Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/06272/2020
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th November 2021	**On 24 March 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS SURINDER KAUR
MR HARDEV SINGH SOKHI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Saini, instructed by My Legal Solicitors
For the Respondent: Ms Z Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission, against the decision of First-tier Tribunal Judge Gibbs ("the judge") dismissing their appeals and upholding the respondent's refusals of 17th June 2020 in response to an application for further leave to remain on the basis of the appellants' human rights. Permission to appeal was brought on the following five grounds:

    (i) the respondent unlawfully raised a new issue contrary to Rule 24(2) and the findings thereon were thus unlawful

(ii) perverse findings in relation to the 2008/2009 ETD applications

(iii) unlawful findings of whether the appellants were in prospective or actual limbo

(iv) unlawful and inconsistent findings on the legal limbo

(v) unlawful assessment inconsistent with Strasbourg jurisprudence

2. I take each ground in turn.

3. In the first ground it was asserted the respondent had unlawfully raised new issues in contravention of Rule 24(2) of the First-tier Tribunal (Immigration and Asylum Chamber) Procedure Rules. It was submitted that the Presenting Officer took issue with matters that took place in 2005, but which were only raised for the first time during the hearing of 2021. These issues then became the subject of adverse credibility findings by First-tier Tribunal Judge Gibbs. The issues related to what became of the appellants' possessions in their rented accommodation in India when they were coming to the UK in 2005 and it was submitted that it was impermissible for the Presenting Officer to raise the new issues unless he had placed an amended refusal letter before the Tribunal in accordance with Rule 24(2) of the First-tier Tribunal (Immigration and Asylum Chamber) Rules ("the FtT Rules"), and this was not done. The new issue was then considered and resulted in the judge commencing her findings on a fundamentally unlawful note by making adverse credibility findings against the appellants upon issues that were not before her. This adverse finding was important to the appellants' lack of preparation and the finding against them demonstrated that the judge unlawfully found them to be appellants capable of manipulating the truth sixteen years after their first failed appeal. The judge's finding that there was no "evidence" of any such arrangements about their possessions shows the lack of evidence on this new issue and they were ambushed at the hearing. The appellant submitted that the judge sought to add to Judge Borsada's adverse credibility findings from 2005 by finding against the appellant on wholly new issues again relating to 2005 which were not raised then or in the refusal letter but raised sixteen years later.

4. At the hearing before Mr Sani submitted that there was no mention of this in the findings of Judge Borsada and he submitted that in his closing submissions he had raised this.

5. I am not persuaded the judge erred in law on this grounds.

6. Rule 24(2) of the FtT Rules set out that

> 'The respondent must, if the respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the respondent opposes the appellant's case and the grounds for such opposition'

7. Credibility is axiomatic in appeals. The appellants were fully aware there had been a previous decision relating to their previous appeal. The

Secretary of State's refusal letter clearly referred to the decision of Judge Borsada and following **Devaseelan [2002] UKIAT 000702** it is axiomatic that the first decision is the starting point. Representatives should be well aware of the **Devaseelan** principles. As set out in **Devaseelan**, the adduction of such facts which could have been before the first adjudicator but were not should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator and further evidence at the time should be treated with caution but this does not rule out a consideration of further facts including those which may assist the appellant.

8. It was very clear in the decision of Judge Borsada dated 31st January 2006 that the credibility of the appellants as to the visit visa process and their entry to the United Kingdom at that point was in issue, indeed the judge records paragraph 17 of the previous adjudicator, Judge Borsada who found:

> *"Given the context of the first appellant's admission that he had lied on his visit visa application form in order to secure entry clearance as well as my lack of trust in the sponsor's own evidence about his mother's mental health and 'suicide attempts' I am not satisfied that either witness can be relied on".*
>
> *"Taking all these things together it is difficult for me to accept that the first appellant is now telling the truth when he has not told the truth in the past and this is particularly given that the purpose of those lies remains the same i.e. to secure a right to stay in the UK".*

9. The judge in this instance at paragraph 11 stated that the "previous Immigration Judge, Mr Borsada's decision is my starting point. He found that neither the appellants nor their son were reliable witnesses." She noted that at paragraph 11 Judge Borsada recorded that:

> *"The first appellant admits that he lied on his previous visa application when he stated that his income was Rs 25,000 but this was only done out of desperation to ensure that they were granted entry clearance to the UK as they felt they could not stay in India because of the suicide risk to the second appellant."*

Thus, underlying the respondent's decision was the first decision of the Tribunal which squarely made an adverse credibility finding against the appellant. No new ground or reason was given in this regard in the refusal letter. The appellants were well aware that credibility surrounding the circumstances of their entry had been considered and adverse findings made. The judge was entitled to address and make updated findings on the issue of the circumstances of their entry into the UK and their intentions thereon.

10. Given the findings made by the previous Immigration Judge, it was entirely open to and proper for the judge to consider at paragraph 12 that she must assess the appellants' claim as of now. The appellants would have known that they may be questioned about their departure from India

particularly as it was in issue before the First-tier Tribunal previously. It was open to the judge to find at paragraphs [13] and [14] that although the first appellant had

> *"denied that he had told Mr [Judge] Borsada that he had lied in his 2004 entry clearance application, he was unable to provide any evidence to corroborate this assertio*n".

It is quite clear that it was from the first appellants' oral evidence that the issue as to documentation arose. Thus in accordance with **Devaseelan** the judge was entitled to explore the previous findings and the claimed basis of their decision to remain in the UK being a "significant change in the appellants' circumstances following their arrival to the UK in March 2005…". Quite fairly, an opportunity was offered to the appellants to have that position clarified.

11. In the circumstances, I find no error of law in the judge's approach to the evidence in the face of the denial by the first appellant that he had lied to the First-tier Tribunal.

12. The second ground of appeal was the judge made unlawful, perverse findings in relation to the 2008/2009 application for ETDs. It was submitted that the judge's findings at paragraphs 22 to 24 suffered from perversity, irrationality and inconsistency with known verifiable facts for the following reasons:

    (a) The judge found that "the Respondent's inability to obtain ETDs is because they had failed to provide all of the information required". The judge noted the appellants had failed to provide an answer to question 12 on the ETD form but crucially the judge failed to note that the appellants "have answered all of the other questions relating to that identity to assist the Respondent in obtaining an ETD form from the Indian authorities by providing comprehensive details". It was submitted that this information had not been noted before the judge.

    (b) Further the missing information at question 12 related to the "Name, telephone number, address and telephone of two respectable / reputed / well-known persons of the area e.g. Sarpanch, Panch of the village, Municipal, School Master, Postman, Consular of City and other respectable person reference". The judge relied on the respondent caseworker's opinion on the file of their inability to answer this question was "hard to believe" but the judge was "an independent judge hearing this appeal and it is for her to form her own opinion. It was submitted in the grounds that Sarpanchs are elected intermittently and the appellants had been out of the country since 2005 and would not have known people in office and it was irrational to the judge to conclude that the lack of information for question 12 stopped the Home Office from obtaining an ETD and it was for the respondent to obtain this information from the Indian Government or searched online to find the name of the relevant Sarpanch. Before finding that the appellants were obstructing their own removal the judge failed to consider the evidence of a further caseworker. He

stated in relation to question 12 that the appellants were compliant but did not know anyone in India.

13. On reading the decision the assertion of irrationality is not soundly made in this instance. In **R (Iran) [2005] EWCA Civ 982** Brooke LJ, affirmed that "perversity" represents a very high hurdle. It was noted that the majority of the court in **Miftari v The Secretary of State for the Home Department [2005] EWCA Civ 481** agreed that it embraced decisions that were irrational or unreasonable in the **Wednesbury** sense. The bar for irrationality is high and has not in any way been reached in this decision which is lucid and logical.

14. Nor is there evidence of inconsistency on the part of the judge. Quite clearly as the grounds themselves state, the appellants had not answered all relevant questions and it is not for the appellants to pick and choose which to answer or to omit answers. The appellants had not answered question 12 as identified and the judge stated at paragraphs 22 and 23 the following:

> *22. I find however that the respondent's inability to obtain ETDs is because the appellants have failed to provide all of the information required. The evidence before me in their Home Office File is that the Appellants have failed to answer question 12 which requires: Name, telephone number, address and telephone of two respectable/reputed/well known persons of the area eg Sarpanch, Panch of the village, Municipal, School Master, Postman, Consular of City and other respectable person reference'.*
>
> *23. The evidence before me is that these questions were being asked of the Appellants in 2008/2009, only three to four years after they had left India, the country in which they had lived for over fifty years. I find it very hard to believe that the Appellants were genuinely unable to provide this information, and given the previous negative credibility findings made by Mr Borsada, I find that this is simply further manoeuvring on their part to be able to remain in the UK'.*

It was entirely open to the judge to conclude, on sound independent reasoning of her own, first, that the appellants had responded to this question only three or four years after leaving India, where they had lived for many years, secondly in the context of previous adverse credibility findings made against them their approach was disbelieved and thirdly, by placing weight on the Home Office file such that "different officers on different occasions felt the Appellants were obfuscating". The last does not suggest that she accepted the evidence of Home Office caseworkers unquestioningly.

15. The judge looked at the evidence in the round and it was open to her to conclude that the appellants had not complied with answering question 12 and the burden rests with the appellants not with the Home Office to answer simple questions. The question does not just ask about a Sarpanch but includes "other respectable person reference" which the appellants could have approached. Bearing in mind the appellants had

lived in India from their births in 1949 and 1953 respectively until 2005, it was open to the judge to rely on the comments of the caseworker that it was "not believed nor had any friends or known to anybody where living in New Delhi".

16. At this point I shall set out some further context. At paragraph 21 the judge recorded

> *'Mr Saini place great weight on the respondent's inability to obtain Emergency Travel Documents (ETDs) for the Appellants after their Indian passports expired on 20 March 2007 (whilst in the respondent's possession). Further that the Respondent stopped trying to obtain such in 2009'.*

17. At the hearing before me Ms Ahmed made an application to submit the documentation to the effect that it was clear the appellants themselves knew, despite the representations, that an ETD had been obtained in 2015 and a further attempt to remove the appellants had been made in 2019. In the interests of justice, I admitted this evidence. I gave Mr Saini time to take some instructions from the solicitors. I accept that the evidence might have been produced by the respondents at the hearing before the First-tier Tribunal, but the appellants themselves and the solicitors who were notified of the ETD application in 2019 - and I was informed by Mr Saini that the same solicitors have acted throughout - did not draw this to the attention of either the First-tier Tribunal or the Upper Tribunal.

18. Indeed, the evidence presented to the judge (bearing in mind the first appellant gave evidence) was that in 2009 the respondent stopped trying to obtain ETDs and it is this and the subsequent twelve years that have passed "on which Mr Sani relies in submitting that the appellants are in limbo". (Paragraph 25).

19. In effect the contention that failure to obtain an ETD shows the appellants are irremovable falls away. In the light of the pandemic the failure of removal even with the ETD takes the case no further forward.

20. The third ground of appeal relates to the unlawful assessment of whether the appellants were in prospective or actual limbo. This was said to be of "vital importance" as those in actual limbo have less weight given to the public interest in their removal and equally have more weight given to their private lives in an Article 8 proportionality assessment. The distinction between prospective and actual limbo is a question of law rather than fact and set out by **R (On the application of AR and FW) v the Secretary of State for the Home Department EWCA Civ 1310** and **RA (Iraq) V The Secretary of State for the Home Department [2019] EWCA Civ 850** at 63:

> *"The term 'limbo' is a convenient shorthand for describing the position of a person whom the SSHD wishes to deport or remove, but there is a limited prospect of ever effecting his deportation or removal (for the purposes of this judgment, the terms deport and deportation should be viewed interchangeably with remove and*

> *removal). The term 'limbo' is loosely used to cover individuals who may be in one of two discrete states: (i) first, someone in respect of whom a decision to deport has been taken, but no deportation order has in fact been made; or (ii) second, someone in respect of whom a deportation order has already been made but who has not yet been deported. In many cases, an individual in the first state (such as this appellant to date) may have suffered little or no day-to-day impact on his or her private or family life. Thus, for a person in the first state, the effect of possessing leave to remain under s. 3C of the Immigration Act 1971 (i.e. pending appeal) will have been that they are free to work and to enjoy private and family life. This may be described as prospective 'limbo'. Where, however, in the second state, a deportation order has in fact been made, there will normally be no leave to remain, and the individual will be unable to work, claim benefits or receive more than basic GP care under the NHS. This may be described as actual 'limbo'.*

21. The question of whether a migrant was a prospective or actual limbo depended on their legal status. Either they had leave to remain or Section 3C leave pending the outcome of an appeal or they did not and were liable to removal and subject to temporary admission or immigration bail.

22. The grounds asserted the judge appeared to misunderstand this distinction because she found the appellants were not in actual limbo because they were not suffering as harshly as they might from a hostile environment as they had their children to rely on. This it was argued, was a plainly unlawful assessment of the category of limbo in which the appellants fell as this was a question of law. They had been categorised as migrants in prospective limbo as if they had leave to remain under Section 3C when in fact they were served with an IS151A in September 2006. They have no Section 3C leave. The unlawful assessment resulted in less weight being given to their scenario and the Tribunal's Article 8 proportionality.

23. In my view, albeit there was an analysis of the legal underpinning to the appellants' position based on the effects of the harshness rather than the legal position, it is the *effect* of the prospective or actual limbo which is material and it was open to the judge to conclude on the basis that "the appellant was de facto not in a position to be unable to work, claim benefits or receive more than basic GP care under the NHS" because they had access to support from their family and to the NHS. At paragraph 64 of **RA (Iraq)** Haddon-Cave LJ confirmed that "The former state of prospective 'limbo' is likely to weigh less heavily in the balance in the interests of the individual than the latter state of actual 'limbo', but each case will depend on its own facts and the periods involved".

24. Ms Ahmed in fact stated that this was not a case of limbo at all and that there was a definite possibility of removing these appellants and their removal was foreseeable. It was clear that the judge was well-aware of the immigration history of these appellants and their legal status and well-aware of the impact of their claimed limbo. As set out by Haddon-Cave LJ

the status of limbo is effected when *there is a limited prospect of ever effecting his deportation or removal'.* This is a case where the nationality of the appellants is known, and ETDs have been secured in the past. The appellants are resisting removal on human rights grounds connected with their family and ill health and in my view, I agree with the Secretary of State that the attempt to characterise this a 'limbo' case would require the reclassification of many many cases as being within the definition of 'legal limbo'. As explained in **RA (Iraq)** at paragraph 65

> *'There is a threshold question to be addressed as to the (non) 'deportability' of the individual. In order to raise a 'limbo' argument in the first place, i.e. whether the public interest justifies making or sustaining a decision to deport or issuing a deportation order itself, the following must be demonstrated: (i) first, it must be apparent that the appellant is not capable of being actually deported immediately, or in the foreseeable future; (ii) second, it must be apparent that there are no further or remaining steps that can currently be taken in the foreseeable future to facilitate his deportation; and (iii) third, there must be no reason for anticipating change in the situation and, thus, in practical terms, the prospects of removal are remote'.*

25. In my view the judge overall properly directed herself in this regard. Any mischaracterisation of the limbo status was not material because first, it was not a legal limbo case as demonstrated by the ETDs sought and secured and not revealed to the judge and secondly even if it were the judge properly weighed into the assessment the relevant factors. I therefore find no material error on this ground.

26. The fourth ground was that the judge conducted an unlawful assessment and made inconsistent findings on the legal limbo doctrine. It was not open to the judge to find the respondent could renew her application. The judge stated that the appellants were not "immediately removeable" at paragraph 29 but then went on to list that this could occur in the "foreseeable future" for speculative reasons. It was maintained that once the judge had found the appellant was not immediately removal at the date of the hearing that was the only point, she could assess whether removal was remote. It was not open to the judge to speculate that matters might improve in returning individuals to India in particular it was submitted that India was suffering from a severe second wave of COVID, was on the red list for travel, there was no evidence that the appellants would voluntarily go to India given their reliance on their family in the UK and their passports had expired. The analogy with the decision of **R (on the application of AM) v Secretary of State ("legal limbo")** [2021] UKUT 62 (IAC) was misguided as this related to the question of true identity and the situation was not remotely analogous as their identity had not been hidden. It was irrational for the judge to state that the respondent "can therefore renew her application for an ETD albeit that I acknowledge he has not done so for twelve years". The grounds for permission to appeal stated "

27. The grounds submitted that the facts before the First-tier Tribunal Judge were that the Respondent had not sought to apply for an ETD for a staggering twelve years. There was no indication that she was going to do so now, nor that she ever intended to do so in the future".

28. This ground ignores the self direction of the judge at paragraph 28 where she cites from paragraph 65 of **RA (Iraq)** as I have identified above**,** such 'first, it must be apparent that the appellant is not capable of being actually deported immediately or in the foreseeable future…'. Even if this were a limbo case the judge was obliged to consider the 'foreseeable future' which she evidently did.

29. Bearing in mind at the hearing before me that I admitted evidence to show that in fact the Home Office had secured an ETD in 2015 and further had made further attempts to obtain an ETD in 2019, I find the criticism of the judge's findings wholly unsupportable.

30. Mr Saini submitted that the fact that an ETD had been obtained and yet the appellants had not been removed demonstrated that in fact they were in limbo. I am not persuaded by that argument for the reasons I have given above particularly in the light of the pandemic. In view of the rational and cogent finding by First-tier Tribunal Judge Gibbs it is entirely foreseeable that the appellants can be removed if they are prepared to tell the truth. Travel has been disrupted owing to the pandemic, but it was open to the judge to conclude that, in effect, the position is not fixed and should not determine such a human rights claim.

31. There was no misunderstanding of **R (on the application of AM) v Secretary of State ("legal limbo")**. The judge was sceptical that the appellants could not answer question 12 and thus was entitled to draw on the reasoning in **R (AM)** that it effectively lay within their power to change 'that state of affairs'. Although the state of affairs in **R (AM)** was to identity it still related to the ability of the appellants reasonably to provide relevant information about themselves and the foreseeability of removal. It was open to the judge to conclude that the appellants would be able to make an application for new Indian passports and the objection that the old passports are with the Home Office takes the challenge no further forward. The passports are clearly available.

32. Ground 5 asserted that the judge had made an unlawful human rights assessment a and one inconsistent with Strasbourg jurisprudence. It was submitted that the judge noted the appellants had been in actual limbo since 17th September 2006 for almost fifteen years and consequently the treatment of their case contravened the minimum threshold for protection of Article 8 rights in such situations of limbo and precariousness as affirmed by the Strasbourg Court in **Aristimuño Mendizabal v France (2010) 50 EHRR 50**.

33. That case was made on its own particular circumstances and can be distinguished; in that instance the appellant was initially granted asylum in 1975 which was withdrawn in 1979 and she was thereafter given

temporary admission until 2003; that is not the case here and in **Mendizabal**, there did not appear to have been any question of the appellant being removed from France. The appellants in this case have never been given temporary leave. They entered on a visit visa in 2005, overstayed, submitted applications for leave to remain which have been refused and mounted successive judicial review applications. The judge in this instance made a careful and detailed assessment of the appellants' circumstances with reference to Article 8 and had not materially erred before turning to a summary of the facts before her at paragraphs 35 onwards. She found the appellants had not been wholly co-operative in the ETD process, had expressed a preference to remain in the United Kingdom to be with and looked after by their children and had properly reasoned those conclusions. Indeed it would appear that even by the date of the hearing the facts as known to the appellants were not before the judge.

34. The decision discloses no material error of law.

35. The decision of the judge will stand and the appellants' appeals remain dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 15th December 2021

Upper Tribunal Judge Rimington