



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/00612/2018**

**Appeal Number:
HU/00617/2018**

THE IMMIGRATION ACTS

Heard at Field House

On 22 March 2019

**Decision & Reasons
Promulgated
On 03 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**A K
D K**

Respondents

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Ms U Miszkiel (counsel) instructed by E1 solicitors

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants because the second appellant's mental health is discussed in these proceedings.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge M R Oliver, promulgated on 28/09/2018 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The First Appellant was born on 17/07/1983 and is a national of Bangladesh. The second appellant was born on 27/11/1990 is a national of Nepal. The appellants met each other in the UK. They had both come to the U.K. as students. The first appellant arrived in the UK on 6 June 2009. The second appellant entered the UK on 16 October 2010. The appellants met when they took part-time jobs at the same supermarket. Romance blossomed, and they were married in the UK on 21 May 2013.

4. On 30 November 2017 the Secretary of State refused the Appellants' applications for leave to remain in the UK on article 8 grounds.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge M R Oliver ("the Judge") allowed their appeal against the Respondent's decision on article 8 ECHR grounds.

6. Grounds of appeal were lodged and on 19 October 2018 Judge Saffer gave permission to appeal stating *inter alia*

"It is arguable that in focusing on delay, the Judge has misapplied the relevant case law, and not engaged with sufficient clarity on the core of the appellants' account. All grounds may be argued."

The Hearing

7. For the respondent, Ms Everett moved the grounds of appeal. She told me that the Judge failed to carry out a proportionality assessment when assessing the article 8 ECHR grounds of appeal. Ms Everett told me that the Judge failed to make findings in relation to the second appellant's poor health. She took me to [17] of the decision and told me that, there, the Judge makes contradictory and conflicting findings. She told me that the Judge's decision was unduly influenced by the Judge's finding that there had been delay in determining the appellant's application, and that the Judge's reasoning was influenced by the erroneous belief that it was for the Home Office to offer a remedy when the appellant had been the victim of a fraudulent scheme.

(b) Ms Everett told me that as the second appellant's mental health was a material factor in the appeal the Judge should have, but did not, make findings about the availability of care and treatment in Nepal and Bangladesh. She told me that the material error of law is that the Judge

has not properly assessed proportionality. She urged me to allow the appeal and set the decision aside.

8. For the appellants, Ms Miszkiel opposed the appeal. She told me that the decision does not contain errors of law, material or otherwise. She told me that the Judge correctly considers article 8 ECHR outside the rules, and that the Judge's findings are consistent with the test set out in Agyarko. Ms Miszkiel told me that the Judge correctly considered the history of the application and the procedural history of decision making, and that the Judge's decision reflected historic injustice that the respondent had contributed to. Counsel for the appellants took me through the medical evidence before both the First-Tier tribunal & this Tribunal in relation to the second appellant. She urged me to dismiss the appeal and allow the decision to stand. She told me that the continuing stress of these proceedings was having a detrimental effect on the second appellant's fragile mental health.

Analysis

9. Neither of the appellants has ever suggested that they can succeed under the Immigration Rules. It is common ground that this appeal concerns article 8 ECHR outside the rules.

10. The Judge had to determine the following separate questions:

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

11. At [15] of the decision the Judge finds that family life exists, and that the respondent's decision is an interference with family life. He then correctly identifies that the determinative issue is proportionality and that he should take account of s.117B of the Nationality, Immigration and Asylum Act 2002. It would be reasonable to expect the ensuing paragraphs of the decision to contain the proportionality balancing exercise. If only [15] to [17] of the decision is read it appears that the proportionality balancing exercise has not been carried out.

12. The proportionality exercise is in fact carried out in the preceding paragraphs of the Judge's decision. At [1] the Judge sets out the appellant's immigration history and the litigation surrounding the respondent's original decision of 6 January 2016. The appellant pursued judicial review proceedings which led to the withdrawal of that decision and the substitution of the decision now under appeal. The decision under

appeal finds that the appellants meet the suitability requirements of appendix FM, so that the allegation of dishonesty made in January 2016 is retracted.

13. Between [2] and [10] the Judge makes his findings of fact while rehearsing the evidence. There are many stylistic criticisms which can be made of the Judge's decision, but the proportionality exercise can be found by carefully reading the decision and separating rehearsal of evidence from findings of fact. The decision would be easier to read if the proportionality exercise had been separately carried out after [15] of the decision; instead the proportionality exercise is intermingled with the preceding paragraphs and is interspersed throughout the decision.

14. The Judge finds that family life exists. The Judge finds the respondent's decision interferes with family life. Because of the history of the application and the circumstances of the respondent's reviewed decision (dated 30 November 2017) the Judge finds that the particular facts and circumstances of this case outweigh the public interest in immigration control.

15. The opening phrase of the first sentence of [17] of the decision is important. There, the Judge draws the disparate strands of his findings of fact together when he says

"Placing all these factors into the balance ..."

16. The Judge clearly gave weight to the history of the applications, to the second appellant's history of adjustment disorder & depressive illness, and the effect that protracted consideration of an application made in 2015 has had on both appellants. The question of weight that he gives those factors is a question for the Judge at first instance. In Green (Article 8 - new rules) [2013] UKUT 254 (IAC) the Tribunal said that

"Giving weight to a factor one way or another is for the fact-finding Tribunal and the assignment of weight will rarely give rise to an error of law."

17. The proportionality exercise is adequately carried out Judge's decision. The weight that the Judge gave to various factors is for the Judge at first instance. The decision might not make easy reading, but it does not contain a material error of law.

18. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account,

unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

19. A careful reading of the decision demonstrates that the Judge applied the correct test in law. The Judge carried out a holistic assessment of all of the evidence. There is nothing wrong with the Judge's fact-finding exercise. The appellant might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

20. The decision does not contain a material error of law. The Judge's decision stands.

A handwritten signature in grey ink, appearing to read "Paul Doyle". The signature is written in a cursive, flowing style.

DECISION

21. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 28 September 2018, stands.

Signed

Date 28 March 2019

Deputy Upper Tribunal Judge Doyle