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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**
**2017/34169101**

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

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**IN THE MATTER OF AN APPLICATION BY ABDA AZIZ IBRAHAM OSMAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF IMMIGRATION & ASSYLUM CHAMBER (UPPER TRIBUNAL) MADE ON 3 JANUARY 2017**

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**COLTON J**

**Background/Chronology**

[1] The applicant is a 28 year-old Somalian. He arrived in the United Kingdom on 22 December 2017. On 13 March 2008 he was granted asylum. On 12 April 2013 he pleaded guilty before Belfast Crown Court to false imprisonment and attempted sexual assault for which he was sentenced to 4 years' imprisonment (1 year in custody and 3 years on supervisory licence). On 15 April 2013, prior to his release from prison, he was served by the Secretary of State for the Home Department (hereinafter referred to as "SSHD") with a Notice of Liability to Deportation. On release from prison he was placed into immigration detention and granted bail by the Immigration and Asylum Chamber (First Tier Tribunal) (hereinafter referred to as "FTT"). His solicitors made written representations to the Home Secretary as to why he should not be deported. In 2013, the SSHD decided not to deport the applicant. On 29 August 2014, the applicant's asylum status was revoked due to the serious nature of his criminal conviction but he was granted leave to remain in the United Kingdom on humanitarian grounds. On 21 October 2015, he was convicted of breaching the terms of the sex offenders registration requirements (he changed his address without informing the PSNI). He was sentenced to 4 months' imprisonment. His sentence expired on 18 February 2016 but he remained in custody under the determinate custodial sentence which did not now expire until 14 April 2016. Prior to the expiry of his sentence, on 16 February 2016, the applicant was notified by the SSHD that she intended to pursue his deportation. His solicitors made representations to the SSHD.

[2] On 3 March 2016, the applicant was served with a deportation decision and was advised that the SSHD had revoked his humanitarian status. The SSHD did not accept that the deportation would be in breach of the applicant's Article 3 and 8 ECHR rights. A Deportation Order was made on 29 March 2016. The applicant lodged an appeal before the FTT against the deportation decision on 30 March 2016.

[3] The deportation appeal took place on 12 October 2016 before FTT Judge Cox in Stoke-on-Trent. The appeal was dismissed by way of a written decision on 21 October 2016. The applicant lodged an application for permission to appeal to the Immigration & Asylum Chamber (Upper Tribunal) (hereinafter referred to as "UT"). By decision made on 17 November 2016, the FTT refused permission to appeal to the UT. The applicant then lodged an application for permission to appeal directly to the UT. By decision made on 3 January 2017, the UT refused permission to appeal to the UT.

[4] It is this decision of 3 January 2017 which is under challenge.

**The relief sought**

[5] The relief sought in the Order 53 application is:

> "(a) An order of *certiorari* to bring up into this honourable court and quash a decision of the UT (IAC) made on 3 January 2017 by which Upper Tribunal Judge Grubb refused the applicant permission to appeal to the UT (IAC) against a determination of IAC (FTT) promulgated on 21 October 2016.
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> (b) A declaration that the decision is unlawful, ultra vires and of no force or effect.
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> (c) An order by way of *interim relief* suspending the effect of the impugned decision pending the determination of these proceedings.
>
> (d) An order granting the applicant permission to appeal and remitting the case back to the Upper Tribunal for an appeal hearing.
>
> …"

[6] The proposed respondent does not intend to engage in these proceedings. At the hearing the SSHD, who was the respondent in the immigration appeal proceedings, as an interested party, was represented before the Court at the leave hearing.

[7] At the leave hearing, Ms Fionnuala Connolly BL appeared on behalf of the applicant. Mr Philip Henry BL appeared on behalf of the interested party, the SSHD. I am grateful to both counsel for their helpful written and oral submissions.

**The statutory framework**

[8] The current tribunal structure was created by the Courts & Tribunal Enforcement Act 2007, which created the FTT and the UT which are specialist immigration and asylum courts. In particular the UT is a specialist court staffed by High Court judges. It is a superior court of record with the ability to set precedents to be followed by inferior courts.

[9] Under section 11 of the Act, a decision of the FTT may, unless it is an "excluded decision" be appealed to the Upper Tribunal on a point of law. Such an appeal lies with the permission of the FTT or the UT under Article 11(4) of the Act.

[10] An applicant seeking permission to appeal must only demonstrate that there is an arguable error in law in the FTT determination (see Presidential Guidance note number 2011, No1: Permission to appeal to the UT (Amendment September 2013 and July 2014)).

**The FTT decision dated 21 October 2016**

[11] The applicant was represented by counsel at the hearing. The decision of Judge Cox contains 74 paragraphs. It sets out the immigration history, summarises the respondent's and appellant's cases and refers to the oral evidence presented at the hearing from the appellant and submissions from legal representatives.

[12] The decision identifies the relevant legal framework. Her findings can be found in paragraphs 19 to 74.

[13] Crucially, from the applicant's perspective, the following appears at paragraph 18 of the findings:

> "**Burden and standard of proof**
>
> 18. The burden of proof is on the appellant to establish, on a balance of probabilities, that he meets the requirements of the relevant immigration rules in respect of deportation."

[14] At paragraph 58 the following appears:

> "58. I do not therefore find that he will face the prospect of living in circumstances falling below that, which is acceptable in humanitarian protection terms. I

> have reminded myself as Mr Holmes cautioned me, I do not have to be sure and I am have made my findings on the balance of probabilities as I must do."

[15] The applicant's case was that his removal from the United Kingdom and return to Somalia would not be compatible with his rights under Article 3 ECHR. This was described in the findings as "the core issue".

[16] The applicant points out that the correct standard of proof to apply in a case such as this was the lower standard, namely whether there was "a real risk" of a breach of Article 3. This test has been set out in **Vivarajah & Others v The United Kingdom [1991] ECHR 41** as follows:

> "Substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the country to which he was returned."

[17] Thus the applicant sought permission to appeal to the UT on the basis that there was a clear error of law. The FTT judge had applied the "balance of probabilities" standard of proof when she should have applied the "real risk" standard.

[18] The grounds of the applicant's appeal were succinctly set out as follows:

> "Simply put, it is respectfully submitted that the appellant is entitled to have his case assessed to the correct standard. When an incorrect and more onerous standard is applied to the appellant's case, and particularly where this results in adverse findings against the appellant, it is respectfully submitted that this discloses a clear error of law that vitiates the negative findings made by the judge."

[19] The application was initially refused by the FTT on 17 November 2016. The primary reason for refusal was based on paragraph 67 of the FTT findings where it stated:

> "I do not find that he faces a real risk on return of being subjected to ill-treatment such as to infringe rights protected by Article 3 ECHR."

Thus it was asserted that the judge had applied the correct standard.

[20] The matter was then appealed to the UT and as has been indicated permission to appeal was refused on 3 January 2017.

[21] The reasons were stated to be as follows:

> "1. The First-Tier Tribunal judge (Judge VA Cox) dismissed the appellant's appeal against a decision to revoke his international protection status based upon risk on return to Somalia.
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> 2. The grounds raised a sole point that the judge wrongly applied the civil standard of proof rather than the lower 'real risk' standard applicable in asylum and humanitarian protection cases. Whilst the judge does refer to the 'balance of probabilities' test at paragraph 18, it is clear that he actually applied the 'real risk' standard. His conclusion at paragraph 76 was that the appellant had not established a 'real risk' of treatment contrary to Article 3. It was conceded that Article 15(c) of the Qualification Directive did not apply.
>
> 3. It may be that the judge had in mind at paragraph 17 the appellant's standard of proof under Article 8. In any event, the standard of proof applied in respect of asylum/Article 3/humanitarian protection was the correct "lower standard" of 'real risk'.
>
> 4. For these reasons, the judge did not arguably err in law in dismissing the appellant's appeal on all grounds and permission to appeal is refused."

[22] It appears that the reference to "paragraph 76" must be a reference to paragraph 67.

**The legal principles**

[23] There is no dispute as to the applicable legal principles.

[24] **In R (Cart) v Upper Tribunal [2011] UKSC 28**, the Supreme Court set out guidance on the approach to be adopted in this type of case. In England and Wales, as a result of this decision, the civil procedural rules set out special procedures applying to a judicial review such as this – CPR 54.7A.

[25] **In Wu's (Jun) Application [2016] NIQB 34,** Maguire J considered a similar type of application for leave to apply for judicial review (the impugned decision was a decision of the UT by which permission to appeal was refused). The court set out the essential relevant principles applicable at the leave stage as follows:

> "[19] These criteria are now well established. They derive from the decision of the Supreme Court in the case of **R (Cart) v Upper Tribunal (Secretary of State for Justice) and other interested parties)** [2011] UKSC 28. They are tailor made to meet cases such as this where there has been a decision by the decision making authority which has already been the subject of an unsuccessful appeal to the Lower Tier Tribunal and where leave to appeal to the Upper Tier Tribunal has been refused by both the Lower and Upper Tiers. In such cases, according to the decision in **Cart**, what are described as 'the second tier appeal's criteria' apply. What this means when translated to the issue now before the court is that there cannot be a judicial review of the refusal of leave unless:
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> (a) the proposed judicial review raises some important point of principle or practice; or
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> (b) there is some other compelling reason for the court to hear the judicial review.
>
> [20] The adoption of these criteria recognises the importance of the enhanced Tribunal structure which, in the words of Lady Hale, 'deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected' (see paragraph [57] of her judgment in **Cart**).
>
> [21] The approach in **Cart** has been applied equally in this jurisdiction: **see A and Others Application** [2012] NIQB 86 and **DJ1 and DJ2s Application** [2013] NIQB 20."

[26] On the first of the criteria (important point of principle or practice), the court stated at paragraph [22]:

> "[22] These words require little expansion or elucidation. Such an important point, it was said in **Uphill v BRB (Residuary) Ltd** [2005] EWCA Civ 60, must be one which is "not yet established". It will, moreover, not be one confined to the individual's personal interests, facts and circumstances: see the sister decision of the Supreme Court in **Eba** [2011] UKSC 29 at paragraphs [46]-[49]. In **Eba**, Lord Hope, referring to this category of case, said that underlying it 'is the idea that the issue would require to be one of general importance, not

> confined to the petitioner's own facts and circumstances' (**Eba** paragraph [48]).”

This “more restrained approach” was described by Treacy J in **Re A & Others [2012] NI QB 86** in the following way:

> “[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*** *[2011] UKSC 28 …*, be exceedingly rare. … 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”.

[27] Ms Connolly in her eloquent submissions referred me to the case of **G & H v UT & SSHD [2016] EWHC 239** which is the first reported case of a successful substantive challenge to a decision of the Upper Tribunal in which permission to appeal was refused.

[28] That was a decision of the High Court in England & Wales heard by Mr Justice Walker. The decision sets out the legal principles in accordance with what I have set out above. The facts of the case were particularly strong for the applicants. They complained about a serious procedural error whereby the FTT disagreed with a concession which had been made by the respondent without ever putting the applicant on notice. In addition, an important point of principle or practice arose from the correct application of the preserved findings of the Court of Appeal in cases involving Nigerian trafficking victims. Walker J went so far as to say that the “relevant parts of the ground of appeal were not merely arguable, but were bound to succeed in law”.

[29] The key point from Ms Connolly's perspective was that the relevant test is whether “an Upper Tribunal FTT permission refusal is vitiated because the Upper Tribunal misunderstood or misapplied the law when holding that the would-be

appellant had identified no arguable ground of appeal." Walker J goes on to state at paragraph 122 of the judgment:

> "Where the High Court reaches that conclusion, it may because, after making full allowance for the expertise of the FTT and the Upper Tribunal, it considers a ground of appeal to have been plainly right. It may more usually have reached that conclusion in circumstances where, after making the same allowance, it considers the ground of appeal to have a real prospect of success. I am not persuaded by the Home Secretary's contentions that an Upper Tribunal FTT permission refusal will only be vitiated if the High Court determines that the FTT did indeed make a material error of law. On the contrary, for the reasons given above, an Upper Tribunal FTT permission refusal may be vitiated if the Upper Tribunal misunderstands or misapplies the relevant law in refusing permission for an argument which has a real prospect of success."

[30] References in the judgment to prospects of success arises from the test set out in the CPR in England which states that in such an application the Court will give permission to proceed only if it considers:

> "(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First-tier Tribunal against which permission to appeal was sought are wrong in law; and
>
> (b) that either –
>
> (i) the claim raises an important point of principle or practice; or
>
> (ii) there is some other compelling reason to hear it."

As indicated earlier we have seen that this rule reflects the principles set out in ***Cart***.

**The application of the relevant law to the facts of this case**

[31] Does the judicial review in this case raise an important point of principle or practice? Does it raise a point which is "not yet established"?

[32] It may well be that the applicant can raise an arguable case that the refusal of permission by the UT and the decision of the FTT from which permission was sought by the applicant were wrong in law, in that the wrong standard of proof was applied. This argument is challenged by Mr Henry. He points out that the FTT judge expressly applied the test of "a real risk" in considering Article 3. This assertion is contained in the substantial findings section of the decision in which all the arguments made on behalf of the applicant are rehearsed fully. He points out that the reference to the balance of probabilities may well be a reference to the standard required for establishing facts. I consider there is force in Ms Connolly's criticism of the UT judge when he speculated that in referring to the balance of probabilities, the FTT may have had in mind "the appellant's standard of proof under Article 8". In any event these points are not determinative. It may well be that a different UT judge may have come to a different conclusion. Just as the FTT judge expressly applied the proper test in considering Article 3 the UT judge also applied the proper test of "arguability". Applying the test adopted by Walker J it is very difficult to see how it can be argued that the Upper Tribunal misunderstood or misapplied the relevant law in refusing permission for an argument which has a real prospect of success.

[33] The matters I have discussed above all go to arguability. The key issue for me in this matter is whether or not this Judicial Review raises some important point of principle or practice. I pressed Ms Connolly on this point but was not satisfied that the applicant could formulate or set out a point of principle or practice. The standard of proof required in an Article 3 case is well established – it is the "real risk" test/standard. This is recognised in the findings by the FTT and the decision of the UT affirms this.

[34] Equally, the test to be applied by the UT in an application for leave to appeal is well established in the jurisprudence, in the immigration rules governing SSHD decision making and in the Home Office Guidance available for decision makers at first instance. In this case the UT expressly applies the test of "an arguable error in law".

[35] There is no doubt, as Ms Connolly stressed in the course of her submissions, that this matter is of great significance to the applicant, particularly in the context of an Article 3 claim. As has been made clear in the jurisprudence, an important point of principle or practice is not one which is confined to the individual's personal interest, facts or circumstances. In this case there is no point which is "not yet established". I do not see, as Ms Connolly argues, that it is relevant in a broader context to other cases. The Court must distinguish between establishing a principle or practice and applying a principle or practice correctly. Only the former would meet the test under ***Cart***.

[36] I do not consider that there is any force in the submission that the Court needs to give guidance as to whether the formulation set out in the CPR Rules in England and Wales is a test which should be applied in this jurisdiction. The principles are

clear and not in conflict. Indeed, insofar as they are it seems to me that it is arguable that the test in England and Wales sets a more onerous task for an appellant than that described by Maguire J in ***Wu's Application***. I have also considered whether or not there is some "other compelling reason" which would justify the granting of leave in this case. I do not understand that Ms Connolly made this case but in any event I can point to no such reason.

**Conclusion**

[37] For the reasons set out above, I consider that neither of the limbs set out in ***Cart*** are arguable in this case and accordingly leave to apply for judicial review is refused.