Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03673/2018
HU/05039/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 12 March 2019	**On 18 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

PAVAN [D]
VENKATA [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hussain, instructed by Clyde, solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants were born on 30 March 1981 and 5 June 1985 respectively and are citizens of India. They are husband and wife. I shall hereafter refer to the first appellant as the 'appellant.' Both the appellants acknowledge that the appeal of the second appellant is dependent upon that of the appellant.

2. The appellant entered the United Kingdom initially in October 2006 with entry clearance as a student. He was granted further leave to remain but left the United Kingdom on 10 October 2011. He returned, with leave, in March 2013. On 12 June 2017, the appellant applied for indefinite leave to remain on the basis of long residence. That application is refused by decision of the Secretary of State dated 7 December 2017. The appellants appealed to the First-tier Tribunal which, in a decision promulgated on 8 October 2018, dismissed the appeals. The appellants now appeal, with permission, to the Upper Tribunal.

3. The appellants assert that the judge's decision and findings as to credibility are vitiated by procedural impropriety, namely that there was a failure to recognise that the appellant was a vulnerable witness with mental health issues. The appellant relies on two medical reports both post-dating the decision of the Tribunal. There is a letter from the appellant's GP dated 18 October 2018 and a report by Dr Alexander, a consultant psychiatrist, dated 16 October 2018. The psychiatrist's report states that the appellant has a 'generalised anxiety disorder' and 'might struggle to convey information clearly.' The report states that the appellant 'should be considered as a disabled person due to his mental illness.' The appellant asserts that, through no fault of her own, the judge had failed to have regard to the appellant's mental condition which has only been diagnosed following the hearing. The appellant relies inter alia on *AM (Afghanistan)* [2017] EWCA Civ 1123.

4. The psychiatric report of Dr Alexander appears to have been based on a single meeting with the appellant on 12 October 2018. It was the doctor's opinion the appellant's mental capacity was impaired 'due to a very high level of anxiety and secondary depression.'

5. The report contains curious features. The doctor states that the appellant 'finds it difficult to communicate with people especially when he is under stress' but it is not clear whether that is an objective diagnosis or the doctor simply reporting what the appellant had told him. Dr Alexander went on to state that 'during the Home Office interview [the appellant] was not able to answer the questions put to him properly. This is because of his severe anxiety state not because he did not want to answer the questions.' Again, it is not clear whether the doctor is here giving an opinion or simply recording the appellant's comments. If the former, I do not see how the doctor is able to explain why the appellant gave particular answers at an interview which took place long before the doctor ever met the appellant. The manner in which the report is written, confusing opinion with the appellant's own account, is unhelpful.

6. Mr Hussain, who appeared for the appellant before the Upper Tribunal, urged me to set aside the judge's decision on the basis of Dr Alexander's report. Even if I were to give substantial weight to the contents of the report (which, for the reasons stated above, I am reluctant to do) I would find that, even if the judge had been aware that the appellant was suffering from generalised anxiety disorder, the outcome of the appeal

would have been no different. I agree with Mr Mills, who appeared for the Secretary of State, that the core finding of the judge remains wholly unaffected by the view she took of the appellant's credibility as a witness. This was an appeal on human rights grounds against a decision of the Secretary of State. Relevant to the question of proportionality under Article 8 ECHR was the exercise, subject to his policy, by the Secretary of State of the discretion to discount from the appellant's residence in the United Kingdom an absence from the jurisdiction of more than 6 months. Indeed, the grounds of appeal offer no criticism of the judge's assessment of proportionality other than in respect of that core issue.

7. The judge was aware that the respondent's policy guidance of 3 April 2017 provided that 'if the applicant has been absent from the UK for more than six months in one period or 18 months in total, the application should normally be refused. However, it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances.' The Secretary of State had not exercised that discretion in the appellant's favour. The appellant had been absent from the United Kingdom between 10 October 2011 13 March 2013, a period of 17 months. The appellant claimed that he began to suffer from back pain in India during a family visit and that he was told by his doctors there to take 12 months' bed rest. In short, the judge did not believe the appellant. At [60], she made the following admirably clear findings of fact:

> "Therefore having assessed all of the evidence I find is a fact that the first appellant was not suffering from the complaints associated with back pain described by him; was not admitted to hospital in India during a family visit there from the United Kingdom; was not hospitalised subsequently; nor prescribed treatment including 12 month bed rest which prevented him from returning to the United Kingdom as he had planned to do in 2011."

8. The judge's reasons for reaching those findings depended upon her inability to accept that the appellant would have been prescribed 12 months' bed rest for a bad back. The Secretary of State had produced to the judge generic evidence from several sources none of which indicated that such prolonged bed rest was an inappropriate treatment. The judge has given cogent and clear reasons why she was to prefer that evidence to that of the appellant himself together with the documentary material from India which he had produced. That was a finding opened the judge who was not obliged, as the appellant now asserts, to prefer his evidence to that produced by the respondent. Significantly, in the light of the appellant's recently diagnosed mental condition, the judge did not disbelieve the appellant for any reason that can be explained away by his claimed vulnerability. Rather, the judge reached her finding because she was persuaded by the evidence produced by the respondent. Had the judge been aware of the appellant's mental condition, I find that the outcome would have been no different.

9. The appellant also complains that the judge took judicial knowledge of matters properly falling within the ambit of expert evidence. The judge did not believe that the appellant had been prescribed antibiotics for his bad back. The grounds of appeal point out that letter from a doctor at the Indian hospital recorded that the appellant had complained of the fever and had been prescribed antibiotics. I find that this finding of the judge, even if it failed to take account of the Indian hospital evidence, was discrete, separable from her other findings and did not in any way vitiate what she has said regarding the appellant's core claim that he had been confined to bed for 12 months.

10. Finally, the appellant claims that the judge made an error of fact. The judge found that both the appellant and his wife had been absent from the United Kingdom for 17 months. It is now asserted that the wife was not absent from the United Kingdom for that period. That may be the case but I agree with Mr Mills that if the judge misunderstood that part of the evidence, it was an error which does not in any way undermine the judge's central finding.

11. The judge, therefore, has made an article 8 the CHR assessment which is thorough and balanced. She was entitled, notwithstanding the most recent medical evidence, to find that the appellant had not been prescribed 12 months' bed rest as he claimed that the Secretary of State, in consequence, exercised his discretion as regards the appellant's absence from the United Kingdom correctly. The judge found accordingly that the appellant did not meet the requirements of HC 395 (as amended). That finding, in turn, operated as a factor in the judge's assessment of proportionality which I find is free from legal error. Consequently, the appeal is dismissed.

Notice of Decision

12. This appeal is dismissed.

Signed Date 13 March 2019

Upper Tribunal Judge Lane