Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11351/2018**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 10 May 2019	**On 14 May 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

RANJIT KAKANI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bradshaw, Counsel
For the Respondent: Ms young, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a 36 year old citizen of India. He has appealed against a decision of First-tier Tribunal ('FTT') Judge Chamberlain sent on 31 January 2019, in which his human rights appeal on Article 8 grounds was dismissed.

Background facts

2. The appellant arrived in the UK as a student in 2005. He remained in that capacity until he was granted leave to remain as a Tier 1

General Migrant on 4 March 2010, for three years. His application for further leave was refused on 30 October 2013, but his appeal against that decision was unsuccessful. He became appeal-rights exhausted on 21 July 2014. He made various further applications to remain after this. It is not necessary to go into the detail of these because they did not result in the grant of any leave.

3. On 4 May 2017 the appellant made an application to remain in the UK, based upon his private life and his family life with his partner. She is not a British citizen but is said to be lawfully in the UK as a student, and is completing her PhD. This application was refused by the respondent, for reasons contained in a decision dated 8 May 2018. In summary, the respondent concluded that there are no insurmountable obstacles to family life in India, the requirements of 276ADE are not met and there would be no breach of Articles 8 and 3 of the ECHR. Significantly, the respondent noted that there was evidence from Dr Idris that the appellant is unfit to travel but that he did not address the fact that the respondent can put in place appropriate safeguards during travel and provide a suitable after-care package for his arrival in India. The respondent states this in the decision:

> "However, Dr Idris does not state that you would be unfit to travel with appropriate safeguards being put in place prior to your flight."

4. The grounds of appeal against this decision rely upon the following:

   (i) There are exceptional circumstances to support a breach of Article 8 including the following: the appellant has a serious health condition; he pays privately for his healthcare; his condition developed whilst he was detained in the UK; he does not have family or other support in India and his health would deteriorate; he would lose all meaningful contact with his partner who will remain in the UK.

   (ii) Dr Idris has not had an opportunity to comment on the possible appropriate safeguards that could be put in place for the appellant's flight from the UK to India.

5. At the hearing before the FTT on 15 January 2019 the appellant was represented by his solicitor, Mr Khan. The appellant did not attend the hearing but his partner attended and gave evidence. In a comprehensive decision, the FTT dismissed the appeal on human rights grounds. The appellant appealed against this decision, and FTT Judge O'Keefe granted permission to appeal.

Grounds of appeal and hearing

6. The grounds of appeal are two-fold and can be summarised as follows:

(1) The FTT failed to take into account medical evidence said to be relevant to the core of the appellant's claim i.e. medical evidence that established that the appellant did not have "*health complaints (chest related) prior to his immigration detention*".

(2) The FTT failed to take into account the more recent letter from Dr Idris dated 10 October 2018 ('the October 2018 letter').

7. At the hearing before me, Mr Bradshaw confirmed that at all material times before the FTT and in the grounds of appeal, reliance was placed solely on Article 8 of the ECHR, and not Article 3. Mr Bradshaw submitted a GP's letter and a letter from Dr Idris dated 1 April 2019, but accepted these would only be relevant if I found that the FTT decision contains an error of law.

8. After hearing from Mr Bradshaw in full I indicated that I did not need to hear from Ms Young. I address Mr Bradshaw's submissions in more detail below.

Error of law discussion

Ground one – medical evidence regarding detention

9. It is very difficult to see how the appellant's claim that the chest problems from which he now suffers were brought on as a result of the respondent's actions in detaining him at Dungavel Immigration Removal Centre, could on any legitimate view be said to be "the core" of the appellant's Article 8 claim. The appellant describes his detention as occurring between 21 October 2016 and 18 November 2016. This is a time when the appellant had no leave to remain in the UK. The appellant complains that he developed a respiratory infection due to unhygienic conditions in detention and then there was delay in taking him from detention to hospital for treatment. The FTT's jurisdiction was limited to determining whether the appellant's removal would breach Article 8 – see Charles (human rights appeal: scope) [2018] UKUT 89 (IAC). Mr Bradshaw acknowledged that the appellant did not contend that the respondent had caused him harm and this in and of itself constituted a breach of Article 8. He therefore accepted that it was difficult to see how the FTT had jurisdiction to determine the issue of causation of the appellant's health complaints. Whilst a clear finding that a health condition was caused by the respondent's actions might be a relevant background matter, it would not add anything of substance to the Article 8 claim to remain in the UK. The Tribunal's jurisdiction is limited to the determination of human rights – see Charles (supra). That would turn on the strength of the appellant's private and family

life in the UK. It does not extend to determining the cause of the appellant's health condition.

10. In case I am wrong on the issue of jurisdiction, I invited Mr Bradshaw to demonstrate how in any event ground one is made out on its facts. I indicated that I was particularly interested in what aspect of the medical evidence available to the FTT supported the proposition that the appellant's chest pains began in detention and what evidence was relied upon to establish that detention itself caused the chest pains. Mr Bradshaw accepted that this evidence was very limited indeed and could only be found in an entry in the GP's notes. I am satisfied that the FTT carefully considered all the evidence relied upon by the appellant and was entitled to reach the conclusion that the appellant's health complaints were not caused by his detention in the UK – see [19] to [30] of the FTT's decision. As the FTT notes at [21], the detention record for 24 October 2016 refers to sharp chest pains occurring most days over the past 15-20 days. The FTT also pointed out at [22] and [23] that the detention records indicate that the chest pains began well before the appellant's detention commenced on 21 October 2016.

11. The grounds of appeal refer to the FTT's conclusion at [27], but entirely ignore the findings at [21] to [26], including Mr Khan not drawing any of the relevant documents to the attention of the FTT and there being no cogent evidence to support the claim that the chest complaints began during detention. The GP's entry of 30 November 2019 (page 25 of the supplementary bundle) is unclear and comes nowhere close to establishing the claim that chest pains began in detention for the first time or that detention caused the chest pains.

12. Ground one is totally without merit and does not contain a material error of law.

Ground two – the October 2018 letter

13. Ground two makes no meaningful effort to explain why the October 2018 letter provided any material or significant evidence, different from Dr Idris's earlier conclusion in his May 2018 letter that the appellant is unfit to travel. The FTT was clearly aware of the May 2018 letter, which is to be found at page 30 of the bundle. The FTT refers to this letter at [37]. This summarises the appellant's health conditions and confirms that his "*oxygen saturation indicates he is unfit to travel*". Dr Idris recommends a test in the lung function department if his condition deteriorates. The October 2018 letter summarises the appellant's health condition and refers to "*symptoms deteriorating and regular panic attacks*". This also states that "*it is not suitable for him to travel or fly until further notice as his oxygen saturations are low*".

14. Mr Bradshaw drew my attention to two matters in support of his submission that the failure to refer to the October 2018 letter made a material difference to the outcome: the October 2018 letter refers to evidence of panic attacks and was capable of providing a different view on the appellant's credibility.

15. I invited Mr Bradshaw to explain how the FTT can be said to have erred in law by not referring to the October 2018 letter, when it was not relied upon by his own legal representative at the hearing – see [53] of the FTT's decision. Mr Bradshaw indicated that the FTT was obliged to consider this material of its own volition as it formed a significant part of the procedural history before the FTT, i.e. it was filed and served pursuant to directions for updated medical evidence. I do not accept this. The FTT's finding that there was no evidence of regular panic attacks appears to be a mistake of fact. This is because the October 2018 letter refers to evidence of regular panic attacks (albeit this appears to be based upon self-reporting). This mistake of fact is not capable of constituting an error of law in accordance with the guidance in E v SSHD [2004] EWCA Civ 49. The appellant's solicitor failed to refer to the October 2018 letter, when he was specifically asked where the evidence was to show that the appellant could not travel. The appellant's advisors are responsible for the mistake. Judge O'Keefe noted that the FTT was not referred to the October 2018 letter. There is no evidence from the solicitors to indicate otherwise.

16. In any event, the failure to consider the October 2018 letter is not a material error because the conclusion on Article 8 would have inevitably been the same. Even when the October 2018 letter is taken at its highest, it does no more than set out that symptoms have deteriorated (and included panic attacks) and the appellant remains unfit to travel or fly. By the time of the FTT hearing some three months later on 15 January 2019, there was no up to date evidence regarding the appellant's symptoms or fitness to fly. Fitness to fly and associated medical conditions and treatment are fluid matters.

17. In addition, the October 2018 letter did not address the possible safeguards that could be put in place to ensure that the flight to India was safe for the appellant. This is an issue raised expressly by the respondent in the decision letter, yet there was no meaningful attempt to address it by the appellant's solicitors. Mr Bradshaw submitted that the onus remained on the respondent to identify what safeguards might be put in place. I do not accept this. A Tribunal is entitled to assume that the respondent will not remove a person by aeroplane unless it is safe to do so and that where a medical condition requires special arrangements to be made, they will be made. The burden remains upon the appellant to establish

his claim. The evidence from Dr Idris came nowhere close to establishing that the appellant's removal would breach Article 8. Dr Idris has not engaged with any possible safeguards to prevent a deterioration in the appellant's condition or identified the outstanding investigations to be completed. It is of some concern that having identified that further tests (including a lung function test) are necessary in the May letter, it is unclear which tests have been carried out by the time of the October 2018 letter, but the recommendation that he completes a lung function test is merely repeated.

18. The high watermark of the appellant's Article 8 claim rested upon his claim that his wife (who was in the UK as a student) was his carer, and the care that she provided was irreplaceable. The FTT was entitled to reject that claim for the reasons provided at [34] to [41]. I acknowledge that the FTT stated there was "*no evidence*" to corroborate the appellant's claim that he suffered from panic attacks at [41]. It remains the case that there was no clear or cogent evidence of this. As far as panic attacks are concerned, the October 2018 letter does no more than repeat the symptoms described by the appellant.

19. The failure to address the October 2018 letter is not an error of law on the part of the FTT, because the appellant's own legal representative failed to refer to it. If I am wrong about this, I am satisfied that the error of law is not material. The finding that there would be no insurmountable obstacles to the appellant's integration to India and no breach of Article 8 remained inevitable even when the October 2018 letter is taken into account.

Decision

20. The FTT's decision did not involve the making of an error of law and I do not set it aside.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
10 May 2019