Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/24953/2018 (V)**

THE IMMIGRATION ACTS

Heard remotely from Field House	**Decision & Reasons Promulgated**
On 27 May 2021	**On 14 June 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

FKA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

The hearing of this appeal was conducted by Microsoft Teams

Representation:
For the appellant: Ms A Bhachu, Counsel, instructed by Optimus Law
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Juss ("the judge"), promulgated on 28 October 2020. By that decision, the judge dismissed the appellant's appeal against the respondent's decision, dated 11 October 2018, refusing his human rights claim made in the context of deportation proceedings.

2. The appellant is a citizen of Afghanistan, born in 1993. He has resided in the United Kingdom since 2007. Having failed to obtain leave through a number of applications and an appeal in 2010, the appellant underwent an Islamic marriage with his current partner, Ms X, a British citizen. They have three children together, born in 2015, 2016, and 2018. Ms X has her parents and siblings living in United Kingdom. In 2018 the appellant was sentenced to 16 months' imprisonment after pleading guilty to the offence of Actual Bodily Harm in respect of a "road rage" incident. The sentence engaged the Borders Act 2007 and a deportation order was accordingly made.

3. In essence, the appellant's human rights claim was based on his family life in the United Kingdom and the lack of support available to him in Afghanistan. More specifically, it was said that Ms X had significant caring responsibilities for her father (particularly during the Covid-19 "lockdown") and that the appellant's absence from the family unit would place significant strain on her and, in turn, the three children. Further, it was said that Ms X's mother, who had separated from father and then re-married, had her own caring responsibilities and would not be able to assist with care of the father or indeed the three children.

The decision of the First-tier Tribunal

4. At the outset of the hearing, the appellant's Counsel (Ms Bhachu) sought an adjournment in order to obtain further medical evidence on Ms X is father's condition (he suffered from mental health problems, specifically paranoid schizophrenia and bi-polar). This application was refused, with the judge giving reasons for this at [10]: in summary, it was said that such evidence could have been sought earlier and there was nothing to suggest that the father's condition had deteriorated, as claimed.

5. The evidence was then summarised, together with the parties' respective submissions. At [24] and [29] the judge directed himself to HA (Iraq) [2020] EWCA Civ 1176 in respect of the unduly harsh test, this being the central issue in the appeal.

6. The crux of the judge's findings and reasons appear at [26]-[33]. The judge noted the absence of medical evidence on Ms X's father's health and found that: (a) Ms X was not having to live with her father as a result of his ill-health; (b) the possibility of assistance from external sources, specifically social services, had not been explored by the family; (c) Ms X's mother and/or siblings could help care for the father.

7. Following from these findings, the judge concluded that because Ms X could be relieved of some or most of her caring responsibilities for her father, she would be able to focus on the three children. In turn, this would have alleviated difficulties arising from the appellant's deportation.

8. The judge concluded that Ms X and the children could visit the appellant in Pakistan.

9. Ultimately, the judge concluded that the separation scenario would not have unduly harsh consequences on either Ms X or the children. Nothing is said about the possibility of them going to live with the appellant in Afghanistan, although this issue was raised in the respondent's reasons for refusal letter.

10. Finally, at [40] the judge concluded that there were no "compelling circumstances" over and above the matters considered within the Immigration Rules (in light of Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 34 (IAC), it is section 117C which provides the relevant legal framework for consideration in deportation cases, not the Rules. However, this has no material bearing on the present appeal).

The grounds of appeal and grant of permission

11. The grounds can best be divided into three: first, it is said that the judge erred in refusing the adjournment request; second, he failed to adequately consider, or give any reasons for rejecting, relevant evidence; third, he failed to undertake a proper assessment of whether "very compelling circumstances" existed.

12. Permission to appeal was granted by the First-tier Tribunal on 12 November 2020. The reasons for the grant purported to exclude the first ground of appeal. However, the stated position above the horizontal line on the decision notice simply says that "Permission to appeal is granted". In light of Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), the grant was unrestricted.

The hearing

13. At the outset it transpired that Ms Cunha had not received the appellant's bundle containing the evidence relied on in the grounds of appeal. As I understood the position, the appellant representatives had sent these materials to the appropriate inbox used by the respondent for service. It is not always clear what has or has not been done in any particular case, but I am currently encountering a similar problem in numerous cases. It seems to me as though Senior Presenting Officers are under a good deal of pressure as a result of the Covid-19 pandemic and the prevalence of remote hearings. I venture to emphasise that the respondent must take all

possible steps to ensure that her representatives are provided with relevant electronic materials in advance of hearings.

14. In the present case, I ensured that Ms Cunha had enough time to read and digest the relevant materials before the hearing proceeded.

15. Ms Bhachu relied on the grounds of appeal. In respect of the adjournment issue, she accepted that there was no new medical evidence and thus she was unable to make any further submissions as to the materiality of any error by the judge. She indicated that the Covid-19 situation had presented difficulties in obtaining such evidence.

16. In respect of the second ground, it was submitted that the judge had failed to take account of, or to have provided reasons in respect of, the 2020 Independent Social Worker's report, Ms X's witness statement, and that of her mother. This evidence went to the issue of the inability of other family members to care for father and his lack of trust in others. This in turn was relevant to the judge's assessment of the unduly harsh test.

17. Ms Cunha submitted that the expert evidence added little to the appellant's case. The judge was entitled to have noted the absence of relevant medical evidence and the failure of the family to explore the possibility of support by social services. In addition, Ms X had been able to care properly for the children whilst the appellant was in prison.

18. At the end of the hearing I reserved my decision.

Conclusions on error of law

19. After careful consideration and reading his decision sensibly and in the round, I have concluded that the judge has erred in law and that as a result his decision should be set aside.

20. In respect of the first ground, it is of course difficult for the appellant to show that any error by the judge was material, given the absence of any new medical evidence. Having said that, the basis of the adjournment application was to obtain the very type of evidence which the judge repeatedly noted was absent. In my view, that absence played a material part in the judge's overall reasoning. I am also prepared to accept that the ongoing Covid-19 issues are likely to have made the obtaining of medical evidence of the First-tier Tribunal hearing and now significantly more difficult for the appellant's than would otherwise have been the case.

21. In the end, I find that the judge did err in refusing the adjournment, but it cannot be shown by evidence that this error was material to the outcome of the appeal.

22. Turning to the second ground, I am satisfied that the judge failed to have adequate regard to, or to provide adequate reasons in respect of, the most recent (as then was) witness statement evidence of Ms X and her mother.

This evidence did indeed address a change in the circumstances of the mother's potential ability to provide care for the father in particular, and, perhaps to a lesser extent, the three children. Whilst reference is made to the 2020 witness statement of Ms X at [19], the relevant aspects of the evidence and that from her mother do not appear to have been factored into the judge's assessment. Nor can I detect reasons for rejecting it.

23. I recognise that the judge has relied on the absence of medical evidence. On the assumption that he was entitled to rely on that absence, there remained what appears to be the uncontroversial fact of the father's mental health conditions and that Ms X had been his primary carer. In addition, it seemed to be common ground that the father did require care. The evidence from Ms X and her mother potentially indicated that alternative adequate care might (I put it no higher) not have been forthcoming.

24. The question of possible care provided by social services has certainly caused me pause for thought. I accept that there was no "positive" evidence from the appellant to indicate that enquiries had been made by the family. It was of course for the appellant to prove his case and in general terms the judge might have been entitled to infer that social services could potentially provide assistance. Three considerations have led me to conclude that the judge has nonetheless erred.

25. First, whilst hindered by the absence of up-to-date medical evidence, it had been accepted that the father did suffer from what, on their face, were significant mental health problems. The judge did not undertake an assessment, based on the evidence he did have, as to the nature of any possible care that might be required.

26. Second, as mentioned previously, the judge failed to deal with the issue of trust. This point is only fairly briefly referred to in Ms X's evidence, but it was a factor relevant to care by either other family members or strangers.

27. Third, the failure to have engaged with the evidence relating to Ms X's mother's circumstances is, to an extent, linked to the general issue of alternative care for the father (see, for example, what is said at [33]).

28. Finally, I am persuaded that the judge failed to adequately engage with the Independent Social Worker's 2020 report. In truth, this is only considered very briefly at the end of [30]. It is said that the report did not undermine the conclusions which had already been reached. There is a distinct danger here of the cart having been put before the horse, as opposed to a holistic assessment of all the evidence. Whilst I am in no way suggesting that the report would have had a decisive impact in favour of the appellant's claim, it was relevant expert evidence, required adequate consideration and, if it was to be rejected in whole or part, reasons for such a conclusion.

29. For the reasons set out above, the judge's decision is flawed and must be set aside.

Disposal

30. Remittal is an exception to the general rule that a case should be retained in the Upper Tribunal and the relevant decision re-made. However, in the present case, material evidence has not been adequately considered and in my view there is relatively extensive fact-finding to be undertaken. In all the circumstances, I conclude that remittal is the appropriate course of action.

31. It is clear that there has been no dispute as to the genuine and subsisting relationships between the appellant, Ms X, and the three children. It is appropriate to preserve this factual basis when it comes to the re-hearing of this appeal by the First-tier Tribunal.

32. In all other respects, the facts and conclusions to be drawn in light of the relevant legal framework are in issue. This must include the respondent's assertion that Ms X and the three children can go and live with the appellant in Afghanistan.

Anonymity

33. The First-tier Tribunal made an anonymity direction. With a degree of hesitation, I am prepared to maintain that direction.

Notice of Decision

34. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

35. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

36. I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. This appeal is remitted to the First-tier Tribunal, to be re-heard in light of what is said in this decision;

2. The remitted hearing shall not be conducted by First-tier Tribunal Judge Juss;

3. The First-tier Tribunal shall issue any further case management directions it deems appropriate.

Directions to the parties

1. **No later than 14 days after** this decision is sent out, the appellant shall confirm with the First-tier Tribunal who, if anyone, will be called to give oral evidence at the remitted hearing and whether an interpreter will be required for that hearing;

2. **No later than 14 days before** the remitted hearing, the appellant shall file and serve (in whatever form is directed by the First-tier Tribunal) a consolidated bundle of all evidence relied on;

3. **No later than 7 days before** the remitted hearing, the appellant shall file and serve (in whatever form is directed by the First-tier Tribunal) a skeleton argument;

4. With liberty to apply to amend these directions.

Signed: H Norton-Taylor Date: 28 May 2021

Upper Tribunal Judge Norton-Taylor