Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Hamasour) v Secretary of State for the Home Department (supplementary decision letter – effect) IJR
[2015] UKUT 00414 (IAC)

Heard at Manchester Civil Justice Centre

On 26 th June 2015

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Before

UPPER TRIBUNAL JUDGE COKER

Between

THE QUEEN ON THE APPLICATION OF

CAMERAN HAMASOUR

Applicant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ms N Braganza, for the applicant, instructed by Latitude Law Solicitors

Mr V Mandalia, for the respondent, instructed by GLD

The decision in Nash v Chelsea College of Art and Design [2001] EWHC 538 (Admin) may provide a useful tool on the issue of whether a supplementary decision letter amounts to a fresh decision, or whether it merely supplements the decision already made, and in relation to matters to be considered in terms of the effect of such a supplementary decision letter.

JUDGMENT

1.
The applicant applied for leave to remain on the basis of his private life, claiming that refusal of leave would bring about an impermissible infringement of rights protected by Article 8 of the ECHR. His application was refused. Permission to apply for judicial review was granted by the President of the Upper Tribunal (IAC) on 18 th March 2015 in the following terms:

The headline criticisms of the impugned letter of decision in this matter are that it discloses no proper consideration of the substantial quantities of information and representations put forward, it contains no proportionality exercise, it makes no assessment of the Applicant's private life and it does not engage with the evidence provided, in particular in the Applicant's witness statements, asserting that

he no longer has any contact with his country of origin, Iraq. I am satisfied that there is an arguable case for judicial review.

Immigration and procedural background

2.
The applicant arrived clandestinely in the UK aged 17 on 25 th May 1999 and claimed asylum. His application was refused on 28 th June 2001. His appeal, against removal on asylum grounds was lodged on 13 th July 2001 and dismissed on 26 th May 2006. He became appeal rights exhausted on 4 th June 2006. He did not leave the UK. Pending the hearing of his appeal against removal he had also sought asylum in the name of Jasim Hussain which was treated as and refused as a fresh application/ further representations on 9 th February 2004. There was no challenge to that decision.

3.
The applicant requested an appointment to attend the Further Submissions Unit in order to present written submissions regarding his asylum/human rights claim. Following an appointment on 9 th March 2010 the respondent considered the applicant's case under the remit of the Legacy Casework Programme and, for reasons set out in a letter dated 6 th July 2012 "deemed that the original decision made on [his] case should remain extant" and he was notified "he has no basis of stay in the UK and should make arrangements to leave the country as soon as possible". Despite that, he did not leave the UK.

4.
By letter dated 6 th March 2014 the applicant sought permission to remain in the UK on private life grounds and that application was refused with no right of appeal for the reasons set out in the decision letter dated 29 th April 2014 ("Decision 1"). It is that decision which is the subject matter of these proceedings.

5.
Permission to judicially review that decision was granted in the terms referred to above.

6.
On 14 th April 2014 the respondent sought an extension of time to file detailed grounds of defence and said that she was in the process of preparing a supplementary decision letter. Correspondence ensued during the course of which the applicant asserted that the fact that the respondent saw the need to supplement her original decision indicated that she accepted that the decision dated 29 th April 2014 was flawed and therefore suggested that the instant proceedings be compromised by way of a consent order, with an order as to costs and the respondent agreeing to issue a fresh decision. This offer was rejected by the respondent and a supplementary letter was served and filed dated 18 th May 2015 ("Decision 2").

7.
Detailed grounds of defence were served; the applicant served an amended statement of grounds and I received skeleton arguments from both parties.

8.
The application for leave to remain on the basis of private life set out the applicant's immigration history, that he was granted permission to work and refers to the establishment of his business and length of residence accumulated. He relied upon paragraph 276ADE of the Immigration Rules, asserting that he had no retained ties including social, cultural or family ties with Iraq; had no contact

with any family in Iraq and that his continued presence was of positive benefit to the UK. He said that for these reasons he should be granted leave to remain. For the same reasons, the applicant also relied upon Article 8 ECHR particularly in the light of his length of residence in the UK. It was accepted in this application that the decision of 6th July 2012 was not susceptible to judicial review. It was submitted that given the subsequent judgment in Hakemi and others v SSHD [2012] EWHC 1967 (Admin) he should have been given leave under Legacy. This submission was, realistically, no longer pursued in these proceedings. Accompanying the application was substantial documentation including correspondence and accounts relating to the applicant's successful business, a letter from his local city councillor dated May 2011, evidence of studies completed successfully, witness statements and a petition as well as evidence of his community activities.

Decision 1

9.
Decision 1 set out the reasons for refusing the application in what might be described as 'standard terms'. The salient parts of that decision are as follows:

Having spent 17 years in your home country and in the absence of any evidence to the contrary, it is not accepted that in the period of time that you have been in the UK you have lost ties to your home country and therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(1)(vi).

….

It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. It has been decided that they do not, because you claim to be in fear of your life if returned to Iraq due to your involvement with the PKK prior to your departure and that you no longer follow the Islamic faith, it would not be unreasonable to expect you to return to an alternative location within Iraq. Your application for leave to remain in the United Kingdom is therefore refused.

If you are in fear of your life or you are in fear of being persecuted if you were to return to Iraq then this would constitute an asylum application…..

10.
The grounds seeking permission to judicially review Decision 1 relied upon the evidence submitted to establish lack of ties namely the applicant's lack of contact with his family as evidenced by the consistency of his statements since his arrival in the UK in terms of the Immigration Rules and drew attention to Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 00060 (IAC). In terms of Article 8 the applicant relied upon his integration into the UK by virtue of his length of residence; the establishment of his business, loss of his Islamic faith and adoption of the social mores of the UK including drinking alcohol occasionally; his friendship network and community ties. It was submitted that these factors taken together provided strong support for his contention that these matters, considered cumulatively, amount to exceptional circumstances such that they should have been specifically considered by the respondent in reaching her decision whether to exercise discretion. The applicant relied upon the line of authority following Nagre [2013] EWHC 720 and Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 42 (IAC).

11.
The respondent sought to defend the claim on the grounds, inter alia, that paragraph 267ADE of the Immigration Rules reflects the public interest considerations set out in s117B Nationality, Immigration and Asylum Act 2002. She submitted that the material submitted by the applicant failed to disclose any basis upon which the respondent could have reached a decision to the effect that the refusal would be unjustifiably harsh.

12.
The respondent made the entirely legitimate point that the consideration by the decision maker required not only an assessment of ties as an objective and subjective consideration but also of whether such ties as there were that were dormant could be revived. She also observed that the consideration of whether there were exceptional circumstances was highly fact sensitive and, where an applicant was unable to meet the requirements of the Rules, it was only in rare circumstances that the respondent was likely to consider exercising her discretion. That is another way of saying that there need to be compelling circumstances to demand that discretion be exercised outside the rules in order to secure an outcome compliant with Article 8 of the ECHR.

13.
The respondent relied upon what she asserted was a failure of the applicant to adduce any evidence to establish that he had no ties and that he had produced no evidence to support his claim that there were exceptional circumstances such as to consider the exercise of discretion.

14.
The respondent in her decision did not address the evidence that was produced, even to the limited extent of explaining why it was considered to fall short of what was required to demand the exercise of discretion in the applicant's favour. The only reference to what the applicant had submitted was to his assertion that he feared return because of previous PKK involvement. Whilst it is correct that if the applicant wished to pursue that element of his claim it should be by way of a claim for international protection, the lack of any acknowledgement by the respondent of the other matters put forward does not indicate that the respondent had engaged at all with these matters when considering whether there were any particular circumstances that constituted exceptional circumstances. This consideration is not apparent from the earlier paragraphs of the letter which refer to a lack of evidence of loss of ties – which in itself is impossible to reconcile with the fact that the applicant had offered evidence, in the form of witness statements and his own assertion of fact, which was, if accepted, evidence of his extensive ties in the UK. Nor did the respondent apparently have any regard to the applicant's age when he left Iraq and or time spent in the UK.

15.
It is not apparent that in Decision 1 the respondent had, in her consideration of matters that may fall outwith the Immigration Rules in deciding whether to exercise her discretion, considered adequately or at all much of the material that was before her. If that was the full extent of the review to be conducted in these proceedings I would grant the application for Judicial Review and quash the decision of 29 th April 2014.

16.
The matter does not, however, stop at this point because, subsequent to the grant of permission, the respondent issued a further decision – Decision 2. It is significant to appreciate that the applicant had not submitted any further or additional evidence between the date of grant of permission and the

making of Decision 2. The respondent accepts that Decision 2 was produced in response to and after consideration of the grant of permission by the President of the Upper Tribunal (IAC).

Decision 2

17.
I must therefore consider the status of Decision 2. There are three possibilities:

(1) Decision 2 is to be read as a continuum of Decision 1 (as contended by the respondent) as supplementing it and so curing the defects I have found to be disclosed by it. It thus operates to render lawful Decision 1 where, absent Decision 2 it would not be;

(2) Decision 2 cannot be read together with Decision 1 so as to cure the defects disclosed by it. Decision 2 is relevant only to the issue of relief, given the discretionary nature of judicial review proceedings;

(3) Decision 2 is a 'stand alone' decision, not relevant to these proceedings, even to the extent of being relevant to the relief to be given but one that may generate its own, quite separate, route of challenge.

18.
The question of whether a supplementary letter amounts to a fresh decision has been the subject of judicial consideration. In Nash v Chelsea College of Art and Design [2001] EWHC Admin 538 Stanley Burton J held

34. In my judgment, the following propositions appear from the above authorities:

(i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Laws J put it in Northamptonshire County Council ex p D) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.

(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:

(a) Whether the new reasons are consistent with the original reasons.

(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

35. To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where

important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.

36. Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members

19.
Although McGowan J did not, in R(K) v SSHD [2015] EWHC 542 (Admin), specifically refer to Nash , she held in [28]:

The SSHD supplemented D1 almost a year later by a new decision on review in D2. There can be nothing irrational or unreasonable in such a course. The Claimant submits that it is “wrong in principle”. If that submission was right then there would be no place for any supplementary decisions in the process. So long as there is an exchange of new and often, unfolding information, there must be a place for supplementary decisions. The power, or duty, to reconsider cannot be denied because it is said that there is “an inevitable bias towards upholding a decision which is impugned, because doing so may thereby win the litigation”. It cannot be argued that all supplementary decisions are flawed because the decision maker will inevitably have a bias towards justifying their original decision.

20.
Although it appears at first blush that there is a conflict in the approach taken in these two decisions, on close examination there is not. In K there is reference to ‘new and unfolding’ information and that there must be a place for supplementary decisions. McGowan J makes the point that it cannot be argued that all supplementary decisions are flawed; that the power or duty to reconsider cannot be denied.

21.
The considerations set out in Nash provide a useful tool to analyse a letter produced subsequent to the grant of permission or indeed on issue of proceedings and prior to the making of a decision whether to grant or refuse permission to judicially review the original decision.

22.
In the instant case there was no further material produced to the respondent for consideration. There was no reference in the GCID case note (disclosed during the course of these proceedings) of consideration immediately prior to Decision 1 of matters submitted by the applicant other than to state:

PRIVATE LIFE 276ADE

…Having spent 17 years in Iraq and in the absence of any supporting evidence, it is not accepted that the applicant has lost ties to their home country during this time.

…

DECISION ON EXCEPTIONAL CIRCUMSTANCES

The applicant claims to be in fear of his life if returned to Iraq because he was involved with the PKK prior to his departure and no longer follows the Islamic faith. The applicant was refused asylum in 1999 and I see no reason why he could not return to an alternative location within Iraq and settle.

23.
The next reference to consideration of the application in the un-redacted GCID notes on 6 th June 2014 to the Pre-action protocol letter merely states:

No points raised that would warrant recon. Reps mention legacy claim, but seems like this is a separate matter. Clmt does not meet RD policy.

24.
Following the grant of permission in the instant proceedings, the GCID notes record the following on 8 th April 2015:

Please draft a supplementary letter addressing the Private Life claim and the Claimant's ties with Iraq in more detail. The Claimant previously sought reliance on his private life, his lack of ties with Iraq (having spent 15 years in the UK and not knowing the whereabouts of his family), and his fear of returning to Iraq (having previously been involved with the PKK and now become an atheist during his time in the UK).

25.
Decision 2 stated:

This letter is supplemental, and should be read in conjunction with the original decision of 19 April 2014. This letter provides further clarification of the reasons for refusing your client's application for leave to remain in the UK.

…

It is this application and the decision made upon it, that gives rise to the present claim for judicial review and this supplemental decision letter.

In reaching a decision regarded as being had (sic) to the matters set out in the covering letter to the application from your firm, dated 06 March 2014. In reaching a decision, particular consideration was given to the matters set out in the two witness statements made by your client dated 29 th October 2013 and 15 May 2009. Regard is also been headed (sic) to the extensive documentation provided about the business that your client established in the United Kingdom, his academic achievements and the representations made on his behalf, particularly in the form of a petition signed by a number of people, some of whom identify the basis upon which you are known to them.

….

Decision 2 went on to consider under the heading Private Life, whether the applicant met the requirements of paragraph 276ADE of the Immigration Rules and considered inter alia his length of residence in the UK, family in Iraq, current age, business, quality of life in Iraq compared to the UK, general considerations of immigration control and immigration history.

26.
It appears to me plain, considering the GCID notes in conjunction with the documents submitted by the applicant in his application in March 2014, Decision 1 and Decision 2 that it was not until Decision 2 that the respondent gave proper consideration to the application made. There was substantial information and material provided by the applicant which was deserving of consideration to at least the extent that the applicant was aware that it had been taken into account and of the reasons for its rejection as a basis for the grant of leave to remain. That consideration did not take place until Decision 2 was drafted.

27.
Considering this in the context of the propositions set out in Nash , it is not clear that the reasons in Decision 2 are indeed the original reasons and I am satisfied that, correctly understood, the later reasons in Decision 2 are a retrospective justification of the original decision.

28.
Accordingly I am satisfied that Decision 2 is not a continuum of Decision 1 and the two letters cannot be read as one decision. Decision 2 constitutes an assessment of matters that needed to have been considered as part of the original decision but were not.

What is the effect of Decision 2?

29.
The applicant submitted that Decision 2 was itself unlawful because there had been no regard to or engagement with or analysis of the evidence and particular matters supporting that evidence. I do not agree. There is no requirement upon the respondent to identify and address each and every matter the applicant relied upon. The respondent considered and reached conclusions on the significant matters raised in representations and those conclusions were plainly open to her. The submissions by Ms Braganza were substantially submissions as to the merits of the representations and are matters that are open to the applicant to raise in a statutory appeal – as to which see below.

30.
In any event, Decision 2 is a separate decision. For the reasons I give below the applicant appears to have an alternative remedy to challenge Decision 2 namely a statutory appeal albeit he would have to waive his entitlement to service of proper notice under the Immigration (Notices) Regulations 2003 as he is entitled to do – see Khan, R (on the application of) v Secretary of State for the Home Department (right of appeal – alternative remedy) (IJR) [2015] UKUT 353 (IAC) (15 June 2015).

31.
The next issue to be addressed is whether and to what extent Decision 2 affects the final outcome of these proceedings. Although I have found that Decision 1 was unlawful, relief is of course discretionary. In the light of my findings in [27] and [28] this is clearly not a case where the applicant is entitled to the relief sought (although it can be said that the production of Decision 2 has in practical terms given the applicant the substance of relief sought namely an immigration decision which has permitted him a right of appeal).

Is there a statutory appeal?

32.
I heard submissions from both parties with regard to the operative date of decision. Mr Mandalia submitted that the operative date of the decision was 29 th April 2014 and that the supplementary decision of 18 th May 2015 had not changed the decision. Ms Braganza submitted that the consideration of the application was completed in May 2015 and that until that had occurred the decision was not complete and thus the operative date was 18 th May 2015; absent the decision of 18 th May 2015 the applicant was not aware of the reasons for the refusal of leave to remain and a decision cannot be complete unless and until the applicant is made aware of the reasons.

33.
As already referred to above I am satisfied that Decision 2 is not part of a continuing decision arising initially with Decision 1. The operative date is therefore 18 th May 2015 ie the date of Decision 2. In

any event, even if Decision 1 and Decision 2 were one decision, the operative date would be 18 th May 2015 – it cannot possibly be successfully said that a decision which is incomplete and has to be supplemented by a later decision carries with it the original date of the partial decision.

34.
Decision 2 did not have on it notice of appeal rights and did not identify itself as an appealable decision. As noted earlier that error can be waived by the applicant if he chooses to exercise the alternative remedy of an appeal to the First-tier Tribunal.

Conclusion

35.
For all of these reasons the claim must fail.

Costs

I have carefully balanced the competing interests of the parties as to costs and taken account of the unlawfulness of Decision 1 and the effect of Decision 2. Subject to written submissions from either or both parties to be received by me within 7 days of the handing down of this judgment I propose to make no order for costs.

Signed Date

Upper Tribunal Judge Coker