Neutral Citation Number: [2023] EWCA Civ 1379

Case No: CA-2023-000214

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Smith
UI-2021-001594

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2023

Before :

LORD JUSTICE NEWEY
LORD JUSTICE SNOWDEN
and
LADY JUSTICE WHIPPLE

- -

Between :

NC **Appellant**

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -
- -

Amanda Jones (instructed by **Sriharans Solicitors**) for the **Appellant**
Sian Reeves (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 31 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE WHIPPLE:

Introduction

1. This is an appeal against the determination of the Upper Tribunal (Immigration and Asylum Chamber) dated 23 May 2022 (Judge Leslie Smith). The Upper Tribunal set aside the determination of the First-tier Tribunal (Immigration and Asylum Chamber) dated 21 April 2021 on grounds that the First-tier Tribunal had erred in law in concluding that there would be very significant obstacles to the appellant's integration if she returned to her home country of St Kitts and Nevis and in allowing the appellant's appeal on that basis.

2. The First-tier Tribunal had applied paragraph 276ADE(1)(vi) of the Immigration Rules. That paragraph is no longer in force (superseded by a Statement of Changes to the Immigration Rules, HC 1118, made on 15 March 2022, with effect from 20 June 2022). At the date of the First-tier Tribunal's determination, paragraph 276ADE(1) provided, so far as is relevant, as follows (with emphasis added):

> "276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant:
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> …
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> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but **there would be very significant obstacles to the applicant's integration** into the country to which he would have to go if required to leave the UK."

3. In this appeal the appellant maintains that there was no error of law in the First-tier Tribunal's determination, that the Upper Tribunal was itself in error in concluding that there was and that the First-tier Tribunal's determination in the appellant's favour should stand. The Secretary of State, respondent to this appeal, maintains that the Upper Tribunal was correct to find that the First-tier Tribunal had made an error of law and to set aside the First-tier Tribunal's determination. The focus of this appeal is on the meaning of "very significant obstacles to … integration" as those words appear in paragraph 276ADE(1)(vi).

Background

4. The appellant is a national of St Kitts and Nevis born on 4 April 1987. She came to the UK on 27 March 2016, aged 28. She claimed asylum on 25 October 2016. Two of her children, who were born in 2009 and 2012 and were, at the time of the First-tier Tribunal's determination, aged 10 and 8, are with her in the UK. She has a third child, who is older, who remained in St Kitts.

5. The appellant's asylum claim was refused by the Secretary of State on 3 July 2020. In her refusal letter, the Secretary of State stated that the appellant did not qualify for

asylum or humanitarian protection, that removal would not be a breach of Article 8 ECHR and that the appellant did not qualify for exceptional leave to remain outside the Immigration Rules; in short, there was no basis on which she would be granted leave to enter or remain in the UK. There are two parts of this refusal letter which are of note in the context of this appeal, namely: (i) the Secretary of State's view there was effective protection provided by the authorities of St Kitts and Nevis for their citizens, including an established police force from which the appellant could seek protection if the need arose (this was stated in the context of the refusal of the appellant's asylum claim, see [78] of the refusal letter); and (ii) the Secretary of State's conclusion that the appellant would not face very significant obstacles to her integration into St Kitts and Nevis because she would still retain knowledge of the customs and traditions of that country and had immediate and extended family living there who could help with integration (this was stated in the context of the rejection of her human rights claim, see [115]-[116] of the refusal letter).

The First-tier Tribunal

6. The appellant appealed the Secretary of State's decision to the First-tier Tribunal. The First-tier Tribunal recorded that the appellant feared that she was at risk of violence from her former friend, CH, who was a drug dealer, that CH suspected the appellant of knowing something about a shooting of CH and that CH had a vendetta against the appellant (First-tier Tribunal's determination at [10]). The First-tier Tribunal said that it had given very careful consideration to all the evidence in the case ([31]). It found that the appellant had experienced four incidents of violence which led the appellant to fear that she was at risk of violence, which fear was genuinely held; those findings are contained in the following paragraphs:

> "36. There appeared to be four incidents which have led the appellant to believe she is a risk of violence from [CH]. Firstly, there was a shooting on 23rd July 2015 at the appellant's home. She was outside the front of the house with a friend of her partner. This man was called [JH]. She says they were shot at by men dressed as police officers and with big machine guns. They shot in the direction of [JH] and the appellant. Somehow the appellant escaped being shot. [JH] was shocked, hospitalised for three months with his injuries and left with mobility problems. The appellant then moved in with her sister [I]. On 31st December 2015 the appellant was driving with her sister, and her partner [ET] and they were shot at by some people in a Jeep. Once again the appellant escaped without injury. The third shooting was on 24 January 2016 when a friend of [ET], [HE], was shot and killed on his way to the appellant's sister's house two blocks from her road. The appellant left Saint Kitts on the 27th of March 2016.
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> …
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> 38. The fourth incident that the appellant is concerned about happened in 2018. Her middle son, [M], was approached by someone who tried to force him into a vehicle on his way home

> from school saying that the appellant had sent someone to collect him.
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> …
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> 42. … I find that the appellant genuinely believes that the three shooting incidents and the abduction attempt of her son are as a result of a vendetta against her by [CH]. …

7. The First-tier Tribunal went on to consider whether the appellant's fear was well-founded and concluded that it was not ([42] continued):

> "… However, for the reasons stated above, I do not find that it is reasonably likely that [CH] or her associates were attempting to harm the appellant during any of these shooting incidents. If this was their intention, then I do not think the appellant would have escaped unharmed and subsequent attempts would have been made to harm her. However, her partner and two of his friends who were present at each of the three shootings were all either killed or seriously injured. Therefore, I do believe it is reasonably likely that all the incidents, including the attempted abduction of the appellant's son, are due to [CH]'s criminal associations."

8. The First-tier Tribunal rejected the asylum and humanitarian protection claims (against which there is no appeal):

> "43. I do not conclude therefore that it is reasonably likely that the appellant would face a real risk of substantial harm from [CH] or her associates were she to return to Saint Kitts."

9. The First-tier Tribunal then considered the Article 8 claim by reference to paragraph 276ADE(1)(vi). It noted the Secretary of State's position that the Article 8 claim "stands or falls with the protection claim" (see [44]). The First-tier Tribunal thought that the Article 8 claim was "not quite as simple or straightforward as that" and went on:

> "44. … I have accepted that the appellant has a genuine subjective fear for herself and her children in Saint Kitts. While I have not found the appellant has met the evidential burden to show that there is any real connection to [CH], I have found that the appellant subjectively believes she is in danger. I accept that subjectively she believes the authorities are not willing to protect her. I think it is likely on the balance of probabilities that this would have a significant impact on the appellant's ability to conduct a normal life in St Kitts and Nevis. I do agree therefore that the appellant would be likely on the balance of probabilities to be unable to integrate into life in Saint Kitts. She therefore meets the Immigration Rules. The appellant claimed asylum shortly after arriving in the United Kingdom. In applying the test of proportionality I therefore do

> not find that the balance of proportionality weighs against her in this case."

10. For those reasons, the appeal was allowed ([45]-[46]).

The Upper Tribunal

11. The Secretary of State was granted permission to appeal by the First-tier Tribunal (Judge Shaerf) on 13 October 2021. The appeal came before the Upper Tribunal on 20 May 2022. The Upper Tribunal concluded that the First-tier Tribunal had been fully aware of the legal test of "very significant hurdles to integration" contained in paragraph 276ADE(1)(vi) but had not properly applied that test (Upper Tribunal determination at [16]). The Upper Tribunal's reasons were set out at [17]-[19] and summarised in the following two paragraphs:

> "20. In summary therefore, although an appellant's state of mind might be relevant to an ability to integrate, it is not suggested for example that the Appellant has any mental health issues arising from her fear which might then prevent her integration. In any event, her subjective fear (not objectively well-founded) is but one factor. If, as the Judge has found, the fear is also not objectively well-founded and if there is in any event objectively a sufficiency of protection (which the Judge did not consider), it is difficult to see how the subjective fear could prevent reintegration. The Judge has failed to provide adequate reasons to explain how she reached the conclusion that it could.
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> 21. The error is therefore one of failing to take into account relevant considerations (such as whether the fear is objectively well-founded and other integrative links) and has taken into account the Appellant's own subjective perception of her ability to reintegrate. The Judge has erred by failing to ask herself the right question whether, objectively, there are very significant obstacles to reintegration. The Judge has also failed to provide adequate reasons for her conclusion."

12. The Upper Tribunal set aside the First-tier Tribunal's determination, preserving the findings in relation to the protection claim (including those set out above, taken from [36]-[43] of the First-tier Tribunal's determination) with directions for a resumed hearing to re-make the decision on Article 8 grounds. That resumed hearing took place on 3 August 2022 before the same tribunal (Upper Tribunal Judge Smith) and led to a second determination promulgated on 29 September 2022 in which the Upper Tribunal dismissed the appellant's appeal on human rights grounds.

Grounds of Appeal

13. The appellant now appeals against the Upper Tribunal's first determination (dated 23 May 2022) on the single overarching ground that the Upper Tribunal erred in finding the First-tier Tribunal had erred in law; rather, the First-tier Tribunal was entitled to reach the conclusion it did. As part of that ground, it is said that the Upper Tribunal

focussed too heavily on the asserted lack of objectivity in the First-tier Tribunal's analysis.

14. Permission to appeal on that single ground was granted by this Court together with an extension of time and anonymity to protect the appellant's identity (order of Lord Justice Males dated 23 June 2023). He refused permission to challenge the Upper Tribunal's second determination (promulgated on 29 September 2022). The consequence of his order is that if the appellant succeeds on this appeal, the decision of the First-tier Tribunal will be restored and the appellant will have the right to remain in the UK. If, on the other hand, she fails on this appeal, she will have failed in her protection and human rights claims and will have no further right of appeal; she will have no right to remain in the UK.

Submissions

15. The appellant was represented in this Court and below by Amanda Jones. The Secretary of State was represented in this Court, but not below, by Sian Reeves. I wish to thank both counsel for their excellent and focussed submissions which I have found to be of considerable assistance.

16. On issues of law, there was much common ground between the parties. Both parties accepted that paragraph 276ADE(1)(vi) required the court or tribunal to reach a broad evaluative assessment of whether the appellant, if returned, would face very significant obstacles to integration. Both parties accepted that subjective factors – to do with the appellant's own perception of risk and fear of harm – could form at least part of that assessment and that the appellant's genuine fear of reprisal (as found at [42] of the First-tier Tribunal's judgment) was relevant. Both parties accepted that objective evidence, by which they meant evidence of factors which were not subjective, such as evidence relating to the availability of state protection and the social and family connections of the appellant, were also relevant.

17. The difference between the parties was this: the appellant submitted that the First-tier Tribunal had taken account of all the evidence before it and had reached precisely the sort of broad evaluative assessment which was required; specifically, the First-tier Tribunal was entitled to conclude that it was likely on the balance of probability that the appellant's subjective fear would have a "significant impact" on her ability to conduct a normal life and that she would on balance of probabilities be unable to integrate into life in St Kitts (see [44]). The First-tier Tribunal had said at [31] that it had taken all the evidence into account and the Upper Tribunal was not entitled to go behind that statement. There was no challenge on the ground of perversity or irrationality. The Upper Tribunal's decision amounted to little more than a disagreement with the First-tier Tribunal's decision on the merits and was an impermissible substitution of its own decision for that of the First-tier Tribunal. This appeal should be allowed.

18. The Secretary of State argued that the First-tier Tribunal had not reached a broad evaluative assessment at all; it had been selective in the evidence it had considered, basing its conclusion only on the evidence of the appellant's subjective fear without considering the other, objective evidence relied on by the Secretary of State to show that whatever obstacles to integration the appellant feared on return, they would fall short of being "very significant". Specifically, the First-tier Tribunal had overlooked

evidence of sufficiency of state protection and factors such as family connections and local knowledge which would help her to re-integrate, which evidence was set out in the Secretary of State's decision letter, and relied on by the Secretary of State at the First-tier Tribunal hearing. The reasoning at [44] of the First-tier Tribunal's decision was wholly inadequate, and disclosed a lack of reasons (because there was no reference to this objective evidence at all), alternatively a failure to take account of material considerations and evidence (again, given the lack of reference to this evidence). This was not a case where the Secretary of State had any reason to allege perversity or irrationality; rather this was a case where the First-tier Tribunal had simply not performed its task of reaching a broad evaluative judgment based on all the evidence. The First-tier Tribunal's assertion that it had considered all the evidence was insufficient because self-evidently the First-tier Tribunal had not considered this evidence in the context of its Article 8 determination. The Upper Tribunal had been right to set the First-tier Tribunal's decision on this aspect aside and this appeal should be dismissed.

Discussion

19. This appeal raises a point of enormous significance to the appellant because it will be determinative of her future, in the UK or otherwise. But in the end the point is a short one relating to the adequacy of the First-tier Tribunal's analysis and reasoning at [44] of its determination. I have come to the view that the Upper Tribunal was correct to conclude that the First-tier Tribunal was in error in its treatment of the paragraph 276ADE(1)(vi) question and was in consequence correct to set aside that part of the First-tier Tribunal's determination.

Legal Approach

20. We were shown three authorities which explain the approach that is required to paragraph 276ADE(1)(vi). The first is *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, [2016] 4 WLR 152. In that case, the Secretary of State appealed unsuccessfully against a determination of the Upper Tribunal that the claimant could not be deported to Sierra Leone because to do so would be in breach of Article 8, given that he would (on the Upper Tribunal's findings) face very significant obstacles to integration in that country (applying provisions which contained the same words as appear in paragraph 276ADE(1)(vi)). Sales LJ, with whom Moore-Bick LJ agreed, said this:

> "14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be

> accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

21. Sales LJ addressed the Secretary of State's argument that the tribunal had failed to have proper regard to all relevant matters:

> "18. There is no special rule regarding the reasons to be given by a tribunal deciding an immigration appeal. The conventional approach applies. The UT's decision is to be read looking at the substance of its reasoning and not with a fine-tooth comb or like a statute in an effort to identify errors. In giving its reasons, a tribunal is entitled to focus on the principle issues in dispute between the parties, whilst also making it clear that it has considered other matters set out in the legislative regime being applied."

22. In rejecting the Secretary of State's submission that the Upper Tribunal had failed to take into account the fact that the claimant was young, in good health and able to work, Sales LJ concluded:

> "22. … On the footing that it did have regard to them, [counsel for the Secretary of State] did not suggest that the tribunal's decision that the deportation of Mr Kamara to Sierra Leone would be in breach of his rights under article 8 could be regarded as irrational or perverse."

23. The next case is *Parveen v Secretary of State for the Home Department* [2018] EWCA Civ 932, a case on paragraph 276ADE(1)(vi), which concerned a Pakistani national who had been in the UK for 18 years and who asserted she would face very significant obstacles to reintegration in Pakistan. The Court dismissed her appeal, not being persuaded that she would face such obstacles. In a judgment with which Gloster and Asplin LJJ agreed, Underhill LJ referred to *Kamara* and said:

> "9. … The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant"."

24. The third case is *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925, [2020] 1 WLR 858 a case involving the meaning of "insurmountable obstacles" in paragraph EX1 of Appendix FM to the Immigration Rules. The Court (Sir Terence Etherton MR, Asplin and Leggatt LJJ) said:

> "36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the

> claimant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the claimant or their partner (or both).
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> 37. To apply the test in what Lord Reed JSC in the *Agyarko* case [2017] 1 WLR 823, para 43 called "a practical and realistic sense", it is relevant and necessary in addressing these questions to have regard to the particular characteristics and circumstances of the individual(s) concerned. Thus, in the present case where it was established by evidence to the satisfaction of the tribunal that the claimant's partner is particularly sensitive to heat, it was relevant for the tribunal to take this fact into account in assessing the level of difficulty which Mr Wilmshurst would face and the degree of hardship that would be entailed if he were required to move to India to continue his relationship. We do not accept, however, that an obstacle to the claimant's partner moving to India is shown to be insurmountable - in either of the ways contemplated by paragraph EX.2. - just by establishing that the individual concerned would perceive the difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to a claimant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together."

25. It is not in doubt, based on these authorities, that (i) the decision-maker (or tribunal on appeal) must reach a broad evaluative judgment on the paragraph 276ADE(1)(vi) question (see *Kamara* at [14]), (ii) that judgment must focus on the obstacles to integration and their significance to the appellant (see *Parveen* at [9]) and (iii) the test is not subjective, in the sense of being limited to the appellant's own perception of the obstacles to reintegration, but extends to all aspects of the appellant's likely situation on return including objective evidence, and requires consideration of any reasonable step that could be taken to avoid or mitigate the obstacles (see *Lal* at [36]-[37]).

26. I would add this. The test posed by paragraph 276ADE(1)(vi) is a practical one. Regard must be had to the likely consequences of the obstacles to reintegration which are identified. In a case like this, where the only obstacle identified is the appellant's genuine but unfounded fear, particular care must be taken to assess the ways in which and the extent to which that subjective fear will or might impede re-integration. It cannot simply be assumed that it will. The likely reality for the appellant on resuming her life in her home country must be considered, given her subjective fear, and the availability of support and any other mitigation must be weighed. It is against that background that the judgment on whether the obstacles to reintegration will be very significant must be reached.

This case

27. In this case, so far as I can tell, the First-tier Tribunal did not turn its mind to any evidence beyond the appellant's subjective evidence of fear. There is no reference within [44] to either of the two types of evidence on which the Secretary of State relied to rebut the appellant's case based on her subjective fear. That objective evidence related, first, to the availability of police protection in the event that the appellant or her children were threatened. Ms Jones suggested, in answer to this point, that the appellant would not be able or willing to seek help from the authorities given her fear of the police. But there is no finding to that effect, and the finding that the appellant "believes that the authorities are not willing to protect her" (at [44]) does not go far enough. It is clear that the Secretary of State relied on the availability of state protection to rebut the appellant's Article 8 claim, because the submission on the Secretary of State's behalf was that the paragraph 276ADE(1)(vi) claim "stands or falls with the protection claim", a direct reference to the evidence of the availability of state protection (noting that the First-tier Tribunal had accepted that evidence as a reason for rejecting the appellant's asylum and humanitarian protection claim). The second area of evidence related to the appellant's connections with St Kitts and Nevis where she had lived for 28 years before coming to the UK for the relatively short period of 4 years, and in which country she had immediate and extended family. These two areas of objective evidence were important; they went directly to the significance of the obstacle to integration the appellant had identified – namely her subjective fear of reprisals. This evidence was set out in the Secretary of State's decision letter and was before the First-tier Tribunal on appeal.

28. The First-tier Tribunal should have considered all of this evidence as part of its evaluation of the appellant's case. Its focus should have been on the likely reality of the appellant's day to day life if returned. Specifically, if it thought that there were likely to be obstacles to the appellant's reintegration, of whatever sort and whatever genesis, it should have considered whether there were steps which the appellant could reasonably take to avoid or mitigate such problems, for example, by seeking state protection or asking for help from family members.

29. If the First-tier Tribunal had engaged with the evidence and, having taken it all into account, had concluded that there would be real, practical difficulties for the appellant which reached the level of "very significant" obstacles which could not reasonably be mitigated or avoided Ms Jones' submissions would have been on a much surer footing. In that scenario, the analogy with *Kamara,* where the Secretary of State's appeal failed, would have some force. But that is not what happened because the First-tier Tribunal failed to consider the wider canvas or to engage with the practical reality for the appellant if returned. *Kamara* is of little assistance to the appellant.

30. The First-tier Tribunal's mistake is most clearly illustrated by its recognition of the appellant's subjective fear, followed by the statement that "therefore" she would be unable to integrate into life in St Kitts (at [44]). The First-tier Tribunal's approach appears to have been to identify an obstacle to integration (in the form of the appellant's subjective fear) and from that start point, to move directly to its determination that the legal test was met, without considering the mitigating and other

objective factors, and without considering how that subjective fear would, in practice and taking account of all the evidence, be likely to impact on this appellant.

31. That amounts to an error of law which can be characterised as a failure to carry out the required broad evaluative judgment (by not taking account of all the evidence), a failure to apply the required objective approach (by considering only the subjective evidence without regard to reasonable steps the appellant could be expected to take), a failure to take into account relevant considerations (by not considering the wider evidence going to state protection and family connections) or a failure to give reasons (because the reasoning offered does not indicate any consideration of these matters). The label does not much matter. The First-tier Tribunal's determination cannot stand.

32. In reaching this conclusion, I have been conscious that I should not pick holes in the First-tier Tribunal's determination, or read it like a statute, or be overly prescriptive about the form it should take. I respectfully agree with the points made by Sales LJ at [17] of *Kamara*. But I am compelled to conclude, on a fair reading of the First-tier Tribunal's determination, that the First-tier Tribunal was in error for the reasons I have already given. The Upper Tribunal was right to set aside the First-tier Tribunal's determination of the appellant's Article 8 claim.

Disposal

33. I would dismiss this appeal.

LORD JUSTICE SNOWDEN

34. I agree.

LORD JUSTICE NEWEY

35. I also agree.