IAC-FH-CK-V1A

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13321/2019 (P)**

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 23 September 2020	**On 29 September 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LINDELIHLE [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation
For the Appellant: C. Avery, Senior Home Office Presenting Officer
For the Respondent: Unrepresented

DECISION AND REASONS

1. This appeal is being decided without a hearing.

2. In directions dated 23 June 2020, Upper Tribunal Judge Lindsley invited the parties to express a view on whether it would be appropriate to determine the error of law issue in this appeal without a hearing. Neither party expressed any objection to, or reservations about, the error of law issue being determined without a hearing and I

am satisfied that I can determine this appeal fairly and justly without a hearing.

3. The respondent (hereafter "the claimant") is a citizen of South Africa who claims that his removal from the UK would breach article 8 ECHR. In a decision promulgated on 4 March 2020, Judge of the First-tier Tribunal Ali ("the judge") agreed and allowed the claimant's appeal against a decision of the respondent dated 26 July 2019 refusing his human rights claim.

4. The judge found that the claimant met the requirements of Paragraph 276ADE(1)(vi) of the Immigration Rules, as there would be "very significant obstacles" to the claimant integrating in South Africa. The judge reached this conclusion on the basis that the claimant's mental health problems and lack of support network in South Africa would render him homeless and destitute.

5. At paragraph 8 of the decision the judge noted that between 2008 and 2016 the claimant committed several offences, and that he has been imprisoned for a period of 8 months. The judge also noted that the Secretary of State refused the claimant's application, inter alia, on the basis that he did not satisfy the suitability requirement specified in S-LTR 1.5 ("The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law").

6. Relying on TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109, the judge found at para. 34 that because the claimant satisfied the requirements of the Immigration Rules (paragraph 276ADE(1)(vi)) there would be "no compromise to the maintenance of effective immigration control" in allowing the appeal.

7. The grounds of appeal argue that the judge erred by failing to have regard to the Secretary of State's suitability findings and by relying on outdated evidence concerning the claimant's mental health.

8. The claimant, in his submissions dated 8 July 2020, raises a number of points relevant to the proportionality of his removal. However, these do not address the error of law arguments made by the Secretary of State.

9. I agree with the Secretary of State that the judge made two material errors of law.

10. The first error concerns the judge's finding that the claimant satisfied the requirements of the Immigration Rules concerning leave to remain on grounds of private life pursuant to paragraph 276ADE(1)(vi).

11. Paragraph 276ADE(1) provides:

> 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 application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting all any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (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.

12. To meet the requirements of 276ADE(1) it is not sufficient to satisfy sub-paragraph (vi): an applicant must also satisfy sub-paragraphs (i) and (ii). The claimant, however, did not satisfy sub-paragraph (i), because he plainly fell for refusal under S-LTR 1.5 of Appendix FM.

13. The judge erred, therefore, by finding that the claimant met the Immigration Rules solely by reference to sub-paragraph (vi), without recognising that 276ADE(1) could not be satisfied without sub-paragraph (i) also being met.

14. If the claimant met the requirements of paragraph 276ADE(1) that would, as the judge correctly recognised, be positively determinative of his Article 8 ECHR appeal: see TZ at [34]. However, he did not meet the requirements and therefore it was an error to treat the finding of "very significant obstacles" as determinative of the Article 8 claim.

15. The second error of law concerns the judge's assessment of the claimant's mental health. The judge found at paragraph 30 of the decision that the claimant's mental health problems mean that he would be unable to work in South Africa which would "inevitably render him homeless and destitute". However, the evidence before the First-tier Tribunal did not support this conclusion. Firstly, there was not any up to date medical evidence from which to draw a conclusion about the claimant's current mental health condition. Secondly, the most recent evidence that was available - the letter from Emily Price, mental health nurse specialist, dated 4 May 2018,

which the judge referred to in paragraphs 27 and 28 of the decision – could not rationally be said to support the contention that the claimant has a serious mental health problem that would prevent him working, as Ms Price stated that the claimant "has had a number of assessments which have concluded that [he] does not have a severe or enduring mental illness that would necessitate hospital admission or specialist community services." Thirdly, there was no evidence to support the conclusion that a person in the claimant's circumstances would be unable to receive adequate care in South Africa and would face destitution. The burden of proof lay with the claimant and the judge has not adequately explained how, on the basis of the (very limited) evidence before him concerning the claimant's mental health and the provision of services in South Africa, the conclusion was (or could be) reached that the claimant was able to discharge this burden.

16. The errors of law described above were material to the outcome of the appeal. I therefore set aside the decision of the First-tier Tribunal.

17. I have carefully considered whether the appeal should remain in the Upper Tribunal or be remitted to the First-tier Tribunal to be heard afresh. I have formed the view that the appeal should be remitted. I reach this conclusion because in order to remake this decision a Tribunal will need to consider afresh, and make findings in respect of, the claimant's mental health. Given the extent of the fact finding that will be required, and that no findings can realistically be preserved, having regard to para. 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, I have decided that the appeal should be remitted to the First-tier Tribunal.

Notice of Decision

a. The appeal is allowed.

b. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 23 September 2020