Upper Tribunal
(Immigration and Asylum Chamber

R (on the application of Kashif) v Secretary of State for the Home Department (JR jurisdiction: applicant in Scotland) IJR [2016] UKUT 00375 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
on 9 June 2016

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

The Queen on the Application of
MUHAMMAD KASHIF

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr D. Balroop, instructed by Bond Adams LLP, appeared on behalf of the Applicant.

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

The Upper Tribunal's jurisdiction to decide an application for Judicial Review is not affected by the applicant's being in Scotland. The Tribunal will, however, consider issues of forum non conveniens if it is suggested that its jurisdiction should not be exercised.

JUDGMENT

1. This in an application for judicial review. The decision under challenge is a decision by the Secretary of State on 9 July 2015. It is a decision refusing to reconsider an earlier decision refusing the applicant leave on human rights grounds.

2. The decision letter is in standard form but it is convenient to indicate that it begins with the address of the decision-maker, an address in Sheffield; it then goes on to say that the decision in question has previously been the subject of an application for judicial review and for that reason the decision-maker does not propose to take the matter further. We shall say in due course more about the context in which that was said.

3. The applicant himself is, and has been for a long time, in Scotland; he is there unlawfully; he has been there unlawfully for a long time. The present judicial review proceedings were issued in the Tribunal in England and Wales on 27 October 2015, out of time. Permission was refused on the papers and the application for permission was renewed orally before Judge Eshun who heard it and gave her decision on 16 April 2016. The decision is in terms that have caused some confusion to this Tribunal as well as, we understand, to the parties. The refusal of permission on the papers had alluded to the fact that there might be an issue of jurisdiction of this Tribunal in England and Wales in relation to a judicial review claim brought by an applicant in Scotland. That matter was the subject of submissions before Judge Eshun and she concluded that the matter required further discussion and she therefore, it appears, granted permission on that issue. She did not, we are told, hear any submissions at all in relation to the merits of the claim.

4. As we noted during the course of argument, her grant of permission might be taken to confirm her view that she had jurisdiction and that therefore the issue as to territorial jurisdiction was to be settled in the applicant's favour. We are persuaded by the submissions made by Mr Malik before us today that that matter does indeed remain open and would have to remain open in view of its preliminary nature. But there is a further difficulty in that it is said by those acting for the applicant that it is not clear whether or not Judge Eshun granted permission on the merits. They say that she did, having not confined her grant of permission. The Government's submission is that in context, no attention having been given to the merits of the case at all, the grant must be seen as a grant of permission related only to the question of jurisdiction. So far as that issue goes, we are content to accede to Mr Balroop's submissions and treat the grant as a grant of permission on all matters. It therefore follows that there is permission both in relation to whether the proceedings are properly brought in this Tribunal and further whether the applicant's substantive claim succeeds.

5. Judge Eshun added, following her decision, the following order:

> "I make an order that no enforcement action is to be taken against the applicant while the case is in progress."

6. It is convenient to bring the status of that order and its effect up to date because it has some possible bearing on jurisdiction. The applicant, as we have said, is unlawfully in the United Kingdom and has been residing unlawfully in Scotland. He is the subject of what we suppose must be Temporary Admission, under which he is required to report twice weekly in Scotland. He is, at the moment, as we give this judgment, in England and Wales; indeed he is in this Tribunal hearing room. We have been told that he took the view that following the order by Judge Eshun he had no need to continue to report and he is currently in breach of his reporting conditions. For what it is worth, we express our view that reporting conditions are not "enforcement action" and are not in any way affected by Judge Eshun's order. However, what is, or may be, of some relevance is that the applicant is a person who is in the United Kingdom and is not physically restrained from passing to and fro across the border between England and Scotland, as his arrival in London some time in the recent past demonstrates.

7. The question as to jurisdiction is whether a person who is in Scotland ought to be allowed to bring judicial review proceedings in England and Wales in relation to a decision nominally taken by the Secretary of State and in fact taken in England. This is a matter not free from authority; there have been a number of decisions of the higher courts relating to this very issue; some of the decisions relate to immigration matters. There is a series of decisions also in relation to tax matters to which we have not been taken in detail. The decisions to which we have specifically been taken are the decision of the House of Lords in R (Tehrani) v Secretary of State for the Home Department [2006] UKHL 26, Sokha v Secretary of State for the Home Department [1992] SLT 1049 a decision of a Lord Ordinary, and R (Majead) v Immigration Appeal Tribunal [2003] EWCA Civ 615 a decision of the Court of Appeal.

8. In each of these cases there was a question whether the Court on one side or the other of the Scottish/English border was an appropriate forum for the proceedings which had been brought. In Majead and also in Tehrani the question was whether the refusal of permission to appeal to the Immigration Appeal Tribunal was judicially reviewable in Scotland or England as the case may be. In Sokha, however, the decision under challenge was a decision which had never been the subject of an appeal; it was a decision relating to the detention of the Petitioner under immigration powers. The Petitioner was a person who had at all material times been in England and who was detained in England. He brought proceedings in Scotland, apparently thinking that he would have a better chance of success there. His only connection in Scotland was the proceedings. Lord Prosser decided that there was no good reason to allow him to bring the proceedings in Scotland; this was properly an English case. In making that decision he did not suggest that the Court of Session had no jurisdiction; but it was a case which was not appropriately brought in Scotland according to the rules of *forum (non) conveniens.* That was a case where, it is to be observed, the decision under challenge was a Ministerial decision, a decision of a Minister operating both in England and in Scotland. The difficulty for the applicant was that he had brought the proceedings in the part of the United Kingdom to which he had no connection at all, and which other than by their issue, the proceedings had no connection.

9. In Tehrani and Majead the matter was somewhat different. Under the provisions applying to statutory appeals, appeals were, so to speak, channelled to the north or south of the English/Scottish Border under certain provisions set out in statute and rules which also contained provisions as to the "appropriate appeal court" depending on where the determination of the adjudicator was made [requiring that further appeals to the Immigration Appeal Tribunal were to be brought on one side or the other of the border]. In each case the challenge was to a refusal by the Immigration Appeal Tribunal of permission to appeal to itself. That was a refusal which *ex hypothesei* was made in a case which had already been the subject of a statutory channelling to one side or the other of the border.

10. In Majead the decision was taken by the Court of Appeal in England, that the case being essentially a Scottish case, and hence a Scottish appeal, and hence a Scottish decision on the refusal of permission to appeal, albeit made in London by a Vice President of the Immigration Appeal Tribunal, was a decision which was properly subject to judicial review if at all, in the Court of Session, not in the High Court in England and Wales. In Tehrani the same position was taken *mutatis mutandis* but Tehrani gives us the advantage of a full review of the authorities as well as being of the highest authority.

11. It appears to us clear beyond a doubt that the High Court in England and Wales and so the Tribunal under the transfer provisions of ss. 15 and 19 of the Tribunals, Courts and Enforcement Act 2007 has jurisdiction judicially to review a decision of the Secretary of State for the Home Department wherever taken. The jurisdiction of the High Court in England and Wales does not depend on any fact as to the place in the United Kingdom in which a decision taken on behalf of the Secretary of State was made. The question therefore in all these cases must be, as explained in some detail in the speeches particularly of Lord Hope and Lord Rodger in Tehrani, an issue of *forum (non) conveniens*. That, as Lord Hope points out, is not an issue of practical convenience but as in the word we have already used, appropriate. As the Court points out in Tehrani, in particular as Lord Hope says at para 56:

> "In my opinion, provided always that the application to the supervisory jurisdiction is competent and the Court of Session has jurisdiction over the exercise of the power that has been given to it by the decision-maker, the court is bound to entertain the application."

12. If there is jurisdiction to entertain the claim, it follows that unless the Court is persuaded that it is not the appropriate forum, it should proceed to entertain the claim. That has to be our starting point too. The question therefore is whether it is appropriate to entertain the claim.

13. We have heard Mr Malik's submissions at some length on that. He made them avowedly on the basis that he was not particularly seeking a decision that the claim should not be entertained but that he was seeking to air the issue so that the Tribunal could consider it.

14. There are a number of factors which might be taken into account in deciding whether the present forum is or is not one which is *conveniens*. One factor alluded to in Tehrani and in particular by the Lord Ordinary in that case at first instance was that if in that case the Court of Session were to make an interlocutor reducing the decision of an English Tribunal sitting in England it could not be enforced. That may, under certain circumstances, be a factor to be taken into account, but as Lord Rodger points out it is not even clearly the case as regards Scots Law. He cites Eliot v Riddel [1663] M 1305 in which the pursuer had wadset his lands to the defender in respect of a sum of money which he owed the defender. The wadset contained an irritancy clause under which the pursuer would lose his right of reversion to the lands if the sum in question was not paid precisely at the due term. Eventually, the defender obtained a "declarator" from "the English Judges" as it was said, but that does not appear to have dissuaded a Scots Court from issuing an interlocutor reducing the decision of "the English Judges". So, even that point is not absolutely clear; and there is no doubt in present circumstances that the Tribunal sitting in England and Wales has power to reduce a decision of the Minister or to quash it. That is why, in our judgment, there is an important distinction between the line of cases dealing with refusals of application for permission to appeal already channelled to England or Scotland and decisions relating directly to decisions by a Minister.

15. The second issue which has been raised in some of the cases, and was raised in Tehrani, was whether the forum which had been chosen should be regarded as *conveniens* because by the time that it had made its decision on whether to exercise jurisdiction, an applicant would be out of time for a claim on the other side of the border. That was a point taken in Tehrani at a time when in Scotland there was no time limit for judicial review in contrast to England. There is now a time limit for most purposes in Scotland.

16. It appears that it is a matter which did have some effect on their Lordships in Tehrani but it seems to us that it is very unlikely to be frequently a matter which will properly be taken into account. Certainly so far as England and Wales has historically been concerned and so far as concerns Scotland now, there is power to extend time; if the forum chosen is decided not to be *conveniens* that will no doubt be a good reason why, if the claim is then re-brought on the other side of the border, time should be extended. It is a matter which the judge dealing with the new claim, if it is out of time, will have to deal with.

17. The only remaining factor, therefore, is whether there is some other basis upon which it can be said that the forum chosen by the applicant is not *conveniens*. If there is no reason for saying that it is not *conveniens* other than that there is a parallel jurisdiction elsewhere, then, as indicated by Lord Rodger in Tehrani the claimant's choice of forum will be the one in which the matter is decided.

18. Other than general issues of the distribution of business between offices and Courts, north and south of the border, we do not understand Mr Malik to have drawn our attention to any basis upon which it can properly be said that the High Court in England and Wales, and hence the Upper Tribunal in its transferred judicial review jurisdiction is not an appropriate forum for the determination of a

judicial review of a decision of a Minister exercising powers over the entire United Kingdom even if the applicant is in a part of the United Kingdom outside of England and Wales.

19. So far as this case is concerned we see no reason for not following the choice of the applicant, claimant or petitioner however he is to be described in the various possible fora. So far as jurisdiction is concerned, our judgment is therefore first that the Tribunal has jurisdiction and secondly that there is no reason why it should not exercise it.

The merits

20. As will have been apparent, the applicant has a considerable history in the United Kingdom. He came to the United Kingdom first as a student nurse and was granted leave to remain until 31 August 2004. He made applications for further leave. It is not absolutely clear when his leave expired but it is certain that he no longer has leave and it appears that he has not had leave for some time. Indeed it may be that his leave expired as long ago as 31 October 2004, nearly twelve years ago. Despite that, he did not leave the United Kingdom, and as he has subsequently admitted, he spent a considerable amount of the next seven or eight years at least, living fraudulently within the United Kingdom, claiming benefits to which he was not entitled; obtaining student loans to which he was not entitled; and it appears making himself well known to senior members of the Labour Party without telling them of his true status. He has made a number of applications for further leave, apparently on human rights grounds, apparently based on the fact that as was put on his behalf today he has behaved entirely consistently. He has apparently put down roots in the United Kingdom because he has been able to remain here unlawfully and fraudulently and he now relies on those roots to found a claim to remain. Indeed we were told on his behalf that he relies in part on his having made charitable donations apparently out of his fraudulently obtained funds, we are also told that he relies on his university qualifications, apparently obtained when he had no business to be in the Untied Kingdom, had no business to be at a university in the United Kingdom and had no business to have the loans on which he lived while he was studying. We were told also that he has assisted immigration appellants in their appeals. He is not said ever to have been authorised to do so: if he was acting by himself, it looks as though it was an offence under s. 84 of the 1999 Act; if he was not acting by himself, it looks as though he must have been working illegally.

21. Those facts are at the heart of the applicant's case and that was the case which he is said to have put to the Home Office as the basis upon which he should be allowed to remain in the United Kingdom relying on article 8 of the European Convention on Human Rights. The matter was first dealt with formally in the period between April and August 2011. The application was refused; there was a right of appeal because there was also a removal decision; the appeal was dismissed. The judge took into account, at that stage, what were then the applicant's admissions as to his criminal conduct. Subsequently it is said further applications have been made. We have not seen them. We have not been shown them. They are not in the papers. That, for reasons which we shall explain, is a matter of some importance. What is

clear is that the applicant has had no success in whatever communications he has had with the Home Office since then. Most recently the applicant has asserted that he was entitled to re-consideration of the last refusal decision, under the terms of the policy which is designed to provide interim cover for decisions which are caught between the old statutory appeal provisions and the new statutory appeal provisions introduced under the Immigration Act 2014.

22. The latter provisions provide a general right of appeal against the refusal of a human rights claim, as defined in the 2002 Act. That is a right of appeal which did not previously exist and some applicants who, having raised human rights grounds and received a decision not carrying a right of appeal, may therefore find that if only the decision had been made later they would have had a right of appeal. The policy is designed to deal with persons in that situation. The applicant's claim is that he requested such a reconsideration; that his request ought to have given rise to a reconsideration under the policy; and that the Secretary of State's response to it, which we have summarised previously was an inadequate and unlawful response.

23. We therefore look at the policy. It is the policy headed "Request for reconsiderations of human rights or protection based claims refused without right of appeal before 6 April 2015, Version 1". It is a direction to the Secretary of State's officers. It is published and there is therefore no doubt that as a matter of public law the Secretary of State's officers are obliged to comply with the policy as a matter of procedure. The relevant parts of the policy to which we have been referred are as follows:

> "Scope of requests for reconsiderations guidance
> This page tells you which cases may be considered against the criteria for accepting a request for reconsideration.
> This guidance only applies if a person previously made a valid protection or human rights claim which:
> - would attract a right of appeal (subject to certification) if decided under the law as it applies from 6 April 2015
>
> and
> - because the person had no leave to enter or remain in the UK when the claim was refused, did not attract a right of appeal under the law which applied before 6 April 2015
>
> In addition, the guidance only applies if the person:
> - did not receive a removal decision when the application for leave to remain was refused or subsequently
> - failed to leave the UK voluntarily, and
> - has requested that a reconsideration (or removal decision) be made."

24. We do not need to set out the rest of the guidance, save a further passage towards the end of this part, which is as follows:

> "You should normally only agree to reconsideration when requested in the following cases:
> - the refused application for leave to remain included a dependent child under 18 who had been resident in the UK for three years or more at the time of application

- the applicant has a dependent child under the age of 18 who is a British citizen
- the applicant is being supported by the Home Office or has provided evidence of being supported by a local authority in accordance with a duty in legislation
- there are exceptional or compelling reasons to reconsider the decision at this time, or
- it is operationally expedient or appropriate to reconsider the decision."

25. We have indicated that the decision under challenge was made solely on the basis that as it, or a previous similar decision had already been the subject of a judicial review claim, that was a claim brought in Scotland which had no success at all, it was dismissed *ab initio*. The decision-maker proposed to take reconsideration no further. The argument on behalf of the claimant is that that was a wholly inappropriate approach to a reconsideration request under this policy.

26. But if that were right, let us examine how the reconsideration request should have been considered. The initial question is whether the person previously made a valid protection or human rights claim. As we understand it, the claimant's submissions fall into two parallel streams. First, there is the claim which undoubtedly was a valid human rights claim, made in 2011, and which led to the decision of 2011, which was a removal decision, carrying the right of appeal. If that is the claim on which the applicant relies however, it is a claim which did receive a removal decision when the application for leave to remain was refused and under those circumstances does not meet the requirements of the third bullet point.

27. The applicant says, however, that that does not rule him out, because he made a valid human rights claim after the appeal decision. However, despite our best endeavours, we have been unable to discover, and indeed the applicant has not suggested that we should have been able to discover in the papers for this claim, any document which could be described as "a valid protection or human rights claim", as defined in the 2002 Act. We do not say that no such claim was made, but the applicability of this policy requires demonstration that such a claim was made: there has been no such demonstration.

28. It therefore follows that there is no basis upon which anybody could properly decide, on the material available to the Tribunal, that there was a proper opportunity for reconsideration in this case: the preliminary conditions are not shown to be met. In any event, however, supposing they were met, the position then is that the person taking the decision would have to go to consider whether he or she should "agree to reconsideration". At an earlier stage the claimant said that the third of the bullet points that the applicant "is being supported by the Home Office or has provided evidence of being supported by a local authority was relevant". It clearly is not applicable, as was conceded before us today. Instead, Mr Balroop, on behalf of the applicant has suggested that this is a case where there are exceptional and compelling reasons to reconsider the decision. This is certainly an exceptional and compelling case. It is a case which is wholly vitiated from the beginning by fraud. There are exceptional and compelling reasons but they are not reasons to reconsider the decision. It is perfectly clear that any decision-maker would reach the view that the reasons in this case are simply reasons to leave the adverse decision in place.

29. It follows that whatever the terms of the response to the reconsideration request had been in this case, it is wholly inconceivable that they would have been in the applicant's favour. In those circumstances the fact that the writer of the decision letter took what is said to have been a bad point and failed to work through the guidance, is immaterial to the outcome of the reconsideration request and response process. This, therefore, is a case in which it cannot be said that the applicant has been affected by the error of law that he purports to demonstrate in the decision letter. For that reason judicial review of it is refused.

Costs

30. Mr Malik on behalf of the Secretary of State seeks his costs summarily assessed in total at £5,174.00. It is argued by Mr Balroop on behalf of the claimant that the issue of jurisdiction featured largely in the case and was raised not by the applicant but in origin by the Tribunal and that to an extent the applicant has won on that issue. That submission has to be considered in the context of the fact that the issue as to jurisdiction was considered in a case which was from the beginning apparently without any substantive merit at all. That is a case which the applicant chose to bring. Nevertheless the judgment that we have given is one which is likely to be regarded as of some general import and it is perhaps in those circumstances not wholly right for the applicant to pay the whole of the costs incurred in sorting out a matter in the public interest. We will therefore make an order which reduces the Secretary of State's claim by £1200.00 rounded down. The order is that the applicant pays the Secretary of State's costs summarily assessed at £4,000.00

Anonymity

31. Mr Balroop seeks anonymity for the applicant given his adverse history. There is no good reason to depart from the principle that justice should be in public. We decline to make the order sought.

Permission to appeal

32. We have an application for permission to appeal on the basis that the criteria should have been regarded as being met. That has not been characterised as an arguable error of law but simply on the basis that the facts were such that the policy was applicable. There is, in truth, no basis for a claim that there was an arguable error of law in our judgment, but in any event there is no reasonable prospect of any appeal, on that basis or any other, so far as we can see, it succeeding. We refuse permission.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 14 July 2016