R (on the application of Asare) v Secretary of State for the Home Department IJR [2016] UKUT 00029 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of
Kwame Anyemedu Asare

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Kebede

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms N Bustani of Counsel, on behalf of the Applicant, instructed by Paul John & Co Solicitors and Mr J Jolliffe of Counsel, on behalf of the Respondent, instructed by the Government Legal Department, at a hearing at Field House, London on 3 December 2015

Decision: the application for judicial review is refused

JUDGMENT

(1) This is an application for judicial review of the decision of the Secretary of State for the Home Department ("SSHD") dated 2 June 2015, to refuse to treat submissions made on behalf of the applicant on 5 February 2015 as a fresh human rights claim. Permission to apply for judicial review was granted by Upper Tribunal Judge Freeman on 3 September 2015.

Immigration History

(2) The applicant has a lengthy immigration history which is set out in detail in the summary grounds of defence. Essentially, it is as follows.

(3) The applicant, a national of Ghana, was born on 18 February 1979. He entered the United Kingdom on 14 September 2004 on a student visa valid until 31 October 2006 and was subsequently granted successive periods of leave to remain until 11 November 2010. Thereafter he remained in the United Kingdom as an overstayer. On 21 January 2011 he was encountered during a joint police/UKBA operation and was served with an IS.151A as an overstayer.

(4) On 7 April 2011 the applicant was admitted to Homerton Hospital Mental Health Unit. He was discharged at the end of September 2011.

(5) In the meantime, on 22 July 2011, the applicant submitted an application for leave to remain outside the immigration rules. His application was refused on 4 January 2012 with a right of appeal. His appeal was heard before the First-tier Tribunal on 2 March 2012 and was dismissed on 30 March 2012, following which permission to appeal to the Upper Tribunal was refused and he became appeal rights exhausted on 2 May 2012.

(6) On 28 September 2012 the applicant made a further application for leave on human rights grounds. That application was refused on 7 August 2013 without a right of appeal. The applicant then sought permission to apply for judicial review but his application was refused on 3 April 2014.

(7) On 5 February 2015 the applicant made another application for leave outside the immigration rules. An extension of time was given to the applicant's solicitors to produce medical evidence in support of the application, but a further application for an extension was refused, although the applicant submitted further evidence, in any event, in the form of a letter from a Dr Fisher, after the deadline. The application was treated as further submissions and was refused on 2 June 2015, although the decision was stated as 9 May 2015, on the basis that it did not amount to a fresh human rights claim.

(8) On 14 July 2015 the applicant was again detained under the Mental Health Act at Homerton Hospital. He was discharged on 8 September 2015.

(9) The applicant lodged his judicial review claim on 7 August 2015.

Determination of the applicant's appeal

(10) It is relevant to consider the determination of the First-tier Tribunal Judge promulgated on 30 March 2012. The applicant appeared before the Tribunal and gave oral evidence, as did his father and mother. The judge set out at some length the applicant's history of mental health problems, recording the applicant's evidence that he fell ill in or around March 2010 when he started experiencing visions and hearing voices in his head. It is recorded that the applicant was arrested on an allegation of actual bodily harm on 4 April 2011

and was assessed and detained under section 2 of the Mental Health Act 1983 and admitted to the City & Hackney Centre for Mental Health at Homerton Hospital. He was diagnosed with paranoid schizophrenia by Dr Fisher, a Consultant Psychiatrist. He was discharged at the end of September 2011. The judge recorded the applicant's evidence that he came to the United Kingdom in 2004 and went to live with his parents who were already here. He studied and worked until his health deteriorated and was currently living in his own accommodation, receiving treatment from a Consultant Psychiatrist at Homerton Hospital.

(11) The judge, having considered the various medical reports before him and having also heard from the applicant's mother and father, concluded that he did not meet the threshold to establish a case under Article 3 of the ECHR. As regards Article 8, the judge accepted that there was an established family life between the applicant and his parents based on his level of dependence upon them and that he had also established a private life in the United Kingdom. When assessing proportionality, the judge noted the applicant's severe diagnosis, paranoid schizophrenia, but also his improved and stable condition since his discharge from hospital. He took account of the fact that there was immediate family in the United Kingdom but no identifiable relatives remaining in Ghana. He concluded that removal would not be in breach of the applicant's Article 8 rights.

Application/ submissions of 5 February 2015

(12) The submissions made on 5 February 2015, at page 13 of the applicant's first bundle, are relatively brief and assert, in essence, that the applicant has established a private life in the UK and cannot be returned to Ghana because of his condition for which he receives medication and because the quality of his life would be drastically reduced in Ghana.

(13) In a letter dated 27 April 2015 the applicant's solicitors requested further time to obtain a medical report from the Consultant Psychiatrist, Dr Fisher, who was unable to prepare a report within the respondent's deadline.

(14) In a short covering letter dated 20 May 2015 the applicant's solicitors informed the respondent that they were producing a report from Dr Fisher, which was enclosed. That report was dated 13 May 2015 and is to be found at page 24 of the applicant's second bundle.

Respondent's decision of 2 June 2015

(15) The respondent, in her decision of 2 June 2015, referred to the letter from Dr Fisher included with the applicant's submissions of 20 May 2015 and concluded that the submissions were not significantly different from the material previously considered. The respondent referred to her previous decision of 4 January 2012, the decision of the First-tier Tribunal of 30 March 2012, her decision of 7 August 2013 and the decision of 3 April 2014 in the applicant's judicial review application in which all relevant matters were considered. The respondent concluded that the applicant's submissions were not significantly different and did not amount to a fresh claim. It was also

concluded that there were no exceptional circumstances in the applicant's case which were sufficiently compelling to justify allowing him to remain in the United Kingdom.

(16) In the grounds seeking permission to apply for judicial review reference was made to the applicant having been detained under section 3 of the Mental Health Act 1983 on 14 July 2015. The grounds asserted that his condition had deteriorated and that the respondent had unlawfully failed to consider his submissions as a fresh claim giving rise to an in-country right of appeal.

(17) The respondent's response, in the summary grounds of defence, was that all relevant matters had already been considered and that the further submissions did not amount to a fresh claim.

(18) Permission to apply for judicial review was granted by Upper Tribunal Judge Freeman on 3 September 2015, on the following basis:

> "This applicant is presently detained under the Mental Health Act and arguably should not be removed while that remains so."

(19) Subsequent to the grant of permission, further submissions were made on behalf of the applicant in the form of a discharge summary from City & Hackney Centre for Mental Health at Homerton Hospital, which was then considered by the respondent, in a decision dated 9 November 2015, as being not significantly different to the information previously considered and therefore not amounting to a fresh claim. Once the permission application was listed for an oral hearing the applicant requested an adjournment in order to obtain a further report from Dr Fisher, but the request was refused.

The Parties' Submissions

(20) At the hearing before me, Ms Bustani agreed that the basis for the grant of permission had gone, with the applicant no longer being detained. She nevertheless wished to pursue the grounds of the application. She confirmed that Article 3 was not being pursued as a ground of appeal. It was also accepted that, whilst the applicant's case appeared to have evolved since the commencement of proceedings, with further evidence being produced and requests for further time to produce additional evidence, the relevant decision under challenge in fact remained that of 2 June 2015 and the further submissions and decision were therefore not of direct relevance to this hearing.

(21) Ms Bustani confirmed that the applicant was pursuing his grounds in relation to Article 8 and submitted that the respondent had never undertaken a holistic consideration of the applicant's family and private life. The decision of 7 August 2013 had only dealt with medical grounds under Article 3 and the applicant's private life, whilst the decision of 4 January 2012 had concluded that family life had not been established between the applicant and his parents. The decision of the First-tier Tribunal was the only decision where full consideration had been given to the applicant's family life as well as his private life and the judge had accepted that family life had been established, contrary to the view taken by the respondent. Since that time circumstances had changed in two respects. Firstly there was the passage of time, as three and a

half years had passed in which the applicant had strengthened ties with his family and the mental health team who assisted him and furthermore his ties to Ghana had weakened, the First-tier Tribunal Judge having already found there to be no identifiable relatives remaining in Ghana. Secondly, the applicant's medical condition had deteriorated. When the judge determined the applicant's appeal, he observed that the applicant's condition had been much improved and stable and was competent to take his own medication, whereas that was no longer the case. Dr Fisher's report referred to the applicant having a reduced ability and capacity to make decisions for himself and also referred to him receiving talking therapy. The discharge notes from Dr Davis from the City & Hackney Centre for Mental Health showed that the seriousness of the applicant's condition fluctuated. Dr Fisher's view was that adequate treatment was not available in Ghana. None of that had been considered by the respondent.

(22) Mr Jolliffe submitted that the applicant's grounds were not even arguable. The applicant had properly conceded the grounds under Article 3 and clearly could not meet the high threshold in N v SSHD [2005] UKHL 31. Baroness Hale had stated in that case that it was difficult to conceive of a medical case that could succeed under Article 8 where it could not succeed under Article 3. The Tribunal could not be satisfied that the SSHD's view was one that no rational decision-maker could take. The point made about the passage of time did not meet the arguability threshold. As to the medical evidence, the respondent considered Dr Fisher's report and was entitled to conclude that it did not materially add to the applicant's case. The respondent was not required to take a holistic view, but was required to make a decision on the evidence before her. The applicant could not meet the criteria under the immigration rules for family and private life. There was no material evidence before the respondent to show that the applicant could succeed on family life grounds outside the immigration rules.

(23) In response Mr Bustani accepted that the applicant could not succeed on medical grounds alone, or on family life alone, but she submitted that he had a strong case when considering all the relevant factors as a whole.

Discussion

(24) Upper Tribunal Judge Freeman granted permission on the sole basis of the applicant having been detained under the Mental Health Act and thus not removable whilst so detained. However, the applicant is not now detained and accordingly the basis for the grant of permission no longer remains.

(25) I have, nevertheless, gone on to consider the other grounds, but I find no merit in them. The respondent's decision of 2 June 2015 clearly took account of all previous decisions and considered in some detail the judge's findings on the applicant's family and life ties and the limited ties to Ghana. The submissions made since that time add little to the decision already made by the judge. As Mr Jolliffe submitted, the passage of time does not materially assist the applicant, since the immigration rules appertaining to private life encompass the question of length of residence in the United Kingdom and it remains the case that the applicant cannot meet the long residence requirements or any of

the other criteria in paragraph 276ADE(1). As regards family life, whilst it may be the case that the First-tier Tribunal Judge accepted that family life was established at that time, in March 2012, the question of family life has now been encapsulated within the immigration rules and it is not in dispute that the applicant cannot meet the requirements of Appendix FM in that regard. Whether there exist exceptional circumstances outside the rules is, as Mr Jolliffe submitted, a matter for consideration on the basis of the evidence produced by the applicant. However the evidence in that regard is extremely limited. There is no new evidence as to the applicant's dependency, or the extent of dependency, upon his parents.

(26) The only new evidence since the judge's determination consists of Dr Fisher's letter of 13 May 2015 which was considered by the respondent in her letter of 2 June 2015. The matters referred to in that letter do not raise any materially new circumstances since the judge's decision. There was no evidence before the respondent to suggest that Dr Fisher had the expertise to express an opinion about a lack of relevant treatment in Ghana and neither was there any independent evidence provided to the respondent to suggest that relevant treatment would not be available to the applicant on return to his home country. As Mr Jolliffe submitted, both in his analysis of the medical evidence in his detailed grounds of defence, and in his submissions before me, there is no basis upon which the applicant could, in reliance upon the limited medical evidence produced to the respondent, hope to succeed on an Article 8 claim on medical grounds.

(27) The respondent considered, in her letter of 2 June 2015, whether there existed any exceptional circumstances justifying a grant of leave outside the immigration rules and took account of all relevant factors, including, as she was entitled to do, the applicant's past conduct and criminal and immigration history, as well as his length of residence in the United Kingdom and his immigration status during that residence. For the reasons cogently given, the respondent concluded that the applicant's circumstances, considered as a whole, were not sufficiently compelling to justify allowing him to remain in the United Kingdom and that was a conclusion she was fully entitled to reach.

(28) Accordingly, the respondent, having plainly applied anxious scrutiny to all the evidence and to the applicant's circumstances, was entitled to conclude that the submissions made on behalf of the applicant did not create a realistic prospect of success before another Tribunal, and thus did not amount to a fresh claim.

Decision

(29) For all of these reasons, the claim must fail and the applicant's application for judicial review is refused.

Permission to appeal to the Court of Appeal

(30) No application has been made for permission to appeal to the Court of Appeal. I have nevertheless considered whether permission to appeal should be granted but find there is no arguable point of law capable of affecting the outcome of the application and I refuse permission accordingly.

Costs

(31) After the hearing I was handed the respondent's schedule of costs which amount to £1,973.60 in total. The applicant, being the losing party, bears the burden of meeting the respondent's costs. The amount claimed appears reasonable to me in the circumstances and there has been no objection by the applicant. I therefore order that the applicant meets the respondent's costs to that amount.

Signed: _____

Upper Tribunal Judge Kebede

Dated: **10 December 2015**

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 given (Civil Procedure Rules Practice Direction 52D 3.3(2)).
