



IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10960/2018

THE IMMIGRATION ACTS

Heard at Field House
On the 20th October 2021

Decision & Reasons Promulgated
On the 17th November 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'AS'

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant:

Ms S Jegarajah, instructed by Greater London Solicitors

For the respondent:

Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 20th October 2021.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Roots, promulgated on 23rd December 2020, by which he dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims. The respondent had refused those claims, in the context of a deportation order having been made against the appellant as a foreign criminal (as defined in section 117D of the Nationality, Immigration and Asylum Act 2002). The appellant had attempted to move to Canada, travelling on a false passport. On 22nd September 2014 he was convicted of two counts of possession or control of identity documents with intent and was sentenced to 12 months in prison. On 10th November 2014 he was served with notice of a decision to make a deportation order under the automatic deportation provisions of section 32(5) of the UK Borders act 2007. Two impugned decisions have been made relating to his subsequent human rights and protection claims, the first on 29th August 2018 and the second, a supplementary decision, dated 20th January 2020.
3. In essence, the appellant's claims involved the following issues: whether the appellant was stateless, having made a statelessness application on 17th November 2017 and whether the respondent had carried out her duties to interview and assess that claim; and whether the respondent's decision to make a deportation order was in breach of article 8 ECHR. Whereas the appellant had previously claimed asylum on the basis that he was a Sri Lankan National, he now claimed not to have been born in Sri Lanka but have been born in Italy where he spent a substantial part of his childhood. He accepted his part in deceiving the respondent, not least the use of a false passport and blamed his mother and uncle for arranging this, despite doing so as an adult. His mother in turn blamed the uncle. The respondent also assessed the appellant's claimed mental ill-health. The respondent rejected the appellant's claims on all grounds.

The judge's decision

4. The judge did not find either the appellant or his mother to be generally credible. The judge considered in particular the appellant's credibility in relation to his asylum claim and rejected it at §§91 to 98. In doing so, the judge took an earlier decision of First-tier Tribunal Judge Lobo, which had rejected the appellant's earlier asylum claim, promulgated on 31st January 2014, as his starting point.
5. At §§99 to 118, the judge considered and rejected the appellant's claim not to be Sri Lankan. He noted the earlier claimed decision of Judge Lobo on the basis that he was a Sri Lankan National. At §183, he cited the authority of CS and others (proof of foreign law) India [2017] UKUT 199 (IAC) for the proposition that the burden of proof rested on the appellant to prove his statelessness. The judge concluded that the question is one fact and judicial notice of foreign law is rarely appropriate, with the norm being the production of expert evidence. The appellant had adduced no such evidence and the judge rejected his claim that he was unable to obtain Sri Lankan citizenship, having previously claimed asylum on precisely that basis. The judge rejected his account of having been born in Italy not Sri Lanka or that he lived from birth until 2003 in Italy.

6. The judge analysed and rejected the appellant's article 3 claim at §§120 to 127.
7. Finally, the judge considered the appellant's article 8 rights at §§128 to 163. In particular, the judge noted that the appellant had arrived in the UK in 2007 and was granted leave until 2012, and therefore had only five years of lawful residence in the UK. The appellant had only relied upon very compelling circumstances in relation to his private life, for the purposes of section 117C of the 2002 Act. The judge concluded that there were not such compelling circumstances.

The grounds of appeal and grant of permission

8. The appellant's grounds of appeal were formulated on a different basis from the renewed grounds, so I do not comment on the first set of grounds, suffice it to say that they were refused. The appellant applied for renewed permission, out of time, on 24th May 2021 on the following grounds:
 - 8.1. first, the hearing was procedurally unfair. The respondent had failed to disclose a relevant policy, specifically the discretionary leave policy which provided that for those granted discretionary leave before 9th July 2012, they would continue to qualify for further leave on the same basis as their original discretionary leave was granted, and normally they would be eligible to apply for settlement after accruing six years' continuous leave. It appeared that Judge Lobo decided the appellant's appeal on the basis that he was granted only two and a half years leave as a minor, whereas he had been granted a longer period of leave as an unaccompanied asylum-seeking child, for whom there were not adequate reception arrangements following a tracing investigation. In his application for further leave to remain, on 17th December 2012, the appellant asserted that he had accrued six years' leave to remain. By the time of the respondent's decision on 7th March 2013, he had, by virtue of his leave being extended by section 3C of the Immigration Act 1971. Nevertheless, he argued that Judge Lobo proceeded on a mistaken assumption that he was not entitled to ILR in refusing the appellant's appeal in 2014.
 - 8.2. The consequence was that had the appellant been granted indefinite leave to remain, this would have been before the appellant's conviction on 22nd of September 2014, so the deportation order that was made on 10th November 2014 was invalid, as the facts on which it was made were wrong. Whether the appellant should have been granted ILR was a relevant factor which should have been weighed in the balance when considering whether to issue the deportation order.
 - 8.3. Had the respondent ascertained that a tracing enquiry had been made, it was likely that that would have involved an interview with the appellant's uncle. This would have resulted in meaningful contact with social services and the mistreatment of the appellant by his uncle (which was said to include the appellant's scarring by his uncle to fabricate a claim of ill-treatment by the Sri Lankan authorities) would have been discovered.

- 8.4. Second the judge's reference CS and Others (Proof of Foreign Law) India [2017] UKUT 00199 (IAC) on the issue of whether the appellant was a Sri Lankan national (he denied he was, having previously claimed to be) to amount to a fundamental misdirection. Leggatt LJ had indicated in KV v SSHD [2018] EWCA Civ 2483 that it was possible for a court or Tribunal to look at provisions of foreign law without the aid of an expert witness. Sri Lankan nationality was derived by descent and if both parents lived born abroad at the time of the birth, the birth had to be registered within one year. The respondent had issued the deportation decision without applying for an emergency travel document, which may well have been rejected by the Sri Lankan authorities. The respondent could have made enquiries either of the Sri Lankan or Italian authorities.
9. Upper Tribunal Judge Hanson granted permission on 26th July 2021. The grant of permission was not limited in its scope.

The hearing before me

10. I make a preliminary observation, without criticism of Ms Jegarajah, but more a concern in relation to the progress of this litigation by her instructing solicitors. This Tribunal and the respondent received amended grounds of appeal by email at approximately 1.57pm, a matter of minutes before the hearing at 2pm, which attached additional documentation running to some 104 pages, including documentation which it is said that Judge Roots had failed to consider. There was no explanation for the lateness of the application. I was satisfied that a fair hearing was possible, after an adjournment; by checking various aspects of the appeal with Ms Jegarajah during the hearing; and by checking with Mr Melvin that he was content to proceed. He indicated that the additional documents were never before the judge and were not relevant. He was able to deal with them by way of submissions.
11. I make the observation to address two issues. First, it is to address a concern that Ms Jegarajah briefly raised, but she did not pursue further, that I might not understand all of the grounds. She raised this in response to my questions of clarification on several points. My questions were necessary, not least because of the appellant's late application to amend the grounds and disclosure. Having sought clarification from Ms Jegarajah, I am satisfied that I was able to understand and determine the issues before me. Second, it is to discourage the practice of making such applications at such short notice, without explanation, in circumstances where the litigation is long-standing. I emphasise that I make no personal criticism of Ms Jegarajah.

The appellant's submissions

12. The first issue had come to light following a response to a Freedom of Information Act ('FOI') request made by the appellant's solicitors to the respondent, which had indicated the grant of leave to the appellant in 2008, and correspondence between earlier solicitors and the respondent. The gist is that the respondent had stated in correspondence, in 2011, that she had granted two and a half years' discretionary leave to the appellant as a minor whereas in fact he had been granted four years'

limited leave. Ms Jegarajah said this longer period must be because tracing enquiries had been made. The respondent's position (set out in correspondence in 2011/12) was that the period of leave was an error (it was too long) but that the respondent was willing to honour the four-year grant of leave. The correspondence was in the additional documentation, not before the judge.

13. I asked Ms Jegarajah when the appellant's solicitors had made the FOI request and the discovery of the correspondence had come to light. She confirmed that the appellant's solicitors had made the request and it was received by the respondent on 22nd December 2014, and the response (with the documents) was date-stamped as received by the appellant's solicitors on 25th March 2015, five years before the hearing with Judge Roots. The import, as Ms Jegarajah accepted, was that not only had the respondent not referred to the correspondence, but her own instructing solicitors had been in possession of them and had not referred to them. Ms Jegarajah accepted that it was only when she reviewed the documents that the significance of the correspondence was apparent. Despite the appellant's solicitors being in possession of the same documents, the respondent had a duty of candour to the Tribunal. The lack of disclosure to the Tribunal was material. Ms Jegarajah cited SL (Vietnam) v SSHD [2010] EWCA Civ 225 as authority for the proposition that past prejudice suffered in consequence of an unlawful decision may be relevant, even if the policy ceased to be in force. SL and UB (Sri Lanka) [2017] EWCA Civ 85 could not be distinguished based on being judicial review applications, as they were statutory appeals. In the latter case, no party had referred the Tribunal to relevant policy guidance relevant to Tamil separatism. While Judge Roots could not be criticised and whilst the appellant's own solicitors were also in full possession of the documents which they now said would have affected the judge's decision, the respondent was under a clear obligation to disclose all documents, including her discretionary leave policy. To the extent that that policy was openly available to the appellant's solicitors on the internet, the respondent should still have drawn it to the judge's attention. If it were argued that the fault lay equally with the appellant's solicitors, the appellant's rights should not be compromised because of any fault on their part.
14. The false premise that both Judges Lobo in 2014 and Roots in 2020 had proceeded on was the basis of the grant of leave on 16th May 2008. While both had also referred to the correct length of leave until 2012, they had not appreciated that he must only have been granted that longer period of four years' leave because tracing enquiries must have been made which indicated that there were inadequate reception arrangements, and no relatives in Sri Lanka. It must be assumed that the respondent would comply with her tracing obligations under the Asylum Seekers (Reception Conditions) Regulations 2005. The lack of relatives in Sri Lanka in 2008, which had resulted in the grant of leave, was also relevant in 2020 when the judge concluded that he had not shown that family members had been in Italy.
15. Moreover, Judges Roots and Lobo had failed to consider that had the appellant had been eligible to apply for, and had previously been wrongly refused, ILR in 2013, as he had the benefit of transitional provisions for those with discretionary leave

granted before 9th July 2012. The six-year period should start from 3rd December 2007, when the appellant had been granted temporary admission, pursuant to paragraph 276A(b)(ii) of the Immigration Rules.

16. The additional consequence of the respondent wrongly refusing the appellant's ILR application in 2013 was that the appellant then may well have chosen not to commit the criminal offence of using a false passport, to emigrate to Canada, as he would not have been subject to the so-called "hostile environment".
17. In relation to the second ground and consideration of the appellant's claimed statelessness, the judge had relied on CS, without considering the more up-to-date guidance in KV that was generally no longer necessary to consult experts in order to conduct legal research and in many jurisdictions, any information would be readily available online.
18. Moreover, the appellant had been in detention for one and a half years and it was likely that the respondent had already applied for an ETD on the appellant's behalf, which she had failed to disclose.

The respondent's submissions

19. The appellant had arrived in the UK on 2nd December 2007 as a minor, with a date of birth of 24th June 1993. His application for asylum was assessed and rejected, but instead of being granted two and a half years' discretionary leave, as standard, he was incorrectly granted four and a half years' leave, in error. The correspondence between the parties referred to in the FOI had made clear the respondent's position that the length of grant was an error but would be honoured.
20. On 17th December 2012, the appellant had applied for further leave which was considered and refused. He had exercised a right of appeal. The appeal of that decision was considered at the hearing on 27th January 2014 before Judge Lobo. The appellant was professionally represented, and a bundle of documents was produced on his behalf. His representatives applied for an adjournment. That was refused. No-one attended on his behalf, but Judge Lobo proceeded and gave a decision on 6th February 2014 which dismissed his appeal and found him not to have provided credible evidence. His appeal rights were exhausted on 19th February 2014.
21. The primary point in relation to the first ground was that the appellant had never been granted six years' discretionary leave under the policy which it is said the respondent, and indeed the appellant's solicitors had failed to disclose. The appellant's solicitors could not have applied on 17th December 2012 for ILR on the basis that he had already been granted six years' discretionary leave in the UK. The appellant could not have benefitted from any transitional provisions relating to grants of leave before 9th July 2012.
22. In relation to the assertion that the respondent had failed to disclose tracing search documents from 2008, even if they existed (which was not admitted), none were relevant to Judge Lobo's decision in 2014 or the 2020 decision. In relation to the 2020

decision, the evidence said to be relied on was over a decade old, and even on the appellant's account, the FOI request had been responded to in 2015. The judge considered and made findings on the issues in relation to the deportation decision; on the protection claim, articles 2, 3 and 8 ECHR and statelessness. The judge was unarguably entitled to consider and conclude that the burden was on the appellant to establish his assertion, only raised in 2017, that he was not Sri Lankan and could not obtain Sri Lankan citizenship. The judge had given reasons why he did not accept the claim that the appellant would be unable to obtain Sri Lankan nationality, and in any event, the judge concluded that the appellant was born in Sri Lanka (§117). In that context, any error (which is not admitted) as to effect of Sri Lankan law on those born outside Sri Lanka was immaterial.

23. On a general point, Ms Jegarajah's assertions that the respondent must have carried out tracing enquiries to reveal a lack of relatives in Sri Lanka, and must have applied for an ETD, were all supposition and bordered on her giving evidence.
24. Any complaints that the appellant's former solicitors had been negligent were not supported by any complaints, for example to the relevant legal regulator. In particular, the judge had considered all the points raised by the appellant, who was professionally represented and who had provided a detailed skeleton argument. Moreover, prior to the hearing before the judge in 2020, the appeal had already been the subject of at least two case management review hearings, at which the appellant's representatives had the opportunity to identify all issues, as well as the 34-page skeleton argument before the judge. In essence, the purported errors were no more than new points that could and should have been by the appellant's representatives, either years before the hearing, in 2015, or before the judge in 2020. The new points were, in any event, not material to the decision.

Discussion and conclusions

25. Dealing with the question of procedural fairness first, on the one hand, I have had regard to the authorities of SL and UB and the respondent's duty of disclosure. I noted Ms Jegarajah's acceptance that the judge cannot be criticised for not considering a point that was never made to him. Taking the appellant's case at its highest, even if the appellant's solicitors were negligent, if the appellant was compromised by an unlawful failure to apply a policy or disclose correspondence, that may remain relevant and if the judge was unaware of the issue because of a lack of disclosure, that may be a procedural error.
26. The flaws in this ground are three-fold. First, it is, in substance, a challenge to the decision of Judge Lobo in 2014, who had expressly referred at §26(b) of her finding to the following:

"26. On the evidence I find these facts:

.....

- (b) Because of his age at the time the appellant was granted discretionary leave to remain until 24th December 2012. On 17th December 2012 the appellant applied for leave to remain in the United Kingdom on asylum and human rights grounds. The appellant relied on the account that he gave in 2008.”

27. There was no appeal of Judge Lobo’s decision, and the substance of this ground is effectively to appeal Judge Lobo’s finding, years out of time. The judge was entitled to take Judge Lobo’s decision as his starting point, and critically, proceed based on a grant of leave for four years, not two and a half, from 2008 to 2012. Any suggestion in the grounds that the judge erred in thinking that the grant of leave was only for two and a half years (although Ms Jegarajah focussed on the reason for the grant) is plainly unsustainable. The period of leave is recorded in the judge’s decision at §3:

“The immigration history in brief summary only:

- (c) He was granted discretionary leave until December 2012.”

28. Second, I emphasise that the appellant not only instructed lawyers but was professionally represented, by Counsel, with very detailed submissions, and I have those submissions of 21st November 2020. The timing and length of the grant of leave, from 2007 on temporary admission, to 2013, was clear to all parties and the judge. Any argument about the application of the transitional provisions for grants of leave prior to 9th July 2012, was clearly open to the appellants’ representative to have made. This was not prevented by the lack of disclosure. Rather it was simply a question of how the appellant, with professional legal representatives, chose to pursue the focus of his appeal.
29. Third, I turn next to the question of whether there was a qualitative difference in the reason for the grant of leave, and the effect of that issue not being pursued before the judge. This is based on correspondence between the appellant’s solicitors and the respondent, which was served by email in a supplementary bundle at 13:57pm, three minutes before the start of the hearing before me at 14:00pm. The appellant’s failure to serve the bundle earlier is unexplained. At pages [2] to [9] is the FOI correspondence in the period 21st March 2011 to 17th December 2012. It makes no reference to tracing enquiries or adequate reception arrangements. It simply deals with the period of leave having been granted; an error in the appellant’s favour, which the respondent agreed to honour. It supports Mr Melvin’s contention that there was a simple mistake.
30. Ms Jegarajah argued that the period of leave must have been because the appellant was an accompanied asylum-seeking child in respect of whom there were not adequate reception arrangements and so the respondent must have made enquiries in Sri Lanka. I accept the force of Mr Melvin’s submission that in essence, this is speculation. There is a supposition that because the grant in question was for a specified period and the appellant was defined as an unaccompanied asylum-seeking child, in those particular circumstances there must have been tracing enquiries which were fruitless. However, as was readily apparent from the original documents themselves, the correspondence made clear that the grant had been made

in error, but she was willing to honour the grant. The appellant's appeal on this basis is also unsustainable.

31. Turning to the second ground and the issue of statelessness, once again, there is the submission by Ms Jegarajah that at least part of the assessment was flawed because the respondent failed to disclose the results of an ETD application which must have been made. I regard that also an unsustainable, speculative submission.
32. Turning finally to the point around the authorities of CS and KV, to which I have been referred, the first point is that the appellant was legally represented and there was nothing preventing him from obtaining expert evidence. Moreover, it ignores the point that the statutory provisions cited in the grounds related to children born outside Sri Lanka, whereas the judge concluded that the appellant had been born in Sri Lanka. In the circumstances, the point is immaterial to the judge's conclusions on statelessness.
33. In summary, the grounds are not sustained, and the judge did not err in law, such that it is appropriate to set his decision aside.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law, such that it is appropriate to set his decision aside. The decision of the First-tier Tribunal stands.

The anonymity direction continues to apply.

Signed *J Keith*

Date: 5th November 2021

Upper Tribunal Judge Keith