IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001808
First-tier Tribunal No:
HU/56093/2023
LH/00689/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

T D
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rehman of Counsel, instructed by Adam Bernard Solicitors
For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on 12 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Trinidad and Tobago born on 24 March 1984. The appellant made a human rights claim on 3 March 2022 which was refused by the respondent on 12 April 2023. His appeal against the decision was dismissed by First-tier Tribunal Judge Smeaton ('the judge') on 3 April 2024 after a hearing on 23 February 2024.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Dainty on Grounds 2 and 3 only on 25 April 2024 on the basis that it was arguable that the First-tier judge had erred in law in failing to conduct a credibility assessment within the very significant obstacles analysis and/or provide reasons and/or take into account relevant factors, in particular separation from his UK support network. It was further arguable that the judge failed to carry out a proper proportionality assessment in that the judge looked at a test of 'signficant difficulties' and failed to take into account that the family had expressed disappointment in the appellant with regards to the finding that there would be family support. This was considered arguable in particular if, as the grounds stated, the appellant was not challenged in cross examination as to the discrimination faced in Trinidad and Tobago and the respondent did not challenge the appellant's credibility generally. Permission was refused on Ground 1.

3. The appellant on 7 May 2024, renewed his application to the Upper Tribunal, in relation to Ground 1, that the judge had not applied the correct standard of proof in considering Article 3, ECHR. It was argued that the judge had misdirected themselves in law with regard to the test under Article 3 ECHR, in particular the evidential threshold to cast doubt on the availability or accessibility of treatment in the receiving state.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and thus whether the decision should be set aside. I considered the renewed ground of appeal in a rolled up hearing together with the substantive grounds.

5. I grant permission in respect of the additional ground of appeal, Ground 1, as it was arguable, in the context of the grounds of appeal already before me that there were arguable errors for the reasons pleaded in the renewed written grounds.

6. It was not disputed that the Rule 15(2A) application was not relevant to the Error of Law application.

Submissions – Error of Law

7. In the grounds of appeal and in oral submission by Mr Rehman it is argued, in short summary, for the appellant as follows.

8. It was argued in terms of Ground 1 that the judge had misdirected herself with regard to the test under Article 3, in particular the evidential threshhold to cast doubt on the availability or accessibility of treatment in the receiving state. It was argued that the judge erred in requiring the appellant to comply with a too high standard or to show clear evidence. It was argued that the documents relied upon by the appellant were arguably sufficient to discharge the burden on him.

9. In terms of Ground 2, it was argued that the judge failed to conduct a credibility assessment, failed to provide adequate reasons and failed to take into account relevant factors.

10. It was submitted that the judge had accepted the appellant's account on the strength of his oral evidence and made no criticism of the appellant's credibility and there was nothing therefore to suggest that the appellant's evidence of his experience living in Trinidad and Tobago as a gay man and the homophobia he witnessed, which the judge recorded at [28] to [33] and the respondent did not challenge, was unreliable. Although the judge had found that the appellant's evidence was 'not enough' when assessing whether there would be very significant obstacles to integration, it was submitted that the judge erred in not carrying out a credibility assessment, to enable the judge to decide what weight ought to have been attributed to that evidence.

11. It was submitted that the judge failed to provide adequate reasons, at [66] in finding that the appellant's church in Trinidad and Tobago would be able to provide help upon return, when it was the appellant's account that the church did not know about his sexuality and would not support him if they did (at [30]). The judge failed to adequately explain why the appellant's unchallenged evidence was insufficient to establish that he would face discrimination upon return, especially given his evidence about past experiences and in light of the Foreign Office Travel advice which acknowledges that same-sex activity is illegal in Trinidad and Tobago and that public displays of affection between same sex couples, may attract negative attention.

12. It was further submitted that the judge failed to take into account relevant factors including the impact on the appellant of separation from his support network in the UK and his ability to live in the UK as an openly gay man and the judge failed to take into account whether the appellant would face heightened discrimination if his partner were to travel with him and live with him in Trinidad and Tobago.

13. In terms of Ground 3, it was argued that the judge incorrectly applied a heightened threshhold to the proportionality assessment at [76] in finding that there 'is no evidence before me which could justify a

finding that they would have significant difficulties in doing so'; it was submitted that the judge had misapplied the test of unjustifiably harsh consequences and had asked the wrong question. Although the judge took into account the appellant's family in Trinidad and Tobago as a factor in favour of return, this did not reflect the appellant's evidence that his family were 'very disappointed' in him and that his brother does not speak with him anymore.

14. Mr Rehman relied on **Lal [2019] EWCA Civ 1925** and submitted that the judge had fallen into a similar error and had not carried out the correct assessment, in deciding whether there were exceptional circumstances, with the applicable test being whether there be unjustifiably harsh consequences for the appellant or their partner, such that refusal would be proportionate. The Tribunal is required to assess not just the degree of hardship which the appellant or their partner would suffer, but to balance the impact of refusing leave to remain on their family life against the strength of the public interest in such refusal.

15. Mr Rehman pointed to the factors relevant to the assessment in **Lal** at paragraph 70, and submitted that the judge had not carried out this exercise. It was further submitted that the judge, at paragraph [72] took into account the first 3 parts of section 117 of the Nationality Immigration and Asylum Act 2002, but gave no consideration to the fact that the appellant had arrived lawfully in the UK and was not an overstayer due to Covid 19 concessions. It was argued that the judge had wrongly discounted the weight to be attached to the family rights relied on in the proportionality assessment.

16. It was argued that the judge failed to take into account the statement in the appellant's evidence from his partner that it would be impossible for him to leave his job with the appellant's partner providing further unchallenged evidence about the 'very strong hostility' towards the LGBT+ community in Trinidad and Tobago. It was submitted that this had not been factored in the appellant's favour.

17. Although there was no Rule 24 response, in oral submissions by Mr Parvar for the respondent it is argued, in short summary as follows.

18. The appellant's renewed Ground 1 was not particularly strong and had not engaged with the judge's findings, including the judge's reliance on there being available medication in Trinidad and Tobago.

19. In terms of Grounds 2 and 3, Mr Parvar submitted that the fact that there are no adverse credibility findings does not mean that an appeal will automatically succeed, and it was submitted that the judge's findings were open to them.

20. In relation to Ground 3 it was submitted that there was no material error in the judge's approach.

Conclusions – Error of Law

21. I have reminded myself of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ **in Volpi & Anor v Volpi [2022] EWCA Civ 464** at **[2]** as follows:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

22. At paragraph [65] of **Volpi** the Court of Appeal observed as follows:

> "65. This appeal demonstrates many features of appeals against findings of fact:
>
> i) It seeks to retry the case afresh.

ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").
iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings."

23. In the earlier case of Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]: the Court of Appeal similarly advised appropriate judicial restraint in the approach to first instance decisions:

"i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
ii. The trial is not a dress rehearsal. It is the first and last night of the show.
iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

24. In terms of Ground 1, the substantive ground is not made out. It cannot be properly said that the judge misdirected herself or required the appellant to comply with too high a standard. The judge properly analysed all the evidence, and it was open to the judge to find that treatment was available for the appellant in Trinidad and Tobago.

25. The judge set out the correct legal framework and authorities at [13] to [24] and properly self-directed herself. The judge made no error in applying **Paposhvili v Belgium [2017] Imm AR 267** and related authorities, including **THTN v SSHD [2023] EWCA Civ 122.** The authorities are clear that Article 3 remains a high hurdle, albeit that the primary stages as to burden and standard of proof only require a prima facie case.

26. It was not the case that the judge improperly required too high a standard or required the appellant to show clear evidence. Whilst it was submitted that the judge's 'attempt at a self-direction does not reflect the considerations' that a judge is to take into account, including that the appellant's representative argued that the judge's self-direction did not properly take into account the advice in **AM (Zimbabwe) v SSHD [2020] UKSC 17** and **Savran v Denmark [2022] Imm LR 3**), that is to misrepresent the proper approach the judge took. The judge correctly directed herself to all the relevant authorities and cannot be sensibly criticised for not including every paragraph of judicial direction from each of those relevant authorities.

27. I have reminded myself that it must not be assumed too readily that the First-tier Tribunal has misdirected itself: UT (Sri Lanka) v Secretary of State for the Home Department .

28. Having appropriately self-directed, the judge's reasoned findings on Article 3 are found at [44] to [50] of the decision and reasons, with the judge accepting that the appellant's HIV diagnosis was not in dispute. The judge had the correct approach in mind in proceeding to carefully analyse all the evidence and reach reasoned, evidence-based findings that the medication the appellant takes is available in Trinidad and Tobago and that this was not the same medication that the appellant was on when he was last in Trinidad and Tobago which made him so unwell.

29. There can be no material error in the judge's ultimate conclusion, at [49] that the appellant had not adduced evidence capable of demonstrating that there were substantial grounds for believing that if removed, although not at imminent risk of dying, he would face a real risk of being exposed to either a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy. Ground 1 is not made out.

30. Ground 2 is concerned with the judge's findings as to very significant obstacles to integration, with a claimed failure to conduct a credibility assessment, and a claimed failure to provide adequate reasons or to take into account relevant factors.

31. The judge had accepted the appellant's account from [54] to [57] and made no criticism of the appellant's credibility and there was no indication that the respondent challenged the appellant's evidence. The judge found at [63] that the appellant's account was 'not enough' in establishing very significant obstacles.

32. The judge at [52] set out the starting point, which was that the appellant had spent the majority of his life in Trinidad and Tobago, having been educated there and having family, friends and his church there. He had only been in the UK since 23 March 2020. It was open to the judge to find as she did, that the appellant was enough of an

insider in Trinidad and Tobago to understand life in that society and how it is carried on.

33. The judge properly acknowledged at paragraph [53] that the question of the appellant's HIV diagnosis and sexual identity made the question of whether he has the capacity to participate in society and a 'reasonable opportunity' to be accepted there, was not so straightforward.

34. The judge considered that his ill- health prior to leaving Trinidad was a barrier to his integration which the judge found, relying on her earlier Article 3 findings found would not, in effect, be an issue on return (paragraph [55]). There was no challenge to those findings.

35. The judge noted that the appellant has not claimed asylum in the UK and took into account the appellant's evidence as to discrimination. The judge considered the reliance by the appellant's representative on the respondent's policy in relation to very significant obstacles, dated 28 January 2021.

36. The judge was entitled to take into account that there was a paucity of objective evidence that would support the contention that the appellant would be subject to discrimination or ill treatment which would amount to very significant obstancels to integration. The judge made reasoned, evidence based findings in relation to why the foreign office travel advice relied on by the appellant, wasn't sufficient.

37. It is unclear how the judge is said to have made any material error in not making a specific credibility finding. The judge took into account at [63] that the appellant did indicate in cross-examination, that he had seen someone left for dead in Trinidad and Tobago. However it was open to the judge to attach the more limited weight to that evidence that it is apparent she did, for the reasons she gave, including that this information was not referenced in the appellant's witness statement or developed in any detail in oral evidence.

38. It was open to the judge to find that this evidence was insufficient to satisfy the Tribunal that the appellant would experience similar risks on return. The judge was also entitled to take into account that the appellant was not pursuing such an argument (as to risk on return) on appeal. The judge reached sustainable findings from [59] to [62] on the paucity of background evidence to support the contention that the appellant would be subject to discrimination or any ill-treatment sufficient to constitute significant obstacles. It was entirely open to the judge to find at [64] that the Tribunal could not make assumptions on these matters, and it indeed it may well have been an error if she had made such assumptions. Mr Rehman's submission that the respondent did not 'produce rebuttal evidence' is difficult to understand, in circumstances where the appellant has the burden of proof. It was open to the judge to reach the findings she did on the

available evidence, oral and documentary, which she properly considered in the round.

39. Similarly the argument that the judge failed to provide adequate reasons for her finding that the appellant's church can help on return and why his unchallenged oral evidence was not accepted, falls into the realm of 'island-hopping'. The judge's findings must be considered holistically, in the context of all her findings, including at [61] that the UK travel advice was not enough to show that the appellant if he were to live as an openly gay man, is likely to experience discrimination to such a level to constitute very significant obstacles to integration and the judge noted that the advice suggests that there is 'growing local support for LGBT rights'.

40. The judge's findings on the appellant's Church, at [66] were properly reasoned and adequate and it was open to the judge to attach the weight she did, including that beyond stating that the Church was very traditional and there was general stigma in society, the evidence did not explain why his pastor, or his friend would be unwilling to continue to support him.

41. In considering whether the appellant would face very significant obstacles, the judge also considered the appellant's claims and the submissions of his representative that his family have 'ostracised him'. It was open to the judge to find at [65], that this was not consistent with the appellant's evidence including that whilst his relationship with his family is 'strained' he does have some support from his mother and sister who want him to be happy.

42. The argument that the judge failed to take into account the impact of separation from his UK network, is misconceived. The judge continued, from [56] onwards, to consider the impact of the appellant's sexuality and took into account that he had not previously lived as an openly gay man in Trinidad and Tobago, which he is doing in the UK. The judge accepted that the appellant would wish to live as such on return to Trinidad and Tobago. It is implicit in such a finding, that the judge had in mind the support network available in the UK.

43. It is equally apparent that the judge's consideration of very significant obstacles, encompassed any difficulties he might experience with his partner as the judge made findings of fact, throughout her consideration under the immigration rules, as to the situation for the appellant 'if he were to live as an openly gay man' (paragraph [61]) which would be the case if his partner accompanied him to Trinidad and Tobago. I note however, that such does not appear to have been the appellant's case as it was put to the First-tier Tribunal, with the judge noting, at [74] that the submissions made on behalf of the appellant suggested that the appellant would return to Trinidad and

Tobago alone. In any event, the judge properly considered this scenario.

44. The judge's findings were supported by cogent and careful reasoning. Ground 2 does not disclose an error, material or otherwise.

45. In terms of Ground 3 and the argument made that the judge failed to conduct a proper proportionality assessment, no error material or otherwise is made out in the judge's consideration of proportionality, using the balance sheet approach from paragraph [69] onwards.

46. The judge properly directed herself that the fact the appellant does not meet the requirements of the immigration rules was an important factor in the public interest and the judge went on to consider and apply the factors in Part 5A of the Nationality Immigration and Asylum Act 2002.

47. Any alleged error by the judge in stating at [75], that the evidence did not justify a finding that the appellant and his partner would have significant difficulties in living openly as a gay couple, is not material. The argument is, in any event, misconceived. The judge was, at [75], reaching a discrete finding on one aspect within her Article 8 assessment, rather than applying the wrong test in conducting that assessment. It was open to the judge to reach this finding in the context of her wider findings, where the judge applied the balance sheet approach and concluded that the respondent's decision was not a disproportionate interference with the appellant's Article 8 rights. This necessarily included a consideration, in terms, of whether there were any exceptional circumstances which would result in unjustifiably harsh consequences.

48. Applying Lal and the non-exhaustive list of factors at paragraph 70 of that decision, it is apparent that this is exactly the approach that the judge took, from [69] to [77] including taking into account that the appellant is in a genuine and subsisting relationship with his partner in the UK and that such an interference, if the appellant would return alone, would weigh in the appellant's favour in the proportionality assessment.

49. Mr Rehman criticised the judge for not making findings on section 117B(4) and (5) and in particular that the appellant had not been in the UK unlawfully. Any claimed error is not material as it is evident the judge applied the correct tests in substance. It is clear that the judge did not apply 'little weight' to the appellant's family life.

50. However, it was open to the judge to reach the findings that she did, that the parties entered into the relationship knowing that the appellant did not have settled status and that there was a good chance the appellant would have to return to Trinidad and Tobago.

51. The argument at paragraph 24 of the grounds that the judge erred in taking into account that the appellant has a family in Trinidad and Tobago at [71] as this did not reflect the appellant's evidence that his family were very disappointed and that his brother did not speak to him anymore, is also misconceived. Again, the grounds and submissions fail to engage with the decision holistically and it is clear that the judge had regard to the whole sea of evidence before her, including as she found at paragraph [65] (and there was no challenge to that finding of fact) that whilst the family relationship was strained the appellant does have some support from his mother and sister.

52. The judge concluded that considering all relevant matters and weighing up the cons against pros, the refusal wasn't a disproportionate interference. There can be no material error in that finding. Ground 3 is not made out.

Decision:

53. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

M M Hutchinson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 21 June 2024