



Upper Tribunal

(Immigration and Asylum Chamber)

R (on the application of T) v Secretary of State for the Home Department

(Judicial review: damages claims) [2021] UKUT 00320 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 15 November 2021

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE QUEEN

on the Application of

T

(ANONYMITY DIRECTION MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the applicant: Mr B. Bundock , instructed by Islington Law Centre (Migrant Law Project)

For the respondent: Mr B. Seifert , instructed by the Government Legal Department

(1) Once the public law issues in a judicial review claim have been resolved, section 25 of the Tribunals, Courts and Enforcement Act 2007 allows the Upper Tribunal to transfer an action for damages to a county court.

(2) The Immigration and Asylum Chamber of the Upper Tribunal is a specialist body, well-used to making decisions on the ambit of the ECHR. Accordingly, where the question whether the respondent has acted in such a way as to breach the human rights of an individual raises novel issues, the Upper Tribunal will, in general, be best-placed to determine them, even if the matter has become one of historic breach.

JUDGMENT

The applicant in this judicial review sought to challenge the respondent's failure to co-operate with the Italian authorities in respect of the applicant's transfer to the United Kingdom under the provisions of the Dublin III Regulations. The respondent accepted responsibility for the applicant's protection claim on 14 July 2020. The applicant subsequently arrived in the United Kingdom.

2.

Permission to bring judicial review proceedings was refused on the papers on 12 July 2021. At the oral renewal hearing on 20 September 2021, the Upper Tribunal was informed that the parties had reached agreement on all relevant issues, save for damages and costs. The applicant sought damages for what he contended was both a substantive and procedural breach of his Article 8 ECHR rights, which he had sustained as a result of the respondent's delay in arranging his transfer under Dublin III from Italy to the United Kingdom. The grounds asserted that the European Court of Human Rights "has frequently awarded damages for procedural and/or substantive breaches of Article 8 where these cause delay in family reunification, or even where a procedural breach results in a mere loss of opportunity to end separation". In this regard various cases were cited.

3.

The parties were agreed that, in the circumstances, so much of the challenge as concerned the applicant's request for a declaration and mandatory order requiring the applicant's transfer to the United Kingdom; and a declaration that the respondent is bound by her policy to accept transfers in so-called "expired cases" under Dublin III, should be withdrawn as academic.

4.

There also appeared to be agreement that so much of the applicant's claim as concerns a declaration and damages in respect of alleged breaches of Article 8 ECHR should be transferred from the Upper Tribunal, either to the High Court or to the County Court.

5.

There was, however, no agreement concerning costs. The applicant contended that costs should be reserved and transferred with the claim. The respondent considered that there should be no Order as to costs.

6.

On 20 September 2021, Upper Tribunal Judge O'Callaghan decided there was merit in receiving submissions from the parties as to the power of the Upper Tribunal to transfer the outstanding issues, as just described, and the general principles to be applied, if such power exists. Mr Bundock, for the applicant, accordingly produced a written statement for use at the hearing on 15 November 2021. For the respondent, Mr Seifert produced written submissions on costs. Both addressed us orally on the questions of power and principles. We are grateful to them for their assistance.

7.

Mr Bundock submits, and Mr Seifert concurs, that the Upper Tribunal has power to transfer to the county court the claims for a declaration and damages. We agree, for the reasons which follow.

8.

Section 25 of the Tribunals, Courts and Enforcement Act 2007 (supplementary powers of Upper Tribunal) provides, so far as relevant:-

"(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal -

(a) has, in England and Wales ... the same powers, rights, privileges and authority as the High Court.

...

(2) The matters are -

- (a) the attendance and examination of witnesses,
- (b) the production and inspection of documents, and
- (c) all other matters incidental to the Upper Tribunal's functions.

(3) Subsection (1) shall not be taken -

...

(b) to be limited by anything in Tribunal Procedure Rules other than an express limitation."

9.

In *R (Singh) v The Secretary of State for the Home Department* [2019] EWCA Civ 1014; [2019] Imm AR 1275, the Court of Appeal considered whether the Upper Tribunal had power to set aside a grant of permission to apply for judicial review, and to relist the application for a fresh hearing, upon realising that, through misunderstanding, Counsel for the respondent had not been present at the hearing of the renewed application for permission.

10.

Leggatt LJ held that such a power existed by reason of section 25 of the 2007 Act, since the High Court possesses an inherent power to set aside an Order made in circumstances where an interested party has not had a fair opportunity to be heard.

11.

In the course of his judgment, Leggatt LJ examined the scope of section 25:-

"18. I see no reason to give section 25 a restrictive interpretation. I agree with the following observations of Mr Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) in *William Hill Organization Ltd v Crossrail Ltd* [2016] UKUT 275 (LC), para 59:

'Parliament was obviously aware of the powers of the High Court, both those which are inherent, and those specifically conferred by statute. Section 25 therefore seems to me to be intended to be read literally and applied generally, and to invest the Upper Tribunal with the powers of the High Court in relation to all matters incidental to its functions; the critical limitation in section 25(2)(c) is supplied by the reference to the functions of the Tribunal, and does not depend on the source of the power or the terms in which it has been conferred on the High Court. Parliament could obviously make explicit an intention that the Upper Tribunal was not to possess a particular power, but where it has not done so, and where no express limitation has been imposed by tribunal procedure rules as contemplated by section 25(3)(b), the Upper Tribunal must be taken to have the same powers as the High Court in relation to all matters incidental to its functions.'

19. Pursuant to sections 15 and 16 of the 2007 Act, one of the functions of the Upper Tribunal is to deal with applications for judicial review and, as an aspect of that function, to decide whether or not to grant permission to bring judicial review proceedings. Considering whether to set aside a decision to grant such permission taken in the absence of the respondent and to re-hear the application is a matter incidental to this function. Pursuant to section 25 of the Act, therefore, the Upper Tribunal has the same powers in dealing with the matter as would the High Court. It would be anomalous if the position were otherwise and if the Upper Tribunal, when exercising a judicial review jurisdiction

similar to that of the High Court, lacked a power which the High Court has as an essential part of its procedural repertoire to manage its proceedings in a just and effective manner.”

12.

The High Court has power to transfer claims to the county court. Section 40 of the County Courts Act 1984 provides, so far as relevant:-

“40 Transfer of proceedings to county court.

(1) Where the High Court is satisfied that any proceedings before it are required by any provision of a kind mentioned in subsection (8) to be in the county court it shall -

(a) order the transfer of the proceedings to the county court; or

(b) if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out.

(2) Subject to any such provision, the High Court may order the transfer of any proceedings before it to the county court.

(3) An order under this section may be made either on the motion of the High Court itself or on the application of any party to the proceedings.

...

(5) The transfer of any proceedings under this section shall not affect any right of appeal from the order directing the transfer.

...”

13.

We consider that, in a case of the present kind, transferring an action for damages brought within an immigration judicial review, once the public law issues have been resolved, is authorised by section 25. We agree with Mr Bundock’s submission that the need to case-manage the resolution of damages claims in this way is plainly “incidental” to the Upper Tribunal’s judicial review functions.

14.

To conclude otherwise would result in the Upper Tribunal’s hands being tied, such that it would not be able, in these circumstances, to manage the disposal of claims in a way that is compatible with the overriding objective. We can see no reason why Parliament should have intended such an outcome.

15.

Having decided the power of transfer exists, we turn to the principles that are relevant in deciding whether that power should be exercised. It is helpful to consider first the position in the Administrative Court.

16.

In R (Swaran) v Secretary of State for the Home Department [2014] EWHC 1062 (Admin), Dingemans J held that the true nature of the relief sought in the judicial review proceedings before him was a claim for damages for wrongful detention (paragraph 30). He held:-

“31. It is important not to encourage arid disputes about the Court in which disputes should be properly commenced. On the other hand it is relevant to note that the Administrative Court seeks to

make speedy decisions auditing the legality of decision making. The procedures of the Administrative Court are not best suited to determine contested historic events where disclosure and cross-examination of witnesses will be relevant.

...

33. As is well known, the Administrative Court is very heavily listed. It would be unfortunate if, as a result of recent changes made to the allocation of business between the Administrative Court and the Upper Tribunal (Immigration and Asylum Chamber), cases auditing the legality of current decision making were replaced by actions which were in reality claims only for damages for wrongful detention well within the jurisdiction of the County Court.

34. The position is obviously different in circumstances where there is a challenge to ongoing detention, see *BA and others v Secretary of State for the Home Department* [2012] EWCA Civ 944."

17.

These observations were approved by the Court of Appeal in *R (SS) v Secretary of State for the Home Department & Anor* [2015] EWCA Civ 652, another challenge to the lawfulness of an individual's immigration detention. At paragraph 11, Moore-Bick LJ said:-

"11. ... Once the respondent had been released from detention all that survived of these proceedings was a claim for damages for false imprisonment. In our view a case which gives rise to disputed questions of fact (particularly one in which the personal integrity of clinicians and officials is questioned) is not well suited to trial in the Administrative Court, in which disputes usually turns on questions of law and are tried on documents alone. This case and others like it should in our view be transferred to the Queen's Bench Division or the county court, as appropriate, for trial as a Part 7 claim, so that the issues of fact can be properly identified through statements of case and witnesses called in the usual way to deal with them. On this question we endorse the comments of Dingemans J. in paragraphs 30-33 of his judgment in *Swaran v Secretary of State for the Home Department* [2014] EWHC 1062 (Admin). ..."

18. In *R (ZA) Pakistan v Secretary of State for the Home Department* [2020] EWCA Civ 146, Dingemans LJ (as he had become) returned to the issue, as follows:-

"69. By the time of the trial of this claim on 14 and 15 December 2017 the real relief sought by the Appellant was a claim for damages for wrongful detention. Claims for damages alone may not be brought in the Administrative Court, see CPR 54.3(2) 'a claim for judicial review may include a claim for damages, restitution or the recovery of a sum but may not seek such a remedy alone'. This procedural rule exists because the Administrative Court seeks to make speedy decisions auditing the legality of decision making by public bodies. The Administrative Court will not be able to do that if its lists are filled with damages claims. Further, the procedures of the Administrative Court are not well suited to determine contested historic events giving rise to claims for damages where disclosure and cross-examination of witnesses will be relevant. These are points which have been made by the Court of Appeal in *R (S) v Secretary of State for the Home Department* [2015] EWCA Civ 652 at paragraph 11, approving *Swaran v Secretary of State for the Home Department* [2014] EWHC 1062 (Admin) at paragraphs 30-34."

19. The Upper Tribunal's judicial review jurisdiction broadly corresponds with that of the High Court. To that extent, the observations in *Swaran*, *SS* and *ZA (Pakistan)* are relevant.

20. Rule 5(3)(k) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the Upper Tribunal may:-

“transfer proceedings to another court or Tribunal if that other court or Tribunal has jurisdiction in relation to the proceedings and –

...

(ii) the Upper Tribunal considers that the other court or Tribunal is a more appropriate forum for the determination of the case”.

21. Although we consider that the power of the Upper Tribunal to transfer to the county court derives from section 25 of the 2007 Act, rule 5(3)(k) is useful in articulating the overarching policy consideration to be applied in deciding whether to transfer; namely whether the county court (in our case) is a more appropriate forum than the Upper Tribunal for determining the issue of liability for breach of the ECHR and, if found, damages.

22. It is uncontroversial that the county court has, since the coming into force of the Human Rights Act 1998, acquired significant experience in dealing with claims that a public authority has acted in violation of section 6 of the Human Rights Act 1998 (which makes it unlawful for a public authority to act in a way which is incompatible with an ECHR right). Section 7(1)(a) of the 1998 Act provides that a person who claims that a public authority has acted unlawfully in this way may bring proceedings “in the appropriate court or tribunal”. Civil Procedure Rule 7.1 provides that, save for a claim brought in respect of a judicial act, any other claim under section 7(1)(a) may be brought “in any court”. Although the general rule is that, where both the county court and the High Court have jurisdiction, proceedings may be commenced in either of them, a claim for money may only be commenced in the High Court if it is valued at more than £100,000 or more than £50,000 for personal injury: articles 4, 4A and 5 of the High Court and County Courts Jurisdiction Order 1991.

23. The fact that the county court has this long-standing function is a relevant but not a determinative factor to be considered, in deciding whether a matter should be transferred by the Upper Tribunal to that court.

23. As Mr Bundock pointed out, a CPR Part 7 claim will typically involve a process of disclosure, prior to trial, which has no counterpart in the Upper Tribunal, whether in its judicial review or appellate jurisdictions. The Immigration and Asylum Chamber of the Upper Tribunal is, however, a specialist body, well-used to making decisions on the ambit of the ECHR. Where the question whether the respondent has acted in such a way as to breach the human rights of an individual raises novel issues, the Upper Tribunal will, in general, be best-placed to determine them, even if the matter has become one of historic breach.

24. A good instance of such a category can be found in the cases concerning the interrelationship between Article 8 ECHR and “Dublin III” (Regulation 604/2013 of the European Parliament and Council): see the judgment of Sir Stephen Irwin in *R (BAA & Anor) v Secretary of State for the Home Department* [2021] EWCA Civ 1428.

25. In the present case, it is not suggested that there is likely to be any novel legal issue in determining whether the respondent breached the applicant’s Article 8 rights. In all the circumstances, therefore, we consider that the appropriate course is to transfer the claims for a declaration and damages to the Central London County Court, which is the most convenient such court for the parties.

26. There remains the issue of costs. Mr Seifert submits there should be no order as to costs. He says that much of the work carried out by both parties is now otiose, in the light of the developments since the claim was issued. The case has, he says, now metamorphosed into an entirely different matter.

27. For the applicant, Mr Bundock's primary position is that the issue of costs should be transferred to the county court; alternatively, that the applicant is entitled to his costs.

28. On this issue, we agree with Mr Bundock's primary position. We have no reason to doubt his assertion that significant elements of the costs so far incurred are directly referable to the applicant's Article 8 claim. If the Upper Tribunal were to make no order for costs and the applicant succeeded in the county court, that element, which would ordinarily be due to him as the winning party, would be irrecoverable. If the Upper Tribunal were to probe the issue now, we would, in effect, be entering upon the very area we have decided should more appropriately be explored by the county court.

29. We therefore conclude that the applicant should have permission to withdraw his claims for (a) a declaration and mandatory order requiring his transfer to the UK; and (b) a declaration that the respondent is bound by her public policy to accept transfers in "expired cases"; because those claims are now academic. The applicant's claims for a declaration and damages in respect of breaches of Article 8 are to be transferred to the Central London County Court. Costs are reserved, and transferred with the claim.

30. Although Mr Bundock asked us to do so, we decline to make any order regarding the case management of the Part 7 claim in the county court. It would, in our view, be inappropriate for us to do so.

31. We invite the parties to submit a draft order that gives effect to the above.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Mr Justice Lane

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

30 November 2021