Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10818/2019

THE IMMIGRATION ACTS

Heard at Field House
On 2nd October 2020

Decision & Reasons Promulgated
On 14 October 2020

Before

UPPER TRIBUNAL JUDGE KEITH

Between

ASHFAQ [N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms S Aziz, Counsel, instructed by Rashid & Rashid solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 2nd October 2020.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Bowler (the 'FtT'), promulgated on 30th December 2019, by which she dismissed the appellant's appeal against the respondent's refusal of his protection and human

rights claims. The respondent had, on 11th October 2019, refused the appellant's further submissions made on 21st December 2017, but provided him with a statutory right of appeal.

Background

3. The appellant, an Indian national, had previously applied for asylum, having arrived in the UK in April 2000. He claimed asylum on 27th September 2000. The respondent had refused this application on 7th November 2000 and his appeal against that refusal was dismissed by, as he then was, Adjudicator Chalkey in a decision promulgated on 16th February 2002. The gist of the appellant's asylum claim was that as a person of Muslim faith, his family had been persecuted by members of the Hindu faith and his parents had been murdered; he had been arrested in India in 1997 and falsely accused of murder, detained, released on bail and subsequently fled to Saudi Arabia; then returned to India and then travelled on to the UK. Adjudicator Chalkley rejected the appellant's account in its entirety, not accepting the plausibility of the account of having been charged with murder in India, fleeing bail, only to return to India; nor accepting the plausibility of the account regarding the appellant's subsequent detention in India, but his ability to then flee that country. Adjudicator Chalkley regarded purported death certificates for the appellant's parents as forgeries. He dismissed the appellant's appeal by reference to refugee status, as well as articles 2 and 3 of the ECHR.

4. The appellant's further submissions reiterated the appellant's fear of persecution in India due to his Muslim faith, particularly by religious extremists and his fear that the Indian police would not help him. He also claimed that he had tried to hide without success in another part of India, as his parents had been murdered. He also reiterated the general obstacles to his integration into India, were he required to return there.

5. The respondent rejected the further submissions, taking Adjudicator Chalkley's decision as her starting point and noting no other evidence except representations from his lawyers substantiated his renewed claims that his life would still be at risk in India due to his religious beliefs. The respondent noted the appellant's relatively youthful age (he was only 49); his residence in India for the vast majority of his life and, in terms of the appellant's claimed mental health issues, the lack of any evidence that he was receiving treatment in the UK, and the availability of medical treatment in India, if he so required it, on his return. The respondent also did not accept that the appellant no longer had family in India.

Limited scope of appeal before the FtT

6. The appellant initially appealed both in respect of the protection appeal and article 3 ECHR; and his wider article 8 ECHR rights, noting the period of time in which the appellant had lived in the UK and the obstacles to his integration in India. However, by the time that the FtT considered the appellant's appeal at the hearing on 6th December 2019, as the FtT's decision records at §[2], the appellant no longer pursued his protection claim or a claim under article 3 of the ECHR. The sole ground of

appeal pursued was with respect to the appellant's rights under article 8 of the ECHR, with the appellant's case summarised at §[17] to [21]. The appellant relied on paragraph 276ADE(1)(vi), namely whether there were very significant obstacles to his integration into India. The appellant asserted that the situation in India for those of muslim faith was deteriorating. He also relied on his poor mental health and the period of time spent by him in the UK. At the date of the FtT hearing, he had been present in the UK for 19 years and eight months, (although the date when the appellant had entered the UK, namely whether it was April or November 2000, was, at that stage in dispute – it has since been accepted to be April 2020). The appellant also relied on paragraph GEN .3 .2 and unjustifiably harsh consequences resulting from his removal.

The FtT's decision

7. The FtT noted at §[6] that the appellant was like to be distressed when questioned and that the accuracy of his testimony may be undermined and he was unlikely to have the capacity to be cross-examined, but that he would have the capacity to give instructions. At §[7], the FtT noted that the appellant was a vulnerable witness, who although might be unable to be cross-examined, could proffer some evidence, but in the absence of cross-examination, the weight attached to his evidence would be reduced. However, at §[12], the FtT said that she had not take into account the witness statement of the appellant, as opposed to attaching limited weight to it, because he had not been called to give evidence. The FtT reminded herself of the previous findings of Adjudicator Chalkley, adopting the guidance in the well-known authority of Devaseelan v SSHD [2002] UKIAT 00702 and taking Adjudicator Chalkley's findings as her starting point. The FtT noted that the appellant had not been in the UK for 20 years, even taking his case at its highest. In terms of very significant obstacles to the appellant's integration to India, despite having close supporters in the UK, they had been unable or unwilling to provide any evidence of their knowledge of the appellant's circumstances in India which would, in the FtT's view, have been readily available.

8. There was a report of an expert, Dr Ahwe, whose evidence the FtT analysed. The FtT noted at §[39] that the expert had not had access to the appellant's medical records, and had based his assessment on the appellant's account of events previously found by Adjudicator Chalkley to have been fabricated. The expert did not suggest that the appellant currently required medication but noted the negative impact of the appellant's removal on his family in the UK, even though in the appellant's case, he did not claim to have family in the UK. Whilst the expert asserted that the appellant was unlikely to engage with mental health care in India, it was said that the expert was inconsistent about the extent which the appellant accessed healthcare in the UK; and the expert had provided no analysis of the availability of treatment in India. Having identified her concerns with the expert's evidence, the FtT applied limited weight to it.

9. The FtT assessed the appellant as a relatively young man, with no physical health conditions, who had lived in a different culture (the UK) where he had not spoken

the language. The FtT considered, at §[63] and §[64], a Country Policy and Information Note ('CPIN') and concluded that while it indicated an increase in tensions faced by people of muslim faith in India, this was not at such a level to support the assertion that there were very significant obstacles to the appellant's integration, noting that he had lived there for nearly 30 years.

10. The FtT dismissed the appellant's article 8 appeal and dismissed his protection appeal, as it was not pursued.

The grounds of appeal and grant of permission

11. The appellant lodged grounds of appeal which are essentially that the FtT had failed to consider the widespread degrading treatment towards Indian Muslims, rather than simply those of Muslim faith who were not Indian nationals. He would be subjected to unduly harsh treatment. The FtT had failed to carry out a proportionality assessment by reference to the well-known authority of Razgar v SSHD [2004] UKHL 27 and there were insurmountable obstacles to the appellant enjoying family and private life outside the UK.

12. The appellant's application for permission to appeal to this Tribunal was initially refused, but a renewed application was granted by Upper Tribunal Judge McWilliam on 27th February 2020. She noted at §[12] of the FtT's decision that the appellant was not called to give evidence and as a consequence, the FtT had not taken into account his witness statement at all. Judge McWilliam regarded that as an arguable '*Robinson obvious*' error, in light of which it was arguable that the FtT's proportionality assessment was flawed. The grant of permission was not limited in its scope.

The hearing before me and concessions by the Secretary of State

13. I explored with Ms Cunha on behalf of the respondent at the beginning of the hearing the respondent's response to Judge McWilliam's identification of the *arguable 'Robinson obvious'* point. I did so, in the context of this Tribunal having since received correspondence from Mr Stefan Kotas, Senior Home Office Presenting Officer, dated 15th July 2020. Mr Kotas asserted that the contents of the appellant's witness statement would not have made any material difference to the outcome, but added at §[6] to §[8]:

> *"6. Further in the circumstances it would now appear that the appellant meets paragraph 276ADE(1)(iii). The Secretary of State considered this Rule in her decision letter in the following terms:*
>
> > *'It is accepted that you meet the requirements of 276ADE(1)(i). It is noted that you are 48 years and 8 months of age and have lived in the UK since 7 April 2000. You have failed to demonstrate that you have had twenty years' residence in the UK as required under Rule 276ADE(1)(iii).'"*
>
> *7. Thus the respondent accepts that the appellant was not refused on grounds of suitability and has indeed lived in the UK since 7 April 2000 and as a consequence of the further passage of time since the date of the decision now meets the Rules.*

8. To that extent that the Upper Tribunal is invited to issue further directions inviting the appellant to vary his grounds of appeal in accordance with the above and subject to the decision of the FtT being set aside, the Upper Tribunal can remake the appeal in the appellant's favour on the papers without the need for a further oral hearing notwithstanding that the appellant still appears to be unrepresented. Should the Upper Tribunal still consider remaking it in the above terms the SSHD of course defers to that view."

14. At the hearing before me Ms Cunha made two further concessions. The first was that contrary to Mr Kotas's submission, the respondent now accepted that the witness statement of the appellant, which had been discounted in its entirety by the FtT, would have added a material weight to the consideration of whether there were very significant obstacles to the appellant's integration into India. The fact that this was not considered by the FtT meant that there had been not only a failure by the FtT to assess that evidence, but a failure to explain why it was discounted. Ms Cunha conceded that that this was a material error and as a consequence, that the FtT's conclusions were unsafe and should be set aside.

15. Second, Ms Cunha conceded that when discounting the appellant's witness statement, the FtT had erred in failing to analyse and consider the appellant's continuous residence in the UK.

16. Ms Cunha made clear that the concessions were made in relation to the article 8 claim, and on the basis that the protection and article 3 ECHR had not been pursued further. Ms Aziz accepted that there had been no renewed appeal in respect of the protection and article 3 ECHR claim and the appellant's appeal, which was considered by the FtT, was solely on the basis of the appellant's article 8 ECHR rights.

Conclusion on error of law

17. In light of Ms Cuhna's concession, I conclude that the FtT erred in law, such that her decision in respect of the article 8 appeal is unsafe and cannot stand. The FtT's decision in respect of the protection and article 3 ECHR remains undisturbed.

Disposal of appeal

18. Ms Cunha and Ms Aziz agreed that given the narrow legal issue and Mr Kotas's concession on behalf of the respondent, which made further fact-finding unnecessary, and considering paragraph 7.2 of the Senior President's Practice Statement, this was clearly a case where the remaking of the appellant's appeal should be retained by the Upper Tribunal.

Remaking of the Decision

19. I next discussed with Ms Cunha and Ms Aziz the scope of the remaking required and was grateful for their clear and concise submissions, as well as the concessions reiterated by Ms Cunha. First, Ms Cunha conceded on behalf of the respondent that

the appellant met the requirements of paragraph 276ADE(1)(iii) and therefore at the date of today's hearing, met those requirements of the Immigration Rules. Both Ms Cunha and Ms Aziz agreed that it was unnecessary and inappropriate for me to consider separately the issue of whether the appellant met the requirements of 276ADE(1)(vi), namely whether there would be very significant obstacles to the appellant's integration in India, noting that this provision applies to those having lived continuously in the UK for less than 20 years. Moreover, this would, in their view, unnecessarily require more detailed evidence as to whether there were obstacles to integration in India on religious grounds, as well as an assessment of medical evidence, when the appellant now met a different part of the Immigration Rules. I explored with Ms Cunha the authority of OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC) and in particular the headnote which stated at §[3]:

> *"Where the judge concluded that the ten years' requirement [in our case twenty years is relevant] is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal unless the judge is satisfied that there is a discrete public interest factor which would still make P's removal proportionate. Absent such factors it would be disproportionate to remove P or require P to leave the UK before P is reasonably able to make an application for indefinite leave to remain."*

20. §[4] of the headnote continues:

> *"Leaving aside whether P has any other Article 8 argument to deploy (besides paragraph 276B) and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all the Secretary of State is required to do in such a case is grant P a period of leave sufficient to enable P to make the application for indefinite leave to remain. If P subsequently fails to make such an application P will continue to be subject to such limited leave as the Secretary of State has granted in consequence of allowing the human rights appeal."*

21. While that case applies to applications for indefinite leave to remain (not applicable here), in the circumstances, Ms Cunha accepted that whilst there might have previously been a separate article 8 argument to deploy, namely paragraph 276ADE(1)(vi), in this case, on the basis that the appellant now meets the requirement of paragraph 276ADE(iii), his appeal on article 8 grounds should succeed.

Conclusion on remaking the appellant's appeal

22. In light of the concessions of Ms Cunha and Mr Kotas, my decision is that the appellant's appeal on article 8 grounds succeeds.

Notice of Decisions

The decision of the First-tier Tribunal contains material errors of law in relation to article 8 ECHR and I set aside the decision in respect of article 8. The First-tier Tribunal's decision in respect of the protection and article 3 ECHR appeal stands.

I remake the appeal by upholding the appellant's appeal on human rights grounds.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **7th October 2020**

TO THE RESPONDENT
FEE AWARD

The appeal has succeeded. I regarded it as appropriate to make a fee award of £140.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **7th October 2020**