**Neutral Citation No: [2012] NIQB 86** | *Ref:* **TRE8644**

*Judgment: approved by the Court for handing down* | *Delivered:* **9/11/12**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

_____

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

_____

**A and ORS Application [2012] NIQB 86**

**IN THE MATTER OF AN APPLICATION BY A & ORS FOR JUDICIAL REVIEW**

**and**

**IN THE MATTER OF A DECISION OF THE IMMIGRATION AND ASYLUM CHAMBER (UPPER TRIBUNAL) MADE ON 21 NOVEMBER 2011**

_____

**TREACY J**

**Introduction**

[1] The applicant and his family challenge a decision of the Immigration and Asylum Chamber (Upper Tribunal) ("the Upper Tribunal") refusing them permission to appeal to the Upper Tribunal against a decision of the Immigration and Asylum Chamber (First-Tier Tribunal).

**Background**

[2] The applicant and his family are all Brazilian nationals. A is married to B and they have three children C, D and E all of whom are applicants in these proceedings. On 12 March 2005 the applicant travelled from Brazil and illegally entered Northern Ireland to reside in Newry. He worked illegally. On 21 March his wife and children also illegally entered NI to join him in Newry. Their son C has a partner F, also from Brazil, who is 17 years old and a child, G who is 22 months old. None of the applicants enjoyed the right to enter the UK nor did F.

[3] On 31 May 2007 the applicant was arrested by the police during an enforcement visit to his employer. He was interviewed following his arrest and he claimed asylum. He

underwent an initial screening interview on that date.

[4] On 13 March 2008 the applicant had a full asylum interview and then a third interview on 29 October 2010. He heard nothing from the Home Office about his asylum claim between these dates. On 24 June 2011, over 4 years after making his asylum claim, he was advised his claim had been refused.

[5] On 7 July 2011 the applicant appealed to the First-Tier Tribunal ("FTT") against the refusal decision. The appeal was heard on 4 August 2011. His family members were also listed as appellants and they were all legally represented. On 11 August 2011 the appeal was dismissed by Immigration Judge Gillespie.

[6] Immigration Judge Gillespie stated that the applicant gave "conflicting evidence" about the basis of his asylum application; that he had been unable to resolve the "inconsistencies" in his evidence; that his claim was "implausible" and his explanation not "in the least bit credible". Further the applicant was found to be in the possession of counterfeit documents and his conduct was "not that of a genuine asylum applicant" and that he had "delayed and obstructed the assessment of his claim".

[7] On 26 August 2011, an application for permission to appeal to the Upper Tribunal was made in the first instance to the FTT. This was refused on 13 September 2011 by Immigration Judge Goldstein who found that the applicant raised "no arguable error of law that might either lead to a different outcome on the appellants case or raise a question of general importance that the Upper Tribunal should consider".

[8] Following receipt of this decision, by letter dated 26 September 2011, the applicant was informed by his experienced solicitor that he did not consider that there were further grounds giving rise to an application to appeal directly to the Upper Tribunal.

[9] The applicant instructed new solicitors and an application for permission to appeal was made to the Upper Tribunal on 4 November 2011 in which the applicant relied on the earlier grounds of appeal and submitted further grounds of appeal.

[10] On 21 November 2011 Judge Latter refused permission to appeal to the Upper Tribunal and in his judgment stated:

> "....the grounds do not satisfy me that there is any properly arguable point of law capable of affecting the outcome of the appeal. The grounds argue that the judge failed properly to assess the article 8 claim by failing to show any consideration of the proportionality test expounded by the House of Lords in Huang, to analyse and assess the arguments raised about the best interests of the children or to consider the position so far as C's partner and child is concerned. It is also argued that the judge erred by

> comparing this case to cases where people have their families during a period of study in the UK.
>
> The judge did take into account the welfare of the children: see [42], [44] – [46]. The assessment of the children's best interests was in the context of the fact that the family would be removed together and that prior to coming to the UK, that they had always lived in Brazil where they had family including grandparents, uncles and aunts.
>
> As far as C's [the applicants son] daughter is concerned, the judge noted that the mother was a Brazilian girl but that there was no evidence before her as to her immigration status, the nature and durability of the relationship or how C's removal might impact upon her and the baby. The Judge was entitled to comment that this was an issue where the burden lay on the appellants to produce the evidence they wished to rely on.....
>
> The judge commented on and took into account the lack of action by the immigration authorities following the family coming to the attention of the authorities in May 2007. He clearly took into account the length of residence but was entitled to conclude that it was not sufficient to make their removal disproportionate to a legitimate aim."

**Statutory Framework**

[11] On 15 February 2010, the Asylum and Immigration Tribunal (AIT) in Belfast transferred into a new Tribunal structure which was created pursuant to the Tribunals Courts and Enforcement Act 2007 ("the 2007 Act") (see also the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010). The 2007 Act introduced a two-tier Immigration and Asylum Chamber, namely the First-tier Tribunal and the Upper Tribunal. The new appellate system is largely the same as before but one key distinction is that a party can bring an appeal before the Upper Tribunal, a superior court of record, rather than making an application for reconsideration by the Asylum and Immigration Tribunal.

[12] Pursuant to Chapter 2 of the 2007 Act (Review of Decisions and Appeals), any party to an appeal before the First-Tier Tribunal has a right of appeal to the Upper Tribunal. This right of appeal is on any point of law arising from the decision made by the First-tier Tribunal other than an excluded decision. The right of appeal is not automatic: an application must be made for permission to appeal. Permission to appeal may be made by

the First-Tier Tribunal or the Upper Tribunal (Art 11(4)) on the application of any party.

[13] There is a right of appeal to the Court of Appeal in Northern Ireland (NICA) "on any point of law arising from a decision of the Upper Tribunal other than an excluded decision" (s13(1), (2) of the 2007 Act). A decision to refuse permission to appeal to the Upper Tribunal is an "excluded decision" and accordingly no right of appeal lies to the NICA in respect of such a decision.

[14] In the case of a second-tier appeal (that is, an appeal from the decision of the Upper Tribunal on appeal from the FTT), section 13(6) provides that permission shall not be granted unless:

> "(a) the proposed appeal would raise some important point of principle or practice; or
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal".

[15] Section 6 of the Human Rights Act 1998 provides, inter alia:

> "(6) (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.....
>
> (6) (3) In this section "public authority" includes -
> (a) a court or tribunal and
> (b) any person, certain of whose functions are functions of a public nature."

[16] Article 8 of the Convention provides for the right to private and family life in the following terms:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**Applications for Judicial Review of a decision of the Upper Tribunal refusing permission to appeal to the Upper Tribunal – the Legal Test**

[17] The Upper Tribunal is a superior court of record. The question as to the amenability of non-appealable decisions of the Upper Tribunal to judicial review (such as refusal of permission to appeal) has been considered by the Supreme Court and the Court of Appeal in England and Wales in a series of recent judgments.

[18] In Cart v The Upper Tribunal [2011] UKSC 28 the claimants failed in an appeal to the FTT and were refused permission to appeal to the Upper Tribunal by both the FTT and the Upper Tribunal. The claimants sought a judicial review of the refusal to appeal by the Upper Tribunal.

[19] The Supreme Court unanimously held that judicial review should be available only where a case raises *an important point of principle or practice* or there is some *other compelling reason* why the judicial review should be heard [adopting the "second-tier appeals criteria"]. The Supreme Court considered that the adoption of the second-tier appeals criteria would be a rational and proportionate restriction on the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself. Lady Hale stated:

> "56. But no system of decision-making is perfect or infallible. There is always the possibility that a judge at any level will get it wrong. Clearly there should always be the possibility that another judge can look at the case and check for error. That second judge should always be someone with more experience or expertise than the judge who first heard the case …. But it is not obvious that there should be a right to any particular number of further checks after that. The adoption of the second-tier appeal criteria would lead to a further check, outside the tribunal system, but not one which could be expected to succeed in the great majority of cases.
>
> ***Conclusion***
>
> 57. For all those reasons, together with those given by Lord Dyson (in this case) and Lord Hope (in *Eba*), the adoption of the second-tier appeals criteria would be a rational and proportionate restriction upon the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself. It would recognise that the new and in many ways enhanced tribunal structure deserves *a more restrained approach to judicial review* than has previously been the case, while ensuring that important errors can still be corrected. It is a test which the courts are now very

> used to applying. It is capable of encompassing both the important point of principle affecting large numbers of similar claims and *the compelling reasons presented by the extremity of the consequences* for the individual..."

[20] Lord Dyson observed:

> "[131]...the second limb of the test ("some other compelling reason") would enable the court to examine an arguable error of law in a decision of the FTT which may not raise an important point of principle or practice but which cries out for consideration by the court if the UT refuses to do so. Care should be exercised in giving examples of what might be "some other compelling reason" because it will depend on the particular circumstances of the case. But, they might include (i) a case where it is strongly arguable that the individual has suffered what Laws LJ referred to at paragraph 99 as "a wholly exceptional collapse of the procedure" or (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences."

[21] In Eba v Advocate General for Scotland [2011] UKSC 29 Lord Hope stated:

> "I would hold that the phrases "some important point of principle or practice" and "some other compelling reason" which restrict the scope of a second appeal, provide a benchmark for the court to use in the exercise of its supervisory jurisdiction in relation to decisions that are unappealable that is in harmony with the common law principle of restraint....Underlying the first of these concepts is the idea that the issue would require to be *one of general importance, not one confined to the petitioner's own facts and circumstances.* The second would *include* circumstances where it was clear that the decision was *perverse or plainly wrong* or where, due to some procedural irregularity, the petitioner *had not had a fair hearing at all*."

[24] In PR Sri Lanka v Secretary of State for the Home Department [2011] EWCA 988 Carnwath LJ summarised the principles that emerge from Cart and Eba (paras 22-23) describing those judgments as "complementary and mutually supportive." The

applications before the Court of Appeal were renewed applications for permission to appeal against decisions of the Upper Tribunal. As Ms Connolly for the applicant acknowledged, this decision although not procedurally on point to the present cases, provided guidance on the second-tier test relevant to applications for judicial review of refusal decisions by the Upper Tribunal to grant permission to appeal to itself. Carnwath LJ referred to the "compelling reasons" aspect of the test and said as follows (para 35):

> "Judicial guidance in the leading case of Uphill emphasised the narrowness of the exception. The prospects of success should normally be "very high", or (as it was put in Cart para 131) the test should be one which "cries out" for consideration by the court. The exception might apply where the first decision was "perverse or otherwise plainly wrong", for example because inconsistent with authority of a higher court. Alternatively, a procedural failure in the Upper Tribunal might make it "plainly unjust" to refuse a party a further appeal, since that might, in effect "deny him a right of appeal altogether". In Cart, Lord Dyson ….characterised such a case as involving "a wholly exceptional collapse of fair procedure (para 131). Similarly, Lord Hope in Eba referred to cases where it was "clear that the decision was perverse or plainly wrong" or where, "due to some procedural irregularity, the petitioner had not had a fair hearing at all.
>
> It is true that Lady Hale and Lord Dyson in Cart acknowledged the possible relevance of the extreme consequences for the individual. However, as we read the judgments as a whole, such matters were not seen as constituting a free-standing test. In other words, "compelling" means legally compelling, rather than compelling, perhaps, from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments."

[25] In JD Congo [2012] EWCA Civ 327, the Court of Appeal considered the second tier appeals test. Sullivan LJ at para 23 said that: "While the [compelling reasons] test is a stringent one, it is sufficiently flexible to take account of the 'particular circumstances of the case'." In the absence of a strongly arguable error of law on the part of the Upper Tribunal, extreme consequences for the individual could not in themselves amount to a freestanding compelling reason, however they are a relevant factor to be taken into consideration.

**Applicant's Submissions**

[26] The applicant submits that there are errors of law in this case which raise important points of principle and some other compelling reason to review the case. The applicant further submits that if the relevant test is satisfied then the appropriate remedy would be the remittal of the family's cases to the Upper Tribunal allowing for a hearing in an appropriate forum permitting oral evidence and questioning of witnesses etc.

[27] The first ground of challenge is that the FTT judge failed to properly consider the proportionality test under art 8 set out in ***Huang*** and that the Upper Tribunal failed to address the merit of that ground of appeal. The second ground is that the welfare and interests of the children (who were not the subject of the removal) namely C's partner and their baby should be reviewed in light of MK (India) UKUT 00475**.** The third ground is the contention that the impact of the delay in determining the asylum application had not been properly considered. The forth ground is that the refusal of permission to appeal breaches the applicants' human rights in respect of their right to and family life. The fifth ground is that it is asserted that there are points of principle and compelling reasons to review their case.

**The Proportionality argument**

[28] Ms Connolly submitted that the Upper Tribunal Judge erred in law. Whilst he correctly *referred* to the ground of appeal that the FTT Judge had not properly assessed the Art 8 claim by failing to show any consideration of the proportionality test expounded by the House of Lords in Huang & Kashmiri [2007] UKHL 11, he failed to *address* the merit of that ground of appeal.

[29] The applicant submitted that a number of principles clearly emerge from the cases. (1) the task for the FTT Judge was not to review the Art8 claim but to decide itself whether there had been a breach of the human right (see Huang & Kashmiri); (2) this required a careful and informed evaluation of the case by the FTT; (3) the central question for the FTT should have been whether the interference was proportionate to the legitimate aim sought to be achieved; and (4) the views of other family members on deportation must be taken into consideration by the FTT. In support of the first two principles the applicant referred the court to a passage by Lord Bingham, in EB (Kosovo) [2008] UKHL 41 setting out the role of the First-tier Tribunal:

> "Thus, the immigration appellate authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that *it will rarely be proportionate to uphold an order for removal of a spouse if*

> *there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or the effect of the order is to sever a genuine and subsisting relationship between parent and child.* But cases will not ordinarily raise such stark choices, and *there is in general no alternative to making a careful and informed evaluation of the facts of the particular case*. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with *the difficult evaluative exercise* which Article 8 requires."

[30] As to the third principle the court was referred to para20 of ***Huang*** clarifying the test on proportionality as follows:

> **"**20. ... the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the Applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. ..."

[31] As to the forth principle the court was referred to Beoku-Betts [2008] UKHL 39 and, in particular, Baroness Hale at para4.

[32] The applicant submitted, as set out in ground (b) of the application to the Upper Tribunal, that the FTT has erred in law in failing to properly consider the Art 8 claim made by A and his family members. In fact Ms Connolly submits "there is simply no consideration of this test" and the Upper Tribunal judge erred because while he refers to the ground he failed to properly address it.

[33] Thus it is submitted the immigration appellate authority erred in law in failing to properly consider the Art8 claim made by the applicant and his family. In support of this contention the applicant relied on the following passage from Senthuran [2004] EWCA Civ 950, where Wall LJ noted the importance of proper consideration of Art 8 claims by the immigration appellate authorities:

> " .. we are very conscious of the pressures under which both Adjudicators and the IAT have to work, and we recognise equally that it is not for this court to pore over very nuance in an adjudication or IAT

> determination. However, the simple and well-established fact remains that the IAT has a duty to give adequate reasons for its decisions, and litigants are entitled to know why they have won or lost, particularly in a jurisdiction where the consequences of success or failure are so profound."

[34] Relatedly the applicant also complains that the Upper Tribunal erred in its approach to the argument that the FTT hadn't properly taken into account the welfare of the child. They challenge the adequacy of their finding that the FTT judge "did take into account the welfare of the children" effectively contending that the UT judge had missed the point of the appeal ground which was directed at the FTT judges alleged failure to *analyse and assess* the arguments raised about the best interests of the child. A broadly similar criticism appears to be made about the impact of delay. The applicant submits the FTT judge didn't properly take it into account and they challenge the conclusion of the UT judge that the FTT judge had taken into account the length of residence and that he was entitled to conclude that it was not sufficient to make their removal disproportionate to the legitimate aim.

[35] Immigration Judge Gillespie found that the applicant was an economic migrant whose asylum application was a "fabrication". In considering the proportionality of the interference with the applicant's private and family rights, issues such as the length of time spent in this jurisdiction were balanced against the fact that all of the applicants have cultural, linguistic and family connections in Brazil; the fact that any return would be as a family unit; and the fact they all had spent considerable time in Brazil.

[36] I reject the applicant's contention that the FTT Judge had not properly assessed the Art8 claim by failing to show any consideration of the proportionality test and I reject the contention that the Upper Tribunal Judge erred in law by failing to address the merits of that particular contention. From para41 of his decision Immigration Judge Gillespie addressed the applicants' Art8 claims. He accepted that the appellants had developed a private and family life and then turned to consider whether their removal was "necessary, proportionate and a fair balance between the right to respect for their private and family life and the particular public interest in question: the maintenance of a proper and efficient system of immigration control. The Immigration Judge addressed the salient points advanced by their legal representative on their behalf and concluded that requiring the applicants to leave the UK and go to Brazil was "reasonable and justified by the public interest identified in these appeals and as a proportionate measure and a fair balance between the competing interests".

[37] At para15 in Huang the House of Lords stated that the first task of the appellate immigration authority is to establish the relevant facts and in para18 stated that the crucial question is likely to be whether the interference complained of is proportionate to the legitimate end sought to be achieved. The issue of proportionality was directly addressed by the immigration judge and his decision demonstrates a sufficiently careful and informed evaluation of the facts. He read the competing factors in order to properly

consider the applicants Art8 rights. It was the view of Judge Goldstein that this conclusion (being the removal of the applicants) was "proportionate" and this view was shared by Upper Tribunal Judge Latter.

[38] Lord Brown in Cart (paras 99-100) stated that the fact the leave to appeal had previously been refused by two tiers of the tribunal was indicative of the absence of any arguable error of law.

[39] Accordingly, I do not accept that, properly analysed, the question of proportionality in these proceedings amounts to "a wholly exceptional collapse of the procedure", is "legally compelling" or could be an important point of principle or a "compelling reason within the context of the second appeals test".

[40] As to the applicant's argument in relation to the best interests of the children, this argument focussed largely on the alleged failure of the FTT to explicitly demonstrate the extent to which it had taken into account the interests of the children (who were not the subject of the removal) ie C's daughter and her mother F. I accept Ms Murnaghan's submission that in the particular factual matrix of this case and given the paucity of details put forward by the applicants as to the nature of the relationship between C and his daughter and Brazilian girlfriend that the judge's consideration was unimpeachable. At para46 of his decision Immigration Judge Gillespie stated:

> "The appellants children still have significant cultural, linguistic and family connections to Brazil. C has made his friendship with a Brazilian girl. There is no evidence before me as to her immigration status or indeed evidence in regard to the nature and durability of their relationship and how his removal might impact upon her and their baby. The burden is upon him to prove their claim under Art8.
>
> 47. I believe this case is analogous to those who have their families with them during a period of study in the UK and in that situation the tribunal ruled that they come in the expectation of return. Five years residence here is not sufficient to tip the balance in their favour.
>
> 48. The appellant and his wife could be in no doubt that when they came they had an obligation to regularise their immigration status at the earliest opportunity. They knew or ought to have known that their immigration status was precarious.
>
> 49. In all the circumstances I conclude that requiring them to leave the UK and to go to Brazil is

> reasonable and justified by the public interest identified in these appeals and is a proportionate measure and a fair balance between the competing interests."

[41] I note that in Mr Hackett's affidavit, solicitor, sworn on 4 September 2012 he has confirmed that the right of F and her daughter to remain in the UK is solely dependent on the right of C to remain in the UK.

[42] As to the third ground of challenge concerning the impact of the delay this was plainly raised before the FTT and expressly dealt with by Immigration Judge Gillespie. As he pithily pointed out it is difficult to understand why the delay happened and that conversely the applicants could not conclude that the Secretary of State had forgotten about them. He concluded that their residence here in Northern Ireland, following their illegal entry into the UK, was not sufficient to tip the balance in their favour. As he pointed out the applicant and his wife could have been in no doubt when they came that they had an obligation to regularise their immigration status and that they must or ought to have known that since their immigration status was precarious that they were liable to removal at any time.

[43] No matter how attractively packaged and persuasively argued by Ms Connolly none of the points raised cross the threshold justifying supervisory relief.

[44] Applicants in immigration cases have a well developed appeal structure available to them comprising the initial Home Office evaluation, one guaranteed tier of appeal and a further right of appeal if the test for appeal is satisfied. This is a tailor made scheme where each tier is experienced and specialised in this sphere of law. The circumstances in which permission to appeal refusals by the specialist Upper Tribunal could appropriately come before the judicial review court should, in light of the guidance in ***Cart***, be exceedingly rare. In this case the applicant complains about the impact of delay on his human rights. There is a vital public interest in properly and lawfully enforcing immigration laws. Of course if deportation would infringe fundamental rights it is forbidden. But there are many who assert such human rights claim. Some may be genuine claims and some may be baseless intended to delay. The impact of delay is heavily relied upon by the applicant. Of course delay in dealing with asylum or other claims can in some circumstances give rise to such unfairness that the legitimate aim of enforcing immigration law is trumped. If a claim is legally unmeritorious it must be refused. It is a feature of immigration litigation that delay by the authorities can work to the benefit of the unlawful immigrant in that delay can be welcomed by him as prolonging his stay in a jurisdiction where he wishes to remain. But delay can sometimes appear to be part of an immigration strategy where those unlawfully in this jurisdiction seek to use legal processes to extend their stay to avoid removal and by reason of the delay, strategically engineered, to maximise their chances of a successful Art8 claim. We have a specialised appeal procedure and any dilution of the more restrained approach to judicial review which the new appellate structure and court decisions have mandated would be a backward step capable of encouraging or contributing to further strategic delay in some cases. More fundamentally it would also be

inconsistent with the legislative purpose of trying to have a self contained and unified appellate immigration process.

[45] The respondent was correct to maintain that neither limb of the second tier appeal criteria was satisfied in this case and that to accede to the application would offend against the more restrained approach to judicial review of refusal decisions.

[46] Accordingly the applications are dismissed.