



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38584/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9 March 2016

Determination Promulgated
On 6 April 2016

Before

UPPER TRIBUNAL JUDGE STOREY

Between

MR CHAUDHRY WAQAS AHMAD
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Benton of Counsel instructed by Synthesis Chambers
Solicitors

For the Respondent: Mr S Staunton, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Pakistan. He had been granted leave to enter the UK as a multiple entry general visitor valid from December 2010 until 19 December 2015. On 20 December 2012 he applied for variation of leave to enter or remain. This was refused in March 2013. His application for leave to remain on family and private life grounds was refused on 12 September 2014. In that application the appellant submitted that he had established family and private life on the basis of having entered into a relationship with his brother's former wife with whom he was living with her 7 children. The appellant said that he had converted to the Ahmadi faith and as a result his father had publicly disowned him. His father, brother and other family members had threatened him on many occasions and therefore it would not be safe for him to return to Pakistan.

2. This appeal arises from the appellant's challenge to the decision of First-tier Tribunal Judge Abebrese made on 10 September 2015 to dismiss his appeal against the decision by the respondent to refuse him leave to remain and removal to Pakistan, decisions made on 12 September 2014.

3. At the hearing before the First-tier Tribunal judge the appellant's representative accepted that the appellant could not meet the requirements of the Immigration Rules but maintained that his appeal should be allowed outside the Rules on the basis of exceptional circumstances. Whilst accepting that the appellant had established a private and family life in the UK, the judge did not find that there would be grave consequences if the appellant were to be returned to Pakistan. The judge gave two main reasons for this conclusion. First of all, the judge stated that

"... the Tribunal does not find his evidence regarding the treatment to be credible regarding the treatment of his family due to change of his religious beliefs. The appropriate forum for this claim to be heard would be within the context of asylum but the appellant had not made such a claim. The appellant claims that he is being ignored by the rest of his family but there is nothing to stop him from living in another part of the country even if his evidence was deemed to be credible. The appellant could also in any event seek protection from the state in respect of the threats which he claims he has received, it is not credible that the appellant has on the facts been persecuted by the state."

4. Second, despite accepting the appellant had a partner settled in this country with 7 children the judge did not consider that his removal would be disproportionate. As set out in [19]:

"The Tribunal finds that the decision of the respondent is proportionate in that the appellant and his partner were both aware of the repercussions of their relationship and the fact that they decided to enter into the relationship when the appellant was in this country as a visitor. The appellant has not complied with the Rules and they may continue their relationship outside of the country with Pakistan being an option which is open to them. It is not credible based on the medical evidence before the Tribunal that the appellant's partner would not be able to cope without him she has the support of her children the eldest of which is 24. The Tribunal does not consider

that the relationship of the appellant with his partner's children is adequate in the circumstances for weight to be given to the provisions of section 55 of the Border, Citizenship and Immigration Act 2009 regarding the duty of the court to consider the best interests of the children ..."

5. The respondent in her Rule 24 notice stated that she opposed the appeal. She also expressed her view that the First tier Tribunal did not have before her the appellant's bundle. This was seemingly a reference to the comment made by the First tier Tribunal judge who had granted permission that he was unclear whether the appellant's bundle before him had been filed with the First-tier Tribunal in advance of the hearing which took place on 4 August 2016. The Rule 24 notice concluded at paragraph 4 that "[g]iven that there was very limited evidence of the Appellant's relationship with his partner's children it was properly open to the [judge] to find that the relationship was not adequate in the circumstances for the weight to be given to the provisions of s. 55". On 4 March 2016 the appellant's solicitors wrote saying that they wished to confirm that the appellant's bundle was submitted via recorded post on 13 July 2015 and they enclosed copies of this bundle along with a copy of their letter of 13 July 2015 and proof of postage.

6. I should first of all clarify that having considered the copy of the letter sent by the appellant's solicitors on 13 July and the proof of postage by recorded delivery I am satisfied that (i) the appellant had served a bundle of documents on the respondent prior to the hearing which took place on 4 August; and (ii) the judge appears not to have seen or had regard to this bundle.

7. That gets the respondent's defence of the judge's decision off to a bad start because her Rule 24 response places particular reliance on the "limited evidence" adduced by the appellant as regards his family life circumstances in the UK, whereas the appellant's bundle contained significant details of the same. It is impossible to rule out that the judge may have taken a different view of the s.55 considerations in this case if he had seen or had regard to these further details.

8. That alone is sufficient to satisfy me that the judge erred in law. It is also sufficient for me to conclude that he materially erred in law because even given the well-established principles governing assessment of Article 8 claim outside the Immigration Rules I cannot exclude that this further detail may have had a material bearing on the outcome of that assessment.

9. In any event, there are other serious flaws in the judge's reasoning. As regards his approach to the appellant's claim that he would be at risk on return because his family had disowned him and threatened him for becoming an Ahmadi, the judge appeared to want to have it both ways. On the one hand his response was that he would not consider this claim because the appellant had chosen not to make an asylum claim. On the other hand his response was to find such a claim not credible: see e.g. the closing words of [16]: "... it is not credible that the appellant has on the facts been persecuted by the state." He also appears to have decided that the appellant's claim could not succeed on asylum grounds anyway because "[he] could also in any event seek protection from the state in respect of

the threats which he claims he has received". That proposition is not consistent with Tribunal country guidance on risks facing certain Ahmadi on return to Pakistan: see MN and others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389 (IAC)

10. Were this a judicial review application I would have some sympathy with the approach of seeking to respond to the appellant's claims regarding risk on return by virtue of having become an Ahmadi by pointing out that he had chosen not to make an asylum claim which afforded him an alternative remedy. In this appeal the appellant raised no asylum grounds in his s.120 notice. Nevertheless I cannot find fault at a general level with the submissions made in his application and repeated before me by Mr Benton that just because an appellant chooses not to apply for asylum does not preclude him from asking that assessment of his Article 8 claim takes into account all relevant factors, including his concerns and fears regarding risk on return to Pakistan. Article 8 requires a holistic assessment and the Strasbourg Court has recognised the country conditions can be a relevant factor: see e.g. *JAKUPOVIC v. AUSTRIA* - 36757/97 [2003] ECHR 67 (6 February 2003). Of course, at a general level it may be said that for a judge to consider asylum grounds in an Article 8 context leaves open to abusive applicants to have two bites at the cherry contrary to the one-stop philosophy reflected in the legislation - first by raising Article 8 grounds in a non-asylum appeal and second, if they are rejected, by making an asylum claim. However, against that, if there is a judicial finding rejecting any sound basis to the asylum grounds in an Article 8 context it may well be open to the respondent to certify any subsequent asylum claim as clearly unfounded on the basis of those findings of fact.

11. In any event, the judge in this case did not proceed to analyse the Article 8 claim in a coherent or consistent way and that in itself betrays an error of law. Again, I am satisfied that it is material because if the judge had considered the appellant's asylum grounds on their merit and in the light of Tribunal country guidance it cannot be excluded that he may have taken a different view about the level of obstacles and difficulties that would face the appellant on return. This error was compounded by the fact that the appellant's wife was also said to be someone who had changed to the Ahmadi faith. This renders equally problematic the judge's finding at [17] that "[t]he objections from his family does not mean however that they are not able to continue their relationship in Pakistan ..." And at [19] that "they may continue their relationship outside of the country with Pakistan being an option which is open to them. "

12. Further errors on the part of the judge were: incorrectly applying at [15] the relevant tests set out in the Immigration Rules; failing to take into account the evidence relating to the appellant's partner's disability (it was simply not enough to say that this was not a relevant factor because there was a child who was 24); appearing to apply a legality rather than a merits approach to the appeal at [18]; and construing ss.117A-D considerations as duties resting on the Secretary of State.

13. For the above reasons I conclude that the decision of the First tier Tribunal was materially wrong in law and must be set aside. I see no alternative in this case but to remit

the appeal to be heard afresh by the First-tier Tribunal whose composition must exclude Judge Abebrese.

Signed 
Date

Judge of the Upper Tribunal