IN THE UPPER TRIBUNAL

R (on the application of Tanveer Ahmed Virk) v The Secretary of State for the Home Department IJR [2015] UKUT 00094 (IAC)

Heard at Field House
On 5th January 2015

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE QUEEN ON THE APPLICATION OF

TANVEER AHMED VIRK

Applicant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ms L Akande, counsel, for the applicant (instructed by Rashid and Rashid)
Mr V Mandalia, counsel, for the respondent (instructed by Treasury Solicitor)

JUDGMENT

1. The applicant was granted permission to bring a judicial review of the asserted continuing refusal of the respondent to reconsider her decision dated 29th September 2011 refusing him leave to remain in the UK, and failing to make and serve an appealable decision.

2. The applicant arrived in the UK on 20th September 2006 with entry clearance valid until 24th February 2007. He did not leave the UK on the conclusion of his leave to remain. On 19th August 2011 the applicant sought leave to remain. That application was refused for reasons set out in a letter dated 29th September 2011. On 7th October 2011 the applicant asked the respondent to review the decision. On

8th October 2011 he requested that removal directions be set and he be given an in-country right of appeal if the refusal decision was maintained. On 31st July 2013 he submitted further representations to the respondent notifying her he had been diagnosed with and was receiving treatment for thyroid cancer. On 19th August 2013 the applicant sent a Pre Action Protocol letter to the respondent and on 8th November 2013 issued the these judicial review proceedings. The grounds relied upon complained of unlawful delay by the respondent in responding to the request for review of the decision dated 29th September 2011 and relied upon his claimed serious medical condition and lack of family and support in Pakistan. In her acknowledgment of service the respondent said:

> 5. The Claimant has made further human rights submissions by letter dated 31 July 2013. The SSHD is required to consider these decisions. However the delay in the SSHD in considering those submissions (3 months at time of judicial review Claim Form) and still less than 1 year, is not so long as to make that delay unlawful. The SSHD will consider the further submissions within a reasonable time period (3 months absent special circumstances)
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> 6. The Claimant submits that he should be issued with a removal decision in order that he is granted a right of appeal. The Defendant is not obliged to give a notice of removal which would generate that right of appeal (see Court of Appeal's judgment in Daley-Murdock v SSHD [2011] EWCA Civ 161)….
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> 7. The Claimant does not fall within her policy in this regard….

3. In granting permission UTJ MacLeman observed:

> In light of the rather vague statement at 15 (sic) of the acknowledgment of service, the grounds are enough to call for oral submissions on delay and absence of appealable decision.

4. Before me the applicant did not and has not asserted that the decision dated 29th September 2011 failed to adequately address all the matters put forward to the respondent for decision at that time. In that letter, in addition to considering the matters raised by the applicant upon which he relied for leave to remain, the applicant was informed that if he wished to rely upon a claimed breach of the Refugee Convention or Article 3 then he should attend the Asylum Screening Unit and make an application in person. The letters dated 7th and 8th October 2011 did not raise any new issues but merely requested a review of the earlier decision and an appealable

decision. It was not until 31st July 2013 that the respondent was informed by the applicant that he had been diagnosed with Thyroid cancer.

5. The respondent defends the claim on the grounds firstly that she was under no obligation to review the 29th September 2011 decision; secondly that any challenge to that decision is significantly out of time; thirdly she acknowledged she was required to consider the human rights application dated 31st July 2013 but she had said she would do so and finally that she was under no obligation to make and serve an appealable removal decision. By letter dated 20th November 2014 (7 months after service of the Acknowledgment of Service and a year after the issue of the judicial review proceedings), the respondent rejected the applicant's further human rights application; again informed the applicant that if he wished to claim that he was at risk of persecution or that his future removal would be a breach of Article 3 of the ECHR then he should make an application for international protection in person and she did not make and serve an appealable removal decision.

6. Before me on 5th January 2015 the applicant relied firstly upon a claimed failure by the respondent to factor into her decision the delay in reaching the decision dated 20th November 2014 and secondly that because the applicant had made a request for a decision to remove him, the respondent was under a duty to consider that request and reach a decision whether to make such a decision. Ms Akande acknowledged that the decision may not necessarily have been to make a removal decision but she asserted that at the very least the applicant was entitled to a decision on his request, one way or the other.

7. Dealing first with the claimed failure to factor into the November 2014 decision the delay about which the applicant complained, there is no merit in this submission. Until 13th July 2013 the applicant had not submitted any details of any claim that he had to remain in the UK other than that which had already been considered by the respondent when she refused his application as long ago as 29th September 2011. He had not challenged the content of the decision or asserted that it was wrong in law. His request for a review had no merit and merely resulted in him remaining in the UK on the basis that he was awaiting a response from the respondent to an unmeritorious application. His application for

further consideration made in July 2013 was the first intimation that he had further information that he wished the respondent to consider. To issue these proceedings on the basis of delay, in reliance on the period of time that he has remained in the UK unlawfully is not a promising basis upon which to bring these proceedings. This is particularly so because his claim to remain on the basis of the diagnosis of thyroid cancer itself was based on the claim that he required further treatment whereas the medical evidence submitted indicates this not to be the case (other than receiving the "usual medication"). In any event there are adequate facilities in Pakistan. The claim that he was suffering from psychological problems was unsupported by any medical evidence whatsoever.

8. The asserted delay of 14 weeks from the date of notification to the respondent of the medical issues and the issue of proceedings cannot by any stretch of the imagination be characterised as unreasonable, unlawful or irrational in the circumstances. Although the respondent filed her acknowledgement of service out of time and failed to comply with the statement therein that she would reach a decision on the October 2013 letter within three months, there was no evidence that the applicant had suffered by that delay. It is unfortunate that the respondent did not see fit to reach a more prompt decision but it cannot be said that the applicant has suffered any detriment whatsoever. He has continued to receive whatever treatment and follow up he requires, at no expense to himself, and he was, of course, free to leave the UK at any time he chose to be reunited with his wife and children in Pakistan. The delay from the issue of proceedings to the 20th November 2014 letter cannot be characterised as unlawful or irrational. It cannot be concluded that the delay has in any way operated to the detriment of the applicant or that his continued stay in the UK was in any way put at risk or adverse to his interests.

9. In so far as the asserted failure of the respondent to make a decision on the request to make an appealable removal decision is concerned, there is no merit in this ground either. There is nothing on the face of the documents submitted by the applicant to indicate that he falls within the respondent's published policy in respect of the circumstances in which a removal decision should be issued. The applicant has received treatment for cancer, has no further need for specialist, frequent and on-going treatment and there are no identifiable compassionate circumstances requiring him to be able to appeal against a decision to remove him. He is free to leave the

UK at any time – as he has been since his visit visa expired in 2007. The applicant asserts that in accordance with the guidance, where an application is made for a removal decision the respondent is required to engage with that application. The assertion that the respondent is required to make a decision on whether to make a decision in circumstances where it is evident on the face of it that an applicant does not fall within the guidance criteria is wholly unsustainable.

10. For these reasons the claim must fail.

11. This judgment was handed down on 12th February 2015 at which neither party was represented and no applications were made.

12. I nevertheless considered whether permission to appeal to the Court of Appeal should be granted but find there is no arguable point of law capable of affecting the outcome of the application and refuse permission accordingly.

Upper Tribunal Judge Coker