



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18542/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 26 January 2015

Decision Promulgated
On 02 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**JAKISHNANKUMAR DEVJIBHAI CHAUHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Aspinall counsel instructed by HSK Solicitors
For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge J D L Edwards promulgated on 4 July 2014 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 24 May 1965 and is a national of India. The Appellant came to the United Kingdom on 12 August 2003 with leave to enter as a work permit holder with leave valid until 27 July 2008. He returned to India and sought re entry on 12 August 2009 on a basis which is unclear. He was served with a notice of his liability to detention and removal as an overstayer. He made an invalid application for leave under Article 8 on 15 September 2009 and a renewed application on 29 September 2009 which was refused on 26 January 2010 with no right of appeal. He made a further application for leave outside the Rules on 9 February 2011 which was refused on 10 March 2011 with no right of appeal. On 5 January 2012 a reconsideration of the Appellant's application was requested and a number of letters dated 13 November 2013, 9 December 2013 and 27 January 2014 provided medical evidence in support of his claim that removal would breach his human rights. The application was refused in a letter dated 3 April 2014 and removal directions dated 3 April 2014 were issued.
4. The reasons given in the refusal letter can be summarised as follows:
5. The medical conditions suffered by the Appellant did not reach the high threshold required to engage Article 3 as set out in N v the Secretary of State for the Home Department [2005] UKHL 31. India has a functioning medical system which although not comparable to that in the United Kingdom was adequate for the nature of the Appellant's conditions especially given that he has a number of family members in addition to two sons and a daughter who are well qualified medical professionals who could support him on his return. Medication for diabetes, tinnitus, and dermatitis are also available in India. There is limited evidence to support the claimed mental health problems beyond a GPs letter suffered by the Appellant but even if he suffers from depression there are mental health services available in India.
6. The Appellant does not meet the requirements of paragraph 276ADE.
7. There is nothing about the Appellants circumstances that would warrant a grant of leave outside the Rules.

The Judge's Decision

8. The Appellant appealed to the First-tier Tribunal. He heard submissions from the Appellant's representatives about which Rules to apply relying on Edgehill & Another v SSHD [2014] EWCA Civ 40 given that the application in issue was made prior to 9 July 2012 and he found that the decision in that case irreconcilable with Haleemuddeen v SSHD [2014] EWCA Civ 558 and therefore out of an abundance of caution decided to deal with the case both under the old and new versions of the Rules. The Judge found that the Appellant could not meet the requirements of paragraph 276 ADE. He then turned to Article 8 applying the questions set out in Razgar and found that the Appellant had no family life in the United Kingdom. In relation to his private life he found that illegal work and being treated by the NHS was an insufficient basis to engage the protection of the Human Rights Convention. He nevertheless went onto assess the proportionality of the decision in the event that he was wrong. Taking into account the extent and nature of the Appellant's illnesses he

found the decision to be proportionate. First-tier Tribunal Judge Edwards (“the Judge”) dismissed the appeal against the Respondent’s decision.

9. Grounds of appeal were lodged and the application was refused. The application was renewed before the Upper Tribunal and on 13 October 2014 Upper Tribunal Judge Chalkley gave permission to appeal stating that while the Appellant had not dealt with Article 3 given the availability of medical care in India it was difficult to see how that ground could succeed; that the Judge had not dealt with Edgehill or the medical aspects of the Appellant’s claim adequately.
10. At the hearing I heard submissions from Ms Aspinall on behalf of the Appellant that in essence:
 - (a) The Judge had failed to deal with Article 3 as there was no mention of it in the determination.
 - (b) The Judge had failed to address the issues raised in Edgehill adequately. The Rules that should have applied were those that prevailed at the date of the decision.
 - (c) The approach to Article 8 was inadequate. The medical evidence had not been properly dealt with or the limited access and quality of health care nor had he addressed the issues of reintegration given the length of his stay in the United Kingdom.
11. On behalf of the Respondent Mr Mc Vitie submitted that :
 - (a) The grounds had no merit.
 - (b) The Appellant had come to the United Kingdom and overstayed then made use of the NHS and asked to remain on that basis.
 - (c) This was an application that could only ever succeed outside the Rules either before or after 9 July 2012.
 - (d) He accepted that the Judge had not dealt with the claim under Article 3 but submitted the error was not material as the Appellant had no life threatening conditions.
 - (e) In relation to the assessment made under Article 8 he submitted that the Appellant had access to medical care in India and was able to travel to obtain it.
 - (f) He submitted that in the balancing exercise the Appellant had no family life, no evidence of a private life other than his engagement with the NHS, could not speak English and had therefore integrated to only a limited degree, contributed little to the United Kingdom. The only thing on the other side of the balance was the length of his stay in the United Kingdom.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

13. I have considered Ms Aspinall's submissions in relation to the first ground that the Judge had failed to engage with the argument that the Respondent acted unlawfully by refusing the claimants leave to remain by reference to the new Immigration Rules incorporated by HC 194 (the "new Rules") which came into effect on 9 July 2012 when the claimants' application for leave was made prior to that date relying on the authority of Edgehill and the old Rules should have been applied.
14. The Judge in this case noted that the Appellant's argument as advanced by counsel was that '*the Appellant should have had the benefit of the more liberal transitional provisions allowing a full consideration under Razgar.*' He also noted that counsel failed to refer to the later Court of Appeal decision taken in Haleemuddeen where a differently constituted court had arrived at a different conclusion in relation to the same issue. He therefore concluded that out of an 'abundance of caution' he would carry out such an Article 8 assessment guided by the case of Razgar.
15. I am therefore satisfied that any failure in the Judge's decision to adequately engage with the Edgehill argument was not material to his decision as the Appellant's case at its highest was only on the basis of leave outside the Rules under Article 8, this was the basis of his application to the Respondent and this is what the Judge considered. This Appellant accepted that he was unable to meet the requirements of the Rules either before or after 9 July 2012 and thus it was always an application for leave outside the Rules based on his medical circumstances. This was assessed in depth in the refusal notice under the heading of 'exceptional circumstances' in accordance with the two stage process of considering Article 8 claims carried out by the Respondent after 9 July 2012 but also by the Judge as part of his assessment under Article 8 on the basis of the guidance in Razgar.
16. The second ground is that the Judge failed to make findings under Article 3 which had been part of counsel's submissions at the hearing and in her skeleton argument. The decision does not record any submissions or findings in relation to Article 3 and the failure to engage with that submission is an error of law. However I am satisfied that the error was not material to the outcome of the decision as this was an argument that was doomed to fail. The Judge set out the list of the Appellant's ailments at paragraph 16 and these were in essence: tinnitus, frequency of micturation caused by TB, osteoarthritis, an umbilical hernia, diabetes, dermatitis and conjunctivitis, jaundice and mental instability. Any Article 3 claim would have to take account of the guidance in N [2005] UKHL 31 where the House of Lords upheld the Court of Appeal's decision and effectively shared and in some ways went further than the views expressed by the majority. The House of Lord's said that the test in this sort of case was whether the claimant's medical condition had reached such a critical stage (ie the claimant was dying) that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he was dying. The fact that he would be deprived of medical treatment which would otherwise prolong his life is not the main consideration. Lord Brown pointed out that the additional factor which set D v UK [1997] 24 ECHR in contrast to more recent cases was that D had no prospect of medical and family support on return. Reference was made by the grounds to GS and EO (Article 3 – health cases) India [2012] UKUT 00397(IAC) but this does not support the Appellant's case as it makes clear that any extension of the principles set out in N will be for the higher courts.

17. There was nothing in the evidence before the Judge to suggest that the Appellant while suffering from a number of conditions was suffering from anything untreatable or was dying. I do not consider that any of the ailments suffered by the Appellant either singly or cumulatively reached the high threshold set in Article 3 caselaw particularly given the availability of medical treatment in India.
18. The final ground of appeal suggests that the Judges assessment of his Article 8 claim given the background material about the availability, accessibility and quality of health care in India was inadequate. I remind myself what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): *“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.”*
19. In this case the Judge had set and the undisputed immigration history of the Appellant and took this into account as underpinning his assessment under Article 8 when applying the guidelines set out in Razgar: he was a 49 year old man who had lived the vast majority of his life in India until he came to the United Kingdom in 2003 as a work permit holder. Between 2003 and 2008 he had returned to India on two occasions for medical treatment. From August 2009 his stay in the United Kingdom had been illegal. He was found working in 2013 illegally in a restaurant. He has no close family in the United Kingdom other than a brother who he has fallen out with and does not apparently speak English. He has close family in India with whom he maintains contact. The Appellant does not meet the requirements of the Rules prior to 2012 for leave nor did he meet the Rules after 2012 for leave based on his Article 8 claim. His claim was based on the fact that he has a list of illnesses for which he has received free treatment by the NHS.
20. The Judge succinctly set out these factors in the proportionality exercise at paragraphs 21-23 of his decision. He stated that medical facilities were available in India for although the grounds suggest he failed to take into account the COIS at paragraph 23 this is exactly what the COIS records: the facilities may not be free as they are in the United Kingdom, they may not be of equivalent efficacy but they are available. Although he made no reference to relevant caselaw he could have gone further and relied on Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC) where the court said in paragraphs 44-45 :

“44. The correct approach is for the judge to have regard to every aspect of the claimant’s private life here, as well as the consequences for her health of removal, but to have in mind when striking the balance of proportionality that a comparison of levels of medical treatment available is something that will not in itself have any real impact on the outcome of the exercise. The judge must recognise, as did Judge Saffer, that it will be a rare case that succeeds where this is an important aspect of the claimant’s case.

45. Put another way, the consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country, are plainly relevant to the question of proportionality. But when weighed against the public interest in ensuring that the limited resources of this country’s health service are used to the best effect for the benefit of those for whom

they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal."

21. As indicated above the Appellant's argument in this case had less force given the availability of treatment in India and the finding that he had close family members there who could support him.
22. Taking all of the evidence into account that was before him I am satisfied that while the reasons given by the Judge may not be extensive the decision as a whole makes sense, having regard to the material accepted by the Judge. It was open to the Judge to conclude that removal was in this case proportionate to the legitimate aim of ensuring that the limited resources of the United Kingdom's National Health Service were used for the benefit of those for whom it was intended.

CONCLUSION

23. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

24. **The appeal is dismissed.**

Signed

Date 2.2.2015

Deputy Upper Tribunal Judge Birrell