IN THE UPPER TRIBUNAL

R(on the application of Tawakoli) v Secretary of State for the Home Department IJR [2014] UKUT 00235(IAC)

Field House,
Breams Buildings
London
EC4A 1WR

Monday, 28 April 2014

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

Between

AHMAD TAWAKOLI

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms R Chapman, instructed by Bindmans LLP appeared on behalf of the Applicant.

Ms N Patel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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JUDGMENT

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JUDGE ALLEN: The applicant seeks judicial review of the respondent's decision of 22 July 2013 in which it was not accepted that further submissions made by the applicant amounted to a fresh claim.

Background

2. The applicant, who was born in December 1991, came to the United Kingdom in December 2007. He was reunited with his brother Jawad who was subsequently granted indefinite leave to remain in the United Kingdom. The applicant's asylum claim was refused in May 2009 but he was granted discretionary leave until June of that year. A subsequent application for further leave to remain was refused and he appealed. His appeal was dismissed and he became appeal rights exhausted on 12 July 2010.

3. He was encountered while working illegally in June 2013 and was arrested and detained. On 4 July 2013 he was served with removal directions for 23 July 2013. Detailed representations were made on 11 July concerning his conversion to Christianity, and further representations were made on 16th, 18th, and 19th, the most recent being in respect of his fiancée Mihaela Manaila, a Romanian national. An application for judicial review was lodged with the Upper Tribunal on 22 July. On the same day the respondent served her decision. Amended grounds of challenge were lodged. Later that day Upper Tribunal Judge Jordan refused an application for a stay of removal, and still later that day the respondent provided a further decision letter addressing the applicant's letter of

earlier in the day. The applicant was removed to Afghanistan at 1:10am on 23 July by way of a charter flight.

4. Subsequently the applicant's representatives passed on to the respondent information as to problems he was said to have experienced after his return to Afghanistan. These matters were set out in letters in August and September 2013. In the meantime the respondent served her Acknowledgment of Service and summary grounds of defence on 29 August. Permission to apply for judicial review was granted by Upper Tribunal Judge Perkins on 24 October 2013. Amended grounds were lodged on 6 March 2014 and summary grounds of defence were lodged on 10 April 2014. It is relevant to note also that subsequent to the problems he says he experienced in Afghanistan, the applicant made his way to Bulgaria where he subsequently claimed asylum and which as I understand it was to lead to the Bulgarian authorities making a request to the United Kingdom on the day of the hearing to accept him under the Dublin 111 Regulation.

5. Ms Chapman's case is put first on the basis that the material before the Secretary of State on 22 July 2013 was such that she should have accepted that that, together with the previously considered material, amounted to a fresh claim and erred in law as a consequence of her failure to do so. In the alternative Ms Chapman argues that the evidence of what befell the applicant after his return to Afghanistan amounts to foreseeable consequences of the respondent's decision and as a consequence the decision falls to be challenged in addition in respect of that evidence.

6. It seemed to me to be appropriate to hear arguments from both sides on the issues raised as a whole rather than dealing with the issue of the post-decision evidence as a preliminary

matter. For the purposes of this decision I will consider first of all whether the evidence that was available to the Secretary of State at the time of her decision taken with the previously considered material was such that she erred in law in not accepting that this was a fresh claim, and then go on to address the position with regard to the subsequent material and its relationship to that decision.

7. It is appropriate to start first with the applicant's asylum claim. His appeal against the refusal to grant further leave was heard by an Immigration Judge on 4 January 2010.

8. He claimed that when he was about 7 years old the Taliban attacked his village and he did not know what had happened to his family. He and his cousin were taken by a man to Kabul where he went to school for some time but subsequently was made by this man to work in his store and the man made him dance for other men and allowed them to take him to their houses and sexually abuse him. Some time around the middle of 2007 he came into contact with a person who by chance was able to put him in touch with his brother Jawad in England, and Jawad sent money to organise his journey to the United Kingdom.

9. The applicant's claim was found to be credible by the Immigration Judge apart from one matter which is set out at paragraph 26(viii) of his determination where he said he found implausible claims by the applicant that his brother had not mentioned to him contact with their family nor had they discussed the basis of his brother's asylum claim. The judge made the point that this did not go to the core of the applicant's claim. Otherwise the claim was found to be credible. The appeal was dismissed essentially on the basis that he would no longer face risk of the kind of ill-treatment

that he had experienced previously. The judge thought he would probably live in Kabul on return and would not face persecution or serious harm on return there. Indeed the judge also found that he did not face a real risk in his home area either.

10. The first set of representations made to the respondent after the applicant's arrest on 27 June 2013 was made on 11 July 2013. There was first a witness statement from Mihaela Manaila. She said that she had been in a relationship with the applicant since January 2013 and they planned to get married. She said that about three to four months into their relationship he had started asking questions about her religion and she had told him what Christians believed and after those conversations he had admitted to her that he was Christian. He said he had not been baptised but had been to church on his own. She had bought him a crucifix to wear about two months previously and he had it at home but could not wear it outside. She said that he had not told anyone other than her that he was Christian and he was scared as to how people would react and on return to Afghanistan people would find out and would kill him. She said that he did not pray as a Muslim anymore and did not fast during Ramadan and the way he viewed Islam had changed.

11. There was also a short letter from Ms Manaila's brother referring to the fact that his sister and the applicant planned to get married and speaking positively of the applicant. There was also an e-mail from Shima Pourmokhtar who said that she had met the applicant about a year ago and they had had Bible study from January 2013 and also Alpha course since April before he went to the detention centre and she referred to friends who had attended the courses with them. In the covering letter it was asserted that the

applicant should be treated as an extended family member of an EEA national on the basis of his durable relationship with Ms Manaila who is a national of Romania. Reference was also made to the country guidance decision in NM (Christian converts) Afghanistan CG [2009] UKAIT 00045, where it had been held that an Afghan Christian convert who could demonstrate that he had genuinely converted to Christianity from Islam was likely to be able to show that he would be at real risk of serious treatment amounting to persecution if returned.

12. Further representations were sent on 16 July 2013. This included the same e-mail from Shima Pourmokhtar which was now signed by her as well as two further friends of the applicant, Imam Rahimi and Ruhullah Sultani. There was a statement from the applicant referring first to the extreme closeness he says he has to his brother Jawad, speaking also of his relationship with Ms Manaila including the fact that they are committed to getting married, and also addressing the issue of the claimed conversion. He describes the change in his views about Islam and his interest in Christianity which led him since meeting Shima Pourmokhtar to spend time with her and other friends studying the Bible together. He said that they had read the Bible in Farsi and he had attended an Alpha course. He said he had attended the local church but stopped doing this as he became anxious about other Afghan people in Bristol spotting him going into the church. He says that he was very worried about telling Jawad about his conversion but he had been supportive. He refers to concerns he has as to what would happen on return to Afghanistan as he would not want to dress in a particular way, attend prayers and fast during Ramadan. There is also a statement from his brother Jawad who refers to the fact that he had had an idea that the applicant was reading about Christianity as he had borrowed his phone, saw he had a couple of apps to do with Christian beliefs and

subsequently the applicant had told him he believed in Christianity and Javad stood by his change of faith. He refers to their closeness as brothers and the responsibility he feels for the applicant and also the seriousness of the applicant's relationship with Ms Manaila.

13. Subsequently, on 19 July 2013 the applicant's solicitors wrote again enclosing a copy of Ms Manaila's passport as evidence that she was exercising treaty rights in the United Kingdom.

14. This, then, was the evidence before the respondent when she wrote the two decision letters of 22 July 2013. In the first letter of that date the respondent noted that the representations as to a fresh application for asylum were based on the applicant's religious views as a Christian convert and family and private life in the United Kingdom. It was noted that he claimed he was in a relationship with an Orthodox Christian from Romania and that he had been attending weekly Bible studies in a church in Bristol. It also noted his claim that conversion from Islam to Christianity was punishable by death. Reference is made to the Home Office's own guidance which conceded that a Christian convert was at risk of persecution/Article 3 harm in Afghanistan, and citing the case of NM. The respondent then went on to say that in considering the representations it was noted that the applicant had supplied no evidence at all to support the claims that he had been attending Bible classes or church. As regards the claim that his partner was an Orthodox Christian from Romania it was said that significantly she had supplied no information in support of his claim to have converted to Christianity and his submissions on this issue did not begin to demonstrate that he had genuinely converted to Christianity and as such it was not accepted that he would be at risk on return to Afghanistan on the basis of religious conversion.

15. As regards his relationship with Ms Manaila, reference was made to her witness statement and a copy of the bio data page from her passport and a copy of a council tax bill of 2 March 2013 that had been provided. Reference was also made to the contents of her statement including the duration of the relationship and the applicant's conversion to Christianity.

16. The respondent commented on this that the applicant could not benefit from his relationship with Ms Manaila as the relationship had not existed for two years as required under the EEA Regulations and therefore he did not qualify for leave to remain in the United Kingdom on the basis of that relationship. The decision-maker then went on to quote from the Immigration Judge's determination where it had not been accepted that the decision would interfere with either his family or private life. It had not been accepted that the applicant enjoyed family life with Jawad. It was said that no new or significant evidence had been submitted that would justify the Home Office departing from this decision. The decision-maker then went on to refer to paragraph 353B of the Immigration Rules, noting that he was an illegal entrant who had failed to comply with the reporting process and absconded from immigration control for three years, that he had failed to show that the length of time he had remained in the United Kingdom following the initial refusal of his asylum claim was for reasons beyond his control and that it was not considered that there were any circumstances within his immigration history that were significantly compelling so as to make the grant of leave under paragraph 353B appropriate. The respondent went on to refer to the paragraph 353 test and noted the requirements as set out in <u>WM (DRC) v SSHD & SSHD v AR (Afghanistan</u>) [2006] EWCA Civ 1495. It had been determined

that the submissions did not amount to a fresh claim and hence there was no right of appeal against the decision.

17. Detailed further representations were promptly submitted by the applicant to the respondent, rehearsing the relevant facts and the relevant law, and arguing that on the basis of such matters as the conversion of the applicant to Christianity, the country guidance in NM, the decision of the Supreme Court in HJ & HT [2010] UKSC 31, the fact of his engagement to Ms Manaila and his private and family life with her and his relationship with his brother Jawad, that the material submitted was sufficiently different from the previous claim such as arguably to create a realistic prospect of success. It was also argued that it was clear from the asylum process guidance in respect of further submissions that it was incumbent upon the respondent to consider whether or not to grant the applicant leave to remain in the United Kingdom and if not, to go on and consider whether the representations and evidence amounted to a fresh claim and if so to make an immigration decision which would give rise to a right of appeal. The point was also made that the guidance makes it clear that if there is any uncertainty about whether to grant any form of leave it may be appropriate to invite the applicant to attend an interview. It was noted that the applicant had not been interviewed to date.

18. The respondent, as noted above, then sent the further decision letter of 22 July 2013. Reference is made there to the evidence supplied consisting of witness statements from Ms Manaila, the statement from the applicant, the signed and dated letter from Ms Pourmokhtar and the other two signatories and the statement from the applicant's brother. It was said that there was no reason why the uncorroborated comments in those statements should be accepted as they were clearly self-

serving and subjective in their content and in those circumstances it was not accepted that he would be at risk on return to Afghanistan on the basis of religious conversion.

19. In the meantime, and noting that there is reference to it in the second letter of the respondent of 22 July 2013, Upper Tribunal Judge Jordan had refused, earlier that day as referred to above, to order a stay on removal. In his order Judge Jordan saw nothing to require interim relief in relation to the claim to have formed a relationship with a Union Citizen as that could be processed in the normal way as an out-of-country application. He commented that Article 8 did not enter into consideration and that either the applicant had a right to remain under the Immigration Rules or the Regulations or he did not and if he did not it was not clear how Article 8 could establish a substantive right not to be removed given the fact that he was a failed asylum seeker who had failed to leave at the conclusion of the appeal process, remained and worked illegally. He considered that the applicant had waited for an unnecessarily long period to take legal action in relation to the proposed flight due to depart at ten minutes past midnight on 23 July.

20. Judge Jordan also noted that the claimed conversion was based on the submission that the applicant was "largely self-taught in matters of faith" which he took to mean that there was no one from a church who was able to vouch for his conversion. He noted that there was no suggestion that he was baptised or had been confirmed or received in any particular church. It was said that he had attended an Alpha course at his local church, there was nothing from the church however to verify this and that in any event attending a course was very different from being committed to a religion that was so central to his own perception of self that he could not be

removed. He regarded all this as being far too vague to make out an arguable fresh claim case.

21. Having received a further bundle by fax subsequent to the above remarks, he considered that the respondent had plainly not acted irrationally in attaching little or no weight to statements from Ms Manaila and the applicant's brother. Whilst the amended grounds asserted that other statements had been submitted to the respondent as part of the fresh submissions, to which the respondent's letter made no reference, the respondent could not reasonably be challenged as acting irrationally in attaching little or no weight to them when no explanation had been provided as to why a church leader could not have vouched for his conversion. He considered that no First-tier Tribunal Judge would be likely to attach any significant weight to such material when there was or might be an unimpeachable source.

22. Subsequently, on 24 October 2013, Upper Tribunal Judge Perkins granted permission to apply for judicial review on the basis that he was particularly concerned that the respondent might have reached her decision without considering evidence that supported the applicant's case.

23. It is not entirely clear what the evidence to which he referred was. It may be that it was a reference to the other statements referred to at paragraph 9 of Judge Jordan's order, which of course was made before the respondent's second letter of 22 July 2013 which addressed the subsequent statements. In the alternative it is possible that it was a reference to further evidence that was put in after the applicant's removal and prior to the application coming before Judge Perkins, though it is not clear whether the matters referred to at paragraphs 13 to 15 of Ms Chapman's skeleton argument

concerning information provided to the applicant's brother and to his solicitors and communications from the applicant's solicitors to the respondent's solicitors were before the judge at the time when he granted permission.

24. As set out above, I propose to consider first whether the matters before the respondent on 22 July were such that she can properly be said to have erred in law in her assessment of whether or not taken with the previously considered material the new material amounted to a fresh claim. The test is clearly set out at paragraph 353 of HC 395 and clarified in the UKBA's Asylum Process Guidance on Further Submissions and as assessed in WM (DRC) v SSHD and other authorities. A point made by Ms Chapman with reference to paragraph 4.1 of the Asylum Process Guidance is that it is said there that all evidence must be considered when deciding whether the applicant qualifies for leave and that this will include all information or evidence put forward by him as well as new country information, new case law including Upper Tribunal country guidance or a new policy. It is also said that if there is any uncertainty about whether to grant any form of leave, it may be appropriate to invite the applicant to attend an interview and if so the usual interview process applies.

25. On the first of those points, it was argued by Ms Chapman that the respondent had not considered the background evidence against which the fresh claim application fell to be assessed.

26. As regards the argument that the respondent failed to address the background evidence which shows risk on return to an Afghan who has converted to Christianity, the respondent referred at paragraph 3 of the first decision letter of 22 July 2013 to the reference in the applicant's letter to the respondent's own guidance conceding that a Christian convert

was at risk of persecution/Article 3 harm in Afghanistan, citing NM. In my view that demonstrates a sufficient awareness of and taking into account of the background against which the claimed conversion had to be considered. The respondent went on to reject the claimed conversion and I shall come on to the quality of the reasoning in this regard in a moment, but in my view there was no failure to set out the background evidence against which the claim had to be considered.

27. As regards the need to take into account the previously considered material, the previously rejected asylum claim was of no real relevance to the situation the applicant now claimed to face. The decision-maker referred at paragraph 5 of that letter to the Immigration Judge's conclusions in respect of family and private life. Ms Chapman makes the point that the applicant was found to be credible by the Immigration Judge. That is right, subject to the one paragraph that Ms Patel identified where there was doubt as to credibility. I have referred to that above, and in my view the judge was clearly right to regard it as not going to the core of the claim. I do not consider that the absence of any express reference to the previous credibility findings can be said to show any error of law in the respondent's reasoning in the decision letters. The material put forward had not already been considered, and the fact that the applicant had been found to be essentially credible by the Immigration Judge while clearly not irrelevant, was not at the forefront of the necessary consideration as to whether or not a fresh claim was made out.

28. Although there are deficiencies in the first letter which no doubt is what led to the applicant's quick response to it, in my view those deficiencies were effectively cured in what was

said in the third paragraph of the second letter of 22 July 2013. There the decision-maker referred to all the evidence that had been put in but did not accept that the uncorroborated comments in those statements should be accepted as they were said to be clearly self-serving and subjective in their content. The remarks of Upper Tribunal Judge Jordan that I have quoted above may lend some extra support to the conclusions reached in that regard as to why the evidence put forward could properly be regarded as not giving rise to a fresh claim, although clearly one must concentrate on what was actually said by the decision-maker. Ms Chapman attached particular weight to what was said by Ms Pourmokhtar as not being a family member of the applicant. What was said by her and endorsed by the two other signatories is however relatively brief, and the remark of the decision-maker that the comments in the statements are uncorroborated can, I think, properly be said to encompass the fuller reasoning in Judge Jordan's decision (which was noted in the second decision letter of 22 July 2013) that there was not the kind of substantiation that could reasonably have been expected from church figures or others as to the claimed conversion.

29. Accordingly I consider that on the basis of the material before the respondent as at 22 July 2013, it was open to her to conclude as she did that the fresh claims test was not satisfied and accordingly I find no error of law in her approach.

30. The further point is set out in essence at paragraph 43 of Ms Chapman's skeleton and developed by her in oral argument, that the evidence subsequently submitted showing that the applicant was arrested and detained on return to Afghanistan on account of his conversion from Islam to Christianity was required to be taken into account as being a foreseeable consequence of

the respondent's decisions of 22 July 2013. It is relevant, in passing, to note that the final sentence of paragraph 353 of HC 395 makes it clear that the paragraph does not apply to claims made overseas. Ms Chapman's argument is that this is not a claim made overseas since all this evidence is required to be taken into account in assessing the legality of the decisions of 22 July 2013. In this regard she argued that an Article 3 breach has occurred, and that that breach is a consequence of an insufficiently rigorous consideration by the respondent given that it was entirely foreseeable from the evidence and the statements in the grounds that the applicant would be at risk if returned to Afghanistan, particularly as a Christian convert during Ramadan.

31. With respect to these submissions, Ms Patel argues first that it is clear from what was said by the Grand Chamber in Saadi v Italy [2009] 49 EHRR 30 that the challenge can only be on the basis of alleged flaws in assessing the evidence as it was before the decision-maker at the date of decision, and that it is artificial to consider the position had the material been before the respondent as she did not base her decision on the situation in Afghanistan in light of the requirements of Article 3 because she did not accept that the applicant had genuinely converted to Christianity. She also points to inconsistencies in the evidence which she says in any event do not show that an Article 3 breach has occurred.

32. The point as it seems to me of particular relevance in this regard is the Saadi point. Ms Chapman pointed to paragraphs 128 to 133 in particular as identifying the relevant test, including paragraph 128 that in determining whether substantial grounds had been shown for believing there is a real risk of treatment incompatible with Article 3, the court will take as its basis all the material placed before it or,

if necessary, material obtained proprio motu. Where there was evidence capable of proving there were substantial grounds for believing that the applicant would be exposed to a real risk of Article 3 ill-treatment it was for the government to dispel any doubts about it and the court was required to examine the foreseeable consequences of sending the applicant to the receiving country and relevant background evidence was clearly of significance in this regard.

33. However the point upon which Ms Patel particularly relies is set out at paragraph 133. The relevant parts of this state as follows:-

> "133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court...".

34. Ms Chapman referred to various paragraphs in the decision of the Grand Chamber in MSS v Belgium and Greece (Application No. 30696/09) but I see nothing in those paragraphs to go against the point at paragraph 133 in Saadi set out above. For example, it is said at paragraph 359 in MSS that it was up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but first to verify how the Greek authorities applied their legislation on asylum in practice and had they done so they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. These paragraphs have to be seen in the context

of the conclusion to which, as I have set out above, I consider the respondent was entitled to come on the evidence before her on 22 July that the fresh claim test was not satisfied. Accordingly, the evidence as to how the applicant would be treated if he were a convert, though it was noted in the decision letter, did not give rise to an obligation to have factored into that decision evidence subsequently arising. Accordingly, I do not accept Ms Chapman's argument which is put on the basis that it would be artificial for the Secretary of State to pretend that nothing had happened. The Secretary of State made her decision on the basis of the evidence as it was before her at the date of that decision, and I read Saadi as authority for the proposition that that was all she was required to do and that the fact that subsequently evidence has emerged which would be relevant to be taken into account if a further decision fell to be taken, does not ipso facto preclude the legality of the decision that was made when it was made.

35. As was common ground, the position now is somewhat uncertain. It seems that the Bulgarian authorities were at the date of hearing on the point of making a Dublin 111 request to the United Kingdom. What the outcome of such communication would be is unclear and that may be a matter for other proceedings should it arise. On the basis set out above, I have concluded that it has not been shown that the respondent committed any public law error in her decisions of 22 July 2013, and therefore I decline to grant judicial review of those decisions.

36. I will hear the parties on costs and any other outstanding issues when this decision is handed down. ~~~~0~~~~