IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002241

First-tier Tribunal No: HU/51525/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of September 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE PINDER

Between

SARMAD RAZA SHEIKH
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby, of Counsel, instructed by Buckingham Legal Associates
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 3 September 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born on 23rd December 1977. He came to the UK with Tier 4 student leave to enter on 22nd February 2006. He had leave as a student until 19th June 2010. He made an in time application to extend his leave with Tier 1 post-study migrant leave and this was granted with leave until 14th May 2011.

2. The appellant then applied for Tier 1 general leave but this application was refused and his appeal was dismissed, and he became appeal rights exhausted on 19th March 2012. An application for judicial review was refused on 20th September 2012. On 29th September 2012 the

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appellant made an application to remain on human rights grounds which was refused on 31st July 2013. On 24th October 2012 the appellant was given a caution for a sexual offence. Further applications to remain outside of the Rules and on human rights grounds were rejected in 2015 and 2016 for non-payment of the fees. On 12th May 2017 the appellant was served with removal papers as an overstayer. The appellant was convicted of a sexual assault on a 15 year old on 27th September 2018, and was given a 12 week custodial sentence, but it was decided not to be pursue a deportation order. On 26th July the appellant claimed asylum but the claim was voided due to non-engagement with the Home Office on 26th September 2018. On 9th January 2020 the appellant made an application to remain on human rights grounds. He was encountered working illegally for Tech Direct on 18th December 2020. It is the refusal of this last human rights application dated 12th April 2021 to which this current appeal relates. The appellant's appeal against the decision was dismissed by First-tier Tribunal Judge Coll in a decision promulgated on 28th March 2024.

3. Permission to appeal was granted by Upper Tribunal Judge Perkins on the 12th June 2024 on the basis that it was arguable that the First-tier judge had erred in law in making an adverse finding of credibility based on the assumed content of an earlier decision that was not before the Judge. It was also arguably an error to have found that the appellant's presence in the UK was undesirable without giving reasons. Permission was granted to argue all grounds.

4. The matter now comes before us to determine whether the First-tier Tribunal erred in law, and if so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside.

5. The appellant had hoped to join the hearing by video link from the Priory Ticehurst House where he is currently an inpatient, as a result of presenting as being at high risk of self-harm or suicide at Charing Cross Hospital on 10th August 2024 with a current diagnosis of severe depression with psychotic symptoms, however the hospital informed the Upper Tribunal that he was not well enough to do so. We were able to proceed with the hearing as the appellant was represented by Mr Sowerby and he raised no objection.

Submissions – Error of Law

6. In the grounds of appeal and in oral submissions from Mr Sowerby it is argued, in short summary, that the First-tier Tribunal erred in law as follows.

7. Firstly, it is argued, that the First-tier Tribunal erred by taking an erroneous approach to the appellant's credibility and failing to consider the matter in the round. It is argued that it was not lawful to find that the appellant's account of not being in touch with his family was not credible at paragraphs 28 and 29 of the decision simply because of a

supposed adverse finding of credibility made by the First-tier Tribunal in 2012 without giving any further reasons when that decision was not before the First-tier Tribunal. It had not proved possible for any party, or indeed the Upper Tribunal, to obtain this decision of the First-tier Tribunal and clearly it was quite possible that there was not a negative finding against the appellant's credibility. Mr Wain helpfully indicated that he accepted that it was an error of law for the First-tier Tribunal to have relied upon this decision but that it was not accepted for the respondent that this was a material error of law. Mr Sowerby argued that this error was material because it led to the conclusion that the appellant was not credible when he said he had no contact with his family, and this in turn led the First-tier Tribunal to conclude that the appellant would be able to access medical treatment and receive support and assistance in relation to work on return to Pakistan at paragraphs 47 and 49 of the decision, which in turn was relevant to the decision under Articles 3 and 8 ECHR.

8. Secondly, it is argued that there was procedural unfairness in the approach to Article 3 ECHR. It is argued in the grounds that the hearing had proceeded on the basis that the appellant was a seriously unwell person, based on counsel for the appellant's notes/grounds and a short statement of truth from Mr Youssefian confirming that they were accurate to the best of his knowledge and belief, and if the First-tier Tribunal took a different view then the First-tier Tribunal Judge had, to be procedurally fair, to inform the parties. However Mr Sowerby accepted that the position was, as recorded at paragraph 32 of the decision, that the respondent had not actually taken a view on whether the appellant was a seriously ill person, and Mr Wain confirmed that the respondent's position was that this was accurate. It was argued, in addition, there had been no suggestion that the report and diagnosis of Dr Ahwe was disputed at the hearing, and indeed the respondent had relied upon the report in the refusal letter. In these circumstances if the First-tier Tribunal was intending to reject the report it was incumbent on the Judge to inform the parties so submissions could have been made with respect to it at the hearing.

9. Thirdly, it is argued that there is an error of law by way of a material misdirection of law with respect to the suitability requirement. It is argued that the appellant does not fall foul of this simply by way of his convictions (a caution and short custodial sentence which would not suffice to bring deportation proceedings) under paragraph S-LTR 1.6 of the Immigration Rules, and there is a complete failure to provide reasons for concluding at paragraph 52 of the decision as to why the appellant's presence is undesirable. It was accepted that the appellant had used a false document but as this was 13 years previously and because S-LTR4.2 is discretionary, there needed to be further reasoning with respect to the issue of discretion for this conclusion to be lawful.

10. Fourthly, it is argued, that the First-tier Tribunal failed to properly and adequately consider the appellant's Article 8 ECHR rights, and

particularly whether he would face very significant obstacles to integration in Pakistan. This is because there was failure to consider the impact of the appellant's mental health due to wrongly and unfairly rejecting Dr Ahwe's report and for the other failures set out above.

11. In a Rule 24 and in oral submissions from Mr Wain it is argued for the respondent, in short summary, as follows.

12. It is argued that the first ground is not arguable because there was clearly sufficient evidence for the First-tier Tribunal to conclude that the appellant was not credible in his claim not to be in touch with family in Pakistan. The Judge had to start somewhere and the issue of dishonesty in the form of a forged document was a fair place to start. The appellant was accepted by his representative as having forged an educational document. In addition he has a poor immigration history which includes an abandoned asylum claim and other failed applications, he had a criminal conviction and a caution for sexual offences and had given different details of family in Pakistan to his doctors in 2016 and 2018, which can be seen from the GP report from Faircross Health Centre dated 22nd January 2020, which also indicated contact with family up to 2018. So whilst it was clearly an error for the First-tier Tribunal to have relied upon the previous decision of the First-tier Tribunal from 2012 which was not before it, and may or may not have found the appellant not to be credible, this error was not material. It was also not material as the decision that the appellant was not a seriously ill person was decided without reference to the credibility of his evidence about his family, and thus the appeal under Article 3 ECHR is dismissed without any arguable legal error.

13. In relation to the second ground it is argued that there was no procedural unfairness with respect to Article 3 ECHR. It was not the case that the hearing proceeded on the basis that both parties accepted that the appellant was seriously unwell, as noted above. The report of Dr Ahwe and other medical evidence show that the appellant is unwell but not seriously ill. The First-tier Tribunal considered the evidence holistically and comes to a legally sustainable conclusion. Further the appeal is determined in the alternative on the basis that if the appellant is seriously unwell then he can access required treatment which will be available to him, and there is no challenge in the grounds to these paragraphs of the decision, so any error with respect to the issue of whether the appellant is a seriously ill person cannot ultimately be material.

14. In relation to the third ground it is argued that there was no material misdirection of law with respect to the criminal convictions. Reliance is placed on the decision of Mahmood (paras. S-LTR 1.6 & S-LTR 4.2; Scope) [2020] UKUT 376. It is argued that it was lawfully open to the First-tier Tribunal judge to consider suitability under S-LTR 1.6 which is a mandatory paragraph with reference to imprisonment sentences of under 12 months. These are relevant matters to character, conduct and

convictions as the paragraph specifically refers to those convictions that fall below the deportation scheme thresholds (detailed in the Immigration Rule as convictions which do not fall within LTR 1.3-1.5) , and the decision was made on this basis and not on the basis that the appellant was otherwise undesirable. It was not arguable that the First-tier Tribunal erred in this respect. Although paragraph S-LTR 4.2 is discretionary the role of the First-tier Tribunal was to assess if the decision of the respondent was reasonable and made out on the evidence, and the finding that the appellant had relied upon a false document, which was an agreed fact in this appeal, was sufficient to find that the decision as to suitability was made lawfully.

15. In relation to the fourth ground it is argued that there is no failure to consider Article 8 ECHR and whether the appellant would have very significant obstacles to integration on return to Pakistan because there is a proportionality assessment at paragraphs 54 to 59 of the decision which includes all the relevant private life factors going to integration, such as work, education and social integration, and the treatment of the evidence is rational.

16. At the end of hearing we informed the parties that we found the First-tier Tribunal had materially erred in law for the reasons which we summarised but now set out in full below. It was agreed that all findings should be set aside in light of the errors made and the appellant's clearly worsened mental health, and that in light of the extent of remaking the matter should be remitted to the First-tier Tribunal for the remaking hearing.

Conclusions – Error of Law

17. It was agreed by both parties and we find that it was an error of law for the First-tier Tribunal to have found, at paragraph 27 of the decision, that it was "more likely than not" that the First-tier Tribunal made adverse credibility findings against the appellant in the 2012 appeal with respect to his Tier 1 post-study work visa. This document was not before the First-tier Tribunal, and it has not been possible for either party or the Upper Tribunal to locate it. It is clearly possible that no such negative credibility findings were made. This is the only reason given by the First-tier Tribunal for finding that the appellant is not in touch with his family at paragraph 29 of the decision. We find that this was not a reason rationally open to the First-tier Tribunal to rely upon. Whilst there could have been other reasons given by the First-tier Tribunal for not believing the appellant, none are given. We therefore find that the finding that the appellant is in contact with his family is tainted by error.

18. We do not find that this error with respect to family contact contaminates the dismissal of the appeal with respect to the medical Article 3 ECHR claim at the time it was heard before the First-tier Tribunal, as is contended in the second ground, for the following

reasons. We do not accept that it was an agreed fact before the First-tier Tribunal that the appellant was a seriously ill person. It is clearly recorded at paragraph 32 of the decision that the respondent had not taken a position as to whether the appellant was a seriously ill person, and Mr Wain confirmed that this correctly represents the position taken at the First-tier Tribunal and Mr Sowerby did not press the point. We do not find that the decision-making on this issue was procedurally unfair. It was clearly identified as an issue in the appeal at paragraph 17.1, where the first issue in dispute is recorded as being whether the appellant had established a prima facie case under Article 3 ECHR. As set out at paragraph 21 of the decision the First-tier Tribunal then properly follows AM (Article 3, health cases) Zimbabwe [2022] UKUT 131 in looking firstly at whether the appellant has established that he is a seriously ill person. We also do not find that the First-tier Tribunal acted unlawfully in finding the appellant was not a seriously ill person. It is clear from paragraphs 30.1-30.17 that the First-tier Tribunal conducted a review of all of the medical evidence. The decision not to put weight on the evidence of Dr Ahwe is reached following a detailed consideration of the evidence at paragraphs 31 to 42 of the decision because the First-tier Tribunal prefers other evidence placed before the First-tier Tribunal by those representing the appellant from Dr Baichoo-Ajgaybee on the very rational basis that Dr Baichoo-Ajgaybee was the appellant's treating psychiatrist, rather than the writer of a medico-legal report, and because his evidence was more recent. We find that this was an unarguably fair approach and the conclusion that the appellant is an ill person but not a seriously ill person, at the time of hearing before the First-tier Tribunal, is properly reasoned. The second ground of appeal is not therefore made out.

19. We find however that the error of law with respect to the credibility assessment raised in first ground of appeal is ultimately material because of its impact on the First-tier Tribunal's Article 8 ECHR assessment. This is because when considering the proportionality assessment the First-tier Tribunal properly factors in the appellant's mental health and treatment at paragraph 55.3 of the decision. However when considering the appellant's access to treatment for his ill-health, at paragraphs 47 and 49 of the decision in the context of the appellant's Article 3 ECHR claim, reference is made to family contact and the appellant's ability to derive support from his family network. As the lack of credibility of his claim to have no such contact or support is a finding which is tainted by the error of law outlined at paragraph 17 above, then the consideration of the appeal more generally outside of the Rules under Article 8 ECHR is contaminated by this error.

20. We also agree that the First-tier Tribunal properly determines the issue of suitability under the private life Immigration Rules at paragraph 52 of the decision and thus that the third ground is not arguable. Paragraph S-LTR 1.6 states that: "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.),

character, associations, or other reasons, make it undesirable to allow them to remain in the UK." SLTR 1.3 – 1.5 details sentences of imprisonment over 12 months and those whose offending has caused serious harm or where the applicant is a persistent offender with a particular disregard for the law, and thus those who are foreign criminals liable for deportation. It is therefore clear that S-LTR 1.6 includes lesser convictions like those of this appellant, and also that is a ground of mandatory refusal, as at paragraph S-LTR 1.1 it is stated that: " The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply". The appellant's conduct in the form of his conviction for sexual assault is therefore properly given by the First-tier Tribunal as a reason why the appellant cannot meet the suitability requirements for the private life Immigration Rules. It is not therefore material whether there is an error in the consideration of whether the appellant also falls to be refused on suitability grounds under S-LTR 4.2 on the basis of the false diploma submitted with his Tier 1 visa application made on 5th April 2011. It is correct to note however that this is a discretionary ground of refusal as set out at S-LTR 4.1, and we do find that there was a failure to consider whether discretion ought to be exercised on this basis within the decision at paragraph 52. We emphasise that nothing turns on this failing given the proper finding with respect to the appellant being unable to meet the suitability requirements under S-LTR 1.6, and as such we find that ground three discloses no material error of law.

21. Ultimately we therefore find that a combination of material errors of law identified in grounds one and four lead us to conclude that the decision of the First-tier Tribunal must be set aside, and that in light of recent medical developments and the need for there to be an assessment of the respondent's decision and the appellant's human rights as at the time of that hearing, no findings should be preserved.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal and all of the findings.

3. We remit the remaking to the First-tier Tribunal for a hearing before any Judge of the First-tier Tribunal other than Judge Coll.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th September 2024