



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000426

First-tier Tribunal No: HU/04632/2021

THE IMMIGRATION ACTS

Decision Issued:

25th March 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

M J
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Allison, Counsel instructed by Turpin Miller LLP
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on Monday 18 March 2024

Order Regarding Anonymity

Although this appeal was initially on human rights grounds only, it now also raises protection grounds. For that reason, it is appropriate to grant anonymity to the Appellant.

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge John Hillis promulgated on 20 November 2023 (“the Decision”), dismissing on protection and human rights grounds his appeal against the Respondent’s decisions dated 21 September 2021 refusing his human rights claim and subsequent decision dated 31 March 2023 refusing his protection claim. The decisions were made in the context of a decision to deport the Appellant to South Africa on account of his criminal offending (offences of violence and drug possession with intent to supply).
2. The Appellant is a national of South Africa. He came to the UK with his father and brother in 2005 (then aged nine years) to join his mother. He was granted indefinite leave to remain (ILR) in 2006. His parents both have ILR and continue to reside in the UK as does his brother.
3. The Appellant was educated in the UK from the age of nine and worked here following completion of his education in unskilled work between 2011 and 2017. He was convicted of a number of violence and drug related offences between 2017 and 2020. He was sentenced to 26 months’ imprisonment in April 2020 for an offence of grievous bodily harm (following which deportation action was begun) and a further 12 months in prison in September 2020 for the possession of Class A drugs with intent to supply.
4. The Appellant claims that he will be at risk on return from a gang known as the 26s which operates in South Africa. He says this is because he owes money to that gang for drugs he held for them. A friend who was a member of the gang warned the Appellant that he would be shot and killed by the gang if he returned. Since that warning, that friend has been shot dead. I will come to the Respondent’s decision as to that claim below. The Respondent says in any event that there would be a sufficiency of protection against that risk on return. The Respondent did not accept that the Appellant could be said to be a member of a particular social group (“PSG”) on account of his claim. The Respondent also relied on section 72 Nationality, Immigration and Asylum Act 2002 (“Section 72”) as reason to exclude the Appellant from the protection of the Refugee Convention.
5. The Judge did not accept as credible the risk which the Appellant claimed. He also found that the Appellant is not a member of a PSG. The Appellant had not rebutted the presumption under Section 72 and was therefore not entitled to the protection of the Refugee Convention in any event. The appeal was therefore dismissed on protection grounds. In relation to the human rights grounds, the Judge did not accept that there would be very significant obstacles to the Appellant’s integration in South Africa. He found no evidence to show that the Appellant’s circumstances were “exceptional” or that his removal to South Africa would be “unduly harsh to him or his parents”.
6. The Appellant appeals on six grounds summarised as follows:

Human rights grounds

Ground 1: Failure to consider Article 8 ECHR outside the Immigration Rules.

Ground 2: Failure to give adequate reasons for finding that no very significant obstacles to integration had been established.

Protection grounds

Ground 3: Making an adverse finding on an issue not in dispute.

Ground 4: Failure to give adequate reasons for adverse credibility findings and/or making a mistake of fact in that regard.

Ground 5: Failure to give adequate reasons for finding that no PSG was established.

Ground 6: Failure to give adequate reasons for finding that Section 72 applied or making an irrational finding in that regard.

7. Permission to appeal was granted by First-tier Tribunal Judge Aldridge on 30 January 2024 for the following reasons:

“..2. The grounds are arguable. The Judge, whilst aware of the issues and the requirement to consider very compelling circumstances, does not appear to have considered the same and it is arguable that this may amount to a material error in law. It is arguable that findings made by the Judge were contrary to concessions made by the Respondent.

3. The grounds disclose arguable errors of law.”

8. The matter comes before me to consider whether the Decision does contain errors of law. If I conclude that it does, I then have to decide whether to set aside the Decision in consequence of those errors. If I do so, I then have to decide whether to re-make the decision or remit the appeal to the First-tier Tribunal to do so.
9. I had before me a bundle of documents lodged by the Appellant which included the Appellant’s bundle before the First-tier Tribunal and the Respondent’s bundle also before that Tribunal (referred to hereafter as [B/xx]). I and Ms McKenzie were also provided with the Appellant’s skeleton argument before the First-tier Tribunal and a Rule 15(2A) notice seeking to adduce further evidence in the form of witness statements from the Appellant’s father and mother. It is not necessary for me to deal with that notice or the further evidence as it is accepted that it cannot be relevant to the errors of law asserted. Although Judge Hillis refused to adjourn the hearing before him to allow the Appellant to obtain this further evidence, there is no challenge to the Judge’s refusal to adjourn.
10. Although Ms McKenzie had, just before the hearing, indicated that the Respondent conceded the sixth ground, she did not concede the materiality of the error there asserted. I will deal with the substance of that concession below.

11. Having heard submissions from Mr Allison and Ms McKenzie, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

12. I begin with the latter four grounds. As Mr Allison submitted and I accept, those grounds are likely to be determinative of the disposal of this appeal if made out.

Ground 6: Section 72

13. I can deal with this ground quite shortly given Ms McKenzie's concession.
14. There is limited express reference to Section 72. The Judge correctly self-directs himself at [24] to the test which applies and the burden on the Appellant to displace the presumption. At [48] of the Decision, the Judge concludes that the Appellant has failed to rebut that presumption.
15. The Appellant very fairly accepts however that some paragraphs of the Decision appear designed to address this issue, in particular [36] to [40] of the Decision. The Appellant's complaint is that this section does not consider some of the arguments on which the Appellant relied. The Appellant drew attention to the assessment of the Appellant as a medium risk. Reliance was also placed on the Appellant having undergone a quite sustained period of employment during which he had not reoffended. His more serious offences came after that, when he was misusing alcohol after being kicked out of home by his parents.
16. Ms McKenzie provided the Tribunal with the Presenting Officer's minute which confirmed the submission made on the Appellant's behalf that the Appellant's circumstances at date of hearing had changed following his abstinence from alcohol and having returned to the family home.
17. As is accepted in the grounds, it was open to the Judge to reject that submission, but he failed to deal with it. There is some consideration of the risk based on the OASys report and subsequent events at [36] to [40] of the Decision. However, the Judge's conclusion at [38] of the Decision that the Appellant's continued use of cannabis and occasional use of alcohol coupled with his lack of employment at the time would "inevitably lead him into temptation to commit offences of dishonesty or supplying drugs to fund his own drug habit" appears not to be underpinned by the evidence or submissions. I therefore accept that there was no rational basis for that conclusion.
18. I therefore accept that the Judge has fallen into error when considering Section 72 by failing to give adequate reasons for his

conclusion and/or reaching a conclusion unexplained by reference to any evidence and for that reason irrational.

19. I also accept however Ms McKenzie's submission that this error alone could not make any difference if the Judge has not fallen into error when dealing with the protection grounds. It stands to reason that if the Appellant does not have a well-founded fear of persecution for a Convention reason, then the issue of exclusion from the Refugee Convention simply does not arise.

Ground 3: Respondent's Concession

20. As I understood Mr Allison to submit, this is the strongest of the Appellant's grounds challenging the Decision as regards the protection claim.
21. The Appellant submits that the Respondent accepted that the Appellant had received threats from the 26s gang in the past. The Respondent was said to have given the Appellant the benefit of the doubt in that regard.
22. Mr Allison accepted that the Respondent's decision under appeal was not entirely clear. That might tend to undermine the Appellant's position that there was a concession. However, he said that the passages read as a whole could only sensibly be construed in the way the Appellant submits.
23. The decision letter under appeal refusing the protection claim does not appear in the composite bundle before me. It is to be found in the second Respondent's bundle before the First-tier Tribunal at [RB/111-123]. The relevant part of the decision letter reads as follows:

"I have considered your claim to fear Gang 26 in South Africa and whether to accept these aspects of your claim. It has been concluded that some aspects of your claim are accepted. It is accepted that you have been convicted of possession of class A narcotics in the United Kingdom and it is plausible that you are involved with others who import and supply Class A narcotics.

However, you have failed to demonstrate that you have been threatened by Gang 26. Your claim is based largely on hearsay, from a claimed friend in South Africa and you have failed to provide any specific or conclusive evidence that you would be threatened or harmed on return to South Africa. You have stated that your family has not been threatened (AIR 109).

You did not make a protection claim at the earliest opportunity. It is noted that you claim to have not heard from Gang 26 since the beginning of 2020 (AIR 98). However, you were informed of your liability to Deportation on 17 June 2020 and you were served a signed Deportation Order on 22 November 2021. However, you did not claim asylum until 10 February 2022.

Therefore, although you have failed to meet some of the conditions in paragraph 339L of the Immigration Rules because you

have failed to demonstrate that you have been threatened, I have considered that it would nevertheless be appropriate to accept this part of your claim.”

24. I accept that, read as a whole, the decision does indicate that the Respondent gave the Appellant the benefit of the doubt in relation to the threats from the gang. That is reinforced by a sentence following this passage which goes on to say “However, your submissions do not show that you are in need of international protection on any basis”. That then leads into the part of the decision dealing with sufficiency of protection.
25. Moreover, Ms McKenzie accepted that the Respondent had given the Appellant the benefit of the doubt in this regard and had accepted that threats had been made by the gang as claimed.
26. At [32] of the Decision, the Judge said this:

“I found the Appellant to be not credible and not reliable in his account that he was threatened by the 26s gang in South Africa. The only evidence before me of this is vague and inconsistent. At one point he claimed the 26s gang said he owed them GB£8,000 and yet on another occasion he claimed it was more than GB£3,000. This is too significant a difference to be consistent as to the debt he was being held responsible for. In my experience the amount of Class A drugs that were seized from him was considerably below these figures in any event.”

27. As Mr Allison submitted and Ms McKenzie accepted, there was no request made by the Respondent to withdraw the concession made. Even leaving aside the case-law to which reference is made in the grounds, it was unfair for the Judge to go behind that concession unless and until the Respondent sought to withdraw it.
28. For those reasons, I accept that the third ground is made out.

Ground 4: Adverse Credibility Findings

29. As I understood Mr Allison to submit, if I found in the Appellant’s favour on the third ground, I did not need to deal with the fourth ground which is a challenge to the adverse credibility findings. However, in case the Respondent’s concession does not cover the entirety of the Appellant’s claim or the Respondent seeks to withdraw it, I deal with the fourth ground for completeness.
30. The fourth ground is broken down into three parts.
31. The Appellant takes issue with the Judge’s adverse credibility finding based on an assessment at [34] of the Decision as follows:

“I found the Appellant’s account of his meetings with members of the 26s gang in South Africa to be vague and lacking in detail as to why he met them on a second time having realised, on his own account, that they were dangerous gang members. He has provided no reasonable explanation as to why he felt he needed to meet up with [B] in the UK if he understood him to be connected with the 26s gang. I conclude on the evidence taken as a whole that the Appellant was a willing participant in the storage and supply of Class A drugs and that he is not at risk of harm from the 26s gang in South Africa. There have been no threats made to him since his release from prison and, on his own account, [B] told him never to contact him again when he told him he had been arrested for the drug offences. I cannot place any significant weight on the expert report stating that his account was plausible when I have found him to be not credible and reliable in his account that he was not a willing participant in the storage and supply of Class A drugs. On his own account he arranged a house occupied by an addict to be used to store drugs.”

32. The Appellant accepts that he was a willing participant in the storage of drugs but not the supply. He only participated in the supply because of the threats. It is said that the Judge’s “assimilation of [the Appellant] being a willing participant in respect of storage and supply is an error of fact established by the evidence before the Tribunal”.
33. I accept that the answers given by the Appellant in interview as set out in the grounds do illustrate the claim that he was making to have willingly been involved in storage of the drugs but not supply. However, taken alone and read as a whole, I do not read this paragraph as suggesting that the Judge’s finding was based on a misunderstanding of the claim or mistake of fact. However, I do accept that the finding here made is tainted by what precedes that paragraph. The Judge did not accept that threats had been made and therefore concluded that the Appellant was willing to participate in both storage and supply. In light of the Respondent’s concession that threats had been made, the conclusion might not otherwise have been open to the Judge. For that reason, I accept that there is an error identified by this part of the fourth ground albeit not for the reasons pleaded.
34. The same can be said of the second part which deals with the inconsistency identified at [32] of the Decision between the value of drugs (see paragraph as cited above). It is accepted in the grounds that the different amounts were stated. However, it is said that the Judge failed to appreciate that the difference may come from the amount for which the Appellant was prosecuted (in his possession) which was different from the amount of the drugs which the Appellant was storing for the gang. Leaving aside that issue, however, this finding is also part of the reason for rejecting the claim that threats had been made which was not open to the Judge as I have concluded under ground three. There is therefore an error in this regard.

35. The third part relates to [33] of the Decision. The Judge there identified what he said were three inconsistencies in the Appellant's account which added to his finding that the claim was not credible. Those were in respect of whether his friend [S] was or was not a member of the 26s, whether drugs were discussed with [S] in South Africa or the UK and whether he contacted [B] in the UK or whether [B] contacted him after the Appellant returned to the UK.
36. I was taken to the Appellant's statement at [B/29-35] where, at [26], the Appellant says "[i]n my interview it was written down that my friend wasn't in the gang when he was in the gang". Mr Allison accepted that he could not explain why the Appellant had said this as, in both the screening interview and substantive interview, he had consistently said that [S] was in the gang. There was therefore no inconsistency. However, since there was no inconsistency, I accept that the Judge was wrong to identify one.
37. Likewise, the Appellant's account in relation to contact with [B] had remained consistent between his interview where he said that he had made contact in the UK (question [50]) and his statement at [29] where he said he met [B] "about a month after [the Appellant] returned to the UK". There was therefore no inconsistency.
38. For those reasons, I accept that the Appellant's fourth ground is also made out.

Ground 5: PSG

39. The Appellant argues that the Judge has wrongly failed to consider whether the Appellant is a member of a PSG based on a disjunctive interpretation of the definition. The Appellant says either that he has a protected characteristic or is perceived differently by society due to being targeted by the 26s gang.
40. The Judge deals with this issue at [26] and [27] of the Decision before reaching the conclusion at [35] of the Decision that the Appellant is not a member of a PSG. The Judge's reasoning is as follows:

"26. The Appellant claims that he is a member of the Particular Social Group, namely, a person who faces being killed by the 26s gang in South Africa as its members regard him as owing them money or, alternatively, that he is a person who will be regarded as English despite being born and spending the first nine to ten years of his life in South Africa.

27. The **Country Background Note: South Africa Version 2 dated August 2020** provides no indication that the State or the population at large would regard the Appellant less favourably than anyone else due to his having lived in England for the preceding 15 years, nor does it show that members of the public who are sought by gangs cannot avail themselves of State protection. There is no evidence on the Background Note that he will be treated less

favourably by the State or the public as a person at risk of harm from a gang. It was accepted by both Representatives that there is no Country Guidance authority in respect of Particular Social Group.”

41. As I understand this ground it is that the Judge has looked at whether there is a PSG based only on social perception and has ignored whether the Appellant has a protected characteristic as a person who would be targeted by the 26s gang. However, Mr Allison could not take me to any evidence which underpinned a submission that a group exists on either basis.
42. In my view, therefore, there is no error made by the Judge or if one is made it could not impact on the outcome in relation to this aspect of the Appellant’s case.

Grounds 3 to 6: Conclusion

43. I accepted Mr Allison’s submission that, if I were with the Appellant on the grounds challenging the Decision as regards the protection claim, it would be appropriate for the appeal to be remitted for redetermination as the challenge was to adverse credibility findings which could not be upheld. It was therefore appropriate for the Appellant’s claim to be tested afresh (so far as necessary given the Respondent’s concession).
44. I also accept that Judge Hillis did not go on to consider sufficiency of protection and that issue needs to be determined for the first time in this appeal and findings made.

Grounds 1 and 2: Article 8 ECHR

45. Although in light of my conclusions about the protection grounds, I do not strictly need to go on to consider the first two grounds which address the human rights grounds, I do so since Ms McKenzie submitted that I should consider preserving parts of the Decision which were not in error in the event that all grounds were not made out.
46. I take the Appellant’s grounds in reverse order in accordance with the order followed by the Judge in consideration of the Article 8 claim.
47. By his second ground, the Appellant challenges the adequacy of reasons given for the finding that there would be no very significant obstacles to his integration in South Africa. The Judge dealt with this issue at [44] of the Decision as follows:

“The Appellant is a physically fit young man who has been employed in a number of diverse jobs since leaving college in the UK. He expressed a firm desire to train as a barber. He has submitted no evidence that he suffers from any significant mental health issues. English is spoken widely in South Africa. Despite his claim that he has no family ties in South Africa he has two aunts, one of whom he stayed

with for a week with his parents when they attended the funeral of another relative. There is no evidence from either of his aunts to say they could not assist him in the short terms until he finds employment and his own accommodation. He has shown that he is resourceful and can turn his hand to different forms of work in the UK and I can see no reason why he could not do so in South Africa notwithstanding the conclusions expressed in the expert report at paragraph 39 which did not fully address his employment history in the UK. It is, in my judgment, insufficient to dismiss his previous employment record in the basis that the Appellant has no qualifications. Additionally, he has, on his own account, obtained a certificate to allow him to work on construction sites and describes himself as a 'hard worker' at paragraph 44 of his witness statement. There is no evidence before me to show that his parents and/or his brother in Bristol would not help him financially on his return to South Africa. I reject Professor Ashworth's conclusion that the Appellant will face unemployment and destitution on return to South Africa."

48. Whilst the ground is pleaded as an inadequacy of reasons, it appears to focus on a failure properly to take into account the expert report relied upon by the Appellant. That is a report of Professor Adam Ashforth which appears at [B/36-45] with an addendum at [B/46-53].

49. The Judge does take the reports into account; he says as much expressly. The Appellant says though that the criticism that the expert did not "fully address his employment history in the UK" ignores [15] of the report. That reads as follows:

"In his statement, Mr Jordan lists a number of temporary positions in construction, warehousing, and bar-tending as his employment history. Given his lack of qualifications and paucity of marketable skills and experience, quite apart from his legal problems, it is virtually certain that given the current economic situation in South Africa Mr. Jordan will be unable to find employment".

50. I cannot accept that the Judge has failed to take this paragraph into account. The Judge goes on to say that it is not enough for the expert simply to say that the Appellant has no qualifications without explaining why his employment history which shows a diversity of experience would not assist.

51. Whilst I accept as is said in the grounds that the expertise of Professor Ashworth was accepted ([28] of the Decision), one cannot ignore the criticisms made of his methodology at [29] of the Decision (albeit in a slightly different context).

52. Moreover, it is difficult to square the Appellant's case that he has limited employment history which would therefore impact on his ability to integrate in South Africa with his case that he is at a lesser risk of reoffending due to his sustained period of employment in various jobs prior to his more serious convictions.

53. I recognise of course that the economic situation in South Africa is very different (as did Judge Hillis). However, when [44] of the Decision is read as a whole, I do not consider that it either fails to take into account the expert report or fails to give adequate reasons for the conclusion that there would be no very significant obstacles to integration in South Africa.
54. The Appellant's second ground does not establish any error.
55. I turn then finally to the first ground.
56. Having found that there would be no very significant obstacles to the Appellant's integration and therefore that he could not succeed under the exceptions to deportation within the Immigration Rules (and/or section 117C Nationality, Immigration and Asylum Act 2002 - "Section 117C") the Judge went on to say the following:
- "46. The Appellant accepted he does not have a partner or a child in the UK with whom he has a family life that would engage Article 8.
47. There is no evidence before me to show that the Appellant's circumstances are exceptional and that his removal to South Africa will be unduly harsh to him or his parents and/or his brother.
48. I conclude on the evidence taken as a whole that the Appellant has failed to rebut the presumption in Section 72 and that the balance is in favour of deportation in the public interest of protecting the public from violence from foreign criminals and the widespread harm caused by Class A drugs.
49. I conclude, for the reasons set out above, that the Appellant's Article 8 rights to a private/family life with his parents and sibling will not be breached by his deportation."
57. The Appellant's first ground challenges a failure to conduct a "full proportionality assessment" having regard to Section 117C (6). It is not accepted that the Judge did this at [46] to [49] of the Decision.
58. This is of course a deportation case. Under Section 117C (6), a Judge is not conducting an "at large" proportionality assessment outside the Immigration Rules. A Judge has to consider whether there are very compelling circumstances over and above the two exceptions in Section 117C which mean that deportation would have unjustifiably harsh consequences.
59. The Judge gave full reasons for finding that the private life exception was not met. I have found that there was no error in that regard. The Judge noted that the Appellant did not claim to have a family life with a partner or child (and therefore implicitly that the other exception could not apply).
60. I accept that the apparent search for exceptionality is not apposite and that the test under Section 117C (6) is whether there are matters going beyond the exceptions which are very compelling. That though is

an equally high test if not higher than that of exceptionality. I accept that the phraseology used is not in accordance with the test, but I do not accept that the outcome would be any different if the correct test had been applied.

61. Similarly, although “unduly harsh” and “unjustifiably harsh” may not be identical in form (the former of course relates to the family life exception in Section 117C), in substance, I can see little difference. Again, the failure to set out the correct wording of the test does not in my view alter the substance of the conclusion reached.
62. The Judge took into account the public interest and balanced the interference (as already found under the private life exception) along with the other factors not there considered against that public interest.
63. No doubt the reasoning could have been fuller, and the Judge might not have fallen into error in the way he did if he had cited the correct test. However, when this section of the Decision is read as a whole and with the previous findings at [36] to [49] of the Decision, I do not accept that any error makes a difference to the outcome.
64. I have though concluded that it would not be appropriate to preserve the Judge’s findings in relation to Article 8 ECHR for two reasons.
65. First, the Appellant’s human rights will have to be assessed at date of next hearing. It is not appropriate to fetter the next Judge’s consideration of that issue which will also need to take into account the further evidence from the Appellant’s parents.
66. Second, and more importantly, I have accepted (and the Respondent conceded) that the Judge fell into error when dealing with Section 72 and the risk of reoffending. Since that forms part of the balancing exercise, it is appropriate for that balancing exercise to be conducted afresh by another Judge.

CONCLUSION

67. An error of law is disclosed by the Appellant’s grounds three to six. Although I have not accepted that a material error is made out by the Appellant’s first two grounds, for the reasons given above, I set aside the entire Decision. The appeal will therefore require to be redetermined entirely afresh. Given the extent of the fact finding involved, I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge John Hillis.

NOTICE OF DECISION

The decision of Judge John Hillis promulgated on 20 November 2023 contains errors of law which are material. I set that decision aside in its entirety and remit the appeal to the First-

tier Tribunal for re-hearing before a Judge other than First-tier Tribunal Judge John Hillis.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 March 2024