UTIJR6

JR/3512/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

MDA
(a protected party by his litigation friend the OFFICIAL SOLICITOR)
Applicant

v

Secretary of State for the Home Department
Respondent

Before Upper Tribunal Judge Kamara

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms A Weston QC, of Counsel, instructed by Birnberg Peirce Solicitors, on behalf of the Applicant and Ms J Anderson, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 14 January 2020.

Decision: the application for judicial review is refused

Introduction

1. These judicial review proceedings, issued on 28 June 2019, challenge the respondent's decision dated 1 April 2019 refusing to grant indefinite leave (ILR) to remain to the applicant. The applicant was granted Discretionary Leave to Remain (DLR) in a decision dated 28 January 2019 following his successful appeal before the First-tier Tribunal, which was allowed on human rights grounds.

2. An application has been made anonymise these proceedings because the applicant lacks litigation capacity, he is detained in a psychiatric hospital and there is an order of the High Court to that

effect. In these circumstances, it is appropriate for anonymity to be continued and therefore the following order is made:

> *"Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original applicant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. "*

Procedural history

3. The applicant, a Somali national, arrived in the United Kingdom clandestinely on 15 September 2008, aged 14, as an unaccompanied minor asylum-seeking child. He became a looked after child. He was detained under section 2 of the Mental Health Act 1983 (MHA) in November 2008. There followed further periods of detention and the applicant was in hospital when his asylum claim was refused on 18 March 2011. The applicant was granted 3 years' DLR on Article 3 grounds owing to his mental ill health as well as the prospect of a breach of his Article 3 rights if removed to Somalia.

4. Following the grant of DLR, the applicant continued to be either detained under the MHA or supported in the community. Periods in the community would be characterised by non-compliance with medication which led to a deterioration in his mental state and consequently, risky behaviour. He received diagnoses of complex PTSD, psychotic symptoms, learning disability and personality disorder.

5. An application for further DLR was made on the applicant's behalf in March 2014. That application was treated as withdrawn because social services informed the Home Office that the applicant wished to return to "Somalia, Somaliland or Puntland."

6. In December 2014, the applicant carried out an indecent assault on a member of staff while detained on a psychiatric unit. He was convicted of outraging public decency and sexual assault and sentenced to 18 months' imprisonment. On 21 May 2015, the respondent wrote to the applicant to inform him of his liability to deportation and inviting submissions. On 18 September 2015, an order was made to deport the applicant which carried no right of appeal.

7. On 15 December 2016, the applicant lodged an unlawful detention judicial review claim. That claim was allowed following a substantive hearing, namely *MDA v SSHD* [2017] EWHC 2132 (Admin), in which it was held that the applicant's detention between 4 November 2015

and 3 February 2017 was unlawful because of the lack of procedural safeguards to enable him to engage in the immigration decision-making process and that there had been a breach of the Public Sector Equality Duty (PSED). The applicant appealed that decision, arguing that immigration detention had breached his Article 3 rights and that the Administrative Court ought to have decided whether damages should be nominal or substantial. In a judgment handed down on 17 July 2019, the applicant's appeal was dismissed by the Court of Appeal, *MDA and ASK v SSHD* [2019] EWCA Civ 1239, albeit a declaration was made that sections 20 and 29 of the Equality Act 2010 (EA) had been breached.

8. On 18 September 2017, an application to revoke the deportation order was made on the applicant's behalf. Following a judicial review, the respondent granted the applicant a right of appeal by way of a decision dated 10 August 2018. That appeal was allowed under Articles 3 and 8 ECHR in a decision promulgated on 2 January 2019. On 28 January 2019, the respondent wrote to the applicant's solicitors to inform them that the applicant was to be granted limited leave to remain in light of his allowed appeal. On 8 March 2019, Birnberg Peirce sent representations on the applicant's behalf seeking the respondent's discretion to grant ILR or 5 years' humanitarian protection.

9. The basis of the above-mentioned request was primarily owing to the applicant's need for long-term care planning in circumstances when it was unlikely that he would have capacity to manage his immigration affairs. In addition, mention was made of the applicant having been unfairly denied the opportunity to apply for ILR because he was not granted humanitarian leave at an earlier stage. Enclosed were supporting letters from Dr Camden-Smith, a psychiatrist and from Mr Brownless, a lawyer who represented the applicant at his mental health tribunal.

10. The respondent declined to vary the applicant's leave as requested and it is this letter dated 1 April 2019, which is the subject of this challenge.

11. The relevant parts of the Secretary of State's decision dated 1 April 2019 were as follows;

> *"I have consulted a senior caseworker regarding your request and can confirm that we can only consider a grant of discretionary leave in line with the discretionary leave policy.*
>
> *Your client was previously granted a period of 3 years Discresionary (sic) leave on 18 March 2011 and the Home Office would only grant a further 3 years Discresionary (sic) Leave in line with this policy.*
>
> *We would not be able to grant ILR or 5 years HP due to his mental health."*

12. The applicant sent a letter before claim on 14 June 2019 which challenged the decision not to grant him ILR. There does not appear to have been a response to that correspondence.

13. The judicial review grounds were as follows:

(i) The respondent failed to take relevant matters into account;

(ii) The respondent unlawfully fettered her discretion and/or failed to exercise it;

(iii) the respondent failed to discharge her duty under the sections 20 and 29 EA to make reasonable adjustments to her decision-making process and/or breached section 149 of the PSED;

(iv) The respondent's decision breaches section 6 of the Human Rights Act 1998, Article 8 ECHR along with the UN Convention on the Rights of People with Disabilities (UNCRPD) and reached a conclusion which was not rationally open to her

14. The above-mentioned grounds were undeveloped in the application, however there was a detailed account of the facts of the case.

15. Permission was granted by Upper Tribunal Judge Owens in a decision sent on 29 August 2019, on all grounds.

16. The respondent provided detailed grounds of defence, dated 23 October 2019, in which it was requested that all aspects of the claim be dismissed, and that the applicant meet the respondent's costs of defending this challenge.

17. The applicant's skeleton argument was received on 20 December 2019. The grounds set out in the judicial review application continued to be relied upon but were accompanied by focused argument which can be summarised as follows.

Ground one

18. It was argued that the respondent was obliged to take into consideration a range of factors and her failure to do so was an established error of public law; that the decision challenged was premised on the view that there can be no departure from the position that 3 years' leave to remain was mandated and it was contended that the applicant had been caused a detriment and denied access to services, long term treatment and care planning. The absence of long- term certainty was said to lead to doubt and a lack of clarity regarding the applicant's entitlement to services.

Ground two

19. The argument here was that the respondent unlawfully fettered her discretion and that she failed to exercise discretion in light of all material factors. Reference was made to the

respondent's Discretionary Leave policy in respect of where a longer period of leave is considered appropriate as well as the arrangements concerning those originally granted DLR under the respondent's policy in force before 9 July 2012.

Ground three

20. The respondent failed to give effect to her duties to disabled migrants under the EA; paragraph 16 of Schedule 3 to the EA did not apply in this case because the decision in this case was not a variation decision and the Secretary of State had not demonstrated that it was necessary for the public good to grant limited leave to the applicant. There was no published policy of practice which set out arrangements to ensure migrants lacking capacity to manage their affairs were not disadvantaged and the respondent had not considered the impact of the DL policy in relation to mentally disordered disabled persons. The reasonable adjustment sought was a grant of ILR.

Ground four

21. The grant of limited leave amounted to an interference with aspects of the applicant's private life, which was not in accordance with the law nor justified. The respondent's DL policy transitional arrangements contemplate that ILR may be granted where DLR was first granted prior to July 2012 for a total of 6 years.

22. The applicant sought the following outcome;

i. An order quashing the part of the decision refusing ILR;

ii. A mandatory order requiring the respondent to reconsider the application for ILR within a limited timescale, in accordance with the FTT decision;

iii. A declaration that the respondent breached sections 20, 29 and/or 149 of the EA;

iv. Such further or other relief as the court considers fit;

v. Costs;

vi. Detailed assessment.

23. The respondent's detailed skeleton argument, dated 2 January 2020, can be briefly summarised as follows. It was confirmed that there were no disputes of primary fact but that there were substantial differences between the parties as to what inference could or should be drawn from those facts. Regarding the first ground, the respondent argued that the matters identified were not legally relevant and did not require or justify a departure from the published policy. The respondent further argued that the second ground should fail as the Secretary of State was under no legal obligation to justify adhering to the published policy. As for the third

ground, the respondent contended that a refusal to grant leave to remain is excluded from the equality duties by paragraph 16(3)(b) of Schedule 3 to the EA.

24. The fourth ground was unfounded in law because the applicant had failed to show that the application of the published policy was not in accordance with the law nor that the decision to grant him limited leave was disproportionate.

The Relevant Law

'***Equality Act 2010***

6 *Disability*

(1) A person (P) has a disability if:

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

20 *Duty to make adjustments*

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

29 *Provision of services, etc*

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

136 *Burden of Proof*

(2) If there are facts from which the court must decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

149 *Public Sector Equality Duty*

(1) A public authority must, in the exercise of its functions, have due regard to the need to -

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;

(3) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(4) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(5) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(6) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) tackle prejudice, and

(b) promote understanding.

(7) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(8) The relevant protected characteristics includes disability-

Part 4 of Schedule 3 to the Equality Act 2010

16 *Disability*

(1) This paragraph applies in relation to disability discrimination.

(2) Section 29 does not apply to—

(a) a decision within sub-paragraph (3);

(b) anything done for the purposes of or in pursuance of a decision within that subparagraph.

(3) A decision is within this sub-paragraph if it is a decision (whether or not taken in accordance with immigration rules) to do any of the following on the ground that doing so is necessary for the public good—

(a) to refuse entry clearance;

(b) to refuse leave to enter or remain in the United Kingdom;

(c) to cancel leave to enter or remain in the United Kingdom;

(d) to vary leave to enter or remain in the United Kingdom;

(e) to refuse an application to vary leave to enter or remain in the United Kingdom.

(4) Section 29 does not apply to—

(a) a decision taken, or guidance given, by the Secretary of State in connection with a decision within sub-paragraph (3);

(b) a decision taken in accordance with guidance given by the Secretary of State in connection with a decision within that sub-paragraph.

19 Interpretation

A reference to entry clearance, leave to enter or remain or immigration rules is to be construed in accordance with the Immigration Act 1971.'

The hearing

25. There was little in the way of preliminary issues. Ms Weston handed up the judgment in *R v SSHD (ex parte Danaei)* [1998] INLR. She also requested that the anonymity order was kept in place. I confirmed that the judgment would be anonymised. I also mentioned that I would be taking into consideration the availability of aftercare in accordance with section 117 of the Mental Health Act 1983 in relation to the services available to the applicant upon discharge from hospital. Ms Anderson clarified that the incorrect Acknowledgement of Service was in the hearing bundle. I indicated that I had the correct copy to hand. The parties also agreed to forward electronic copies of their respective skeleton arguments after the hearing.

Applicant's submissions

26. Ms Weston explained the background to her instruction in this matter. Briefly, a Detention Action caseworker visited the applicant in detention in 2016 and brought attention to his condition. A judicial review was brought by the Official Solicitor (OS) on the applicant's behalf seeking his release, which was contested by the Secretary of State. Following a court order, the applicant was released into the care of an NHS mental health trust and admitted under Section 2 of the Mental Health Act 1983. The applicant was currently detained under Section 3 of the Act in a low-secure facility. The afore-mentioned judicial review regarding the lawfulness of the applicant's detention was still ongoing, in part. A second challenge regarding the unreasonable delay in the respondent deciding the application to revoke the deportation order was conceded. That left the current challenge, where the OS was concerned that the Secretary of State had not grasped the significance of the applicant's condition and ought reasonably to have granted the applicant ILR. Ms Weston also made the following arguments.

27. It was the applicant's case that there is no policy in place at the Home Office to ensure what happened to him would not happen in the future. The Home Office were not solely to blame but the lack of arrangements to protect the applicant put him at risk.

28. Reliance was placed on the content of the decision of the First-tier Tribunal (FtT) allowing the applicant's appeal against deportation as well as a quantity of documents in the full hearing bundle which established the chronology of this matter. Ms Weston particularly relied upon the evidence from a mental health nurse at YOI Glen Parva which provided clear evidence that the applicant had a mental disorder and contrasted this with the consultant at the same YOI who said the opposite, in the context of whether the applicant was fit to fly. Ms Weston described the applicant as functionally illiterate and highlighted that no capacity assessment was undertaken at any stage in relation to his indication that he wished to return to Somalia.

29. Ms Weston summarised the challenge as follows. In the application to revoke the deportation order it was put to the respondent that because no arrangements had been made to ensure that the applicant, who lacked capacity, could respond, he had been unfairly deprived of his right of appeal. The applicant needed to raise a human rights' claim in order to obtain a right of appeal, but he was unable to do so. When the applicant was sent a minded to deport letter when detained at Glen Parva, he could not read it. Following his indication that he wished to return to Somalia, two social workers had attended but made no assessment of his capacity to make that decision. The decision to deport the applicant was made notwithstanding evidence that he had lacked capacity and was delusional and that he had previously been granted DLR on Article 3, mental health grounds.

30. The FtT decision and reasons made a series of findings, which Ms Weston described as findings of fact which bound the respondent, in terms of deciding what period of leave to grant to the applicant. Those findings included reliance on the evidence of Dr Camden-Smith who stated that even when the applicant's health is managed and he is compliant, his illness is of a kind which varies and it was not currently foreseeable that he would be able to handle his affairs after discharge from hospital.

31. Ms Weston argued that it was significant that the applicant was not medicated at the time the index offence was committed. The view of Professor Hale was that the risk of offending was greater without a supportive therapeutic environment. The FtT judge concluded that the very compelling circumstances test had been met and also allowed the appeal under Article 8. It was at this point that Ms Weston referred to the case of *Danaei* which she had handed up earlier, making the point that if the respondent wished to

challenge the findings of the FtT, she ought to have appealed that decision. Furthermore, there was no credibility challenge brought during the applicant's appeal and Ms Weston submitted that the FtT made findings of fact by which the Secretary of State is bound.

32. At this point Ms Anderson interjected in order to dispute the characterisation of the matters highlighted in the FtT decision as findings of fact.

33. Reliance was placed on the written representations made on the applicant's behalf regarding the period of leave to be granted. Additional information was submitted which touched on why ILR should be granted, in the form of a letter from the representative appointed to represent the applicant before the Mental Health Tribunal as well as a report from Dr Camden-Smith. Ms Weston compared the decision letter which emphasised that the Secretary of State would not be able to grant ILR and would only be able to grant DLR with the terms of the current policy, which included transitional provisions for those granted DLR previously.

34. Ms Weston summarised the approach in case law to complaints regarding discretionary grants of leave outside the Rules. In *R (S & Others) V SSHD* [2009] EWCA Civ 142 the opportunity of leave was missed, the courts took a rationality approach, with fairness relevant only to the extent the Secretary of State ought to have taken into account her own illegality, it was not relevant to the human rights findings or to remedy. In this case a broad sense of historic illegality was relied upon. In the applicant's case there were declarations of unlawful discrimination. Ms Weston argued that this case demonstrated how separation of power is preserved and how a court can exercise its discretion in this case.

35. Summarising ground one, Ms Weston argued that there was no grappling by the respondent with any of the historic unfairness issues and that the previous findings of unlawfulness were necessarily relevant factors, which the respondent's policy said must be considered.

36. As for the second ground regarding unlawful fettering, Ms Weston submitted that the policy plainly set out the requirement to exercise discretion. She relied on *Asiweh v SSHD* [2018] EWCA Civ 13, arguing that regardless of the policy, an express request for the exercise of discretion should have been acted upon, in light of the material submitted. There was no indication on the face of the decision letter that discretion was exercised; it was expressed as the decision-maker being bound to grant limited leave.

37. The third ground concerned the law relating to reasonable adjustments. Ms Weston argued that an express request was made for the Secretary of State to depart from normal practice because a grant of ILR had been identified as a reasonable adjustment by the

OS on the applicant's behalf.

38. Addressing the respondent's view that this case fell with an exception to unlawful discrimination, Ms Weston handed up further documents, which consisted of section 136 of the Equality Act and the Home Office policy equality statement in relation to discretionary leave. She submitted that there was an applicable exception to the normal principle that a party raising an issue has the burden of proving it. In this case the respondent must convince the court that the refusal of ILR is necessary for the public good. The respondent's decision to grant DLR did not appear to come within exceptions (a)-(e), however this was a moot point. The argument on behalf of the applicant was that the Secretary of State cannot say that the decision was necessary. Ms Weston argued that with ILR, the applicant would receive the help he needs in order to reduce the risk of offending and that the Secretary of State had put no evidence to the contrary.

39. In response to my query regarding the evidence that the applicant would be deprived of aftercare, Ms Weston referred to the email from the applicant's mental health lawyer and letter from Dr Camden-Smith which referred to insecurity over temporary immigration status having a great impact because those planning care are required to look in the short rather than long-term. She emphasised the limited scope of support under section 117 of the 1983 Act, which did not extend to social care falling under the local authority such as for accommodation or visits from a community mental health team. The applicant was at a disadvantage where leave was finite. In addition, it was not just a question of access to aftercare because the applicant was at serious risk of becoming an overstayer. Ms Weston emphasised that it was not the function of the OS to steer what happens to a person absent litigation.

40. Ms Weston submitted, with reference to section 136 of the Equality Act, that the burden of establishing the unreasonableness of reasonable adjustments was on the Secretary of State. With reference to Chapter 14 of the Equality Act 2010: Code of Practice on Services, Public Functions and Associations, she argued that there was still no policy developed to assist those in the applicant's position. Should the applicant's leave expire he was still at risk of becoming an overstayer in a hostile environment as there were no procedures in place. In *R (ASK) and R (MDA) v SSHD* [2019] EWCA Civ 1239, the Secretary of State conceded that there had been a failure to make reasonable adjustments. It was clear that the applicant was at a disadvantage in the immigration decision making process and there was a finding to that effect. In relation to the PSED, Ms Weston relied on what was set out between pages 14-17 of her skeleton argument. She added that the Secretary of State did not previously detained those with mental health disorders and if she was going to do so, it was likely that some will lack capacity and

will suffer as a consequence, like the applicant.

41. Lastly, in relation to the fourth ground, Ms Weston argued that this is a case in which the Tribunal was entitled to find a breach of the applicant's rights under Article 8, for reasons set out in her skeleton argument. As for the UNPRCD, Ms Weston acknowledged the respondent's view that this instrument was not relevant, arguing that the UK is a signatory and must have regard to it. With reference to *Burnip v SSWP* [2012] EWCA Civ 629, the courts may have regard to human rights instruments which make specific provisions for the group in question. Ms Weston concluded by stating that the applicant had shown no signs of making a recovery any time soon, he continued to lack capacity and that there was a prospect that matters may go awry because there is no statutory body to ensure his immigration status was properly governed.

Respondent's submissions

42. Ms Anderson indicated that she would take her skeleton argument as read and respond to the Ms Weston's arguments in order. Her opening submission was that it was only in extreme cases where a court would intervene to impose a different discretion and that the applicant had a steep hill to climb to justify a departure from published policy.

43. Arguing that it was not the case that the applicant had been failed by all those he came into contact with, Ms Anderson emphasised that the applicant's offending occurred in a psychiatric institution, psychiatric evidence was before the Crown Court and there was a process for setting aside convictions if there was a miscarriage of justice.

44. Ms Anderson contended that it was not a proper approach for the respondent to take into account the findings of the FtT and that Ms Weston was putting too much weight upon them. The key part of the FtT decision was the findings at [180], which she described as a speculative exercise of opinion regarding a hypothetical matter. One assumption was that medication would have been effective in stopping the offence from arising. Speculation did not assist the Secretary of State and it did not amount to a binding finding of primary fact, referring to *Danaei*. The opinion of the FtT did not change what was material for ILR to be granted. The Secretary of State could not ignore the convictions owing to the automatic deportation regime with a statutory presumption that deportation was conducive to the public good.

45. Ms Anderson made the following submissions regarding what she described as the high point of the applicant's evidence. What was relied on to say ILR ought to be granted, could not bear the weight put on it. The email was from an advocate on behalf of the applicant whose perspective is to look at best interests of the client.

What was striking was the lack of reasoning why a grant of ILR would be in the applicant's best interest. There was a lack of reference to hard evidence. Regarding Section 117 MHA, one cannot do down the value of care if it is to stabilise mental health. It was accepted on behalf of the applicant that he can receive aftercare for as long as it is required. There was no reference to arguments about funding in this evidence. What was said is that it is "almost impossible to definitively plan recovery". There was no evidence that denial of treatment flows from the refusal of ILR. There was no explanation why it's "quite plain" that the applicant's needs would be much better served by a grant of ILR. The email indicated that it was written with the intention of assisting the presentation of the case to the Home Office. There was no other evidence making the case for saying a grant of ILR would make any significant difference. The FtT decision said only that there was an Article 3 barrier to removal and there was no failure by the Secretary of State to deal with the FtT decision.

46. Arguing that it was not irrational for the Secretary of State not to apply the DL policy, Ms Anderson said the following. The policy applied to a self-evidently exceptional case, which the instant case was not. There was no challenge to the policy as being unlawful. The FtT made no directions to the Secretary of State, there was no medical evidence and no basis for persuading the Secretary of State to depart from the policy. That was why Ms Weston was focusing on corrective justice, which the respondent did not consider to be a relevant factor or principle. The Secretary of State could not do anything regarding the suggestion that the applicant was wrongly convicted.

47. Regarding the applicant's lack of competence when immigration decisions were made, the respondent received a statement from the applicant, countersigned by a social worker which was issued by a psychiatric institution and signed by a witness acting in an official capacity. The Secretary of State was entitled to expect the institution treating the applicant to write and say that he lacked capacity if that was the case. This was not an illegality by the Secretary of State. At this point, Ms Weston confirmed that she did not seek to go beyond the findings of the Administrative Court and Court of Appeal on illegality.

48. In relation to the deportation process, the Secretary of State was aware of the issues and that the applicant was in a psychiatric hospital, however she had a duty to the public and parliament, in that it was deemed by parliament to be conducive to the public good to deport foreign criminals and she had no discretion. There was no illegality to which to apply corrective justice.

49. Regarding, the claimed illegality in relation to the PSED in relation to the applicant lacking capacity, the Mental Health Act

1983 presumes capacity and in this instance an institution forwarded documents without indicating a lack of capacity. There was no reason why the Secretary of State would assume the applicant had no capacity. It did not follow that the respondent would have made a different decision but for the lack of policies in place.

50. Ms Anderson then focused on the issue of corrective justice, making the following points. This was not a live and relevant issue to form the basis of an intervention by the Upper Tribunal because the jurisprudence was clear that this was simply wrong. Referring to *TN (Afghanistan)* v SSHD [2015] UKSC 40, such arguments were rejected. In R(S) the court found that it was improper to compensate maladministration and it was not a proper use of statutory power and the Supreme Court agreed with this and confirmed that *Rashid* should not be followed.

51. Ms Anderson submitted that it was not necessary for a caseworker to go over the past and ask if there's been a breach of duty as it was legally irrelevant. To oblige the Secretary of State to do so would encourage complexity. This was why there are policies with the potential for an extreme case to be excepted. As for Ms Weston's argument that ILR ought to have been granted and reasons given why it was not, Ms Anderson submitted that the policy was clear, DLR should be granted and exceptionally there was scope for ILR to be granted. The reverse approach was wrong, applying *Mohammed* [2014] EWHC 14 (Admin). The law was stronger since then, in that the Secretary of State must apply published policies unless there is good reason not to. Deportation was in the public interest, it was not just about reoffending but in terms of public confidence in the government and courts, applying *Hesham Ali.* The case of *George*, concerned ILR lapsing following deportation, which was a legal symmetry point. The instant case was not one where the Secretary of State should say why ILR should not be granted. The burden was on the applicant to show that his circumstances warranted an exception, if he does not show it, there is no error of law.

52. In response to the argument that the respondent had engaged in unlawful conduct regarding the EA and common law fairness, Ms Anderson argued that the risk that the applicant became an overstayer involved speculation that there would be future failings and as such a pre-emptive remedy was being sought.

53. Commenting on the decision letter, Ms Anderson emphasised that the first paragraph made reference to the representations sent on the applicant's behalf and that there had been consultation with a senior caseworker. It was right that the letter said that only a grant of DLR in line with the policy could be considered because the policy allowed for grants of ILR. In relation to the statement that the

Home Office would only grant a further 3 years' DLR, there was no challenge to the length of leave, except that it was not indefinite. As for the part of the decision letter which stated that the respondent would not be able to grant ILR or 5 years' Humanitarian Protection due to mental health, this was correct and Ms Weston's submissions did not extend that far, there being no policy to that effect. The decision dealt correctly with the submission that it was in the applicant's best interests to receive ILR on mental health grounds.

54. Ms Anderson submitted that the Secretary of State was not able to grant ILR owing to the consequences of a lack of mental capacity, other than under the policy, which was not a remedy for the effects of mental illness plus alleged failings by the Secretary of State. Ms Anderson stressed that there was no challenge to the reasons here but if there was it would fail. The Secretary of State was entitled to adhere to the policy. What was put forward on the applicant's behalf were not matters which would properly justify a grant of ILR. This did not mean that ILR would not be granted in the future. Nor was there an irrationality challenge.

55. Lastly, in relation to the Article 8 and PSED points, Ms Anderson referred to the Upper Tribunal decision in *R (MBT) v SSHD* (JR/7722/2018, where similar attempts to rely on PSED was rejected. She plumped for exception (d), accepting that the decision could be seen as a variation. Nonetheless, she argued that it would not be a reasonable adjustment to grant ILR to someone and that there were other ways of ensuring the applicant could make future applications. Finally, it was not accepted that there was nothing in place regarding future decisions in this case. There was not a proper basis for the Upper Tribunal to intervene.

Applicant's reply

56. Ms Weston asked me to look at the case of *TN* in context. *Rashid* concerned asylum and loss of statutory rights where the *Ravichandran* test was not satisfied. This was a very different case. She reminded me that she had made the point earlier that discretion applies to the Secretary of State but that the avenue regarding illegality was not closed down, in that the respondent must exercise her discretion lawfully. Ms Weston reiterated that the Secretary of State failed to take into account relevant matters which was a species of irrationality and failed to apply the policy. A reasoned decision was not made, the letter just said the respondent does not grant ILR on mental health grounds. Therefore, the minimum requirement of legality was not met. There remained a failure to have in place a process to ensure equal access to the statutory appeals process. The "but for" test does not apply, if it did there was the advantage of knowing what would happen if there was a process because the OS required the Secretary of State to consider her Article 3 duties.

57. Referring to *VC* [2018] EWCA Civ 57 Ms Weston argued that there was still no policy in place, following *MDA* in a case where the applicant could not make representations regarding his immigration status. In that case there was a finding of breach of duty. This is an important aspect of previous illegality. The respondent had not provided any evidence of a policy to ensure that the applicant was protected from becoming an overstayer and does not consider it any part of her duty to ensure his human rights are well protected. Section 117 of the 1983 Act was not a complete answer. For instance, this would not apply to section 17 leave say to supported accommodation. There might be concerns regarding entitlement to public funds. The burden is on the Secretary of State to show that this reasonable adjustment is not needed, a broad assertion is not sufficient. In relation to the exceptions, the decision was not a variation as the applicant had no leave at the date of the decision or at the time ILR was sought following the allowed appeal.

58. Ms Anderson interjected to say that her instructions were that if the applicant had ever been granted leave, the decision was a variation. In response, Ms Weston concluded her submissions by contending that it was only if the applicant already had leave, that it could be varied.

Discussion

Ground one – that the Secretary of State failed to take relevant matters into account

59. The applicant relies on a list of factors which it is argued were not considered by the respondent in refusing his application for ILR. Those matters include the respondent's conduct, detriment caused to the applicant in having no policy in place for those lacking capacity, the findings of previous judges and medical and other evidence. There is no basis for a finding that the respondent did not consider the matters which were set out in the representations made on the applicant's behalf. It has to be said that those representations did not include reference to all the factors set out in the skeleton argument. That those representations were considered is evidenced by the respondent's reference to them in the first line of the decision letter, which stated as follows, "*Thank you for your letter dated 8th March 2019, which we received on 29th March 2019, and your emailed copy on 28th March 2019.*"The letter goes on to note the request for ILR, regarding which the author of the letter consulted a senior caseworker. There is no reason to suspect that the respondent did not consider the representations made on the applicant's behalf. Nor is there any reason to believe that the respondent acted in ignorance of the history of this matter, including the judgments of the higher courts. There has also been no direct challenge to the adequacy of the reasons provided and if there was *Mohammed* [2014] EWHC confirmed that there was no

requirement to give reasons for applying a published policy. Consequently, there is little support for this ground on the face of the evidence.

60. Notwithstanding the findings in the preceding paragraph, I have considered the individual factors and their relevance to the respondent's decision to grant DLR rather than ILR.

61. It is argued that the respondent's unlawful conduct ought to have been taken into consideration with respect to the duration of leave granted. Even if it was not, in *TN (Afghanistan)* [2015] UKSC 40, Lord Toulson rejected the argument that past conduct of the respondent was relevant to leave being granted as a form of corrective justice.

62. At [72] of *TN* the following was said:

> *"Discretionary leave by definition involves a discretion, but it is a discretion which belongs to the respondent and not to the court. The respondent must of course exercise her discretion lawfully, with proper regard to any policy which she has established, but I agree with Sir Stanley Burnton that it is not proper for a court to require the respondent to grant unconditional leave to an appellant who would not be entitled to such relief under current policy (or have a current right to remain in the UK on other grounds, such as article 8), as a form of relief for an earlier error or breach of obligation."*

63. I have carefully considered Ms Weston's submission that the judgment in *TN* related to the *Ravichandran* issue in asylum cases however, I do not accept that the conclusions of the Supreme Court were limited in that way, as the above quote demonstrates.

64. The historical failures in this case cannot compel the respondent to grant ILR. The Supreme court in *George* [2014] UKSC 28 [2014] held that it was a matter for the Secretary of State to regulate the status of foreign criminals and that there was:

> "*no legal symmetry in indefinite leave to remain co-existing with the status of someone whose presence is not conducive to the public good. It makes perfectly good sense, whilst the legal obstacle remains, for the Secretary of State to be in a position to re-visit the terms of leave to enter."*

65. Ms Weston argued that there was evidence that the applicant's recovery and care was being hampered by lack of certainty and that there was a medical evidence as to the applicant' need for long-term security. For reasons which are set out below, the evidence fell well short of establishing that the applicant's treatment including aftercare on discharge from hospital would be

adversely affected by a grant of DLR as opposed to ILR.

66. The reference in the grounds to the risk that the applicant would become an overstayer stretches the corrective justice point to cover anticipated failures by the respondent or other parties and there is no authority for such an approach.

Ground two - that the respondent unlawfully fettered her discretion

67. Ms Weston maintained that the respondent erred by failing to consider the matters set out in ground one and failing to exercise discretion in any event. She argued during the hearing, that the decision was inadequate in public law terms because it was premised on the position that there could be no departure from a grant of DLR. That is not the case. The decision referred directly to the policy, stating that the Home Office "*would only grant a further 3 years*" leave. There is no support for the contention that the caseworker was under the impression that the Home Office could not depart from a grant of DLR. The respondent's DLR policy allows for a grant of ILR in exceptional cases and is couched in the following terms; "*the duration of leave must be determined by considering the individual facts of the case but leave should not normally be granted for more than 30 months.…"* Under part 5.3 of the policy the respondent acknowledges that "*There may be cases where a longer period of leave is considered appropriate…because there are other particularly exceptional compelling or compassionate reasons to grant leave for a longer period (or ILR)*."

68. The evidence provided on the applicant's behalf was insufficient, in the view of the Secretary of State, for her to take the exceptional step of granting ILR rather than DLR. That was a decision the respondent was entitled to take and she was not required to justify adherence to the published policy, under which leave is not normally granted in excess of 30 months.

Ground three – failure to give effect to Equality Act duties

69. It is argued that the respondent failed, as a service provider, to give effect to her duties to disabled migrants by making the reasonable adjustment requested. That adjustment being a grant of ILR. I have been guided by the judgment in *ASK & MDA* [2019] EWCA Civ 1239, which concerned this applicant and which sets out a detailed history and discussion on the PSED in the context of the Secretary of State's failure to enquire into the applicant's mental capacity. The applicant succeeded on this basis and was granted a declaration that the Secretary of State had discriminated against him by failing to make reasonable adjustments to the decision-making process.

70. In this instance a decision had been made to grant the applicant limited leave to remain on 28 January 2019. Following the

applicant's representations seeking a greater period of leave, he received the decision letter of 1 April 2019, refusing that request. It is clear that what was sought was a variation to the grant of limited leave. The refusal to vary a grant of leave to remain is excluded from the equality duties relied on under the Equality Act 2010 by paragraph 16(3)(e) of Part 4 of Schedule 3 to the Act. Alternatively, I accept Ms Anderson's submission that the applicant's case comes within paragraph 16(3) (b), being a decision to refuse leave to remain in the United Kingdom. In these circumstances, I find that section 29 of the EA is not engaged and there is therefore no requirement for the respondent to explain why the adjustment sought was not reasonable. It follows that sections 20 and 149 of the EA have no application.

Ground four – that the applicant's Article 8 rights have been breached

71. The applicant relies on his right to develop a private life and to his right to respect for his physical and moral integrity. It is argued that his recovery and treatment towards rehabilitation and independent living in the community is impeded by the grant of time-limited leave.

72. In view of the applicant's lengthy residence and complex mental health needs, he has evidently established a private life in the United Kingdom. It is clear that a decision refusing settlement could, in principle, amount to an interference with the enjoyment of that private life. Furthermore, with reference to the conclusions reached on ground two, the respondent's published policy was applied appropriately and as such her decision was in accordance with the law. Unsurprisingly, in terms of necessity, the respondent points to the prevention of disorder or crime given that the applicant's presence is deemed not to be conducive to the public good.

73. That leaves the issue of whether the decision to refuse to grant ILR was a disproportionate breach of the applicant's right to develop his private life.

74. The evidence of the impact upon the applicant of a time-limited grant of leave is set out in correspondence from Dr Camden-Smith and Mr Brownless. I was not referred to any other evidence which supported this contention.

75. The correspondence from Mr Brownless confirms that the applicant's mental health case is complex and that the relapsing and remitting nature of the diagnoses made recovery planning "*almost impossible*." He had the following to say in respect of the effect of temporary leave on the applicant;

> *"You will see therefore that in terms of fitting this within the permitted leave period for immigration purposes it would not be possible to place a finite period on this patient's recovery*

> *and rehabilitation. It would appear quite plain that the patient's interests and needs will be much better served through him being permitted to remain indefinitely. This would allow thorough Care co-ordination and after-care services to adequately plan for MDA's time in and future beyond hospital."*

76. Mr Brownless appears to be a very experienced legal representative and it was his honest belief that the applicant's best interests would be served by a grant of settlement and he may be right however, he refers to no evidence which supports his view. Nor has he provided any detailed reasons why adequate care planning could not be achieved with temporary leave. Ms Weston argued that there may be difficulty in funding accommodation so that the applicant could access section 17 leave to a placement pending discharge. This submission was not fully developed. Furthermore, the applicant's psychiatric history indicates that he was previously discharged into the community both when he had limited leave to remain and none.

77. Dr Camden-Smith provided independent psychiatric reports on the applicant dated 21 December 2017 and 8 December 2018, which were submitted as evidence in his deportation appeal. The letter from Dr Camden-Smith, dated 4 March 2019 which was sent in support of the request for settlement, explains that the applicant is diagnosed with complex PTSD associated with a psychotic illness and that people with this disorder are "*unable to engage in any form of therapy until they feel safe and settled*." Regarding the applicant's position, the psychiatrist stated the following:

> *"The ongoing uncertainties about his immigration status, and the risk of deportation have negatively impacted on (the applicant's) ability to engage in therapy. It would be highly detrimental to (the applicant) to commence therapy for c-PTSD without an assurance that his stay in the UK is likely to be of sufficient length to enable him to complete his treatment. Given the difficulties with the engagement, language, and the complexity of (his) condition, a period of thirty months would not be sufficient for his treatment to be completed. Uncertainty about renewal after this period is likely to cause ongoing distress and uncertainty and will delay (his) recovery and rehabilitation. Partial treatment of his mental disorder would in all likelihood result in further trauma and deterioration in his mental state."*

78. It is unclear how Dr Camden-Smith was able to form the opinion she did regarding the effect upon the applicant of limited leave. There is no indication in her letter of 4 March 2019 that she had seen the applicant since the time she assessed him for her addendum report in December 2018. Furthermore, there is no support for her current opinion in that report, or indeed in her report

dating from 2017.

79. In her 2018 report, Dr Camden-Smith had the following to say regarding the applicant's ability to engage in psychological therapy:

> *"(the applicant) has been unable to engage in any specific psychological therapy, due to his poor language skills. (He) has poor language skills in English (although these are improving) and a previous interpreter has indicated that his vocabulary and power of self-expression in Somali is poor. Engagement in psychological therapy has also been limited by (his) lack of insight, and ongoing insistence that he does not have a mental illness, or any needs that would be amenable to psychological therapies."*

80. Elsewhere in the 2018 report, Dr Camden-Smith confirms that the applicant has been unable to access treatment for c-PTSD, partially because of his lack of willingness to engage in this work.

81. I have also considered the most recent report from the applicant's responsible clinician, namely Dr Mudholkar, which was prepared for the Mental Health Tribunal and is dated 29 September 2017. Dr Mudholkar merely records that the applicant "*does not wish to discuss his past traumatic experiences*." There is no indication in this report that the applicant is reluctant to engage with therapy owing to concerns regarding his immigration status.

82. The supporting evidence before the Secretary of State was insufficient to show that there were particularly exceptional compelling or compassionate reasons to grant leave for a longer period as required by the relevant policy. It has therefore, simply not been established that the respondent's decision amounts to a disproportionate interference with the applicant's right to a private life because there is no evidence to support the contention that he would be deprived of access to services or suffer any other detriment.

Order

I order, therefore, that the judicial review application be dismissed.

Costs

As the applicant is a legally aided party, I make no order as to costs.

T Kamara

Signed: _____

Upper Tribunal Judge Kamara

Dated: **20 March 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

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 applicant'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).

UTIJR6

JR/3512/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

MDA
(a protected party by his litigation friend the OFFICIAL SOLICITOR)
Applicant

v

Secretary of State for the Home Department
Respondent

Before Upper Tribunal Judge Kamara

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms A Weston QC, of Counsel, instructed by Birnberg Peirce Solicitors, on behalf of the Applicant and Ms J Anderson, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 14 January 2020.

Order

For the reasons given in the judgment attached, this application for judicial review is refused.

Permission to appeal to the Court of Appeal

I refuse permission to appeal to the Court of Appeal.

Costs

I make no order as to costs.

T Kamara

Signed: _____

Upper Tribunal Judge Kamara

Dated: **20 March 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

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).