

SPECIAL IMMIGRATION APPEALS COMMISSION/THE ADMINISTRATIVE COURT

Field House,
Breems Buildings
London
EC4A 1WR

Thursday, 7 August 2014

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN

BETWEEN:

B
(SC/09/2005)

Appellant/Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Respondent

MR A VAUGHAN (instructed by Birnbergs Peirce and Partners) appeared on behalf of the Appellant/Claimant

MR R TAM QC (instructed by the Treasury Solicitor) appeared on behalf of the Defendant/Respondent.

RULING
APPLICATION FOR
PERMISSION TO APPEAL

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MR JUSTICE IRWIN:

1. As always I am grateful to counsel. First of all, in SIAC, I address the application for permission to appeal the strike out of the SIAC appeal. It seems to me that there are no reasonable prospects of success in the appeal, nor is there any other compelling reason for such an appeal to proceed, and permission to appeal the strike out is refused.
2. I am grateful for the joint submissions from both parties as to the procedural aspects in relation to the judicial review. As will be clear, there are two bases in fact, on which the claimant seeks permission to mount judicial review proceedings in relation to bail. In shorthand, it is the period up to the strike out and the period after the strike out. The application for permission is made, understandably in the context here, on the basis of proposed amended grounds. I have seen draft amended grounds which it is accepted need re-amendment to deal with the correct parties and to incorporate the prospective challenge to the exercise of SIAC's powers to grant or withhold bail after the dismissal of the appeal.
3. It is clearly the case in my judgment that, were I to be in receipt of an application for permission for judicial review before the SIAC hearing had proceeded to address the principal issue on bail, the case would have been arguable. The legal complexity here is real, the statutory provisions we have already described as labyrinthine. The difference in the dicta relied on by two sides, in one case in the case of *Kadir* and, in the other, in *Lumba*, whilst the Commission is confident it got the right answer, are capable of different interpretations. Therefore, an application for permission for judicial review made in the normal sequence would have been met by the decision that

judicial review permission should be granted so that the matter could be argued. However, it has been argued and found in error. In those circumstances, it seems to me that it is legitimate to consider the question of discretion: whether judicial review should be permitted only to be dismissed, because the inevitable outcome of the grant of permission, given the findings in the Commission, is dismissal of the claim for judicial review. In reality, the only basis for granting permission would be if permission was going to be granted to the Court of Appeal. Although the tests are different, they are quite closely aligned. I think there is force in what Mr Vaughan has said, that the wording may be different, but, in relation to a hard-edged question of law, the two tests are very close,

4. Considering the exercise of discretion, it seems to me right, therefore, even if there is to be a dismissal of the judicial review following the grant of permission, because it would have been arguable, to consider the question of appeal. There is little point granting permission for a judicial review which is to be quashed or refused if onward appeal is also to be refused. If onward appeal is the appropriate course, then the application makes sense.
5. After some hesitation, I grant permission for judicial review on the two bail arguments, subject to the amendments anticipated. Final permission, of course, can only be granted once that amendment has taken place, but I indicate that that will be the ruling.
6. I refuse judicial review on the amended grounds. I grant permission to appeal to the Court of Appeal because it seems to me that there is enough difficulty in the law to sustain a possible argument that the Commission's decision is wrong. It seems to me

very unlikely to succeed, but it is possible. I am impressed by the importance of the issue and there may be sufficient importance in determining the question to justify an appeal and, in effect, to tie the Court of Appeal's hands so that they must hear the argument.

7. I have noted the procedural advantage advanced by Mr Tam, which would arise if permission had been refused, but it seems to me that I cannot put the cart before the horse and set out to achieve the capacity of the Court of Appeal to remit to a Divisional Court or, indeed, a single judge. That has to be a consequence rather than a consideration in the decision. Here too I accept that there is force in what Mr Vaughan has had to say. This is a question of law and it seems to me that there is likely to be little advantage, in fact, in that procedural flexibility.
8. For those reasons I will grant permission for judicial review. Judicial review will be refused. I grant permission to appeal to the Court of Appeal from that refusal.
