



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/11920/2019

THE IMMIGRATION ACTS

**Heard remotely at Field House
On 21 January 2021 via Skype for
Business**

**Decision & Reasons Promulgated
On 2 March 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**RP
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Spurling, Counsel, instructed by Sriharans Solicitors
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to are in the original bundles from the hearing before the First-tier Tribunal, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content the hearing had been conducted fairly in its remote form.

1. The appellant is a citizen of India born in 1962. He appeals against a decision of First-tier Tribunal Judge Ruddick promulgated on 21 January 2020 dismissing his appeal against a decision of the respondent dated 14 November 2019 to refuse his fresh claim for asylum.
2. The hearing took place remotely, in order to take precautions against the spread of Covid-19. Mr Spurling provided written submissions to accompany his grounds of appeal, and a skeleton argument. I am most grateful to both advocates for their assistance and clear submissions.

Factual background

3. The appellant entered the United Kingdom clandestinely on 11 March 2012 and claimed asylum on 14 June 2012. That claim was refused on 6 February 2015, and an appeal against that refusal was eventually dismissed by First-tier Tribunal Judge Hodgkinson on 18 July 2016. There had been an earlier appeal before the First-tier Tribunal, heard by First-tier Tribunal Judge Geraint Jones, QC, but that decision was set aside by the Upper Tribunal and remitted to be reheard afresh.
4. The appellant made further submissions which, after a successful application for permission to bring judicial review proceedings, were accepted as a fresh claim by the respondent.
5. The appellant claimed asylum on the basis of his political opinion arising from his membership and profile within the Dravidar Munnetra Kazhagam Party ("the DMK"). The party was in power from 1996 to 2001, and from 2006 to 2011. The appellant claimed to have enjoyed a high profile within the party, and to have risen to positions of prominence. He was a popular local politician. Between 2001 and 2006, and from 2011, the All India Anna Dravidar Munnetra Kazhagam Party ("the AIADMK") was in power. There were clashes between the two parties. The AIADMK claimed the appellant was responsible for some of the unrest, using his profile to incite violence. Matters came to a head on the election day in 2011, following which the AIADMK was returned to power. An AIADMK supporter was murdered, and, upon assuming power and control of the police, the AIADMK sought to frame the appellant for the murder. He claims he was arrested and tortured, but that a friendly contact within the police released him upon hearing that the police were planning to kill him in a so-called staged encounter. The appellant fled to Chennai, and later to this country, to claim asylum. He claims that in 2012 following his arrival here, the Indian police continued to look for him. One of his friends was murdered in India, and others had false charges brought against them.
6. The judge took Judge Hodgkinson's decision as her starting point. She set out his relevant findings at length [53], recording that he had rejected the entirety of the appellant's account. The judge said it was her role to

conduct her own credibility assessment [56]. She said at [83] that she “might not have made all of the precise findings made by FtJ Hodgkinson”, and listed a number of findings which she would not have reached. However, she continued, “I am not hearing an appeal against FtJ Hodgkinson’s determination, and a simple disagreement with some of his reasoning cannot be a ‘good reason’ to depart from it”, drawing on her earlier summary of AL (Albania) v Secretary of State for the Home Department [2004] EWCA Civ 80, in which the Court of Appeal held at [25] that, “not only is the earlier determination the starting point, it should be followed unless there is a very good reason not to.” See [17].

7. The judge had credibility concerns of her own. A detailed witness statement submitted by the appellant contained little detail that was personal to him, in particular relating to his role within the party [58]. It did not mention the murder of his brother-in-law [59].
8. From [60] to [63], the judge set out concerns arising from the “vague and shifting” oral evidence of the appellant. He had provided an unsatisfactory account of why he had not sought to obtain updated information from India about the charges he claimed had been brought against him in 2012. The friends the appellant claimed to have asked for assistance in India were unwilling to help, which was inconsistent with his case that he had been a prominent local politician. It was implausible for the appellant to have sought such information on so few occasions, especially given the extensive litigation his asylum claim had triggered. Had he been the respected community leader he claimed to have been, someone would have been willing to help [61]. Statements he provided from Members of the Legislative Assembly (“MLA”) were silent as to his claimed high profile role within the DMK, and the appellant’s explanation that it was his son, who remains in India, who procured the statements on his behalf did not convince the judge that there was a good reason for this omission. Again, his answers to these questions were “vague” [63]. The absence in the DMK MLA statements of any references to his claimed high profile damaged his credibility [68].
9. A statement from the police officer said to have assisted the appellant to escape police detention attracted little weight. This was because, first, he had not made the statement at the time of the appellant’s earlier appeal and, secondly, it was “inconsistent” that the officer had not been arrested or disciplined at the time. The judge said it was “fundamentally implausible” that the police in India would take five years to bring disciplinary proceedings against the officer, even allowing for the bureaucratic nature of internal Indian police investigations. See [70] to [74].
10. A medical report provided by the appellant analysing scarring on his body attracted little weight. It was extremely brief, and had failed to comply with the Istanbul Protocol concerning scarring, and the requirements of the practice direction concerning the necessity of a statement of truth.

11. The judge accepted part of the appellant's wife written evidence that, in June 2015, Indian government officials had visited the head of her village, and her home directly, in connection with the appellant, stating that they knew he had claimed asylum in this country. The judge described that as a "shocking violation" of the Secretary of State's duty of confidentiality towards asylum seekers, finding that the process adopted by the respondent to re-document the appellant following his refused asylum claim must have revealed to the Indian authorities that he was an asylum seeker [85]. However, the background materials demonstrated that there was no risk to failed asylum seekers upon their return to India, and the appellant would not be at risk on that basis [91]. The same written evidence had been before Judge Hodgkinson in the 2016 appeal and he rejected it as lacking credibility. The judge had noted at [53.viii] that Judge Hodgkinson gave no reasons for rejecting its reliability.
12. The global conclusions of the judge were that there was no good reason to depart from Judge Hodgkinson's findings concerning the appellant's profile in India, and his findings that he had not been tortured, nor framed for murder. She added that, "I also follow his finding that the appellant has not shown that he is of adverse interest to anyone on return to India on account of his political activities..." At [92], the judge found that the appellant had not shown that there was a reasonable likelihood that he would be prosecuted or subject to serious harm upon his return. She dismissed the appeal on asylum grounds.

Permission to appeal

13. Permission to appeal was granted by Upper Tribunal Judge Lindsley on all grounds.
14. Under Ground 1, the appellant contends that the judge provided an "insufficient basis" for finding the appellant lacked credibility. His actions upon his arrival in this country were neither implausible or inconsistent, and the judge had mischaracterised his oral evidence. Rather than simply saying his friends had been unwilling to assist him, Mr Spurling contended that the appellant's evidence had been that they were unable to do so. There was no requirement for corroboration and asylum claims, and by expecting such corroboration, the judge acted unlawfully. She failed to take sufficient account of the fact the DMK MLA statements had been procured by the appellant's son, so it was hardly surprising the appellant had been vague in relation to the approach his son had taken, in India, to obtaining statements.
15. Pursuant to Ground 2, the judge is said to have erred in her application of the principle in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702, by treating the findings of Judge Hodgkinson as a "judicial straitjacket", rather than merely as a starting point. The judge expressly acknowledged that Judge Hodgkinson had reached findings she would not have reached, yet impermissibly treated

them as binding upon, failing properly to analyse the entirety of the evidence she had, in the round.

16. Ground 3 contends that the judge failed to consider the evidence of the appellant's wife. In contrast to Judge Hodgkinson, who gave no reasons for rejecting the account given by the appellant's wife, the judge accepted part of her evidence as reliable, but was silent as to the import of the remainder of her evidence, which supported the appellant's core narrative.
17. Ground 4 avers that the judge erred in her treatment of a scarring report by Dr Al-Wakeel which, properly analysed, was consistent with the requirements of the Istanbul Protocol.

Submissions

18. Mr Spurling expanded upon his written submissions, summarised above.
19. For the respondent, Ms Isherwood submitted that the judge reached findings that were open to her on the evidence, and that, properly understood, the appellant's grounds of appeal were merely disagreements with legitimate findings of fact reached by the judge.

Preliminary observations: findings of fact

20. By way of a preliminary observation, it is necessary to recall that an appeal to the Upper Tribunal lies only on an error of law, not a disagreement of fact. Certain findings of fact are capable of being infected by an error of law, as notably summarised in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]. There are many judgments of the higher courts which underline the distinction between errors of fact and law. I can do no better than rely on the oft-quoted judgment of Lewison LJ in Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so... The reasons for this approach are many. They include

- i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii. The trial is not a dress rehearsal. It is the first and last night of the show.
- iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] 2 WLR 210; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135"

21. The judgment in Fage UK Ltd. v Chobani UK Ltd is seven years old, but it continues to represent a useful summary of the law on the approach to findings of fact, and the deference owed by appellate tribunals and courts to first instance judges. See the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5 at [52], and most recently in the Court of Appeal in Lowe v Secretary of State for the Home Department [2021] EWCA Civ 62 at [29].

Ground 1

22. Properly understood, the core of ground 1 amounts to a series of disagreements of fact with the legitimate findings of the judge. It was open to the judge to assess whether the conduct of the appellant in this country, including the steps he had taken to prepare for the appeal proceedings, was commensurate with his overall narrative. Properly understood, the judge was not seeking unlawful corroboration of his account. She was simply analysing whether the way he conducted himself following his arrival here was consistent with his case. The judge even stressed that it was not the failure to obtain an update about the charges pending against him that concerned her, but rather the inconsistency and implausibility of his account of how he sought to do so: [62]. Those were concerns that were open to the judge.

23. Similarly, the judge's concerns about the lack of detail in the MLA statements were equally valid. This appellant's case was advanced on the basis he was a high profile DMK politician. That the DMK MLAs who provided statements did not even refer to his claimed political standing was significant, and the judge was entitled to have concerns accordingly. It was not irrational for the judge not to ascribe significance to the fact the appellant's son had procured the statements for him when reaching her credibility concerns. The judge had the benefit of hearing all the evidence in the case, observing more than once that the appellant's evidence was vague on these crucial matters was vague: see [60] and [63]. Barring irrationality, questions of weight are matters for the judge.

Ground 2

24. In relation to ground 2, the judge correctly directed herself as to the import and significance of Judge Hodgkinson's earlier decision: [17] to [19]. While she was candid about the fact she may not have reached some of the findings Judge Hodgkinson reached, she correctly identified that she was to take his decision as her starting point, and only depart from it in the case of good reasons to do so. She did not treat the decision as a straight jacket; she reached differing findings concerning the evidence of the appellant's wife and the visit of government officials, and elsewhere during her operative analysis underlined the need for her own credibility assessment in the round: see the opening sentences to [53], and also [56] and [84]. The appellant's complaints are disagreements of fact and weight. Again, barring irrationality or any of the other established bases for findings of fact to amount to errors of law, the judge's approach to the Hodgkinson decision was entirely open to her.

Ground 3

25. In relation to ground 3, the appellant contends that the judge failed properly to analyse the evidence of the appellant's wife, or to give reasons for having not done so, in light of the fact she accepted part of the wife's written evidence. It is important to recall that first instance judges are not required expressly to consider every point in evidence. Nor are they required to repeat back to the parties the evidence that has been given, or relied upon, during the proceedings. The wife's evidence had been before Judge Hodgkinson in precisely the same form as it had been considered by Judge Ruddick. The contents of the wife's statement are light, with minimal details concerning the core elements of the appellant's account. Plainly, the judge accepted the final two paragraphs of her statement, concerning the visit from CID officials. It was not necessary for the judge expressly to engage with the preceding paragraphs, especially given Judge Hodgkinson had considered the evidence as part of his overall analysis, and had rejected the very same account as that outlined in the initial paragraphs of the wife's statement. The judge also had the benefit of correspondence from the appellant's from July 2015, complaining about the breach of confidentiality by the Home Office, in response to the visit

by CID officials to the appellant's wife in India. It was not incumbent upon the judge to give further reasons in her credibility analysis.

Ground 4

26. In relation to ground 4, Mr Spurling contends that the judge was wrong to find that the scarring report did not comply with the Istanbul Protocol. It is not necessary, he submits, for a medical expert to address each scar in turn. What is required is that an overall assessment concerning all injuries be provided, and that is precisely what the judge did. He relies on paragraph 188 of the Protocol:

“Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story...”

27. However, the preceding paragraph states that a physician “*should*” address each lesion individually. See paragraph 187:

“**For each lesion** and for the overall pattern of lesions, **the physician should indicate** the degree of consistency between it and the attribution given by the patient. The following terms are generally used: (a) Not consistent...” (Emphasis added)

28. Pursuant to paragraph 188 of the Protocol, it would have been open to the judge to disregard the expert's failure to address each individual lesion, but, in the exercise of her judicial discretion, she chose not to. That is a question of weight, and the approach taken by the judge was entirely consistent with the expectation of the Istanbul protocol's requirements that an expert “*should*” address each lesion individually.

29. The judge also had concerns that the expert had failed to discount the possibility of accidental infliction of the injuries: see [77]. The expert's failure to do so was inconsistent with the requirements of paragraph 176 of the Protocol:

“Ultimately, the examiner must offer an opinion as to the origin of the lesions: inflicted or self-inflicted, accidental or the result of a disease process.”

30. It was entirely legitimate for the judge to ascribe less weight to the report in light of those factors. She was also entitled to have concerns arising from the expert's non-compliance with the practice direction, by the omission of sufficient reasons in the report. Mr Spurling's submissions are simply disagreements of weight. There is no merit to this ground.

Conclusion

31. For the reasons set out above, the grounds of appeal are essentially a series of disagreements of fact with the legitimate conclusions of the first instance judge. She had the advantage of considering the whole sea of evidence, whereas this tribunal can only engage in “island hopping”. The

reasons given by the judge were clear and sufficient and there is no basis for this tribunal to interfere with them. This appeal is dismissed.

32. I maintain the anonymity direction made by the First-tier Tribunal.

Notice of Decision

The appeal is dismissed.

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*

Date 11 February 2021

Upper Tribunal Judge Stephen Smith