Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2023-005490
[PA/55796/2022; LP/00912/2023]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2024	**On 5 February 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MTM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify SJ or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Mr N Aghayere, Counsel, instructed by Lawland Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant brings this appeal against the decision of First-tier Tribunal Judge E M Field ("the judge"), signed on 20 November 2023, by which she dismissed the appellant's appeal against the refusal of his protection and human rights claims.

2. The appellant, who was 75 years of age at the date of hearing, entered the United Kingdom as a family visitor and then promptly claimed asylum on the basis of the risk to him as a supporter of the Bangladesh Nationalist Party ("BNP"). Additionally, the appellant claimed that he had a number of health problems (kidney damage, diabetes and poor eyesight) such that his removal would breach article 3 of the Human Rights Convention. His health had declined and he relied on the support of his sons, who are British citizens.

The decision of the First-tier Tribunal

3. The judge identified the issues in dispute in the appeal at [6]. They were (1) whether the appellant's removal would breach the Refugee Convention, (2) whether it would breach article 3 of the Human Rights Convention on medical grounds, and, (3) whether it would breach article 8 on account of the interference with private and family life.

4. The judge heard evidence from the appellant through an interpreter and found there were no issues of communication or understanding. At [10] she noted the appellant was using a wheelchair and was "obviously frail". She set out the steps taken to ensure the appellant was comfortable and she noted the parties were content with her approach. At [11] she noted the appellant was unable to recall having made his witness statement and therefore the judge permitted counsel to lead him though it. She recorded that no issues were raised in this regard. At [12] the judge recorded the appellant's oral evidence that he was having dialysis three times a week, he has cholesterol problems, everything is written down for him and he is not able to stand. At [21] the judge noted the appellant's son's evidence that he had been told the appellant was in the first stages of dementia. The appellant had been having dialysis for around six months as neither of his kidneys were functioning. He also said the appellant was due to have an operation on his eye. Similar evidence was given by the appellant's other son [23].

5. At [28] the judge reminded herself that she should exercise caution in rejecting as incredible the evidence of an anxious asylum seeker who might have been a victim of trauma. However, at [30], she stated the appellant had not satisfied her that he had a genuine fear of the authorities in Bangladesh as he had clearly articulated that the reason he wished to remain in the United Kingdom was to be with his children and because there is no one to look after him in Bangladesh. At [31] she expressly took account of the fact the appellant may be experiencing difficulties with his memory but she gave reasons for finding the appellant had not been anything more than a BNP supporter. She concluded he would not be at risk on return [33].

6. The judge considered the article 3 health claim at [34] to [39], concluding the high threshold set out in AM (Zimbabwe) v SSHD [2020] UKSC 17 had not been reached on the evidence.

7. Finally, the judge considered the article 8 claim and found the appellant's relationship with his sons did not amount to family life, although he had established a private life [41]. The judge found the Immigration Rules could not be met and the decision did not amount to a breach of article 8. She concluded at [49] that it was a "finely balanced decision given the current personal circumstances of the Appellant and his need for dialysis". She accepted return would be difficult for the appellant but she was not persuaded that there were unjustifiably harsh consequences which rendered the respondent's decision disproportionate.

The grounds of appeal and grant of permission

8. The grounds of appeal, which were drafted by Mr Aghayere, argue the judge had misdirected herself and made perverse or irrational findings. Furthermore, she had failed to provide adequate reasons on material matters. In particular, the judge had failed to take into account the Joint Presidential Guidance Note No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. The judge had failed to make any finding whether the appellant was vulnerable or to reflect that in her assessment of credibility. Further, the judge had failed to assess the evidence holistically before coming to her conclusion and she had "put the cart before the horse". Finally, in relation to the protection claim, the judge had applied a standard of proof "far above" the correct standard of a reasonable degree of likelihood. She had impermissibly required corroboration.

9. In relation to the article 3 claim, the grounds argue the judge failed to make any finding. In relation to article 8, the appellant's serious medical condition had not been "properly explored".

10. Permission to appeal was granted by First-tier Tribunal Judge Parkes on all grounds. The grant noted,

> "3. There is no reference to the guidance that applies to vulnerable witnesses and it is arguable that the Judge may not have applied the appropriate caution in approaching the evidence of the Appellant having regard to the medical evidence and his presentation at the hearing."

11. The respondent filed a rule 24 response opposing the appeal

The hearing

12. Mr Aghayere's submissions were a reflection of his grounds. On the point about the judge erring by requiring corroboration, he relied on MAH (Egypt) v SSHD [2023] EWCA Civ 216 in which the Court found the Upper Tribunal had erred in requiring corroborative evidence because it had asked more of the appellant than was necessary. Pressed to amplify his submission on the judge's finding on article 3, Mr Aghayere said he was arguing that the judge's decision was irrational or perverse.

13. Mr Tufan submitted that the judge's conclusion on the protection claim was right on the evidence as the appellant was only a BNP supporter and he had been able to travel to and from the United Kingdom without any problems. The judge had acknowledged the appellant's medical conditions. She had directed herself correctly in terms of the article 3 medical claim. The judge's decision was rational. The appellant had circumvented the rules in order to seek better medical treatment. There was no material error in the decision.

14. Mr Aghayere replied. He suggested that the point taken by Mr Tufan about the appellant circumventing the rules was not one taken by the respondent previously. He argued that the evidence showed that removal would meet the high threshold for a breach of article 3 and the judge had completely ignored the evidence.

15. At the end of the hearing I reserved my decision.

Conclusions on error of law

16. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact. The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
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> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> iv) Giving weight to immaterial matters;
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> v) Making a material misdirection of law on any material matter;
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> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

17. It is important to reiterate the need to exercise restraint before interfering with a decision of the First-tier Tribunal. In this regard, I have borne in mind what has been repeatedly stated by the Court of Appeal in, for example, KB (Jamaica) [2020] EWCA Civ 1385, at [16], UT (Sri Lanka) [2019] EWCA Civ 1095, [19]; Herrera [2018] EWCA Civ 412, at [18], and MI (Pakistan) [2021] EWCA Civ 1711, at [47] and [51]. When analysing a decision of the First-tier Tribunal, is important to read it sensibly and holistically, and to

guard against the danger of simply substituting one view for the legitimate view of another. Perfection is not being sought, there is no obligation to provide the best possible reasons (or indeed reasons for reasons), and an irrationality challenge imposes an elevated threshold.

18. With the above in mind, I turn to the judge's decision in this case. Having considered the judge's decision as a whole and reflected on the parties' submissions, I find no error of law in the decision and the appeal is therefore dismissed.

19. The argument that the judge did not have the Joint Presidential Guidance Note in mind does not bear scrutiny. It is immediately evident from the decision that the judge recognised the appellant's frailties, arranged her conduct of the hearing in a way which took account of these and, crucially, that she factored in the appellant's memory difficulties when reaching her conclusions on his credibility. In the circumstances, her conduct of the appeal and her reasoning is not undermined by the mere fact she did not refer to the Joint Presidential Guidance Note.

20. The Court of Appeal held in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 that a failure to follow the guidance would likely be an error of law. However, it is plainly sufficient for the judge to show she has applied the standards suggested in the guidance and it is clear to me that the judge in this case did just that.

21. The guidance states that,

> "14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> 15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind".

22. That the judge applied this guidance in substance, if not in name, is most clearly shown at [31] in the FINDINGS section of her decision. She stated,

> "Whilst I accept that the Appellant may be experiencing difficulties with his memory of events in Bangladesh, his account of his political activities at interview and in witness evidence is consistent that he was not an active member of the BNP and was simply a low-level supporter."

23. The judge had already set out the appellant's health conditions, as Mr Aghayere acknowledged. She was plainly fully aware of the appellant's state of health.

24. At [11] the judge stated that no inferences were drawn from the appellant's failure to recall making his statement. In other words, she showed that she had made allowance for his health condition.

25. Moreover, the judge's reasons for rejecting the evidence were not based exclusively on the appellant's failure to recall matters or his inconsistency. In fact she noted the appellant had been consistent about his reasons for coming to the United Kingdom (see [30]). She noted the appellant's wife had stated in her statement that the appellant was not really involved in politics. She noted his sons could not add anything to the evidence about their father's political activity. The judge did rely on the appellant's inability to recall or explain the circumstances of his arrest and detention at [32]. However, in the overall context of the decision as a whole, it cannot seriously be argued that this shows the judge did not take into account the appellant's health conditions. At [35] the judge noted the claim that the appellant was suffering from dementia but she was entitled to place little weight on this given the absence of any reference to a diagnosis or treatment in the medical evidence. She had already noted her impression that there were no problems at the hearing of communication or understanding [9].

26. Finally, there can be no suggestion the judge failed to apply the guidance in terms of her conduct of the hearing which she expressly noted had been approved by the representatives (see [10]).

27. I turn to the argument that the judge failed to apply the correct standard of proof and that she expected corroboration, when this was inappropriate. I start by noting that the judge set out the correct standard of proof at [25]. She also stated she had considered all the evidence in the round and with the most anxious scrutiny applicable to all protection claims (see [28]). In the same paragraph she reminded herself again of the low standard of proof that applies. It is slightly troubling that she uses the phrase "I am not persuaded that" in [30] but this is insufficient to show she must have forgotten that the standard of proof she was applying was low. I see nothing in the judge's explanation of her reasoning or findings to demonstrate she was using a higher standard of proof.

28. Mr Aghayere's submission that the judge erred by drawing an adverse inference from a failure to adduce corroborative evidence is misguided. In fact, what the judge did was to examine the corroborative evidence which the appellant had adduced and, having done so, conclude that it provided little support for the claim. For example, the judge looked at the evidence of the appellant's wife and sons at [31] and found it added no support to the appellant's account of his role in the BNP. At [32] she rejected the appellant's claim to have been arrested primarily because of the lack of detail in the account. She also reasoned at [33] from what the appellant

had said that, even if the appellant had been arrested, he was no longer of interest. She did not expect corroboration.

29. In terms of Mr Aghayere's argument that the judge failed to look at the evidence in the round and that she reached her conclusions before considering key parts of the evidence, there is no basis for concluding this is what happened. The judge began by stating she had had regard to all the evidence before her at [30] and she rolled up her findings in the final sentence of [33].

30. I simply do not understand Mr Aghayere's submission that the judge failed to deal with article 3 or to reach a conclusion on it, applying AM (Zimbabwe). There is a clear self-direction on the AM (Zimbabwe) test at [26] and a relatively detailed analysis of the evidence of the appellant's conditions and the availability of healthcare in Bangladesh at [34] to [39]. She concluded,

> "Accordingly, I am not persuaded to the relevant standard of proof that the high threshold as set out in AM (Zimbabwe) is met and that removal would amount to a breach of Article 3 due to the health of the Appellant."

31. As noted, Mr Aghayere did not argue that the judge had failed to apply that test properly. He argued her decision on the evidence was irrational or perverse. I remind myself that in R (Iran) Brooke LJ set out the test for perversity as follows:

> "11. ... It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no willful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter."

32. Plainly this appellant is seriously ill and currently requires renal dialysis to sustain his life. However, it cannot be said that the judge's decision was perverse or irrational in the sense that no judge could reasonably have come to the same conclusion on the evidence or that the judge reached a conclusion wholly unsupported by the evidence.

33. The judge noted the evidence of dialysis at [34] but continued,

> "There is, however, no medical documentation setting out the prognosis, the anticipated duration of his current treatment or the effects of any interruption or changes to his current treatment. The GP lists the Appellant as suffering from diabetes and associated retinopathy with a history of vitreous haemorrhage, cataract, macular oedema, and hypertension. Multiple medications are also listed within the medical records. Unfortunately, I do not have the benefit of any medical report with specific details about the Appellant's health, his prognosis, the likely duration of his treatment and/or the impact of any interruption to such treatment or a change in treatment. I further note that

there is no medical evidence relating to the level of care which the Appellant requires day-to-day or his fitness to travel."

34. The judge also carefully considered the limited evidence before her of available treatment in Bangladesh. At [37] she said,

> "CPIN: Health indicates that there is a functioning and comprehensive healthcare system in Bangladesh. It further records that treatment and medication for diabetes and diabetic retinopathy is available as is ophthalmology. In respect of renal failure and dialysis, treatment is available, and it is recorded that those with little or no resources receive treatment for free. With regard to CPIN: Health, I am satisfied that there is appropriate treatment in Bangladesh for the Appellant. In terms of access to the necessary healthcare, I note that the Appellant's home in Bangladesh is Sylhet whereas the principal centres for treatment for the conditions from which he suffers are in Dhaka or Mirpur where The Kidney Foundation is located. However, I find that there is an absence of satisfactory cogent evidence before me that the Appellant would not be able to access appropriate medical treatment either because of an inability to attend relevant treatment facilities or due to any financial concerns. For completeness, I note that in his witness statement, the Appellant asserts that there "is no proper treatment in Bangladesh, at least no access to whatever there is if you are not a member or [sic] the government party". A similar assertion is made in the witness statement of the Appellant's wife. However, I find that there is no satisfactory objective evidence in this regard and such assertions do not accord with the findings of CPIN: Health. Under the Constitution, the Government of Bangladesh is responsible for providing healthcare to all its citizens (paragraph 2.1.2) and Bangladesh is committed to achieving Universal Health Coverage (paragraph 2.1.5)."

35. There is no perversity or irrationality in the judge's decision.

36. The submission that the judge erred in her assessment of the appellant's article 8 case was not explained in either the written grounds or in Mr Aghayere's oral submissions. I can therefore deal with it quite shortly.

37. It is incorrect to suggest the medical evidence was not explored properly. Having already looked at the medical evidence within her assessment of the article 3 claim, the judge went on to consider article 8 at [40] to [49]. She examined the evidence of the appellant's need for personal care at [41(f)] and found there was a paucity of evidence. However, she did acknowledge at [42] that the appellant needed more physical support and he used a wheelchair. She accepted his health had deteriorated but again noted she did not have the benefit of medical evidence setting out satisfactory detail of the appellant's current conditions and prognosis. In making her proportionality assessment, the judge was entitled to find treatment was available to the appellant in Bangladesh [45]. The judge's article 8 assessment was careful and based on the evidence. It was not a conclusion all judges would have reached but that is not the point. The judge's assessment does not contain any legal error.

38. In summary, the appellant has failed to identify any errors of law in the judge's decision. The appeal to the Upper Tribunal is therefore dismissed and the decision of the First-tier Tribunal shall stand.

Anonymity

39. The First-tier Tribunal made an anonymity direction, presumably because the appellant has made a protection claim. Taking all the circumstances into account, I conclude that the direction should remain in place.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal shall stand.

Signed: **N Froom** Date: 2 February 2024

Deputy Upper Tribunal Judge Froom