**Neutral Citation No [2013] NIQB 20** | *Ref:* **TRE8772**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/02/2013**

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

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

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**DJ1 and DJ2's Application (Leave stage) [2013] NIQB 20**

**IN THE MATTER OF AN APPLICATION BY DJ1 and DJ2 (a minor) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF A DECISION OF THE IMMIGRATION AND ASYLUM CHAMBER (UPPER TRIBUNAL) DATED 9 DECEMBER 2011**

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**TREACY J**

**Introduction**

[1] This is an application for leave to apply for judicial review against a decision of the Immigration and Asylum Chamber (Upper Tribunal) ("the UT") dated 9 December 2011 whereby the applicants were refused permission to appeal to the UT against a decision of the Immigration and Asylum Chamber (First-tier Tribunal) ("the FTT") dated 15 November 2011.

[2] The applicants do not have a right of appeal to the UT, an expert immigration Tribunal and a court of superior record, and do not have an appeal to the NI Court of Appeal, therefore they must show that there are new circumstances which merit a fresh claim or they face expulsion from the UK.

**Background**

[3] DJ1 is a South African national and DJ2 is her seven year old child, also a South African national. They both reside at an address in Saintfield. On 23 May 2008 the applicant married a British cititzen, GP, in South Africa. On 5 August 2008 she entered the UK with her daughter on foot of entry clearance as the spouse of a settled person for a period not exceeding 27 months. Thereafter her marriage to GP

broke down due to domestic violence. Divorce proceedings are pending before the High Court in Northern Ireland.

[4] On 11 July 2010 the applicant made an application to the Secretary of State for the Home Department seeking leave to remain in the UK as the victim of domestic violence pursuant to para 289A of the Immigration Rules. This application was refused on 27 October 2010 as the applicant had failed to produce the requisite evidence to demonstrate that her marriage had permanently broken down as a result of domestic violence.

[5] The applicant appealed the decision before the FTT on 11 October 2011. She attended the hearing and gave evidence. There was no representative in attendance on behalf of the Home Secretary. During her oral evidence the Judge referred to police and medical notes and records and a police statement from GP that was contained within the papers before him. The Judge was unsure about where the documents came from. Neither Counsel for the applicant nor her instructing solicitor had these papers before them.

[6] The applicant's Counsel advised the Judge that she did not have the papers and an opportunity was provided for him and instructing solicitor to inspect the documents. There was no break in the proceedings. A submission was then made on behalf of the applicant that the Judge should not take the documents into account. The Judge did not make a positive finding as to whether he was or was not taking them into account and put the documents to one side.

[7] Immigration Judge McClure delivered his determination on 15 November 2011 refusing the application on the following basis:

(i) In response to the first ground, which criticised Immigration Judge Gillespie for not questioning the applicant in respect of the content of police and medical documents, it was held that the Applicant's legal representatives had the documents and so her Counsel had 'every opportunity to put the matters to the Appellant'.

(ii) That the second, third and fourth grounds merely challenged the weight given to evidence and findings of the Judge, all of which were open to him to reach.

(iii) That the fifth ground (wherein it was alleged that the Judge had failed to assess the applicant's Art8 rights) was rejected as the judgment referred to his specific consideration of same.

(iv) Consequently it was found that none of the grounds disclosed 'an arguable error of law'.

[8] The Applicant further appealed to the UT on identical grounds to those lodged with the FTT. Judge Spencer of the UT refused permission to appeal on 9 December 2011. Judge Spencer agreed with the assessment made by Immigration Judge McClure and held that the grounds of appeal did not disclose 'an arguable error of law'.

**Grounds of Challenge**

[9] In her Order 53 Statement the applicant raises four challenges:

(i) that the FTT Judge relied on documents which the applicant firstly argued should have been excluded from his decision making process; and secondly, which the applicant did not have 'the opportunity to reply in evidence to the content of the documents';

(ii) that the FTT Judge failed to consider the applicant's Art 8 rights;

(iii) that there are 'compelling reasons' to review the applicant's case before the UT; and

(iv) that the failure to permit the appeal to proceed breaches the applicant's human rights in respect of her right to a fair hearing and her right to a private and family life.

**Submissions**

[10] In the decision of the UT refusing permission to appeal, the Judge stated:

> "As to the first ground, as explained by Designated Immigration Judge McClure the police documents, medical records and statement of [GP] were adduced in evidence and the Appellant's counsel had the opportunity of questioning the Appellant about them."

The applicant submitted that this conclusion was wrong since no decision was made by the Judge about whether the documents should be admitted when this issue was raised by the applicant. Therefore the applicant was unable to respond to the allegations contained therein because the evidence was not put to her.

[11] It was agreed by the parties that the question whether decisions of the UT are amenable to judicial review was considered by the Supreme Court in Cart v The Upper Tribunal and R (on the application of MR Pakistan) v The Upper Tribunal [2011] UKSC 28 in which it was held that permission for judicial review should only be granted where the criteria for a second-tier appeal apply – ie that permission

should only be granted where there is an important point of principle or practice or some other compelling reason to review the case.

[12] The applicant summarised the principles established by these cases as follows:

> "(a) The adoption of the second-tier appeals criteria recognises '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 capable of encompassing the important point of principle affecting large numbers of similar claims and the compelling reasons presented by the extremity of the new consequences for the individual' [per Baroness Hale, para 57 of Cart].
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> (b) However, 'there is, at least until we have experience of how the new tribunal system is working in practice, the need for some overall judicial supervision of the decisions of the Upper Tribunal, particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that errors of law of real significance slip through the system' [per Lord Phillips, para 2 of Cart].
>
> (c) 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 para 99 as 'a wholly exceptional collapse of fair procedure' or (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences" (para 131 of Cart).

(d) The court must distinguish between errors of law that raise an important issue of principle or practice, or reasons that are compelling, and those that do not answer to this description. The question whether the application meets this test must depend on the facts of each case (para 49b of Eba)."

The Court was also referred to PR (Sri Lanka) [2011] EWCA Civ 998 at para 23 and Uphill [2005] EWCA Civ 60 at para 24 in which the Courts summarised the main principles derived from the relevant case-law; and more recently JD (Congo) & Ors [2012] EWCA Civ 327.

[13] However, the respondent cited Lord Phillips at para 89 of the judgment in Cart where he stated:

> "… exercising the power of judicial review, the judges must pay due regard to the fact that, even where the due administration of justice is at stake, resources are limited. Where statute provides a structure under which a superior court or tribunal reviews decisions of an inferior court or tribunal, common law judicial review should be restricted so as to ensure, in the interest of making the best use of judicial resources, that this does not result in a duplication of judicial process that cannot be justified by the demands of the rule of law."

[14] In relation to the applicant's challenge that the FTT failed to consider her Art 8 rights the respondent denied that there had been a breach of Art 8 and referred the Court to Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60 in which it was held that an important point of principle or practice must be one which is 'not yet established'.

[15] The respondent also referred the Court to Eba [2011] UKSC 29 in which Lord Hope emphasised that the Judicial Review Court should be slow to interfere with decisions of the UT as a specialist tribunal. Furthermore, he reiterated that leave must not be granted in circumstances when the argument was confined to the individual's personal interest, facts and circumstances [see paras 46-49 of Eba].

[16] At para 49 Lord Hope stated:

> "the question of whether the application meets the test must depend on the facts of each case. It ought to be capable of being applied at the earliest possible stage, and certainly at the stage of the first hearing, as a matter of relevancy".

**Discussion**

[17] It was agreed that a restrained approach to judicial review is the correct approach in cases such as this but the applicant submitted that it is also plain from the case law that Courts do not intend that errors go unchecked. The applicant submitted that the appeal brought by her was an appeal against a refusal to grant her and her dependent child permission to remain in the UK on the ground that she was the victim of domestic violence. The Judge brought the police documents and the other documents in question to the attention of the legal representatives and a submission was made to the Judge that he should not take those documents into account. The Judge did not make a positive decision but the applicant submits that it is clear from his determination that he did in fact take them into account and that they formed part of his decision and thus there is therefore a compelling reason to review this case.

[18] It is common case that permission to judicially review decisions of the Upper Tribunal refusing leave to appeal should only be granted where the criteria for a second-tier appeal apply, that is, where there is an important point of principle or practice or some other compelling reason to review the case. As the Supreme Court pointed out at para 57 of Cart the adoption of the second-tier appeals criteria requires a more restrained approach to judicial review. Lord Phillips at para 2 of Cart recognized the need "at least until we have experience of how the new tribunal system is working in practice … For some overall judicial supervision of the decisions of the Upper Tribunal, particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that *errors of law of real significance* slip through the system." Whilst the SC recognised that care should be exercised in giving examples of what might be "some other compelling reason" they said it might include a wholly exceptional collapse of fair procedure or a strongly arguable error of law which caused truly drastic consequences. *Consequences* for the individual..."

[19] 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."

[20] 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*."

[21] 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. 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."

[22] 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.

[23] The choice of language in these cases serves to emphasise the high threshold that has to be crossed before judicial review of such decisions will be permissible. This is doubtless to ensure that the more restrained approach to judicial review required by the adoption of the second-tier appeals criteria is not subverted. The resolution of the issue as to whether a case raises an important point of principle or compelling reason will necessarily be case and fact sensitive. I suspect the court will ordinarily have little difficulty identifying whether a case falls into either of these categories or is just a disguised attempt to bypass the purpose of the new tribunal system by trying to have a further 'bite at the cherry'.

[24] As the court pointed out in A & Ors [2012] NIQB 86 at para 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. There is a vital public interest in properly and lawfully enforcing immigration laws. There are many who assert human rights claim. Some may be genuine and some may be baseless intended to delay. 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 and inconsistent with the legislative purpose of trying to have a self contained and unified appellate immigration process.

[25] Despite the persuasive skill of Ms Connolly I am impelled by authority to conclude that neither limb of the test has been satisfied and that to accede to the

application would offend against the more restrained approach to judicial review of refusal decisions.

[26] Accordingly the applications are dismissed.