



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: HU/09067/2017

THE IMMIGRATION ACTS

Heard at: Field House  
On: 23 November 2018

Decision and Reasons Promulgated  
On: 4 December 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

MR ABHISHEK DOGRE  
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr M Symes, counsel, instructed by Irvine Thanvi Natas Solicitors  
For the Respondent: Ms Z Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Swaniker, promulgated on 7 September 2018, dismissing his claim against the respondent's decision dated 14 August 2017 to refuse leave to remain in the UK.
2. In refusing his claim the respondent noted that the appellant had applied for leave to remain outside the Immigration Rules, in order to pursue legal proceedings against his former employer through an Employment Tribunal. That was not a purpose covered by the Rules.

3. The respondent also concluded that the particular circumstances set out in his application did not constitute compassionate or exceptional factors warranting a grant of leave to remain outside the Immigration Rules.
4. Judge Swaniker noted at [10] that it was clear that his application was for leave to remain outside the Rules, as was conceded by his counsel, and the cover letter had stated that he wished to pursue an application outside the Immigration Rules for the grant of discretionary leave “due to his exceptional/compelling circumstances.”
5. She noted that the letter raised a discrete Article 8 private life issue outside the Rules on the basis of what was said to be the appellant’s exceptional/compelling circumstances. Accordingly, she rejected a preliminary issue raised by the presenting officer as to whether there was an effective human rights appeal before the Tribunal. She found that the appellant had made a valid human rights appeal.
6. She considered the oral evidence from the appellant which she has set out. He confirmed that he had relatives in India, his parents. He has a sister there who is a dentist [12]. When asked if there was any reason why he could not pursue his case from India, he said he did not have any funds and up to now it had been just himself and the Free Representation Unit pursuing his employment case before the Tribunal [12].
7. When asked whether he had considered asking the FRU to represent him from abroad he said that his understanding was that ‘... you still had to do all the paperwork and they would only represent you at hearings’. He said that he did research and went to the library to carry this out. He did not have any evidence from FRU as to what they could do or not, to assist him [12].
8. First-tier Tribunal Judge Swaniker found on the evidence before her that the appellant had not established family life in the UK. Nor had he met the requirements under paragraph 276ADE(1) of the Immigration Rules. There were no very significant obstacles to his integration into India upon return. He arrived in the UK in June 2010 at the age of 21. He is a well educated man with a degree in Chemical Engineering and a Masters in Business Administration from a UK university. There was no evidence that he suffered any serious health issues. He had made an overall recovery from the depression and anxiety he was said to have suffered consequent to his problems with his employer [17].
9. There were no exceptional circumstances consistent with a right to private enjoyment of his private life under Article 8 warranting a grant of leave to remain on Article 8 grounds [19].
10. She found he also had access to a remedy against his employer which lay before the Employment Tribunal. He had succeeded in his claim against his ex-employer and judgment had been given in his favour. There was no justification for any claim of unfairness in the circumstances [20].
11. She noted that the appellant’s counsel also raised Article 6 in his human rights argument. She found that there was no substance to the argument that a fair hearing demanded that

he should be allowed to remain in the UK until the Employment Tribunal case came to its finality [21].

12. Although the appellant's ex-employer had sought to challenge the Employment Tribunal judgment by injunction proceedings, so that the appellant's case has not been finally resolved, there is no credible reason why the appellant should or would be unable to instruct FRU from overseas to represent him in the UK [21].
13. She found that the appellant would be able to continue to carry out any necessary research including research conducted via the Internet to advance his Employment Tribunal claim as required, and to instruct the FRU who would already be familiar with his case and would therefore likely readily be able to continue to represent him in the same capacity. He could instruct them from India. There was no "reliable evidence" to demonstrate that the appellant was required to be in the UK in order to be able to adequately advance or otherwise pursue his Employment Tribunal case. He is an intelligent, informed, tenacious and capable individual [21].
14. Nor was there any credible reason why he should be allowed to remain in the UK to secure a new Tier 2 sponsor and apply for further leave on that basis. Since the curtailment of his leave, he has had more than ample opportunity to follow through with such an application or at least to seek to follow through with such an application. He had not done so. He is free to make such an application for the appropriate visa from India should he secure the required sponsorship [22].
15. First-tier Tribunal Judge Swaniker accordingly did not accept that he had shown any compelling circumstances in his case. Although he has likely established some element of a private life here she did not accept that there would be a disproportionate interference with this if he were now to leave the UK.
16. She had regard to the public interest considerations set out in s.117B of the 2002 Act and concluded that the respondent's decision pursues the legitimate aim of maintaining effective immigration control in the wider interests of society. Any interference with his private life is proportionate [24].
17. She accordingly dismissed his appeal on human rights grounds, Articles 6 and 8.
18. In granting permission to appeal, First-tier Tribunal Judge I D Boyes stated that it was not possible for her to determine whether the Judge was right or wrong "as simply not enough is known about the proceedings." She stated that "one would have thought that if it was the case that the appellant was involved and entangled in litigation, then there would have been a consideration of discretionary leave and/or some evidence from his counsel/FRU about the need for him to be in the UK. Those circumstances should be examined on appeal."
19. Mr Symes, who did not represent the appellant before the First-tier Tribunal, and did not settle the grounds of appeal, noted that there three grounds of appeal have been advanced.

20. The first ground contended that the Judge adopted the wrong test as to whether the appellant's human rights would be breached. Reference was made to the House of Lords decision in Huang [2007] Ac 167. The Tribunal need not ask whether the case meets a test of exceptionality.
21. Mr Symes submitted with regard to [19] of the determination that the Judge in looking outside the Rules has "wrongly set the prism". He acknowledged that this was "not the best ground".
22. He submitted with regard to Ground 2, paragraph 2, that the appellant's primary case was the need to remain in the UK to pursue litigation in the Employment Tribunal. His removal would deprive him of his human rights protected by Articles 6 and 8 by depriving him of the chance of a fair trial and therefore compensation for the wrong done to him.
23. Mr Symes referred to [20] of the Tribunal's decision where the Judge noted that he had succeeded in his claim against his ex-employers. He referred to page 34 of the appellant's bundle, which contains the reasons of the Employment Tribunal allowing his appeal. The Tribunal stated that as far as they could determine, all the employers and employees worked under visa arrangements that were entirely dependent on their employer. They were satisfied with the claimant's account that the employer enforced this culture of dependency upon him and then proceeded to extort money from him.
24. It is evident that the employer sought to appeal that decision and was 30 days out of time. The respondent's - Mr Dogra's- comments on the employer's application to extend time are produced at pages 74-75. It was contended that he had put his life on hold for two years to see the proceedings through. He was awarded his due after serious findings were made against the employer that amounted to fraud and extortion. He contended that he should not be required to wait any longer just because the employer cannot file papers on time.
25. I have also had regard to the order of Master Gidden sitting in the Queen's Bench Division, dated 19 July 2018, produced at page 76 of the bundle. He considered an application by the employer for a stay of enforcement. He ordered that there be a stay pending the determination of the defendant employer's appeals from the Employment Tribunal. Should the appeal be unsuccessful the stay will automatically be lifted.
26. On 25 August 2018, a consent order was approved by Cheema Grubb J in the Queen's Bench Division [78-79]. The application made by Mr Dogra for an order discharging the order of Ouseley J dated 9 July 2018 and the order of Master Gidden dated 19 July 2018, was adjourned generally. It was ordered that there be a stay of execution in respect of the employer's liability pending the final disposal of the employer's appeal in the proceedings.
27. In consideration for the parties' agreeing to enter into that Order, it was agreed by the employer, Mr Dogra and the Managing Director of the employer, that the employer would pay £50,000 into court to abide the outcome of the employer's appeals in the ET claim and will pay out to Mr Dogra, in the event of the failure or to the appropriate extent,

partial failure, of the said appeals, in the amount of £50,000 to be paid into the Court's Fund Office by 8 August 2018, and a further sum of £50,000 to be paid into Court by 29 August 2018 or in the alternative, the employer was to provide reasonable security.

28. Mr Symes submitted that in the event of any re-hearing, the appellant would be in India and will accordingly be disadvantaged. He asserted that the appellant does not have the money to proceed. During the course of his submissions the appellant informed the Tribunal that he had received £10,000 on account in September 2018.
29. The amount awarded by the Employment Tribunal was £124,658.82, including loss of earnings to "Remedies Hearing" (gross), future loss of earnings (gross) and ACAS uplift (on compensatory award) at 20%.
30. Mr Symes submitted that the only help he has thus far received is from the FRU.
31. It was also contended that the Judge erred in the proportionality assessment by making a mistake as to the true immigration history of the appellant, and in that basis making adverse finding that he had overstayed or failed to apply for further leave.
32. However, despite the fact that the Home Office record of the appellant's immigration history set out in the refusal letter is provably incorrect, it was on that incorrect basis that the Judge at [22] suggested that the appellant's 'last leave' expired on 10 August 2015 and that he had not sought leave to extend that leave. In fact, it is contended that he applied to extend the leave on 10 August 2015 in time. That application was granted. It was then curtailed to 18 July 2018. He then made an in time application but with a fee waiver application which was later rejected, meaning that the application was deemed invalid. A further application was then made on 25 October 2016 leading to the current appeal.
33. Mr Symes submitted with regard to [22] where the Judge stated that the appellant had not sought to make an application to secure a new Tier 2 sponsor and apply for further leave on that basis, that the appellant cannot get one until he sorts out his immigration history. It is not possible for him to get a reference following his "victory" against his former employer. Until proceedings are completed, he cannot get a job.
34. On behalf of the respondent, Ms Kiss submitted with regard to Ground 1 that there was nothing wrong with the Judge's test relating to exceptional circumstances. She referred to the decision of the Supreme Court in Agyarko and Ikuga, R (on the applications of) v SSHD [2017] UKSC 11 at [19]. There the Court considered para 3.2.7d of the Instructions in force, which state that although an application will normally be appropriate where the applicant does not meet the requirements of the Rules, leave can be granted outside the Rules where exceptional circumstances apply. The Instructions referred to "exceptional" as not meaning "unusual" or "unique". They mean circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely.

35. Lord Reed stated at [19] that in considering whether there are exceptional circumstances, the decision maker is instructed to consider all relevant factors, examples of which are set out.
36. Lord Reed stated at [19] that it is also pointed out that cumulative factors should be considered. In particular, although under the Rules family life and private life are considered separately, when considering whether there are exceptional circumstances, both private and family life can be taken into account.
37. With regard to Ground 2, Ms Kiss submitted that the Judge looked at Article 6 in detail. That Article is not within the immigration system. The Judge was aware that the appellant's appeal with his erstwhile employer has not been resolved. She submitted that in any event he could still instruct the FRU. No credible reason has been advanced as to why he would be unable to conduct any relevant research from India. On that basis he would be able to continue to instruct the FRU from abroad.
38. Ms Kiss referred to paragraph 26 of the judgement of the Employment Tribunal, where the Tribunal set out his immigration history. His application for further leave to remain was refused in August 2017 as the Home Office contended that there were no exceptional circumstances warranting the grant of such immigration status.
39. The Tribunal accepted that it was a condition of his further leave to remain that he has not been permitted to work in the UK since 17 July 2016. The Employment Tribunal at [26] noted that the appellant accepted that he could apply for a further Tier 2 visa but, as he is in the UK under a different immigration status, he would need to leave the UK and apply out of country.
40. At [35] of the judgment, the Employment Tribunal held that but for his dismissal, he would have continued to work in the UK until August 2020. They considered whether it would be proportionate to award him his loss of earnings for a period of over two and a half years and they determined that rather than impose an arbitrary cut off period, without any factual basis whatsoever, it would be appropriate to award the claimant his losses in full for the entirety of his original visa placement with the employer.
41. Ms Kiss submitted that the First-tier Tribunal Judge accepted that the appellant would be able to continue to pursue his claim from abroad.
42. She submitted that Ground 3 relates to a "minor matter." She submitted that "this is a strange assertion." The Judge accepted that he was here legally.

### Assessment

43. The First-tier Tribunal Judge rejected the assertion of the presenting officer that the appellant had not raised a human rights element in his application. She noted that his application was for leave to remain outside the Immigration Rules, as conceded by his counsel. His cover letter had asserted that he wished to submit an application outside the Rules with a grant of discretionary leave due to his exceptional/ compelling circumstances [10].

44. She proceeded to consider his application outside the Rules. She accepted that his “situation” vis a vis his Tier 2 leave was not his fault and that his ex-employer failed to comply with the terms of his employment contract, and that his wrongful dismissal led to the mandatory curtailment of his leave under the general grounds for refusal as he did not have a Tier 2 sponsor [19]. However, she found that whether or not he was at fault, he ceased to have a Tier 2 sponsor and did not meet the requirements for leave to remain as a Tier 2 migrant.
45. She had regard to his pursuance of a remedy before the Employment Tribunal. In that respect she had regard to the assertion that he had a right to a fair hearing which demanded that he be allowed to remain in the UK until the Employment Tribunal case came to its finality.
46. She had regard to the attempts being made by his ex-employer to challenge the judgment in the appellant’s favour. She referred to the injunction proceedings which I have set out.
47. Having assessed the evidence as a whole however, she found that there was no credible reason why the appellant should or would be unable to instruct FRU from overseas to represent him in the UK. No credible reason was given why he would be unable to continue carrying out the required research from India and follow up with any paperwork required.
48. She gave reasons for that conclusion: The FRU would already be familiar with his case. There was no “reliable evidence” to demonstrate that he is required to be in the UK to be able to adequately advance or pursue his case with the Employment Tribunal. She had regard to his past qualifications, his response to his employment situation and the Employment Tribunal claim. That pointed to his being an intelligent, informed, tenacious and capable person.
49. Nor was there any credible reason why he should be allowed to remain in the UK to secure a new Tier 2 sponsor and apply for further leave on that basis. She accepted that he had suffered anxiety and depression following his experiences with his previous employer. Having received therapy, “he is better now and is not on any medication or therapy” [22].
50. She did not accept the argument that he should be placed in the position he would have been in if his last employer had not wrongfully dismissed him and the Home Office curtailed his leave.
51. In the circumstances she concluded that he had not shown any compelling or exceptional circumstances in his case. There would thus not be a disproportionate interference with his private life if he were now to leave the UK. She had regard to the public interest considerations in s.117B of the 2002 Act. There was a paucity of evidence as to the nature and extent of such a private life established in the UK whilst he was here.
52. Having regard to the circumstances a whole, I find that the First-tier Tribunal Judge has undertaken a detailed assessment and has given sustainable reasons for her findings.

53. I accordingly find that the decision of the First-tier Tribunal did not involve the making of any material errors on a point of law.

**Notice of Decision**

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

No anonymity direction made.

Signed

Date 2 December 2018

Deputy Upper Tribunal Judge Mailer