IN THE UPPER TRIBUNAL

R (on the application of Mohammed Alam Mamour) v Secretary of State for the Home Department IJR [2014] UKUT 00512(IAC)

Field House,

Breams Buildings

London

**Before**

**UPPER TRIBUNAL JUDGE O'CONNOR**

**Between**

**MOHAMMED ALAM MAMOUR**

Applicant

**-and-**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation**:
For the Applicant: Mr B Bedford, instructed by Sultan Lloyd Solicitors
For the Respondent: Mr N Chapman, instructed by the Treasury Solicitor

**JUDGMENT**

*Given extempore at hearing of 9 October 2014*

***Introduction***

1. The Applicant brings an application for judicial review of the Respondent's decision of 21 February 2013, and supplementary decision of 23 July 2013, refusing him leave and refusing to treat his representations as a fresh claim pursuant to paragraph 353 of the Immigration Rules.

2. Permission to bring these proceedings was granted on 11 July 2014 after an oral hearing by Mr Justice Cranston and Upper Tribunal Judge Storey.

***Factual background***

3. The factual backdrop to this case is both lengthy and complex but it is necessary to recite it with some particularity:

© CROWN COPYRIGHT 2014

- On 22 October 2005 the Applicant entered the UK and claimed asylum.
- On 1 November 2005 he was assessed as being over the age of 18 years. His asylum claim was processed accordingly and then refused. On 16 December 2005 his appeal was dismissed by Immigration Judge Elvidge. Although finding the Applicant's asylum claim not credible the judge found him to be a minor – likely to be aged 16.
- In a file minute dated 9 August 2006 a Home Office official stated 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 years old "has an error of margin of two years" and that "the evidence is weighted in favour of the Applicant being aged 18 plus". As a result the Respondent did not proceed to grant the applicant any form of discretionary leave.
- The Applicant then made a number of further representations, beginning with a letter of February 2007, all of which the Respondent rejected.
- In August 2010 the Applicant applied for judicial review; an application which was eventually withdrawn after the Respondent agreed to withdraw her previous decisions.
- On 13 February 2012 the Respondent refused to treat further representations made by the Applicant as a fresh claim and, on 7 March 2012, she issued directions to remove the Applicant from the United Kingdom.
- On 12 March 2012 the Applicant applied for judicial review of the abovementioned decisions.
- On 13 March 2012 Mr Justice Beatson ordered a stay of the Applicant's removal.
- On 24 April 2012 HHJ McKenna, sitting as a Judge of the Upper Tribunal, refused to grant the Applicant permission to apply for judicial review, discharged the order of Beatson J and ordered that renewal of the application should not be treated as a bar to the Applicant's removal.
- On 27 April 2012 the Applicant lodged a notice of renewal of his claim for permission to bring judicial review proceedings and, on 20 June, he submitted an application for a stay in respect of imminent directions for his removal.
- On 22 June 2012 Upper Tribunal Judge Gleeson refused to grant such application.
- On 9 July 2012 the Applicant's solicitors lodged further grounds in support an application for a stay of removal. On the same date Upper Tribunal Judge Gleeson refused a further application for a stay on removal [see paragraph 2 of the decision of Judge Storey].
- The Applicant was removed to Afghanistan on 10 July 2012 and currently remains living outside of the United Kingdom.
- Permission to bring judicial review proceedings was granted by Upper Tribunal Judge Jordan after an oral hearing on 18 September 2012. On the same date Judge Jordan refused to make an interim order requiring the Respondent to use her best endeavours to return the Applicant to the United Kingdom.

4. The substantive application challenging the decision of 13 February 2012 was heard by Judge Storey on 24 January 2013 and, in a decision handed down on 22 February 2013, the Secretary of State's decision was quashed. However, Judge Storey refused to make a mandatory order requiring the Respondent (i) to treat the Applicant's representations as a fresh claim and (ii) to use her best endeavours to return the Applicant to the United Kingdom.

5. The substance of Judge Storey's reasons for quashing the Secretary of State's decision is to be found in paragraphs 9 to 13 of his Judgment:

> "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 9th 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."

6. Unbeknown to Judge Storey, by the time of his decision on 22 February 2013 the Secretary of State had reconsidered the Applicant's application. It is this reconsideration decision of 21 February 2013 that is the subject of the instant application for judicial review.

***Legal context***

7. Prior to turning to the decision of 21 February, it is prudent to briefly set out the relevant legal principles that lay at the heart of cases such as the instant one.

8. The general rule is that decision makers are required to deal with applications on the basis of the law and policy prevailing at the time of the making of their decision (R (Hamzeh) v SSHD [2013] EWHC 4113).

9. There may be circumstances in which a decision maker is required to take into account the fact that an earlier decision was unlawful or that there has been a failure to carry out a duty which has caused historic injustice to the individual (Rashid v SSHD [2005] EWCA Civ 799, as considered in, *inter alia*, R(S) v SSHD [2007] EWCA Civ 546 and KA (Afghanistan)[2013] 1 WLR 6115. As explained in the immigration context in R(S), earlier judicial decisions resulting in

conspicuous unfairness amounting to an abuse of power giving rise to illegal or unlawful decisions may amount to a relevant consideration in the taking of a later decision.

10. As to whether fresh representations are to be treated as a 'fresh claim', this is regulated by paragraph 353 of the Immigration Rules which states:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim.
>
> The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. These submissions will only be significantly different if the content:
>
> (i) has not already been considered; and
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

***Discussion***

11. It is accepted by the Respondent that she ought to have, but did not, grant the Applicant Discretionary Leave to Remain ('DLR') in or around December 2005 - as a consequence of Judge Elvidge's findings as to the Applicant's age.

12. In her decision of 21 February 2013 the Respondent initially sets out the facts relevant to her consideration, including detailing Judge Elvidge's findings both as to the Applicant's age and as to the credibility of the Applicant's evidence. She thereafter gives careful consideration to the issue of whether leave should be granted in order to 'redress' any disadvantage caused to the Applicant by the failure to grant him DLR, including (i) the loss of the opportunity to appeal against any refusal to grant him an extension of the DLR (ii) the failure of the Respondent to fulfil her tracing obligations and (iii) the consequences for the Applicant of not being given permission to work.

13. Mr Bedford attacks this limb of the Respondent's decision on the basis that she placed insufficient weight on the prospects of the Applicant succeeding in either (i) the application for an extension of leave that he would have made had he been granted DLR or (ii) in any appeal against a negative decision arising from such an extension application.

14. Despite the capable submissions made by Mr Bedford, in my conclusion the Respondent's decision on this issue is one which falls well within the range of reasonable responses open to her

and consequently it has not been established that it is irrational.

15. Moving on to the Respondent's consideration of Article 8 of the Human Rights Convention. In her decision of 21 February the Respondent says as follows - at [25]:

> "Regard is given to your client's claims in relation to Article 8 of the ECHR. It is noted that aside from a cousin he at no time claimed to have any other family in the UK. Your client resided in the UK for a relatively short period of less than seven years, during which time he presented no evidence of any substantial private life. Regard is had to the case of EB (Kosovo) v SSHD [2008] which considered the bearing any delay in decision making has on a person's right under Article 8. It is noted that the case stated that delay in decision making may reduce the force that removal is necessary in the interests of upholding immigration control if the delay is shown to be a result of inconsistency in outcomes which will have a bearing on the proportionality of removal or requiring the applicant to apply out of country. Whilst there has been some delay in adequately addressing the correspondence raised by your client during the course of his claim; for the reasons given in this letter it is not considered that he has in any way been disadvantaged in light of this. Your client adduced no evidence that he had substantial private or family life in the UK such to make his removal from the UK in any way disproportionate. Your client was returned to Afghanistan nearly seven months ago following an asylum claim in the UK which was found to have no basis. He now has the opportunity to rebuild his life in Afghanistan."

16. Mr Bedford submits that in coming to the aforementioned conclusion the Respondent failed to give consideration to two relevant aspects of the Applicant's circumstances – (i) the fact that the failure to grant the Applicant DLR is a disadvantage of itself requiring consideration in the proportionality balancing exercise, and (ii) the fact that the High Court and the Tribunal permitted the Applicant's removal in July 2012 on a mistaken basis of fact for which the Respondent was responsible.

17. Mr Chapman responded to the former by pointing to all of the aspects of the Applicant's Article 8 claim that the Respondent did consider. Doing so, however, only served to highlight the relevant features of the Applicant's circumstances that the Respondent failed to give consideration to.

18. In my conclusion it is clear that the Respondent's consideration of Article 8 in her decision of 21 February 2013 is fundamentally flawed for the very same reasons as the 13 February 2012 was found to be flawed. She failed to either

explicitly or implicitly treat her failure to grant the Applicant Discretionary Leave as any kind of disadvantage. As Judge Storey identified, however, the failure to make a grant of Discretionary Leave is to be regarded, in itself, as a significant disadvantage.

19. This flaw is not remedied in the supplementary decision of 23 July 2013, there being no reference at all to Article 8 in this letter. I observe in passing that the terms of the 23 July letter do not, in my view, reflect the fact that a further open-minded assessment was given to the Applicant's case at this stage, but rather point to an attempt to shore up the Respondent's position pursuant to the Applicant's persistence in pressing his claim.

20. Mr Bedford is also correct, in my conclusion, in his second submission on this issue. The decision of 21 February 2013 is further flawed in its consideration of Article 8 for its failure to consider the relevance of the Applicant having been removed in circumstances where the attempts to resist such a removal were declined by both the High Court and this Tribunal on the basis of a misstatement of fact made by the Respondent.

21. This error has at its source the Respondent's initial stance, in the judicial review proceedings relating to the decision of 13 February 2012, that it was open to her not to have granted the Applicant leave in 2005/2006 despite the decision of Judge Elvidge, because there had been an age assessment undertaken by Kent Social Services on 9 August 2006 concluding the Applicant to be over the age of 18. This statement was inaccurate. There has never been such an assessment undertaken – as was identified by Upper Tribunal Judge Jordan in his decision of 18 September 2012.

22. Mr Chapman urges me to find that there is no causation between the Applicant's removal and the aforementioned misstatement of fact by the Respondent. I do not accept that this is so, however.

23. As identified in the chronology above, Mr Justice Beatson granted the Applicant a stay of removal on 13 March 2012. This stay was discharged by His Honour Judge McKenna on 4 April, Judge McKenna having first refused the Applicant permission to apply for judicial review on the papers. He did so, at least according to his order of 24 April 2012, having considered not only the decision under challenge but also the Summary Grounds of Defence, both of which wrongly asserted that the Applicant's age had been re-assessed by Kent Social Services on 9 August 2006. Judge Gleeson placed reliance of the decision of HHJ McKenna when making her decisions.

24. It is sufficient to say that despite the strident terms of Judge McKenna's decision, once the true factual matrix had come to light permission to bring judicial review was granted by Judge Jordan and ultimately the underlying decision of 13 February 2012 was quashed by Judge Storey.

25. Mr Chapman submits, in the alternative, that the Respondent was not required to deal with this issue in her decision of 21 February 2013 because the Applicant had not sought to place reliance on it in correspondence prior to the taking of this decision. This, in my view, is a deeply unattractive position for the Respondent to take in circumstances where she has been found to have misstated relevant facts to both the High Court and Upper Tribunal. The Respondent was well aware prior to the 21 February 2013 that she had she had misstated facts to the Court and Tribunal in the circumstances identified above – particularly in light of the clear terms of Judge Jordan's decision of 18 September 2012. Even if she did not take the view that this played a role in the Applicant's removal, she ought, in my conclusion, to have given consideration to this matter in her decision letter of 21 February.

26. In any event, reliance was placed on the Respondent's mis-statement, and its consequences, in the grounds of claim for this application. These were served on the Respondent prior to the supplementary decision of 23 July 2013, which the Respondent herself seeks to place reliance upon. Despite this, the Respondent did not engage with this issue in her decision of 23 July.

27. For these reasons I quash the Respondent's decisions of 21 February 2013 and 23 July 2013. The Secretary of State failed to take into account two material matters when coming to her conclusions not to grant the Applicant leave on Article 8 grounds and not to treat the Applicant's representations as a fresh claim pursuant to paragraph 353 of the Immigration Rules. I make clear that I do not conclude that this is a case in which there is only one possible outcome i.e. that the Respondent ought to grant the Applicant leave or treat his representations as a fresh claim. What she is required to do is make a decision on the correct legal footing and take into account all relevant matters. She has not done so thus far.

***Relief***

28. I quash the Respondent's decisions of 21 February 2013 and 23 July 2013.

29. Mr Bedford submitted that I should also order the Respondent to take all reasonable endeavours to return the Applicant forthwith. In doing so he drew attention to a

statement drawn in the name of the solicitor having conduct of the Applicant's case, dated 23 September 2014, in which it was said that the Applicant had fled Afghanistan and that he is now residing in Turkey illegally with friends who are supporting him. Mr Bedford also submitted that (i) the Applicant would not be in a position, or as good a position, to pursue an asylum claim in the UK if he remained living outside the United Kingdom (ii) should the Respondent once again refuse the Applicant's representations the Applicant would be in significant difficulty in challenging the decision from abroad, particularly given the changes in the regulations relating to the provision to legal aid (iii) there have been lengthy delays in the Applicant receiving a lawful decision and such delays are not attributable to the Applicant (iv) the foundation of the case involves the failure the Respondent to comply with her duties to both the Court and the Tribunal and (v) there would be no detriment to the Respondent in allowing the Applicant to return.

30. In reply Mr Chapman submitted that the balance of convenience did not lie in the Applicant being brought back to the United Kingdom. He has now been outside of the United Kingdom for over 2 years and the Respondent would make a fresh decision swiftly, and comply with any time limits placed upon her by the Tribunal in this regard.

31. I accept that I have jurisdiction to make the order sought. In coming to my conclusion as to whether to do so, I apply the principles identified by the Court of Appeal in R (YZ – China) [2012] EWCA Civ 1022. Having carefully considered all the submissions made to me, and the circumstances of the case as a whole, I conclude that the balance of convenience does not lie in making an order requiring the Respondent to facilitate the Applicant's return to the United Kingdom. Whilst I have quashed the Respondent's decision, I have concluded that this is not a case where the only possible outcome of a further consideration by the Respondent is in the Applicant's favour. The Applicant has now been living outside of the UK for over 2 years, and he is not living in a country where he claims an immediate fear of being persecuted. The Respondent has indicated she will make another decision swiftly and accepts that I have jurisdiction to confine her to a particular period of time in which she must do so. Given the history of this case, and the Applicant's current circumstances, I make an order requiring the Respondent to make a fresh decision in accordance with the findings herein, and to serve such decision on the Applicant's legal representatives no later than five weeks after this decision was orally delivered.

32. The fact that a further decision will be made by the Respondent imminently, when taken with my conclusion that this

is not a case in which the only possible outcome of the reconsideration is a decision in the Applicant's favour, leads me to conclude that I should not exercise my discretion to make an order requiring the Applicant's return, despite all that is said by Mr Bedford in his submissions urging me to conclude to the contrary.

33. Neither party sought permission to appeal to the Court of Appeal and, having considered this issue of myself as I am required to do by rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I refuse to grant such permission.