



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08535/2019

THE IMMIGRATION ACTS

Heard at Field House
On 23 April 2021

Decision & Reasons Promulgated
On 10 May 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AA (MOROCCO)
(ANONYMITY DIRECTION MADE)

Appellant/Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Appellant

Representation:

For the Appellant: Ms M. Cohen, Counsel, instructed by the Coram Children's Legal Centre

For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Hussain promulgated on 20 November 2020. The judge dismissed an appeal by the appellant, a citizen of Morocco born on 23 August 1999, against a decision of the respondent dated 23 August 2019 to refuse his asylum and humanitarian protection claim, allowing it on human rights grounds. There is a cross-appeal by the Secretary of State against the decision to allow the appeal on human rights grounds.

2. For convenience, I will refer to the appellant before the First-tier Tribunal as “the appellant”, and to the respondent/appellant in the human rights claim appeal as “the Secretary of State”.

Factual background

3. The appellant was born in Italy and lived there until he was seven years old. He moved to Casablanca with his family, and later to Marrakesh. His father died from cancer in 2012. The appellant’s mother and two sisters remain in Morocco. The appellant is still in contact with them.
4. The appellant claimed to have opened a Facebook account in Morocco, on which he posted content that was insulting to the monarchy, and made other anti-government comments. The posts received a lot of comments, around 90% of which were negative. There were threats that it would be easy to track the appellant down and get rid of him. He later received two anonymous threatening phone calls. He deleted his Facebook account and destroyed his SIM card. He made plans to leave Morocco illegally without telling his parents, when he became aware of people who had opposed the government disappearing. He claims that he is on a wanted list and that he is at risk of being persecuted on his return. He arrived in this country clandestinely in May 2016, when he was still a child, and claimed asylum in August 2016.
5. The Secretary of State rejected the appellant’s claim on credibility grounds, as did the judge below. It is not necessary to outline the judge’s credibility findings in any depth, as it is common ground between the appellant and the Secretary of State that the judge fell into error in his assessment of it, on grounds to which I will return. The Secretary of State did not consider there would be any obstacles to the appellant’s reintegration in Morocco, or any exceptional reasons such that his removal would have unjustifiably harsh consequences.

The decision of the First-tier Tribunal: paragraph 276ADE(1)(vi)

6. A theme of the evidence before the First-tier Tribunal was the appellant’s mental health conditions. The judge had the benefit of a psychiatric report (Dr Day) and a psychological report (Mr Thorne), and a country report from Dr I. Fernández-Molina, a lecturer in International Relations at the University of Exeter, as well as statements from two of the appellant’s support workers. Dr Day opined at page 22 of her report that the appellant was fit to give evidence, provided steps were taken to accommodate his vulnerability. The hearing before the judge proceeded on the basis of submissions only.
7. The medical reports and the evidence of the appellant’s support workers said that appellant experiences depression and anxiety and is reliant on his support network to cope. He has symptoms which could be paranoid schizophrenia, and some PTSD symptoms, although those were harder to confirm due to his guarded mental state (see Dr Day at page 16). The judge accepted that evidence. At [56] he said:

“Looking at his medical condition as expressed in two expert reports as well as two professional support workers [sic], I cannot simply brush aside the comment that the appellant’s mental health would be under severe strain if he goes back. He is likely to become more suspicious and to experience the negative consequences of stress. He is likely to have ‘raises [sic] stress hormones, inability to relax and elevated fear. I believe he could deteriorate and his psychotic symptoms... may be worsened culminating in a psychotic breakdown.’”

Although the judge did not say so in terms, the quote in the above paragraph appears to be taken from paragraph 65 of Mr Thorne’s report dated 10 February 2020.

8. The judge said that both experts had been unable to agree upon the condition(s) from which the appellant suffers, or make arrive at any form of firm diagnosis (see [52]). At [53], the judge noted that Mr Thorne’s report recorded depressed mood and anxiety symptoms in the appellant, although did not diagnose him as being clinically depressed. The appellant, noted Mr Thorne, had declined to engage with the mental health services available to him, preferring to self medicate using controlled substances.
9. The judge concluded that the appellant would face “very significant obstacles” to his integration in Morocco upon his return, within the meaning of paragraph 276ADE(1)(vi) of the Immigration Rules. Having outlined the support the appellant receives in this country at [55], the findings of Dr Day at [58], and an extract from the country report of Dr Fernández-Molina at [60] concerning the comparative availability of mental healthcare in Morocco, the judge concluded at [63] in these terms:

“I have borne in mind the fact that the appellant’s mother remains in Morocco and he has two younger siblings. However, his father is dead. Given his complex needs, including the support he receives in the United Kingdom, I conclude that the absence of that support structure which his mother and two younger siblings alone cannot provide, the appellant would not be able to integrate into Moroccan society in the sense explained by the court in [Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813; [2016] 4 WLR 152].”
10. At [64] the judge said, “I conclude therefore that the appellant meets the requirement of paragraph 276 ADE(1)(vi).” At [76], under the heading *Decision*, the judge said, “I allow this appeal on human rights grounds.”

Permission to appeal

11. Permission to appeal was granted to the appellant and the Secretary of State by Upper Tribunal Judge Martin.
12. The appellant advanced four grounds of appeal:
 - a. Ground 1: the judge relied on his own opinion of the inherent plausibility of the appellant’s asylum claim.

- b. Ground 2: the judge failed to direct himself concerning the impact of the appellant's age and vulnerability when assessing the appellant's credibility, and failed to take into account expert evidence relied upon by the appellant when reaching adverse plausibility and credibility findings.
 - c. Ground 3: the judge failed to make findings on live issues, namely whether the appellant was at risk of Article 3 consequences upon his return as a result of his health conditions, and whether the appellant would face being persecuted as a result of his membership of the particular social group, namely a person living with mental ill-health in Morocco.
 - d. Ground 4: the judge relied on matters adverse to the appellant which had not been raised by the Secretary of State, nor put to him or his appellant.
13. The Secretary of State's grounds of appeal against the judge's human rights findings were as follows:
- a. There was no basis upon which the judge was entitled to find that the appellant's removal to Morocco would breach his human rights. His mother and sisters still live there and could help him to access the support he needs.
 - b. The judge failed to identify which article of the European Convention on Human Rights he allowed the appeal under.
 - c. The threshold for Article 3 ECHR is very high, even as modified by the Supreme Court in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17.

The law

14. Article 3 of the European Convention on Human Rights ("the ECHR") provides:
- "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
15. Article 8 provides:
- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Discussion

16. In a rule 24 response dated 5 February 2021, the Secretary of State did not oppose the appellant's appeal against the dismissal of his asylum claim. It was accepted that the judge failed to consider the impact of the appellant's vulnerability on the assessment of his evidence, such that the credibility assessment was flawed. In further written

submissions dated 16 February 2021, the Secretary of State expanded upon her position. The judge had failed to consider the Joint Presidential Guidance Note No. 2 of 2010, nor the principles enunciated in SB (vulnerable adult: credibility) Ghana [2019] UKUT 398 (IAC). Before me, Mr Tufan adopted the same approach. It was common ground at the hearing that the judge's credibility assessment was flawed for that reason alone and must be set aside. The judge also failed to address the health consequences of the appellant's removal, in Article 3 terms, as he had been invited to do. That was an error.

17. There was a discussion at the hearing as to whether the appellant's claim to be a member of a particular social group ("PSG") on account of his mental health conditions was a "new matter" for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002. If it were, the First-tier Tribunal would have lacked the jurisdiction to consider the point, subject to the consent of the Secretary of State. I raise this issue here for completeness. It is not necessary for me to resolve it, in light of the common ground concerning the judge's flawed credibility assessment, which requires the entirety of the judge's credibility assessment to be conducted afresh in any event. For the reasons set out below, I remit this case in its entirety to the First-tier Tribunal. It will be for that tribunal to determine the issues to be resolved upon the decision being remade, including whether the PSG point is a "new matter".

The Secretary of State's appeal

18. I turn now to the Secretary of State's appeal against the judge's human rights findings.
19. Mr Tufan submitted that the judge erred by purporting to allow the appeal "under the Immigration Rules", whereas human rights appeals may only be allowed on human rights grounds. That submission is without merit. It is clear from [47] that the judge was addressing the appellant's human rights claim through his consideration of paragraph 276ADE(1)(vi). That paragraph provides that, subject to certain other criteria (none of which is disputed in these proceedings), a person is entitled to limited leave to remain on human rights grounds, if the person:

"...is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be **very significant obstacles** to the applicant's integration into the country to which he would have to go if required to leave the UK..." (Emphasis added)
20. The judge summarised the import of the "private life" provisions of the Immigration Rules at [48], correctly noting that they set out the Secretary of State's view as to the assessment of private life claims. Only if that assessment fails would an assessment "outside" the rules be necessary, the judge noted. I consider that the judge correctly approached the role of the Immigration Rules in a human rights appeal as setting out the Secretary of State's view as to the proportionality of the matters encapsulated by Article 8(2) of the ECHR. In addition, as the Secretary of State's skeleton argument

dated 16 February 2021 now rightly concedes, it is clear that the judge allowed the human rights appeal under Article 8, so nothing turns on that criticism: see [11].

21. The judge did not, therefore, err on account of having allowed this human rights appeal “under the Immigration Rules”. The operative decision of the judge was to allow the appeal “on human rights grounds”: see [76]. Where an individual meets the requirements of the rules, that is positively determinative of the proportionality question under Article 8(2) of the Immigration Rules. As the former Senior President of Tribunals held in TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109 at [34]:

“...where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”
22. The Secretary of State’s true complaint lies with the judge’s conclusion that the appellant would face “very significant obstacles” to his integration in Morocco within the meaning of paragraph 276ADE(1)(vi) of the Immigration Rules. At its heart, that was a finding of fact. Appeals lie to this tribunal on points of law, rather than disagreements of fact. Of course, certain findings of fact may be infected by errors of law, thereby falling within the jurisdiction of the Upper Tribunal to consider whether the decision of the First-tier Tribunal involved the making of an error of law. In R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982, the Court of Appeal summarised, at [9], some of the bases upon which a finding of fact may be infected by an error of law. They include failing to give adequate reasons for findings on material matters, giving weight to immaterial matters, and making a material misdirection of law on any material matter.
23. Mr Tufan relied on the Secretary of State’s grounds of appeal. The judge did not provide any reasons for finding that the appellant’s mother and sisters would not be able to support him upon his return. That was a finding central to his conclusion that the appellant would face “very significant obstacles” upon his return, and one which was, therefore, insufficiently reasoned, he submitted.
24. Mr Tufan also submitted that the judge approached the paragraph 276ADE(1)(vi)/Article 8 private life assessment as though it were a proxy for Article 3 health claims, without having set out the clear distinction between Article 3 and Article 8. By his discussion of the appellant’s health conditions, and the relative unavailability of healthcare in Morocco (see [60]), the judge approached the Article 8 private life analysis within an Article 3 health paradigm, and took into account an irrelevant consideration, namely the relatively poor mental health provision the appellant would receive in Morocco. The comparison between British and Moroccan standards of healthcare was not the test, he submitted. Given the judge purported to allow the appeal in light of the appellant’s mental health conditions, and the comparative lack of support he would receive in Morocco, it was incumbent upon him to have approached his discussion by reference to the test for Article 3 health claims, namely that as set out in AM (Zimbabwe) v Secretary of State for the Home

Department, pursuant to Paposhvili v Belgium (Application no. 41738/10). There were insufficient reasons for allowing the appeal on this basis, submitted Mr Tufan.

25. Resisting those submissions, Ms Cohen submitted that there was no substance to the Secretary of State's complaint that the reasons given by the judge at [63] were inadequate. The judge's findings that the appellant's mother and sisters in Morocco could not provide him with the assistance he requires must be viewed in the context of the evidence before the First-tier Tribunal, with which the parties were familiar. The judge would have been familiar with the evidence of GN, the appellant's support worker with the South London Refugee Association. At [22] of her statement dated 10 February 2020, GN wrote that the appellant's family in Morocco do not know about his health conditions. They would not understand and would think that his conditions were shameful. In any event, [63] was not the highpoint of the judge's findings; the thrust of the Day report's conclusions, for example at pages 15, 16 and 22, was that the appellant would not be able to cope if returned to Morocco. That was plainly relevant to the appellant's private life claim. The judge accepted that evidence. The Secretary of State simply disagrees with the judge's findings.
26. I accept Mr Tufan's submissions. The judge gave insufficient reasons for finding that the appellant's mother and sisters would not be able to support him. Secondly, he approached his analysis of the appellant's health-based Article 8 private life claim without first having addressed the factual matrix through the lens of an Article 3 assessment.
27. The judge's operative conclusion was that the appellant, having lived in Morocco for most of his formative years, with the support of his mother and sisters, with whom he remains in contact, would not be receive from them the support he needs. I agree with Mr Tufan that the reader of the decision is left wondering why the appellant's mother and sisters would not be able to help him to (re)establish his family and private life in Morocco. Their role was plainly central to the appellant's prospect of reintegrating in Morocco. While I accept that GN wrote in her statement that the appellant would not want to speak to his family about his mental health conditions, that is not a factor capable of addressing the broader factors which are inherent to the concept of integration.
28. At [62], the judge quoted from the well-known passage at [14] of Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813; [2016] 4 WLR 152. Sales LJ there stated that:

"The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society **and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.**" (emphasis added)

29. Even if the appellant may have some difficulties in speaking about his mental health conditions and drug use with his family in Morocco, that does not address his wider ability to rely on his sisters and mother for their support in other aspects of his life. The medical evidence before the judge outlined how the appellant has engaged with mental health services here to only a limited extent, despite the support and encouragement to do so that he currently enjoys. It is not clear to the reader of the decision, even when armed with the materials that were before the judge, as to why the appellant's unwillingness to engage with his mother and sisters concerning his mental health conditions would place his broader integration at risk, given the minimal medical support he currently receives in this country for his mental health conditions, even with the benefit of his current support networks.
30. I also accept Mr Tufan's remaining submissions about the deficiency in the judge's "very significant obstacles" analysis. Paragraph 276ADE(1)(vi) of the Immigration Rules intends to articulate the Secretary of State's Article 8 ECHR private life obligations towards applicants. When approaching what amounts to "integration" for the purposes of paragraph 276ADE(1)(vi) in the context of a health-based integration claim, it was incumbent upon the judge to have directed himself concerning (and, moreover, considered) the threshold for an Article 3-based health claim. As Ms Cohen's third ground of appeal correctly contends, the judge had failed expressly to address Article 3 at all. That was an error which not only left an Article 3-shaped void in the judge's decision, but it also led to the judge failing to take account of a relevant consideration when addressing Article 8 through the lens of the "very significant obstacles" test.
31. There has been extensive judicial consideration of the relationship between Article 3 claims and Article 8 health-based claims. Health-based Article 8 claims are not lesser form of Article 3 claims, pursuant to a lower threshold. Accordingly, an assessment of what amounts to "very significant obstacles" based on a health claim should take place in the context of the health claim having also been assessed within the Article 3 paradigm. That assessment will inform and calibrate the assessment of what amounts to "very significant obstacles" for the purposes of paragraph 276ADE(1)(vi), as it will guide the decision maker to focus on the integration aspect of the "very significant obstacles" test, over and above health and treatment difficulties. In PF (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 1139, Hickinbottom LJ addressed the relationship between articles 3 and 8 in these terms, at [19]:
- “...although they each seek to translate the value of human dignity and freedom (which is the very heart of the ECHR) into specific rights of individuals and the same factual matrix may coincidentally engage both article 3 and article 8, the focus of and relevant criteria for the two provisions are very different. In particular, it is wrong in principle to consider that an article 3 claim can be treated in the alternative as an article 8 claim with the latter simply having a "lower" threshold. The threshold criteria are essentially different in nature, not (or, at least, not only) degree.”

32. By failing to conduct a free-standing Article 3 ECHR assessment, the judge failed to have regard to considerations that were material to the related assessment of the health-based “very significant obstacles” claim under paragraph 276ADE(1)(vi).
33. For these reasons, I consider the judge’s human rights analysis to be flawed and must be set aside.
34. Even if the judge’s Article 8 analysis was not flawed to the extent that set out above, I would not have preserved those findings. As the appellant and Secretary of State agree, the judge failed to conduct an Article 3 analysis. While he addressed some of the matters that would be relevant to such an assessment under his Article 8 analysis, he did not do so in the context of addressing the extensive jurisprudence on Article 3. Nor did he consider whether the appellant was a member of a PSG who faced being persecuted in Morocco on that account (subject to the issue as to whether the Secretary of State’s consent was required). Extensive findings of fact are yet to be made, some of which may overlap with the health-based Article 8 findings already reached by the judge. I do not consider that the existing findings of fact concerning paragraph 276ADE(1)(vi) are sufficiently distinct from the matters in relation to which it is common ground that the judge failed properly to address to enable those findings to be preserved. Preserving health-based Article 8 findings which should have been reached in the context of an overall assessment of the appellant’s health from an Article 3 (and possibly PSG) perspective could unnecessarily tie the hands of the tribunal seized with the remaking of this appeal. The findings are interlinked and cannot readily be differentiated. A full reappraisal of the case is required.
35. The appellant did not give evidence before the First-tier Tribunal, meaning that the prospect of the Article 8 findings being set aside and remade does not expose him to the ordeal of having to give evidence for a second time on the same issues. The concerns highlighted by Carnwath LJ in HF (Algeria) v Secretary of State for the Home Department [2007] EWCA Civ 445 at [26] would not apply here. Of course, the appellant may choose to give evidence when the matter is remade, subject to any reasonable adjustments that may be required to accommodate his vulnerability (a matter in relation to which the First-tier Tribunal has great expertise), but if he does so, he will be giving evidence for the first time.
36. Setting aside the decision in its entirety is, therefore, the appropriate course.
37. I find that the decision of Judge Hussain involved the making of an error of law. Pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I set the decision aside, with no findings preserved. Pursuant to paragraph 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, the extent of the fact finding required for the resolution of this matter is such that it is appropriate to remit the case to the First-tier Tribunal, to be heard afresh by a different judge.

Notice of Decision

The decision of Judge Hussain involved the making of an error of law and is set aside with no findings of fact preserved.

The case is remitted to the First-tier Tribunal to be heard by a different judge.

I maintain the anonymity order already in force.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith*

Upper Tribunal Judge Stephen Smith

Date 30 April 2021