



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15006/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 February 2014

Determination Promulgated
On 4 March 2014

Before

MR JUSTICE JAY
UPPER TRIBUNAL JUDGE CRAIG

Between

MOHAMMED SAEED ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E King, Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a determination of the First-tier Tribunal Judge Walker presiding, promulgated on 18 December 2013, whereby the appellant's appeal against the Secretary of State's decision dated 25 April 2013 to refuse his application for leave to remain in this country under Articles 3 and 8 of the Convention was dismissed.

2. The essential factual background to this case is as follows. The appellant is a national of Pakistan born in 1961. He arrived here on false documentation, probably in May 2006. He applied for asylum in 2007 but that claim was refused and certified with no right of appeal. The Secretary of State raised very serious issues in relation to the appellant's credibility, in particular the relationship he had with his family. It should be emphasised that at that stage the appellant was in good health.
3. There were then a number of applications for leave to remain, the last of which was refused, as we have said, on 25 April of last year. The Secretary of State's refusal letter dated 25 April is lengthy. It has been accurately summarised in the First-tier Tribunal's determination and we have examined it carefully.
4. The real issue here concerns the appellant's severe mental illness. There is medical evidence in support of it but the current situation is summarised in paragraph 13 of the First-tier Tribunal's determination which we set out as follows:

"Since 2007 his health has deteriorated with a significant deterioration taking place in August 2008. He is wheelchair bound and suffers from severe depression with psychotic symptoms. He is unable to bathe or to prepare any food without assistance. He has on occasions spoken of self-harm and is unaware of time. He is incapable of giving proper instructions and a recent psychiatric report dated 2 December 2013 from Dr T M Choudhry confirms that using the Pritchard test the appellant is not fit to plead, give evidence or give instructions."

5. The First-tier Tribunal noted that on the available evidence which appears to have been accepted the appellant has not retained any contact with family members in Pakistan. The available evidence is a reference to friends and family in the United Kingdom. The First-tier Tribunal noted that there would be no support network in Pakistan and that it would be unlikely that the appellant could avail himself of the very limited mental health services which exists in that country.
6. As we have said, the claim was and is brought under Articles 3 and 8 of the Convention. As for Article 3, his case is that there was a real risk that he would be abandoned helplessly at the airport on arrival and so would not be able to avail himself of the probably limited mental health services in Pakistan.
7. The First-tier Tribunal rejected this case on the basis that the burden of proof of establishing "how the appellant could or could not be escorted to a suitable care facility ... rests on or with the appellant" and that he had not discharged it. There was therefore as the Tribunal put it, an evidential void. As for the Article 8 claim, similar issues arose. Finally the Tribunal addressed paragraph 276ADE(vi) and noted that it had not been the subject of any decision by the respondent, "nevertheless, my finding is that the appellant has not been able to show that he has no ties (including social, cultural or family) with Pakistan".

8. The main ground of appeal advanced by Miss King today relates to the incidence of the burden of proof and the application of the standard of proof in this case. The First-tier Tribunal appears to have proceeded on the basis, Miss King submits, that that the burden of proof remained throughout on the appellant. When we see for example paragraph 25 of the determination “the appellant and his advisors cannot rely on the premise that he would be abandoned helplessly at the airport without then doing or attempting to do anything to alleviate this situation”.
7. The First-tier Tribunal appeared to be suggesting that full and proper enquiries should have been made by the appellant and that there was no burden on the respondent whatsoever.
8. When the case was called on before us Miss King read out for us the Rule 24 notice which had been submitted by those representing the Secretary of State. That notice had not been provided to the Upper Tribunal or as it happens to Mr Jarvis, representing the Secretary of State today. He conceded an error of law in relation to the burden of proof. Mr Jarvis’s position was slightly different. He did not accept that there was an error in relation to the burden of proof but he did accept that the determination does not properly address the consequences of removal. In our judgment the correct analysis is to proceed on the basis that a claim under Article 3 of the Convention is made out on the basis of a relatively low standard of proof if a real risk of serious harm, we paraphrase, is established if this appellant were returned to Pakistan. Strictly speaking, the burden of establishing that real risk resides, it is true, on the appellant.
9. But a question which arises here is at what stage is the evidential burden of proof discharged so that in reality it moves to the respondent Secretary of State. What Miss King submits is that the evidential burden has been shifted here or should properly have been regarded as having moved to the Secretary of State for this reason. Given this appellant’s frank disabilities, his lack of understanding and everything else it would be unlikely that he could gain access to limited health care facilities in Pakistan. The focus should be on what would or might happen at the airport. Given the obvious inference flowing from the fact that the appellant is incapable and cannot look after himself coupled with the apparent finding of fact that there are no family members available in Pakistan to meet him. The evidence evidential burden in relation to the reality of the risk has, Miss King submitted, been discharged in the circumstances of this case. Furthermore, the Tribunal should be in a position to draw inferences in this sort of case. It is different from other cases of destitution where it would not necessarily appropriate to draw inferences. But each case of course would turn on its own facts.
10. This First-tier Tribunal does not appear to have proceeded on that basis at all. In the view of this First-tier Tribunal the evidential burden of proof was never discharged notwithstanding the inferences which could and should have been drawn and the

available evidence. It is true that Miss King placed heavy reliance on a report from someone who is described as a country expert, namely Mrs Uzma Moeen, which sets out in some detail what is stated to be the limited nature of health care facilities in Pakistan. The difficulty with this report, which was we believe available to the First-tier Tribunal, is that it does not come from an expert source in the true sense. Although paragraph 5 of the report states that Mrs Moeen is producing the report as an expert witness on matters within her expertise, namely what she describes as personal research, and as a specialist in Pakistani law and practice, it is obvious from the document that she is a lawyer with experience obviously in Asian law matters practising from an address in the United Kingdom.

11. It may well be that the First-tier Tribunal had the deficiencies in this report well in mind when it referred in paragraph 24 of the determination to the need for there to be an expert's report "from a suitably medically qualified professional in Pakistan but no such report has been produced." If the First-tier Tribunal were intending to reject Mrs Moeen's evidence on the basis that she was not a suitably qualified expert we would tend to agree with their conclusion.
12. The fact remains that it is demonstrable from the reasons that we have given that the First-tier Tribunal perpetrated a significant and material error of law in paragraphs 24 and 25 of its determination. It follows that the decision under appeal cannot stand.
13. The next issue for our consideration is whether we should decide this appeal for ourselves or whether we should remit it to a differently constituted First-tier Tribunal for further consideration. The relevant test is well-known and set out in paragraph 7 of the President's Practice Statement. It amounts to this: are there sufficient facts on which we can properly proceed today or is there a further fact finding exercise which should better be carried out before a differently constituted First-tier Tribunal.
14. When this case was called on we were initially attracted by the idea that we could decide the issues for ourselves but on further examination we have changed our mind. In our judgment there are additional facts which merit proper investigation. Not merely is the evidence unsatisfactory in relation to the position in Pakistan, we have referred already to the report of Mrs Moeen, but there is also material set out in the Secretary of State's refusal letter, some of which is properly evidenced before us but other parts of which are not. Not merely is there that issue, we do have concerns relating to the family in Pakistan which would benefit from further exploration. The appellant's credibility was effectively blown out of the water, we can use that phrase, back in 2007. We fully accept and understand that he cannot give evidence now owing to his physical and mental health, but the Secretary of State would well wish to explore the available evidence in more detail and establish whether better findings of fact can be elicited in relation to family members in Pakistan and what indeed would happen if this appellant were returned to an airport. Would he be left helpless, to use the appellant's terminology, or would there be a good prospect of the

appellant being properly looked after and, furthermore, enabled to access, admittedly limited, health care facilities in that jurisdiction.

15. So it seems to us on balance that there are additional issues which require to be investigated. There is no doubt in our judgment that this is a difficult and sensitive case which needs full and proper preparation on the side of the Secretary of State and as powerful representation below as the Secretary of State minded to muster. We suspect that the case was presented below largely on the basis of the decision letter and limited questions being asked of the relevant witnesses, but in reality this is a case which with respect to the Home Office Presenting Officer below, perhaps required more heavyweight representation.
16. That is all a matter for the Secretary of State. She can decide how these cases are presented in the First-tier Tribunal and we should emphasise that today we have been extremely well placed to reach a fair and just decision in the light not merely of Miss King's representations and submissions but the excellent submissions advanced to us by Mr Jarvis who has given us great assistance in this case, indeed all the cases in our list today.
17. For the reasons that we have given what we are going to do is allow the appeal for error of law and remit the underlying appeal to the First-tier Tribunal for redetermination in the unusual way.

Signed

Date

Mr Justice Jay