IN THE UPPER TRIBUNAL

R (on the application of Kallal Taludker) v Secretary of State for the Home Department IJR [2015] UKUT 00057 (IAC)

Field House

19 January 2015

BEFORE

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

KALLAL TALUDKER

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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No appearance on behalf of the Applicant.

Ms Amelia Walker of Counsel, instructed by the Treasury Solicitor, appeared on behalf of the Respondent.

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JUDGMENT

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Introduction

JUDGE GOLDSTEIN: The applicant brings an application for judicial review of the respondent's decision dated 15 April 2014 in which the respondent refused the applicant's application for leave to remain in the United Kingdom as a Tier 4 (General)

Student Migrant. The application was refused because leave to remain had been curtailed to 12 October 2012 and accordingly the application dated 23 January 2014 was more than 28 days after the expiry of the applicant's previous leave.

2. The applicant claims that the curtailment notice dated 13 August 2012 was ineffective in light of Syed (curtailment of leave – notice) [2013] UKUT 00144 (IAC). He maintains that he had valid leave until 30 April 2014 and that accordingly his application for leave to remain was made in time.

3. Permission to bring these proceedings was granted on 30 July 2014 by Upper Tribunal Judge Peter Lane on the basis that in reliance on Syed the applicant asserted that he did not receive notice of curtailment and that:

> 'In the absence of a reply by the respondent to the PAP letter and acknowledgement of service, the point is arguable'.

4. At the outset of the hearing before me on 19 January 2015 there was no appearance on the part of the applicant, no explanation for his absence and no request for an adjournment. I was satisfied and indeed having checked, that the applicant was properly served with the notice of hearing by this Tribunal on 19 November 2014. In those circumstances I was invited by Ms Walker to proceed with the hearing in his absence and saw no reason why I should not do so.

Factual Background

5. On 31 July 2014 the respondent filed and served an acknowledgement of service and summary grounds of defence in which she explained that the applicant's judicial review was

an abuse of process since the ground on which the applicant relied had already been adjudicated upon.

6. Upon receipt of the grant of permission on 5 August 2014 the Treasury Solicitor wrote to the Tribunal further explaining that the point under challenge in this judicial review had already been litigated through to an oral hearing in the Administrative Court under reference CO/5577/2013 and had already been heard by the court and found to be unarguable.

7. In that regard there is before me the decision on the papers of Mr Justice Hickinbotton in which he had this to say:

> "The claimant seeks to challenge the Secretary of State's decision of 1 May 2013 setting removal directions. He relied upon two grounds.
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> First, he says that the curtailment of his leave to remain on 13 August 2012 (effective 12 October 2012) was ineffective, because he did not receive notice of it. However, the Secretary of State was entitled to conclude that he did receive it, given (i) when encountered the claimant accepted that the address to which it was sent was his home until December 2012, (ii) the notice was sent there by recorded delivery in August 2012, and (iii) the claimant accepts he knew that the college's licence had been suspended in November 2012 and that the college had been shut down by February 2013 but took no steps to regularise his position or find/register with another college. From that, I would draw the same conclusion.
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> Second he submits his Article 8 [rights] would be breached if he is removed. However, there is no evidence upon which an independent Tribunal could find that the removal of the claimant from the United Kingdom was a disproportionate interference with the Article 8 rights of either the claimant or anyone else. The Article 8 claim, is legally hopeless.

For those reasons I do not consider either ground arguable."

8. The applicant orally renewed his application for permission to apply for judicial review, in relation to which there is before me the Order of the Administrative Court dated 17 January 2014 when following the hearing of the applicant's renewed oral application for permission before David Pittaway QC (sitting as a Deputy High Court Judge) it was ordered that permission be refused and that the applicant pay the respondent's costs in respect of the acknowledgement of service summarily assessed in the sum of £320.

Discussion

9. In R (Opoku) v Southwark College Principal (QBD) [2002] EWHC 2092 (Admin) it was held inter alia that although the common law doctrine of res judicata did not preclude a fresh application, "… a fresh application unless based on fresh material, may constitute an abuse of process".

10. In the present case the applicant has adduced no new evidence and provided no fresh material to support his claim not to have received a notice of curtailment. In consequence, I have had no hesitation in concluding that the application of the doctrine of res judicata and the principles outlined in Opoku (above) clearly apply in the particular circumstances of this case and that the applicant's present claim of lack of effective service can only be viewed as an abuse of process.

11. I find it to be of particular concern that the applicant chose not to draw to the Tribunal's attention the fact that the Administrative Court had found against him upon exactly the ground upon which he now relies.

Decision

12. For the above reasons, this claim for judicial review is dismissed.

Costs

13. For like reason I grant Ms Walker's application that the applicant be ordered to pay the respondent's costs of resisting the claim that includes the drafting of detailed grounds of defence and attending the hearing.

14. In that regard there is before me a schedule of costs prepared by the respondent a copy of which I am told, was sent to the applicant on Friday 16 January 2015. Ms Walker has informed me most fairly that due to the applicant's non-attendance at the hearing today both she and her instructing Treasury Solicitor have agreed to reduce their respective fees of attendance that was previously based on two hours but will now be based on 45 minutes. Therefore I am informed, that the attendance of Counsel's Treasury Solicitor will now be reduced from the sum of £380 to the sum of £120, that being a reduction of £260.

15. Ms Walker has told me that she would have been at the Tribunal for at least one hour by the time the hearing before me concludes and in such circumstances she has decided to reduce her fees by the sum of £80.

16. Having made these reductions from the original figure submitted of £2,524 the sum now sought will be £2,184 exclusive of VAT and with VAT added of £104 the total due will be £2,288.

17. I have decided that in view of what I have found to be the hopelessness of the applicant's claim and the abuse of process

that I have identified above I grant and order the respondent's costs in the sum of £2,288.

18. I will thus make this costs order as an interim one so that I can allow the applicant the opportunity to raise objections to it (if any) within seven days of the date of service of this judgment. In the absence of such representations within that time the order for costs will become absolute.

Permission to Appeal

19. Although no application has been made for permission to appeal to the Court of Appeal having considered this issue for myself as I am required to do by Rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, for the reasons already given I refuse to grant such permission.~~~~*0*~~~~