IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000873

First-tier Tribunal Nos : PA/54381/2023
IA/10724/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

IAW
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Paul Draycott, Counsel
For the Respondent: Mr Stephen Walker, Home Office Presenting Officer

Heard at Field House on 7 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

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1. This is an appeal by the Secretary of State for the Home Department (the Secretary of State) against the decision of FIRST-TIER TRIBUNAL JUDGE MEYLER (the judge) sitting in the First-tier Tribunal to allow the appellant's appeal on Article 3 grounds only.

2. In referring to "the appellant" I refer to the appellant in the First-tier Tribunal. I will refer to the Secretary of State as "the respondent" notwithstanding that his role is reversed before the Upper Tribunal.

3. An anonymity direction was made by the First-tier Tribunal, which I have not been asked to vary and it will therefore continue in force.

Background

4. The appellant is a Kashmiri Indian national who was 46 at the date of the hearing having been born on 20 February 1977. There is no dispute as to his origins and nationality. There is a dispute over the extent to which he would be able to obtain an Indian passport.

5. On 24 July 2023 the judge allowed the appellant's appeal against the respondent's decision to refuse his protection claim solely on the grounds that that decision would breach his rights under article 3 (article 3) of the European Convention on Human Rights (ECHR). The judge considered that the difficulty the appellant had in establishing his Indian nationality, which, she accepted, was partly due to his own actions, meant the appellant could not be safely returned to Kashmiri India. At paragraph 68 of the decision, the judge said she had no basis for concluding that the Indian authorities had deliberately deprived the appellant of his nationality for a Convention reason. The judge appreciated Mr Draycott's argument that "it fits a pattern of discriminatory refusal to recognise Muslim refugees from certain neighbouring countries as Indian nationals". But the judge concluded that the treatment of the appellant would not be due to a deliberate policy as there "is a different context". She went on to consider the appellant's position in greater detail later in her decision and concluded that the appellant would face a serious risk if he were returned to India.

6. The respondent appealed the decision because he said that the appellant must have genuinely been unable to provide evidence that he was a national of India. The reason that the appellant had not been able to establish his Indian nationality was that he had been less than candid. He had been dishonest and obstructive. Therefore, he had not been genuinely unable to provide evidence. The correct standard of proof in the case, according to the respondent's grounds of appeal, was the balance of probabilities. The appellant would not be *persona non grata* if he returned to India but would merely be questioned by the authorities. He was not connected with an Islamist organisation and, all by reference to certain case law, the respondent asserted in his grounds of appeal that the appellant would not be destitute if he returned to India. Given that Indian Muslims make up a large part of the population of India, the appellant had nothing to fear on return.

7. On the 5 March 2024 First-tier Tribunal Judge Dempster gave permission to appeal to the Secretary of State, stating that an inadequate reference had been made to the standard of proof. The other grounds could also be argued.

The hearing

8. Before the Upper Tribunal Mr Walker argued that the absence of the appellant's documentation did not mean that reasonable, practical steps had been taken to obtain such documentation. The judge only focused on attempts, whilst in reality the Indian authorities would not in fact refuse to verify his Indian nationality. The appellant had not placed sufficient evidence of the comprehensive steps he claims to have taken to obtain the information required by the Indian authorities. Overall, therefore, there were grounds to consider that the appellant would be granted Indian nationality if he returned to India or Kashmiri India. There was no evidence of efforts made to obtain nationality or other documents and no statements from which the Tribunal could properly have so concluded

9. Mr Walker also said that the principle which arose in the case of **Devseelan [2002] UKIAT 702** applied here. In particular, he said that there had been an earlier decision of the Asylum and Immigration Chamber in 2009 in which the appellant had been found to be able to reside in all areas of India. That decision was referred to at paragraph 39 of the judge's decision in this case. In Mr Walker's submission, it was a material error for the First-tier Tribunal not to attach significant weight to that decision and given that finding, it would not have been appropriate to reach the contrary view, based on evidence presented at the hearing before the First-tier Tribunal in this case.

10. Mr Draycott's submissions were quite detailed and, at times, difficult to follow. It is unfortunate that he provided no skeleton argument or summary of his points, although the appellant did provide a very lengthy rule 24 response. However, broadly his submissions may be summarised as being:

1) That the respondent had argued in his grounds for the wrong standard of proof, the correct one being the lower standard which applied to asylum and article 3 claims-i.e. a reasonable degree of likelihood or serious degree of possibility – in article 3 terms expressed as "serious grounds for believing the claim";

2) The "perversity test" had to be satisfied in order to overturn the decision of the First-tier Tribunal, without explaining what that test was;

3) Some of the points made by the respondent in the written grounds and orally by Mr Walker, had not been articulated before the First-tier Tribunal.

11. Mr Walker had not presented the appeal on behalf of the respondent at the First-tier Tribunal. However, before the Upper Tribunal no correspondence had been placed before the First-tier Tribunal and the judge was entitled to reach a finding based on the submissions and evidence before her. She reached clear findings and conclusions. Therefore, the Upper Tribunal was not in a position to gainsay those conclusions which were sound in all the circumstances.

12. His final point was that the case of **Devaseelan** dealt with the evidence in 2009, when that decision was reached. This did not reflect the evidence in June 2023, when the hearing before the judge took place, nor did it reflect the evidence when the judge's decision was promulgated on 24 July 2023. Given a fourteen-year gap between the two decisions, it seems little or no weight should attach to the 2009 decision.

Discussion

13. The judge was required to look at the up-to-date CPIN reports and other evidence including expert evidence of Dr Wali in reaching her decision. According

to the **Devaseelan** guidelines, it is necessary to consider the facts as they were at the date of the original decision and compare them with the facts as they were at the date of the second decision. It is only where the evidence is the same that the second judge will be expected to keep his decision in line with the original decision, rather than allowing the matter to be effectively re-litigated. It is not the second tribunal's function to question an earlier decision without there being a change in circumstances. However, it is clear from paragraph 39(2) of **Devaseelan** that:

> "Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator"…

14. The test for perversity was set by the case of **Yeboah v Crofton [2001] EWCA Civ 1309** at paragraph 93; the decision must be one that no reasonable tribunal could have come to on a proper appreciation of the evidence and the law (per Mummery LJ). The judge was required to consider the conditions on return as at the date of her decision. This included consideration of the factors discussed in **RM (Sierra Leone) [2004] UKIAT 00108**. Mr Draycott said that far from being perverse the conclusion the judge came to was one any reasonable judge would have come to on the evidence. That evidence was thoroughly considered by the judge and before she reached her decision. There was no basis for interfering with that decision.

15. As far as the burden and standard of proof is concerned, reference was made to **AS Guinea [2018] EWCA Civ 2234** which considered **RM Sierra Leone**. In **AS Guinea** the Court of Appeal said that the burden of proof rested on the stateless person but the standard of proof which applied was: "whether it is established to a 'reasonable degree' that an individual is not considered as a national by any state under the operation of its law" (paragraph 8).

Conclusions

16. The judge assessed the evidence and came to conclusions within her discretion. In particular, having heard and read the evidence, the judge was best placed to make an assessment as to the appellant's risk on return, including the attitude of the Indian authorities' attitude to him as an undocumented person. She also weighed up the appellant's attempts to re-document himself over the years and preferred the evidence of the appellant which was to the effect that he had taken reasonable steps to re-attend and re-obtain his Indian nationality. It was common ground that this was the nationality to which he was entitled, although the possibility of him obtaining Pakistani nationality was also considered.

17. I have concluded that the Secretary of State has been unable to establish that the grounds of appeal are sustainable to such extent that there is a material error of law requiring me to set aside or interfere with the decision of the First-tier Tribunal.

Notice of Decision

18. There is no material error of law in the decision of the First-tier Tribunal.

19. The respondent's appeal is dismissed.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 June 2024