



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26293/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 29th July 2014

Determination promulgated
On 15th Aug 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JEETENDER KUMAR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr Sharma, of Matthew Cohen and Associates, Solicitors
For the Respondent: Mr Young, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India, born on 5th January 1980. He came to the UK as a student on 21st September 2010. By written application dated 25th January 2013 he sought further leave to remain outside the requirements of the Immigration Rules, giving these reasons:-
 - (1) My right to a private and family life under Article 8 ECHR would be infringed. I am in a close and loving relationship with my EEA fiancée.
 - (2) I will be detained/ill-treated by Indian authorities if returned to India.
2. By letter and notice dated 17th June 2013 the respondent refused the appellant's application by reference to the family and private life requirements of the

Immigration Rules, finding no exceptional circumstances, and informed the appellant of his liability to removal to India. Regarding the alleged threat from the authorities, the appellant was advised that a request for international protection should be made in person by booking an appointment at an Asylum Screening Unit (ASU).

3. The appellant did not act on that suggestion, but appealed to the First-tier Tribunal on the following grounds:
 - (1) The appellant is in a relationship with an EU national and his removal will affect his and his partner's rights to family life conferred by Article 8 ECHR.
 - (2) The appellant has threat to his life from his estranged wife and her family. They have lodged false criminal complaints against the Appellant in India. If removed to India he fears threat to his life.
4. First-tier Tribunal Judge P A Grant-Hutchison heard the appellant's appeal on 27th January 2014. The appellant and his girlfriend gave evidence. She is a citizen of Poland who has worked in Denmark for the last seven years. They plan to marry when he is free to do so. The appellant had begun divorce proceedings in Scotland against his wife in India. His concern over return to India was that his estranged wife, a police officer, has raised a false domestic violence allegation against him under section 498A of the Indian Penal Code.
5. In his determination promulgated on 1st February 2014 the judge observed that the Article 3 matter would have been more aptly raised as an asylum claim. However, the ground of appeal was procedurally available and the judge correctly found that he was bound to consider it.
6. The judge noted objective evidence that section 498A of the Indian Penal Code is open to abuse, but he rejected the Appellant's particular allegations at ¶15. At ¶16 he found in the alternative that a section 498A complaint did not engender a breach of Article 3, India being in general a country which operates under law.
7. Turning to Article 8, the judge found no good reason to go outwith the framework of the Immigration Rules (¶23). He went on to observe that the appellant's relationship with his girlfriend, established largely through the internet but also through visits, did not amount to family life, and that there would be no significant infringement of private life.
8. The appellant's first ground of appeal to the Upper Tribunal complains that the judge's finding at ¶15 goes against the weight of the evidence. It insists that documents obtained from India are genuine and that if the Appellant were to be imprisoned as a result of such a process this would "breach his Article 3 rights". It also complains that the finding at ¶16 that India operates under law does not exclude an Article 3 risk to the Appellant.
9. Ground 2 criticises the judge's finding that there was no family life in the UK. It is said that the appellant and his fiancée cannot enjoy family life in India, because he

would be put in prison as soon as he arrives, and that he should be granted one year's discretionary leave in order to finalise his divorce in the UK and to marry his fiancée.

10. Ground 3 is taken against the finding that the wife of the Appellant does not work for the police in Delhi and insists again on the genuineness of the documents obtained.
11. In oral submissions Mr Sharma summarised his points thus: (1) the adverse credibility finding misapprehended and was against the weight of the evidence; (2) the judge accepted evidence of this particular law being abused, and erred by finding that was overcome because India generally applies the rule of law; and (3) the judge erred in thinking that the appellant could have family and private life anywhere but the UK, and so should have allowed the appeal also under Article 8. Mr Sharma referred to documents showing proceedings against the appellant in India, including one which records the appellant's mother saying in a complaint that the appellant's wife is a constable in the police in Delhi, and that her daughter-in-law had registered a case against the appellant's family. This is not item JK2 mentioned in the determination, which is also numbered as page 20 of the appellant's First-tier Tribunal bundle, but page 28 (there are varying and rather confusing numbers and references on the documents, which seem to have been used in various contexts.) Mr Sharma sought also to introduce further evidence from India to prove that the appellant's wife (now ex-wife) is a police officer. He also said that at ¶11(a) the judge misunderstood his submission about police actions in India. Page 28 of the bundle showed that police officers had gone to carry out a search connected with the wife's complaint at the home of his family members, but it was on an air force station and guards did not allow them to do so without a court order. This showed that the police had tried to carry out an illegal search on her behalf. As to Article 3 risk, there were so many articles about abuse of section 498A, which was admitted even by the Supreme Court of India, that the judge ought to have held it proved. As to Article 8, the appellant has now obtained a divorce from the Sheriff Court in Aberdeen, and could produce the extract decree if error of law were to be found and updating evidence admitted. The appellant had a right under Article 8 to the grant of leave which he sought, one year, in order to marry his girlfriend, which would be possible only in the UK.
12. Mr Young submitted that the judge was right to say that only one document mentioned the appellant's wife being a police officer, and the attribution of a wrong page reference for that was insignificant. The source of the information was not official, but the appellant's mother. There was admittedly a sheaf of documents about legal proceedings in India concerning the appellant and his wife, which the judge did not mention. Even if there were some error in that, the judge was right to point out that if the appellant thought this to be a real risk, he could have raised it well before he did. More importantly, the judge was right to find in the alternative that any proceedings pose no Article 3 risk. It was for the appellant to prove that. If the proceedings are genuine, it is plain that they are vigorously opposed on the appellant's side. He has access to lawyers in India. A process of detention and trial,

even if the offence is non-bailable, does not equate to risk of ill-treatment. As to Article 8, the Immigration Rules amount to an almost complete code. The appellant did not suggest that he met the requirements of the Rules, and showed no good reason to go outside the Rules. Nor did he show anything to prevent him, once free from his previous marriage, from marrying his girlfriend in the UK - or in Denmark, Poland or elsewhere.

13. Mr Sharma in reply said that the Registrar at Aberdeen would not allow the marriage to go forward unless the appellant produced his passport and a valid visa, and that the respondent currently has the passport and (if asked) would decline to release or exhibit it for purposes of the appellant showing his identity to the Registrar. He accepted that there was no evidence or submissions on this aspect in the First-tier Tribunal. He said that the appellant advised him that the local authority website states that a passport is required, and that he cannot go anywhere to marry until he gets his passport and a visa.
14. I reserved my determination.
15. It would have made for a much more satisfactory consideration of the case if the appellant had made his protection claim at an ASU in the usual way requested by the respondent, rather than by adding it into his application based on family and private life and then stating it as a ground of appeal. As the judge observed at ¶15, the respondent did not have an opportunity to interview the appellant. There is no substantive refusal letter on the matter and the respondent has not taken any considered position on the background evidence of risk of the nature alleged. I raised the question again in the Upper Tribunal why the appellant elected to proceed as he did, and the question went unanswered. However, the issue now is whether the judge went wrong as a matter of law in resolving as he did the case which the appellant offered to prove.
16. The Indian court documents in the appellant's bundle before the First-tier Tribunal show acrimonious proceedings between the appellant and his wife, or their families. They do not all relate to a section 498A complaint, but it would be a radical conclusion that they are all fabrications. The judge did not go so far as to find that they are, but they provide a context in which the conclusion at ¶15 that the appellant has not been complained about to the Indian police might be doubted. However, that was a conclusion open to the judge; he gave reasons; and a conclusion to the contrary would not make the appellant's case.
17. It can also be drawn from the court documents that the appellant's side of any proceedings is being vigorously fought. The appellant did not develop any coherent case that he could not vindicate his rights in legal proceedings in India without infringement of his Article 3 rights. His case assumed that it would be sufficient to show that such proceedings exist, that they are sometimes taken by vindictive spouses, and that he was liable to be detained, the alleged offence being non-bailable. That was misconceived. Pre-trial detention, and prosecutions on malicious

complaints, happen everywhere. Without more, those are matters for resolution in the country concerned, not for international protection.

18. The submission that the police attempted an illegal search on behalf of the appellant's wife, and that this was overlooked by the judge, read too much into the evidence. It is an account that officers attended with a view to conducting a search, and went no further when told a warrant would be required. That might happen anywhere, and does not show attempted abuse. Much the same applies to the appellant's proposed reading of the background evidence that the Supreme Court and the Law Commission in India accept that there is a major problem of malicious complaints under section 498A. There is a letter from the Chairman of the Law Commission, a former Judge of the Supreme Court, on this subject dated 30 August 2012 at page 35 of the appellant's bundle. It says that the extent of abuse is "not established by empirical data" and is "not a ground to denude the provision of its efficacy, keeping in view the larger societal interest".
19. The appellant did not show in the First-tier Tribunal that the Indian legal system is incapable of resolving cases such as this, or that those affected are at risk of ill-treatment reaching the level required for protection in terms of Article 3. His appeal to the Upper Tribunal is substantially reargument and to some extent exaggeration of his case, and falls short of showing any material error. The judge's conclusion on the fundamental point at ¶16 is brief, but adequate.
20. The same applies to the judge's finding that there was no good arguable case requiring him to look outside the Rules regarding family and private life; and even if he had shown legal or practical difficulties in the way of his marriage in the UK, that is not a situation where he has a right under Article 8 to be granted leave for that purpose, notwithstanding that he cannot meet the requirements of the Rules.



30 July 2014
Upper Tribunal Judge Macleman