Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07426/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2018	**On 14 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NAZIM TEMUR
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent/ Claimant: Mr C Jacobs, Counsel instructed by Ahmed Rahman Carr Solicitors

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Vernon sitting at Taylor House on 3 November 2017) allowing on Article 8 grounds outside the Rules the claimant's appeal against the decision made on 10 March 2017 to refuse to grant him further discretionary leave to remain and to refuse him leave to remain on an alternative basis. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 19 January 2018 First-tier Tribunal Judge Chohan granted the Secretary of State permission to appeal for the following reasons:

> "In short, the grounds argue that the Judge erred by finding that in 2013 the respondent had granted the appellant discretionary leave based on his mental health condition. The respondent argues that that was not the case in 2013. At paragraph 50 of the decision, the Judge does assume that the appellant had been granted leave as stated above. But if that was not the case in 2013, then the Judge may well have made a factual error. Had that error not been made then it is open to argument that the decision may have been different."

Relevant Background

3. The claimant is a national of Turkey, who arrived in the United Kingdom on 29 December 2000 and claimed asylum on the same day. His asylum claim was refused on 5 February 2001. His appeal against the refusal was dismissed on 26 June 2003. The claimant submitted an application for ILR in 2007, and this was refused on 17 March 2008. He made a further application for leave to remain on compassionate grounds outside the Immigration Rules on 6 January 2010. This application was refused on 30 July 2013. On that date, the claimant made a further asylum claim which was refused. However, he was granted discretionary leave to remain in the United Kingdom until 6 April 2016 pursuant to paragraph 353B of the Rules. The claimant made a further application for leave to remain on 5 April 2016.

4. On 10 March 2017, the Secretary of State gave her reasons for refusing the application. He had an unspent conviction for an offence of destroying and damaging property on 13 April 2015, for which he had been sentenced to community order on 20 August 2017. This criminality weighed heavily against his character, and it was considered that the conditions of his previous grant of leave no longer prevailed. He did not qualify for limited leave to remain on private life grounds, as he had failed to demonstrate that there were very significant obstacles to his reintegration into Turkey. His legal representatives claimed that he had experienced a rapid decline in the state of his mental health: he had been sectioned and was currently placed at a hospital in West Suffolk following a relapse. Further evidence had been requested from him and his legal representatives with regard to his current mental health problems and whether he remained sectioned at the hospital. But no response had been received. Thus, the medical evidence which had been provided with his application was considered to be out-dated and not reliable. On his return to Turkey, it was considered that he could access treatment for his depression similar to that which he had received in the United Kingdom, if he required it. It was not accepted that returning him to Turkey would breach the United Kingdom's obligations under Articles 3 or 8 ECHR on medical grounds.

5. At paragraphs 44 and 45 of the refusal letter, the caseworker addressed the question of whether there were exceptional circumstances in the claimant's case which meant that his removal from the United Kingdom was no longer appropriate, having regard to the factors set out in paragraph 353B of the Immigration Rules. He said at paragraph 45:

> *"I have taken into account your character, conduct, compliance and any time that you may have spent in the United Kingdom beyond your control after your human rights or asylum claim was submitted and/or refused. It is acknowledged that there was a delay in considering your appeal and your further submissions, however, you were awarded discretionary leave previously on this basis and since this date, there have been no further delays by the Home Office in dealing with your applications. Furthermore, you have not raised any exceptional circumstances to justify a grant of leave on any other basis so I am not prepared to exercise discretion in your favour.*

The Hearing before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Vernon. In his skeleton argument, Counsel for the claimant submitted that the Secretary of State had given no consideration as to the claimant's mental health when considering exceptional circumstances "*despite this having formed the basis of the previous grant of leave."*

7. In his subsequent decision, the Judge summarised the basis of the claimant's appeal as follows:

> "During the last few years he has suffered with rapidly deteriorating mental health and has, in fact, been sectioned on three occasions. His mental health is the basis upon which he was granted discretionary leave to remain in 2013, the [Secretary of State] accepting that his mental health amounted to exceptional circumstances for the purposes of paragraph 353B of the Immigration Rules. The state of his mental health has not changed since that time. The only change in the [claimant's] circumstances is that he has been convicted of an offence of criminal damage in August 2015."

8. The Judge gave his reasons for allowing the appeal at paragraphs [37] to [57]. At paragraph [50], he found that the Secretary of State had accepted (in 2013) that the claimant's circumstances were exceptional so as to result in the conclusion that his removal from the United Kingdom at that time was not appropriate: "*That decision appears to have been based upon the [claimant's] mental health conditions."*

9. At paragraph [56], the Judge concluded as follows:

> "In circumstances in which the Secretary of State accepted (by granting a period of discretionary leave in 2013) that the [claimant's] circumstances were exceptional, and where there has been subsequently no material change in his mental health (which formed the basis of the conclusion that his circumstances were exceptional), I am satisfied the decision to refuse him further leave to remain, thereby interfering with his right to private life

contrary to Article 8.1, is disproportionate and is not justified by reference to Article 8.2 ECHR."

The Grounds of Appeal to the Upper Tribunal

10. Mr Ian Jarvis of the Specialist Appeals Team advanced two grounds of appeal. The first was that the Judge had made a material error of fact at paragraph [50]. The Home Office had not issued the claimant with DL because of his mental health condition. He went on to quote verbatim from the grant note. This provided *inter alia* as follows:

> "Length of Residence - The applicant entered the UK on 29 December 2000 and has therefore lived in the UK for 12 years and 8 months. It should be noted that it took 2 years for his appeal against his original asylum claim to be heard. He submitted further submissions on 16 Janu8ary 2010, and these were recorded as being refused on 25 February 2010. However, this letter was never issued. The Home Office issued the_RFRL on 6 December 2012, without a date of address. It could be considered that there has been a total of a 4-year delay in processing the applicant's case, further allowing him to form bonds with his family and develop his private life.
>
> It is considered that there has been an element of mishandling of the applicant's case and therefore it has been concluded to provide him with a grant of discretionary leave."

11. Mr Jarvis additionally pleaded that there was no suggestion in the Home Office refusal letter that the mental health condition of the claimant was material to the grant of DL in 2013.

12. Ground 2 was that, even if the Judge was right to proceed as he did (which was not accepted), the Judge had further materially erred in law in treating the assessment of the case outside the Rules as purely a review of the Secretary of State's refusal to grant a further period of DL. His task was to consider whether, at the date of the hearing, there were any compelling circumstances in a case where the claimant had failed to meet the requirements of the Rules. The Judge's approach manifestly ignored material changes in the law since the decision of the Home Office in 2013, namely: (i) the introduction of the very significant obstacles test into the Rules; and (ii) the introduction at the same time of section 117B into the 2002 Act which now prescribed the statutory weight to be given or not given to certain themes within the Article 8.2 assessment.

13. Mr Jarvis pleaded that the First-tier Tribunal Judge had unlawfully conducted a "*constrained review"* of the Secretary of State's 2013 grant of DL.

The Hearing in the Upper Tribunal

14. At the hearing before me to determine whether an error of law was made out, Ms Isherwood produced the decision of Mr Clayton of the Further Submissions Team (OLCU) dated 7 October 2013, explaining why he had decided to make a discretionary grant of limited leave to remain in the

United Kingdom to the claimant for 30 months. It was from this internal document (aka "the grant note") that her colleague, Mr Jarvis, had quoted verbatim in the grounds of appeal. Ms Isherwood accepted that this document had not been previously disclosed to either the claimant or his legal representatives.

15. Mr Jacobs, who did not appear below, produced a copy of the refusal letter of 7 October 2013 which he believed had been placed before Judge Vernon. He submitted that it was open to Judge Vernon to infer from the contents of this letter that the claimant's mental health formed the basis of the grant of DL in 2013.

16. Ms Isherwood submitted that to draw such an inference would be illogical and perverse as the letter explained why the claimant was not entitled to relief on human rights grounds on account of his mental health condition.

17. I invited Mr Jacobs to comment on paragraph 45 of the 2017 refusal letter. He accepted that this paragraph explained that the basis for granting DL in 2013 was delay. But it did not say that the grant of DL was exclusively on this basis.

Discussion

18. In **E&R -v- Secretary of State for the Home Department [2004] QB 1044,** Carnwath LJ said at paragraph [66]:

> "In our view, the time has now come to accept a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to the existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the factual evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

19. Carnwath LJ went on to say in paragraph [68] that, assuming the relevance of showing a mistake of fact in the Tribunal's decision, there may need to be evidence to prove it. The Court had discretion to admit new evidence, but it was normally exercised subject to **Ladd -v- Marshall** principles, raising in particular the issue of whether the material could and should have been made available before the decision.

Admissibility of the Grant Note

20. It appeared initially that Mr Jacobs might have a valid argument that the grant note should not be admitted into evidence in the Upper Tribunal as

the Secretary of State was at fault in not ensuring that the grant note was before Judge Vernon. However, this argument does not run as the Secretary of State disclosed the reason for the previous grant of DL at paragraph 45 of the decision letter of October 2017. So, the First-tier Tribunal Judge had the necessary information in front of him, but he overlooked it. The grant note is admissible to prove the truth of what is stated in the decision letter, and hence to prove the mistake of fact by Judge Vernon alleged by the Secretary of State.

Proof of Mistake of Fact

21. I am satisfied that the Judge Vernon laboured under the misconception that the grant of DL in 2013 was based upon an acceptance by the then Secretary of State that it was not appropriate to remove the claimant to Turkey because of his mental ill-health. It is shown by the grant note that this is incorrect, and that the claimant's mental health was not a factor which contributed in any way to the grant of DL in 2013.

22. On the topic of character, conduct and associations, Mr Clayton observed that, since his arrival in 2000, the applicant had made numerous attempts to regularise his immigration status. He did not have a criminal record. Despite being detained on numerous occasions as an illegal entrant and working illegally, he had never been convicted. He developed strong ties with his brothers, nieces and nephews who were are all settled in the UK.

23. On the topic of compliance, Mr Clayton said that the applicant had generally managed to comply with reporting restrictions, on and off throughout his stay in the UK. He had maintained contact with the Home Office by writing to them on various dates between 5 November 2010 and 3 October 2011, and the Home Office had failed to respond to any of these submissions.

24. In the light of the contents of the grant note, it is established by uncontentious and objectively verifiable evidence that the Judge was completely mistaken as to the reason for the previous grant of DL in 2013.

Responsibility for the Error

25. On the issue of responsibility for the error, I accept Mr Jacob's submission that it is the party who is complaining of the mistake who must not have been responsible for it. So, on the particular facts of this case, it is the Secretary of State who must not have been responsible for the mistake of fact.

26. In the refusal letter of 7 October 2013, which was written by Mr Clayton, he stated at paragraph 33 that it had been decided to exercise a discretionary grant of leave in the claimant's favour under exceptional circumstances when applying paragraph 353B, without giving any explanation as to the reasoning which had led to this decision.

27. However, earlier at paragraph 29, he acknowledged that the claimant had requested that his case be considered under the legacy exercise. He explained that the Case Resolution Directorate was established to resolve all incomplete, old asylum cases where the initial asylum claim was made prior to 5 March 2007 and which had not been concluded with either removal or a grant of leave, or otherwise closed. He also explained that the work of the CRD had now been overtaken by the Older Live Cases Unit, of which he was a representative.

28. As the legacy exercise was directed at cases where there had been significant delay on the part of the Home Office, the implication of Mr Clayton's explanation was that the reason for the grant of DL to the claimant was lengthy residence for reasons beyond his control. Conversely, the notion that the claimant's mental health condition was the trigger for DL was highly tendentious, not only because much earlier in the 2013 letter Mr Clayton had explained why the claimant did not qualify for relief on medical grounds under either Article 3 or Article 8 ECHR, but also because (as Mr Jacobs accepted in oral argument) ill health *per se* does not come within the scope of paragraph 353B.

29. In any event, the Secretary of State put the matter beyond reasonable doubt by explaining in the October 2017 decision letter the basis of the previous grant of DL in 2013. The contents of the 2013 letter do not in any respect contradict the clarification given in the 2017 decision letter, and so the Secretary of State is not responsible for the Judge's manifest error about the reason which underlay the grant of DL in 2013.

Whether mistake of fact material to the outcome

30. The mistake of fact was clearly material to the outcome. The Judge placed great weight on the (mistaken) fact that the exceptional circumstances recognised by the Secretary of State in 2013 still persisted.

Conclusion

31. Accordingly, the fundamental mistake of fact made by the Judge has given rise to material unfairness, whereby the Secretary of State has been deprived of a fair hearing of her case in the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside. The Secretary of State's appeal to the Upper Tribunal is allowed.

Directions

As was agreed by the representatives in the event that the Secretary of State's case on material unfairness was made out, this appeal is remitted to the First-tier Tribunal at Taylor House for a fresh hearing (Judge Vernon incompatible).

I make no anonymity direction.

Signed Date 28 April 2018

Judge Monson
Deputy Upper Tribunal Judge