Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01746/2020 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Tuesday 4 May 2021

Decision & Reasons Promulgated
On Monday 17 May 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

B R M

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wilson, solicitor, Refugee and Migrant Centre
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal initially involved a protection claim, I consider it is appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Sharma promulgated on 10 December 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 7 February 2020, refusing his protection and human rights claims.

2. The Appellant is a national of Iraq. He entered the UK clandestinely in August 2006 and claimed asylum on arrival. His claim was refused and an appeal on that basis was dismissed by Immigration Judge Zucker in a decision dated 9 January 2007. The Appellant then made a series of further submissions in 2009 and 2010 which were all rejected by the Respondent. However, the Appellant was granted three years' discretionary leave on 13 December 2011, therefore expiring on 13 December 2014. Ms Everett confirmed that this was as a result of a "legacy" review, in other words, a review within the Case Resolution Programme ("CRP") then in existence to deal with the cases of failed asylum seekers whose cases were incomplete as they had not been removed. I will need to say more about the way in which such reviews were conducted later in this decision.

3. The Appellant made an application for further discretionary leave on 8 January 2015. The Respondent refused that application on 25 July 2015. I will need to come to the detail of that refusal in due course as it forms the central core of the Appellant's grounds before me. For now, it is sufficient to note that the Respondent relied on criminal offences committed between 2011 and 2013 which led to suspended prison sentences (as well as other factors). The Appellant's appeal against the 2015 decision was dismissed first on 20 July 2017 and then, following remittal after a finding of error of law in the first decision, on 17 June 2019 by First-tier Tribunal Judge Borsada.

4. The Appellant then made further submissions on 28 November 2019 which were refused by the Respondent by the decision under challenge but accepted as amounting to a fresh claim. He was therefore given a further right of appeal.

5. The Appellant challenges the Decision on two grounds which can be broadly summarised as follows:

   (a) Judge Sharma failed to take into account the medical evidence on which the Appellant relied when considering whether to depart from the previous adverse credibility findings of Judge Zucker ("the Devaseelan issue") ([1] to [3] of the grounds).
   (b) Judge Sharma erred when dealing with the previous refusal of further discretionary leave in the context of Article 8 ECHR. It is asserted that the Respondent failed to follow her guidance in relation to the grant of further discretionary leave and that both she and the Judge have failed to exercise the discretion required by paragraph 322(5) of the Immigration Rules ("the Rules") ("the discretionary leave issue") ([4] and [5] of the grounds).

6. Permission to appeal was granted on the discretionary leave issue but not on the Devaseelan issue by First-tier Tribunal Judge O'Garro on 22 January 2021 in the following terms:

> "…3. Contrary to what is submitted in the grounds, there was no misapplication of the Devaseelan guidelines by the judge. Even though the judge took the decisions of the earlier judge as his starting point he carefully considered the evidence before him and reached findings properly open to him and gave adequate reasons for doing so.
> 4. However in relation to paragraph 322(5) which according to Court of Appeal in *Balajigari* [2019] EWCA Civ 673 involves a two-stage analysis, requiring firstly a decision on whether the paragraph 322(5) applies and secondly whether discretion falls to be considered, it is arguable that the judge fell into error. Permission to appeal is granted."

7. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The remote hearing was attended by representatives for both parties. The hearing proceeded with no major technical difficulties.

8. I have before me a small (unpaginated) bundle filed by the Appellant which was before Judge Sharma. I also have the Respondent's bundle of core documents. Mr Wilson also helpfully provided a skeleton argument for the hearing before me.

DISCUSSION AND CONCLUSIONS

9. Although Judge O'Garro did not expressly refuse permission to appeal on the Devaseelan issue, Mr Wilson indicated that he did not pursue that part of the grounds of appeal. He was in my view right to do so for the following reasons.

10. Judge Sharma considered the previous decision not only of Judge Zucker but also of Judge Borsada. As the Judge observed at [10] of the Decision, on that appeal the Appellant relied on his health conditions as obstacles to returning to Iraq. The Judge went on to point out at [12] of the Decision that "[i]n refusing the appeal, Judge Borsada used the decision made by Judge Zucker as his starting point" but that "[i]n considering both that decision and the evidence before him, Judge Borsada made further adverse credibility findings on the appellant's credibility". As Judge Sharma pointed out at [13] of the Decision, Judge Borsada had before him "copious medical notes" and that the Judge "accepted that there was enough evidence to satisfy him as to the fact that the appellant suffered from the chronic conditions relied upon".

11. In the section of the Decision containing Judge Sharma's findings, the following is said:

> "52. Dealing with Mr Wilson's submissions then. He argues that the medical evidence before me undermines Judge Zucker's (and hence Judge Borsada's) conclusions about the appellant's credibility. I do not agree. Whilst arguably Judge Zucker found the lack of medical evidence to be a significant matter against the appellant, Judge Borsada plainly accepted that the appellant suffered from the chronic conditions that have been raised before me."

12. Judge Sharma properly directed himself on the Devaseelan guidelines at [49] to [51] of the Decision, recognising that they were a starting point and not binding. Judge Sharma went on to consider the other new evidence in the form of threatening letters and rejected the protection claim based on those letters at [56] of the Decision. Having rejected any claim to humanitarian protection, Judge Sharma rejected the protection claim as a whole at [58] of the Decision.

13. Since, as I have already noted, Mr Wilson did not pursue the grounds of appeal relating to the Devaseelan issue, there is no challenge to the Decision so far as the protection claim is concerned.

14. I turn then to the discretionary leave issue. Before I deal with Mr Wilson's submissions, it is necessary to set out some of the background facts and evidence in this regard.

15. I deal first with the relevance of this case being part of the CRP. For ease, I refer to the judgment of Mr Justice King in the cases of Geraldo and others v Secretary of State for the Home Department [2013] EWHC 2763 (Admin) ("Geraldo"). At [39] to [45] of the judgment in Geraldo, King J sets out the background to the CRP and the types of case which fell within it. As I have already noted that included cases of failed asylum seekers (as this Appellant then was) who had not yet left the UK. Paragraphs [48] to [56] explain the process followed in relation to the consideration whether to remove the failed asylum seeker applying paragraph 395C of the Rules (later paragraph 353B) and the guidance in Chapter 53 of the Enforcement Instructions and Guidance ("Chapter 53"). In such cases, where removal was not considered to be appropriate, leave was granted. Helpfully, given the issue in the cases of Geraldo, the Judge also sets out at [67] to [73] the changes in the Rules which led to the replacement of paragraph 395C with paragraph 353B (and setting out that paragraph at [68] of the judgment) and the change in the discretionary leave policy which led to the grant of indefinite leave being replaced first with a grant of discretionary leave of three years and later to a grant of thirty months leave. In this case, since the original grant of discretionary leave was made after July 2011 but before July 2012, the Appellant was granted three years leave following the initial review under the CRP.

16. Next, I need to say something about the refusal of further discretionary leave on 25 January 2017. That appears on the final pages of the Appellant's bundle. Having set out the Appellant's immigration history, the Respondent's decision records the Appellant's criminal offences in the following way:

> "... It is considered that your circumstances do not prevail since that of your previous grant of Discretionary Leave. Security Checks have returned with a positive hit. You were convicted on 10/07/2012 at Coventry District Magistrates for failing to surrender to custody on the 15/12/2011. You were given a suspended imprisonment of 2 weeks, wholly suspended for 12 months. A curfew requirement for 6 months.
> You were convicted on the 10/07/2010 at Coventry District for possessing a knife blade/sharp pointed article in a public place on 01/11/2011. You were given 10 weeks imprisonment wholly suspended 12 months. Curfew requirement 6 months.

You were convicted on 08/01/2013 to fail to comply with the requirements of a community order on the 17/12/2012. You were given curfew requirement 4 weeks starting on the 11/01/2013 ending 07/02/2013. Electronically monitored with a fine of £50."

17. I pause to observe that the PNC check does not appear in any of the bundles. However, the above record is largely consistent with the Judge's findings at [11] of the Decision save that the conviction for possession of a knife blade/sharp pointed article is 10 July 2012 (not 2010 as must be the case based on the date of the offence) and that the Appellant denied the latter offence of failing to comply with a community order so that Judge Borsada who had also considered this matter in the 2019 appeal decision had not relied upon it (see [2] of Judge Borsada's decision in the Respondent's bundle).

18. The Respondent then considered paragraph 276ADE(1) of the Rules ("Paragraph 276ADE") but concluded that the Appellant could not meet that paragraph based either on his length of residence or obstacles to his integration in Iraq. The Respondent also considered the Appellant's medical condition. This is not relevant to the discretionary leave issue and I can therefore skip over this part of the decision. The Respondent then went on to consider paragraph 353B of the Rules ("Paragraph 353B"). As the heading to that section makes clear that consideration was guided in policy terms by Chapter 53. Having set out Paragraph 353B, the Respondent went through the various headings in that paragraph. The following consideration was carried out:

"The Secretary of State has considered all the relevant factors of your case. And is content that your removal from the United Kingdom remains appropriate for the following reasons:

Character, conduct and associations

Consideration has been given to your character, conduct and associations whilst residing in the UK. As noted above it has become apparent during mandatory security checks that you have spent criminal convictions.

In light of the above, it is considered that you have cast doubt upon your character and therefore your character and conduct do not justify a grant of leave to remain in the UK.

Compliance

Regard has been given to your compliance during your time spent in the UK. You arrived in the UK 19/08/2006, claiming Asylum the same day. Your asylum application was refused on 15/11/2006. You subsequently lodged an appeal against this decision on 1/12/2006. Your appeal was dismissed on 10/01/2007. Your appeal rights became exhausted on 23/04/2007. Following this, you failed to report on the following dates: 05/10/06, 21/12/06, 15/03/07, 12/04/07, 19/04/07, 26/04/07, 25/03/10, 26/4/10, 26/5/10, 8/10/10, 7/10/11. On 13/12/11 you were granted Discretionary Leave to remain in the UK until 12/12/14. It is noted that you submitted a out of time application for further leave to remain on the 08/1/15.

It is clear from your immigration and reporting history your compliance is not a desirable fact when considering an exceptional grant of leave under paragraph 353B.

Length of time in the United Kingdom accrued for reasons beyond the migrants control

Consideration has been given to the length of time that you have spent in the UK that has been outside of your control. It is considered that all of your applications submitted to the Home Office have been considered in a timely manner. In light of this, you have not been subject to any significant delays which have prolonged your residency within the UK. You therefore fail to qualify for a grant of leave in the UK due to your length of residence which was outside of your control.

Any representations received
Consideration has been given to your medical conditions, however you have not provided any evidence to show your medical conditions are life threatening and would breach your human rights in line with caselaw N, it is therefore considered that it would not be unjustifiably harsh to return you to Iraq.
Conclusion
Regard has been given to your character, conduct and compliance whilst residing in the UK. You have failed to comply throughout the length of your stay and this evidence weighs against your case.
When assessing all aspects of your claim as a whole, it is not considered that there are any significant, compelling factors which would warrant a grant of leave. Therefore, it is considered that your removal from the UK is appropriate."

19. Before moving on, I make two observations about that decision. First, the Respondent considered whether there were any changes in circumstances since the previous grant of leave and concluded that there were due to the criminal convictions. Second, having considered the Appellant's private life and medical conditions, the Respondent reconsidered whether there were exceptional circumstances which justified not removing the Appellant under Paragraph 353B applying the Chapter 53 guidance which required an evaluation of all the circumstances. In essence, that was a repeat of the review which had led to the grant of the initial period of discretionary leave but based on the changed circumstances.

20. That was the decision which was the subject of the appeal which ultimately came before Judge Borsada. Judge Borsada dealt with the discretionary leave issue thus:

"[8(vi)] With regard to the reasons for the failure to renew the grant of discretionary leave and his previous period of living in the UK prior to 2013: whilst the appellant disputed the commission of any of the offences he had accepted that he had previous convictions in respect of those matters (all except the failure to comply with the community service order which he did not remember). Furthermore, the appellant accepted that he was 'out of time' when he applied for further discretionary [leave] such that the respondent exercised its discretion correctly"

21. It was argued on the Appellant's behalf at that time that the offences were not sufficiently serious to justify the refusal of further leave and that two of the convictions were prior to the initial grant of discretionary leave ([9a(i)]). I pause to observe that the latter point is inaccurate. As I have already noted, Judge Sharma in the Decision corrected what must be an inaccurate date regarding the conviction for having a knife in a public place. The earliest conviction was therefore July 2012, about seven months after the initial grant of leave. Judge Borsada dealt with these points at [11] of his decision as follows:

"I note the appellant's representative's claim that the appellant's admission of a drunken episode in 2013 is an indication of his willingness to be truthful. That one piece of oral evidence however stands in stark contrast with his continued denial that he carried a knife as an offensive weapon and failed to surrender to custody despite his being convicted of those very offences. With regard to the previous offences, it was unfortunate that the respondent did not provide me with his previous convictions 'print out' (PNC). Nevertheless, I did note

> that the appellant, in a previous leave application, had accepted of two previous convictions. I also noted that the failure to surrender to custody charge occurred during the appellant's period of discretionary leave and that this fact coupled with his failure to submit his further discretionary leave application 'in time' would certainly have been sufficient reason for the respondent to refuse an application for further discretionary leave. In my view the appellant has not been unfairly treated in respect of the failure to renew his discretionary leave and certainly the failure to renew his leave is not a matter that I consider can now be used to weigh in the balance in the consideration of the article 8 proportionality exercise in 2019."

22. The next point in the chronology is the further submissions made by the Appellant which led to the decision here under appeal. Those appear in a form completed by hand, it appears by the Appellant himself. That appears in the Respondent's bundle. The Appellant there says that his further submissions are about "[t]hreats from Islamic fundamentalist militants". He refers to "4 documents left in [his] house threatening [his] life" which had been sent to him by his brother. Those documents are appended to the form. He said that those documents demonstrate a "risk of being killed by militants".

23. Unsurprisingly in light of the content of those further submissions, the Respondent's decision under appeal here focusses on the earlier findings regarding the protection claim in the context of the new documents and the updated country guidance. In the context of Article 8 ECHR, the Respondent considers the Appellant's private life, concluding that he could not meet Paragraph 276ADE on the basis of his length of residence or the situation he would face on return to Iraq. The human rights claim is not rejected on suitability grounds. The Appellant's medical condition is then considered under the headings of "Exceptional circumstances" and "Article 3 (medical)". Finally, the decision maker returns to the Paragraph 353B issue and concludes that, having regard to the factors set out in that paragraph, removal remains appropriate.

24. That then is the context in which the appeal came before Judge Sharma. I make two observations before turning to the Decision. First, the refusal of further discretionary leave was not the decision under appeal before Judge Sharma. Second, Judge Sharma took as his starting point, as he was entitled (indeed bound) to do, the findings of Judge Borsada which include the paragraph which I have set out at [21] above. No new evidence was produced in this regard. Judge Sharma referred at [11] of the Decision to the way in which Judge Borsada dealt with the earlier refusal to grant further discretionary leave. I do not need to set that out as it largely replicates what Judge Borsada said in the passage I have cited.

25. Having dealt with the findings about the protection claim and concluded at [56] of the Decision that the Appellant was not "under any kind of threat upon return to his family home" and having rejected also the humanitarian protection claim based on the updated country guidance, Judge Sharma turned to deal with Article 8 ECHR. He found that there were no very significant obstacles to the Appellant integrating in Iraq (where he still has family). That finding is not challenged. The Judge then said this about the discretionary leave point:

> "60. I agree with Mr Wilson that, when considering the article 8 claim outside of the Immigration Rules, I should take into consideration together the matters of long residence, health and the refusal of discretionary leave rather than take them one by one.
> 61. Considering the discretionary leave point, refusal due to the conduct of the appellant clearly falls within the discretionary grounds set out in paragraph 322(5) of the Immigration Rules. However, regardless of whether or not the application was wrongly considered to be out of time, and even accepting that it was wrongly considered thus, it is nevertheless a justifiable refusal on the grounds of the criminal offending alone.
> 62. There is nothing amounting to exceptional circumstances in either the private life that has been further established by the appellant's time in the United Kingdom (at a time when his immigration status was precarious) or the fact of his medical conditions. The consequences of removal to the appellant are not unjustifiably harsh."

26. The reference there to Paragraph 322(5) of the Rules ("Paragraph 322(5)") is mystifying. As Mr Wilson accepted, the Respondent has never relied on Paragraph 322(5) to refuse any application made by the Appellant. As I have already observed, the Respondent did not even refuse the further submissions on this occasion on suitability grounds in spite of the previous convictions.

27. The submissions which Mr Wilson made to Judge Sharma as recorded at [37] and [38] of the Decision are therefore equally puzzling. Those are as follows:

> "37. The refusal of extension of leave is significant and has not been properly addressed in the previous decision. It should be reassessed. The decision that was actually appealed before Judge Borsada (and Judge Lawrence) is that decision. It is dealt with at paragraph 11 of Judge Borsada's determination. There are two problems with it. The first is that the application was made in time (there was a 28 day grace period at the time within which to reapply). The second is that Judge Borsada does not substantively consider the exercise of the discretion. Rather than decide that it was within the range of responses open to the respondent, the tribunal should have exercised the discretion itself.
> 38. In reaching its view, the respondent had not followed its own guidance. I was referred to paragraph 7 of the skeleton argument which, in summary, argues that the circumstances comprising of the long delay and residence were even more in the appellant's favour than at the time of the initial grant of leave. As for the criminality threshold, that was not reached as the offence was not punished by a custodial sentence and nor was any harm caused as a result of it. The relevant grounds were those at paragraphs 322(5) and (5A)."

28. It is entirely unclear why Mr Wilson submitted to Judge Sharma that Paragraph 322(5) had any purchase either in the instant appeal or in the appeal before Judge Borsada. Paragraph 322(5) was not the basis for the refusal of further leave in the decision which Judge Borsada was considering. As I pointed out to Mr Wilson, the refusal of further discretionary leave was based on a change in circumstances between the grant of initial leave and the application for further leave because the initial grant was on the basis of a review of the factors in Paragraph 353B and one of those factors was character and conduct to which the Appellant's intervening criminal offending was of relevance.

29. The mistaken apprehension that Paragraph 322(5) is and was of relevance is developed in the grounds challenging the Decision as follows:

> "4. The IJ also errs in dealing with the issue of refusal of discretionary leave to A. A's criticism of two errors in IJ Borsada's approach is reported at paragraph 37. The second is that the judge fails to exercise the discretion required by paragraph 322(5). (The complexity of the discretion involved is indicated by the Home Office guidance to caseworkers on deciding to refuse under para 322(5) in the case of criminal behaviour, which requires reference to a senior caseworker). In paragraph 61 the conclusion that the decision to refuse to extend discretionary leave was 'a justifiable refusal' falls into the same error.
> 5. The IJ accepts in para 60 the need to take the issues of long residence, health and refusal of an extension of discretionary leave together in considering the article 8 claim. However, by disregarding the discretionary leave refusal in para 61 and stating that there is nothing amounting to exceptional circumstances in A's long residence or medical conditions he fails to take these factors together into account in conducting the balancing exercise to assess whether refusal of leave to remain in proportionate."

30. Unfortunately, it is the asserted failure of Judge Sharma properly to deal with Paragraph 322(5) which led to the grant of permission to appeal the Decision. This was and is a red herring. The case of Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673 (Balajigari") relied upon by Judge O'Garro is of no relevance for that reason. Neither is the case of R (oao Ngouh) v Secretary of State for the Home Department [2010] EWHC 2218 (Admin) (leaving aside also that Mr Wilson accepted that this was an extreme case on its facts, concerned the refusal of indefinite leave to remain and was a judicial review challenge and not an appeal).

31. Due to the inapplicability of Paragraph 322(5) in the Respondent's decision under appeal or indeed any of her previous decisions, I can ignore the submissions made by Mr Wilson in his skeleton argument and orally concerning the "two-stage process" to be adopted where Paragraph 322(5) is relied upon. Paragraph 322(5) is one of the discretionary general grounds of refusal where the exercise of discretion is obviously part of the consideration to be undertaken. That is not relevant in this case.

32. I turn then to the other part of Mr Wilson's argument regarding the discretionary leave issue. He relies on the Asylum Policy Instruction entitled "Discretionary Leave" ("the API"). Mr Wilson accepted that this document does not appear in the bundle before the Tribunal. Nor, so far as I can see was it relied upon by the Appellant before Judge Sharma. I have been unable to find Mr Wilson's skeleton argument before Judge Sharma but the Judge's record of proceedings makes no mention of any reliance placed on this policy. Nor is there any mention of the API in the grounds of appeal challenging the Decision.

33. Notwithstanding that, I have considered Mr Wilson's submissions in this regard. I should add that, due to his failure to produce that policy, I have only been able to find the version published on 18 August 2015 which post-dates the Respondent's refusal of further discretionary leave by a few weeks. I will assume however for current purposes that the policy is in the same form so far as relied upon by the Appellant. It does not appear from the "Document Control" reference at the end of the document

that the change to the policy in August 2015 is relevant to the argument Mr Wilson seeks to make.

34. The sections of the API concerning consideration of further leave applications so far as relevant to this case are as follows:

> "7.1 Considering further DL applications
> All applications for further DL must be considered in line with this guidance, taking into account all information available at the date of decision, including the contents of the application form, country reports and any other relevant information, including that provided at the time of the original grant of DL…Out of time applications must still be considered on the basis of all the evidence put forward and the fact that the application was late should not, on its own be used as a reason to refuse further leave where the individual otherwise qualifies under the policy. Those who apply out of time will be unable to accrue continuous leave towards settlement.
> …
> 7.4 Refusing further DL
> Where an application for further DL is considered and it is decided that the individual no longer qualifies for DL, the application should be refused. There is no automatic right to further leave or settlement and those who apply for further leave must qualify under the policy in force at the time of the decision."

35. In short, therefore, the section of the API dealing with further applications guides caseworkers to consider the application against the policy in force at the time of the initial grant. As I have already pointed out, the basis of the initial grant of discretionary leave was following a review under the CRP and the application of Paragraph 353B. The decision maker made clear that the review was conducted in accordance with Chapter 53. I have already made reference to the sections of the judgment in Geraldo which explain the Chapter 53 guidance and the Paragraph 353B factors. That is the exercise which was conducted in this case leading to the refusal of further leave on the basis that the application of the factors to the Appellant's case no longer justified a grant of discretionary leave.

36. Mr Wilson relies on the section of the API dealing with criminality. That reads as follows so far as relevant to this case:

> "3.6 Exclusion and criminality
> In all asylum and non-asylum cases caseworkers must consider the impact of an individual's criminal history before granting any leave.
> …
> Where an individual does not fall within the restricted leave policy (for example, where they are not excluded under Article 1F or the criminal sentence was less than 2 years' imprisonment), caseworkers must consider the impact of any criminal history before granting DL, having regard as appropriate to Part 9 (General Grounds for Refusal) and, where an individual is not liable to deportation, paragraph 353B(i) of the Immigration Rules. Criminals or extremists should not normally benefit from leave on a discretionary basis under this policy because it is a Home Office priority to remove them from the UK."

37. For the sake of completeness, I also set out the paragraph from Chapter 53 dealing with character and conduct which includes reference to criminality. Chapter 53 was archived in October 2017 but remains available electronically via the archive:

> **"(i) Character, conduct and associations including any previous criminal record and the nature of any offence of which the applicant has been convicted**
> When considering an individual's character and conduct, regard must be given to whether:
> • there is evidence of criminality that meets the criminal casework (CC) threshold
> • the individual has been convicted of a particularly serious crime (below the CC threshold) involving violence, a sexual offence, offences against children or a serious drug offence
> • there are serious reasons for considering that the individual falls within the asylum exclusion clauses, or
> • it is considered undesirable to permit the individual to remain in the UK in light of exceptional circumstances, or in light of their character, conduct or associations, or the fact that they represent a threat to national security.
> Evidence of criminality or conduct meeting the criteria above will normally mean that an individual cannot benefit from exceptional circumstances."

38. Whilst I would accept that the Appellant's offending does not bring him within the first two of those bullet points, the Respondent was entitled to take the view as was said in the 2015 decision that it remains relevant to character and conduct. Further, the decision that it was appropriate to remove was based not only on the criminal offending but also on the Appellant's immigration history and there being an absence of factors weighing in his favour. No arguments were addressed to either Judge Borsada or Judge Sharma concerning Chapter 53 and whether the 2015 decision was lawful in that regard. As I have pointed out, there was no new evidence before Judge Sharma in any event and his starting point was therefore rightly the findings of Judge Borsada.

39. Mr Wilson's point so far as I understood it is that there is a "two-stage process" when an application for further leave is made, first considering whether the circumstances have changed from those at the time of the initial grant of leave and then, even if they have, whether the criminal history is sufficient to warrant a refusal. I would accept that the passage I have cited from the API refers to the guidance on the general grounds of refusal (the link to that page is no longer extant in the published API so I cannot refer to it). However, that is only of relevance where it is appropriate. It is not said to be relevant where the caseworker is refusing an application on the basis that the individual's circumstances have changed so that discretionary leave is no longer appropriate. It would or might be relevant where, for example, a person continues to meet the policy which forms the basis for the initial grant of discretionary leave but where a refusal might be appropriate due to criminal conduct. I observe in passing that the situation of this Appellant is very different from that of the appellants in Balajigari who were entitled to leave to remain under the Rules but for the application of Paragraph 322(5).

40. Moreover, the tenor of that part of the API is not that leave should be granted unless an individual's criminal history is sufficiently serious. As stated in the final sentence of

the passage I have quoted, the policy is that criminals should not normally benefit from discretionary leave.

41. I have already set out and explained my view of the way in which criminality is relevant to Paragraph 353B. In support of my view and for completeness in relation to the operation of Paragraph 353B, I make reference to the cases of Qongwane and others v Secretary of State for the Home Department [2014] EWCA Civ 957. Those were cases in which there was no criminal conduct. At least one (Singh) was on similar facts to this case (ie a failed asylum seeker who had not been removed). Although as Sir Stanley Burnton pointed out at [26] of the judgment, Paragraph 353B is concerned with whether or not to remove an individual and not whether to grant leave and if so what form of leave, and therefore the Court of Appeal was not seized of that issue, the discretion in Paragraph 353B is held to be "a safety valve, pursuant to which the Secretary of State may refrain from removing but only in [exceptional circumstances] which will necessarily be rare" ([24]). Underhill LJ also made the following observations at [40] about the operation of Paragraph 353B which underline the way in which the review of the factors in that paragraph operates:

> "I only wish to add one point about para. 353B. Ms Anderson submitted that the factors listed at (i)-(iii) were (unlike the much more extensive list in the old para. 395C) all "negative" in character and thus that their intention is to constrain (or at least guide) the exercise of what would otherwise be a general discretion not to remove migrants who had no right to remain under the Rules or the general law. On a literal reading that submission seems wrong: taking the example of head (i), migrants can have good character as well as bad, and a very long period of time spent in the UK for reasons beyond the migrant's control (head (iii)) would surely in principle count in favour of non-removal. But I think that that is too literal. Para. 353B is not very well drafted, but it seems to me clear, reading it as a whole, that its essential purpose is indeed to identify specific points which will weigh in the balance *against* the exercise of the discretion not to remove a migrant, or to qualify the effect of factors that might otherwise weigh in its favour. Thus **the point of heads (i) and (ii) is to make clear that (in short) *bad* character/conduct and *non*-compliance with conditions must always count against the exercise of the discretion. As for head (iii), the point surely being made is that time spent in the UK after the adverse immigration decision ought (at least generally) *only* to count in the migrant's favour if his or her reasons for not leaving were beyond their control**. I think this point worth making because I have observed a tendency for migrants or their advisers to treat the facts that they have committed no criminal offences or have complied with all conditions as if that created some kind of presumption in favour of non-removal 'under para. 353B'. That is not the right approach. Para. 353B is not a kind of mandatory check-list of the same character as (albeit less comprehensive than) the old para. 395C. I do not say that good character or compliance with conditions are wholly irrelevant to an exercise of the discretion in question. But it is not the purpose of para. 353B to ensure that they are considered; and they are hardly likely to be significant factors by themselves given the exceptional nature of the discretion as explained by Sir Stanley Burnton at para. 24 of his judgment."
> [my emphasis]

42. Leaving aside the difficulties faced by the Appellant in making out a challenge relying on an argument which was not apparently made to the Judge below nor referred to in

the grounds of appeal, I consider that Mr Wilson's submissions regarding the API are for those reasons misconceived and without merit.

43. It is perhaps slightly unfortunate that Judge Sharma was led down the path of considering Paragraph 322(5) where that was not and never had been relied upon by the Respondent. It is equally unfortunate that the way in which the challenge to the Decision was pleaded on this issue (and therefore the reasons for the grant of permission) bore little resemblance to the way in which the case was argued before me.

44. Whilst Ms Everett very fairly accepted that [61] of the Decision is brief in its consideration of the discretionary leave issue, I do not consider that to amount to an error of law for three further reasons. First, the appeal was not against the refusal of further discretionary leave. Second, and flowing from that, the Appellant already had an appeal against the refusal of further discretionary leave. That appeal was dismissed by Judge Borsada and the Appellant did not challenge that decision. Third, and again flowing from that, the starting point for Judge Sharma was the findings of Judge Borsada which stood unchallenged. I add that I do not agree with Judge Sharma's finding that the refusal of further discretionary leave might be unjustified insofar as based on the application being out of time (contrary to the view of Judge Borsada). The application for further discretionary leave was clearly made after the Appellant's discretionary leave had come to an end even if the period between that date and the application fell to be disregarded for the purposes of deciding the application. However, if anything that finding is unduly generous to the Appellant and makes no difference to the Judge's conclusion. Judge Sharma, as Judge Borsada, was clearly entitled to reach the conclusion that the refusal of discretionary leave was justified by the Appellant's criminal offending as well as the other matters relied upon following the Respondent's review of his case under Paragraph 353B/Chapter 53 in 2015.

CONCLUSION

45. For the foregoing reasons, there is no error of law in the Decision on the discretionary leave issue. As I have already noted, Mr Wilson did not pursue a challenge to the Decision on the Devaseelan ground. There is no other challenge to the Decision dismissing the appeal on protection and human rights grounds. The Decision does not contain any error of law. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed on all grounds.

DECISION

The Decision of First-tier Tribunal Judge Sharma promulgated on 10 December 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision. The Appellant's appeal remains dismissed.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 6 May 2021