JR-2023-LON-002492

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
Sami Tumarevic

Applicant

and

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Hoffman

HAVING considered all documents lodged and having heard the applicant, acting as a litigant in person, and Mr M Biggs of counsel, instructed by GLD, for the respondent at a hearing on 26th September 2024

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

(2) The applicant do pay the respondent's reasonable costs on the standard basis, to be assessed if not agreed.

(3) The applicant's application for permission to appeal to the Court of Appeal is refused on the basis that it did not engage with the reasons given for refusing his claim and did not establish any arguable error of law on the part of the Upper Tribunal.

Signed: M R Hoffman

Upper Tribunal Judge Hoffman

Dated: **26th September 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 09/10/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-002492

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

26th September 2024

Before:

UPPER TRIBUNAL JUDGE HOFFMAN

- -

Between:

THE KING
on the application of
SAMI TUMAREVIC

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Sami Tumarevic
(Acting in person)

Mr M Biggs, Counsel
(instructed by the Government Legal Department) for the respondent

Hearing date: 26 September 2024

- -

J U D G M E N T

- -

Judge Hoffman:

Introduction

1. The applicant, who is a national of Lithuania, seeks by way of judicial review to challenge the decision of the respondent dated 10 November 2023 that his asylum claim made on 11 September 2023 was

inadmissible in accordance with paragraph 326E of the Immigration Rules.

2. Permission to apply for judicial review was granted by Upper Tribunal Judge O'Callaghan in the applicant's absence at an oral hearing that took place on 24 May 2024. Judge O'Callaghan granted permission on one ground that had not been pleaded by the applicant. That ground is:

> "When declaring the applicant's asylum application inadmissible under paragraph 326E of the Immigration Rules and in concluding that the applicant did not meet the exceptional circumstances test of paragraph 326F of the Rules, the respondent acted unlawfully as neither Rule was in force in respect of an asylum application made on 11 September 2023".

Background

3. The applicant claims to have entered the United Kingdom on 28 December 2004 as a dependant of his mother. The applicant has been convicted of several criminal offences since arriving in the UK. On 1 December 2014 he was convicted of possessing a controlled drug, Class A (MDMA), and was issued with a referral order. On 9 February 2015 the applicant was convicted of possessing a prohibited weapon, a disguised firearm, and issued with a four month detention and training order. This led to the applicant being issued with a warning letter by the respondent on 20 March 2015 that he might face deportation if he continued offending. On 20 May 2016 the applicant was convicted of robbery, possessing an imitation firearm when committing the offence, possessing an imitation firearm on arrest for an offence, possessing prohibited weapon, a weapon for discharge of noxious liquid gas, etc., possessing an imitation firearm in a public place and possessing prohibited ammunition.

4. On 20 June 2016 the applicant was sentenced to six years' imprisonment and extended licence for two years. His appeal against that sentence was dismissed. As a consequence of this, on 12 December 2016 the applicant was served with a Stage 1 notice of liability to deportation letter which he did not respond to. On 29 August 2018 the applicant was convicted of unauthorised possession of a knife or offensive weapon in prison and sentenced to six months' imprisonment. On 1 May 2019 the applicant was convicted of three counts of unauthorised possession of a knife or offensive weapon in prison and sentenced to 80 days' imprisonment. On 19 December 2019 the applicant was served with a further Stage 1 notice of liability to deportation letter. No response was received again. On 17 January 2020 the applicant was served with a signed deportation order and a Stage 2 notice of a decision to deport him certified under regulation 33 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The applicant did not exercise his right of appeal against that decision. On 3 March 2020 the applicant was deported to Lithuania. However, on 21 September 2020 the applicant was encountered by police in the UK having presented himself to the A&E department at Manchester Royal Infirmary with a

gunshot wound to his foot. The applicant was subsequently arrested and returned to prison for breaching the conditions of his early release.

5. On 16 January 2023 the applicant submitted representations via his legal representatives regarding his deportation from the UK. On the same day, the applicant also lodged an appeal against the 17 January 2020 notice of the decision to deport him. The applicant completed his custodial sentence and was detained under immigration powers on 23 January 2023. On 31 January 2023 the applicant's appeal against the 17 January 2020 decision was struck out by the First-tier Tribunal who said it was out of time. On 19 April 2023 the applicant was granted conditional bail subject to him residing at approved address.

6. On 5 May 2023 the applicant's representations dated 16 January 2023 were treated as an application to revoke the deportation order and a human rights claim. The applicant's application to revoke the deportation order was rejected with no right of appeal under regulation 34(4) of the EEA Regulations because it had been made while he was in the UK. The applicant's human rights claim was refused affording him an out of country right of appeal.

7. On 1 June 2023 the applicant was released from detention with electronic monitoring and reporting restrictions but on 22 August 2023 he was detained on reporting with a view to his removal to Lithuania. However, having been served with removal directions on 1 September 2023, on 11 September 2023 the applicant claimed asylum and the removal directions were cancelled.

8. In a decision dated 10 November 2023, the applicant's asylum claim was rejected as being inadmissible. This is the decision being challenged in these judicial review proceedings. On 17 November the applicant lodged his application for judicial review. His application for judicial review was initially refused on the papers by Upper Tribunal Judge Gleeson on 19 February 2024. The applicant renewed his application for judicial review to an oral hearing and, as discussed above, that application was granted by Upper Tribunal Judge O'Callaghan.

9. Following the grant of permission, the respondent took steps to settle the judicial review claim. On 21 June 2024 the Government Legal Department emailed the applicant explaining that the 10 November 2023 decision would be reconsidered and urging that he withdraw the application for judicial review. He was provided with a draft consent order for his consideration and invited to respond by 25 June. Having failed to respond to the respondent's offer, on 25 June 2024 the Government Legal Department called the applicant but the call was not answered. The respondent therefore proceeded to file and serve her detailed grounds of defence on 28 June 2024. Also on 28 June 2024, the respondent wrote to the applicant explaining again that she had offered to reconsider her decision. A track and trace confirmation confirmed that the applicant had received that letter, but again he failed to respond. As a consequence, on 23 July 2024 the Government Legal Department made contact with the applicant by telephone and asked him again to consider the proposed consent order. Again the applicant failed to respond. On

26 July 2024 the respondent wrote to the Upper Tribunal explaining that the respondent had agreed to reconsider the 10 November 2023 decision and they had communicated this to the applicant on 21 June and 26 June 2024 and that they had spoken to the applicant about this topic on 23 June 2023. As a consequence of the applicant's failure to engage with the respondent's offer to settle this case, the substantive hearing for the judicial review was listed before me on 26 September 2024.

The legal framework

10. The relevant legal framework is as follows. Paragraph 326E of the Immigration Rules provided that an EU asylum application will be declared inadmissible and will not be considered unless the requirement in paragraph 326F is met. Paragraph 326F said that an asylum application will only be admissible if the applicant satisfies the Secretary of State that there are exceptional circumstances which require the application to be admitted for full consideration. Exceptional circumstances may include, in particular:

    (a) the Member State of which the applicant is a national has derogated from the European Convention on Human Rights in accordance with Article 15 of that Convention;

    (b) the procedure detailed in Article 17(1) of the Treaty on European Union has been initiated, and the Council or, where appropriate, the European Council, has yet to make a decision as required in respect of the Member State of which the applicant is a national; or

    (c) the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national, or the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national.

1. The key issue as identified by Judge O'Callaghan was that paragraphs 326E to 326F had been deleted by paragraphs 11.6 to 11.7 of Statement of Changes HC 17 of 11 May 2022 before the applicant claimed asylum. Those deletions took effect from 28 June 2023. As the respondent points out in her skeleton argument paragraphs 326E to 326F of the Rules were deleted because they had been superseded by primary legislation. Specifically, with effect from 28 June 2022, Part 4A of the Nationality, Immigration and Asylum Act 2002 was inserted into the Act by sections 15 and 87 of the Nationality and Borders Act 2022 subject to transitional provisions. These amendments in particular expanded section 80A of the 2002 Act to cover human rights claims as well as asylum claims and to cover removals to third countries that are deemed safe but are not EU Member States. They also inserted a new section 80AA listing safe countries, which is not yet in force but includes Lithuania. Section 80A of the 2002 Act, which is in effect and was in effect on the date of the 10 November 2023 decision, includes the following provisions:

    > "(1) The Secretary of State must declare an asylum claim made by a person who is a national of a member State inadmissible.

> (2) Any asylum claim declared inadmissible under subsection (1) cannot be considered under the immigration rules.
>
> […]"

Lithuania is a Member State for the purposes of section 80A(1).

Legal arguments

2. The respondent raises two grounds as to why this application for judicial review should not be successful. The first point raised by the respondent is that the application is academic. The respondent says that given the respondent's agreement to reconsider the 10 November 2023 decision, the applicant cannot receive anything of legitimate practical value from this litigation. The proceedings are therefore academic and the respondent refers to the case of **R v BBC ex parte Quintavalle [1998] 10 Admin LR 425**. The respondent also relies on the case of **R (Heathrow Hub Ltd) v Secretary of State for Transport [2020] EWCA Civ 213** at paragraph 208:

> "It is well-established that Courts should not opine on academic or hypothetical issues in public law cases other than in exceptional circumstances where there is good reason in the public interest for doing so…".

The respondent submits there are plainly no exceptional circumstances in the public interest to justify allowing the applicant's case to proceed.

3. At the hearing before me, the applicant submitted that he thought that his case should proceed, firstly on the basis that the respondent should be held to account for her error of law; and, secondly, he submits that there is a public interest in his application for judicial review proceeding. He says the wider significance of his case is that if a mistake had not been made by the Home Office then his case would not have been deemed inadmissible in the first instance and that he would have been granted a screening interview to substantiate his asylum claim. He submits that had he been granted that asylum interview, he would have been able to provide further evidence in support of his case which he would have been able to use to demonstrate that his case did include exceptional circumstances. When asked what the exceptional circumstances to his case were, the applicant said that his life is at risk in Lithuania due to his ethnic and genetic makeup. He said that if removed to his home country, he would be at risk from the police. He said that he had submitted documents in relation to his grandmother's asylum claim in 2002. The applicant said that his grandmother had successfully claimed asylum in 2002 and he was present at the events that led to her grant of refugee status.

4. The second point relied upon by the respondent is that while the respondent may have erred in law in applying the Immigration Rules to the applicant's asylum claim on 10 November 2023, had she not made that error and instead applied the relevant legal provisions as set out under section 80A of the 2002 Act, the outcome would have been the

same, i.e. the applicant's asylum claim would still have been deemed inadmissible because he was from an EU Member State, Lithuania. On that basis, the respondent relies on section 31(2A) of the Senior Courts Act 1981 to argue that the court, or in this case the Upper Tribunal, should decline to grant relief on the basis that the outcome would have been the same for the applicant. Section 31(2A) of the Senior Courts Act 1981 says:

> "The High Court –
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

5. The applicant during the hearing made submissions that essentially were similar to those that he made in relation to the first point relied upon by the respondent: that had the respondent applied the law correctly, she would not have found his asylum claim as inadmissible in the first instance and he would have had the opportunity to attend a screening interview and he would have been able to provide documents to substantiate his claim.

Findings

6. Having carefully considered the submissions from both parties I am satisfied that in the light of the respondent's offer to withdraw the decision of 10 November 2023 and re-make the decision that the grounds for judicial review are academic. The only relief the applicant could hope to obtain from these proceedings is a quashing order for the 10 November 2023 decision, in which case the matter would have gone back to the Home Office for a new decision. That is exactly what the respondent had offered to do in June of this year, as is clear from the draft consent order that has been provided in the trial bundle prepared by the respondent. There was nothing more that the applicant could have achieved by carrying on with this substantive hearing.

7. While the applicant argued that there was a public interest in his case proceeding notwithstanding the offer of settlement, I am not satisfied that there was. There was a single issue in this case, which is whether or not the respondent was wrong to have applied the Immigration Rules as she did. It has been accepted by the respondent that she was wrong to apply them, but the outcome would have made no difference because of what the statute said on the relevant date. There is clearly no wider public interest in allowing the application to proceed in those circumstances.

8. I am also satisfied that the second relied upon by the respondent is made out. It is clear that the respondent did err in considering the applicant's asylum claim in accordance with the Immigration Rules that were no longer extant on 10 November 2023; however, it is also clear that the substance of those Rules had at that time substantially been reproduced in Part 4A of the 2002 Act to the extent that had the respondent not made that error and correctly applied the statutory provisions instead, the outcome would still have been the same for the applicant, i.e. his asylum claim would have been deemed to be inadmissible. While the applicant did argue that had the error not occurred his case would not have been deemed inadmissible and that he would have been invited to a screening interview, that essentially misunderstands the point that the substance of the Rules had been replicated in statutory legislation therefore the respondent would have approached the matter in exactly the same way that she had. For that reason, I am satisfied in accordance with section 31(2A) of the Senior Courts Act 1981, it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In fact, it is extremely likely that the outcome would have been exactly the same for the applicant.

Conclusion

9. For these reasons, I find that the application for judicial review falls to be dismissed.

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