Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10172/2016 (V)

THE IMMIGRATION ACTS

Heard at Field House by remote means	**Decision & Reasons Promulgated**
On 8 December 2020	**On 2 February 2021**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE FRANCES

Between

J J M

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Bovey QC, instructed by Drummond Miller (Glasgow)
For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Respondent on 29 September 2016 refusing his protection claim. The First-tier Tribunal dismissed his appeal. He now appeals, with permission granted by this Tribunal following the reduction

of an earlier refusal by Interlocutor of the Court of Session, against that decision.

2. The appellant's last entry to the United Kingdom was as a spouse on 21 December 2009. (He has since claimed that the relationship on which that application, and an appeal against its refusal, was based, meant nothing to him). The leave he was granted was due to expire on 21 March 2012. On 16 March 2012 he applied for its extension on the same basis.

3. In the mean time he had become in August 2011 the subject of an extradition request by the United States of America with a view to him standing trial on an indictment alleging various offences of fraud. He was also under investigation for an offence of a completely different nature in the United Kingdom. In late 2014 he was convicted at Glasgow Sheriff Court of the offence of assault with intent to rape. He was sentenced to three years' imprisonment.

4. At the end of 2014 the appellant was served with notice that the Secretary of State proposed to make a deportation order against him as a foreign criminal. In February 2016 his extradition was ordered. Following his release from custody he lodged an asylum claim in July 2016. The basis of his claim is that he has converted from Islam to Judaism and would be at risk of persecution in Pakistan, the country of his nationality; and that if extradited to the USA he would be at risk of being returned from there to Pakistan. The appellant's conversion is said to have been accomplished on-line while he was in custody, with the assistance of a Rabbi in California. He was unable to discover a Rabbi at the Reform Synagogue he said he had been attending for many years.

5. The Secretary of State's response was to reject his asylum application. The claim was certified under s 72. In relation to the appellant's assertions apart from his claim under the Refugee Convention, the Secretary of State observed that "in this case removal is to the USA and not to Pakistan", and gave her reasons for considering that the appellant would not be at risk of ill-treatment in the USA, nor would he be at risk of return by the USA to Pakistan if he were at risk of ill-treatment in Pakistan.

6. On appeal, the First-tier Tribunal, sitting as a panel, upheld the certification. It disbelieved the appellant's claim to conversion. It concluded that the USA has a functioning judicial and protection system and that if removed there the appellant would not be at risk of being treated contrary to articles 2 or 3, would not be detained indefinitely, and would not be removed to Pakistan if he established a well-founded fear of ill-treatment there. Permission to appeal was refused by the First-tier Tribunal, and by this Tribunal on 6 September 2019.

7. The appellant challenged the latter decision by Petition to the Court of Session. Those proceedings were compromised on the basis of a Joint Minute agreeing (only) four points upon which it was arguable that the

First-tier Tribunal had erred in its approach to the evidence. Permission to appeal to this Tribunal was granted on 29 July 2020.

8. There had, however, been an important development in the USA. The indictment against the appellant was dismissed on 2 October 2019. Accordingly, on 10 October 2019 the Edinburgh Sheriff Court discharged the appellant's extradition. These events wholly changed the focus of the appellant's case, because there was now no prospect of the appellant's removal to the USA. The Petition stated at paragraph 11 that:

> "The deportation order is still extant and appears to be operative to remove the petitioner to Pakistan… [I}t is believed that the respondent still [sic] proposes to remove the petitioner to Pakistan."

9. In parallel, the appellant issued a pre-action protocol letter seeking withdrawal of the deportation order. The Secretary of State's response was that deportation to Pakistan would not breach the United Kingdom's obligations, and the deportation order was not withdrawn.

10. The assertion made in paragraph 11 of the Petition was somewhat side of the mark. The deportation order does not constitute removal directions, and it does not specify any destination. Rather, it simply requires the addressee to leave the United Kingdom and not return: (see s 5(1) of the Immigration Act 1971). It may specify a place to which the individual may be removed if he does not comply. Any such removal would require a separate decision, under paragraph 5 of Schedule 3 to the 1971 Act. The reason for specifying a possible destination is so that any claim or appeal can be focussed. There is no longer a requirement under the Immigration (Notices) Regulations 2003 for a prospective destination to be specified; but in practical terms an appellant cannot review his position or formulate any objection to what is proposed, unless he knows what he faces. Even an acknowledged refugee may under certain circumstances lawfully be removed to a place where he will not be persecuted (see 32 and 33 of the Refugee Convention); and many human rights claims have to be based on evidence about how the individual would be treated in a particular country.

11. In the present case, the appeal has been based on the proposed removal to the USA by way of extradition. The posibility of ill-treatment in Pakistan therefore only fell to be considered as befalling a person who had failed to make or had failed to establish a claim in the USA. That such a person ought nevertheless to be regarded as at risk of ill-treatment upon removal from the USA in accordance with some speculation that that might happen is little more than fanciful. Now that removal is not to be to the USA, however, the present challenge, to removal to Pakistan, is the one that needs to be faced, both by the Secretary of State and, if necessary, by the Tribunals.

12. The material dealing with this aspect of the case consists of part only of the eighth (sic) Inventory of Productions, which was accompanied by an

application under rule 15(2A) and singularly ill-focussed submissions. We admit items 1, 2 and 3 of that Inventory. They show an error of law of the type identified in E & R v Secretary of State for the Home Department [2004] EWCA Civ 49: there is no doubt about the facts they demonstrate; their non-production before the First-tier Tribunal is not the appellant's fault because they were not in existence; but they demonstrate that, as it turns out, the First-tier Tribunal erred in considering that the appellant would be removed to the USA.

13. The Secretary of State now needs to consider the validity of the appellant's claim on the basis of his removal directly to Pakistan, and if so advised indicate to the appellant that removal to that country is now envisaged. None of this affects the deportation order itself: it is a question of re-stating to the appellant what consequence he faces if he does not himself comply with that order. When that has been done, the appellant's appeal will need to be re-determined on the basis that removal will not be to the USA.

14. At the hearing we directed the Secretary of State to consider her position and if so advised issue a supplementary Reasons for Refusal Letter within three months, taking into account any further submissions made by or on behalf of the appellant within two weeks.

15. We set aside the First-tier Tribunal's decision for error of law. We remit the appellant's appeal for a fresh determination by a differently constituted First-tier Tribunal no earlier than three months after the date of this decision, but as promptly as may be thereafter.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 11 January 2021