. He should have provided an explanation as to why the date stamp on the letter is 11 days after the date it was apparently sent and, importantly, whether he advised the applicant of the significance of this letter and if not, why not. The absence of that evidence, while not itself necessarily decisive, does significantly reduce the reliance which can be placed on the assertion that this letter was genuinely received by him. In these circumstances, although like Mr Bray, I could not be certain that the letter was not a genuine one, nonetheless, on the balance of probabilities, regardless of who has the burden of establishing this, I consider it much more likely than not that the letter was not a genuine one.

22. As has been accepted on behalf of the applicant that effectively disposes of this application but I will still give my reasons why I consider that even had this letter been a genuine letter sent by the respondent to the applicant her claim anyway would have been bound to fail. It is trite law that for a case founded on legitimate

expectation to succeed, unless there has been a clear statement of policy which the respondent has not complied with (in which case it could properly be said that the respondent was not applying her policy consistently as between different people) at the very least in order for a claim founded on what is asserted to be a legitimate expectation which is personal to the applicant to succeed the person making that claim must arguably have acted to his or her detriment in consequence of the promise being made to her. I do not need for these purposes to trawl through the very many authorities which have been very helpfully put before the Tribunal by Ms Anderson on behalf of the respondent because the jurisprudence in this regard is very succinctly summarised by Sedley LJ in *R v Department of Education & Employment ex-parte Begbie* [2001] 1WLR 1115, in which he stated as follows at paragraph 101:

> "I have no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it. The legitimate expectation in such a case is that government will behave towards its citizens as it says it will. But where the basis of the claim is, as it is here, that a pupil-specific discretion should be exercised in certain pupils' favour, I find it difficult to see how a person who has not clearly understood and accepted a representation of the decision-maker to that effect can be said to have such an expectation at all. A hope no doubt, but not an expectation."

23. I do not consider that there is a material distinction which can be made with regard to the government having stated a policy as to how it would behave towards its citizens as distinct from the government stating how it will behave to people who are not its citizens but are nonetheless within the country but it cannot in this case be argued that there is any general policy which can be relied on which would support the proposition that leave to remain should be granted and so this case is very similar on its facts to the situation being considered by the Court of Appeal in *Begbie*. A further difficulty that the applicant has now is that her case is advanced on the basis that the only way in which it is said she acted to her detriment was that she paid £561 which was the fee required for the application she made subsequently to be allowed

to remain under Article 8. I have to confess I simply do not understand this argument because what is said is not that the applicant paid this fee because she was relying on the promise which she says had been made in the letter of 26 August 2011 but rather because she did not realise that such a promise had in fact been made. I do not see how it could possibly be said in those circumstances that she acted in reliance on this letter. It is accepted moreover that other than by making this application (which as I have already noted was clearly not made in reliance on the letter at all) the applicant's behaviour did not change a jot as a result of the letter having been sent because she was unaware either that such a letter had been sent or in any event what its implication might be. It is hard to see how this can be distinguished from the type of case contemplated by Sedley LJ in *Begbie* of "a person who has not clearly understood and accepted a representation" in which circumstances that person could not have had any expectation at all. The applicant has not acted to her detriment at all and had no legitimate expectation that she could rely on because she was not aware of any promise, which is what it is said the letter amounted to, having been made to her.

24. Ms Anderson has made a number of other points all of which are in my opinion good ones, but which it is not necessary to deal with in any great detail given the substance of the decision which I have already made. She notes that in any event even if the letter had actually been sent, it could only have been sent by mistake because it is clear that the respondent had not intended to grant leave and in any event no actual decision had been made. The most that could be said regarding the August 2011 letter even if it had been sent is that subject to certain checks the respondent at that time intended to give some form of leave to the applicant. Further steps would still have had to be taken and the applicant could not be certain that leave would ultimately be given. Furthermore, even if the applicant did believe she would be allowed to stay, before a decision could be quashed on the basis that the Tribunal ought to make the Secretary of State abide by the indication that had previously been given, it would have to weigh up the competing interests of the applicant on the one hand and society in general, represented by the Secretary of

State, on the other. In this case, given the lack of merit of the application generally it could by no means be assumed that a court or Tribunal would put the applicant's own interests which had been barely affected above the interests of society generally to have the Immigration Rules upheld in a consistent fashion.

25. It follows that this application must be dismissed and I so find.

Permission to appeal

26. Although no application has been made for permission to appeal, I am nonetheless obliged to consider whether or not to grant permission to appeal pursuant to rule 44 (4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I refuse permission to appeal because there is no error of law in my judgment.

Costs

27. I summarily assess costs in the sum of £10,000.

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