Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: PA/07669/2018 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester Piccadilly IAC **Decision & Reasons Promulgated**

On 21 August 2020 **On 26 August 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TH

(ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS (P)

For the appellant: Mr C Bates, Senior Presenting Officer

For the Respondent: Ms E Fitzsimons of Counsel, instructed by Sutovic & Hartigan

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was

not practicable and all issues could be determined in a remote hearing. The order made is described at the end of these reasons.

1. For the purposes of this decision I will continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a Pakistani national born on 6.7.65.

3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 31.10.19, dismissing the appellant's asylum and humanitarian protection claims but allowing the appeal on articles 3 and 8 ECHR human rights grounds.

4. The general background is that the appellant came to the UK from Pakistan in 2006 on a 6-month visit visa but overstayed. He has dwarfism (achondroplasia), a congenital condition also referred to as restricted growth syndrome, as a result of which he has shortened arms and legs, with other associated medical conditions, all of which are fully reported and summarised in the decision of the First-tier Tribunal. Owing to his medical needs, the appellant was transferred to a care home in 2011, where he remains. He claimed international protection on the basis that on return he would face persecution, harassment and ill-treatment, and that he would face destitution such that his rights under articles 3 and 8 would be infringed.

5. In September 2019, the respondent informed the appellant that it was proposed to grant him discretionary leave outside the Rules and, therefore, invited him to withdraw his protection claim. However, he insisted on pursuing that claim, asserting that on return to Pakistan he would have no support, would be unable to afford necessary medical treatment, and would be discriminated against, so that he was entitled to protection as a member of a particular social group (PSG).

6. The protection claim was dismissed, both on asylum and humanitarian protection grounds. However, the First-tier Tribunal found that as the appellant would be unable to obtain employment to support himself and would be bed and/or housebound, this would affect his ability to engage with wider society so that there were very significant obstacles to his integration on return, outweighing the public interest in immigration control, thus allowing the appeal on human rights grounds under both articles 3 and 8 ECHR.

7. The respondent's grounds submit that in allowing the appeal on article 3 non-medical grounds, the judge has materially erred in law. It is submitted that as the criteria for non-medical article 3 claim is the same as for protection under the Refugee Convention, which the First-tier Tribunal Judge refused, there was no logical basis on which the article 3 claim could have succeeded.

8. Permission was granted by First-tier Tribunal Judge Landes on 24.12.19, considering that in the light of the decision of the Court of Appeal in SSHD v Said [2016] EWCA Civ 442, it is arguable that the judge erred in allowing the appeal on article 3 grounds. Judge Landes stated, "*It is my understanding that the allowing of the appeal on Article 3 grounds (as opposed to simply on Article 8 grounds) may make a difference to the length of leave which is granted under the respondent's policy*." In the circumstances, any error in this regard would be material.

9. In response, the appellant has submitted a Rule 24 Reply, dated 20.4.20, drafted by Ms Fitzsimons, which I have read and taken into account.

10. The appeal to the Upper Tribunal is limited to the narrow issue of the decision allowing the appeal on article 3 ECHR non-medical grounds. The decision to allow the appeal on article 8 ECHR grounds is not challenged by the respondent. Neither has there been any cross-appeal against the dismissal of the appellant's asylum and humanitarian protection claims.

11. I have carefully considered the decision of the First-tier Tribunal in the light of the written and oral submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal.

12. At [127] the judge found that the appellant did not meet the high threshold required for a medical article 3 claim. Whilst in a decision post-dating the First-tier Tribunal appeal hearing, the Supreme Court in AM (Zimbabwe) concluded that the threshold should that in Paposhvili v Belgium [2016] ECHR, the judge found that the appellant still could not meet even that lowered threshold.

13. Neither did the judge accept that the circumstances the appellant will face on return were sufficient to meet requirements for international protection. At [114] the judge accepted that the appellant is likely to be the victim of discrimination and the subject of unpleasant unwelcome attention from other but concluded that that treatment would not be of such severity as to amount to persecution. At [115] the judge accepted that the appellant had complex medical needs and at [117] that he will face challenges and difficulties securing a level of care equivalent to that which he receives in the UK. Nevertheless, none of these circumstances were found sufficient to qualify for international protection. The judge found at [116] that he has a family home to return to and family emotional and practical support available to him. At [120] the judge was also satisfied that the appellant would be able to obtain the medication he needs.

14. The Article 3 non-medical claim was considered between [119] and [124] of the decision. At [120] the judge found that the practical/social day to day care with which the appellant is currently provided "to enable him to live with some measure of dignity and comfort" would unlikely be available to him. At [121] the judge found he needs help with many aspects of everyday life and receives round the clock care with

specialist equipment. At [123] the judge concluded that appropriate care is not likely to be available to the appellant and, therefore, than his ability to live with any sense of dignity are remote.

15. However, it is not clear that the judge has applied the correct standard or burden of proof to the article 3 issue, or on what basis the appeal was allowed under article 3. Although accepting at [122] that the appellant had brothers and sisters in Pakistan, the judge the stated, "*but I do not know where they live and what their domestic and financial circumstances are as far as being able and willing to offer the appellant any help*." That finding appears somewhat contradictory to that at [116] of the decision and the judge appears to have forgotten here that it is for the appellant to prove his case, not for the respondent to disprove it. A similar concern might be raised in relation to the finding at [123] that the judge "did not discount" a deterioration in the appellant's mental health, whilst finding that at the date of the last medical report there was no evidence he was suffering from any mental health issues. The judge concluded "*It is reasonable to assume that if the appellant were to develop mental health issues, then in the absence of effective treatment the quality of his life would further deteriorate*" relying there on factor in respect of which the judge had found no evidence.

16. At [124] the judge found that without the ability to work and given the extremely limited funds from others sources that might be available to the appellant, "*the risk of destitution cannot be ruled out*." Again, it is not clear that the judge is applying the correct standard and burden of proof suggesting that the risk of something happening could not be ruled out rather than that the appellant had established the risk to the correct standard of proof required.

17. Finally, at [124], the judge concluded that in the absence of the type of care the appellant needs to function, the conditions in which the appellant would find himself living would be so poor as to amount to inhuman or degrading treatment and a violation of his article 3 rights.

18. From [129] of the decision, it is clear that the judge reasoned that because the appellant would not be able to obtain employment on return to Pakistan and will be bed and/or housebound, this would adversely affect his ability to engage with wider society and render him unable to provide for himself. The judge did not there make specific reference to article 3 but appeared to be relying on very significant obstacles to integration under paragraph 276ADE(1(vi) and article 8 ECHR grounds outside the Rules. As stated above, the respondent accepted the article 8 findings.

19. However, in relying on Said, the respondent complains that the findings summarised above were insufficient to justify allowing the appeal on article 3 grounds. At [18] of Said the Court of Appeal held that,

> "*to succeed in resisting removal on article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others*

> *in the sense described in paragraph 282 of Sufi and Elmi, whether or not the feared deprivation is contributed too by a medical condition, the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases*."

20. Mr Bates argued that the expert evidence relied on the judge supported the finding of very significant obstacles to integration but not article 3. He pointed out that in relation to alleged discriminatory treatment the appellant would received on return to Pakistan the judge found this was insufficient to reach the threshold for international protection, and that the claim under article 3 medical grounds was also dismissed.

21. In essence, Ms Fitzsimons sought to navigate a very narrow passage between the Refugee Convention on the one hand and the high threshold required for an article 3 medical claim on the other. She submitted that the judge accepted the expert evidence that the appellant's non-medical needs would not be met on return to Pakistan and argued that the circumstances on return did not equate to simply destitution arising from living conditions. She pointed to the expert opinion that persons experiencing the same degree of 'debility' as the appellant and in particular those with visible and stigmatising disabilities, "*would face extraordinary and life threatening social, economic and health-system specific challenges*" in accessing necessary medical care. At [12] of her skeleton argument, Ms Fitzsimons submitted that "*the Appellant's case is one that relates to disability, and the evidence from Dr Varley shows that the abject circumstances faced by disabled people like the Appellant are in part a consequence of deliberate societal discrimination and exclusion, rather than simple poverty*."

22. Much of the skeleton argument and Ms Fitzsimons submissions amount to an attempt to reargue the appeal by recharacterising the appellant's claim in a rather different way to how the judge framed the article 3 non-medical conclusions. Ms Fitzsimons accepted that the N threshold could not be met but argued that due to disability the appellant would be excluded from employment and face a hostile environment. She accepted that this had been found not to be sufficient to meet the threshold for persecution but argued that the types of harm identified by the expert were different, because they arise from she described as, "*engrained discriminatory attitudes of society in Pakistan*." It is difficult, however, to see how this can be distinguished from persecution. At [24] of the decision, the judge noted that the respondent had accepted that people who have physical disabilities such as dwarfism are subject to harassment and discrimination, but that treatment was insufficient to amount to persecution or a breach of article 3 ECHR, with which conclusion the judge agreed. It is also difficult to see how the circumstances relied on are the responsibility of the state or others as Ms Fitzsimons appeared to suggest.

23. I am satisfied that all the points made by Ms Fitzsimons are and were more appropriately relevant to persecution of the appellant as a PSG, and did not in fact reflect the basis of the judge's findings on article 3 which clearly pointed to a

conclusion based on destitution. However, it is clear from Said that the living conditions arising from circumstances of poverty or deprivation such as the judge identified or anticipated as would result in destitution are insufficient to meet the high threshold required under article 3 ECHR. Further, for the reasons given, I am not satisfied the judge has applied the correct burden and standard of proof in the article 3 considerations.

24. In the premises, I find that the decision is flawed for error of law and cannot stand but must be set aside and remade. For the reasons set out above, I am satisfied that the difficult circumstances facing the appellant on return, which have been found not to amount to either persecution or sufficient to meet an article 3 medical claim, but which do amount to very significant obstacles to integration, as the respondent has always agreed, are insufficient to meet the high threshold required under an article 3 non-medical claim. It follows that the appellant's appeal must be dismissed on article 3 ECHR grounds.

Decision

The decision of the First-tier Tribunal involved the making of an error of law;

I allow the Secretary of State's appeal to the Upper Tribunal;

I set aside the decision in the appeal in relation to article 3 ECHR grounds only, preserving the findings and conclusions on article 8 ECHR grounds;

I remake the decision by dismissing the appeal on asylum, humanitarian protection, and article 3 ECHR grounds, but allowing the appeal on article 8 ECHR grounds only.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 24 August 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 24 August 2020