IAC-FH-GJ-V4

Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Mamour) v Secretary of State for the Home Department (FCJR)
[2013] UKUT 00086(IAC)

Heard at Field House **Judgment sent**

On 24 January 2013

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

UPPER TRIBUNAL JUDGE STOREY

THE QUEEN (ON THE APPLICATION OF

MOHAMED ALAM MAMOUR)

Applicant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Applicant: Becket Bedford, instructed by Sultan Lloyd

For the Respondent: Fiona Paterson, instructed by Treasury Solicitor

JUDGMENT

1. This case concerns an application for judicial review brought by the Applicant, who is a national of Afghanistan, against a decision by the Respondent of 13 February 2012 augmented by a decision of 22 March 2012 refusing his further representations as a fresh claim. One relatively unusual feature of it is that the Applicant was removed from the United Kingdom prior to being granted permission to apply for judicial review at the oral renewal stage.

2.
A number of matters are of more relevance than usual to the way in which the arguments have been developed before me. In chronological order they are:-

- On 22 October the Applicant enters the UK and claims asylum.

- On 1 November 2005 the Applicant was assessed as over 18, his asylum claim was processed accordingly and then refused.

- On 16 December 2005 his appeal is dismissed by Immigration Judge Elvidge. Although finding the Applicant's asylum claim not credible, the judge finds that he is a minor who is "likely to be of the age of 16". He also states that "[i]t may be in the light of this determination the respondent may grant the appellant some form of limited leave to remain until he is 18".

- The appellant does not appeal, but his representatives write asking that he be granted discretionary leave.

- In a file minute dated 9 August 2006 a Home Office official states that the Applicant had been found to be over 18 by Kent Social Services, that the report relied on by the Immigration Judge finding him to be 16 "has an error margin of 2 years" and that "the evidence is weighted in favour of applicant being aged 18+". As a result, the respondent does not proceed to grant the Applicant any form of discretionary leave. (In subsequent correspondence the reason is incorrectly stated as being because a further age assessment by Kent Social Services has confirmed their original view that he was 18: I return to this below.)

- Beginning with a letter sent in February 2007 the Applicant's representatives make a number of further representations.

- In August 2010 the Applicant applies for judicial review; this is eventually withdrawn after the Respondent agrees to withdraw previous decisions.

- On 13 February 2012 (as already noted) the respondent refuses to treat these further representations as a fresh claim and on 7 March issues removal directions to remove the Applicant from the UK.

- On 12 March 2012 the Applicant applies for judicial review of the refusal of his fresh claim and the Respondent's decision of 7 March 2012 to issue removal directions.

- On 13 March 2012 Beatson J orders a stay of removal.

- On 24 April 2012 McKenna J refuses to grant permission to apply for judicial review, stating that the case is considered to be totally without merit and that his order is no bar to removal. He further transfers the application to the Upper Tribunal pursuant to the Lord Chief Justice Practice Direction of 17 October 2011.

- On 27 April 2012 the Applicant lodged notice of renewal of his claim for permission.

- On 20 June the Applicant submits "Grounds for stay on removal" in respect of imminent directions for removal. These were then cancelled.

- On 22 June Upper Tribunal Judge Gleeson refuses to grant a stay on removal.

- On 9 July the Applicant's solicitors lodge further "Grounds for stay on removal" repeating the original grounds but also alleging that the Respondent had not given the Applicant proper service of removal directions.

- On 9 July 2012 Upper Tribunal Judge Gleeson again refuses an application for a stay on removal.

- The Applicant is removed from the UK on 10 July 2012.

- On 23 July the Applicant's solicitors lodge "Renewed grounds for permission" which although stating that the Applicant makes his application on the same grounds as relied on previously, go on to submit

that “C says his removal directions are unlawful in that R has breached her policy in failing to give C or his solicitors more than 2 days clear notice of the date for removal….C’s solicitors believe that C was not served with removal directions on 5 July 2012 despite D’s statement to the contrary.” A witness statement from a solicitor at Sultan Lloyd is appended which stated that the Applicant had not been given two clear days notice of the date of removal, and had not been assisted by the detention centre in understanding the removal directions served on him or in having access to telephone facilities to contact his legal representatives.

- The oral renewal hearing is adjourned from 24 July 2012 to await the expected Court of Appeal judgment in KH (Afghanistan) (see below).

- On 14 September the Respondent files a witness statement from an employee of the UKBA stating that removal direction set for the 10 July were served on the Applicant on 5 July, that the Applicant understood them but threw them on the floor and refused to sign the papers. The same witness stated that there were pay hones in the centre and detainees also have access to mobile phones and can use computers and there the Applicant and his solicitors were able to contact each other.

- On 18 September 2012, the day of the oral renewal hearing, UTJ Jordan grants permission although he refuses to grant an interim order for the Respondent to use her best endeavours to return the Applicant to the UK.

- Circa 24 September 2012 (Mr Bedford advises us) the Applicant lodged an application for permission to appeal to the Court of Appeal against UTJ Jordan’s decision. Whilst stating that they considered the latter had been correct to grant permission to apply for judicial review, his legal representatives take issue with (i) his refusal to make an interim order; and (ii) this refusal to grant a quashing order in respect of the removal directions served on 5 July 2012 in light of their belief that the Respondent had prevented the Applicant from accessing legal or free advice in sufficient time to enable him to adequately prepare an application to stay his removal and/or to prepare an application against the Tribunal’s decision to refuse to stay his removal.

3. Before me Mr Bedford submitted that the decision of the Respondent to refuse this further representation as a fresh claim was irrational. It was manifest, he said, that the Respondent’s considerations had proceeded on a false basis. He drew attention to the ruling of Immigration Judge Elvidge in his determination of 22 October 2005 that the Applicant was 16, not 18. The Respondent had proceeded to ignore that ruling on the basis that Kent Social Services had made a further age assessment which confirmed their original assessment that he was over 18. UTJ Jordan’s judgment showed that to be false; there had never been a fresh age assessment by Kent Social Services. As a result of this error the Respondent’s consideration of the Applicant’s fresh claim failed to take account of a highly material consideration in respect of his claim, namely that he had wrongly been denied a grant of discretionary leave until his 18 th birthday as was envisaged by Home Office policy on unaccompanied minors at that time. Mr Bedford did not pursue before me his challenge to the issuing of removal directions made against the Applicant on 5 July 2012.

4. At the outset of her submissions on behalf of the Respondent Ms Paterson stated that the Respondent did not seek to defend the Applicant’s application. She said that the Respondent undertook to withdraw her previous decision and issue a fresh decision on his application for a fresh claim within the next few days. So as not to prejudice the Applicant she proposed that I adjourn the proceedings for four weeks so the Respondent had time to make that fresh decision which the Tribunal could then consider in the context of the current proceedings.

5. Mr Bedford objected strongly to the adjournment request. He argued that (leaving aside the pending application for permission to appeal to the Court of Appeal against two other aspects of UTJ Jordan's judgment) the Respondent had had ample opportunity to withdraw the decision and make a fresh one.

6. I decided to reject Ms Paterson's application to adjourn. It has been open to the Respondent from at least the date of the hearing before UTJ Jordan to withdraw her decision and no good reason has been given for why this was not done.

7. In light of my decision to proceed, I asked Ms Paterson whether she still maintained her position that the Respondent did not seek to resist the Applicant's application. She confirmed that she did but she wished to make it clear that the only error the Respondent was prepared to concede had been committed in the refusal decision of February 2012 concerned the failure to appreciate that there had in fact been no fresh age assessment conducted by Kent Social Services.

Discussion

8. Having considered both parties' submissions I am satisfied that the February 2012 decision of the Respondent was Wednesbury unreasonable.

9. Save for one matter it seems to me that there was nothing wrong with the Respondent's treatment of the Applicant's further representations. As regards his asylum claim, this had been rejected by IJ Elvidge as not credible and the Applicant made no appeal against that decision. In recent representations he has sought to argue that he still has a valid asylum claim based on further documents sent from Afghanistan by his paternal uncle recently. However, the Respondent addressed those new materials in her refusal letters and the Applicant has failed to challenge them in any of his subsequent grounds for permission to apply for judicial review. As regards the Applicant's claim based on his right to respect for private and family life, the Respondent gave careful consideration to the materials relied on in support and found them wanting. Given the Applicant's relatively short period of stay in the UK; his illegal entry; his failure to appeal the rejection by an Immigration Judge of his asylum appeal; the tenuous evidence he had submitted as to his ties with friends, relatives, etc., I consider that this aspect of the Respondent's decision was based on seemingly cogent reasons.

10. However, in my judgement it remains that there is one insurmountable difficulty with the Respondent's refusal decision, namely her failure to act without valid reason upon the Immigration Judge's finding that the Applicant was a minor, despite her own policy instructing a grant of discretionary leave in such circumstances (both parties were content for me to describe this as "the historic injustice" point).

11. This difficulty has to be kept in context. This is not a case in which the Respondent failed to consider the historic injustice argument at all. The Applicant in further representations had raised it and in support had expressly sought to rely on the Court of Appeal judgment in (AA Afghanistan) [2007] EWCA Civ 12.

12. The difficulty is rather in the way the Respondent chose to address this argument. At [24] and [25] of the February 2012 refusal letter it was stated:

"24. You submit that your client should have been granted Discretionary Leave to remain in the United Kingdom following the Immigration Judge's finding that Mr Mamour was only sixteen years of age.

25. Reference has been given to the case of AA (Afghanistan) [2007] EWCA Civ 12 to consider whether [Mr Mamour] has been disadvantaged by failing to have the opportunity to seek to extend any leave granted under the Unaccompanied Asylum Seeker Child (UASC) policy. Any entitlement to UASC Discretionary Leave would have expired in June 2009, when your client reached the age of seventeen years and six months. As his asylum application was refused on 9 th November 2005, any subsequent application for an extension of leave would, by now, likely to have been refused. It can therefore be concluded that your client has not been disadvantaged as a result of not being granted Discretionary Leave which would not have expired and your request fails to create a realistic prospect of success."

13. I am in agreement with Mr Bedford that this passage is deficient in at least two respects. First, it treats the failure to make a grant of Discretionary Leave as being no kind of disadvantage at all; whereas the Court of Appeal in AA clearly regarded such a failure as in itself a significant disadvantage. Second, by not considering it as any kind of disadvantage, the letter failed to weigh in the assessment of the fresh claim in its Article 8 aspect any detriment caused to the Applicant by this disadvantage. This amounted to failure to take into account a potentially material relevant factor.

14. For the above reasons I am satisfied that the Respondent's decision to refuse the Applicant's further representations as a fresh claim was Wednesbury unreasonable.

Relief

15. In the course of submissions I heard argument from both parties as to what remedies and/or relief I should order were I to find the Respondent's decision irrational.

16. Mr Bedford submitted that I should adopt his draft order which covered: (1) a quashing order; (2) an order or "indication" to the Respondent that she should respond to my decision by granting the Applicant a fresh claim so that he had a statutory right of appeal to a First-tier Tribunal judge in accordance with para 353 of the Immigration Rules; and (3) an order for the Respondent to "make arrangements forthwith to trace the claimant and immediately return him to the jurisdiction from Afghanistan". He also submitted that I should

17. Ms Paterson submitted that it would go beyond my judicial review jurisdiction to do anything further than to make a quashing order. She cited in support a judgment of Mr Stephen Morris QC sitting as a Deputy High Court judge: **The Queen on the application of Fatima Farhan Mohammed [2012] EWHC 3091 (Admin)** and in particular [102] and [103]:

"102. The courses of action open to this court upon making a quashing order are set out in CPR 54.19 and s.31 Senior Courts Act 1981 (as amended). Since the relevant decision maker in the present case is not a court or tribunal, this court does not have the power to substitute its own decision for the decision taken by the Defendant: see s.31(5)(b) and s.31(5A) SCA 1981. Rather the court has power to remit the matter to the Defendant and to direct the Defendant to reconsider and reach a decision in accordance with the findings in this judgment.

103. It therefore falls to the Defendant now to take a fresh decision on the representations made in the 4 September 2009 letter."

18. Having considered the competing arguments, I have decided that the only remedy I should grant is an order to quash the decision of the Secretary of State of February 2013 to refuse the further representations as a fresh claim.

19. With great respect to Ms Paterson, it is not in the Civil Procedure Rules (CPR) that I must locate my powers to grant relief. Although closely modelled on the CPR the kinds of relief open to the Upper Tribunal in judicial review proceedings are set out in s. 15 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), which provides:

“15 Upper Tribunal's ‘judicial review’ jurisdiction

(1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief--

(a) a mandatory order;

(b) a prohibiting order;

(c) a quashing order;

(d) a declaration;

(e) an injunction.”

20. Section 15(4) further provides that:

“(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.”

21. Further, both under both the CPR (as made clear by the Deputy High Court judge in the above case) and the TCEA 2007 a quashing order may be added to by a decision to remit with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal:

“17 Quashing orders under section 15(1): supplementary provision

(1) If the Upper Tribunal makes a quashing order under section 15(1)(c) in respect of a decision, it may in addition—

(a) remit the matter concerned to the court, tribunal or authority that made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal, or

(b) substitute its own decision for the decision in question.

(2) The power conferred by subsection (1)(b) is exercisable only if—

(a) the decision in question was made by a court or tribunal,

(b) the decision is quashed on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision that the court or tribunal could have reached.”

22. Whilst in my judgement it is appropriate, in addition to making a quashing order, to remit the matter to the Respondent for her to reach a decision in accordance with my findings, I would point out that I consider my findings of limited effect. This is not a case in which I can conclude with confidence that the only rational response of the Respondent to the Applicant’s further representations would be to accept his fresh claim. I have not found any flaw in the Respondent’s rejection of the Applicant’s

attempt to revive his asylum claim and this is not a case in which it can seriously be suggested that there was any causative link between the "historic injustice" and the outcome of the Applicant's asylum claim: see KA (Afghanistan) and others v Secretary of State for the Home Departmen **t** [2012] EWCA Civ 1014, at [25] and, most recently, EU (Afghanistan) & Ors v Secretary of State for the Home Department [2013] EWCA Civ 32, at [7].

23. On my findings the flaw in the previous decision was confined to a failure to take account of one particular relevant factor and in that light all that is required is a fresh assessment of the further representations based on Article 8 of the Human Rights Convention and possibly also of para 353B considerations, so that the Respondent weighs in the balance the nature and extent of the disadvantages or "disbenefits" the Applicant has experienced as a result of the failure to grant him discretionary leave.

24. It follows that I reject Mr Bedford's request that I order or "indicate" to the Respondent that she should respond to my decision by granting the Applicant a fresh claim so that he had a statutory right of appeal to a First-tier Tribunal judge in accordance with paragraph 353 of the Immigration Rules. That would in any event be tantamount to seeking to substitute my own decision for that of the Secretary of State, contrary to s.17(2) of the 2007 Act.

25 As regards Mr Bedford's request that I make an order directing that the Respondent use best endeavours to return the Applicant, I observe in the first instance that it lies within my jurisdiction to make such an order if I consider it appropriate and that I must apply the principles that the High Court would apply: see s. 15(3)-(4) of the 2007 Act. In that regard I have had regard to the principles set out by the Court of Appeal in R (on the application of YZ (China) v Secretary of State for the Home Department [2012] EWCA Civ 1022. The Court held that it was unhelpful to consider, even in a case where removal was unlawful, that there was a "presumption" in favour of return, although it may well be a strong factor; all cases. it is emphasised, were fact-sensitive (see [49]).

26. I am satisfied that I should not exercise my discretion to make such an order. As I have already made clear, this is not a case in which I conclude that there is only one way in which the Respondent could remake her decision on the fresh claim: see **R (S) Secretary of State for the Home Department [2007] EWCA Civ 546** . Only if the Respondent were to decide in the context of re-making that decision to grant the Applicant a fresh right of appeal would the matter of steps to effect the return of the Applicant to the United Kingdom become a real issue.

27. For the above reasons:

The decision of the Respondent of 13 February 2012 refusing the Applicant's further representations as a fresh claim was Wednesbury unreasonable. The matter is remitted to the Respondent for her to reconsider the matter in accordance with my findings.

No other relief is granted.

Signed Date

Upper Tribunal Judge Storey