Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22789/2018 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House	**Decision & Reasons Promulgated**
On 25 August 2021	**On 05 October 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H R
(ANONYMITY DIRECTION MADE)

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.

Representation:
For the appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the respondent: Ms K McCarthy, Counsel, instructed by Duncan Lewis & Co

DECISION AND REASONS

Introduction

1. For ease of reference I shall refer to the parties as they were before the First-tier Tribunal. The Secretary of State is once more the respondent and HR is the appellant.

2. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Cartin ("the judge"), promulgated on 10 February 2021. By that decision, the judge allowed the appellant's appeal against the respondent's decision, dated 25 October 2018, refusing his human rights claim made in the context of deportation proceedings.

3. The appellant is a citizen of Bangladesh who last entered the United Kingdom in early 2012. He became an overstayer from May 2014. In January 2016 he was found not guilty by reason of insanity (paranoid schizophrenia) in respect of an incident in which he wounded a relative. The Crown Court made the appellant the subject of a hospital order and a restrictions order pursuant to sections 37 and 41 of the Mental Health Act 1983. The appellant was discharged from hospital in early November 2018 following intensive management of his condition. The restrictions order remains in place and the appellant has the status of a conditionally discharged patient.

4. It has been common ground throughout that the appellant is not a "foreign criminal" because he has not been "convicted" of an offence. Thus, the provisions of the UK Borders Act 2007 and section 117C of the Nationality, Immigration and Asylum Act 2002 do not apply. Instead, the respondent made a deportation order pursuant to section 3(5)(a) of the Immigration Act 1971 (what is sometimes described in shorthand terms as a conducive deport decision). In response, the appellant made a human rights claim, the refusal of which led to the appeal before the First-tier Tribunal. In essence, both the deportation decision and the refusal of the human rights claim relied on the fact of the wounding incident as constituting, in and of itself, a sufficient basis for the appellant to be deported as it allegedly indicated a risk to the public.

The decision of the First-tier Tribunal

5. The appellant's appeal to the First-tier Tribunal was essentially put onto grounds: first, that deportation would violate Article 3 ECHR (Article 3) on the basis that there would not be appropriate treatment for him in Bangladesh; second, that deportation would violate Article 8 ECHR (Article 8), relying primarily on paragraph 276ADE(1)(vi) of the Immigration Rules (the Rules), but also a wider proportionality argument.

6. The judge rejected the Article 3 claim, concluding that the high threshold was not met because:

(a) there was no real risk of the appellant committing suicide;

(b) there was no real risk of a lack of treatment of his mental health condition resulting in "intense suffering";

(c) there was appropriate treatment available in Bangladesh.

7. In reaching these findings, the judge found that certain aspects of the evidence provided by family members had been somewhat exaggerated.

8. In considering Article 8, the judge found that there was no family life in the United Kingdom, but private life had been established, albeit in the absence of any lawful status since 2014. The judge turned to paragraph 276ADE(1)(i) of the Rules and considered whether any of the suitability criteria under S-LTR of Appendix FM applied. The only provision which had potential application was S-LTR.1.6, which read as follows:

> "S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

9. At [72], the judge reasoned as follows:

> "In regard to the 1.6, whilst this is drafted more widely to include conduct and other reasons, his conduct must still be such that it makes his presence here undesirable. I have observed already that the Appellant is not a foreign criminal. Whilst it is the Secretary of State's stated view that his presence in the UK is not conducive to the public good, I am not convinced. The Appellant was unwell at the time of his actions which harmed a family member. In law he was not criminally responsible and it is clear his actions were attributable to his illness. In those circumstances he cannot be regarded as culpable. I therefore do not consider that the actions which led to his hospital order be made, make his presence non-conducive to the public good."

10. This conclusion permitted the judge to go on and consider sub-paragraph (vi) and whether the appellant would face very significant obstacles to integration if deported to Bangladesh. The judge addressed various matters in some detail between [73] and [77], including a reference to Kamara [2016] EWCA Civ 813. At [78], the judge set out his overall conclusion on paragraph 276ADE(1)(vi) of the Rules:

> "On the basis of the above, I conclude that the Appellant has been away from the country for a number of years, he suffers with mental ill-health and he has been institutionalised for the last 5 years in the UK. Prior to then he was very dependent on his family and he continues to be dependent on their presence and support. By contrast he will have limited support available to him from his ageing parents who have some understandable reticence over caring for their son. He is a quiet and reserved individual who has to date developed few social relationships and those are with his family and care team in the UK.. He has limited life skills, education and work experience. I therefore conclude that the Appellant would face very significant obstacles to his re-integration in

> Bangladesh and so he satisfies the rules for a grant of leave to remain on the basis of his private life. Accordingly, his appeal is allowed."

11. No consideration was given to Article 8 outside the context of the Rules.

The grounds of appeal and grant of permission

12. Three points are made in the grounds of appeal. First, it is said that the judge should have attached only "little weight" to the appellant's private life in the United Kingdom and that that private life was "insufficient to outweigh the public interest". Second, it is said that the judge erred in "equating non-conducive grounds to criminal convictions", with particular reference to S-LTR.1.6 and what is said at [72] of the decision. Third, it is said that the judge failed to give adequate reasons for his conclusion that the appellant would face very significant obstacles to re-integration if deported to Bangladesh. A portion of [78] is quoted and it is specifically stated that the judge failed to take account of the fact that the appellant had previously worked on the family farm in Bangladesh, a matter which was relevant to the assessment of very significant obstacles.

13. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 27 March 2021. He focused on the second point highlighted in the preceding paragraph and regarded the other proposed challenges as "weak".

14. A rule 24 response was provided by the appellant on the day of the hearing, although it had not found its way to the Tribunal's file. This did not cause any difficulties at the hearing.

The hearing

15. At the outset of the hearing, Ms McCarthy formally applied to cross-appeal in respect of the judge's conclusion on Article 3. Given that success on Article 3 grounds would, as I understand it, have led to a similar grant of discretionary leave to the appellant to that applicable on Article 8 grounds, it was unclear to me whether there was a need to cross-appeal (see Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216 (IAC)). In the alternative, Ms McCarthy relied on her rule 24 response to the effect that Article 3 should be a live issue at the error of law stage.

16. Whether on the application to cross-appeal or on the basis of the rule 24 response, I refused permission for the appellant to challenge the Article 3 findings. It was far too late in the day to seek to mount an attack on the judge's conclusions. I indicated that if I were to set the judge's decision aside, I would consider afresh whether to look again at Article 3.

17. Mr Tufan relied on the grounds of appeal. I raised the contents of the respondent's guidance on suitability ("Suitability: non-conducive grounds

for refusal or cancellation of entry clearance or permission", version 1.0, published on 1 December 2020) and asked whether the matters set out in S-LTR.1.6 required culpability (in other words, a degree of blameworthiness). In response, he referred me to KE (Nigeria) [2017] EWCA Civ 1382 and noted that in the present case the appellant had been made subject to a restrictions order under section 41 of the Mental Health Act 1983. He submitted that this, in and of itself, indicated that there was a risk to the public and that S-LTR.1.6 was the appropriate provision. He submitted that culpability was not required.

18. In respect of what the judge said at [78], Mr Tufan submitted that there was a failure to have taken findings made under the Article 3 issue into account.

19. Ms McCarthy noted that the respondent had never specifically raised or relied on the existence of the restrictions order as constituting a specific basis for the application of S-LTR.1.6 of the Rules. It had only been raised at the hearing. The judge could not be criticised for failing to specifically consider an issue which had not been addressed by the respondent's representative. Further, Ms McCarthy submitted that the respondent's guidance on suitability suggested that culpability was, to a greater or lesser extent, required. The judge had dealt with the respondent's case as it had been put, and the conclusion stated at [72] was sustainable. The act of wounding was not, by itself, sufficient to make out the conducive criterion.

20. On the issue of paragraph 276ADE(1)(vi) of the Rules, Ms McCarthy submitted that the judge had taken a good deal of expert evidence into account, together with evidence provided by family members. The expert evidence had not been challenged by the respondent. What was said at [78] had to be considered in light of the overall analysis.

21. Mr Tufan made no reply.

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

Conclusions on error of law

23. For the reasons set out below, I conclude that the judge did not err in law such that his decision should be set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

24. I deal first with the "little weight" point raised in the grounds, although this is not specifically referred to in oral submissions. In my view, it has no merit. The judge was plainly aware of the appellant's lack of status in this country from 2014, specifically referring to this and the consequent breach of immigration laws at the beginning of [67]. In addition, the bald assertion that in any event the appellant's private life did not outweigh the public

interest is simply a statement of disagreement with the ultimate conclusion reached.

25. There is a potentially interesting point arising in this case relating to the scope of S-LTR.1.6: is a degree of culpability required for it to bite?

26. The respondent's suitability guidance gives a fairly clear indication that some form of blameworthiness (a term used by the Oxford English Dictionary 3rd Edition for the definition of "culpable") is needed. Page 5 of the guidance refers to "offending" and "reprehensible behaviour". Nine examples of situations rendering an individual's presence in this country to be non-conducive are set out, all of which clearly involve culpability to a greater or lesser extent. Having said that, immediately following the list of examples is the caveat that, "This list is not exhaustive. In all cases, you must consider what threat the person poses to the UK public."

27. I have also considered the respondent's guidance on deporting non-EEA foreign nationals, version 3.1, April 2015. This includes a section on deportation under section 3(5) of the 1971 Act (conducive deportations). This refers to the need to prove "serious or persistent criminality" to the civil standard of proof and, at section 3.2, makes it clear that criminal activity can have taken place in either the United Kingdom or overseas. It refers to situations in which sentences of less than 12 months having been imposed and where an individual has received cautions. As with the suitability guidance, there is a 'catch-all' passage at the end of the section stating that the scenarios set out are non-exhaustive.

28. There is in my view a respectable argument to be made that something more than a bare fact of doing an act (such as injuring another person) should be required for an individual's claim to fail under paragraph 276ADE, or indeed in respect of any other case in which suitability criteria must be considered.

29. On the other hand, the phrase "other reasons" in S-LTR.1.6 is, on its face, broad in scope. There would in my view be merit in the suggestion that its presence must be given utility and that this should encompass the scenario in which an individual is not culpable, but nonetheless, on the facts of a particular case, represents a significant ongoing risk to the public, perhaps by virtue of a mental illness which could manifest itself in violent acts.

30. I am unaware of any judgments of the higher courts or decisions of the Upper Tribunal in which a situation such as that which arises in the present case has been considered. Neither representative has been able to assist in this regard.

31. In the end, I have concluded that the particular issue outlined above does not need to be determined in this appeal. I say this on the basis of the way in which the respondent's case appears to have been put to the judge, and the significant body of expert evidence relating to the period between the

appellant being discharged from hospital in 2018 and the date of the hearing in November 2020.

32. Having reviewed the decision to deport letter and the decision letter refusing the human rights claim, I note that reference was made to the imposition of the hospital order and the restrictions order under the Mental Health Act 1983. Both highlight the serious nature of the wounding incident and the second letter quotes from the Sentencing Remarks from 2016 and a subsequent risk assessment by a medical professional in 2017 to the effect that the restriction order was necessary and that there was an ongoing risk of violence at that time given the early stage of the appellant's treatment.

33. However, as far as I can see nothing further was put forward by the respondent, either by way of evidence or submissions, which considered the appellant's circumstances (including risk to the public) at any time between the assertions made in 2018 decision letters (which themselves looked back in time to 2016/2017) and the hearing before the judge. I have seen no reference to any submissions made on the scope of S-LTR.1.6 and its accompanying guidance. There has been no substantive challenge to the voluminous body of expert evidence provided by the appellant as to his ongoing high-intensity care and treatment in the United Kingdom, evidence which the judge plainly took careful account of. The overall effect of that evidence was to indicate that: the appellant was compliant with all forms of his treatment (including, importantly, taking the relevant medication); his mental health had been "stable" since discharge from hospital; he was spending some nights with his family away from his supported accommodation; he had regular contact with a variety of professionals; that there had been no relapse or violent behaviour or offending since discharge; and that his prognosis was "very good" (see, for example, the addendum psychiatric report from Dr R Latham contained in the appellant's supplementary bundle).

34. Further, and importantly, the respondent's grounds of appeal make no mention of the restrictions order or any purported failure on the judge's part to have regard to relevant expert evidence. Rather, paragraph 4 of the grounds wrongly seeks to blame the judge for "equating non-conducive grounds to criminal convictions." The judge did no such thing at [72]. His reference to "culpable" conduct was plainly made after recognising that S-LTR.1.6 encompassed more than just convictions. Indeed, the judge correctly directed himself that the conduct in question must be such that it made the appellant's presence in United Kingdom "undesirable".

35. The reality is that the reliance on the restrictions order has only been put forward in oral submissions by Mr Tufan at the hearing before me. That is not a criticism of him, but it is relevant to my consideration of whether the judge erred in law.

36. In my judgment, the judge was entitled to conclude that the appellant was not culpable in respect of the wounding incident. He was not to blame (in the ordinary sense of that word) because he was mentally unwell at the time, a state of affairs recognised in the verdict of not guilty by virtue of insanity. Even if it is the case that culpability is not a prerequisite for all of the considerations falling within S-LTR.1.6, its absence was nonetheless a relevant factor to the overall assessment of whether the appellant's presence in this country was undesirable.

37. Beyond what was expressly stated at [72], it is in my view implicit in the judge's overall assessment that he had in mind all the evidence pertaining to the appellant's current circumstances when deciding whether the undesirability criterion had been met. I have summarised that evidence, above. In contrast, there appears to have been nothing from the respondent side, save for the simple reliance on the historical fact of the wounding incident and a subsequent imposition of the hospital and restrictions orders (together with the brief reference to a 2017 assessment of whilst the appellant was still in hospital and at the outset of his treatment).

38. In all the circumstances, I conclude that the judge was entitled to find that the respondent had not made out her case on the suitability issue. There are no errors of law here.

39. Even if the judge had been wrong on the culpability point, there is no realistic prospect that it would have made any difference to the ultimate conclusion: the overall evidential picture before him and the respondent's position were such that he would in all likelihood have come to the same result on the S-LTR.1.6 issue.

40. The respondent's third ground of appeal is, as described by Judge Sheridan in his grant of permission, "weak". It quotes only part of what the judge said at [78], which is in my view does not reflect well on the respondent. Further, and more importantly, the ground fails to have any proper regard to the totality of the judge's findings and reasons, as set out at [73]-[77]. These paragraphs include a detailed consideration of relevant factors including: the significant period spent in hospital in the United Kingdom; the lack of an independent life before or after the hospitalisation; limited education; "limited skills" in respect of establishing a reasonable life for himself; a degree of exaggeration in the evidence from some family members, specifically in respect of his parents being "aged"; a reluctance on the part of his mother to care for him because of his past conduct; and the relatively significant degree of stigma attached mental health in Bangladesh. These factors were then correctly placed in the context of the guidance set out in Kamara.

41. The complaint in the grounds relating to past work undertaken by the appellant on the family farm is misconceived. First, it was taken into account alongside a variety of other considerations. Second, it is not clear to me what the respondent was seeking to suggest in this aspect of her

challenge. Should the judge have concluded that the appellant could go to Bangladesh and effectively live and work in the fields away from all other members of the local community or wider society?

42. Finally, what Mr Tufan described as the "negative credibility findings" in respect of the Article 3 issue do not in any material way undermine the judge's conclusion on paragraph 276ADE(1)(vi). The judge noted an aspect of exaggeration when considering this provision (see [75]). Beyond that, the findings in question related to the availability of appropriate treatment and the ability to travel to and from a hospital. Those narrow issues were not of any particular relevance to the test under the Rules, which addresses integration (or re-integration) in a broad sense, not solely through the narrow prism of a pure medical claim under Article 8.

43. Reading the judge's decision as a whole, I am satisfied that his conclusions on paragraph 276ADE(1)(vi) were open to him and there is no error of law.

44. It follows that the respondent's appeal to the Upper Tribunal must be dismissed and that the First-tier Tribunal's decision stands in so far as the appellant's appeal before the judge succeeded on Article 8 grounds.

45. I have not permitted the appellant to challenge the judge's conclusions on Article 3 and these shall stand.

Anonymity

46. The First-tier Tribunal made an anonymity direction because of the appellant's significant mental health difficulties. In light of his particular condition, I deem it appropriate to maintain that direction.

Notice of Decision

47. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

Signed: H Norton-Taylor Date: 26 August 2021
Upper Tribunal Judge Norton-Taylor