JR/7692/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Ali Muawia Musa

Applicant

v

Secretary of State for the Home Department

Respondent

Covid-19 Protocol: This judgment was handed down remotely. The date and time for hand-down is deemed to be at 10:00 am on Wednesday, 16 December 2020.

Before Upper Tribunal Judge Hanson

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms Alison Harvey, of Counsel, instructed by Duncan Lewis Solicitors, on behalf of the Applicant and Mr Christian Jowett, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Birmingham CJC on 5 November 2020.

Decision: the application for judicial review is refused

Background

1. The Applicant is a national of Sudan who challenges the decision of 19 July 2018 which refused and certified as clearly unfounded his claim brought to prevent his removal to Italy, the impugned decision, which is supported by a supplementary reasons letter of the 14 November 2019.
2. Two matters are before the Tribunal today being an application by the applicant for permission to rely on further medical evidence and the substantive hearing of the applicant's claim.
3. There is common ground in relation to the applicable authorities which are set out in full in the applicant's documents and referred to in the skeleton arguments. As such there is no need to quote extensively from the same. The fact they are not

mentioned does not mean they have not been considered with the required degree of anxious scrutiny in arriving at this decision

Decision on application to rely on fresh medical evidence

4. On 19 October 2020, the applicant filed a skeleton argument in preparation for the substantive hearing listed for 5 November 2020.
5. The skeleton argument refers to post decision material for which no leave had been given. That material, which was obtained to specifically address the Article 3 ECHR issue, is in the form of:
    i. A report by Dr Sahota, a Consultant Forensic Psychologist, dated 28 December 2019.
    ii. A report by Dr Ramzi Freij, a Consultant, dated 6 December 2019.
    iii. A report by Dr A Griffiths, a GP and Primary Care Director with Assist Inclusion Healthcare, dated 6 December 2019.
    iv. The applicant's medical records dated 13 November 2019.
6. The first question is why, as none of the material has been obtained recently and was no doubt in the possession of the applicant's legal advisers for some time, was no application made for permission to rely upon the same before? Whilst the applicant's solicitors have admitted this was due to an 'oversight' that is not a satisfactory explanation.
7. The fact the material was clearly not before the decision maker is shown by the chronology. The respondent initially refused the applicant's submissions on 7 February 2018. The impugned decision which certified the claim is dated 18 July 2018. A supplementary reasons letter, post SM and Others, is dated 14 November 2019. The evidence could not have been before the decision maker as it did not exist at the time and most post-dated the respondents Detailed Grounds of Defence served on 19 November 2019.
8. This is not a case in which the new material is of no relevance to the merits of the applicant's case, per se, for as Mr Jowett confirmed in both his skeleton argument and oral submissions the respondent intends to give the new material proper consideration together with that previously filed, as it could not now be simply ignored, which will lead to a fresh decision being made.
9. I refuse permission to rely on the new material as it was not before the decision maker. The challenge is to the rationality of the certification not to the merits of the applicant's case. The new material introduces a wider consideration of the question of whether the applicant is a vulnerable person based upon material which was not before the decision maker when the impugned decision was being considered. That which was available is discussed below. I find to give the applicant permission to rely upon the new material at this very late stage, on the day, is not in accordance with the overriding objectives. To be permitted to do so is contrary to the principle of fair and open justice with parties setting out the nature of their case and evidence relied upon in advance to enable issues to be understood and relevant arguments prepared. Only receiving notice of such new material when the applicant's skeleton

argument was filed put the respondent in a difficult position. There is also no satisfactory explanation for why the material was not disclosed when first available, nearly a year ago, and why no application was made then. The material will be considered in any event and a further decision made.

10. The sections of the applicant's skeleton argument which seek to rely on the new material are inadmissible although I accept Ms Harvey may have been unaware when drafting the same that permission to rely upon the new material had not been sought or granted.
11. Mr Jowett refers in his skeleton argument to the respondent's primary position being that the claim is now academic for even if the applicant succeeded the only remedy available is for the Upper Tribunal to quash the impugned decision which will lead to a reconsideration of the application in any event, precisely what will occur as a result of the new material having now been provided. An email to the applicant's representative inviting them to withdraw the claim on that basis was rejected.
12. For the applicant Ms Harvey submitted the claim is not academic despite the new material not being admitted. The remedy sought in the original claim is for an order quashing the decision to certify the claim as clearly unfounded and for a mandatory order that the applicant be granted an in country right of appeal in relation to his human rights claim, which she submits are remedies that can be achieved on the material before the decision maker in any event.
13. The case therefore proceeded but with no reference to the new material.

The Chronology

14. The applicant left Sudan and travelled to Italy where he claims he was fingerprinted and released onto the streets.
15. The applicant travelled to France after a very short stay in Italy where he remained for three months before entering the UK illegally on 17 December 2014.
16. The applicant was removed to Italy on 10 February 2015.
17. The applicant claims he remained in Rome for one month living on the streets before travelling to Calais where he stayed for two years in the camps.
18. The applicant was encountered by the police in Birmingham on the 25 May 2017 having, again, entered the UK illegally.
19. On 23 June 2017, the respondent became aware the applicant had been granted refugee status in Italy and so was a beneficiary of international protection and not an asylum seeker.
20. Notwithstanding the initial correspondence from the applicant's solicitors making extensive reference to the Dublin III Convention, that is not applicable as the purpose of the Dublin Regulations is to establishes the criteria and mechanisms for determining which Member State is responsible for examining an asylum claim made in the EU.
21. On 22 January 2018, the respondent served the applicant with a notice of removal to Italy pursuant to section 10 Immigration and Asylum Act 1999.
22. On 26 January 2018, the applicant lodged submissions assertion his removal will be unlawful as there will be a breach of his Article 3 ECHR rights.

23. On 7 February 2018, the respondent refused leave on this basis.
24. On 21 March 2018 and 27 June 2018, the applicant filed further submissions relying upon Article 3 ECHR.
25. On 19 July 2018 the respondent refused the Article 3 representations and certified the same as 'clearly unfounded' on the basis it was considered to be a claim that was bound to fail on the evidence before the decision maker.
26. The applicant issued proceeding challenging the certification on 18 October 2018 in the High Court (Administrative Division).
27. On 23 November 2018, the proceedings were transferred to the Upper Tribunal (UTIAC).
28. On 27 November 2018, the proceedings were stayed pending the decision in R (on the application of SM & Others) v Secretary of State for the Home Department (Dublin Regulation – Italy) [2018] UKUT 00429 (IAC).
29. On 8 January 2019 Upper Tribunal Judge Canavan made directions in relation to the filing of amended grounds consequent to the decision in SM & Others.
30. On 31 July 2019 permission to bring judicial review was refused on papers by HHJ Stacey.
31. On 9 October 2019 HHJ Worster granted permission at an oral hearing on the basis the claim predated SM and Others and needs to be considered in light of it, which therefore warrants further consideration.

The irrationality challenge.

32. The test for assessing whether a decision is irrational originates from the case of Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 which set out the standard of unreasonableness of public-body decisions that would make them liable to be quashed on judicial review, known as 'Wednesbury unreasonableness'. That test requires an applicant to prove that the public body has acted so unreasonably that no other public body acting reasonably would do as that body did.
33. In relation to the challenge to the decision to certify in this case, it has not been shown the respondent failed to consider the material made available with the required degree of anxious scrutiny as a reading of the material provided and impugned decision clearly demonstrates. The Tribunal is grateful to Ms Harvey for her confirmation during her submissions, following Mr Jowett's forensic examination of each decision and the material considered in arriving at the same, that this aspect is not in dispute. That is the correct position in law.
34. What remains in issue is the decision makers conclusion that this is a claim that is bound to fail. That is a fact sensitive issue.
35. The impugned decision considered, among the applicant's other papers, his witness statement of the 29 January 2028 and a psychiatric report of Dr Chiediu Obuaya dated 16 March 2018.
36. It is not made out the decision maker adopted a flawed approach to the evidence and/or the applicable standard of proof.
37. In his report Dr Obuaya concluded the applicant fulfils the criteria of a moderate depressive episode complicated by symptoms of PTSD, although he did not meet

the diagnostic criteria for a separate diagnosis of PTSD in its own right.

38. In Dr Obuaya's opinion the depressive symptoms are said to be best understood as occurring in the context of several traumatic events in Sudan which have been exacerbated by the difficulties the applicant claimed to have faced in Italy where he claimed to have been destitute and felt vulnerable. Uncertainty about his immigration status is also said to be a contributing factor to perpetuating his depression.
39. It is stated the applicant was not receiving any anti-depressant medication or psychological therapy. It is noted in the report that the NICE recommendation is to treat depression with anti-depressive medication for up to six months. It is also recommended the therapies outlined at [46-48] of the report should be commenced.
40. The applicant's case is that based on this material and his experiences in Italy, his claim is not one that is bound to fail, even when considering the judgment in SM and Others.
41. R (on the application of SM & Others) v Secretary of State for the Home Department (Dublin Regulation – Italy) [2018] UKUT 00429 (IAC) was promulgated on 4 December 2018, the headnote of which reads:

    (1) Subject to paragraph (2) below, on the evidence before the Upper Tribunal, no judge of the First-tier Tribunal, properly directed, could find there is a real risk of an asylum seeker or Beneficiary of International Protection (BIP) suffering Article 3 ill-treatment if returned to Italy pursuant to the Dublin Regulation, by reason only of the situation that the person concerned may be reasonably likely to experience in Italy, as a "Dublin returnee". The evidence does not rebut the general presumption that Italy will comply with its international obligations in such cases.

    (2) However, the evidence before the Upper Tribunal is markedly different from that previously considered by the High Court in "Dublin" cases concerning Italy, such that it cannot, without more, be said a human rights claim based on Article 3 is bound to fail, if the claim is made by a 'particularly vulnerable person' (as described in paragraph (3) below).

    (3) The categories of "vulnerable persons" identified in the Reception Directive are a starting point for assessing whether a person has a particular vulnerability for the purposes of this paragraph. The extent of a person's particular vulnerability must be sufficiently severe to show a potential breach of Article 3. It is difficult to specify when a particular vulnerability might require additional safeguarding to protect a person's rights under Article 3. The assessment will depend on the facts of each case. However, a person who makes general assertions about mental health problems without independent evidence or who has been diagnosed with a mild mental health condition or has a minor disability may have sufficient resilience to cope with the procedures on return to Italy, even if it entails the possibility of facing a difficult temporary period of homelessness or basic conditions in first-line reception facilities. There will be cases where a person's particular vulnerability is sufficiently serious that the risk of even a temporary period of homelessness or housing in the basic conditions of first-line reception might cross the relevant threshold. Such cases are likely to include those with significant mental or physical health problems or disabilities. Other people may have inherent characteristics that render them particularly vulnerable e.g. unaccompanied children or the elderly.

(4) In the case of a 'particularly vulnerable person', the following considerations apply:

(i) A failure by the respondent to consider whether to exercise discretion under article 17(2) of the Dublin Regulation is likely to render the certification decision unlawful;

(ii) If the respondent considers whether to exercise such discretion but decides not to do so, the return and reception of the person concerned will need to be well-planned. Although the Italian authorities would not want to leave a particularly vulnerable asylum seeker or BIP without support, the evidence indicates that there is no general process, similar to that which exists for families with children, to ensure that particularly vulnerable persons will not be at real risk of Article 3 treatment, while waiting for suitable support and accommodation, of which there is an acute shortage. In order to protect the rights of such a person in accordance with the respondent's duties under the European Convention, the respondent would need to seek an assurance from the Italian authorities that suitable support and accommodation will be in place, before effecting a transfer.

(iii) It follows that a failure to obtain such an assurance prior to the transfer of a particularly vulnerable person is likely to give rise to a human rights claim that is not necessarily 'bound to fail' before the First-tier Tribunal.

42. Following publication of SM and Others a supplementary decision letter of 14 November 2019 was published and the Grounds of challenge amended.
43. The applicant's case is that he satisfies the definition of a 'particularly vulnerable person' on the evidence such that his claim was not bound to fail. The respondent's case is that the evidence did not establish that the extent of the applicant's health issues/vulnerability were sufficiently severe to show a potential breach of Article 3 ECHR, on the facts.
44. This issue is of importance in light of [339] of SM and Others where it is written:

> 339. In conclusion, the Tribunal finds that, having regard to the evidence as a whole, a hypothetical First-tier Tribunal could not, on the basis of that evidence, rationally conclude that a BIP would be at real risk of Article 3 treatment, if returned to Italy pursuant to Dublin III.

45. The applicant refers to part of the headnote in SM and Others where it is written "*However, a person who makes general assertions about mental health problems without independent evidence or who has been diagnosed with a mild mental health condition or has a minor disability may have sufficient resilience to cope with the procedures on return to Italy, even if it entails the possibility of facing a difficult temporary period of homelessness or basic conditions in first-line reception facilities*" asserting this does not apply to him as he has been diagnosed as suffering from a moderate not mild depressive episode. Such a submission in isolation does not arguably assist the applicant, per se.
46. It is important to read SM and Others as a whole. The section of the headnote: "*There will be cases where a person's particular vulnerability is sufficiently serious that the risk of even a temporary period of homelessness or housing in the basic conditions of first-line reception might cross the relevant threshold. Such cases are likely to include those with significant mental or physical health problems or disabilities. Other people may have*

inherent characteristics that render them particularly vulnerable e.g. unaccompanied children or the elderly" is of importance. A significant mental illness can be defined by its duration and the disability it produces and impact this may have upon the sufferer in light of conditions he or she is likely to experience on return. This is fact sensitive. The conclusion the report of Dr Obuaya did not support the applicant's case that his presentation meant there will be a breach of Article 3 has not been shown to irrational.

47. It has also not been shown to be irrational for the decision maker to conclude in the impugned decision that the applicant had demonstrated through his actions, considerable resilience and not vulnerability. Whilst the applicant disagrees and challenges such an assertion it has not been shown it is a conclusion outside the range of those available to the decision maker on the evidence.
48. It is also noted in the supplementary decision that consideration has been given to the applicant's health care entitlement in Italy as a beneficiary of international protection. It was not shown on the evidence available to the decision maker that the treatments recommended by Dr Obuaya are not reasonably available, not accessible, or that they will not be sufficient to assist the applicant with his diagnosed mental health needs in Italy.
49. The decision maker, whilst not accepting the applicant is a particularly vulnerable person, also confirmed that in any event adequate arrangements and assistance will be made to ensure that the applicant's return will not result in a breach of Article 3 ECHR. It is the applicant's case that his return will be unlawful as there will be such a breach but as noted in SM and Other: "*in order to protect the rights of such a person in accordance with the respondent's duties under the European Convention, the respondent would need to seek an assurance from the Italian authorities that suitable support and accommodation will be in place, before effecting a transfer*". It is reasonable to infer this is the nature of the enquiry the decision maker proposes to make.
50. The requirement to take an applicant's case at its highest does not mean the decision maker was bound to accept what was being said in support of the claim, without more. The decision maker records a number of concerns with the applicant's evidence which have not been shown to be conclusions not available to the decision maker on the material provided.
51. I find the applicant has failed to establish the decision makers conclusion he is not a particularly vulnerable person whose return will result in a breach of Article 3 ECHR is irrational, based upon the material available to the decision-maker. Such evidence was considered with the required degree of anxious scrutiny and it has not made out that such material warranted a finding of the nature of that the applicant is seeking.
52. It is also arguable that the applicant or his representatives were aware of the lack of suitable material and the failings in the original report provided to the decision-maker as otherwise it is hard to see why they would incur additional cost to the public purse in securing the reports of Dr Sahota, Dr Freij and Dr Griffiths to deal with the deficiencies in the evidence.
53. I find the applicant has failed to establish public law error in the decision-maker's conclusion that, on the basis of the material relied upon by the applicant at that time and applicable legal principles, the application was bound to fail warranting

the certification of the claim. Such conclusion is neither irrational on the facts or in law and is a conclusion wholly within the range of those reasonably available to the decision maker.

Order

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

Permission to appeal to the Court of Appeal

55. Of the Tribunal's own motion, permission to appeal to the Court of Appel is refused, no arguable basis for granting permission to appeal having been identified.

Costs

56. The applicant shall pay the respondents reasonable costs of the claim summarily assessed in the sum of £13,312.35.

Signed: *Upper Tribunal Judge Hanson*

Dated: **16 December 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).