

IN THE UPPER TRIBUNAL

JR/3954/2016

Field House,
Breems Buildings
London
EC4A 1WR

29 March 2019

BEFORE

MR JUSTICE DINGEMANS SITTING AS AN UPPER TRIBUNAL JUDGE

Between

ZZ

Claimant

and

The Secretary of State for the Home Department

Defendant

Raza Husain QC and Duran Seddon instructed by Gherson solicitors appeared behalf of the Applicant.

Neil Sheldon QC instructed by the Government Legal Department appeared on behalf of the Respondent.

APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

Mr Justice Dingemans:

Introduction

1. This is the hearing of a claim for judicial review of the refusal of the Secretary of State to consider further representations in support of ZZ's claim for asylum because ZZ has outstanding an appeal to the Upper Tribunal against the Secretary of State's earlier decision to refuse asylum. The Secretary of State's decision was affirmed by the First Tier Tribunal, but ZZ has been granted permission to appeal to the Upper Tribunal.
2. ZZ has the benefit of an anonymity order made earlier in the proceedings. There is in this case a higher risk of jigsaw identification because of information given in earlier proceedings and judgments. In these circumstances and with the agreement of the parties I will avoid referring to the relevant facts as far as I can.

The factual background

3. ZZ's extradition to a category 1 state was sought pursuant to a European Arrest Warrant. His extradition was ordered in Westminster Magistrates' Court and an appeal to the Administrative Court was unsuccessful. Section 36(3) of the Extradition Act 2003 ("the 2003 Act") requires the return of ZZ within 10 days of the order for extradition becoming final.
4. ZZ made a claim for asylum. This had the effect of extending the 10 day period pursuant to section 39(3)(b) of the 2003 Act. The Secretary of State refused the asylum claim. ZZ appealed to the First Tier Tribunal. The First Tier Tribunal dismissed ZZ's appeal. ZZ sought permission to appeal. After the decision of the First Tier Tribunal ZZ obtained a further statement from a witness which ZZ said supported his claim for asylum and he also relied on a further development in the relevant country. (The issue of the effect of the further witness statement and the further development is not before me and I do not comment on it). ZZ obtained permission to appeal to the Upper Tribunal to challenge the decision of the First Tier Tribunal. ZZ was refused permission to rely on the further witness statement on the appeal. This was because the only basis of a challenge to the decision of the First Tier Tribunal is for an error of law, and the further witness statement was not

before the First Tier Tribunal so it could not support an argument that there was an error of law made by the First Tier Tribunal.

5. ZZ therefore sent the further witness statement and other material to the Secretary of State as further representation for a claim for asylum. The Secretary of State refused to give advance consideration to further submissions and evidence in support of a fresh claim for asylum saying “unfortunately we are unable to accept this claim”. In letters this was explained to be because of the outstanding application for permission to appeal to the Upper Tribunal and, after permission to appeal was granted, because of the outstanding appeal.
6. The hearing of the appeal in the Upper Tribunal is scheduled in late March 2019 and this hearing was before me on 20 March 2019.

Issues

7. If ZZ’s claim for asylum is determined by the Upper Tribunal against him he is concerned that the Secretary of State may not have time to consider his further representations and accept, as ZZ contends that he should, those further representations as amounting to an asylum claim. ZZ is also concerned that if the Secretary of State does consider the further representations and then decides that the further representations do not amount to a fresh claim then ZZ may be extradited before he has an opportunity to challenge that decision in public law proceedings. ZZ contends that in these circumstances the Secretary of State has a public law duty to avoid the risk that ZZ might be extradited when he should be protected by the 1951 Convention Relating to the State of Refugees (“the Refugee Convention”) and its implementing legislation and rules. ZZ also contends that the Secretary of State wrongly fettered his decision to entertain ZZ’s claim because of the existing policy to wait until the appeal to the Upper Tribunal has been heard.
8. The Secretary of State contends that there is no public law duty on the Secretary of State to make a decision, in part because ZZ’s case depends on hypothetical future events. The Secretary of State contends that ZZ’s case will be fairly determined, if and when it becomes necessary to do so, at the appropriate time. The Secretary of State contends that there was no wrongful fettering of his discretion, because he acted properly in accordance with his policy.

9. I am very grateful to Mr Raza Hussain QC and Mr Neil Sheldon QC and their respective legal teams for their helpful written and oral submissions.

Relevant statutory provisions and provisions of the Immigration Rules

10. Sections 36 and 39 of the Extradition Act 2003 provide as follows:

36 Extradition following appeal

(1) This section applies if—

- (a) there is an appeal to the High Court under section 26 against an order for a person's extradition to a category 1 territory, and
- (b) the effect of the decision of the relevant court on the appeal is that the person is to be extradited there.

(2) The person must be extradited to the category 1 territory before the end of the required period.

(3) The required period is—

- (a) 10 days starting with the day on which the decision of the relevant court on the appeal becomes final or proceedings on the appeal are discontinued, or
- (b) if the relevant court and the authority which issued the Part 1 warrant agree a later date, 10 days starting with the later date.

(3A) If the day referred to in paragraph (a) of subsection (3) is earlier than the earliest day on which, by reason of an order under section 36B or 36C, the extradition order may be carried out (“the postponed date”), that paragraph has effect as if it referred instead to the postponed date.

(4) ...

(5) The decision of the High Court on the appeal becomes final—

- (a) when the period permitted for applying to the High Court for leave to appeal to the Supreme Court ends, if there is no such application;
- (b) when the period permitted for applying to the Supreme Court for leave to appeal to it ends, if the High Court refuses leave to appeal and there is no application to the Supreme Court for leave to appeal;
- (c) when the Supreme Court refuses leave to appeal to it;
- (d) at the end of the permitted period, which is 28 days starting with the day on which leave to appeal to the Supreme Court is granted, if no such appeal is brought before the end of that period.

(6) These must be ignored for the purposes of subsection (5)—

- (a) any power of a court to extend the period permitted for applying for leave to appeal;
- (b) any power of a court to grant leave to take a step out of time.

(7) The decision of the [Supreme Court]² on the appeal becomes final when it is made.

(8) If subsection (2) is not complied with and the person applies to the appropriate judge to be discharged the judge must order his discharge, unless reasonable cause is shown for the delay.

39 Asylum claim

(3) If—

- (a) an order is made under this Part for a person to be extradited in pursuance of a Part 1 warrant, and
- (b) the person has made an asylum claim (whether before or after the issue of the warrant),

the person must not be extradited in pursuance of the warrant before the asylum claim is finally determined; and sections 35, 36, 47 and 49 have effect subject to this.

(4) ...

(5) If the Secretary of State allows the asylum claim, the claim is finally determined when he makes his decision on the claim.

(6) If the Secretary of State rejects the asylum claim, the claim is finally determined—

(a) when the Secretary of State makes his decision on the claim, if there is no right to appeal against the Secretary of State's decision on the claim;

(b) when the period permitted for appealing against the Secretary of State's decision on the claim ends, if there is such a right but there is no such appeal;

(c) when the appeal against that decision is finally determined or is withdrawn or abandoned, if there is such an appeal.

(7) An appeal against the Secretary of State's decision on an asylum claim is not finally determined for the purposes of subsection (6) at any time when a further appeal or an application for leave to bring a further appeal—

(a) has been instituted and has not been finally determined or withdrawn or abandoned, or

(b) may be brought.

(8) The remittal of an appeal is not a final determination for the purposes of subsection (7).

(9) The possibility of an appeal out of time with leave must be ignored for the purposes of subsections (6) and (7).

11. Section 216(7) of the 2003 Act provides that “asylum claim” in section 39(3)(b) has the meaning given to it by section 113(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). Section 113(1) of the 2002 Act is an interpretation section and defines an asylum claim as a “claim made by a person to the Secretary of State ... that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention”.

12. The Immigration Rules provide:

353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules 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. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas.

353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

Some relevant legal principles on what amounts to a claim and when injunctions will be granted

13. In *Robinson v Secretary of State for the Home Department* [2019] UKSC 11 the Supreme Court considered the meaning of a “human rights claim” in section 82(1)(b) of 2002 Act in the context of a second human rights claim. It was held that where a person had already had a human rights claim or a protection claim which had been rejected and there was no pending appeal, further submissions which relied on human rights or protection grounds had to be accepted by the Secretary of State as a fresh claim pursuant to paragraph 353 of the Immigration rules if they were to attract a right of appeal under section 82 of the 2002 Act. In *Robinson* the submission that the change of wording introduced by amendments made in 2014 to the 2002 Act impliedly abrogated paragraph 353 of the Immigration Rules was also rejected, see *Robinson* at paragraphs 52 and 62. *Robinson* approved the authorities on paragraph 353 of the Immigration Rules decided before the 2014 amendments to the 2002 Act which held that further representations which the Secretary of State did not accept as a fresh claim did not amount to a claim, see *Robinson* at paragraph 57.

14. In *R(Troitino) v National Crime Agency* [2017] EWHC 931 (Admin) the Court considered an asylum claim in the context of extradition to a category 1 state. In *Troitino* there was a dispute about whether the claimant had made an asylum claim because the claimant contended that he had and the Secretary of State contended that no such claim had been made. In that case because of the concern that the claimant would be extradited in the 10 day period set out in section 36 of the 2003 Act, the Court granted an injunction on the application of the claimant with short notice to the Secretary of State and to the National Crime Agency to restrain extradition pending the resolution of the issue by the Court.

15. Mr Hussain relied on the decision in *Robinson* to show that if the Secretary of State rejected the further representations made by ZZ as amounting to a fresh claim for asylum, then the 10 day period set out in section 36(3)(b) would expire before ZZ could challenge what Mr Husain asserted would be wrongful failure to accept the asylum claim. Mr Sheldon relied on the decision in *Troitino* to show that if the Secretary of State either did not deal with ZZ’s claim in time (and he said it would be dealt with in time) and rejected ZZ’s claim and found that it did not amount to a fresh claim, then ZZ could seek an injunction from the courts to restrain his extradition, and that such an injunction would be granted if there was an arguable case that the Secretary of State’s refusal to accept the further representations as

a fresh claim was unlawful. This meant that the risk which so concerned ZZ was not a real risk.

16. *Robinson* is a case about what will amount to a human rights or protection claim for the purposes of a statutory appeal. However in my judgment *Robinson* and the earlier authorities to which it referred and which it approved, are authority for the proposition that further representations about asylum will not amount to an asylum claim for the purposes of the 2002 Act if the Secretary of State has held that the further representations do not amount to a fresh claim. This is because *Robinson* and the earlier authorities have made it clear that asserting that further representations amount to an asylum claim does not mean that the further representations are an asylum claim. This reasoning applies to section 39 of the 2003 Act, by reason of the definition section in section 216(7) of the 2003 Act which refers to the definition of asylum claim in the 2002 Act and because the same need to prevent repetitious unmeritorious claims applies, compare *Robinson* at paragraph 33.
17. However the authorities show that the Secretary of State has on occasions wrongly failed to accept further representations as amounting to a fresh claim. There is no appeal from such a decision of the Secretary of State but the decision of the Secretary of State is subject to judicial review on *Wednesbury* grounds, albeit applying anxious scrutiny, see *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495; [2007] Imm AR 337 and *Robinson* at paragraph 37.
18. In such circumstances it may be that a person awaiting extradition may make further representations which, when properly analysed, amount to asylum claim but this fact might either not be determined by the Secretary of State before the 10 day period in section 36(3) of the 2003 Act expires or the Secretary of State might unlawfully have failed to accept the further representations as a fresh claim. In such circumstances that person may seek an injunction to restrain his extradition, pending the determination of the issue of whether the Secretary of State has unlawfully failed to recognise the further representations as a fresh asylum claim. The Court will assess whether that person has a properly arguable case either that the further representations amount to a fresh claim for asylum if the Secretary of State has not yet made a decision, or that the decision of the Secretary of State not to recognise the further representations as a fresh claim for asylum is unlawful. The Court may then

grant an injunction pending the determination of the issue. The Courts have been granting injunctions where necessary in such cases, and *Troitino* is an example of that practice.

19. Therefore if ZZ's further appeal to the Upper Tribunal is dismissed and the further representations have either not yet been considered by the Secretary of State or ZZ contends that the Secretary of State has unlawfully failed to recognise the further representations as an asylum claim, then ZZ may seek an injunction to restrain his extradition, pending the determination of the issue of whether the Secretary of State has unlawfully failed to recognise the further representations as a fresh asylum claim.

No unlawful decision

20. It is against this background that I turn then to the issues in this case. In my judgment there is no requirement for the Secretary of State to make a decision on the further representations before the determination by the Upper Tribunal of the outstanding appeal. First, for the reasons set out above, there is no need to do so in order to ensure that the further representations can be considered before ZZ is removed. This is because the courts can, if there is an arguable case that ZZ has an asylum claim which has either not yet been considered or recognised by the Secretary of State, restrain ZZ's removal. Secondly it is not yet known what the Upper Tribunal will decide, and a decision on the further representations might not be necessary. It would be very unusual to find a public law duty on the Secretary of State to make a decision when there is an outstanding appeal, if only because it would divert resources into decision making which might be irrelevant. In my judgment the existence of the court's powers to restrain an unlawful removal means that there is no such public law duty in this case.

21. Further there was no unlawful fettering of the Secretary of State's decision making in this case when he did not consider the further representations because the appeal was outstanding. ZZ made an application under paragraph 353 of the Immigration Rules and the Secretary of State applied that policy by not considering the further representations until the appeal was determined. That policy was lawful and the Secretary of State was right to apply it in this case for the reasons given above. I therefore refuse this claim for judicial review.

Costs

22. There were submissions about costs at the conclusion of the hearing in the event that either ZZ or the Secretary of State won. The Secretary of State has won in the sense that the claim for judicial review has been refused. ZZ contended that an explanation of the circumstances in which ZZ might apply to the Court for relief was of practical assistance to him. That may be so, but individuals are not entitled to come to the Courts for an advisory opinion. The explanation in this judgment about the circumstances in which an injunction might be granted has been given to show that the public law duty contended for by ZZ did not arise. In my judgment ZZ should pay the Secretary of State's costs to the subject of a detailed assessment on the standard basis if not agreed. This is because the Secretary of State won the claim and there is no proper reason either to make no order as to costs or to order payment of a percentage only of the costs.