IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001100

First-tier Tribunal No:
HU/51237/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1st November 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

Mati Ur Rehman
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for The Home Department

Respondent

Representation:
For the Appellant: Ms N Bustani, instructed by Briton Solicitors
For the Respondent: Mr M Parvar, instructed by the Government Legal Department

Heard at Field House and via Teams on 4th October 2023

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal on 3rd February 2022 of his human rights claim, based on a right to respect for his private life under Article 8 ECHR. The appeal focusses on the appellant's health. The appellant confirms that there is no appeal based on Article 3.

2. On 14th March 2023, First-tier Tribunal Judge Zahed (the 'FtT') dismissed the appellant's appeal. The appellant appealed and this Tribunal (Deputy Upper Tribunal Lewis) set aside the FtT's decision, allowing the appeal, in a decision which is annexed to these reasons, which I do not recite. Judge Lewis stated at §48 that there was no error with regard to any aspect of the FtT's evaluation of the appellant's history and circumstances other than his approach in respect of medical evidence and therefore it was not necessary to set aside the whole of the decision. What was required was a reconsideration of the medical aspect of the

appellant's case. At §50, Judge Lewis stated that the appellant was to be provided the oppo

3. rtunity of filing any further evidence he may wish to rely on and in particular such evidence might reasonably be expected to update his medical condition and any ongoing treatments. He may also wish to file evidence in respect to the medical facilities available in Pakistan so far as relevant to his case. Judge Lewis noted that it was not anticipated that he would seek to argue Article 3 unless the medical evidence of his present circumstances revealed a very significant change of condition from that which was apparent on the evidence currently on file. Any further evidence should be accompanied by written submissions setting out the basis on which his medical case should succeed under Article 8.

4. At a previously adjourned remaking hearing on 7th September 2023, (which I adjourned because the appellant's solicitors had apparently failed to instruct Counsel, believing they had done so), I directed that the appellant must file and serve any additional evidence on which he seeks to rely by 14th September 2023. I directed that such evidence, together with the evidence filed with the First-tier Tribunal and the medical letters dated 29th August and 4th September 2023 shall comprise the entirety of the appellant's evidence, including his existing witness statement which shall stand as his evidence-in-chief and the appellant shall made available for the purposes of cross-examination and re-examination only at the Resumed Hearing.

The issues in this appeal

5. The parties agreed that the issues in remaking the FtT's decision, are, as per the appellant's skeleton argument:

   (a) Whether there would be very significant obstacles to the appellant's integration in Pakistan by virtue of his medical conditions.

   (b) Whether, by reference to the same medical conditions, removal would amount to a disproportionate breach of his Article 8 rights.

Documents

6. The parties referred me to two appellant's bundles and one respondent's bundle. Where I refer to page numbers in them, I will refer to page [X]/AB for the appellant's main bundle, and for the supplementary bundle, "SB" or, for the respondent's bundle, "RB".

7. The bundles contained a single witness statement for the appellant at page [1] to [5]/AB, and two statements for his brother, Dean Shakoor Alam, at pages [9] to [13]/AB and [1] to [5]/SB. Mr Alam gave evidence in English, whilst the appellant gave evidence with the benefit of an Urdu interpreter. They did so attending via Teams as did Ms Bustani, whilst Mr Parvar attended the hearing at Field House. I asked the representatives and witnesses to let me know straightaway if there were any issues in hearing or seeing one or another or there were any difficulties in the interpretation. I also asked the interpreter to confirm with the appellant that they understood one another. No concerns were raised at any stage and I am satisfied that the parties were able to participate effectively in the hearing.

8. I do not recite in detail the witness statements and the oral evidence of the witnesses, except to summarise the gist of them together with the respective representatives' submissions.

The appellant's evidence

9. The appellant referred to an asylum claim, albeit one that had previously been rejected in circumstances where he had entered the UK as a student in March 2004. I bear in mind the previous undisturbed findings that the appellant had not been continuously present in the UK since that date. The appellant reiterated the fact of his cancer diagnosis on 10th August 2018, when he had an operation to remove part of his tongue and parts of his throat and lymph nodes. Whilst medical correspondence referred to his cancer now being cured in the sense of his being in remission, he still had lymph nodes in his neck for which he was receiving treatment. The appellant claimed that doctors in Pakistan would not have the expertise to diagnose and manage his condition adequately, nor would he have any financial support to get that treatment in Pakistan. None of his family members would support him, were he returned there and he would be left alone and would be forced to live destitution. His father had passed away in November 2021, whilst his mother was living with his widowed sister and her family and another sister had also recently passed away. He did not have any assets or place to live in Pakistan. He suffered from depression, for which he took Sertraline and for which he was under the supervision of his GP. While he accepted that he was educated to degree level, he had not been employed in Pakistan or in the UK and therefore would have some disadvantages in the employment market.

10. The appellant was also asked about a reference in a letter from one of his doctors, Dr Marios Margaritis dated 13th December 2022, at pages [24] to [25]/AB, which had stated:

> "Mr Rehman informed me that he is engaged to be married to a woman in Pakistan with whom he had not had intercourse".

11. The appellant denied that he had been engaged ever in Pakistan and explained that his mother had made enquiries about the possibility of marriage with a number of families but when they learnt that he had no status in the UK, the prospective brides' families did not wish to know anything further. The matter had not gone beyond the preliminary discussions and he disputed that he had ever been engaged.

12. When the appellant was asked why there was nothing in the medical correspondence about the medical treatment that he was currently receiving for any of his conditions or why he had not produced an updated witness statement, he said that his solicitor had only advised him that he needed to provide appointment letters and that there was no need for further evidence. When he was challenged that whilst correspondence referred to outpatient appointments, there was no evidence in terms of any current treatment, or what treatment might be needed in the future, the appellant reiterated that three different doctors were treating him. He was taking Sertraline, and had done so for approximately two and a half years for depression, and he was due to start counselling next week. In answer to questions, he confirmed that both the

hospital at which he has check-ups, and his GP and the counselling service believes that he is living at an address in Hounslow, whereas in fact he lives with his brother in Manchester. The reason for this was that he had been advised by an unnamed solicitor that if he gave his current address or attempted to change GPs, he would "fall out of the GP system", so he was advised to keep a correspondence address, at which a friend lived, who would forward on letters and where he would occasionally stay, when travelling down by bus from Manchester to Hounslow to receive treatment. A recent diagnosis of severe depression had been based on a telephone conversation.

Witness evidence of Dean Shakoor Alam

13. Mr Alam confirmed the death of the appellant's and his father and the circumstances of the appellant's diagnosis for cancer. He also referred to his sister having suddenly passed away with a heart attack in June 2021 and their mother living with her widowed sister and family. He accepted that he had not stated in his first statement, which had pre-dated Judge Lewis' decision, to not being able to support financially the appellant, as he thought there was no need to do so and it only occurred to him by the time of his second witness statement, which postdated Judge Lewis' decision. He referred to the appellant still receiving treatment for lymph nodes at Northwick Park Hospital and the appellant feeling drained and low. Although the appellant was educated he had never been employed and was without any employable skills. Their respective mother was also very fragile, aged 84, and could not afford to have any more bad news about the appellant. He himself had medical issues, with an abnormal heart rhythm for which he received beta blockers, a result of which he had to cut down his working so that his current gross annual salary, as indicated by pay slips was only £13,687.29. There was therefore no chance that he could assist his brother if the appellant were removed to Pakistan.

14. Mr Alam added that whilst he was part-owner of the property in which he and his ex-wife lived and was paying a mortgage on it, he was barely able to make ends meet and in essence the appellant ate what he ate and so he would not be able to remit any money to support the appellant in Pakistan. He reiterated the appellant's contention that the appellant had never been engaged and there were merely preliminary discussions in Pakistan which had been rebuffed because the appellant did not have status to remain in the UK. In terms of his visits to Pakistan, Mr Alam had typically visited Pakistan every two years but he had been again more frequently in June 2021 when his sister passed away and then after his father passed away in November 2021, in March 2022. He had returned again in March 2023 because his mother was sick and although she wished to see the appellant, the appellant was unable to travel and therefore Mr Alam had to. However, Mr Alam had had to pay for his trip on his credit cards, and while he had not provided any documentary evidence, he had credit card debts of £14,000.

15. When challenged as to what investigations, if any, he had carried out in respect of the availability of any medical treatment and the availability of employment opportunities in Pakistan, Mr Alam said that he had visited a few hospitals, to make preliminary enquiries and the cost of the treatment for sarcoidosis ran into the millions of rupees, albeit he did not have any documentary evidence as to the precise amounts because he would have had to ask for a formal quote through

"proper channels". When asked the details of the availability of jobs, he said the working situation and environment was completely different from when he had previously visited and he had spoken to various people who said that they were struggling to find small jobs even in the private sector. When asked why no family members in Pakistan had produced statements of their own he said that they were struggling with their own finances and they would not be able to support hospital fees.

The respondent's closing submissions

16. Mr Parvar relied on the case of Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC) for the proposition that the consequences of removal for the health of a claimant who would not able to access equivalent healthcare in their country of origin as was available in the UK was relevant to the question of proportionality, but when weighed against the public interest in ensuring the limited resources of this country's health service are used to the best effect, those consequences do not weigh heavily. A previous report from Dr Allan who had opined on the difficulties in obtaining a diagnosis for sarcoidosis was before the later diagnosis by Dr Margaritis. There was therefore no ongoing issue with diagnosis. In addition, it was unclear what Dr Allan's expertise was in opining on the availability of treatment in Pakistan. It was even unclear what the proposed treatment needed to be. The stark gap in the evidence was that whilst there were various letters showing appointments, there was no description about what happened during the appointments, what treatment or putative treatment was being discussed and the level of care that might be needed in the future. At its highest, the appellant's case was that he was receiving no treatments, but was being monitored for his physical conditions. Even though Dr Vala, his GP, had referred briefly to the appellant being under hospital observation for his sarcoidosis, there was very limited evidence and no new witness evidence about the details of what treatment would be required. A new piece of evidence relied upon by the appellant, that of a doctor in Pakistan, Dr Khokar, at page [12]/SB onwards was in similarly brief terms. It reiterated the difficulty in diagnosing sarcoidosis for which there was no cure, in apparent ignorance that the appellant had now got a diagnosis. Dr Khokar said that doctors in Pakistan were having trouble to diagnose and manage the condition adequately and there were too many "real-time stories" to confirm that "developing countries" like Pakistan could find affordable and effective solutions against the disease. He referred to a journalistic article in the Pakistan Tribune, without explaining what the treatment, supposedly unavailable, was. Dr Khokar's correspondence said nothing about the treatment or management of the appellant's condition, and gave no details about the quality or level of care that the appellant in particular needed, despite the fact that the appellant had been provided multiple opportunities to do so. The burden was on the appellant. The appellant's brother's evidence was particularly weak, merely asserting that in general terms that Mr Alam had approached hospitals and had been quoted high costs, but without any detail of what treatment was said to be available, or even what was actually needed.

17. In respect of the appellant's depression, he was on standard antidepressants and was about to start counselling, with no explanation or evidence for why he could not receive counselling in Pakistan.

18. In terms of family support in Pakistan I was reminded of the previous undisturbed findings of the FtT and in particular §§26 and 27 which had referred to seven aunts and uncles and 10 cousins. The appellant had not produced any

witness statements to counter those findings. Mr Alam's first witness statement had made no reference to not being able to support the appellant financially and that assertion was, in most likelihood, only made in the second witness statement to embellish his claim, following Judge Lewis' decision. Mr Alam had provided no documentary evidence about his credit card debts and had only volunteered the fact that he co-owned a house, when asked.

The appellant's submissions

19. I was asked to make positive credibility findings and whilst Ms Bustani accepted that the appellant's case could have been assisted by a report which addressed all of the conditions, there was nevertheless correspondence from the GP and the hospital to which she had referred in her skeleton argument. Dr Vala referred to the appellant being under observation for sarcoidosis and even though he was merely under observation, Dr Allan had confirmed that the condition could lead to organ damage. The Pakistani journalistic article to which Dr Khokar referred had detailed the struggles of obtaining treatment, and she was a "middle class" journalist whereas the appellant would fare far worse. When I queried with Ms Bustani whether the expert report of Dr Khokar was in an acceptable format as it did not include any statement acknowledging the expert's duties independently to this Tribunal, she accepted that it was not in that format, albeit the issue had not been taken by the respondent and the report remained objective. It was also clear from the brother's evidence that he would be unable to support the appellant and he had a mortgage to pay. In simple practical terms, the appellant ate what he ate. She once again accepted that there could have been better evidence in relation to Mr Alam's financial circumstances, but these had never really formed part of the respondent's case. In any event there was witness evidence from the appellant's siblings at pages [70] and [72]/RB as to the limited resources in Pakistan.

20. When I queried with Ms Bustani what the appellant's case was about the treatment he was receiving and what it was said he would be unable to afford in Pakistan, she accepted that he was not receiving treatment for his physical conditions, but they must be serious to warrant observation for extended periods and she referred to elements of the respondent's Country Policy and Information Note: Pakistan – Medical and Healthcare Provisions (September 2020) in particular at §4.1.14 in relation to cancer. Turning to her skeleton argument, she referred to Dr Margaritis' report at pages [22] to [23]/AB and the conditions of lymphadenitis, chronic hepatitis B and lymph nodes. Those lymph nodes were of indeterminative significance with a recommendation in December 2022 of a follow-up in three months. Those appointments had last been on 15th June 2023, were evidenced in correspondence and the appellant was next booked at the Maxillo-Facial Surgery on 14th December 2023. This was confirmed by Dr Vala, page [11]/SB, and he had regular monthly appointments with the Infectious Diseases Clinic, having been seen on 7th February, 21st February, 23rd March, 4th April and 20th July 2023. Dr Khokar formed the view that there was no expertise to confirm and diagnose the condition of sarcoidosis in Pakistan. The report of September 2020 (Kevin O'Doherty) referred to his suffering moderate anxiety and depression and this had been caused by his uncertainty and immigration status as well as his medical position. More recently a letter dated 4th September 2023 from Kane Davidson, a psychological wellbeing practitioner, referred to severe depression and anxiety.

Discussion and conclusions

21. I am conscious to assess all of the evidence in the round and not merely to discount the medical evidence because of any concerns that I may have about the credibility of the appellant and his brother, Mr Alam, what is sometimes referred to as "the Mibanga error" (see Mibanga v SSHD [2015] EWCA Civ 367). The law in relation to right for respect for private life, (with Ms Bustani expressly conceding that the appeal was only in respect of private life and not family life), is well understood and referred to by Ms Bustani as including Kamara v SSHD [2016] EWCA Civ 813 and in particular, the obstacles to the appellant's integration in Pakistan as an "insider". Clearly in those circumstances, depression and anxiety as well as ability to receive treatment could impact on the appellant's ability to participate and/or find meaningful employment. In any event, more widely by reference to Article 8, the decision must be proportionate, striking a fair balance as per Agyarko [2017] UKSC 11 and I must of course bear in mind the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. I pause to observe at this stage, as per previous findings, that the appellant has as found to have been in the UK continuously since August 2015, albeit unlawfully, having previously entered as a student. Whilst Ms Bustani points out that the appellant would have been entitled to NHS emergency treatment, the fact that he continues to receive non-emergency treatment and does so on express legal advice that he should not provide to those treating him his current home address, for fear that he would no longer be able to access GP services, gives a clear indication that he is receiving free non-emergency NHS treatment, which, were he to disclose his correct address, he fears he would not receive without paying for it.

22. In relation to private life, I also bear in mind, as Ms Bustani asked me to do, the support of the appellant's brother, Mr Alam, and the current status quo as well as what would occur were he to return to Pakistan. I also accept Mr Parvar's submission that as per the previous findings it is not the case that the appellant merely has a mother and widowed siblings who would be unable to assist but a far wider family in Pakistan. Moreover, it was only when questioned that he volunteered the fact of a friend in London who was willing to be a conduit for his medical correspondence as well as to provide him with accommodation. I accept in those circumstances that whilst on the face of it Mr Alam may be of relatively limited financial means, even taking the case at its highest, (although the financial evidence on this is far from complete with no documentary evidence as to debts, mortgage statements, bank statements and the like beyond the limited evidence of pay slips), there is no reason to suppose that family members in Pakistan or indeed friends such as the person living at the Hounslow address, whom he has not previously discussed in any detail, would not be willing to assist him to integrate, at least initially in Pakistan. I bear in mind, in the round, the appellant's lack of prior work experience, although he has been educated to degree level including in modules of accountancy, see page [74]/AB, albeit I am conscious that this is many years ago in 2002. Nevertheless, he is educated to degree level. Moreover, the FtT had not accepted that he had been in the UK continuously since 2004 and even though the appellant has not returned to Pakistan for many years, when challenged as to the investigations that the family had made as to availability of jobs in Pakistan, Mr Alam made no more than a brief generalised assertion of having spoken to some people who suggested that jobs were scarce. This did not begin to amount to sufficient evidence to satisfy me that proper job searches had been carried out to suggest that the appellant, educated to degree level, would be unable to find any useful work. I should add that Ms Bustani has not submitted that the appellant is medically unfit to work. The appellant's mother's enquiries about potential marriages to a Pakistani bride

have not been rebuffed because of his inability to work on grounds of ill-health, or because of his ill-health generally, but because of his lack of the right to remain in the UK.

23. I next turn to the appellant's medical conditions of lymph nodes, sarcoidosis and severe depression and anxiety. In relation to the severe depression and anxiety, as I discussed with Ms Bustani, so that she was able to comment on it, the appellant's psychological wellbeing practitioner, Kane Davidson referred (page [9]/SB) to the appellant having scored 20 on a PHQ-9 test and 21 on a GAD-7 test which fell within the severe range for depression and severe range for anxiety. That assessment was on the basis of what the appellant told Mr Davidson during a telephone call about his difficulties with his immigration status over many years and his worries about his health. Of note, Mr Davidson's letter was addressed to the Hounslow address so clearly Mr Davidson was unaware of the appellant's true location, and it raises the question of whether he was in fact fully aware of the appellant's domestic circumstances. In any event, the correspondence did not refer to the appellant's GP records. As I canvassed with Ms Bustani the case of HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC), that Tribunal had had significant concerns about the criteria (PHQ-9 and GAD-7) Mr Davidson referred to. As §136 of HA makes clear, the PHQ-9 and GAD-7 tests are not diagnostic. "These tests can only provide an indication of whether someone might be suffering from a mental health problem. In medico-legal settings….it is "wholly possible to provide whatever answers someone wants to in order to appear as ill, or as well, as the person wants to."" The key to the evidential problem, as the Tribunal in HA outlined, was the availability of GP records and the specific record of presentation (see headnote (4)). Dr Vala's letter states that the appellant has longstanding significant depression for which he takes antidepressants and has been referred to psychological counselling. This is consistent with the appellant's evidence that he has been taking Sertraline for two and a half years, and is only due to attend counselling next week, but Dr Vala's letter gives no history or detail about the appellant's presentation. I have no doubt that the appellant is suffering from anxiety and depression for some years. Where I have more significant concerns is Mr Davidson's assessment of severe anxiety and depression, based on a single telephone consultation and where Mr Davidson was unaware of the appellant's true circumstances, namely where he lives, and by reference to criteria which are not diagnostic. Dr Vala's letter is also addressed to the Hounslow address, so it is also far from clear that he is aware of the appellant's full domestic circumstances, including the fact that he lives with family members, clearly potentially relevant to an assessment of mental health. The appellant has relied on a report of a trauma specialist, a Kevin O'Doherty, but the report was based on an assessment in September 2020. It is therefore old. Mr O'Doherty has also not been apprised of the appellant's full domestic circumstances, as he refers the appellant having an older brother in the UK (presumably Mr Alam) whom the appellant "sees frequently" (page [81]/RB). This is not the same as the appellant's claim to have been living with his brother. Mr O'Doherty makes clear that he has not seen the appellant's GP records (page [80]/RB), but based his assessment on the appellant's personal witness statement, some form of interview with the appellant, PHQ-9 and GAD-7 scores, by which he assessed the appellant as suffering from persistent, but moderate anxiety, worry and depression. This is distinct from Dr Vala's more recent reference to "significant" depression and it is not clear on what presentation Dr Vala bases that comment. Mr O'Doherty's report has similar weaknesses to that of Mr Davidson (relying, in part, on non-diagnostic tests and without access to medical records) and has the added weakness that it is significantly old. In

summary, I find that the appellant suffers from stress, anxiety and depression. I do not accept as reliable the claims that these mental health issues are so severe, such as to prevent him from participating in Pakistani society as an insider, whether in terms of searching for work, reestablishing friendships, or participating generally. While in the UK, he lives in Manchester but maintains friendships in London and travels there by public transport. He is far from being isolated in the UK and I do not accept that he would become isolated in Pakistan.

24. I turn to the issue of the availability of treatment and how his conditions might be managed. In relation to treatment for his depression and anxiety, the appellant is currently taking Sertraline and is about to begin counselling. I have had no substantive evidence as to the availability or lack of availability of Sertraline and/or counselling in Pakistan and I accept Mr Parvar's submission that the burden is upon the appellant. He has failed to discharge that burden, particularly in the context of the FtT's previous findings of a large and potentially supportive family in Pakistan.

25. In relation to his sarcoidosis, lymph node conditions and hepatitis, there is no dispute that the appellant is not actually receiving any treatment for any of these conditions. He is instead being monitored. Ms Bustani was unable to describe what treatment the appellant might require in the future. She put forward the proposition that because he is under regular observation, the appellant's conditions must be serious. That may be so but does not answer the question of whether any treatment might be needed in the future, if at all. There is also no substantive evidence as to what monitoring might be available, and if there is, how easy it would be able to access. Dr Khokar's evidence focussed on the issue of diagnosis, which has been resolved. It may be that monitoring could be expensive and intrusive, or equally that the monitoring is relatively simple with some rudimentary blood tests. Equally management of a condition may be severe, or it may be equally relatively modest and I bear in mind the reference, however brief in the journalistic article, to the use of steroids to manage the condition. Dr Khokar's report does not explain why access to steroids would be so difficult.

26. Bearing in mind the amount of uncertainty and gaps in the evidence that the appellant has specifically had several opportunities to address (about which he has been reminded, following a previously adjourned hearing), as to the basis on which his conditions would cumulatively either present very significant obstacles or render refusal of leave to remain disproportionate, I am satisfied that the appellant has failed to discharge that burden. That stark gap is one which the appellant could have addressed, including what potential treatment might be needed in the future and how such monitoring might work. As it stands, he is currently under no treatment for either sarcoidosis, or for his lymph nodes or hepatitis. He takes Sertraline and is about to receive counselling. I am not satisfied that there is reliable evidence that he would be unable to access his medication and counselling in Pakistan, so as to present very significant obstacles to his integration, or that there would be very significant obstacles generally, notwithstanding his absence from Pakistan.

27. Adopting a balance sheet approach and by reference to Section 117B the appellant has not, since the previous determination of his asylum claim after 2015, had any lawful leave to remain in the UK. Whilst he speaks some English, albeit he spoke with the benefit of an interpreter, he is not financially independent and has received non-emergency NHS treatment in circumstances

where he has not disclosed his true circumstances to his GP or those treating him, namely his true address. Whilst I do not go so far as to say that he has been intentionally dishonest, as he says that it was on legal advice from a solicitor, I do not accept that he was entitled to receive all of the non-emergency NHS treatment free of charge, which he has received. He has been a burden on the taxpayer in respect of that non-emergency treatment and is not financially independent.

28. Bearing in mind all of the evidence, including the unlawful nature of his residence in the UK in recent years; and his ability to return and integrate in Pakistan, with the support of his family and friends and access to medication for his anxiety and depression, even where this would disrupt the status quo of living with his brother, I am satisfied that the respondent's refusal of leave to remain for the purposes of Article 8 is proportionate.

Notice of Decision

29. **The appellant's appeal on human rights grounds is dismissed.**

30. **The respondent's decision to refuse the appellant's human rights claim stands.**

J Keith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19th October 2023

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

ANNEX – ERROR OF LAW DECISION

THE IMMIGRATION ACTS

Before

DEPUTY UPPER TRIBUNAL
JUDGE LEWIS

Between

MATI UR REHMAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Bustani of Counsel
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 2 June 2023

DECISION AND REASONS: ERROR OF LAW

Introduction and Background

1. This is an appeal against a decision of First-tier Tribunal Judge Zahed promulgated on 14 March 2023 dismissing an appeal against a decision of the Respondent dated 3 February 2022 refusing a human rights claim.

2. The Appellant is a citizen of Pakistan born on 22 January 1979.

3. The Appellant was granted a 6 month visit visa on 18 March 2004. The Respondent's records show that he was encountered by Home Office officials on 13 August 2015 and claimed asylum on 15 August 2015.

4. The Appellant claims to have been continuously present in the UK between 2004 and August 2015. This was not accepted by the Respondent in the decision of 3 February 2022 – and in turn was not accepted by the First-tier Tribunal Judge: see Decision & Reasons, paragraph 24. However, as explained below, the raising of this issue has now been objected to by the Appellant.

5. The asylum claim of 15 August 2015 was refused and a subsequent appeal dismissed in a Decision of First-tier Tribunal Judge Moran promulgated on 7 January 2016 (reference PA/01736/2015), with the Appellant becoming 'appeal rights exhausted' on 26 January 2016.

6. In April 2018 an application was made for leave to remain on compassionate grounds; this was refused in August 2018. The following month a further application for leave to remain on compassionate grounds was made, which was again refused in January 2019. On 19 October 2020 the Appellant made further submissions, the refusal of which forms the foundation of this appeal.

7. The Appellant's human rights claim of 19 October 2020 was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 3 February 2022: the contents of that letter are a matter of record on file, and its substance – along with quoted passages – is set out in the decision of the First-tier Tribunal; it is unnecessary to repeat the reasons in their entirety here.

8. It was a feature of the Appellant's application that he was receiving treatment for cancer and mental health issues. The Respondent did not accept that this availed the Appellant pursuant to any of Article 3 of the ECHR, paragraph 276ADE(1) of the Immigration Rules, or Article 8 of the ECHR.

9. The Appellant appealed to the IAC.

10. The Appellant's Skeleton Argument before the First-tier Tribunal presented the medical case in the first instance as a very significant obstacle to reintegration to Pakistan, i.e. as an aspect of paragraph 276ADE(1), (e.g. see paragraph 22), and secondly as a compelling reason why removal would amount to a disproportionate interference of his Article 8 rights (paragraph 29). The Skeleton Argument did not articulate a medical case based on Article 3. Ms Bustani confirmed to me that there had been, and there was, no reliance upon Article 3.

11. The appeal was dismissed for reasons set out in the decision of the First-tier Tribunal promulgated on 14 March 2023.

12. The Appellant applied for permission to appeal to the Upper Tribunal, which was granted by First-tier Tribunal Judge Barker on 14 April 2023. The reasons for granting permission helpfully and succinctly highlight the issue that was the primary focus of proceedings before me:

> "*The Judge arguably failed to consider the most recent medical evidence provided in a report dated 12 December 2022, which detailed ongoing issues and a requirement for further investigation. Or, if the Judge did consider this, he failed to mention it in his assessment of the evidence relating to the appellant's health situation. It is arguable that without consideration of the full picture of the appellant's health, the findings he made are not sustainable.*"

13. Judge Barker went on to comment that whilst the other grounds pleaded in support of the application for permission to appeal "*appear to have less merit*" the scope of the grant of permission was not limited and such grounds could still be argued.

Analysis

14. The First-tier Tribunal Judge noted that both parties had submitted a bundle of documents in the appeal, and commented "*I have looked at all documents with anxious scrutiny and have taken account of them even if I have not specifically mentioned them in in the decision and reasons*" (paragraph 13).

15. The Judge addressed the supporting medical evidence at paragraphs 20-23:

> "*20. I have carefully looked at the medical evidence. Dr Earnest Allan, consultant clinical oncologist in his medical report dated 16th October 2022 stated that he had a video consultation with the appellant on 14th October 2022 and that "The applicant appeared well with no evidence of recurrence of his cancer." He states at the end of his report that "His cancer has been cured." I find that the appellant's cancer has been cured and that he is no longer suffering from cancer.*
>
> *21. The medical report also mentions that the appellant may also be suffering from Sarcoidosis, which is a rare autoimmune condition. I find that it is not life threatening. I find on the evidence to be found in the CPIN and in the background evidence that the*

> *medical facilities in Pakistan can treat such a condition and in most cases the condition clears up by itself.*
>
> *22. I have also seen a letter from the appellant's GP, dated 26 January 2022 which states that the appellant is suffering from Depression and Anxiety due to his health, family circumstance, and uncertain immigration status for which he is taking antidepressants and sleeping tablets.*
>
> *23. I note that the appellant started a course of Sertraline on 24th January 2022. I note that that the appellant has not submitted a psychiatric report or an updated medical report, as the GP letter relied on is more than a year old. I have not seen any evidence that the appellant is still currently on Sertraline. I find that given the GP's letter is over a year old that the letter is of limited value. In any event, I find on the evidence before me taking the background evidence into account that the appellant can receive medical treatment for his depression and anxiety in Pakistan. I note that Sertraline is a common drug that can easily be obtained in Pakistan.*"

16. The Judge went on to repeat "*that the appellant's cancer has been cured*" (paragraph 27, and see similarly paragraph 28), before concluding:

> "*I find that the appellant cannot succeed under Article 3 and Article 8 on the medical grounds for the reasons that I stated above and for the reasons given in the refusal letter in line with the medical facilities available in Pakistan*" (paragraph 29).

17. For completeness, and context, I also note that the Judge did not accept that the Appellant was without "*family in Pakistan who will support him financially and emotionally*" (paragraph 26), finding that family members in Pakistan as well as the brother in the UK who had housed and fed him whilst here, "*will support him financially and emotionally in Pakistan and assist him with any medical issues he may have whilst he is in Pakistan*" (paragraph 27).

18. The Appellant has raised 3 areas of challenge – contending errors of law in respect of the First-tier Tribunal's assessment of medical evidence, assessment of the Appellant's length of stay in the UK, and assessment of the Appellant's personal circumstances in Pakistan. It is the first of these that particularly informed the grant of permission to appeal.

Ground 1: Assessment of medical evidence

19. The principal ground of challenge that has informed the grant of permission to appeal relies for the main part on the contents of a letter dated 13 December 2022 signed by Dr Margaritis of the Department of Infectious Diseases and Tropical Medicine at Northwick Park Hospital. (See Grounds of Appeal at paragraphs 5-8.)

20. The Appellant's express reliance upon the letter of Dr Margaritis is manifest from the Appellant's Skeleton Argument before the First-tier Tribunal (see Skeleton Argument at paragraphs 16-20).

21. A further feature of the principal ground of appeal pleads that in circumstances where Dr Allan's report of 16 October 2022 noted "*there is no cure for sarcoid. However, sarcoidosis may last for years and may cause organ damage*", it was unclear on what basis the First-tier Tribunal Judge had concluded that sarcoidosis was not life threatening and "*in most cases clears up by itself*" (paragraph 21): see Grounds of Appeal at paragraph 9-10.

22. The premises of this ground of challenge are sound. As identified in the grant of permission to appeal it is indeed the case that the Judge did not refer to the letter of Dr Margaritis in the Decision. Moreover, it is indeed not apparent on what basis the Judge expressed the view that sarcoidosis clears up by itself in most cases.

23. In the circumstances the focus of discussion and argument before me was on the materiality of the omission of any reference to Dr Margaritis's letter to an evaluation of the Appellant's case under either or both paragraph 276ADE(1) and Article 8.

24. As indicated from the quotation above, the Judge made particular reference to a report by Dr Allan. Dr Allan was not the Appellant's treating physician but had been commissioned to prepare a report for the purposes of the appeal. No criticism is to be made of Dr Allan's medical expertise, but it is to be noted that in part of the report he refers to the availability of facilities in Pakistan and the standard of medical care without at any point establishing his expertise so to comment.

25. In the conclusion of his report Dr Allan is clear in stating in response to the question posed to him by the Appellant's solicitors - "*for an expert report regarding his current medical (cancer throat) condition*" - "*His cancer has been cured*".

26. Although in the Grounds of Appeal, at paragraph 7, criticism is expressly made of the Judge's assessment that the Appellant's "*cancer is cured*" being based on only one item of medical evidence (i.e. Dr Allan's report), I cannot identify anything in Dr Margaritis's evidence that goes so far as to say that the Appellant again has cancer. As such, the fact that the Judge has not made express reference to Dr Margaritis's evidence does not undermine the Judge's finding that at the date of the hearing the Appellant's cancer had been cured.

27. Dr Margaritis is the Appellant's treating physician. Her letter of 13 December 2022 post-dates Dr Allan's report. It refers to 3 diagnoses: (i) Granulomatous cervical lymphadenitis, (which appears to be Dr Margaritis's diagnosis for what Dr Allan thought might be sarcoidosis); (ii) incidental chronic hepatitis B (discovered on routine screening); and (iii) intrapulmonary lymph nodes (i.e. a condition affecting the lungs). The proposed treatment plan did not appear to approach any of these matters on an emergency basis: further tests were to be conducted and various clinic follow-ups indicated; further testing in 3 months was recommended in respect of the intrapulmonary lymph nodes, and similarly the Appellant was to be seen in 3 months in respect of his hepatitis – unless it were to be shown that he had developed fibrosis.

28. Although there is no apparent concern in Dr Margaritis's letter in respect of a return of cancer, it seems to me that it provides evidence significantly different from the evidence ultimately considered by the Judge. What Dr Allan thought might be sarcoidosis is diagnosed as granulomatous cervical lymphadenitis; two further conditions – hepatitis B and intrapulmonary lymph nodes were identified.

29. The exact significance of these matters to the Appellant's ability to reintegrate in Pakistan, or otherwise in respect of his private life argument under Article 8 is less clear. Be that as it may, ultimately it seems to me that the different perspective offered in Dr Margaritis's letter as to the Appellant's then current conditions cannot easily be marginalised as wholly immaterial. To this extent I find that the omission of Dr Margaritis's evidence from consideration by the Judge was a material error of law.

Ground 2: Assessment of the Appellant's length of stay in the UK

30. The Appellant's claim to have been continuously resident in the UK since 2004 was plainly put in dispute in the RFRL herein: "… *we do not have evidence of your continuous residence in the UK from 2004-2015. Therefore, to clarify it is considered you have been continuously residing in the UK since August 2015*".

31. This being a matter of dispute between the parties, it was clearly incumbent upon the Judge to determine the issue. The Judge was correct to identify that the Appellant had not provided any supporting documentary evidence to answer the Respondent's concerns. On its face, the Judge's conclusion in this regard was, in my judgement, open to him and has been adequately reasoned.

32. The challenge that is pursued before me relies on an inference from the decision of the Respondent in the earlier protection claim, and in turn the decision of First-tier Tribunal Judge Moran in the protection appeal heard in December 2015 and dismissed in January 2016.

33. In reaching an adverse credibility assessment both the Respondent and Judge Moran relied in part on the Appellant having failed "*to claim asylum until 11 years after arriving in the UK*" (paragraph 25 of Judge Moran's Decision).

34. Ms Bustani submits that this constituted a finding on the part of the previous Tribunal of continuous residence. It is pleaded that Judge Zahed's effective departure from this finding ran contrary to the principles in **Devaseelan**.

35. Beyond the reliance upon the failure to make a claim for protection at any point prior to December 2015, in refusing the protection claim the Respondent did not otherwise address the question of length of residence. The Appellant did not attend the hearing before Judge Moran, and so there was no further exploration of this matter in the appeal process.

36. Be that as it may, it is not apparent that there was any supporting evidence of length of residence submitted to either the Respondent or the Tribunal in the course of the protection application and appeal: indeed, had there been any such documentary evidence it might have been expected that it would have featured in the current proceedings.

37. In all such circumstances it would appear that the Respondent did no more than accept, presumptively, that the Appellant had remained in the UK between 2004 and 2015. In turn, given that this was not raised as an issue between the parties, and given that the Appellant did not attend the appeal to provide any oral testimony, Judge Moran in substance did no more than accept the common position of the parties. Albeit this informed the Judge's evaluation of credibility with reference to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, this was not pursuant to the Judge making a finding based on any specific evidence or upon evaluation of contested testimony.

38. Ms Bustani's submission is in substance to the effect that the Respondent was in some way estopped from adopting a different position on this issue in the decision of 3 February 2022 – by which time the length of residence had assumed more significance in the context of an Article 8 claim. It is argued that **Devaseelan** supports this submission, or otherwise means that it was not open to Judge Zahed to depart from the position adopted by Judge Moran.

39. Before turning to the substance of this submission, it seems to me appropriate to observe that no such argument appears to have been presented to Judge Zahed. The Appellant was on notice that the Respondent did not accept his length of residence; yet, it does not appear to have been argued that the Respondent was prevented from raising such a point – instead the Appellant sought to meet the Respondent's case by offering testimony to the effect that he had been present throughout. In the circumstances there does not appear to be any good cause to criticise Judge Zahed for not addressing the possible relevance of **Devaseelan** now contended before me.

40. Nor can it be said that there was anything intrinsically unfair in the procedure: the Appellant was put on notice that his length of residence was in issue and was thereby afforded an opportunity of addressing it on appeal.

41. In any event, I do not agree with Ms Bustani's submission in principle. I do not accept that **Devaseelan** is to be interpreted in such a way as to estop the Respondent raising a matter in a new decision that was seemingly previously conceded in earlier proceedings, or that there is any other basis upon which the Respondent is so estopped.

42. Whilst I accept that in the ordinary course of events departure from previous findings in subsequent proceedings are to be justified by reference to new evidence, it seems to me as a matter of common sense that in circumstances where there was no supporting evidence in respect of an earlier concession at all, and where any previous judicial finding was not based upon an evaluation of contested evidence, in making a new decision in the context of a new and different application involving different considerations, it is open to the Respondent, in effect, to have a change of mind. Providing the applicant has the opportunity of addressing this – as the Appellant did in these proceedings – there is no inherent unfairness.

43. It is to be noted that in offering guidelines in **Devaseelan** the Upper Tribunal expressly recognised that the categorisations offered did not cover every possibility (see guideline (8)). Indeed it is difficult to fit the circumstances raised in the submission before me with any of the specific illustration addressed in the guidelines. Certainly, I am not readily able to identify anything in the guidelines that would prevent the Respondent from withdrawing a concession made in the context of a different application and a different decision.

44. I conclude that it was open to the Respondent to raise the matter in the current RFRL; the Appellant was thereby put on notice that it was an issue and had an opportunity to address it; the matter having been raised between the parties, it was incumbent upon Judge Zahed to reach a conclusion - which he did based on sustainable reasoning. I cannot detect any material error of law and I reject this ground of challenge.

Ground 3: Assessment of Appellant's personal circumstances in Pakistan

45. In my judgement this is in substance a disagreement with the conclusions of the First-tier Tribunal Judge with no error of law being adequately identified. The Judge was entitled to reject the Appellant's claim that he would be without support, and provided cogent reasons for finding the Appellant to be both generally – and in this regard specifically – a witness who lacked credibility.

46. In so far as the Appellant's brother offered oral testimony corroborating the Appellant's claim that family members in Pakistan were not in a position to offer financial assistance to the Appellant, such an assertion is vulnerable to the same criticism made by the Judge in respect of the Appellant's testimony - that it was not supported by any corroborative documentary evidence.

47. In any event, as regards possible financial support from the brother, the brother's protestations of an inability to support the Appellant in Pakistan did not readily reconcile with the fact that he was supporting him in the UK notwithstanding his claim – without provision of any supporting evidence - that he was 'struggling to make ends meet'.

Error of Law: Remaking the Decision

48. In circumstances where I find that there was a material error of law in respect of the First-tier Tribunal's approach to the medical evidence, but I do not accept that there was any error with regard to any other aspect of the evaluation of the Appellant's history and circumstances, it is, in my judgement, not necessary to set aside the whole of the decision of the First-tier Tribunal. What is required is a reconsideration of the medical aspect of the Appellant's case - which, as noted above, has up to this point been confined to a submission based on Article 8 (including with reference to paragraph 276ADE(1). The decision in the appeal only requires to be remade in the context of this relatively narrow issue.

49. Given the narrowness of the issue that requires to be reconsidered it is appropriate that the decision in the appeal be remade by the Upper Tribunal, rather than the case being remitted to the First-tier Tribunal.

50. The Appellant is to be afforded the opportunity of filing any further evidence that he may wish to rely upon. In particular such evidence might reasonably be expected to update his medical condition and any ongoing treatments. He may also wish to file evidence in respect of the medical facilities available in Pakistan in so far as he may consider this relevant to his case. It is not anticipated that he will seek to argue Article 3 unless the medical evidence of his present circumstances reveals a very significant change of condition from that which is apparent in the evidence currently on file from Dr Allan and Dr Margaritis. The Appellant's further evidence should be accompanied by written submissions setting out the basis upon which his medical case should succeed under Article 8. The directions below are issued accordingly

DIRECTIONS

(i) The appeal is to be relisted in the Upper Tribunal on the first available date after 6 weeks from the date of promulgation of this decision on 'error of law'.

(ii) On such a date the Decision in the Appeal is to be remade by any Judge of the Upper Tribunal in respect of the Appellant's medical case, with reference to Article 8 of the ECHR (including paragraph 276ADE(1) of the Immigration Rules). (If any further medical evidence so justifies, the Appellant may also argue a medical case under Article 3.)

(iii) The Appellant is to file any further evidence upon which he wishes to rely, together with Written Submissions, within 21 days of the date of promulgation of this decision. The evidence and the submissions are to be confined to the Appellant's medical circumstances, including any further diagnoses, prognoses, and ongoing treatments, the availability of treatment in Pakistan, and the way in which it is said that his medical circumstances either constitute very significant obstacles to his integration into Pakistan, or otherwise would render his removal from the UK a disproportionate interference with his private life.

(iv) The Respondent is to file any further evidence upon which she wishes to rely, together with a Written Response, within 14 days of the Appellant filing evidence in accordance with Direction (iii) above.

Notice of Decision

51. The decision of the First-tier Tribunal contained a material error of law.

52. The decision in the appeal is to be remade by any Judge of the Upper Tribunal pursuant to the Directions above.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

29 June 2023