JR-2022-LON-001260

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

The King on the application of Andrew O'Connor

Applicant

v

Secretary of State for the Home Department

Respondent

Before

Upper Tribunal Judge Pitt

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr S Galliver-Andrew, of Counsel, instructed by Duncan Lewis Solicitors on behalf of the Applicant and Mr B Keith, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 4 May 2023

Order

1. The application for judicial review is granted for the reasons set out in the attached judgment.
2. The respondent's decision dated 17 May 2022 is quashed and it follows that the applicant's removal on 18 May 2022 was unlawful.
3. The respondent is to make a decision on the applicant's human rights claim made on 17 May 2022.
4. No order is made requiring the applicant to be brought back to the United Kingdom.

Permission to appeal to the Court of Appeal

5. The applicant applied for permission to appeal to the Court of Appeal against the Upper Tribunal's decision not to order that the applicant be brought back to the UK.

6. The application for permission to appeal to the Court of Appeal is refused, the reasons being set out in a separate document.

Costs

7. The respondent is to pay the applicant's costs on the standard basis, to be subject to detailed assessment if not agreed but subject to costs protection under s26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

8. There shall be a detailed assessment of the applicant's publicly funded costs.

9. The order for costs set out above does not apply to the costs incurred by the parties in providing written submissions on remedies as regards which no order for costs is made.

Signed: *S Pitt*
Upper Tribunal Judge Pitt

Dated: 14 June 2023

Applicant's solicitors: Duncan Lewis
Respondent's solicitors: Government Legal Department
Home Office Ref: O1825669
Decision(s) sent to above parties on: 14/06/2023

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 question 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).

JR-2022-LON-001260

Field House,
Breams Buildings
London
EC4A 1WR

4 May 2023

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The King on the application of Andrew O'Connor
(ANONYMITY DIRECTION NOT MADE)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Pitt

Representation:

For the Applicant: Mr Galliver-Andrew instructed by Duncan Lewis Solicitors
For the Respondent: Mr Keith instructed by the Government Legal Department

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

- - - - - - - - - - - - -

(1) The applicant is a national of Jamaica. He was born on 11 February 1984.

(2) The applicant challenges a decision dated 17 May 2022 (the Decision) which found that further submissions did not amount to a fresh claim as provided in paragraph 353 of the Immigration Rules. He also maintains that as the decision under paragraph 353 was unlawful this also made his removal to Jamaica on 18 February 2022 unlawful.

(3) The applicant came to the UK on 21 December 1998 on a visit visa to join his family. He was 14 years old at that time. He had leave as a visitor until 21 June 1998. He was granted indefinite leave to remain on 1 November 2000.

(4) It is common ground that the applicant has received a diagnosis of paranoid schizophrenia. The materials indicated that this contributed to an extensive history of low-level offending comprising 14 convictions for 43 offences between 3 February 2009 and 18 August 2016. The most serious offences of 14 counts of shoplifting, 2 counts of possessing Class A drugs, 2 counts of common assault and failing to provide a specimen for analysis led to prison sentence of 9 months being imposed on 19 October 2015.

(5) This forensic history led the respondent to seek to deport the applicant. On 30 August 2017 the respondent attempted to serve a Stage 2 deportation decision which is at [272] of the hearing bundle (HB). The covering letter to the decision stated “Although you did not make a human rights claim, we are aware that you have suffer (sic) from Paranoid Schizophrenia and therefore your Human Rights have been considered in light of this” [HB 271]. The decision also stated that “consideration has been given to your Human Rights” [HB 274] and acknowledged that the applicant had not responded to the notices indicating that deportation was being considered. The decision did not find that deportation would breach the applicant’s rights under Articles 3 or 8 of the ECHR.

(6) The decision was sent to the applicant at a nursing home but the staff there informed the respondent that he did not appear to be resident and that the letter remained unopened in his room; [HB 159]. The respondent considered that there had been no effective service of the decision dated 30 August 2017 and re-served it on 17 April 2018 [HB 157, HB 267]. On 15 May 2018 a deportation order was signed.

(7) On 5 May 2022 the applicant was detained pending removal. On 17 May 2022, with the assistance of his current legal advisers, he made submissions opposing his deportation on the basis that further time was needed to establish any human rights claim as the legal advisers had only been instructed on 14 May 2023.

(8) The respondent addressed those submissions in the Decision dated 17 May 2022 [HB 4-11]. In paragraphs 14 to 33 the respondent set out why she did not consider that the deportation order should be revoked. In paragraphs 34 to 41 the respondent set out why she did not find that the

submissions amounted to a fresh claim such that the applicant was entitled to an in-country right of appeal.

(9) The applicant issued an out of hours judicial review in the Administrative Court on 17 May 2022 but this was refused as the possibility of a human rights claim being established if time were allowed was not sufficient to justify a stay, in part because the applicant had had 3 years to formulate a human rights claim since the service of the deportation order.

(10) The applicant was removed to Jamaica on 18 May 2022.

(11) This application was lodged on 17 August 2022. Permission to apply for judicial review was granted by Upper Tribunal Judge L Smith on 13 January 2023.

(12) The applicant brought three grounds:

Ground 1 – the respondent acted unlawfully when purporting to make a fresh claim decision on 17 May 2022 as the applicant had not previously made a human rights claim and acted contrary to her own policy by failing to suspend removal in light of a first human rights claim

Ground 2 – the respondent's fresh claim assessment was, in any event, irrational

Ground 3 – procedural irregularity where there had not been effective service of material documents.

Ground 1

(13) The respondent is entitled to find that submissions do not make out a fresh claim as provided in paragraph 353 of the Immigration Rules:

> 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.

(14) If the respondent finds that the submissions do not show that leave should be granted and also finds that they do not amount to a fresh claim the individual cannot access an appeal right under s.82 of the NIA 2022.

(15) The applicant maintains that when he made submissions on 17 May 2022, there had not been a previous human rights claim that had been refused or withdrawn or treated as withdrawn and that there had never been a valid appeal relating to such a decision. The respondent was wrong to find that his submissions came within the fresh claim provisions. therefore. His submissions were the first human rights claim he had made and the refusal should have afforded him a right of appeal.

(16) The respondent maintains that the decision of 30 August 2017 was a refusal of a human rights claim and that it afforded the applicant an in-country right of appeal which he had not exercised.

(17) Section 113 of the Nationality, Immigration and Asylum Act 2002 (NIA 2002) defines a human rights claim:

> "human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998"

(18) Nothing before me showed that the applicant made a human rights claim as defined in s.113 of the NIA 2022 prior to 17 May 2022. As above, the respondent's decision dated 30 August 2017 and the covering letter to it do not say that the applicant had made a human right claim, only that the respondent had "considered" human rights in the absence of any response from the applicant. The Decision did not set out any particular event or action of the applicant that required this "consideration" of human rights. It was not suggested by the respondent that any other conduct from the applicant at any other time could have amounted to a human rights claim as defined in s.113 of the NIA 2022 prior to the submissions of 17 May 2022.

(19) Further, the Home Office's Immigration Directorate Instructions "Deporting Non- EEA Foreign Nationals" issued in April 2015 were in force at the time that the decision and removal were made in May 2022. Paragraph 5.1 of the Instructions addresses the situation that was before the respondent when she made her decision dated 30 August 2017:

> "5.1 Consideration of representations and right of appeal
>
> If no representations are made after the 20 working day deadline for representations has passed, the case owner must make a decision on issuing a deportation order on the facts that are before them. <u>As a human rights claim will not have been made by the individual</u>, the deportation order will not be appealable and the

individual can be removed" (my emphasis).

(20) That policy is consistent with the provisions of s.113 of the NIA 2022. If there is no response from the individual facing deportation then no human rights claim has been made. No appeal right arises because there has been no human rights claim. The statement in paragraph 5.1 that if there is no response "a human rights claim will not have been made" could not be clearer on this issue. It is not compatible with the respondent's defence that the decision of 30 August 2017 somehow amounted to a decision on a human rights claim.

(21) The respondent sought to defend the claim on the basis that s.6 of the Human Rights Act 1998 required the applicant's human rights be considered in the decision of 30 August 2017. It did not appear to me, however, that the obligation imposed by s.6 to avoid acting in a way which is incompatible with a Convention right could override the clear provisions of s.113 of the NIA 2022 as to the definition of what constitutes a human rights claim. I was not taken to anything that suggested that the respondent had the power to deem or infer that a human rights claim had been made as of 30 August 2017 or at any time thereafter until 17 May 2022 on the basis of the Human Rights Act 1998 or any other provision.

(22) The purported offer of an appeal right in the 30 August 2017 decision also could not act to somehow turn that decision into one refusing a human rights claim as defined in s.113 or for the purpose of the fresh claim regime. The inclusion of an appeal right in the 30 August 2017 decision appears to have been a mistake, Mr Keith confirming that it is not the respondent's policy or practice to offer an appeal right in the circumstances described in paragraph 5.1 of the Instructions; see paragraph 19 above.

(23) Given my view that the applicant did not make a human rights claim at any time prior to 17 May 2022, it is my conclusion that the respondent acted unlawfully in treating the submissions made on that date as a fresh claim. The respondent had a first-time human rights claim before her on 17 May 2022 and was not entitled to treat those submissions as a fresh claim. Her policy was to suspend removal in light of an outstanding first-time human rights claim but the applicant was removed on 18 May 2022 because it was not recognised that he had made such a claim. It follows that the removal was unlawful.

(24) There is therefore an outstanding human rights application before the respondent. The parties agreed that a timetable for submission of further materials in support of that application and for a decision to be made could be settled outwith these proceedings. The respondent has since confirmed in her written submissions dated 15 May 2023 that she undertakes to make a decision on the applicant's human rights claim within 3 weeks of receiving any further submissions he wishes to make.

(25) The parties were in agreement that where the applicant was successful on

Ground 1, it was unnecessary to consider the other grounds.

Decision on Remedies

(26) I informed the parties of the decision set out above and the reasons for it at the hearing on 4 May 2023. The applicant maintained that the Upper Tribunal should also make an order requiring the respondent to return him to the UK, as claimed in the original application [HB 50]. The parties were not in a position to provide submissions on this remedy at the hearing on 4 May 2022. I made a direction that written submissions on whether the respondent should be required to bring the applicant back to the UK should be provided within 7 days.

(27) The applicant provided submissions in time. The respondent did not, indicating on Thursday 11 May 2023 that she would provide submissions that day and had been limited in obtaining them due to the ill-health of Counsel who had appeared on 4 May 2023 and new Counsel being instructed. The respondent did not provide submissions until Tuesday 16 May 2023. Correspondence from the respondent indicated that the delay was also due, in part, to a fire drill at the office of GLD on 15 May 2023.

(28) I considered whether to admit the respondent's submissions given that they were late. The delay was not excessive, amounting to 3 working days at most. I accepted that the respondent would have had some difficulty where Counsel who had appeared on 4 May 2023 was unable to act, becoming unwell over the intervening weekend. It did not appear to me given the overall timeframe, the applicant having been outside the UK for a year and the application being brought as long ago as August 2022, that a delay of 3 working days amounted to a material prejudice to the applicant. The implications of a decision on this remedy are serious for both parties and engage the public interest. I concluded that the delay was not significant, that adequate reasons for it had been provided and that, in all the circumstances, it was in the interests of justice to extend time. I therefore extended time to admit the respondent's submissions on remedies.

(29) There was little difference, if any, in the relevant principles derived from the case law relied on by the parties in their written submissions. The applicant referred me to R (YZ (China)) v Secretary of State for the Home Department [2012] EWCA Civ 1022. The respondent referred me to R (Mendes) v Secretary of State for the Home Department [2021] EWHC 115 and the section in that decision which summarised R (Nixon) v Secretary of State for the Home Department [2018] EWCA Civ 3. These cases set out principles that can be relevant when considering ordering return:

- The importance of returning the applicant to the position he would have been in had the respondent not removed him on the basis of an unlawful decision is the starting point for the consideration of whether the respondent should be directed to bring him back now; YZ (China) at [49]

- There is a wide discretion when considering whether to make a return order but no presumption in favour of return even where the respondent's decision leading to removal has been shown to have been unlawful; YZ (China) at [49] and [75 (iii)] of Nixon

- Each case must be decided on its own facts; YZ (China) at [52] and Nixon at [75 (iii)]

- The decision authorising removal not being "bad" on its face or appearing lawful at the time, notwithstanding later assessment showing otherwise, is a highly material factor weighing against return; YZ (China) at [51] and Nixon at [75 (iv)]

- The extent to which the applicant's ability to litigate his human rights claim will be adversely affected if he is not returned is also highly relevant; YZ (China) at [51] and Nixon at [75 (v)]

- There is a public interest in public money not being expended on return when the applicant can litigate adequately and fairly from abroad; Nixon at [75 (vii)].

(30) I take as my starting point that as the decision of 17 May 2022 and subsequent removal were unlawful, the applicant should be returned in order to be in the position of being in-country while the respondent considers his human rights claim. That does not amount to a presumption that return should take place, however, and I have to make an assessment of whether it is the correct remedy in the context of the particular facts of this case.

(31) There were a number of factors which indicated to me that the respondent should not be required to return the applicant notwithstanding the importance of his being returned to the position he was in prior to the unlawful removal. Firstly, nothing in the materials here argued that the applicant could not litigate his human rights claim adequately from Jamaica. He refers in his witness statement dated 2 May 2023 to having provided instructions by telephone. No concerns about that method of communicating with his legal advisers were raised. There was nothing arguing that the applicant being abroad had impacted negatively on his involvement in these proceedings.

(32) Secondly, in his witness statement the applicant stated that he was living in a homeless persons' hostel in Jamaica. The hostel had funds to pay for antipsychotic medication. Most of the time the hostel was able to help him obtain his medication but sometimes it was not available. The applicant did not indicate that when he was not able to be fully compliant that he had experienced a serious relapse, even though there had been a period of 3 weeks without medication. He also stated that when he did relapse at the time of his arrival in Jamaica, he was admitted to hospital, given medication and his mental disorder remitted. The applicant's evidence does not show strong grounds for requiring his return to the UK because of

a significant lack of access to medication and treatment or significant risk of relapse in his mental state, therefore.

(33) Thirdly, the public interest weighs against the cost of return where the applicant can litigate adequately and fairly from abroad.

(34) Fourthly, as the respondent's decision of 17 May 2022 has been quashed, the applicant has an outstanding human rights claim and the respondent must now make a new decision. The parties agreed on 4 May 2023 to settle a timetable for the submission of further submissions in order for the respondent to make the new decision. The respondent has undertaken to make that decision within 3 weeks of receiving the applicant's further submissions; [28] of respondent's submissions on remedies. The period that the applicant has to wait for the new decision is limited, therefore.

(35) Fifthly, at this stage, it is speculative as to whether the respondent will make a decision either allowing the claim, refusing the claim or whether, if refused, she will certify the claim, affording the applicant only an out-of-country right of appeal. The respondent will have to return him if she finds that his human rights claim is made out. The respondent also indicated in paragraph 8 of her submission on remedies that if the claim is refused but not certified, "it would be appropriate to consider whether the Applicant should return to exercise any appeal rights". If the respondent certifies any refusal, affording only an out of country appeal, the applicant can apply for permission to bring judicial review against that certificate. Where the outcome of the human rights claim is unknown, will be decided within a limited period of time and it remains possible that the respondent will decide to bring the applicant back, that weighs to some extent against exercising a discretion requiring him to be returned now.

(36) Sixthly, the materials do not show that the respondent acted in bad faith when making the decision of 17 May 2022 and removing the applicant. The decision was unlawful because of a mistake as to there having been an initial human rights claim in 2017. The applicant's submissions were made on 17 May 2022, the day before removal and did not raise the issue of whether there was a fresh claim jurisdiction open to the respondent. The thrust of the submissions was for the applicant to be given time to substantiate a human rights claim, as noted by Mr Justice Griffiths in his decision refusing a stay; [HB 353]. It is highly material that the respondent's conduct was apparently lawful, the Administrative Court having refused a stay.

(37) For these reasons it is my conclusion that it is not appropriate to require the respondent to return the applicant to the UK pending a decision on his outstanding human rights claim notwithstanding the finding that the decision of 17 May 2022 and ensuing removal were unlawful.

(38) The applicant did not seek damages when bringing this claim; [HB 36 and HB 50]. Damages were not referred to in the applicant's skeleton argument for the hearing on 4 May 2023. Nothing was said about damages

at the hearing on 4 May 2023. The applicant's submissions on remedies states at paragraph 73 that "There is a previously un-pleaded action for damages which existed before but is crystallised following the Tribunal's public law decision." I did not find that this statement could amount to a formal application to vary the claim to include a claim for damages so do not address it further.

Conclusion

(39) The respondent acted unlawfully in treating the submissions made on 17 May 2022 as further submissions following a previously made human rights claim and considering them as a fresh claim. The decision of 17 May 2022 is therefore quashed.

(40) It follows that the removal of the applicant to Jamaica on 18 May 2022 was unlawful.

Decision on the application for judicial review

(41) The application is granted.

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