



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001905
First-tier Tribunal No:
IA/00958/2021/2021
IA/00958/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 September 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

RS
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr P Haywood, counsel, Direct Access

For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 14 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family 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 or his family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge JH Napier, promulgated on 9 September 2021.
2. Permission to appeal was granted by First-tier Tribunal Judge Swaney on 28 October 2021.

Anonymity

3. No anonymity direction was made previously; however, this matter is now anonymised as it concerns the appellant's private medical matters.

Factual Background

4. The appellant is a national of India, aged fifty-three. He first entered the United Kingdom in February 2010 with leave to enter as a Tier 4 migrant. His leave initially was extended until March 2013. Following a successful appeal against a subsequent refusal of leave to remain as a Tier 1 Entrepreneur, the appellant was granted leave in this capacity until September 2017. The appellant's wife and children joined him in the United Kingdom in 2016, dependent upon his leave to remain. The appellant was unsuccessful in further extending his leave.
5. At some stage, which is unclear from the documents before me, the appellant made a human rights claim which was refused with no in-country right of appeal. The appellant initially sought judicial review of this decision but withdrew his application for permission to proceed, making a further human rights application on 7 February 2020. That application was refused by way of a decision letter dated 3 December 2020, which is the subject of this appeal.
6. In his further human rights submissions, the appellant relied on his family life, the private life he had established in the United Kingdom, his mental health and raised a fear of return to India. The application was refused as the appellant could not meet the requirements of the Immigration Rules, there were no exceptional circumstances, his health claim fell short of the high threshold required under Article 3 and the appellant had failed to make an appointment to make an asylum claim.

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the judge considered that the issues to be decided were whether the appellant could meet the requirements of paragraph 276ADE(1)(vi) of the Rules as well as Article 8 more generally. The appellant and his two adult daughters gave evidence remotely. The judge concluded that there were no significant obstacles to the appellant's reintegration in India and that the factors put forward by the appellant did not outweigh the public interest in his removal.

The grounds of appeal

8. The grounds of appeal can be summarised as follows.
- i) A failure to consider the appellant's mental health and need for treatment as a factor under paragraph 276ADE(1)(iv).
 - ii) A failure to consider the appellant's Article 3 medical case.
 - iii) The Article 8 assessment was flawed in several aspects.

9. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The judge stated on more than one occasion in the decision that there was no separate article 3 claim. While article 3 of the ECHR was not specifically pleaded in the skeleton argument, there are references in it to case law on article 3, particularly in relation to risk of suicide. In addition, in the covering letter that accompanied the appellant's application article 3 was specifically relied on and article 3 was considered by the respondent in the refusal letter and in her review. There is no indication in the record of proceedings that the appellant specifically stated that article 3 of the ECHR was not pursued - all that was asked by the judge was whether it was accepted that paragraph 276ADE was not satisfied and therefore that the article 8 claim was solely outside the Rules (which was answered in the negative). It is tolerably clear that there was a separate article 3 claim before the judge which was not considered.

10. The respondent filed no Rule 24 response.

The error of law hearing

11. Ms Rushforth confirmed that the respondent had filed no Rule 24 response in this case. She indicated at the outset that the appeal was opposed. Mr Haywood made submissions in line with the grounds of appeal. For her part, Ms Rushforth argued that the judge was correct to say that there was no Article 3 case. The skeleton argument did not clearly include such an argument and the reference to the case of *J* [2005] EWCA Civ 629 was not enough. Nor were any submissions made referring to *AM* (Zimbabwe) [2020] UKSC 17. Ms Rushforth highlighted the headnote of *Latter* [2023] UKUT 000163, referring to the reform system which is in place to outline the issues in advance in a focused skeleton argument and respondent's review so that a judge can focus on the remaining issues. It was now too late for the appellant to say he would like to rely on Article 3. Even if Article 3 had been raised, his evidence would have failed to meet the high test in *AM*, given that mental health treatment was available in India. Ms Rushforth accepted that the judge did not refer to the appellant's mental health issues when considering very significant obstacles, but she submitted that this was not a material error as the matter was considered outside the Rules and adequate findings were made.
12. At the end of the hearing, I announced that I was satisfied that the judge materially erred in relation to the assessment of paragraph 276ADE(1)(vi) of the Rules and this sufficed to set aside the decision in its entirety. After hearing from the parties, I decided to remit the matter to the First-tier Tribunal for a de novo hearing. I give my reasons below.

Decision on error of law

13. The First-tier Tribunal failed to assess all considerations in concluding that the appellant had not demonstrated that there were very significant obstacles to his reintegration in India. The judge's complete findings are set out at paragraph 23 in the following manner.

I agree with the Respondent that the Appellant does not meet the test in 276ADE. Whilst he may not wish to re-integrate with Indian society, it is more likely than not that he can if he had to. He and his family speak the language, the Appellant grew up in India and has lived as an adult there. His family lived there until 2016 and he has close relatives with accommodation there. He would be able to work without restrictions (unlike here at

present). Whilst I accept that he has not been in India for a substantial amount of time, the evidence does not show that the obstacles to reintegration are very significant.

14. The difficulty with these findings is that there was no assessment of the appellant's mental state or of his fears relating to moneylenders which is also linked to the appellant's poor mental health.
15. The appellant relied upon a letter from his GP which provides evidence regarding the appellant collapsing which a cardiologist puts down to his mental health rather than a physical health issue. In addition, the GP considers that the appellant is at 'high risk of suicide' owing to his mental state. A psychiatric report, which was part of the respondent's bundle, made reference to the appellant having changed medication and suffering blackouts in relation to his fear of moneylenders. The said report sets out the risk to the appellant's physical health owing to self-harm were he to face enforced removal to India. There is no rejection of this evidence in the First-tier decision. In view of the medical evidence, the appellant's subjective fear of return, the fact that he has not lived in India for decades (having worked abroad for many years prior to coming to the United Kingdom) alongside the respondent's evidence on the state of psychiatric care in India, it cannot be said that the judge would have inevitably arrived at the same conclusion under the Rules even if this evidence had been considered. I do not accept the submission that the judge's reference to the medical evidence when assessing the proportionality of the respondent's decision, outside the Immigration Rules, sufficed given that the judge was applying a different test, that of exceptionality.
16. As for the second ground, relating to whether Article 3 ECHR was a live issue before the judge, there were sufficient indications that it was. There is no reference in the decision to the appellant having conceded the point. Indeed, the respondent's review provides detailed rebuttal of the Article 3 arguments set out in the appellant's skeleton argument. In addition, there is psychiatric evidence adduced. While it may be that the Article 3 argument was not forcibly made at the hearing, there were too many references in the documents before the judge for the conclusion to be reached that 'no Article 3 medical or suicide claim has been made,' as the judge stated at [33] and elsewhere.
17. While there is merit in the third ground, in relation to the way the judge structured the proportionality assessment, there is little utility in considering it further given the material errors in relation to the first two grounds.
18. Careful consideration was given to Ms Rushforth's submission that the judge's findings in relation to paragraph 276ADE should be preserved. In view of the passage of time since the appeal was heard, the appellant should not be restricted as to how he puts his case on rehearing.
19. I canvassed the views of the parties as to the venue of any remaking, noting that there were no preserved findings of fact and two years have elapsed since the hearing. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that the appellant was deprived of an adequate consideration of his

human rights appeal. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge JH Napier.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2023