CORNWALL STREET
BARRISTERS

Briefing Note

R (on the application of) Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423

Lord Justice Holroyde
Lady Justice Arden
Lord Justice David Richard

Introduction

The decision in Kaur is important as it notes the difficulty of a successful judicial review challenge where an applicant's position materially rests on a unsubstantiated assertions in a cover letter, and acts as useful reminder as to the threshold to engage Ex.1(b) of the immigration rules.

Facts

Mrs Kaur is a 53 year old woman who had spent 7 years in the UK at the date of the Secretary of State for the Home Department's decision [§11]. The force of her application for leave to remain was on the basis of (1) IR 276ADE(1)(vi) and (2) Ex.1(b).

In support of EX.1(b) she stated in the cover letter she had no means of support in India, her partner had resided in the UK for 16 years and was established in the UK, and she was integrated into British society [§7]. Insofar as IR 276ADE(1)(vi) it was said she did not have any social, cultural or family ties in India, her mother in law had recently passed away in India [§7]. No relevant supporting evidence in respect of her position was advanced.

It should be noted, the test of IR 276ADE(1)(vi) was as per a previous iteration of the rules [HC 194]; "…no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

The Secretary of State refused the application under both the immigration rules and exceptional circumstances. An in-country right of appeal was not granted on the basis Mrs Kaur did not have leave to enter or remain in the UK as at the date of her application.

The judicial review grounds against the decision posited the Secretary of State had erred in the assessment of Ex.1(b), IR 276ADE(1)(vi) and "exceptional circumstances" pursuant to Article 8 ECHR; in an (inferred) ***Wednesbury*** unreasonable challenge [§28].

High Court

At the High Court, Deputy Judge Alexandra Marks quashed the Secretary of State's decision on the basis that the decision maker (1) failed to give reasons for concluding there were no insurmountable obstacles to relocating to India and omitted to mention consideration of factors relating to practical

possibilities of relocation [Ex.1(b), §33], (2) failed to give adequate reasons for concluding Ms Kaur had lost ties to India and failed to conduct a rounded assessment of all her circumstances [IR 276ADE(1)(vi), §34]. She rejected the exceptional circumstances challenge [§35].

Grounds of Appeal

Five grounds of appeal brought by the Secretary of State were considered by the Court of Appeal with Lord Justice Holroyde providing the lead judgment.

Grounds four and five related to the "no ties" test. Given the dearth of cases where this will still be relevant, these shall not be expanded upon in this article. Ground three largely rested on a procedural point. As such the relevant grounds of appeal were:

- Ground 1 – it was wrong for the judge to conclude the Secretary of State for the Home Department had failed to give proper consideration to insurmountable obstacles as Ms Kaur had submitted insufficient evidence [§37].

- Ground 3 – the judge failed to appreciate insurmountable obstacles sets a high threshold, had wrongly applied the test of whether it was "practicably possible" for Mr Singh (Mrs Kaur's partner) to return to India, and had wrongly focused on Mr Singh's life in the UK or India as opposed to the comparison between family life in India and family life in the UK [§37].

Discussion

<u>Ground 1</u>

A key point for claimant solicitors is the basis on which the Court upheld the first ground of appeal. A crucial point was the lack of supporting evidence with the application [§55]:

> *"The evidence in support of those assertions was however limited to features of the lives of Mrs Kaur and Mr Singh in the UK, and it seems to me that no real attempt was made to provide a foundation for the assertions that there were insurmountable obstacles to their family life in India. Nothing was put forward in support of the assertion that Mrs Kaur would have no means of support in India. That was in my view a significant omission. In the circumstances of this case, Mrs Kaur could and should have explained where she had lived and how she had supported herself and her children in India after Mr Singh came to this country, and why her situation would be different if she now had to return. Nor was any attempt made to explain what the financial position of the couple would be if they returned to India; again a significant omission,"*

In essence, the only real evidence, insofar as it can be said to be evidence , in support of Mrs Kaur's case were the matters set out in the cover letter. Lord Justice Holroyde considered the Deputy

Judge was wrong to find the decision was vitiated by a failure to give reasons as Mrs Kaur's position had not been sufficiently raised in the application [§55, 57].

Following the amendments to **s.82 Nationality Immigration and Asylum 2002**, a current leave to remain application of this nature would ordinarily attract an in-country right of appeal such that the supervisory jurisdiction would not be tasked with a challenge of this nature.

However, the Secretary of State is able to restrict that right of appeal pursuant to **s.94(2) Nationality Immigration and Asylum Act 2002** (or IR 353 where appropriate), and as such practitioners are aware of the large volume of judicial reviews against decisions refusing leave to remain pursuant to Article 8 ECHR.

The principle in **Kaur** shall be relevant to such challenges. Any application for leave to remain pursuant to Article 8 ECHR should be supported by cogent evidence with an application and not merely relying on matters in a cover letter [See Conclusion/Best Practice below]. The prospects of success in any ***Wednesbury*** unreasonable challenge to a certification are inextricably linked to the evidence presented with the application. Indeed, the requisite level of supporting evidence *should* preclude a decision maker, properly directed, from issuing such a certificate.

Ground 3

Insofar as the third ground of appeal, it was considered as "clear" that the Deputy Judge did not consider whether the applicant would face very serious difficulties which could not be overcome or would entail very serious hardship [§56]. As such the Deputy Judge had applied an incorrect test and failed to appreciate the high threshold.

The Court confirmed the correct approach to Ex.1(b) had been clarified in **R on the application of Agyarko v Secretary of State [2017] UKSC 11** for the Home Department and further stated at §55:

> *"The matters put forward certainly provided good reasons why both would much prefer to continue their family life in this country; but they did not come close to establishing any insurmountable obstacle which would meet the stringent test in paragraph EX.1(b)."*

As a reminder, these facts were a claim she had no means of support in India, her partner had resided in the UK for 16 years and was established in the UK, she was integrated into British society [§7]. **Kaur** therefore acts as a reminder of the high threshold to establish Ex.1(b), and that "common" arguments such as those raised in Kaur are unlikely to meet the same.

Other points of interest

The court considered Mrs Kaur's worship and voluntary work at her local Sikh temple was not "irrelevant" to assessing her claim of lost ties under IR 276ADE(1)(vi) [§62]. The applicant had

"continued to embrace those links". Whilst the current iteration of IR 276ADE(1)(vi) has a different focus, this observation may lend support to submissions by representatives of the Secretary of State that community ties within a diasporia community are indicative of an applicant's ability to re-integrate to their country of origin.

Finally, in assessing a challenge in the Respondent's notice as to the correct approach for assessing "exceptional circumstances", the Court noted there was a "strong public interest" in maintaining immigration control where an individual joins a spouse in the UK, but "does not take proper steps to obtain the necessary entry clearance or right to remain…"[§68].

Conclusion/Good Practice

The following conclusions can be drawn from **Kaur**:

- A judicial review challenge, whether couched as a ***Wednesbury*** unreasonable challenge or otherwise, is largely dependent upon the matters imparted within the application for leave to remain. Where the applicant relies on bare assertions in a cover letter, he is likely to face difficulty in sustaining a challenge of this nature.

- Adequate time spent at the application for leave to remain stage can avoid significant cost thereafter. To avoid criticisms of "bare and insufficient assertion" in any subsequent challenge to certification; applications for leave to remain reliant upon Ex.1(b) and/or Article 8 outside the immigration rules should routinely be accompanied by:

    - Witness statements by the applicant and their partner addressing Ex.1(b) and/or the exceptional circumstances relied upon. Where an applicant has lived abroad for the majority of their life, the factual situation as to their circumstances whilst in that country should be set out, including reference to any friends [§61] and an explanation as to why an applicant could not return to those circumstances [§55].

    - Supporting evidence of the claimed difficulties on return. If it is said, for example, as in Kaur, an applicant's family member has passed away, this should be evidenced by a death certificate and/or supporting evidence from other family members. Furthermore, if it is said an individual is to be left destitute or without financial support, there should be evidence of how they are currently being financially supported and an explanation, again supported by evidence, as to why this could not continue if the applicant is to return.

    - Prospective applicants should be advised prior to considering relief by the costly method of judicial review the high threshold for establishing a claim of "insurmountable obstacles" to family life continuing outside the UK. Assertions of having spent time in the United Kingdom, being integrated to the United Kingdom, or facing financial difficulties are unlikely to be sufficient.

- Where a claim has been certified as “clearly unfounded” based on a flimsy application for leave to remain unsupported by evidence, regard should always be given to a further application for leave to remain accompanied by the relevant supporting evidence as opposed to seeking to judicially review the decision.

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September 2018