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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ABDUL SAID FOR JUDICIAL REVIEW

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Darcy Rollins (instructed by Phoenix Law) for the Applicant
Aidan Sands (instructed by the Crown Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] The applicant is a 29 year old man, originally from Somalia, who has been seeking asylum within the United Kingdom since January 2013.

[2] By this application for judicial review, he challenges the decision of the Secretary of State for the Home Department ('SSHD') to refuse to provide him with an Application Registration Card ('ARC'). More generally, the applicant also seeks to impugn the policy under which this decision was made.

Background

[3] The applicant was initially refused asylum in the UK on third country grounds, namely that he had previously sought asylum in Italy. He was deported to Italy in August 2013 but returned to the UK and made a fresh asylum application in January 2014. This application was refused in September 2015 and an appeal to the First Tier Tribunal was dismissed in November 2016. Permission to appeal to the Upper Tribunal was refused in January 2017 and the applicant became appeal rights exhausted.

[4] Since this time, the applicant has sought, on numerous occasions, to lodge further submissions pursuant to paragraph 353 of the Immigration Rules. On each occasion this has resulted in a further refusal, at least to the point where the 10th set

of further submissions was lodged on 13 May 2021. These latest submissions seek to rely on the report of Dr Anees-Ul-Haq Syed, Consultant Psychiatrist, dated 26 February 2021, in which a diagnosis of mixed anxiety and depressive disorder of moderate severity is made.

[5] At the date of hearing of this application, no determination had been made on foot of this latest set of further submissions.

The Impugned Decision

[6] On 13 May 2021, at the time of the lodging of the latest further submissions, the applicant applied for an ARC. On 28 January 2022 an official from the Home Office informed him that he was not entitled to be issued with an ARC as he no longer had an asylum application pending. It was asserted that the making of further submissions under paragraph 353 of the Immigration Rules did not amount to a fresh asylum application unless and until a decision maker determines that they ought to be treated as a fresh claim.

[7] The applicant contends that this decision, and the policy underpinning it, are not supported by paragraph 359 of the Immigration Rules and are therefore ultra vires and unlawful. It is also claimed that the approach of the respondent amounts to an unlawful fetter on discretion and that the decision breaches the applicant's rights under article 8 ECHR and article 14 ECHR, read in conjunction with article 8.

The Immigration Rules

[8] The Immigration Act 1971 gave the SSHD power to lay down rules regulating the entry into and stay in the UK of persons requiring leave for that purpose. Such rules are not delegated legislation as such but do require to be laid before Parliament and are subject to the negative resolution procedure.

[9] In *Odelola v SSHD* [2009] UKHL 25, Lord Hoffman observed:

> "The status of the immigration rules is rather unusual. They are not subordinate legislation but detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration. But they create legal rights: under section 84(1) of the Nationality, Immigration and Asylum Act 2002, one may appeal against an immigration decision on the ground that it is not in accordance with the immigration rules."

[10] Paragraph 353 of the Immigration Rules states:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> 1. had not already been considered; and
>
> 2. taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas."

[11] In *R (Robinson) v SSHD* [2019] UKSC 11, the Supreme Court held that further submissions made under paragraph 353 had to be accepted by the SSHD as constituting a fresh claim in order for a right of appeal to arise.

[12] Paragraph 359 of the Rules provides as follows:

> "359 The Secretary of State shall ensure that, within three working days of recording an asylum application, a document is made available to that asylum applicant, issued in his own name, certifying his status as an asylum applicant or testifying that he is allowed to remain in the United Kingdom while his asylum application is pending. For the avoidance of doubt, in cases where the Secretary of State declines to examine an application it will no longer be pending for the purposes of this rule.
>
> 359A The obligation in paragraph 359 above shall not apply where the asylum applicant is detained under the Immigration Acts, the Immigration and Asylum Act 1999 or the Nationality, Immigration and Asylum Act 2002.
>
> 359B A document issued to an asylum applicant under paragraph 359 does not constitute evidence of the asylum applicant's identity.
>
> 359C In specific cases the Secretary of State or an Immigration Officer may provide an asylum applicant with evidence equivalent to that provided under rule 359.

> This might be, for example, in circumstances in which it is only possible or desirable to issue a time-limited document."

[13] The Guidance published by the Home Office on 11 February 2022 explains that the ARC is a credit card-sized plastic card issued to "individuals who claim asylum." It is not, of itself, evidence of identity but it does contain information about the holder, including nationality and age. The Guidance confirms:

> "The ARC certifies that its holder is an asylum claimant and as such will be allowed to remain in the United Kingdom while their asylum claim is still pending."

[14] This document also addresses the position when fresh submissions have been made following the refusal of an asylum claim. It states that such an individual is only entitled to an ARC when the further submissions are considered to be a new asylum claim.

The Position of Failed Asylum Seekers

[15] In *Re Omar Mahmud's Application* [2021] NIQB 6, Friedman J analysed the position of those individuals who have made an asylum claim which has been rejected and whose appeal rights are exhausted:

> "3. The mere making of submissions in support of a fresh claim does not alter the status of the claimant whose legal existence and concrete situation in this country is marginal. That is because he is prohibited from establishing a livelihood, has no right to subsistence, nor right of abode. Also, without the formal acknowledgement that he has a fresh claim he is at risk of being removed or required to leave immediately. To say that the applicant's situation is marginal does not mean, however, that he exists outside the protection of a legal framework. A failed asylum seeker is someone who has exhausted his formal avenues of appeal against a negative decision on his asylum claim. At that stage, and pending his removal or voluntary exit from the United Kingdom, he is entitled to make further submissions in support of the existence of a fresh claim and the Home Office is under a duty to consider them carefully in accordance with paragraph 353 of the Immigration Rules and otherwise in conformity with public law. The requisite care in considering such submissions is derived from the consequences of their erroneous rejection, which could be

> death, torture and persecution. While those submissions are under consideration it is open to the claimant to apply for discretionary asylum support under section 4(2) of the Asylum and Immigration Act 1999 (the '1999 Act'). The Home Office is under a duty to provide that support in order to avoid a claimant suffering from a breach of his rights under the European Convention of Human Rights ('ECHR'), as provided for by regulation 3(2)(e) of The Immigration and Asylum (Provisions of Accommodation to Failed Asylum Seekers) Regulations 2005 (the '2005 Regulations'). This mandatory intervention arises from the special situation of the migrant who as a condition of his temporary entry into the country has "*no recourse to public funds*" such as to enable him to independently acquire shelter, food, or what Lord Bingham in one of the key authorities termed the '*most basic necessities of life.*'"

[16] The inescapable consequence of this analysis is that the applicant is properly recognised in law as a failed asylum seeker, albeit one who has exercised his right to make further submissions under paragraph 353.

The Grounds for Judicial Review

(i) Ultra Vires

[17] The applicant contends that the decision in question is not supported by paragraph 359 of the Immigration Rules. Properly analysed, this is not an attack on the vires to make the operative rules but rather a claim that the policy adopted by the SSHD is inconsistent with the Rules themselves.

[18] However, in light of the analysis of Friedman J set out above, and the clear wording of paragraphs 353 and 359 of the Rules, it is apparent that only asylum seekers are eligible for an ARC, not failed asylum seekers. Unless and until the extant further submissions are treated as a fresh claim, the applicant remains a failed asylum seeker and therefore cannot avail of the benefits of an ARC.

(ii) Fetter on Discretion

[19] In order that the invocation of a policy can be impugned as amounting to a fetter on discretion, it must be established that the decision maker enjoyed a discretion in law.

[20] When read together, paragraphs 353 and 359 confer no discretion on the SSHD to issue an ARC to a failed asylum seeker in circumstances where further submissions have not been accepted as a fresh claim. Equally, there is no exercise of

discretion engaged in relation to asylum seekers – they are entitled to an ARC as a matter of right.

[21] Any claim which seeks to challenge the exercise of discretion on public law grounds is therefore fundamentally misconceived.

(iii) Article 8 ECHR

[22] Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[23] The applicant states that, without the benefit of an ARC, he cannot access education. He would wish to take up a course of study at Belfast Metropolitan College but cannot do so without a form of identification. He also complains that he cannot register with a GP or dentist and these issues have contributed to harm to his mental wellbeing.

[24] On this basis, it is claimed the refusal to issue an ARC has disproportionately interfered with the applicant's right to private and family life.

[25] However, the policy published by the SSHD makes it clear that an ARC is not required for the purpose of registering with a GP or a dentist, nor is it necessary in order to enrol in education. Insofar as the applicant has been prevented from enrolling at college, it would appear that this has come about as a result of a policy adopted by the educational institution.

[26] The evidence reveals that the applicant is currently in receipt of discretionary support under the 1999 Act and has been provided with self-contained accommodation.

[27] In these circumstances, it cannot be said that the decision to refuse an ARC has given rise to a breach of the applicant's right to family and private life.

[28] Even if such an interference were established, it has arisen as a result of the consequences of a failed asylum application. The law recognises a distinction

between those individuals whose applications are pending and those whose applications have been rejected. In the latter case, once appeal rights have been exhausted, certain consequences flow and the denial of an ARC is one of these. As Friedman J observed, the legal existence of such individuals is marginal. The existence of discretionary support under the 1999 Act and 2005 Regulations is intended to provide a bare minimum, human rights compliant, entitlement. Any such interference with the applicant's article 8 rights is in accordance with law.

(iv) Article 14

[29] Article 14 of ECHR is the prohibition on discrimination which enshrines that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

[30] In *Re DA and DS* [2019] UKSC 21, Lady Hale set out a four stage test to be followed when assessing compatibility under article 14:

(i) Does the subject matter of the complaint fall under one of the substantive Convention rights?

(ii) Does the ground upon which the complainants have been treated differently from others constitute a 'status?'

(iii) Have they been treated differently from other people not sharing that status?

(iv) Does the difference in treatment have an objective and reasonable justification? [para 136]

[31] In order to fall within the ambit of a Convention right, the decision must engage the modalities of the way in which the state implements the right in question. This is therefore a wider concept than the interference with the right *per se* – see the judgment of Lord Reed in *R (SC) v SSWP* [2021] UKSC 26, at paragraphs [39] and [40]. In *SC*, the appellants challenged the compatibility of legislation limiting the entitlement to child tax credit to the first two children of a family. The court found that there was no breach of the article 8 rights of either the adults or children impacted by the new scheme but that the complaint fell within the ambit of article 8, taken together with article 14.

[32] The availability of welfare benefits which are intended to provide financial support to families with children falls within article 8 when taken together with article 14. However, the availability of an ARC is not a means of implementing

article 8 rights. It cannot be said to relate to private or family life in a manner comparable to the provision of welfare benefits.

[33] The applicant does not rely on any core article 14 status but on 'other status.' In the immigration context, the European Court has held:

> "the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not prevent it from amounting to an 'other status for the purposes of article 14. In the present case, and in many other possible factual scenarios, a wide range of legal and other effects flow from a person's immigration status." [*Bah v UK* [2011] ECHR 1448 at para [46]]

[34] As was recognised by Lord Reed in *SC*, the issue of status rarely troubles the European Court and it oftens moves straight to the question of whether there has been differential treatment, and whether any such difference is justified.

[35] The applicant's identified comparator is a failed asylum seeker who has made further submissions which have been accepted as a fresh claim. Such an individual would be entitled to an ARC.

[36] In *Re McLaughlin's Application* [2018] UKSC 48, the Supreme Court recognised that a comparator for the purposes of article 14 does not require an exact match but rather an analogous situation. As Lady Hale stated:

> "It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation." [para [26]]

[37] There is a marked difference between this applicant and his identified comparator. The latter has a pending undetermined claim for asylum whilst the former does not. The courts have recognised both the different legal status of each and the consequences which flow from this. Both the applicant and his comparator enjoy the right to remain in the UK but one is a failed asylum seeker and the other is not.

[38] The question of justification of the difference in treatment was considered by Friedman J in *Mahmud*:

> "… it must be correct that the protection under section 4(2), when the person is a failed asylum seeker, is narrower than the protection under section 95 of the 1999 Act when there is a recognised, but pending, asylum

claim, whether an original one or a fresh one. That is because:

(i) There is a long established acceptance that the asylum seeker falls into a special category of need because he cannot return for fear of persecution and human rights abuse, but is denied any recourse to income in the host country. It cannot be right to force him into abject poverty as a price for him fairly establishing his claim that he is unable to return. The reasoning is prevalent in *JCWI* and *Limbeula*;

(ii) Parliament has clearly structured section 4(2) in more limited terms than section 95, including requiring street destitution, as opposed to mere destitution (so defined), and providing for a temporary accommodation while applications for asylum are processed, whereas section 4(2) includes no provision for temporary support pending the processing of further applications. As Hodge J (as then) described it *R (Matembera) v Secretary of State* [2007] EWHC 2334 Admin at [15], there is here a detailed scheme, comprising of 'a main duty to support asylum seekers and a less comprehensive scheme where, after an adverse asylum decision, there is a danger of destitution.'"

[39] Parliament has consciously created different schemes of support for individuals based on their asylum status and these differences have been upheld as being legitimate and compatible with Convention rights. The failure to provide ARCs to failed asylum seekers has a much less significant impact than the different schemes of support. This is not a case based on a suspect ground where very weighty reasons need to be shown for different treatment. Insofar as there can be said to be differential treatment between the applicant and his comparator, I find such difference to be justified.

Conclusion

[40] For all the reasons set out, the applicant's challenge to both the instant decision and the adopted policy must fail and I dismiss the application for judicial review. I will hear the parties on the question of costs.

Postscript

[41] Although I have found that there is no legal basis for the applicant to challenge the refusal to provide him with an ARC, it is not possible to end the analysis without commenting on one of the salient features of this case.

[42] The applicant made his further submissions under paragraph 353 of the Rules on 13 May 2021. His solicitors wrote to the Home Office enclosing the report of Dr Syed and asking that these should be considered as a fresh claim on the basis that:

(i) They have not already been considered; and

(ii) Taken together with previously considered material, there was a realistic prospect of success.

[43] Some 19 months later, no decision has been made as to whether these further submissions will be treated as a fresh claim. This has left the applicant in a legal limbo whereby he enjoys a right to remain in the UK but his status remains that of a failed asylum seeker. This cannot be in his interests nor those of the public more generally.

[44] No doubt it could be said that the asylum system in the UK is under stress and there is a lack of resources to process applications and make decisions in a timeous fashion. It is nonetheless completely unacceptable that this situation has been allowed to persist over such a long period. People who seek asylum have the right to be treated fairly and with respect. This basic right cannot be afforded in circumstances where there has been abject failure to implement the Immigration Rules and make decisions on the status of claims.