Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09242/2019 (V)**

THE IMMIGRATION ACTS

Heard remotely by Skype for Business from Field House	**Decision & Reasons Promulgated**
On 15 March 2021	**On 31 March 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M P T S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr J Byrne, Counsel, instructed by Masters Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

The Appellant appeals with permission against the decision of First-tier Tribunal Judge Mill ("the judge"), promulgated on 20 January 2020, by which he dismissed the Appellant's appeal against the Respondent's refusal of his protection and human rights claims.

The Appellant, a citizen of India, had put forward a relatively unusual claim for international protection. He asserted that he had been heavily involved in the promotion of chess, particularly in schools. He had travelled widely in furtherance of this and other chess-related objectives. To reduce the Appellants, claim to its essence, it was said that he exposed corrupt practices by the All India Chess Federation ("AICF") and past information to the International Chess Federation ("FIDE"). This led to the AICF suffering significant financial and reputational damage problems. This, it is said, caused the AICF to issue a "show cause notice" ("SCN") to the Appellant in May 2015. It was the consequences of the SCN that would lead, through a series of events, to the Appellant being detained or imprisoned in India and subject to treatment contrary to Article 3 ECHR (it being accepted throughout that the Refugee Convention was not engaged).

The decision of the First-tier Tribunal

The judge identified what he believed to be evidential difficulties in respect of the SCN. In particular, he had concerns that the contents of an email sent to the Appellant was not in the same format as the SCN produced elsewhere in the Appellant's bundle. Further, the judge was of the view that the email address from which the document had been sent to the Appellant did not appear to be an official AICF account. For these reasons he placed limited weight on the evidence and found that the Appellant had never been the subject of formal disciplinary proceedings by that organisation.

In the alternative, the judge went on to find that even if the SCN was reliable, the AICF had lost interest in the Appellant over the course of time and would not have posed any risk to him on return. This conclusion was supported by a number of findings set out in paragraphs 45 to 54 of the decision. In summary, the judge noted the absence of any criminal proceedings instigated against the Appellant; the passage of time without any form of action having been taken; the lack of evidence in relation to any prosecutions of others who had accused the AICF of wrongdoing; the fact that the Appellant had not disclosed information to anyone other than the FIDE; the absence of evidence relating to collusion between the AICF and the airport authorities in India; the fact that the Appellant had apparently returned to India in July 2015; and the significant delay in the Appellant making his protection claim in the United Kingdom. These matters rendered the Appellants claim to be "entirely speculative."

In respect of Article 8, the judge noted that this aspect of the case was predicated upon the same factual matrix said to apply to the protection claim.

The grounds of appeal and written submissions

Four grounds of appeal were put forward: first, that the judge made errors of fact when considering the SCN; second, that the consideration of this document also gave rise to procedural unfairness; third, that the judge failed to consider relevant evidence, failed to make appropriate findings of fact, and made findings which were perverse; fourth, the judge had failed to conduct a balancing exercise under Article 8.

Permission to appeal was granted on all grounds.

Mr Byrne provided a skeleton argument, dated 13 December 2020, which followed the grounds of appeal.

There has been no rule 24 response from the Respondent.

Prior to the hearing, an application was made by the Appellant to adduce further evidence which, it was said, went to the first ground of challenge, namely whether the judge had committed an error of fact in relation to the SCN.

The hearing

I admitted the item of new evidence relating to the AICF's change of email address.

Ms Everett accepted that the judge may have committed errors in respect of his assessment of the SCN. However, she contended that such errors were not material, given everything else said by the judge. Even at its highest, submitted Ms Everett, the Appellant's claim would not have succeeded. The links in the various stages of his claim were simply too tenuous.

Mr Byrne submitted that the errors in respect of the SCN were central to the judge's overall assessment of the Appellant's case. The lack of any formal proceedings against the Appellant thus far were readily explained by his absence from the country, in other words, if the Appellant were to return the risk would materialise at that point. The Appellant had exposed corruption within the AICF and caused it significant problems on the international stage. The AICF would be able to use its considerable influence to have action taken against the Appellant. Mr Byrne referred me to country information on the prevalence of corruption in India that had been before the judge. Mr Byrne criticised the judge for failing to have made sufficient detailed findings on the Appellant's case. There was also a difficulty in respect of paragraph 53. The judge had been of the view that the Appellant had in fact returned to India in July 2015 when the oral evidence and that contained in the Asylum Interview Record indicated that he had not in fact made the journey. This was because he was worried about what would befall him if he did. Mr Byrne urged me to find that the errors of the judge were material and that the case needed to be looked at again afresh.

In respect of Article 8, Mr Byrne accepted that the basis for this was essentially the same as put forward in the protection claim. Mr Byrne submitted that the Appellant had provided an article about a prosecution against somebody else who had exposed problems within the AICF.

At the end of the hearing I reserved my decision.

Decision on error of law

I conclude that whilst the judge has committed errors in respect of his consideration of the SCN, these were not, in the circumstances of this particular case, material to the outcome.

In respect of the SCN, I accept that the body of the email referred to at page 205 of the Appellant's bundle constituted a copying and pasting of the notice itself, which was appended as an attachment to that same email (see page 206 of the bundle). This was not entirely clear on the face of the evidence and I have a degree of sympathy for the judge. Nonetheless, I am satisfied that the judge erred in respect of the first reason stated in paragraph 43 for rejecting the reliability of that document.

In respect of the second reason provided, namely the email address itself, I again have sympathy for the judge in that the evidential picture did not seem to be clearly presented to him. However, I am prepared to accept that the particular issue of the address was not raised at the hearing itself as it really should have been if this was deemed to be a concern. In the event, the new evidence relating to a change of email addressed made by the AICF does go to confirm that the address used in the email of May 2015 was at that time the address used by this organisation. Thus there is a second error in respect of the judge's consideration of the SCN.

I do not accept, however, that these two errors in and of themselves go to show that the rest of the judge's decision is flawed such that it should be set aside. The alternative conclusion reached by the judge in paragraph 44 is to the effect that even if the SCN was a reliable document, for the reasons the judge goes on to set out, the AICF had lost interest in the Appellant and failed to pursue any possible action against him and that there was, all matters considered, no risk on return. In my judgment the judge was entitled to conclude that the Appellant's case was ultimately "entirely speculative".

The SCN itself simply stated that the Appellant should show cause why "action" should not be initiated against him on specified "charges". Nothing in that notice mentions criminal proceedings. The "charges" referred to plainly relate to breaches of the organisation's own procedures/rules. Once the Appellant's had responded to that notice, the AICF contacted him again by email dated 10 July 2015 (page 234 of the bundle). That email reads as follows:

> "This is to inform you that the Central Council of the All India Chess Federation which met on 28.06.2015 discussed the above matter and had directed me to inform you that your reply to the show cause notice is not

> satisfactory. It was decided to recall your nomination to FIDE Committees and also not to recommend your name in future for any assignment with FIDE. Please be guided by the above."

Again, there is no reference to any criminal action being pursued against the Appellant. On the face of the evidence it was clearly being dealt with as an internal matter only. Although the judge did not make specific reference this item of evidence, it only goes to reinforce his overall conclusion that the Appellant's claimed fear of prosecution and/or ill-treatment by the Indian state apparatus was wholly speculative.

It was plainly open to the judge to conclude that no criminal proceedings had been brought against the Appellant. At the very least, if they had, the judge was entitled to conclude that the Appellant would have known about them. The absence of any formal proceedings other than on an internal basis was a matter on which the judge was entitled to rely in respect of his conclusion that the AICF were not interested in taking relevant action against the Appellant.

The judge was entitled to take into account the fact that the Appellant had failed to provide any evidence that other individuals who had made disclosures against the AICF to the FIDE had been prosecuted. Even if evidence of one such prosecution had been adduced, this could not be said to constitute a material error of law, given all other matters to which the judge addressed himself. The judge was entitled to conclude that a reference in oral evidence to active court proceedings in January 2020 was entirely unsupported, as it reasonably could have been. It was also open to the judge to conclude that there was a lack of clarity as to who might have filed a criminal case in respect of the article referred to in paragraph 47.

In the absence of any country or expert evidence to the contrary, it was open to the judge at paragraph 51 to conclude that there was no link between the AICF and the airport authority such that the latter would have notice of the Appellant's return to India.

The significant delay in the Appellant making his protection claim in the United Kingdom was a further matter that the judge was entitled to take into account. The SCN was sent to him in May 2015. The notification that the AICF were dissatisfied with his response to this was communicated to him a couple of months later. The Appellant did not make his protection claim until 2019.

During the course of submissions Mr Byrne sought to identify a further factual error committed by the judge in paragraph 53. Whereas the judge stated that the Appellant had returned to India in July 2015, it was said that the oral evidence and an answer in the Asylum Interview Record indicated that the Appellant had intended to return but did not do so once he received the AICF response of 10 July of that year. The Appellant's witness statement to which I was referred during the hearing was entirely unclear on what had in fact happened. Even if the judge had fallen into a factual error on this particular point, it does not affect my view of the judge's decision as a whole. If indeed the Appellant has fostered a genuine subjective fear of returning to India at that stage, the content of the SCN, the AICF's response of 10 July 2015, and the

absence of other relevant evidence, all pointed in one direction; the fear of repercussions relevant to a protection claim were simply not well-founded, even on the lower standard of proof.

That feeds in to a wider point that underpins much, if not all, of what the judge was in essence saying about the Appellant's claim, namely that it was so speculative as not to disclose a reasonable likelihood of risk. In order to show the relevant risk of Article 3 ill-treatment, the Appellant was in truth having to show that the following chain of events would be reasonably likely to occur:

> notwithstanding the actual contents of the SCN and the response of 10 July 2015, and notwithstanding the inaction between 2015 and 2019 on their part, the AICF held a genuine intention not simply to have taken internal action but to have made a false complaint to the police;
>
> that the AICF would have employed corrupt influence in order to ensure that the police then went on to lay charges against him;
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> that the charges would have resulted in a trial that was, due to corruption instigated by the AICF, itself in flagrant denial of the right to a fair trial;
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> that a corrupt conviction would have resulted;
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> that once in detention as a result of that corrupt conviction the Appellant would have been subject to positive ill-treatment contrary to Article 3, again by virtue of corrupt influence of the AICF (it had not been suggested that prison conditions of themselves violated Article 3).

I bear in mind the country information that was before the judge and cited in Mr Byrne's skeleton argument. The general background information does point towards the prevalence of corruption (see in particular paragraph 4 of the 2019 skeleton argument). In that sense the Appellant's case had some generalised objective support. However, it was still open to the judge to conclude that the chain of events required to have been demonstrated by the Appellant were so speculative as not reasonably likely to occur. That is the upshot of the judge's statement at paragraph 52 that the account was "entirely speculative".

What I have said above is not a complete re-assessment of the Appellant's case on my part: it is based on what the judge himself concluded.

In respect of the submission that the risk to the Appellant would only materialise on return and that the absence of any proceedings against him now was unsurprising, there may be cases in which such an argument would find favour with a judge. However, on the facts of this case, the judge was entitled to place weight on the absence of any proceedings. This was one consideration amongst a number. Further, as has been seen, the contents of the SCN and the AICF's response of 10 July 2015, firmly underpin the judge's conclusion that the absence of proceedings was due to a lack of interest in the Appellant. Beyond that, for the Appellant to have potentially made good this aspect of his case, he would have needed to show that the AICF would have somehow become aware of his return to India. Given the judge's unchallenged finding that there was no

collusion between that organisation and the relevant airport authority, there was in any event no realistic prospect of this link in the chain being established on the lower standard of proof.

In respect of Article 8, Mr Byrne acknowledged, realistically in my view, that if the protection claim were to fail there was no freestanding private life claim that could potentially have succeeded. In any event, the judge undertook a perfectly adequate Article 8 assessment between paragraphs 57 and 60 of his decision.

Finally, and in light of what has already been said, I conclude that the judge made findings on all matters relevant to the Appellant's case and there is nothing perverse in any of these.

In all the circumstances, whilst I have identified errors of law, they are not such as to warrant the exercise of my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set the judge's decision aside.

Anonymity

I maintain the anonymity direction made by the First-tier Tribunal.

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 decision of the First-tier Tribunal stands.

Signed H Norton-Taylor Date: 23 March 2021

Upper Tribunal Judge Norton-Taylor