



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

Appeal Numbers: HU/02367/2018
HU/02360/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice

On 18th February 2019

**Decision & Reasons
Promulgated**

On 21st February 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**MANJINDER KAUR
SUKHJINDER SINGH
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Rana of Counsel, instructed by Marks & Marks Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge I F Taylor promulgated on 5 September 2018, in which the Appellants' appeals against the decision to refuse their human rights claims dated 27 December 2017 were dismissed.

2. The Appellants are nationals of India and are twins born on 7 January 1994. They originally made applications for indefinite leave to enter the United Kingdom on 7 July 2011, to join their father, pursuant to paragraph 297 of the Immigration Rules. Those applications were refused by the Respondent on 13 September 2011, but successful on appeal in a decision promulgated on 6 February 2012. There was no further appeal by the Entry Clearance Officer or the Respondent against that decision, however entry clearance was not issued to either of the Appellants and instead their applications were refused again on 11 October 2012, albeit the decisions were not received until 25 February 2013. For reasons which are unexplained, it appears that one of the Appellants, Sukhjinder Singh sought Judicial Review of that decision and the other, Manjinder Kaur appealed the decision.
3. In an order dated 21 July 2014, Michael Fordham QC sitting as a Deputy High Court Judge, on the application for Judicial Review, quashed the Respondent's decision dated 11 October 2012. Ms Kaur's appeal against the same decision was allowed by Judge of the First-tier Tribunal O'Garro in a decision promulgated on 22 August 2014 with the direction that the Entry Clearance Officer grant the Appellant entry clearance.
4. The Appellants were granted entry clearance to the United Kingdom on a multi-visit visa basis between 21 November 2014 and 14 August 2017. The nature of the entry clearance granted was not challenged by either appellant prior to a letter from their solicitors dated 19 July 2017 claiming a case working error as to the nature of the visas granted which was not appreciated at the time. A request was made for settlement with indefinite leave to remain as initially sought by the Appellants.
5. Presumably having had no response to the request on 19 July 2017, the Appellants applied for further leave to remain on human rights grounds on, according to the Respondent's decision, 16 August 2017 (albeit there is a dispute about the date upon which the applications were made) and refused on the basis that the Appellants applied at a time when they were overstayers and could not meet the requirements of the Immigration Rules either under Appendix FM or paragraph 276ADE for a grant of leave to remain. The Respondent did not consider that there were any exceptional circumstances outside of the Immigration Rules.
6. Judge I F Taylor dismissed the appeals in a decision promulgated on 5 September 2018 on human rights grounds. In summary, the First-tier Tribunal found that there was insufficient evidence of a previous grant of indefinite leave to remain to the Appellants (in particular no copies of any application forms, refusal letters or records from the Respondent were available) and the Appellants could not succeed under the Immigration Rules. It was not accepted that the Appellants had established family life in the United Kingdom, although it was accepted that they had established private life here, their removal from the United Kingdom would not amount to disproportionate interference with their right to respect for private life under Article 8 of the European Convention on Human Rights.

The appeal

7. The Appellants appeal on two grounds. Firstly, on the basis that the First-tier Tribunal failed to appreciate that the Appellants' initial entry clearance applications were for settlement under paragraph 297 of the Immigration Rules and there was sufficient evidence before the First-tier Tribunal to show that they had been successful on appeal and in the application for Judicial Review on that basis, such that they should have both been granted indefinite leave to remain without the need for any further application to extend the leave. In these circumstances, there would be no public interest in the Appellants' removal, which is highly relevant, although accepted not be determinative, of the proportionality balancing exercise and therefore the outcome of the appeal on human rights grounds.
8. Secondly, that the First-tier Tribunal erred in finding that the Appellants' applications for further leave to remain were made on 16 August 2017, therefore two days out of time and refused under the Immigration Rules for that reason (amongst others). Pursuant to paragraph 34(2) of the Immigration Rules, the date of application is the date of posting, not the date of receipt and therefore the applications were made when the Appellants still had extant leave to remain.
9. At the oral hearing, Mr Rana highlighted the evidence supporting the Appellants' applications for settlement under paragraph 297 of the Immigration Rules and the findings in their favour on this point in both the statutory appeal and Judicial Review application in 2014; which he submitted created a legitimate expectation for the Appellants to be granted indefinite leave to remain. As to the second ground of appeal, it was submitted that there was an error in the findings as to the timeliness of the application, albeit accepted that this was only one of several grounds for the refusal of the applications and not the strongest ground in this onward appeal.
10. On behalf of the Respondent, Mr Bramble submitted that in relation to the issue of whether the correct leave had been granted, the issue is whether the error was a material. The second ground of appeal in relation to timeliness, even if an error, was clearly immaterial to the outcome of the appeal.
11. On the first ground of appeal, Mr Bramble's focus in his submissions was that the Appellants could not in fact meet the requirements of paragraph 297 of the Immigration Rules because although their father was in the United Kingdom with the required status here, their mother had been here unlawfully since 2005 and that was clearly the reason why they had left India in the first place. It was submitted that even if a mistake had been made by the Entry Clearance Officer, this would not be determinative because it would be necessary to look at the situation of the mother as

part of the facts in the round and determine whether paragraph 297 of the Immigration Rules actually applied to the Appellants. It is not known what details were before the court in the application for Judicial Review and in particular whether the situation of the mother was known. Similarly, it was accepted that there is no evidence of the Entry Clearance Officer's reasons for any of the decisions made in relation to these Appellants.

Findings and reasons

12. To determine the first ground of appeal, it is necessary to look in more detail at the findings of the First-tier Tribunal on the issue of whether the Appellants should have previously been granted entry clearance for settlement under paragraph 297 of the Immigration Rules. The findings on this point are as follows:

“17. On the evidence before me there is insufficient evidence to suggest that ILR was granted to the appellants previously. The evidence largely consists of assertions and there is no evidence such as application forms and refusal letters or records held by the respondent on the computer for example to assist in determining this issue.

18. Prior to November 2014 decisions made by the respondent were allowed on appeal and despite the ECO not challenging either decision the ECO took it upon him or herself to refuse to issue the entry visa without expressing any grounds why this should be done. The ability to do this can only happen in very limited class of cases where there are cogent and compelling reasons which are given for refusal after the determination of an Immigration Judge. To hold otherwise would have major repercussions as the rule of law would be damaged if the Secretary of State were free to ignore an un-appealed decision by an Immigration Judge. In the final paragraph of the decision dated 20 August 2014 the Immigration Judge directs that the Entry Clearance Officer grant the appellants entry clearance. It seems that following that direction and the findings of the High Court, the respondent's decision dated 11 October 2012 was quashed. There then is the issue, was the respondent in error once entry clearance had been issued from 14 November 2014 to 14 August 2017 and whether that should have been indefinite leave to remain rather limited leave to remain. As stated above the evidence is not very clear about this matter but bearing in mind that the burden of proof is on the appellant. I am not satisfied that they have established that an error has in fact occurred which I should deal with under the proportionality exercise.”

13. At the outset, paragraph 17 of the decision displays a misunderstanding of the Appellants case – it is not that they had previously been granted indefinite leave to remain, it is that they had succeeded on appeal and in an application for Judicial Review against decisions refusing this and

should have been granted indefinite leave to remain as a result. The case is based on there being an error in the entry clearance they were granted in 2014.

14. Although the First-tier Tribunal recognised that it would only be in very limited cases that a further refusal could be given after an un-appealed successful appeal by an appellant, the Judge did not make any reference to the findings of Judge O'Garro in 2014 that there were no such reasons in the present case, there being no new evidence or material considered when the Entry Clearance Officer made to the fresh decisions in 2012 and therefore the Respondent's decisions to refuse entry clearance after succeeding in their previous appeals was found to not be in accordance with the law. It is clear from that appeal decision that the original applications were under paragraph 297 of the Immigration Rules, which are applications for settlement and not just for entry clearance.
15. Further, although the First-tier Tribunal refer to the Respondent's decision in 2012 being quashed by the High Court in the application for Judicial Review, there is no reference to or consideration of the basis upon which that Order was made, which is expressly recorded on the face of the order as follows:

"UPON the Defendant having indicated that she will now secure the grant to the Claimant of entry clearance as the child of a parent present and settled in the UK, pursuant to S297 of the Immigration Rules"
16. I find that the First-tier Tribunal erred in law in reaching the findings in paragraphs 17 and 18 of the decision that there was insufficient evidence to show that the Appellants should have previously been granted indefinite leave to remain, which was against the, albeit limited evidence, before the Tribunal. There was a failure to take into account the detailed reasons given by Judge O'Garro for allowing the appeal in 2014 and more importantly, a failure to take into account the Respondent's express indication that the grant of entry clearance pursuant to paragraph 297 of the Immigration Rules would be secured for Sukhjinder Singh, with liberty for an application for an order to join Manjinder Kaur whose case is materially identical. The combination of this evidence and the fact that paragraph 297 of the Immigration Rules is an application for settlement and not just leave to remain is sufficient to show that the Appellants had a reasonable expectation that they would be granted entry clearance on this basis with indefinite leave to remain. The findings to the contrary having failed to take into account this evidence and the nature of the application made is an error of law.
17. As recognised by the First-tier Tribunal in paragraph 18 of the decision, if the Appellants should have previously been granted indefinite leave to remain, that is a matter which is relevant to the proportionality exercise in a human rights appeal. In this situation there is a clear impact on the public interest in removal relevant to the balancing exercise and the

failure to take it into account when undertaking the same which is material to the outcome of the appeal.

18. I do not accept the submissions on behalf of the Respondent that the error identified above is immaterial on the basis that in fact the Appellants could not have satisfied the requirements of paragraph 297 of the Immigration Rules for two primary reasons. First, in the absence of any evidence from either party about the reasons for refusal of entry clearance or the reasons for the grant which was made in 2014, the submissions were speculation. Secondly, and in any event, this submission seeks to reopen clear findings made in the decisions of the First-tier Tribunal and the Respondent's express position before the High Court in 2014, neither of which were appealed by the Respondent.
19. For the all of these reasons, I find a material error of law on the first ground such that the decision of the First-tier Tribunal must be set aside. It is not necessary to consider the second ground of appeal which was in any event immaterial to the outcome. I indicated the finding of an error of law in summary to the parties at the oral hearing, further to which submissions were made by the parties to enable me to remake the decision under appeal.
20. On behalf of the Appellants, Mr Rana sought to rely on the findings in 2014 to show that the Appellants should have been granted indefinite leave to remain under paragraph 297 of the Immigration Rules at that time. In these circumstances there would be no public interest in their removal from the United Kingdom. Considering the other factors in section 117B of the Nationality, Immigration and Asylum Act 2002, there are no other adverse factors in relation to these Appellants, in particular there is no issue as to the English language ability or ability to maintain themselves. Although there was no direct challenge to the findings of the First-tier Tribunal that the Appellant had not established family life in the United Kingdom, it was submitted that in fact there was subsisting family life with their parents and in any event this must be taken into account as part of their private life. Taking all of these factors together with the unusual history and exceptional features of this case, it was submitted that the removal of the Appellants would be a disproportionate interference with their right to respect for private and family life under Article 8 of the European Convention on Human Rights.
21. Mr Bramble reiterated his earlier submissions that paragraph 297 of the Immigration Rules did not in fact bite on the Appellants' case and in any event in the balancing exercise, it would have to be considered whether the passage of time since 2014 when the Appellants entered the United Kingdom is such that they have developed private life which outweighs the public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002, in particular when little weight is attached to such private life given the precariousness of their status. The Appellants are now adults who could return together to India, potentially with their mother as well who has no leave to remain in the United Kingdom and that

would not amount to a disproportionate interference with her rights under Article 8.

22. In determining the appeal on human rights grounds, I follow the five stage approach in Razgar v Secretary of State for the Home Department [2004] UKHL 27. There was no challenge to the findings of the First-tier Tribunal that Article 8 was engaged, at least in relation to private life, for these Appellants and that their removal would constitute an interference with the same and I adopt those findings. Such interference would be in accordance with the law and necessary in a Democratic society in the interests of effective immigration controls and the economic well-being of the country.
23. The final question is whether the interference is proportionate to the legitimate public aims sought to be achieved, which requires a balancing of the public interest and the Appellants' private life established in the United Kingdom. In undertaking this exercise, I am required to take into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002.
24. In these appeals, I find that at its highest, only minimal weight can be attached to the public interest in removing the Appellants in light of their immigration history and the evidence as set out above in the context of the error of law decision. That evidence is sufficient to establish that the Appellants should have been granted entry clearance for settlement, that is indefinite leave to remain under paragraph 297 of the Immigration Rules, at the latest following the appeal decision and application for Judicial Review in 2014, if not earlier. At the latest in 2014, this was the position that the Respondent had himself expressly accepted in relation to one of the Appellants and there is no distinction at all between the two cases. If the Appellants' had been granted entry clearance in accordance with the decisions of the First-tier Tribunal and High Court in 2014, as the Respondent indicated that he would secure, they would have entered the United Kingdom with indefinite leave to remain and no further application would be required to the Respondent to extend leave. There can be no significant public interest in removing individuals in such circumstances. There are no other adverse factors to the Appellants which would strengthen the public interest in this case under section 117B, in particular the maintenance of effective immigration control falls away for the reasons already given, the Appellants speak English and are not a burden on the state and even if only little weight is to be attached to private life on the basis of the entry clearance which were they were in fact granted, the private life established taken together with the unusual circumstances of these cases would be sufficient to outweigh the public interest in any event. I find that the Appellants' removal from the United Kingdom would be a disproportionate interference with their right to respect for private life under Article 8 of the European Convention on Human Rights for these reasons.

25. Although I have no power to direct that the Respondent grants any particular type of leave to remain to the Appellants following a successful human rights appeal, I would hope that in all of the circumstances of this case, that the Respondent remedies the previous errors and abides by the undertaking given to the High Court in 2014 for the correct leave to remain to be given to both Appellants under paragraph 297 of the Immigration Rules.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake the appeal is as follows:

The appeals are allowed on human rights grounds.

No anonymity directions are made.

Signed
2019



Date 18th February

Upper Tribunal Judge Jackson