Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07245/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2022	**On 4 April 2023**

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE B. KEITH

Between

MS (BRAZIL)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Chirico, Counsel, instructed by Wilson's solicitors.
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and any member of his family is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the Appellant and any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. This is an appeal by the Appellant against a decision of Judge of the First-tier Tribunal R A Singer, promulgated on 10 May 2021 in

relation to a decision made by the Respondent on 17 July 2017. The FTT had dismissed the Appellant's protection and human rights appeals.

2. This is a Foreign National Offender case. The Appellant is a Brazilian national who entered the UK lawfully on 7 August 2003 and was granted Indefinite Leave to Remain on 10 December 2005. He was then convicted on 26 November 2012 for a serious sexual assault and false imprisonment and sentenced to a total of 10 years imprisonment and various other orders. He is married to British national and has a previous marriage which he says was to a Finnish National.

3. The SSHD made a deportation order on 12 May 2017, in the context of which the Appellant made protection and human rights claims, which the SSHD refused on 17 July 2017. It is that later decision which the Appellant challenged.

4. One of the focuses of the challenge to the FTT's decision is about internal relocation and whether it is unduly harsh to require the Appellant to relocate away from his home area in Brazil if deported. He states that he is at risk from criminal gangs if deported. The FTT found that it would not be unduly harsh for him to relocate to Sao Paolo, applying the reasoning of the Court of Appeal in the case of SC (Jamacia) [2017] EWCA Civ 2112.

5. However, the case of SC (Jamaica) was appealed to the Supreme Count and in the judgment at [2022] UKSC 15, the Supreme Court reflected a different understanding of the law in relation to the unduly harsh test to that applied in this case. This is in reference as to whether the decision maker and court must take into account the criminality of the individual when assessing whether internal relocation would be unduly harsh. At the time of the FTT hearing the judgment of the Court of Appeal was the relevant law and said, in short, that criminality is relevant to the assessment of unduly harsh. The Supreme Court disagreed and held at § 36 and §95:

> 36. The SSHD's policy also refers to paragraph 339O of the Immigration Rules which governs the approach to internal relocation in the context of applications for refugee status rather than whether a deportation order is in breach of article 3 ECHR. SC proceeded on the basis and for the purposes of this appeal the SSHD conceded that the paragraph, with suitable adaptations, should also apply in the context of deportation of a foreign criminal. That paragraph provides:
>
> > "(i) The Secretary of State will not make: (a) a grant of asylum if in part of the country of origin a person would not have a well-founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or (b) a grant of humanitarian

> protection if in part of the country of return a person would not face a real risk of suffering serious harm, and *the person can reasonably be expected to stay in that part of the country.*
>
> (ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.
>
> (iii)(i) applies notwithstanding technical obstacles to return to the country of origin or country of return." (Emphasis added)

As the emphasised phrases indicate, the test in relation to internal relocation in the context of an application for refugee status is whether "the person can reasonably be expected to stay in that part of the country." This reflects the principle that a person may establish a well-founded fear of being persecuted for a Refugee Convention reason in part of his country of nationality. If he does so, then the question as to internal relocation arises because he would not be outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason if he could reasonably be expected to relocate internally. The SSHD has conceded that the same test applies in determining whether a deportation order is in breach of article 3 ECHR. I will proceed on that basis."

6. The Supreme Court concluded at §95:

> "95. The correct approach to the question of internal relocation under the Refugee Convention is that set out in *Januzi* at para 21 and in *AH (Sudan)* at para 13 (see paras 58 and 59 above). It involves a holistic approach involving specific reference to the individual's personal circumstances including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual "can reasonably be expected to stay" in that place. It does not take into account the standard of rights protection which a person would enjoy in the country where refuge is sought. Also, as correctly conceded by the SSHD, it does not take into account what is "due" to the person as a criminal. There is no support for such an approach in domestic authority or in authority in any other jurisdiction. For instance, in Australia, Gummow, Hayne and Crennan JJ delivering the judgment of the High Court in SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18 stated, at para 24 that:

> "What is 'reasonable', in the sense of 'practicable', must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality."
>
> This anchors the test of reasonableness of internal relocation on the particular circumstances of the individual and the impact upon that person of the proposed place of relocation. It says nothing as to what is "due" to the individual as a criminal."

7. As a result the test applied by the FTT, whilst at the time, was as per the Court of Appeal's view, that view is now understood to be an error of law. As discussed below this has led to the SSHD conceding that part of the appeal.

Grounds of appeal

8. We are grateful to the advocates for narrowing the issues in this appeal. There are 5 grounds of appeal which we summarise below:

   Ground 1: Errors in approach to the Appellant's ability to relocate safely and reasonably within Brazil.

   a. No finding on a core issue of whether the Appellant's social media activity would lead to a risk, even outside his home area.

   b. Misdirection in law as to whether the Appellant can be expected to suppress his online activity in order to secure safety, where the suppressed activity (advocacy for prisoners' rights) was distinct from the Refugee Convention reason relied on, specifically membership and/or family connections to a murdered brother.

   c. Irrelevant consideration: That the FTT was wrong in its application of SC (Jamaica) as the Supreme Court disapproved of the Court of Appeal's judgment in relevant parts in relation to relocation.

   Ground 2: Errors in approach to the question of whether the Appellant rebutted the presumption that he constitutes a danger to the community of the UK, for the purposes of section 72 of the Nationality, Immigration and Asylum Act 2002.

   Ground 3: EU law

   a. The FTT erred in his approach to the question whether the Appellant's first wife was half Finnish.

b. The FT erred in his approach to the question of law: whether the Appellant could acquire a right under EU law.

Ground 4: Article 8 ECHR – grounds 1 and 2 also have bearings on the FTT's decision on the Appellant's Article 8 claim.

Ground 5: the FTT failed to have regard to a consideration material to the Article 8 balancing exercise, namely previous, allegedly unnecessary restrictions on the Appellant's liberty.

The SSHD's concession

9. At the outset of the hearing, the SSHD explained that Ground 1 was conceded in part. After giving the parties time to discuss the case, the SSHD also accepted that Ground 4 was conceded.

10. In relation to Ground 1, the SSHD conceded that the change in case law with the Supreme court in SC (Jamaica) meant there was an error of law but maintained that the other matters in Ground 1 were properly dealt with by the FTT. In our judgment the SSHD was correct to concede Ground 1 there is a material error of law. The case will therefore require rehearing on the issue of relocation in Brazil and whether that is unduly harsh. In our judgment it is right that a fresh tribunal has discretion to make a fresh decision on all of the issues relating to relocation. The SSHD's position that some findings can be preserved on Ground 1 would make the exercise extremely difficult, if not impossible. The fresh tribunal will need to look at all issues, including the Appellant's social media profile, and as a result no findings of fact in relation to relocation are preserved. We therefore find a material error of law in relation to Ground 1 and do not preserve any findings.

11. In relation to Ground 2, there was no concession. The Appellant's challenge is that in assessing whether he continued to constitute a danger, the FTT erred in considering that his attempts to engage with the relevant authorities for the purposes of rehabilitation were "cynically" focused on getting categorisation of his high risk of harm reduced so that he could present himself on paper as reformed and rehabilitated, rather than a genuine and honest desire to address the root causes of his criminality (paragraph 47). In reaching his conclusions, we accept that the FTT had considered a partial OASys report and also a report of a Doctor Sen, which included an assessment that the risk of reoffending was low albeit that the Appellant was at high risk when stressed, which could most likely lead to a potentially violent scenario in the context of his intimate relationships. The grounds point out that the Respondent had never suggested in her decision letter that the Appellant's engagement with the prison authorities or the Ministry

of Justice was cynical and no submission was made to that effect at the FTT hearing. The finding, which amounted to deliberate and sustained dishonesty, was distinct from, and was of a different order from mere non-acceptance of culpability. Had the Appellant appreciated that this was a concern (i.e. that in essence, he had attempted to manipulate the authorities) he would have sought evidence to rebut it, which he has since done in light of an updated OASys report. The Respondent's Rule 24 response does not dispute that the allegation of 'cynical' engagement was not an issue between the parties at the hearing. In these circumstances, the FTT's analysis, while considering a wide range of factors, erred in considering a factor ('cynical' engagement) which had not been part of the Respondent's case or discussed at the hearing. The FTT therefore erred on the basis of Ground 2.

12. In relation to Ground 3, no submissions were made outside of the written submission, which Mr Chirico did not pursue with any vigour. This ground hinges on whether the Appellant's first wife was Finnish, even before an analysis of whether that gives him any further rights. That element was not proved before the FTT and there is no further evidence before us nor any suggestion that the FTT was wrong on the evidence before it. As a result there is no reason to interfere with the decision of the FTT. We find there was no error of law in Ground 3.

13. In relation to Ground 4 (Article 8) the SSHD accepted at the hearing that this ground was conceded. Given the proper concession we find there was a material error of law in relation to the assessment of Article 8 and this aspect should be reheard.

14. In relation to Ground 5, the ground recognises that the issue of whether the Appellant's detention under the Immigration Acts and subsequent bail restrictions were impermissible had not been raised in submissions before the FTT, but argues that the issue was 'Robinson obvious' (see R v SSHD Ex p. Robinson [1997] EWCA Civ 3090). The grounds contend that the FTT ought to have been considered the Appellant's unnecessary immigration detention and restrictions as part of the Article 8 claim. We do not accept that such an issue, where never raised before the FtT, was 'Robinson obvious', as being readily discernible, particularly where a challenge to immigration detention and bail restrictions may be pursued through separate processes. To the extent that the Appellant now seeks to criticise his detention and restrictions via his Article 8 claim, as opposed to those other procedures, that was not a readily discernible issue, and the FTT cannot be legitimately criticised for not having raised it of his own motion. Ground 5 discloses no error of law.

Disposal

15. Therefore in summary we find material errors of law in relation to:

    a. Ground 1

    b. Ground 2

    c. Ground 4

16. We find no error of law in relation to Grounds 3 and 5.

17. The Appellant submitted that the case should be remitted to the FTT and the SSHD that the case should remain in the UT. Having considered paragraph 7.2 of the Senior President's Practice Statement, and in particular sub-paragraph (b), we are satisfied that the extent of judicial fact finding necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains errors of law and we set it aside.

We remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

The remitted appeal shall not be heard by First-tier Tribunal Judge Singer.

The anonymity direction continue to apply.

Signed Dated: 18/01/2023

B Keith
Deputy Upper Tribunal Judge B. Keith