



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/49233/2014

THE IMMIGRATION ACTS

Heard at Birmingham
On 26 April 2016

Sent to parties on:
On 13 May 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR VIJAY KUMAR

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bradshaw (Counsel)
For the Respondent: Mr Mills (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellant's appeal, brought with permission, to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Juss hereinafter "the judge") promulgated on 16 March 2015 dismissing his appeal against the respondent's decision of 28 October 2014 refusing his asylum and human rights claims and deciding to remove him from the UK.
2. By way of brief background, the appellant was born on 16 December 1976 and is a national of India. It appears that he entered the UK on 12 May 1999. It is noted that he claimed asylum on that date. He attended a screening interview on 22 November 1999 but did not attend a substantive asylum interview until 14 October 2014. It does appear that there has been considerable delay on the part of the respondent in processing the asylum claim. In any event, the respondent refused the claim on the above date and also refused to grant leave under Article 8 of the European Convention on Human Rights (ECHR) either within or outside the Immigration Rules. It was that refusal which led to the unsuccessful appeal before the judge.
3. The hearing before the judge took place on 4 March 2015. Both parties were represented. The appellant was, in fact, represented by Mr Bradshaw of Counsel who also appeared on his behalf before me. Oral evidence was given by the appellant (though only in response to questions put by cross-examination) and by three witnesses who had been called on his behalf. As to the asylum arguments, it was the appellant's case that he was at risk at the hands of members of the Khalistan group, a Sikh militant group based in the Punjab. He said that some members of that group had left a bag containing guns at his father's store, that the police had subsequently seized it and that the members of the group had wrongly thought he had informed the police about the guns. The appellant also sought to argue that he had established a strong family life and private life in the UK such that, when taken with the unexplained delay in dealing with his asylum claim, it would not be proportionate to remove him.
4. The judge, as noted above, dismissed the appeal. It is entirely clear, in reading the determination, that he did not think very much of the asylum claim. In the grounds it is suggested that the judge indicated to Mr Bradshaw, at the outset of the hearing, that he viewed that claim as being one which was unlikely to succeed. Indeed, in the determination he concluded that the claim was "entirely fabricated" and sought to explain that view in paragraphs 16, 17 and 19 of the determination. At paragraphs 16 and 17 he said this:
 - “ 16. I find that the appellant does not discharge the burden of proof for the reasons given. First there is the asylum claim. I consider this at the lower standard of proof. I do not accept that the appellant has a well founded fear of persecution for a convention reason. He claims to have been visited by two men from the Khalistan group who came to his father's shop and left a bag there containing pistols. However, the appellant has been inconsistent about how many men there were, how many pistols there were, and even whether he was beaten up by these men at his home or not. In the absence of any evidence to this effect, it cannot be assumed, as the refusal letter makes clear, that they were from the Khalistan group. But even if they were, this was a long time ago. The Khalistan movement is now dead to all intents and purposes in India. The appellant can turn to the State authorities for protection. This is not a case for surrogate international protection.
 17. The same must apply to the claim for humanitarian protection. There is no case for saying that there is a potential violation of Articles 2 and 3 of the Human Rights Convention. The fact is

that there is a sufficiency of protection available in India for the appellant, even if his claim were true, which I hold it is not. Moreover, internal relocation is available to him. The claim which he puts, which I have held to be entirely implausible, has to be assessed in terms of the assessment of future fear, and there is no reasonable possibility on the lower standard of this fear being anything other than fanciful for the future. Finally, and no less importantly, it is significant that the entire tenor of the evidence in chief and the evidence generally given by the appellant has been predicated on the Article 8 claim. There is next to nothing on the asylum claim put before me in evidence orally.”

5. As to the Article 8 claim it is suggested, in the grounds, that the judge took a somewhat unorthodox approach to the oral evidence of the witnesses, calling all three of them in at the same time to adopt their witness statements. It is also said that there was no subsequent cross examination. In explaining why he was not allowing the appeal on Article 8 grounds the judge said this:

“ 20. But in any event, there is nothing to suggest why this appellant, being able-bodied, and still relatively young, cannot return to India and reintegrate in society there. This is an appellant who is single, has no children, and has no family in the UK. He has no medical issues. I accept that there is the wider family that he associates with but this is nothing out of the ordinary in terms of normal family ties that one may have with uncles, aunts and sibling cousins. If the appellant did pick up an 8 year old cousin many years ago and take him to school, that still does not take the relationship anything other than into the realms of a normal relationship. Article 8 must also now be considered in the context of the public interest considerations as a result of Part 5A of the Immigration Act 2014.

21. The appellant’s private life has been built up at a time when his status was precarious in the UK. The statutory provisions are clear that little weight is to be given to a private life that has been established at a time when the person in the United Kingdom is here unlawfully. What he has to do is show ‘exceptional circumstances’, and in the light of the fact that there are no medical issues, no marriage, no children, and no dependency of any kind other than the ordinary, it cannot be said that there are exceptional circumstances.

22. There is, however, the question of delay. This is, I accept, an inordinate delay. Lord Simon Brown in *EB (Kosovo)* had made it clear that delay can have an impact in at least three different ways, one of which is to enable someone to cast down roots and to develop a private and family life and the other of which is to lead to the impression that the Secretary of State is not interested in removing a party such as to give a person with unlawful leave a degree of permanency which otherwise would not exist. This is not a matter of three or four years delay which has sometimes figured in the leading delay cases of past years. This is a very significant delay of over 15 years for which no explanation has been given whatsoever. The cases on delay have, however, also made it clear that it is no part of the judicial function to reprimand the administrative authorities and to penalise them for such administrative failings.

23. Accordingly, whereas I view the delay in coming to a decision with some concern, I can only express the hope that the Secretary of State will revisit the position of the appellant and consider granting him leave to remain. Whether or not the Secretary of State does so, however, is ultimately a matter for her.”

6. The appeal having been dismissed, the appellant applied for permission to appeal to the Upper Tribunal. The grounds contended, in summary, that the judge had erred with respect to his treatment of the relevance of the delay in the context of his Article 8 considerations; had erred in failing to consider the adopted and unchallenged evidence of the three witnesses as contained in their respective witness statements and, in particular, had failed to consider indications therein that

the ties the appellant had with relatives in the UK amounted to family life within the meaning of Article 8 as opposed to private life; had erred with respect to the asylum arguments in seemingly taking a point against the appellant for not giving oral evidence about it in circumstances where it is normal practice for asylum claimants to simply adopt the content of a witness statement and had erred in failing to consider argument and background material regarding risk on return and sufficiency of protection.

7. Permission was granted on all grounds although the judge granting permission expressed the view that the first two were, perhaps, the stronger.

8. Permission having been granted there was a hearing before the Upper Tribunal (before me) in order to consider whether the judge's determination did contain material errors of law and, if so, what should follow from that. The respondent had, in fact, filed a brief "rule 24" response defending the determination. However, Mr Mills, before me, indicated he would concede that there was legal error in the judge's treatment of the Article 8 considerations. Mr Mills expressed the view that the determination failed to demonstrate that any proper balancing exercise, with respect to proportionality, had been carried out. He suggested that the case should be remitted to the First-tier Tribunal.

9. I accept Mr Mills concession. It does not appear that in considering Article 8 the judge did take into account the inordinate delay despite his clearly expressing the view that that delay was, indeed, inordinate. What was required, it seems to me, was a consideration as to proportionality (since it seems to have been accepted that Article 8 was engaged) which treated the very extensive delay and its consequences and implications as a relevant factor. Indeed, in looking closely at what the judge said towards the end of paragraph 22 and in the opening to paragraph 23, it seems to me that he took the view that he should not consider the delay as part of the balancing exercise simply because it is not a judge's function to reprimand or penalise administrative authorities for administrative failings. At least that is one reading of the words used and nothing was said to suggest a different reading was appropriate. It does not seem to me then that what was said by the judge represented the correct approach. Whilst it may well be true, as he properly points out, that a judge should not seek to penalise the Secretary of State for delay, that does not mean that such a delay, at least of this magnitude, should not or cannot be considered as a part, perhaps even a key part of an Article 8 assessment. Accordingly, I do conclude, as indeed I am urged to do by both representatives, that the judge erred in his treatment of the Article 8 claim and that, in consequence, material legal error is established.

10. As to asylum, Mr Mills did not make a similar concession. Nevertheless, I do have some concerns about the way in which the matter was considered though I accept that there may have been reason for the judge to think that there were some weaknesses regarding aspects of that claim. However, what the judge had to say at paragraph 17 of the determination does appear to suggest that he weighed against the appellant his failure to provide oral evidence in support of the claim. In this context I would accept Mr Bradshaw's argument in the grounds that that is not, of itself, a factor which ought to weigh against an appellant bearing in mind, in particular, the practice of witness statements standing as evidence in chief. The appellant had, whatever view might be taken as to the contents of his witness statement, submitted one for the purposes of the appeal hearing so he had provided, through that means, his evidence as to the claim. I also, insofar as it is now relevant, have some doubts about the appropriateness of the approach (and it has not been contested that this was the approach) of the judge in indicating, at the outset, that he viewed the asylum claim as unlikely to succeed and it may be the case that the strength of that initial view impacted

unconsciously on the way he subsequently dealt with the arguments. I would accept, therefore, that the judge did also err in his treatment of the asylum claim.

11. It follows from the above that I must set the judge's decision aside. In the circumstances I do not preserve any of the findings or conclusions. I have decided to remit the appeal so that matters may be considered entirely afresh by a differently constituted First-tier Tribunal. I have, therefore, issued some directions, which appear below, and which will hopefully aid the preparation of the rehearing before the First-tier Tribunal.

Directions

- A. The decision of the First-tier Tribunal is set aside. The case is remitted to the First-tier Tribunal to be decided by a judge other than Judge Juss.
- B. The time estimate for the rehearing shall be three hours. The services of a Punjabi speaking interpreter shall be required.
- C. The parties shall prepare for the rehearing before the First-tier Tribunal on the basis that nothing is preserved from the previous determination.
- D. The respondent (my having noticed that the original respondent's bundle is for some reason not contained within the Upper Tribunal's file) shall, at least 10 working days prior to the date which will be fixed for the rehearing, send to the First-tier Tribunal and the appellant's solicitors, a copy of all documents which are to be relied upon at the rehearing including a copy of the relevant reasons for refusal letter.
- E. The appellant's solicitor shall, at least 10 days prior to the date which will be fixed for the rehearing, send to the First-tier Tribunal and the respondent, a bundle containing any documents to be relied upon not previously filed, including any further witness statements, any further skeleton argument and any further background country material.
- F. The parties should note that any bundles filed in accordance with these directions should be indexed and paginated and, where appropriate, should contain a schedule of essential reading.

Decision

The making of the decision of the First-tier Tribunal involved the making of errors of law. The decision is set aside.

The case is remitted for rehearing before a differently constituted First-tier Tribunal.

Anonymity

I make no anonymity direction.

Signed
Upper Tribunal Judge Hemingway

Date

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed
Upper Tribunal Judge Hemingway

Date