IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT
Given orally at Field House on 30th October 2015

R (on the application of J) v Secretary of State for the Home Department IJR [2015] UKUT 00678 (IAC)

Field House
London

30th October 2015

THE QUEEN
(ON THE APPLICATION OF)
J

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PETER LANE

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Mr O Shibli, instructed by Lawrence Lupin Solicitors appeared on behalf of the applicant.

Mr Z Malik, instructed by Government Legal Department appeared on behalf of the respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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JUDGE PETER LANE: This is an application for judicial review of the respondent's decision of 27th June 2013 not to treat the applicant's submissions as a fresh asylum or human rights claim. Permission was refused on the papers by the Upper Tribunal but granted by the President of the Upper Tribunal, Immigration and Asylum Chamber on 5th January 2015.

2. The President dealt in some detail with the nature of the challenge. He noted that the applicant was a national of Sierra Leone, aged 28 years. She had been in the United Kingdom since 2009 when she entered without permission and made an asylum claim. In November 2009 the First-tier Tribunal dismissed her appeal on all grounds. In doing so the First-tier Judge found that the applicant entered fraudulently by using another person's passport and that her claim for asylum was not raised until removal directions had been served on her.

3. The President noted that fresh evidence had been submitted on a number of occasions on behalf of the applicant since mid-2010. This evidence was said to show multiple rape and inhuman treatment allegedly perpetrated upon the applicant when she had been kidnapped in Sierra Leone by rebel soldiers.

4. The President then made reference to subsequent events, culminating in the decision of 27th June 2013 which is under challenge. The President noted that the new material upon which the applicant relied consisted of three professional reports and medical records. I shall come to those in due course.

5. The President considered that the writer of the decision letter had attributed what he described as scant weight to these reports, on the ground that the First-tier Tribunal had found the applicant's claim to be a fabrication. Having set out the legal test for assessing a fresh claim, namely whether there is a reasonable likelihood of a hypothetical judge reaching a conclusion in the applicant's favour, the President

reminded himself that the test he had to apply at the permission stage was in effect relatively modest.

6. The President held that for the purposes of establishing an arguable case he was satisfied that the applicant overcame that modest threshold. In particular, he considered that the impugned decision arguably did not apply the correct tests and attributed what he described as disproportionate weight to the findings of the First-tier Tribunal. Further, there were indications that the decision-maker failed to juxtapose the new representations with the previous ones; approached the decision with a closed mind, fettering her discretion in consequence; and failed to apply the requisite standard of anxious scrutiny. The President then gave certain directions, one of which related to the service of evidence, to which I shall return.

7. At the beginning of this hearing, I heard an application by Mr Shibli on behalf of the applicant for the hearing to be adjourned. I have given my decision on that application. I decided not to grant it and therefore heard submissions from Mr Shibli and Mr Malik. I am grateful to both of them for their characteristically able contributions.

8. Mr Shibli described what he regards as a wealth of medical evidence and sought to juxtapose that evidence, on the one hand, with what he says is the inadequate way in which it was dealt with in the decision letter. We see in the decision which begins at page 168 of the bundle that certain submissions said to have been previously considered were dealt with in the following way:

> "You provided medical evidence to support your claim as part of the further submissions you previously lodged. This evidence was considered in line with the Secretary of State for the Home Department's published policy on Medical Foundation evidence. However, it was considered that following the adverse credibility findings of the Immigration Judge, the evidence did not establish that your injuries had been caused in the way you described. Therefore it is considered that this issue has previously been fully considered. However, the new evidence that you have provided will be considered below in section 2."

9. The Medical Foundation evidence is a report of Dr Cheal. We find it at page 72 of the bundle. Mr Shibli drew my particular attention to passages beginning at page 78. There we find the examiner noting that the applicant had multiple scars on her arms and legs which were "highly consistent" with cigarette burns. A large number of scars were noted. The examiner said that, although these could have other causes, there was nothing in the applicant's history to suggest another cause.

10. Furthermore, whilst each individual scar could have another explanation, the fact that the scars were so many and spread over the appellant's arms and legs was compatible with the story she gave of being held down by one soldier to be raped while another was burning her limbs with cigarettes. At paragraph 19 we find a statement that scars to the applicant's feet were also "highly consistent" with the history she gave. At paragraph 20 the examiner noted that the applicant did not attempt to attribute all her scars to abuse. That is plainly of relevance, in that it may well be a factor going to the credibility of the applicant regarding the causes of the other scars. The examiner also made a view on the age of the applicant, effectively disagreeing with the Immigration Judge, who had considered the applicant to be older than she claimed.

11. Mr Shibli makes the point that, in using the language of high consistency, the examiner in this report was plainly using the terminology of the Istanbul Protocol, which is an established international instrument for assessing the relevance of scars and other injuries to the issue of credibility in claims for international protection.

12. Mr Shibli then turned to the report of Dr McKay and again contrasted what was said about that in the decision with the nature of the report itself. We find that report set out in the bundle beginning at page 102. Dr McKay sets out his qualifications. At page 115 paragraph 94 Dr McKay expressly considered the issue of whether the applicant was malingering and decided for the reasons he gave at paragraphs 95 and 96 that she was not. At paragraph 96 he said that whilst it was easy to feign one or two symptoms, it was less easy to feign an entire syndrome. That would require in his view a sophisticated understanding of psychiatric symptomatology, which he considered to be "unlikely". This reinforced Dr McKay's diagnosis of post-traumatic

stress disorder. Those aspects of Dr McKay's report, Mr Shibli said, did not find expression in the Secretary of State's decision. If one looks at page 169 of the bundle, one does not see reference made to them; although it is the case, as Mr Malik pointed out, that other aspects of the report are dealt with.

13. There is also a report at page 126 of Ms Massamba, who is a social worker. Her evidence is relevant, in that she found the applicant to be suffering from a pelvic inflammatory disease.

14. There were also medical notes before the respondent, emanating from the medical officers at Yarl's Wood, where the applicant was being confined. Again, they post-dated the decision of the Immigration Judge. Amongst other things, they noted cigarette burns on the applicant's body, as well as other scars. That matter also, Mr Shibli submitted, is inadequately dealt with in the letter.

15. Mr Shibli drew my attention to various pieces of case law including R (AM) v Secretary of State for the Home Department [2012] EWCA Civ 521, where it was in effect held that there had been an inadequate consideration of medical evidence that was similar, Mr Shibli says, to the material before the Tribunal in the present proceedings. Reference was also made to the case of Virjon B [2002] EWHC 1469 (Admin) where, Mr Shibli said, similar observations could be found.

16. All of this, Mr Shibli submits, leads to the applicant having, in his words, no confidence in the respondent's offer, made on 16th March 2015, after the grant of permission, to deal with this case by considering all the relevant material again in the light of the further submissions and materials that were submitted in February 2015. The further evidence so submitted comprises a supplementary psychiatric report from Dr McKay, a letter from a Family and Child Development Support Worker; a witness statement of Mr Sandiford of Lawrence Lupin Solicitors, regarding contact with the Sierra Leone High Commission; and a Wikipedia article regarding a neighbourhood of Freetown.

17. By contrast, according to Mr Malik, the respondent's offer is of extreme significance. In Mr Malik's submission, it makes these proceedings academic. The offer is

contained in a letter from what was then the Treasury Solicitor's Department. The letter stated that the Secretary of State has agreed to reconsider the applicant's case in terms of an enclosed consent order. The applicant's solicitors were asked to approve and sign the order, which states the following:

> "Upon the applicant agreeing to submit any further submissions on which she seeks to rely within four weeks of signing this consent order and upon the respondent agreeing to consider those further submissions together with the submissions made on 23rd January 2012 and the further evidence submitted on 16th February 0215 under paragraph 353 of the Immigration Rules within three months of the date this consent order is sealed",

by consent it would be ordered that the applicant had leave to withdraw the claim on the basis that there is no order as to costs.

18. This offer was rejected by the applicant in an email dated 2nd April 2015. In that email it was stated that it would be a better use of court time and public money for the issue of the fresh claim to be resolved in the current proceedings, as allegedly envisaged by the President in his directions following the grant of permission. The relevant direction is paragraph 8(a), in which the President stated that any further evidence upon which the applicant relies was to be served within four weeks of the grant of permission. It appears that the further evidence of February 2015 was submitted in purported pursuance of that direction.

19. I agree with the respondent that if that was the applicant's interpretation of what the President had directed, she and her advisors were wrong to conclude that it enabled further material, not before the respondent at the time of the decision under challenge, to form a part of these proceedings. It is well-known that challenges by way of judicial review are to historic decisions and there would need to be something far more detailed and explicit than the direction to which I have referred in order to give rise to any reasonable supposition that the President's direction was intended to displace the normal state of affairs.

20. The proceedings therefore come down to the following, so far as the respondent is concerned. Mr Malik states that the case is academic and that following the well-known line of authorities to which he makes reference, the Tribunal should accordingly dismiss the substantive application in the light of the offer made by the respondent.

21. The authorities in question are as follows:

R v Secretary of State for the Home Department ex parte Rathakrishnan [2011] EWHC 1406 (Admin);

R (Bhatti) v Bury MBC [2013] EWHC 3093 (Admin) and

R (Asif) v Secretary of State for the Home Department [2015] EWHC 1007 (Admin).

These High Court decisions make it plain that in the circumstances with which we are concerned, a matter which has become academic should be allowed to continue - and relief should only be granted - in a wholly exceptional state of affairs. One such case would be where there is an important point of principle or other similar issue that needs to be determined, irrespective of the academic nature of the proceedings so far as the parties are concerned. There is no such important point in the present case.

22. Mr Shibli therefore sought to counter Mr Malik's submission in the following way. Mr Shibli said that the material that was before the respondent at the time of the decision was of such quality that, when contrasted with the decision of the Immigration Judge, no rational Secretary of State could do anything other than conclude that this material gave rise to a realistic prospect of success. Accordingly, Mr Shibli's submission was that the applicant should now be entitled to an in-country right of appeal, quite irrespective of what might occur in the proceedings in the First-tier Tribunal under rule 32 (which were subject to the adjournment application).

23. Mr Malik cited strong authority for the proposition that, as a matter of law, the decision in a fresh claim is that of the Secretary of State and no court or Tribunal

should disturb that important constitutional principle. He relied in particular upon the Court of Appeal judgment in Onibiyo v Secretary of State for the Home Department [1996] EWCA Civ 13, where we find it stated that:

> "The role of the court in the immigration field varies, depending on the legislative and administrative context. Where an exercise of administrative power is dependent on the establishment of an objective precedent fact the court will, if called upon to do so in case of dispute, itself rule whether such fact is established to the requisite standard. Thus, for example, where power to detain and remove is dependent on a finding that the detainee is an illegal entrant, one who has entered clandestinely or by fraud and deceit, the court will itself rule whether the evidence is such as to justify that finding."

And then this:

> "I am of opinion, although with some misgivings, that the judgment whether a fresh 'claim for asylum' has been made should be assimilated with the latter, and not the former, class of judgment. If the test propounded in (1) above is correct, the answer to the question whether or not a fresh 'claim for asylum' has been made will depend not on the finding of any objective fact, nor even on a literal comparison of the earlier and the later claim, but on an exercise of judgment, and this is a field in which the initial judgments are very clearly entrusted to the Secretary of State. In giving effect, for example, to Rule 346 of HC 395 it must be for the Secretary of State and not for the court to rule whether the applicant can demonstrate a relevant and substantial change in circumstances since his refusal of an earlier application. In a case such as the present the judgment is not very different from that which the Secretary of State may make under section 21 of the 1971 Act."

24. In the well-known case of WM (DRC) [2006] EWCA Civ 1495, we find this at paragraph 9:

> "Commentators for a time regarded that conclusion as still open for debate, but in truth no other answer could have been given to the question posited by Counsel in Onibiyo. As the Secretary of State rightly submitted, his conclusion as to whether there was a fresh claim was not a fact, nor precedent to any other decision, but was the decision itself. The court could not take that decision out of the hands of the decision maker. It can only do that when it is exercising an appellate role. With appeal

excluded, the decision remains that of the Secretary of State, subject only to review and not appeal. And in any event, whatever the logic of it all, the issue to which Bingham MR gave only a tentative answer in Onibiyo arose for decision before this court in Cakabay v Secretary of State for the Home Department [1999] Imm AR 176. There is no escaping from the ratio of that case that, as encapsulated at the end of the judgment of Peter Gibson LJ at page 195, the determination of the Secretary of State is only capable of being impugned on Wednesbury grounds."

25. In the case of MN (Tanzania) [2011] EWCA Civ 193 there is a similar pronouncement to the effect that the court cannot substitute its own decision for that of the Secretary of State.

26. Mr Malik therefore submitted that, even if the original application had been put in terms that contemplated the kind of challenge that Mr Shibli put forward, I should decline to make a mandatory order. Mr Malik said further that, in any event, the decision under challenge of June 2013 is in fact not unlawful. He submitted that the starting point was correctly identified by the respondent as being the determination of the Immigration Judge. That determination was wholly against the applicant in terms of credibility and provided the appropriate starting point for considering the remainder of the evidence. So far as Dr McKay is concerned Mr Malik submitted that there is a sufficiently detailed engagement with the doctor's evidence in the respondent's decision.

27. I am not persuaded that the respondent can shut out Mr Shibli's argument regarding the need for a mandatory order compelling the respondent to grant an in-country right of appeal, by pointing out that there is no reference to such an order in the grounds which accompany the application for judicial review. A mandatory order was clearly sought in that application. I have to say, however, that on the basis of the authorities, I would be acting contrary to established legal principles if I were to decide not only to quash the respondent's decision but also to make a mandatory order, compelling the respondent to grant the applicant an in-country right of appeal. However bad the respondent's decision may be, the authorities in my view

make it plain that it is not for a court or Tribunal to arrogate to itself a function which lies with the Secretary of State.

28. In any event, even if I am wrong about that, with respect to Mr Shibli's able submissions, the applicant has not shown that no rational Secretary of State could do anything on this material except grant (in effect) an in-country right of appeal. There are deficiencies in the letter of 27th June 2013. The Medical Foundation report is given scant consideration at page 168. The fact that scars from cigarette burns were said to be highly consistent with the applicant's account in terms of the Istanbul Protocol has not been addressed by the respondent; nor has the significance of the findings of the respondent's own medical staff at Yarl's Wood regarding the same issue.

29. It is relatively easy to find case law to support the proposition that, on the one hand, great weight must normally be given to psychiatric and other medical reports and, on the other that, on occasions at least, such reports are not deserving of weight. What matters, it seems to me, is the amount of detail in the report in question and what it has to say. In the case of Dr McKay it is, in my view, significant that the doctor considered expressly whether the applicant might be faking the symptoms associated with a diagnosis of post traumatic stress disorder. That consideration finds no response in the respondent's letter.

30. The decision of 27th June 2013 was, therefore, in my view unlawful on ordinary WM (DRC) terms. The evidence did not, however, demonstrate that only one lawful answer is possible. Looking at the issues to which I have just made reference, it is evident that the Secretary of State, properly regarding all those matters, could still come to the conclusion that the Immigration Judge's findings are such as to counteract the medical evidence. It will be for the respondent, when framing any new decision, to take account of the criticisms of the letter which had been identified by Mr Shibli and which, to a limited extent, I have accepted in my conclusion that the letter was unlawful and would have fallen to be quashed; but for the respondent's actions in rendering the proceedings academic.

31. The position therefore is that, as I say, even if I am wrong about my finding that it is not for me in any circumstances to substitute my own decision for that of the Secretary of State, the evidence does not reveal a state of affairs where only one answer is possible.

32. Mr Shibli's attempt to counter what would otherwise be the consequence of the respondent's offer of 16 March 2015 therefore fails and this application is dismissed.

33. I am going to make an order that the applicant's reasonable costs of the proceedings up to 2nd April 2015 shall be paid by the respondent, to be assessed if not agreed; and that the respondent's reasonable costs of the proceedings from 3rd April shall be paid by the applicant.

34. I refuse permission to appeal as I do not consider that anything I have said in my judgment is wrong in law. ~~~~*0*~~~~