Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003090
[HU/06847/2020]

THE IMMIGRATION ACTS

Heard at: Field House
On: 25 October 2022

Decision & Reasons Promulgated
On: 29 November 2022

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

HAROON ZAHEER

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, instructed by Portway Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse his human rights claim following the making of a deportation order against him.

2. The appellant is a national of Pakistan born on 17 September 1982. He arrived in the UK on 8 October 1992 with his parents, at the age of 10 years, on a visitor's visa. His parents made an asylum claim which was refused and they unsuccessfully appealed against that decision, but on 3 May 2002 the appellant was granted indefinite leave to remain in the UK.

3. On 14 March 2003 the appellant received a police caution for 'disorderly behaviour'; on 14 February 2011 he was convicted of receiving stolen goods and received a 25-week sentence suspended for 12 months; on 11 November 2013 he was made the subject of a non-molestation order; and on 13 November 2013 he was convicted of making false representations and was sentenced to 12 months' imprisonment and fined. The latter offence involved the mismanagement of client funds in the appellant's capacity as an employee of a property agency.

4. As a result of his conviction the appellant was issued with a notice of liability to automatic deportation on 23 January 2014 and was invited to make representations in response, which he did in February and March 2014. On 9 April 2014 he was served with a deportation order and a deportation decision. He appealed against the decision and his appeal was heard in the First-tier Tribunal and was initially dismissed on 26 September 2014, then remitted following an appeal to the Upper Tribunal and allowed in the First-tier Tribunal on 16 February 2015, but then remitted again following an appeal to the Upper Tribunal and finally dismissed in the First-tier Tribunal on 28 July 2016 by Judge Khawar. His application for permission to appeal the decision was refused and he became appeal rights exhausted on 18 October 2016.

5. Removal directions were set for 29 November 2016 but were subsequently cancelled when the appellant made an application for leave to remain on private and family life grounds. That was followed by an application raising protection grounds which in turn was followed on 20 December 2016 by further representations relying only on Article 8 human rights grounds. The representations were refused under paragraph 353 of the immigration rules on 7 March 2017 and, following an unsuccessful judicial review challenge, the appellant was deported to Pakistan on 21 March 2017.

6. The appellant then made a human rights application for entry clearance to the UK as a spouse which was refused on 6 March 2018 owing to the fact that there was a deportation order in existence. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Wood on 8 February 2019. Judge Wood dismissed the appeal on 26 February 2019 and the appellant became appeal rights exhausted on 27 March 2019.

7. On 18 October 2019 the appellant's solicitors applied on his behalf for the deportation order to be revoked. The respondent treated the application as a human rights claim and, in a decision of 27 July 2020, refused the claim and refused to revoke the deportation order. The appellant appealed that decision and it is the decision of First-tier Tribunal Judge Manuell dismissing that appeal following a hearing on 12 April 2022 which is the subject of these proceedings.

8. The background to the appeal before Judge Manuell is relevant to the matter before me. That is set out at [5] of the appellant's grounds prepared by Mr Georget, as follows.

9. Following the guidance in Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 and the Presidential Guidance Note No. 1 of 2022 "taking oral

evidence from abroad", the appellant made an application to the relevant authorities by email to the ToE for permission to give oral evidence in his appeal from Pakistan. The issue was discussed at a case management hearing on 17 December 2021 before Judge Burnett. Directions were made by the Tribunal, in the interests of avoiding further delay in the event that a reply from the FCDO was not forthcoming, for the appellant to file a witness statement and for the respondent, if she wished to challenge the appellant's written evidence, to file written cross-examination questions in advance of the hearing to which the appellant might respond. The appellant then filed and served his witness statement on 20 January 2022 but the respondent failed to file any questions. A subsequent substantive hearing listed for 28 February 2022 was adjourned by First-tier Tribunal judge Beg as there had been no permission given for the appellant to provide live evidence owing to a lack of response by the FCDO and the respondent indicated that she wished to challenge the appellant's evidence but had not served written questions. The appellant then served a chasing email to the FCDO on 8 March 2022 but there had been no response by the time the appeal came up for hearing on 12 April 2022.

10. At the hearing on 12 April 2022 the respondent's representative, Ms Martin, indicated that she wished to challenge the appellant's written evidence and accepted that no written questions had been provided but she opposed an application by the appellant to adjourn the appeal. The appellant applied to adjourn the proceedings until he could give oral evidence. Judge Manuell refused to adjourn the proceedings, noting that the appellant had served two witness statements and that he was able to observe the proceedings. He concluded that the appeal could be fairly and justly determined without live evidence from the appellant and he heard from the appellant's wife and sister who appeared before him. Judge Manuell found that the appellant was attempting to raise almost exactly the same matters as previously considered by Judge Khawar and Judge Wood and, having considered the further evidence, concluded that nothing of substance had changed since the previous decisions. He found that the appellant's continued exclusion was neither unduly harsh nor disproportionate and that there were no very compelling circumstances. He dismissed the appeal.

11. The appellant sought permission to challenge that decision on two main grounds: firstly, that it was fundamentally wrong of the Tribunal to refuse to adjourn the proceedings in order to enable the appellant to give live evidence and that the appellant had been denied a fair hearing; and secondly, that the judge had acted unfairly in his approach to the substantive issues by failing to give the appellant a fair chance to re-visit the findings in his previous appeals and by closing his mind to the case from the start.

12. Permission was granted to the appellant and the matter then came before me, with no rule 24 response from the respondent having been produced.

13. Both parties made submissions and I shall address those in the discussion which follows. Mr Tufan referred to an email he had received in response to his enquiries which confirmed that the Pakistan authorities had refused to give consent for the appellant to give oral evidence from that country.

Discussion and Findings

14. Mr Georget's first ground was that procedural unfairness had arisen through Judge Manuell's refusal to adjourn the proceedings. He submitted that Judge Manuell had failed to have regard to the background set out above and to the fact that Judge Beg had adjourned the matter previously on fairness grounds owing to the respondent's failure to file written questions for the appellant in accordance with the Tribunal's previous directions. He emphasised that it was not only the issue of the appellant being able to give live evidence, but the fact that the Tribunal had put a procedure in place to ensure fairness yet the respondent had failed to follow that procedure but still intended to challenge the appellant's evidence. In so asserting, and in anticipation of Mr Tufan's response, Mr Georget submitted that materiality was an irrelevant consideration in matters of fairness. He submitted that procedural unfairness gave rise to an error of law in any event, even if it may have made no difference to the decision.

15. However, it seems to me that the relevant consideration was not whether the procedural unfairness was material, but whether there was procedural unfairness in the first place. That clearly involved the question of whether the appellant's inability to give live evidence, or respond to cross-examination, was material to the decision ultimately reached. That was plainly what Judge Manuell was considering at [16] onwards, where he noted that the appellant had had the opportunity to provide witness statements setting out his case and that there was live evidence from other witnesses including his wife such that the appellant's oral evidence would not have added anything to his case. Indeed, I find nothing in the grounds to suggest what the appellant's live evidence would have added to his written witness statements and the evidence given by the attending witnesses about his circumstances in Pakistan and in the UK.

16. In any event, and aside from the question of materiality, I find no procedural unfairness arising from Judge Manuell's approach and no unfairness in him proceeding to hear the appeal without the appellant giving oral evidence. The judge was fully aware of the background to the appeal and the directions previously made by the Tribunal and he set that out in some detail in his decision at [13] to [14]. As noted at [14] the respondent's representative indicated that there was no intention to cross-examine the appellant by way of written questions and it was therefore unclear what an adjournment would have achieved given the continued lack of response from the FCDO. As Mr Tufan submitted, there was nothing in the guidance provided in Agbabiaka or in the Presidential Guidance Note requiring the respondent to provide written questions for cross-examination. That was merely a suggestion within the guidance, qualified by a statement that the guidance was not to be "*taken to be prescriptive or exhaustive*" and was simply a process by which the First-tier Tribunal judges, when faced with the issue of delay caused by a lack of response from the FCDO, considered matters could move forward. There was nothing binding in those directions on a future Tribunal, and it was for the judge

at the relevant time to assess the situation, as consistent with the reference in the Presidential Guidance Note to it being "*a matter for judicial discretion by reference to the overriding objective*". That was precisely the approach taken by Judge Manuell, whereby he considered the issue of fairness at [16], giving cogent reasons why the appeal could be justly and fairly determined without live evidence from the appellant.

17. Mr Georget's second ground was that Judge Manuell had, through his comments at [27] as to the appellant having shown an "unfortunate propensity" not to accept findings against him and to relitigate whenever he could, thereby closed his mind to the appeal from the start. He submitted that that was not the correct approach to the principles in Devaseelan and that, again, there had been procedural unfairness in his approach. However, I find no merit in such a suggestion. It is clear that the judge fully and properly applied the principles in Devaseelan, taking the findings and conclusions made by the two previous Tribunals as his starting point but also giving detailed consideration to the further evidence which had been produced in the form of the oral evidence of the witnesses and the appellant's statements and bundles of documentary evidence to which he referred at [17] to [23]. At [28] to [33] he went on to analyse that further evidence and to assess whether there was any change in the appellant's circumstances justifying a departure from those previous decisions. His conclusion at [33] that there was none took full account of the legal principles relevant to deportation and was a conclusion that was fully and properly open to him on the evidence before him and for the reasons cogently given.

18. Accordingly, I find that the appellant's grounds are not made out. The judge's decision took account of all relevant matters and was one which he was perfectly entitled to reach. There was no unfairness in the judge's decision to proceed to hear the appeal without live evidence from the appellant and there was no unfairness in his approach to the evidence. The decision to dismiss the appellant's appeal was fully and properly open to him on the evidence before him.

DECISION

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The decision of the First-tier Tribunal to dismiss the appellant's appeal therefore stands.

Signed S Kebede
Upper Tribunal Judge Kebede Date: 26 October 2022