IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19041/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 September 2021	**On the 20th October 2021**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR MEHMOOD MUHAMMAD TAHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Sarwar, Counsel instructed by Kays Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals with permission against a decision of First-tier Tribunal Judge Shepherd promulgated on 22 March 2021 dismissing his appeal against a decision of the Secretary of State to refuse him entry clearance to the United Kingdom as the spouse of a person settled and present here. The core of the decision is that the Secretary of State was justified in refusing entry clearance, given the finding by the judge that paragraph 320(11) was properly applied in this case.

The history behind this case is that the appellant first entered the United Kingdom in 2012 with entry clearance as a spouse. That marriage came to an end with allegations of rape of which the appellant was found not guilty at trial. He then sought leave to remain on the basis that he was the victim of domestic violence. That was refused and his appeal against that decision was also refused. At some point he went to Ireland, apparently in July 2015, returning to the United Kingdom on 20 August 2016 where he met the sponsor and he then left the United Kingdom on 10 October 2017, returning to Pakistan where he married the sponsor in February 2018.

In the refusal letter the Secretary of State relied primarily on the fact that the appellant had according to the Secretary of State overstayed and this was aggravated in that he had failed to comply with reporting instructions and had absconded. The appellant then in his skeleton argument required under the Practice Directions in the First-tier Tribunal put the Secretary of State to proof on that point, it being stated that no aggravating feature for failure to report has been served and as such the appeal stood to be resolved in the appellant's favour.

The Secretary of State replied to that, stating at paragraph 5 that no evidence of the appellant's failure to report had been served, that was noted. It says: "Our records show that he was contacted by letter on 3 July 2015 to make him aware that he was liable to be detained, that he was required to report from 17 July 2015 onwards and to remain at the [address in] Walsall." It is said that it was signed for and received on 7 July 2015 and it is highly probable that he received these notices and was aware of his duty to report.

At the hearing, the Secretary of State adduced a copy of the previous determination which related to the domestic violence claim and the judge made findings about that. The judge did not hear evidence from the appellant but did hear submissions from the Secretary of State's representative, Mr Hogg, and from Mr Sarwar, who appeared for the appellant below as he appears today. It is of note that Mr Hogg submitted that Home Office records indicate the appellant had claimed asylum on the day of arrival in Ireland but there was no further records available as to what had happened. The submission was also made that the appellant had been willing to frustrate the Immigration Rules by failing to sign. In reply Mr Sarwar is recorded to have submitted that no proof of the relevant matters had been provided, that is that he had been served with a notice informing him that he had to report and second, that there had prior to that hearing, been much reliance by the Secretary of State on the prior determination in identifying aggravating factors; and,that in any event 320(11) should not be applied.

The judge turned herself to the decision of the previous Tribunal at paragraphs 41 and 43, finding that there were not merely background and lent significant support to the respondent's case by finding the appellant exaggerated what had happened to him in order to make a claim to stay in the United Kingdom, that this was evidence of contriving to frustrate the Immigration Rules and he had used the Rules to stay in the United Kingdom knowing his claim was exaggerated and that he had no other basis for staying.

The judge also at paragraph 49 said:

> "The facts of this case are similar in terms of the appellant's overstaying and voluntarily returning to his country of origin in order to seek to regularise his status to return as a spouse to a British citizen. However, there are aggravating circumstances in this case which were not present in PS and the refusal letter clearly considered them."

The judge then noted that the aggravating circumstances included, amongst other things: absconding; not meeting temporary admission or reporting restrictions; making frivolous applications. At paragraph 51 it was noted that a copy of a letter had been provided, the appellant had not denied receiving the letter of 3 July 2015 and she found on balance that the appellant did fail to report. The judge also found that the appellant going to Ireland and claiming asylum negatively affected his credibility. The judge found that the respondent was entitled to exercise discretion to refuse the application and then considered Article 8, finding that the scales were tipped significantly in favour of the public interest such that the refusal decision was proportionate.

The appellant sought to challenge the decision on three grounds:

(i) That the judge misdirected herself in law with regard to PS (India) [2010] UKUT 440 and that this was material, the judge failing properly to distinguish PS on its facts.

(ii) that the judge misdirected herself in law as to the burden of proof and had wrongly relied on the unsupported submission that the appellant had claimed asylum in Ireland, given that there was no evidence of that, simply submissions by Counsel and that accordingly the hearing was unfair and that this was a material error; and,

(iii) that the judge erred in her assessment of Article 8 in misapplying Section 117B(4) of the 2002 Act and did not apply a correct test in assessing insurmountable obstacles.

Having heard submissions from both representatives, I conclude that the judge manifestly erred in taking into account as evidence the fact that the appellant had claimed asylum in Ireland, a fact which is not evidenced and appears simply to have arisen in closing submissions. Findings can only be made on evidence and submissions clearly are not evidence.

The question then is whether that is material. I consider that the judge's error is aggravated by her findings in respect of whether the letter of 3 July was served or not. The judge has, with all possible respect, fallen into exactly the same error as noted above; treating submissions as evidence. What is said is that the letter was served but again of course there is no evidence of that and simply saying that the appellant had not denied it is not proof and the judge's

finding that on the balance of probability she was satisfied that it had been served is not made out.

I accept also the appellant's submission that in taking into account as evidence without an opportunity of the appellant to counter that does amount to unfairness in all the circumstances of this case and applying the proper test of what a reasonable onlooker possessed of all the relevant facts would think I conclude that there was an appearance of unfairness in this case.

Whilst I consider that the judge's findings with respect to the previous determination are unchallenged, how and why she took them into account are less clear, given what is said at paragraph 49, and I am not satisfied that it could be said that in any event, had the judge not made the findings in respect of absconding and having claimed asylum in Ireland that the judge or indeed any other judge could safely have concluded that there were aggravating circumstances in this case, given the taint of unfairness to which I have already referred. Accordingly, for the reasons I find that ground 2 is made out.

In the circumstances therefore it is unnecessary for me to consider ground 3, which is parasitic. Ground 1 is of less relevance, given that I have already found that the decision did involve the making of an error of law and falls to be set aside.

Accordingly, I find that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. Given the nature of the unfairness and the unfair hearing which took place, I reluctantly come to the conclusion that the matter must be remitted to the First-tier Tribunal to be heard again on the basis that none of the findings of fact reached by Judge Shepherd are preserved.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues; none of the findings of fact are preserved.

Signed Date 23 September 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul