Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10653/2018**

THE IMMIGRATION ACTS

Heard remotely via Teams	**Decision & Reasons Promulgated**
On the 2nd June 2021	**On the 21st June 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

ABDUL HAMEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Slatter
For the Respondent: Mr Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 11 March 2021, I found that the First-tier Tribunal had erred in law such that its decision should be set aside. My reasons were as follows:

> "1. The appellant, a male citizen of Pakistan who was born on 17 April 1988, appeals against the decision of the First-tier Tribunal (Judge Alis) which was promulgated on 16 January 2020. The First-tier Tribunal dismissed the appellant's appeal against a decision of the Secretary of State dated 24 April 2018 refusing the appellant's application for leave to remain on the basis of long residence and private/family life. The hearing before Judge Alis had been necessary because the Upper

Tribunal had set aside an earlier decision of the First-tier Tribunal (Judge Raikes).

2. The first ground of appeal concerns the status in the appeal before Judge Alis of the findings made by Judge Raikes. Judge Alis found that the Upper Tribunal (Judge Juss) had not preserved any of the findings made by Judge Raikes (the Upper Tribunal decision is silent as to whether any findings were preserved or set aside) and, consequently, all matters remained to determined de novo. Judge Raikes [15] had found that the appellant had not been dishonest providing different details of his income from self-employment to HMRC and, the same tax year (2010/2011), to the Secretary of State in support of a Tier 1 application. The judge had found that the Secretary of State had been wrong to refuse the appellant's application for leave to remain under paragraph 322(5) and that the allegation of dishonesty had not been proved. The judge had gone on to dismiss the appeal under Article 8 ECHR. Judge Alis found that, as the decision of Judge Juss had said nothing about the preservation of findings or about the paragraph 322(5) issue, Judge Raikes's finding that the appellant had not been dishonest had been set aside together with the rest of his decision. Judge Alis went on to find that the appellant had been dishonest.

3. I find that Judge Alis has erred in law. Mr Slatter, who appeared before the Upper Tribunal for the appellant, relied on the recent decision of the Upper Tribunal in AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 00268 (IAC). At [41] the Upper Tribunal held:

> "What the case law demonstrates is that, whilst it is relatively easy to articulate the principle that the findings of fact made by the First-tier Tribunal should be preserved, so far as those findings have not been "undermined" or "infected" by any "error or errors of law", there is no hard-edged answer to what that means in practice, in any particular case. At one end of the spectrum lies the protection and human rights appeal, where a fact-finding failure by the First-tier Tribunal in respect of risk of serious harm on return to an individual's country of nationality may have nothing to do with the Tribunal's fact-finding in respect of the individual's Article 8 ECHR private and family life in the United Kingdom (or vice versa). By contrast, a legal error in the task of assessing an individual's overall credibility is, in general, likely to infect the conclusions as to credibility reached by the First-tier Tribunal."

Before concluding that none of the findings of Judge Raikes had survived the setting aside of his decision, Judge Alis failed to consider whether any of those findings had or had not been 'infected' by errors of law. It would have been helpful and good practice if Judge Juss had expressly stated which, if any, of the First-tier Tribunal 's findings he had preserved but his silence on the issue did not mean that none of the findings remained. The line of authority identified by the Upper Tribunal in AB (in particular, the remarks of Lord Carnwath in HMRC v Pendragon plc [2015] 1 WLR 2838) indicates that only those findings which have been contaminated by error of law should fall with the decision. The reasons for this are obvious; it is potentially unfair for an appellant to be denied the benefit of favourable findings when these

have not been challenged whilst the efficient administration of justice generally is promoted if parties can rely upon the issues between them being narrowed. In the instant appeal, it is wholly clear that Judge Raikes's findings on the paragraph 322(5) issue were not only entirely discreet and unaffected by the error of law identified by Judge Juss but also that those findings had not been the discussed at all, let alone challenged, before the Upper Tribunal. Judge Juss had, unsurprisingly, focussed only on those issues which remained in contention. He had not, as Judge Alis states at [12], 'simply remitted [the appeal] back to the [First-tier] Tribunal for fresh findings to be made … *de novo* on all issues.'

4. The second ground concerns the alleged failure of Judge Alis to apply the Secretary of State's Long Residence Policy Version 8.0. The appellant had been found by the respondent to have failed to accrue 10 years' continuous lawful residence and consequently had been refused leave to remain under paragraph 276B of HC 395 (as amended). Mr Bates, who appeared before the Upper Tribunal for the Secretary of State, relied on *Hoque* [2020] EWCA Civ 1357 as authority (which Mr Slatter acknowledged is binding on the Upper Tribunal) as to the correct interpretation of paragraph 276B. However, Mr Slatter sought, in effect, to bypass the issue of continuous lawful residence for 10 years (which I note different counsel before Judge Alis had accepted the appellant had not achieved (Alis at [31]). He submitted that the Court of Appeal in *Hoque* had accepted that the respondent's own policy was more generous than the rule [39]:

> "I should acknowledge in connection with the previous paragraph that there may be a question whether it is legitimate to refer to the Guidance as an aid to construction. At paras. 10-11 of his judgment in Mahad (Ethiopia) v Entry Clearance Officer [2009] UKSC 16, [2010] 1 WLR 48, Lord Brown disapproved the use of IDIs (the predecessor to Guidance documents) for this purpose; and para. 23 of the judgment of Dyson LJ in MD (Jamaica) v Secretary of State for the Home Department [2010] EWCA Civ 213 is to the same effect. At para. 15 (7) of its judgment in Masood Ahmed the Court referred to Lord Brown's observations in the context of this very issue. However at para. 42 of his judgment in Pokhriyal v Secretary of State for the Home Department [2013] EWCA Civ 1568 Jackson LJ noted a qualification to that approach in cases where a rule is ambiguous and the Secretary of State has in her published guidance adopted the interpretation more favourable to applicants. The intended scope of element [C] is certainly ambiguous, given the mismatch between its terms and its placing within the paragraph, and the interpretation that I believe to be correct is more favourable to applicants. In any event, however, the terms of the Guidance are not essential to my conclusion."

However, as he acknowledges in his skeleton argument [20], Mr Slatter was unable to say exactly why the Court of Appeal considered the policy more favourable to applicants than the rule. He submitted, correctly in my view, that, because the appellant had wrongly been refused on Article 8 ECHR grounds in part on account of a dishonesty which he had never perpetrated, he should, having succeeded in setting aside the First-tier Tribunal decision on Ground 1, be considered on the remaking of the decision on the basis that there existed no suitability grounds which should deny him leave. He relied on the

decision of the Upper Tribunal in *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351(IAC), in particular [47]:

> "Although not immediately apparent, one way in which this kind of erroneous treatment of an individual can have a bearing on Article 8 proportionality is in an ensuing human rights appeal, as was envisaged by Underhill LJ. In such an appeal, the individual would be able to argue that, if the respondent had not formed the mistaken view of their conduct, he or she would have been given leave to remain; and that this should be given weight in the balancing exercise, comparably with how the Court of Appeal, in AA (Afghanistan) etc, spoke of the respondent taking account of past mistakes in deciding whether to exercise discretion in the individual's favour."

Section 117B of the 2002 Act (as amended) provides that 'the maintenance of effective immigration controls is in the public interest' in all cases involving Article 8 ECHR. Mr Slatter submitted that that public interest was diminished; it matters not whether the injustice he has suffered is characterised as 'historic' or 'historical' (see Patel). In the words of the counsel (Mr Aslam) who had appeared before Judge Alis, 'it would be unfair to require the appellant to return to Pakistan in circumstances where he has been living in this country for 12 years and ha[s] clearly established a private life.' (see Alis, at [27]).

5. The problem with Mr Slatter's submission (which was persuasively advanced) is that the appellant was not refused leave to remain on the application which is the subject of this appeal solely because the respondent had erroneously considered that he had been dishonest. That had been one reason but he had also failed to satisfy the relevant provisions of any part of HC 395, including those as to long residence. The text of the 'more generous' policy of the respondent was not addressed in any detail at the initial hearing; as Mr Slatter accepts, the Court of Appeal's discussion of this policy in Hoque is unclear, possibly because it was not 'essential' to the conclusion which the Court reached. I fully accept that the appellant has succeeded in removing any suggestion that his conduct has been unsuitable but I do not find that any past injustice is so strong a factor that it trumps all other considerations, including the proper application of section 117B. I note that Judge Alis at [52] recorded that the appellant 'now relies on the support of friends and indicated that his family are no longer providing any financial support. There was limited evidence, if any, of what support would be available and for how long bearing in mind that the appellant has not worked for a number of years.' None of those matters, which may be relevant in any proportionality assessment, were considered at the initial hearing. Despite the fact that Mr Slatter urged me to proceed to remake and allow the appeal, I have concluded that there shall be resumed hearing in the Upper Tribunal at which the appellant may adduce evidence bringing his circumstances up to date (any evidence, including witness statements, should be served on the other party and filed at the Upper Tribunal no less than 10 days prior to the resumed hearing). I shall also consider any additional submissions which the parties may wish to make. Finally, in the light of my finding that the paragraph 322(5) issue is settled and shall not be revisited, the Secretary of State may wish to look again at the appellant's case before the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The decision shall be remade in the Upper Tribunal (Upper Tribunal Judge Lane; first available date; remote hearing; no interpreter; 2 hours) following a resumed hearing."

2. At the resumed hearing on 2 June 2021, I heard the submissions of the representatives of both parties. I reserved my decision.

3. My Slatter, who appeared for the appellant, submitted that the appellant had suffered a historic (as opposed to historical) injustice as defined by the Upper Tribunal in *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 351(IAC) (and see above). The headnote reads as follows:

> "A. Historic injustice
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> (1) For the future, the expression "historic injustice", as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now (eg Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17; AP (India) v Secretary of State for the Home Department [2015] EWCA Civ 89).
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> (2) The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.
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> B. Historical injustice
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> (3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.

> C. Part 5A of the Nationality, Immigration and Asylum Act 2002 and the weight to be given to the maintenance of effective immigration controls
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> (4) In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully. Judicial fact-finders should, however, avoid any recourse to double-counting, whereby not only is the weight to be given to effective immigration controls diminished but also, for the same reason, a private life is given more weight than would otherwise be possible by the undiluted application of section 117B(4).
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> (5) The weight to be given to the public interest in the maintenance of effective immigration controls is unlikely to be reduced because of disappointments or inadequacies encountered by individuals from teaching institutions or employers."

He submitted that the appellant fell into a clearly defined class of applicant for leave to remain, that is those applicants for leave who have been victims of injustice perpetrated by the Secretary of State who had now recognised the need to adopt a fair procedure, namely the policies referred to Mr Slatter at [26] of his skeleton argument of 25 February 2021.

4. I do not agree with that submission. First, the operation of the injustice against which the appellant complains does indeed 'depend on the particular interaction between the individual member of the class and the Secretary of State', that is the incorrect refusal of his 2016 application for leave to remain as a Tier 1 (General) Migrant under paragraph 322(5) of HC 395 (as amended). Secondly, Mr Slatter's submission presents a rather circular argument according to which all appellants who fall into the category of victims of 'historical' injustice as defined by *Patel* would also have suffered 'historic' injustice thereby rendering the distinction meaningless. *Patel* indicates that those in the latter category are likely (in the absence of an adverse immigration history) to succeed in an appeal whilst for those in the other category the injustice which they have experienced will be one of a number of factors in the Article 8 ECHR assessment. In other words, the appellant may yet succeed in his appeal under Article 8 ECHR but perhaps not as readily as he would have done had his injustice have been 'historic'.

5. Mr Whitwell, who appeared for the Secretary of State, submitted that the appellant could not meet the long residence requirements on account on account of a gap in continuous lawful residence (see error of law decision above at [4]). Therefore, to succeed the appellant would have to show the existence of very significant obstacles to his return to Pakistan (the appellant speaks Urdu and English) or exceptional circumstances (any private life he has acquired in the United Kingdom had been at a time

when his immigration status had been precarious). Since the appellant's private life should attract little weight in the Article 8 ECHR assessment (Section 117 B(5) of the 2202 Act), the factors favouring the appellant could not outweigh the public interest notwithstanding that the latter may have been diminished by the operation of a historical injustice.

6. Mr Whitwell is correct to say that the decision which is the subject of this appeal concerns an application for leave to remain which the appellant himself appears to acknowledge could not succeed under the Immigration Rules (see error of law decision above at [4]). However, the fact remains that the previous application which the appellant made in June 2016 (for indefinite leave to remain as a Tier 1 (General) Migrant) had been based on 5 years' continuous lawful residence as a migrant in that category. The application was refused on the sole basis of deception under paragraph 322(5); I accept Mr Slatter's submission that, now that the deception allegation has been removed, it follows that the application should have resulted in a grant of leave. Moreover, that application did not attract a right of appeal. I am satisfied that the 'historical' injustice of the 2016 refusal should be treated an exceptional circumstance in the Article 8 ECHR assessment in the appeal against the 2018 refusal.

7. I accept also Mr Slatter's submission that, into whatever category of '*Patel injustice'* any wrongful refusal may fall, 'the respondent is obliged to deal with [the appellant] thereafter as far as possible as if that error had not been made.' The effect of the operation of that obligation is to diminish significantly the public interest attaching to the removal of the appellant; if the injustice had not occurred, then the appellant would now be settled and enjoying indefinite leave to remain. Mr Whitwell did not seek to challenge the new evidence adduced by the appellant at the resumed hearing that the appellant is not and is unlikely to become reliant on public funds (although Mr Slatter accepted that would not act as a positive factor in the appellant's favour). There are no other obvious factors in favour of the appellant or of neutral operation whilst I can identify no circumstance capable of restoring the (significantly diminished) public interest. Upon careful reflection, I find that there exist exceptional circumstances which would result in unjustifiably harsh consequences for the appellant; whilst the appellant could reintegrate into Pakistani society, he would only be obliged to do so, after 14 years living continuously in this country, on account of the respondent's false allegation of dishonesty. Accordingly, I allow his appeal. As Mr Slatter submitted, it will be for the Secretary of State to determine the period of the grant of leave to remain.

Notice of Decision

The appeal is allowed.

Signed Date 3 June 2021

Upper Tribunal Judge Lane