



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14026/2019

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)
On 14 April 2021

Decision & Reason Promulgated
On 29 April 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ABDUL SUBHAN
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Georget instructed by Sabz Solicitors.

For the Respondent: Mr McVeety Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Herwald ('the Judge') promulgated on 20 January 2020, in which the Judge dismissed the appellant's appeal on all grounds.

Background

2. The appellant is a citizen of Pakistan born on 16 April 1982 who applied for leave to remain in the United Kingdom on human rights grounds.
3. Having considered not only the documentary evidence but also the oral evidence given at the hearing, which enabled the Judge to consider the weight that should be given to the various aspects of the evidence, the Judge sets out findings of fact from [16] of the decision under appeal. The Judge concludes the appellant had not established that he was able to succeed under the Immigration Rules or that the appellant had established very significant obstacles to integration into Pakistan. The Judge considers article 8 ECHR outside the rules from [19] finding there will be no interference with any right to private life. The Judge finds the family life with a UK-based sibling and his wife goes beyond the normal elements of dependency. In relation to whether any interference with such family life is proportionate the Judge writes:
 22. Even if the refusal prejudice is private or family life of the Appellant and others in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8, I am also satisfied that the interference is in accordance with the law because the Appellant has no other right to remain in the United Kingdom in the circumstances appertaining at the date of the decision. Furthermore I concluded that given that the state has a right under international law to control the entry of non-nationals to its territory, in this case on performing the necessary balancing exercise, any interference would not be disproportionate to achieving the maintenance of a fair and just immigration policy which it is necessary for the United Kingdom government to maintain.
4. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 15 April 2020, the operative part of the grant being in the following terms:
 3. The grounds in the application for permission to appeal argue that the judge erred by failing to take into account all the medical evidence that was submitted with the Appellant's appeal which was relevant to the assessment of proportionality under Article 8 of the ECHR. It is submitted that a letter from the GP dated 1 March 2019 noted that the Appellant is unfit to travel on his own hence unfit for an interview at the moment. It is also argued that the Immigration Judge failed to place adequate weight on the expert opinion of Dr Samia Latif who concluded that the Appellant had established a close psychological and emotional bond and he would find it very difficult to receive support from anyone else. He suffers from speech difficulties and experiences problems in communicating and as a result he would not only experience difficulty in communicating his needs but his mental health difficulties caused him to suffer self esteem and confidence issues and he would not be able to request his care needs to be met by anyone else and therefore being returned to Italy or Pakistan would not allow him to gain the support and help he requires.
 4. The judge found that the Appellant's case is put on the basis that the Appellant's mental health and current state are such as would militate against such integration. The judge found that there were other relatives living in Pakistan and found that the witness sought to obfuscate the court by suggesting that there was no one in Pakistan whatsoever who could help the Appellant when in fact when push came to shove they would next have to revise his evidence. The judge noted that no relatives in Pakistan had been approached to see if they might assist. With regards to Article 8 outside the Rules the judge found that he is not persuaded that there is interference with the right to respect for private life and found that he does not find that there are such

circumstances as required him to go on to consider Article 8 proper. The judge found that any interference will be proportionate, given his findings above.

5. I find that there is an arguable error of law with regards to the judge's decision. Initially, the judge found that the circumstances were such he was not required to go on and consider Article 8 proper but then went on to state that the Appellant has a degree of family life with his siblings and he proceeds on the basis that the relationship perhaps goes beyond the normal elements of dependency given the description of the witness as to their assistance to the Appellant at the present. This in itself has some inherent contradiction. If the judge accepts that the relationship goes beyond the normal elements of dependency then it is incumbent upon the judge to give more weight to the expert opinion of Dr Samia Latif which is "I find that there is a close psychological and emotional bond and the Appellant would find it very difficult to receive support from anyone else". In view of the expert opinion of Dr Samia Latif I find that the judge has not engaged properly with all the relevant factors in resolving the issue of proportionality. Although it is unclear whether the GP letter dated 1 March 2019 relates particularly to the asylum appeal which had been previously refused I find that it may somehow be relevant with regards to removing the Appellant from the United Kingdom if in fact he is still unfit to travel.

5. The Secretary of State in a Rule 24 response dated 23rd June 2020 opposes the application, submitting:
 - (b) The first ground argues that the FTT judge failed to consider or give sufficient weight to the medical evidence submitted in this case. It is clear from the decision that the FTT Judge did consider the GPs report from March 2019 and the supplementary report from Dr Latif and records a summary of Dr Latif's evidence at 13 (i) of the determination. The FTT Judge did not need to set out the report in its entirety. The medical evidence also needed to be considered set next to the contradictions and omissions in the sponsor's evidence about which family members the appellant still had in Pakistan [see the FTT Judges detailed findings at paragraph 17(f) to (m) of the determination]. Even if Dr Latif's report had been corrected about the whereabouts of the appellant's father, it is submitted this is not material given the FTT Judge's findings about the availability of other family members to whom the appellant could turn.
 - (c) The second ground of appeal argues that the FTT Judge acted procedurally unfairly in failing to adjourn the hearing (at the request of the Respondent, who was unable to provide a Presenting Officer on that date). It is submitted that the lack of a Presenting Officer could not make the hearing unfair for the appellant.
 - (d) The ground further argues that it was not clear on what basis the appellant's protection claim had been refused. It is submitted this is not material as the FTT Judge considered the Human Rights claim on the basis of the Immigration Rules and there was no Protection claim before him. For completeness the Respondent would notify the Tribunal that the appellant's asylum claim had been refused on 8 February 2019 on 3rd Country grounds and certified with no in country right of appeal; the appellant's application to remain on Private Life grounds [the subject of the appeal] was made on 4 April 2019.
 - (e) The respondent submits that the grounds do not establish any material errors of law.

6. The Judge's findings at [17 (a) - (o)] are of importance and are in the following terms:

“17. It is appropriate to consider at this stage, whether or not the Appellant may have met the requirements of the Immigration Rules

- (a) The Appellant is a citizen of Pakistan, albeit he has been granted limited leave to remain in Italy. The proposal here was that he should be returned to Pakistan, and the Respondent insisted that there were no “very significant obstacles” to integration in that country.
- (b) The Appellant’s case is put on the basis that his mental health and current state are such as would militate against such integration. The onus is on him to show this.
- (c) The Appellant has a brother living in this country. I do not doubt the sincerity of the brother in terms of his wish to look after the Appellant, who, it must be said, evinces present mental health difficulties which are, to an extent, being addressed by medication.
- (d) What became quickly apparent here, is that the Appellant had in the past been able to adapt to a lifestyle in Italy, a country far removed culturally from his homeland, and it appears from the background information that he left that country only because his leave to remain expired. He then chose to enter the United Kingdom illegally, and made a claim for asylum.
- (e) The Respondent was not present, and I could not access the documents relating to the asylum claim. There was no suggestion on the Appellant’s behalf that the hearing should be adjourned to enable this to occur. I proceed on the basis, therefore, that the asylum claim was rejected, and no appeal against this followed.
- (f) The evidence, such as it was, put before me on an objective basis, fails to persuade me that any treatment required by the Appellant, could not be accessed in Pakistan. There is no evidence to the effect that antidepressant medication might not be available, and nothing to persuade me to the effect that suitable medical treatment would not be available in the Appellant’s home country. The fact that the standard of medical facilities in that country might not be comparable with that here, does not entitle the Appellant to remain in the United Kingdom of itself.
- (g) While the attention provided by the Appellant’s brother and sister-in-law are no doubt admirable, I did not find them to be credible witnesses in terms of what might be available to the Appellant were he to have to return to Pakistan.
- (h) The witness Mr Khaliq was asked what family the Appellant now has in Pakistan. His answer was clear:-

“There is no one, just my old father, aged 72, and he lives in a mosque because he does not have any money”.

I was therefore left with the impression that the only person who might be of assistance to the Appellant in his homeland, would be his “elderly” father, aged 72.

- (i) In fact, the wife of Mr Khaliq gave the lie to this, claiming that there is only the elderly father who is “in his 80s,”. I was not therefore sure what age the “elderly” gentleman might be.
- (j) Minutes later, in his evidence, Mr Khaliq was asked if the Appellant (and he) did not have any siblings? The witness remembered that there were siblings, but his immediate reply was that “they are all married, living too far, somewhere I do not know”. He was asked to clarify. It turned out that there are four brothers, one of whom is in Saudi Arabia. There is therefore a brother still living in Pakistan, and I am not persuaded to the effect that he might be unavailable to provide assistance. I am persuaded that the witness sought to obfuscate the court, by suggesting that there was no one in Pakistan whatsoever who could help the Appellant, when in fact, when “push came to shove,” witness had to revise his evidence. He then revealed that he has four sisters in Pakistan whose husbands presently reside in Dubai. The witness could give no reason, which would satisfy the court, as to why it might not be that such persons might assist the Appellant on his return
- (k) Both witnesses made it clear that they give financial support to the Appellant. I found it particularly telling, as to why this might not continue in Pakistan. He was asked as follows:-

“If your brother was sent to Pakistan. Would you send the money to family to assist him?”

His answer was to the effect that “he would die, there are no male relatives”. That hardly answered the questions, as I had already found that there were male relatives who might be of assistance. The witness then went on to say that although “we can do it here, he would not have the understanding to look after himself in Pakistan.”; that avoids answering the question. The fact is, that it seems to me feasible and probable that were the Appellant returned to Pakistan, this family, who had dug deep into their own pockets, could continue to do so, and support the Appellant living with relatives in that country, or, alternatively, in the form of semi-independence with care provided.
- (l) It later transpired that there are in fact cousins in Pakistan, some of whom live in major cities, according to the male witness (although the female witness contradicted this and said that they live in a dangerous area in the north-west).
- (m) It transpired that no relatives in Pakistan had been approached to see if they might assist. It transpired that no enquiries had been made in Pakistan of what care might be available outwith the family.
- (n) The psychologist seems to have been misled, for she opined that the Appellant’s father lives in the United Kingdom (paragraph 2.6 of her report). She does not address the issues of what might or might not be available in Pakistan, but I note that although it was

suggested before me that the Appellant did not have capacity at present, he had been able to give a reasonable account of himself to the psychologist, which suggests that might also be possible, on his return to Pakistan, and would assist him to gain the help he needs there.

- (o) On this basis, I do not find that there are very significant obstacles to integration in Pakistan.

Discussion

7. The appellant's case is based upon the medical evidence that was before the Judge in relation to his mental health needs and dependency on his brother and sister-in-law as the first issue, and secondly an assertion that the Judge erred in relation to the appellant's protection claim and committed a procedural unfairness when all the information relating to the protection claim was not available to the Judge.
8. Reference was made by Mr Georget to the reports from Dr Latif and the GP letter which it was submitted contain a diagnosis of severe PTSD and depression and to communication difficulties that the appellant has. It was submitted that the appellant will not feed himself and his food is put in front of him and that he is unable to live independently at this time and that the UK-based sponsor, his brother and sister-in-law, had given evidence that they did not leave him alone and that they cared for him in tandem.
9. It was accepted by Mr McVeety that the Judge's decision was not as detailed as others may have been and did not examine within the body of the determination the level of care received by the appellant in the United Kingdom, but I find that does not mean that the evidence relied upon by the appellant in support of his claim was not considered with the required degree of anxious scrutiny by the Judge. A reading of the decision as a whole shows that all the material, including the medical reports, was properly considered.
10. The Judge was aware of the appellant's arguments regarding the degree of care it was claimed he needed and specifically refers in the decision to the discussion concerning the care available to the appellant in Pakistan. It is not made out this was the Judge considering an abstract issue, but rather a matter that specifically relates to the appellant's evidence relied upon before the Judge.
11. It is not made out any medication the appellant requires is not available in Pakistan. This is not an Article 3 case based upon medical needs of the appellant, but if it was the required test would not be satisfied on the evidence. Whilst it was suggested the appellant's condition and presentation would allow it to be found there are very significant obstacle to his integration into Pakistan, the finding of the Judge at [17 (d)] that the appellant had in the past been able to adapt to a lifestyle in Italy (where the UK-based family were not available to assist) is a finding that has not been shown to be outside the range of those available to the Judge on the evidence, especially as Mr McVeety noted in his submissions, there is no evidence of any medical need in Italy and the appellant claimed PTSD as a result of issues in Pakistan not events that occurred in Italy. No legal error has been shown in the Judge finding the appellant lived without issue when he must have had the condition he later raised with the medical professionals in the UK,

before his grant of residence ran out and rather than apply for a further period he came to the United Kingdom.

12. The difficulty for the appellant is that the witnesses before the Judge did not tell the truth in relation to who is available in Pakistan within the family who could take on a caring role or assist the appellant. The Judge referred to the evidence in the findings above and the conclusion regarding lack of credibility of the witnesses and the finding they deliberately attempted to mislead or prevent the Judge from gaining an honest picture of the family situation is a finding within the range of those available to the Judge on the evidence. If a party deliberately withholds information and fails to tell the truth, a Judge is left having to make findings upon the evidence upon which appropriate weight can be placed. The Judge's finding it had not been shown the appellant could not return to Pakistan, could not access medical treatment, and that there were no family members who could assist him to gain the help he needs, are findings within the range of those available to the Judge on the evidence. The Judge's finding of no very significant obstacles and the proportionality is based upon this finding in part. It was not made out the appellant would be intentionally deprived of the necessary mental health care if sent back to Pakistan or that if professional assistance was required it was not available or that those who engage with the appellant would not be to facilitate effective communication with him or work out a regime that ensured his care needs were met.
13. In relation to the Judge's findings concerning article 8 ECHR, the Judge sets out the relevant legal self-direction at [19] and [20] and the conclusion there was no interference with the right to respect for private life and that the appellant could not satisfy the requirements under the Immigration Rules relating to the same, as there was little evidence in relation to the nature of his private life, or to show any interference was not proportionate is a finding within the range of those available to the Judge.
14. The Judge at [21] finds there was no circumstances requiring him to consider article 8 proper although the Judge does consider whether the appellant could succeed on the basis of family life within the Immigration Rules but finds no such entitlement exists. Having made that statement, the Judge does go on to consider the issue of family life outside the Rules within the same paragraph which, whilst contradictory, is not material as both elements were considered.
15. The Judge finds a degree of family life between the appellant and his siblings, which is the nature of the relationship that had been relied upon in support of the medical aspects and the submissions regarding the existence of very significant obstacles which the Judge did not need to repeat again in the later sections of the decision. The Judge clearly finds that family life recognised by article 8 exists and proceeded on the basis that there was more than a normal element of dependency. The Judge identifies that the nature of that family life and the element of dependency is as per the evidence, then goes on to consider the remaining aspects of the Razgar questions.
16. The Judge finds that the public interest in maintaining effective immigration control relied upon by the respondent is the determinative factor. The appellant could not satisfy the immigration rules, his status in the UK had always been

unlawful and precarious, and the Judge clearly weighed in the balance the evidence relied upon by the appellant. There is no challenge in the grounds to the adverse credibility findings made and the lack of clarity in the appellant's case also undermines the challenge to the Judges assessment.

17. Much was made by Mr Georget in his submissions of the protection issues. The documents before the Judge included a copy of the appellant's Italian ID card and Italian Residence Permit valid from 3 October 2013 to 30 September 2016, and evidence of the appellant being granted subsidiary protection by the authorities in Italy as a result of the situation in his home area in Pakistan. It is not clear from such documents whether the question of internal relocation in Pakistan was considered on the limited information available.
18. The EU Directive sets minimum standards for the grant of 'subsidiary protection' with a view to supplementing the international protection afforded by the Geneva Convention. A person who does not qualify as a refugee but who, if returned to his country of origin, faces a risk of serious harm such as the death penalty, torture or inhuman or degrading treatment or punishment, is eligible for subsidiary protection. A person granted subsidiary protection is issued with a residence permit of limited duration.
19. The appellant claimed to fear on return to Pakistan at the hands of the Taliban, which was accepted by the Italian authorities, but unless there was evidence to show that the appellant continued be at risk of such treatment if he returned to Pakistan, the original grant is in itself not sufficient justification for the appellant to be eligible for a further grant of subsidiary protection. As the appellant failed to make any further application or evidence that any application made had been successful in Italy, the Judge has not been shown to have erred in law in relation to this aspect of the appeal. The appellant failed to establish on the evidence that substantial grounds could be shown for believing that if he was returned to Pakistan he would face such a risk. It was not made out on the evidence before the Judge that there were good reasons for believing that the risk of serious harm previously accepted by the Italian authorities will be repeated or continues.
20. Mr Georget submitted the Judge was wrong not to adjourn the hearing due to the asylum point as the Judge proceeded on the basis of the appellant's asylum claim made when he entered the United Kingdom had been rejected without being sure of the basis on which this had occurred. It was submitted the evidence in the Rule 24 response now informs that the claim was rejected on third country grounds, not because it was a claim without merit. It was argued the Judge's failure to agree to adjourn and to proceed without obtaining the necessary information concerning the asylum claim amounted to procedural unfairness.
21. The Judge refers at [5] to the adjournment request where it is written:
 - “5. The Respondent was not represented, due to a shortage of Home Office Presenting Officers, and I resolved to proceed under the guidelines laid down in the case of Surendran. The Appellant's representative agreed to this proposal. There was a formal application for an adjournment by the Home Office. I did not consider it in the interests of justice to adjourn the matter, and even if I did so, it was not clear that a Home Office presenting Officer might be available in the future. Thus there was no submission from the Respondent.”

22. No procedural unfairness is made out in the Judge refusing the respondent's request for the reasons claimed. The Judge was arguably correct to note that the appellant's asylum claim had been rejected by the Secretary of State, albeit that the Judge was unaware that this was on third country grounds. Even though there was no Presenting Officer present that does not explain why the appellant, who would have received the third country decision and certification, did not himself provide that evidence if he was seeking to rely upon it. The submission on the appellant's behalf that the Judge should have of own motion adjourned the proceedings to obtain the information relating to the asylum claim fails to explain why this should be so when proceedings before the First-tier Tribunal are adversarial by nature and not inquisitorial.
23. The other point, as noted by Mr McVeety, is that the Judge records at [5] that the appellant's representative before the Judge, Mr Holt, agreed to proceed in the manner proposed as set out above. There was no application made by the appellant's representative that the Judge was required to consider whether the proceedings should have been adjourned to obtain any missing documents.
24. It is also relevant to note this is a human rights appeal and not a protection appeal and that there is no evidence before the Judge of a successful challenge to the third country decision and certification by way of judicial review.
25. It is settled law that a person need not make an asylum claim to be able to rely upon evidence supporting a real risk of harm. The Upper Tribunal in the recently reported decision of JA (human rights claim: serious harm) Nigeria [2021] UKUT 0097 (IAC) found, with specific reference to headnote (2):

"(1) Where a human rights claim is made, in circumstances where the Secretary of State considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for her to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required, in the light of the Secretary of State's international obligations regarding refugees and those in need of humanitarian protection.

(2) There is no obligation on such a person to make a protection claim. The person concerned may decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the immigration rules. If so, the "serious harm" element of the claim falls to be considered in that context.

(3) This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether

or not the element constitutes a “new matter” for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.

(4) On appeal against the refusal of a human rights claim, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1) of the 2002 Act, but only on the ground specified in section 84(2).”

- 26. The difficulty for the appellant is that insufficient evidence was led before the Judge, or submissions made upon the same, to establish there was any merit in a claim that the appellant faced a real risk sufficient to entitle him to a grant of leave to remain in United Kingdom on any basis, including protection related issues.
- 27. The Judge clearly dealt with the material that was made available relevant to the basis on which the case before him had been brought. It is not made out the Judge failed to understand the nature of the appellant’s case, failed to consider the evidence with the required degree of anxious scrutiny, gave undue or rational weight to the evidence upon which the Judge considered weight could be given, failed to provide adequate reasons in support of findings made, misdirected himself in law, or made findings outside the range of those which are reasonably available to the judge on the evidence.
- 28. Whilst the appellant disagrees with the Judges decision and clearly wishes to remain in the United Kingdom with his brother and sister-in-law, article 8 does not entitle a person to choose where they wish to live, and it is not made out the Judges decision is infected by error of law material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in relation to this appeal. It has not been made out there is anything arguably irrational or unfair about the Judges decision to dismiss the appeal on all grounds.

Decision

There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 22 April 2021