



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers:
UI-2022-002409 HU/52674/2021
UI-2022-002402 HU/52675/2021
IA/07051/2021 & IA/07054/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 12 December 2022**

**Decision & Reasons Promulgated
On 28 February 2023**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MR ASHIK BIPINCHANDRA DUDHIA
MRS JALPA ASHIK DUDHIA
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Hingora, Counsel instructed by Jein Solicitors
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. By my decision promulgated on 7 November 2022 I set aside the decision of Judge of the First-tier Tribunal Meah promulgated on 9 April 2022. I now remake that decision.
2. The appellants' sole ground of appeal is that set out in section 84(2) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"); that their removal from the UK would be unlawful under section 6 of the Human Rights Act 1998. They contend that their removal would violate Article 8 ECHR.
3. It is not in dispute that the appellants' have a private life in the UK as well as a family life with their son (who has limited leave to remain) in the UK that engages Article 8 ECHR. The issue in contention is whether their removal from the UK would represent a disproportionate interference with their private and family life.
4. Although I have not summarised, in this decision, the (helpful) submissions of Mr Hingora and Mr Clarke, I have considered them carefully and they are reflected in the analysis below.

Background

5. The appellants are a husband and wife from India who have been in the UK since 2008 and 2009 respectively. They have an adult son (born in 2002) who has limited leave to remain.
6. The appellants' immigration history has been the subject of considerable judicial consideration and it is not necessary to set it out in full. In summary, the family were initially dependent on the first appellant's leave as a student and then became dependent on the second appellant's leave as a Tier 2 (General Migrant). On 28 July 2017 an application by the second appellant to extend her leave was refused on the basis that her sponsor's licence had (unbeknownst to her) been revoked.
7. After over a year with no leave (and no application pending) in September 2018 the first appellant, and in October 2018 the second appellant, applied for ILR. Their applications were unsuccessful. They appealed to the First-tier Tribunal. Judge of the First-tier Tribunal Ruddick allowed the appeal on the basis that it would not be proportionate to require the family to leave the UK at a crucial point in the education of their son.
8. Following Judge Ruddick's decision, the appellants were granted limited leave outside the Rules until 3 December 2020. They both applied (in time) for further leave. These applications were unsuccessful. They appealed and the matter came before Judge of the First-tier Tribunal Meah who, in the decision that I set aside and am now remaking, dismissed the appeals.

9. Judge Ruddick's decision is the authoritative assessment of the situation at the time of the decision and it is my starting point. However, there have, since that decision, been at least two significant changes which mean that it is of only limited assistance in determining the appellants' article 8 claims. Firstly, at the time of Judge Ruddick's decision the appellants had a child under 18 studying for his A-levels whose best interests lay in the appellants being granted leave for long enough for him to complete his A-levels. In contrast, the appellants' son is now no longer a minor and has completed his A-levels. The second change is that since Judge Ruddick's decision the Supreme Court has decided *Pathan, R (on the application of) v Secretary of State for the Home Department* [2020] UKSC 41, which has a direct bearing on the weight that ought to be given to the issues (discussed below) relating to the refusal of leave on 28 July 2017.

Findings of Fact

10. Judge Ruddick found the appellants to be credible witnesses: paragraph 70 of his decision. I reached the same conclusion. The first appellant, when cross-examined by Mr Clarke, gave his evidence in a candid and clear manner. The second appellant's evidence was not challenged.
11. I find that the circumstances relating to the appellants' family and private life in the UK are as follows:
- (a) The appellants speak English and have resided in the UK for a long time (well over a decade). Both are working: the first appellant in a warehouse and the second appellant as a beautician. They have conscientiously sought to comply with the Immigration Rules but there is a significant gap in their lawful residence (following the refusal decision on 28 July 2017).
 - (b) The appellants financially support their adult son, who has limited leave to remain in the UK, and fund his (expensive) University education.
 - (c) The appellants have spent most of their life, and have family, in India.
 - (d) The appellants would not be able to fund their son's education, as they do now, from India, at least in the short-term whilst they are establishing themselves and finding employment opportunities.
12. In respect of the refusal of leave on 28 July 2017, I find as follows:
- (a) On 5 September 2016 the second appellant applied in time (amending a previous application) for leave to remain as a Tier 2 migrant.
 - (b) On 28 July 2017 the application was refused on the basis that her sponsor's licence had been revoked.

(c) The second appellant first learned of the sponsor's licence being revoked when she received the decision refusing to extend her leave of 28 July 2017. However, the sponsor's licence was revoked over 50 days prior to this.

13. It is common ground that the events described above involved the appellants being affected by a wrongful operation by the respondent of her immigration function and being treated in a way that was procedurally unfair. This is because there was a duty on the respondent to notify the second appellant promptly about the revocation of her sponsor's licence. Given that her sponsor's licence was revoked over 50 days before her application was refused, prompt notification would have given her an opportunity to take make alternative arrangements, such as to find a new sponsor or to vary the application to make a human rights claim. This is explained in paragraphs 131-132 of *Pathan*:

131. We are of the view that the duty to give notice of a decision to someone who will be adversely affected by it cannot be defined solely by the consideration that it is pointless for that person to make representations with a view to reversing or avoiding the effect of the decision. The duty to give notice is an accepted element of the duty to act fairly. Three months elapsed between Submania's sponsor's licence being revoked and the refusal of Mr Pathan's application. It cannot be suggested that informing him promptly of the revocation of the licence when it had been cancelled would not have made a difference.

132. The options that would have become available to Mr Pathan have been discussed at paras 100 to 105 and 113 to 114 above. To have the three months extra in which to explore those options that prompt notification would have afforded him would have made a difference. That conclusion does not rest on any estimate of his likely success in pursuing any of the chances that opened up for him. Nor does it depend on a view as to whether he would have sought to follow up on any of them. The cornerstone here is procedural fairness. What was the fair thing to do, procedurally? In our judgment, it was to tell Mr Pathan as soon as reasonably possible after the cancellation of Submania's licence that this had happened. He would then have known that his application in its current form was bound to fail."

14. Following the refusal of leave on 28 July 2017 the appellants believed that, in accordance with their instructions, their then law firm, Malik Law Chambers (which has since been closed down) made an Administrative Review application. They also relied on Malik Law for advice and representation with respect to how best to proceed in the light of the decision of 28 July 2017. It is common ground that they received poor advice.

Proportionality under Article 8 ECHR

15. It was common ground before me that the appellants have a private and family life in the UK for the purposes of Article 8 ECHR, such that the issue to resolve is whether their removal would be proportionate.
16. It was also common ground that the appellants are unable to meet the conditions of any route to leave to remain under the Immigration Rules. This is clearly the case as: (i) the appellants are not entitled to ILR under para. 276B because their continuous lawful residence ended on 28 July 2017 (before they had accrued the necessary 10 years); (ii) they do not come close to meeting any of the “private life” conditions under para. 276ADE(1) (in particular, their circumstances fall a long way short of the “very significant obstacles to integration” threshold); and (iii) as the family life that they enjoy in the UK is with a person who has only limited leave to remain there are no provisions in Appendix FM that they can rely upon.
17. I now undertake a balancing exercise, weighing factors for and against the appellants (having regard to the relevant considerations enumerated in Part 5A of the 2002 Act).
18. Weighing against the appellants is the public interest in the maintenance of effective immigration controls (as specified in section 117B(1) of the 2002 Act). This public interest is not fixed, and can be reduced (and even given no weight at all) in certain circumstances: see *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351(IAC). For the reasons explained above (in paragraphs 12 and 13 above), the appellants were treated by the respondent in a procedurally unfair way on 28 July 2017 with the consequence that they lost an opportunity to take steps that might have meant that they did not cease to have leave on that date. An effective immigration system (and one that enjoys public confidence) is, in my view, one in which people are treated procedurally fairly. I therefore find, with respect to their leave ending in July 2017, that the public interest in effective immigration controls does not weigh against them.
19. However, it does weigh against the appellants that they failed to take timely steps (e.g. by making a timely application) once their leave ceased. I recognise that they received poor advice from (and were let down by) their representatives; but, for the reasons explained in para. 30 of *Mansur (immigration adviser's failings: Article 8) Bangladesh* [2018] UKUT 00274 (IAC), it does not follow from this that the public interest in effective immigration controls is reduced.
20. Accordingly, the public interest in effective immigration controls does, to an extent, weigh against the appellants because the procedural unfairness in July 2017 does not fully justify the period of over a year in which they lived in the UK without leave and without making an application to regularise their situation. Considering all of the circumstances, I am of the view that some, but only little, weight attaches to the public interest in effective immigration controls.

21. As the appellants are employed and speak English, the public interests identified in sections 117B(2) and (3) of the 2002 Act do not weigh against them: they are neutral considerations.
22. I now turn to the appellants' side of the scales. They have spent a considerable amount of time in the UK, engaging in work and education, and have undoubtedly, during that time, established a private life. They have also strived to adhere to immigration law. However, their private life was established when they were in the UK with a precarious immigration status. Therefore, in accordance with section 117B(5) of the 2002 Act, I attach only little weight to their private life.
23. The appellants enjoy a family life with their adult son, who is studying at university in the UK (funded by them). However, their son has only limited leave to remain. Their relationship with their son can continue in India: with him visiting during holidays or continuing his education there. Their son's education might be hindered following their removal due to the impact on funding, but Article 8 does not protect a right to be educated in the country of a person's choice or require the UK to grant leave so that a person can work and provide their adult child with material support. The appellants' relationship with their son is not a factor to which I give any weight in the proportionality assessment.
24. In conclusion: in the Article 8 proportionality assessment, on the respondent's side of the scales is the public interest in the effective immigration controls. For the reasons explained above, the particular circumstances of this case are such that I attach significantly less weight than would normally be the case to this public interest. I give it some, but little, weight. There are no other public interests weighing against the appellants.
25. On the appellants' side of the scales is their private life in the UK, to which I attach little weight.
26. Balancing the two sides of the scales (both of which have little weight attached to them) I reach the conclusion that, in this case, the appellants' private life in the UK outweighs the public interest in effective immigration controls. Removing the appellants from the UK would, therefore, constitute a disproportionate interference with their Article 8 ECHR rights.

Notice of Decision

27. Having set aside the decision of the First-tier Tribunal, I remake the decision by allowing the appellants' appeal on human rights grounds.

Signed

D. Sheridan

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UI-2022-002409 HU/52674/2021
UI-2022-002402 HU/52675/2021

Upper Tribunal Judge Sheridan

Dated: 28.12.2022