



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04749/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 7th May 2019

Decision & Reasons Promulgated
On: 30th July 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Kalidas Keshavlal Parekh
(no anonymity direction made)

Respondent

For the Appellants: Mr N. Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr Jacques M Rene of Counsel, instructed by direct access

DECISION and REASONS

1. The Respondent Mr Parekh is a British Overseas Citizen born in 1970. He was formerly resident in India but has lived in the United Kingdom since 2007. In February 2017 he made an application for leave to remain on human rights grounds. That application was refused, but by its decision of the 31st October 2018 the First-tier Tribunal (Judge Asjad) allowed Mr Parekh's appeal against that decision. The Secretary of State now has permission to appeal against the First-tier Tribunal.

2. Before the First-tier Tribunal Mr Parekh relied on Article 8. He submitted that he could demonstrate there to be 'very significant obstacles' to his integration in India such that the requirements of paragraph 276ADE(1)(vi) were met, and further that 'outwith the Rules' the Secretary of State could not show the refusal of leave to be proportionate.
3. The relevant facts, for the purpose of the appeal before the First-tier Tribunal, were found to be as follows:
 - i) Mr Parekh was born in 1970 and spent his entire life in India up until the point that he left in 2007;
 - ii) He worked in India and speaks fluent Gujarati;
 - iii) His wife and children remain in India;
 - iv) His elderly mother lives in the United Kingdom and had done for some ten years at the date of decision;
 - v) Although he does provide her with some care she is not, as he claimed, dependent upon her;
 - vi) On the 29th August 2007 Mr Parekh surrendered his Indian passport, having been issued with a British Overseas citizen passport. The Indian authorities thereafter required him to register as a foreigner. The Tribunal therefore accepted that he has lost his Indian nationality.
4. Applying those facts to the legal framework the First-tier Tribunal dismissed the appeal 'under the Rules'. It found that Mr Parekh clearly retains family and social links with India such that it could not be said that he faces very significant obstacles. There is no appeal against that decision.
5. In respect of Article 8 the Tribunal said this:

"I do not find that the care that he provides to his mother amounts to a compassionate circumstance for the reasons I have already given. It was his choice to move to the UK in 2008 and not return, and I find that his primary reason for doing so was for work purposes. It is clear from the Appellant's statement when he mentions that his wife has accepted the circumstances because men do go abroad to work - that that was his motive for staying in the UK. He has no right to work and yet even as the date of hearing - he continues to do so. Although the Appellant claims that he is proud of his British heritage, there is little or no evidence of integration. He speaks

minimal English and required an interpreter at court. I accept that there is some evidence of him having done an English course but it is still cost to the taxpayer that he required an interpreter. He had paid tax, but he had been working in breach of the terms of his status and has therefore shown a disregard for immigration laws in that regard. All of these factors are relevant to the proportionality assessment as is my finding that he has lost his Indian nationality. On balance, I find that the latter is a factor that should be given significant weight and that in the balancing exercise the interference with his private life is disproportionate. I therefore allow the appeal under article 8 outside of the rules”

6. The Secretary of State now appeals that decision. Although the grounds of appeal stretch to 12 paragraphs, in reality they make two short points. First, that the decision fails to reflect the public interest as it is expressed in s117B of Nationality, Immigration and Asylum Act 2002. Second, that the decision is vitiated for a lack of reasoning.
7. Following an initial hearing on the 8th March 2019 I issued a written decision indicating that I found both grounds are made out. My reasons are set out below. The hearing was reconvened on the 7th May 2019, when I heard no further evidence, but detailed submissions from the parties. I now give my decision in the appeal.

Error of Law

8. The paragraph cited above, although it makes reference to Mr Parekh’s inability to speak English, contains no analysis of what weight should be attached to his private life. As the grounds point out, section 117B of the Nationality, Immigration and Asylum Act 2002 mandates that decision-makers apply the stipulated public interest considerations in all cases:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent,

because such persons –

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to –

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

9. It is not in issue that Mr Parekh's status in this country is "precarious". His repeated attempts to register as a British citizen were refused by the Home Office and by his order of 18th September 2013 Mr Justice Collins refused him permission to judicially review the last of those decisions, finding that the Secretary of State was entitled to issue the refusal under section 4B(2)(b) of the British Nationality Act 1981. Whilst the parties were in agreement that Mr Parekh may have entered the United Kingdom as a visitor in 2007 it does not appear that he has any leave since. This was clearly a factor of some significance, since it meant, by virtue of s117B (5) that only a "little weight" could be attached to the life that he has established here.
10. In respect of the second ground I am mindful that decision-makers cannot be expected to give detailed reasons for each and every finding that they make. In any reasons-based challenge the test must be whether the party who has lost is able to understand *why* they have lost. In this instance I have no idea why the First-tier Tribunal found the decision to refuse leave to be disproportionate, so I can readily accept that the Secretary of State is equally in the dark. All of the reasons to refuse leave are, on the analysis set out at my §5 above, all outweighed by the fact that Mr Parekh has lost his Indian nationality. No explanation is offered as to why that matter is relevant to the question of whether this decision is unlawful under s6(1) of the Human Rights Act 1998. The determination contains no analysis or findings on what the impact might be on Mr Parekh of such a loss of citizenship. There are for instance no findings on whether the Indian government would readmit him to its territory, or allow him to live there unhindered; there is no consideration of the evidence that Mr

Parekh was previously registered as a foreigner living in India or the possibility that that exercise could be repeated.

The Submissions

11. Mr Rene began his submissions by giving me further background on Mr Parekh's life so far. He is a BOC because his parents were born in Kenya, under British rule. He himself was born in India, and from there he spent many years trying to get recognition from the British authorities. He was issued with an Indian passport in 2001 but by Indian law was required to surrender that passport when he was eventually recognised as a BOC, because India does not recognise dual nationality.
12. He arrived in the United Kingdom in 2007. He was never advised that there were any conditions attached to his entry, specifically that he was not permitted to take employment. He was issued with a National Insurance number and has never had any problem working. It was only when he decided that he would try and bring his wife and children here to join him that he was advised that he would need to apply to convert his 'British Overseas Citizen' status to become a 'British citizen'. That is where his problems started, and how he ended up in the Tribunal.
13. Mr Parekh has attempted to clarify his position with the Indian authorities on a number of occasions. On the 20th May 2009 he wrote to the Ministry of External Affairs Regional Passport Office in Ahmedabad asking them to confirm that he would never have been issued with an Indian passport had they known that he was in fact a BOC. On the 4th July 2013 his then solicitors wrote to the Indian High Commission asking them to confirm whether he was able to regain Indian citizenship. They wrote in the same terms a week later to the Joint Secretary of the Ministry of External Affairs in New Delhi. None of these letters elicited a response. Mr Parekh further describes in his witness statement how he approached the consulate in Birmingham who said that they could not assist and that he had to go to London.
14. Against that background Mr Rene took me to the Home Office policy statement issued in November 2004: the Immigration Directorates' Instructions Chapter 22, Section 2 '*British Passports*'. At paragraph 9 that instructions reads:

“In some cases a BOC will claim that his nationality obliges the UK to allow him to remain. In considering such cases we must be aware that no country routinely accepts non-citizens and that we cannot force a BOC to go somewhere else. There is a balance between those who genuinely find themselves with nowhere to go and those seeking to circumvent the immigration rules.

UKPH [*United Kingdom passport holders*] applicants who make an application for exceptional LTR/ILR and have no claim to remain under the Rules are to be refused unless there are compelling compassionate circumstances present or there is clear evidence of non-returnability”

15. Notwithstanding that this guidance shows its age, with its reference to ‘exceptional leave to remain’, the parties confirmed that it remains in force and that it should now be read to be referring to ‘Discretionary Leave’. Likewise the test of “compelling compassionate circumstances” could be transposed into the language of human rights law and read as “unjustifiably harsh consequences”, or a disproportionate interference with family and/or private life. Mr Rene submitted that both limbs of the test set out in the policy were here satisfied.
16. First, he submitted, there would be unjustifiably harsh consequences for Mr Parekh if he were to be returned to India. He did have a permit to remain in India as a ‘foreign national’ between the 27th August 2007 and the 15th September 2007 but this placed severe restrictions on him. It states on its face that a failure to obtain further permission to remain would render him liable to prosecution for contravention of the Provisions of the Foreigners Act 1946, punishable with imprisonment for a period of five years, a fine and/or expulsion from India. As a registered foreigner he is obliged to report to his local Registration Officer if he wishes to leave his registered address for more than two weeks, providing a full itinerary of the places he intends to visit. If he moves house, or stays in one other place for more than seven days, he must tell the Registration Officer. Failure to do so would render him liable to prosecution.
17. As to the second limb of the test in the policy, Mr Rene points to the various failed attempts to get clarification from the Indian authorities as evidence of his non-returnability. He accepts that the burden of proof is on Mr Parekh, but submits that on the evidence provided, that burden has been discharged.
18. Mr Bramble reminded me that this is a human rights appeal, which I can only allow if I am satisfied that the decision to refuse leave would be a disproportionate interference with Mr Parekh’s private life. The First-tier Tribunal did not make a finding that he shared a *Kugathas* family life with his mother and there was nothing to indicate that this was the case. Applying the public interest considerations in s117B Nationality, Immigration and Asylum Act 2002 it was clear that the public interest prevailed. The tests in the IDI did not assist Mr Parekh since he had not shown that there were compelling compassionate circumstances, or that there was clear evidence of non-returnability.

The Re-Made Decision

19. Mr Parekh brings this appeal under s82(1)(b) of the Nationality, Immigration and Asylum Act 2002:

82 Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where –

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) **the Secretary of State has decided to refuse a human rights claim made by P,**

or

(c) the Secretary of State has decided to revoke P's protection status.

20. His ground of appeal is set out in s84(2):

(2) An appeal under section 82(1)(b) (refusal of human rights claim) **must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.**

21. Section 6(1) of the Human Rights Act 1998 reads:

Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

22. The Convention right relied upon here is Article 8 ECHR. In any case where I must consider Article 8 rights I am obliged to have regard to the public interest considerations set out in s117B Nationality, Immigration and Asylum Act 2002 (set out at my §8 above).

23. I accept and find as fact that Mr Parekh has a private life in the United Kingdom. He has lived here for approximately 12 years now. He has worked, paid tax, made friends and a life for himself. He is close to, and spends a lot of time with his mother, who is now elderly and looks to him for comfort and support. I am satisfied that the decision to refuse leave would amount to an interference with that private life and so Article 8 is engaged.

24. There does not appear to be any dispute that the Secretary of State was entitled, as a matter of law, to take the decision that he has. The question is whether the decision is disproportionate.

25. Mr Rene framed his submissions on proportionality in terms of the Secretary of State's policy: he should succeed if he can show either that there is clear evidence of his non-returnability to India, or that there are compelling compassionate circumstances. If either or both of these two limbs were met, the decision to refuse leave would have to be found disproportionate.
26. The Appellant acknowledges that he bears the burden of proof in establishing that he is unable to return to India, and that the standard is a balance of probabilities. In seeking to discharge that burden he points to the efforts he has made thus far in trying to contact the Indian authorities. I accept that the Appellant, or someone acting on his behalf, has written to the Ministry of External Affairs Regional Passport Office in Ahmedabad (in May 2009), the Indian High Commission in London and the Joint Secretary of the Ministry of External Affairs in New Delhi (both July 2013). I further accept that the Appellant visited the consulate in Birmingham on a date unknown.
27. I am not satisfied that any of these approaches demonstrates a "clear evidence of non-returnability". First, because the letters themselves are not concerned with whether the Appellant is able to return to India and continue to live there with his wife and children. In each of the letters I have been shown the Appellant has enquired about *citizenship*; why is difficult to fathom given that he must have known the answer. As long as he is a BOC he is no longer entitled, as a matter of Indian law, to re-acquire that nationality. Second, because the letters themselves, whilst I do not doubt that they were sent, tell me nothing about the view of the Indian authorities. The most straightforward way for the Appellant to demonstrate his non-returnability to India would be to apply for a visa to re-enter the country. This he has not done. Third, because other evidence in fact indicates that the Appellant would be permitted to enter and remain in India: as he has himself acknowledged, he was permitted to remain there as a 'foreigner' in the period immediately after his recognition as a BOC. Mr Rene was unable to tell me why that period was so short, but on at least one reading of the evidence it was simply because the 15th September 2007 (the date that his 'foreign national' permit expired) was the date that he was due to travel to the United Kingdom. As the evidence stands, the Appellant has not demonstrated that he is unable to return to India.
28. Mr Rene submits that notwithstanding my conclusion on returnability there are here compelling compassionate circumstances. In the United Kingdom the Appellant lives with, and gives meaningful support to, his aging mother. Mr Rene submits that in India he would be subject to significant restrictions on his ability to live freely, for instance to choose his place of residence. As the permit issued to him in 2007 demonstrates, he would not be treated like an Indian national. He would, for instance, have to register his place of residence with the authorities and tell them if he moved.

29. I have given some significant weight to the fact that the Appellant is a British Overseas Citizen, and that he gave up his Indian nationality in the genuinely held belief that this status would entitle him to come and live and work in the United Kingdom. I accept his evidence that when he entered the country in 2007 he was permitted to do so without condition, and that his national insurance number was issued to him upon production of his BOC passport. The Appellant's belief may have been mistaken, but it was honestly held. I accept that he fought all those years to get his BOC status recognised, and left his family behind, because he believed that he was entitled to enter this country and make a better life for himself, his wife and his children. That those hopes have been dashed is no doubt a bitter disappointment for him, and I accept that it may be hard to bear.
30. The First-tier Tribunal accepted that the Appellant has, in the years that he has spent in the United Kingdom, contributed to his mother's care, keeping her company and generally looking after her wellbeing. Whilst it rejected the suggestion that he was her carer, or that she needed him to look after her, the substance of the relationship was recognised. I have attached some weight to that, and I have further taken into account the fact that his return to India would be difficult and upsetting for her, given that she has become used to his presence.
31. I am able to attach only a little weight to the restrictions that might be placed on the Appellant as a foreigner in India. The only evidence I have on this point is the 2007 permit. I do not know whether in practice any of the penalties set out therein are ever actually imposed, or in what circumstances. Moreover I do not accept that a restriction such as having to keep the authorities informed as to your place of residence is a matter that can be said to impinge on an individual's private life in any meaningful way. It is a basic administrative requirement that any state might impose on non-nationals resident there. The Home Office routinely expects foreigners residing here to keep them informed of their address; that cannot rationally be framed as a disproportionate interference with their liberty or privacy within the meaning of Article 8(2). There is no evidence to suggest that a Registration Officer, duly informed of the Appellant's intentions or address, would deny him the right to reside or visit any particular place.
32. Against these factors is the fact that the Appellant would be returning to live in India, where he has lived for most of his life, and where he would be reunited with his wife and children, a wholly positive outcome as far as Article 8 is concerned. The Appellant's loss of his relationship with his mother, and friends that he might have made in this country, must be balanced against that.
33. Having considered all of those facts I conclude that the Secretary of State has discharged the burden upon him and shown this decision to be a necessary and proportionate response to the need to protect the economy. The consequence

for the Appellant is that he will be able to return to India to live with his family. That could not, absent other compelling circumstances, amount to an outcome that could be said to unjustifiably harsh.

34. I record for the sake of completeness that the Appellant has not, before me, put his case on the basis that he is stateless.

Decisions

35. The decision of the First-tier Tribunal contains material errors of law and it is set aside.

36. The decision in the appeal is remade as follows: the appeal is dismissed.

37. There is no direction for anonymity.

Upper Tribunal Judge Bruce
8th July 2019