



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001901
First-tier Tribunal No:
HU/50031/2020
IA/00067/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ANIMESH ROY
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Khan, Counsel instructed by Lexwin Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 22 December 2022

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge T. Lawrence (“the judge”) dated 12 May 2021. The judge dismissed the appeal brought by the appellant, a citizen of Bangladesh born in 1986, against a decision of the Secretary of State dated 24 June 2020 to refuse his human rights claim. The appeal before the judge was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

Factual background

2. The appellant arrived in the United Kingdom with leave to remain on 27 September 2009. On 1 September 2015, when he had accrued approximately five years and eleven months' continuous lawful residence, the Secretary of State rejected his in-time application for further leave, which he had submitted on 6 June 2015 ("the 1 September 2015 decision").
3. The appellant sought to challenge the 1 September 2015 decision by judicial review, but later settled the proceedings by consent. A significant issue in this appeal concerns the impact of the terms on which those proceedings were compromised. On the appellant's case before the judge, the withdrawal of the 1 September 2015 decision meant that his application of 6 June 2015 was yet to be decided. That being so, he remained on leave extended by section 3C of the Immigration Act 1971 ("the 1971 Act") and, by the time of the decision under challenge in these proceedings, had accrued over ten years' continuous lawful residence (presumably on the basis that that would entitle him to indefinite leave to remain under what was paragraph 276B of the Immigration Rules). The Secretary of State's case was that the 1 September 2015 decision had not been withdrawn. The rejection of the appellant's application for leave to remain on 1 September 2015 had the effect of bringing his leave under section 3C of the 1971 Act to an end on that date. The appellant was an overstayer of some vintage by the time of the Secretary of State's decision dated 24 June 2020.
4. The operative terms of the consent order, which was sealed on 30 March 2016, permitted the appellant to withdraw the claim for judicial review and ordered the Respondent to pay his reasonable costs. The recitals to the order provide an insight into the respective positions of the parties and the bases upon which they agreed to compromise the proceedings. It is necessary to set out the recitals in full:

"UPON the Respondent agreeing to withdraw her decision of 1 September 2015;

AND UPON the Applicant agreeing to resubmit his application for leave to remain in the United Kingdom within 14 days following the sealing of this order and pay the appropriate fees;

AND FURTHER UPON the respondent agreeing to treat the application referred to above as 'in Time' and to consider and issue a new decision in relation to the same within three months of the ceiling of this order, absent special circumstances;

BY CONSENT, it is ordered that..."
5. The appellant did not re-apply for leave following his solicitors' approval of the consent order. His case before the judge was that his then solicitors were negligent. They did not tell him he had to make a further application. He had no idea that he had to do so within 14 days, or at all. He went on to make four applications under the Immigration (European Economic Area) Regulations 2016, all of which were refused.
6. The appellant also contended that, as a Hindu returning to Bangladesh, he would face very significant obstacles to his integration, on account of the obstacles and serious difficulties encountered by Hindus in that country. Further,

it would not be in the best interests of his daughter, who was born in June 2020, to return to Bangladesh with him, as that would disrupt the family, and disrupt his wife's studies, which itself would be contrary to her best interests. The appellant's wife is also a citizen of Bangladesh; at the time of the hearing, she had been granted leave as a student until August 2021 (we were told at the hearing that her in-time application for further leave was refused, with an in-country right of appeal; Mr Khan did not suggest that this development affects the issues for our consideration in these proceedings).

The decision of the First-tier Tribunal

7. The judge's operative analysis commenced at paragraph 92 with the consent order issue, citing *R (MMK) v Secretary of State for the Home Department (consent orders - legal effect - enforcement)* [2017] UKUT 198 (IAC). At paragraph 95, the judge found that the recitals to the consent order expressed the Secretary of State's "intention or aspiration" to withdraw the 1 September 2015 decision, the "intention or aspiration" of the appellant to resubmit his application", and the Secretary of State's "intention or aspiration" to treat the resubmitted application as being "in time". Applying *MMK*, he said:

"Following McCloskey J's analysis, with which I respectfully agree, I consider that those expressions of intention or aspiration were neither undertakings to the Tribunal nor inter-parties contractual promises."

8. The material question, said the judge at paragraph 96, was whether the respondent "did act in accordance with its expressed intention or aspiration to withdraw the decision of 1 September 2015." He continued:

"The respondent's position is that it did not withdraw the decision of 1 September 2015, and I do not consider that there is any evidence or other basis on which I could make a finding to the country."

9. The judge found that the appellant's leave came to an end on 1 September 2015 and had not been extended by section 3C beyond that point. He had been in the UK unlawfully since.
10. The judge found that the appellant would not face very significant obstacles to his integration in Bangladesh. He had lived there until he was 23 years old; although he had lived in the United Kingdom for 11 years, he had returned to Bangladesh throughout the period, and retained ties with family who remained there. The best interests of the appellant's daughter were to remain with both parents, which was a primary consideration. The family faced a choice as to whether the appellant's wife and daughter could remain in the UK without him, with him. If they didn't return with the appellant immediately, he would be able to establish himself and obtain accommodation and employment to ensure that the family would be in a better position in the long-term if they did decide to return to the country of their nationality. See paragraphs 104 and 105.
11. In relation to the country materials relied upon by the appellant concerning the position of Hindus in Bangladesh, the Hindu minority was significant in number. The appellant would be able to navigate and mitigate the adverse elements of the treatment of his minority. There was evidence that Hindus had made a significant contribution to Bangladeshi public life, including in politics, government, academia, business, and the arts. See paragraph 107.

GROUNDS OF APPEAL

12. There are four grounds of appeal:
- a. Ground 1: the judge erred by concluding that the respondent had not withdrawn the 1 September 2015 decision. The chronology of the appellant's immigration history in the decision of the Secretary of State that was under appeal before the judge expressly stated that the Home Office had "agreed to reconsider the decision".
 - b. Ground 2: the judge should have considered the lawfulness of the 1 September 2015 decision for himself, irrespective of whether the Secretary of State had withdrawn the decision, in order to consider whether the appellant had suffered "historical injustice".
 - c. Ground 3: the judge failed fully to consider the country background materials pertaining to the discrimination and persecution encountered by Hindus in Bangladesh.
 - d. Ground 4: the assessment of the best interests of the appellant's daughter was inadequate, there was an inadequate Article 8 ECHR proportionality assessment, and the judge erroneously imported the higher standard imposed by paragraph 276ADE(1)(vi) of the Immigration Rules concerning "very significant obstacles" to the "lower threshold" of whether it would be unjustifiably harsh for the appellant to be removed, pursuant to an assessment of Article 8 ECHR outside the rules.
13. Permission to appeal was granted by First-tier Tribunal Judge Parkes on the basis that it was arguable that the judge erred in his approach to the consent order issue. The other grounds, observed Judge Parkes, had considerably less merit, but he did not restrict the scope of the grant.

SUBMISSIONS

14. Mr Khan, who did not appear below, accepted that the judge's analysis of *MMK* was correct in that the recitals to the consent order were non-binding, but focussed his submissions on what he characterised as the Secretary of State's acceptance in the refusal letter of 24 June 2020 that the 1 September 2015 decision had been withdrawn. It was not necessary for the appellant to resubmit his 6 June 2015 application for the 1 September 2015 decision to be withdrawn; as confirmed by the refusal letter, the decision *had already* been withdrawn. Its withdrawal was not conditional upon the appellant resubmitting the application.
15. Very fairly, Mr Khan accepted that there had been no complaints against the appellant's previous solicitors, and that he did not pursue that limb of the appellant's case. He also confirmed, rightly in our view, that he did not pursue ground 2, as the First-tier Tribunal had no jurisdiction to engage in a judicial review of the lawfulness of the 1 September 2015 decision for itself.
16. In relation to ground 3, Mr Khan submitted that although the judge considered the background country materials concerning Bangladesh, he failed to address the subjective elements of the appellant's evidence, concerning his own family's experience of land appropriation, and experiencing persecution within the country.

17. Mr Khan also submitted that the judge's analysis of the appellant's daughter's best interests was flawed. The judge did not address the "real world" context for that assessment, nor the proportionality of an interruption to family life through the appellant having to return to Bangladesh on his own.
18. Ms Everett invited us to uphold the judge's decision. His approach to section 3C leave was sound, and the remaining grounds were disagreements of fact and weight.

DISCUSSION

19. In our judgment, the judge approached the issue of the consent order correctly. As Mr Khan very fairly recognised, the recitals to the consent order were not part of its operative terms and did not give rise to any independent obligations on the part of the Secretary of State, or the appellant. Even if they did, taken at their highest, they merely recorded the "aspiration" (as the judge correctly put it) of the parties that the Secretary of State would withdraw the 1 September 2015 decision, not that the decision had actually been withdrawn.
20. We reject Mr Khan's submission that the 24 June 2020 decision provides confirmation of the 1 September 2015 decision's withdrawal. In our judgment, the 24 June 2020 letter underlines the position: the Secretary of State had agreed to withdraw the decision, but does not demonstrate that it was, in fact, withdrawn. At its highest, that is all the letter said: "the Home Office agreed to reconsider the decision on 22 February 2016". We therefore consider the judge was right to draw a distinction between the Secretary of State's *agreement to withdraw* the decision, on the one hand, and its *actual withdrawal*, on the other.
21. We observe that it is hardly surprising that the Secretary of State did not formally withdraw the 1 September 2015 decision. Her doing so would have to have been catalysed by the appellant resubmitting the application originally submitted on 6 June 2015 (presumably with the correct biometrics) which, of course, he failed to do, and instead went onto submit a number of unsuccessful applications under the 2016 Regulations. There is yet to be a decision of the Secretary of State withdrawing the 1 September 2015 decision.
22. It follows that the appellant's 6 June 2015 application was rejected on 1 September 2015, and his leave under section 3C of the 1971 Act came to an end on that date. Ground 1 is without merit.
23. We do not consider Ground 2 in any depth, in light of Mr Khan's decision not to pursue it. We simply observe that the appellant would face considerable hurdles in demonstrating that he suffered "historic injustice" arising from a decision which he challenged at the time, in circumstances when he compromised the challenge to that decision while legally represented. We also consider that it would be an abuse of the tribunal's process to attempt to mount a *de facto* judicial review challenge before the First-tier Tribunal against a decision which attracted no right of appeal, and in relation to which the only avenue of challenge was by means of an application for judicial review in this tribunal, which the appellant commenced, but later settled.
24. We consider Ground 3 to be a disagreement of fact and weight. The judge correctly directed himself concerning what amounted to "very significant obstacles" and gave reasons that were open to him for concluding that the appellant's reintegration in Bangladesh would not encounter such obstacles. The

judge realistically acknowledged that the appellant could “reasonably be assumed to have lost a degree of familiarity with Bangladeshi society as it is likely to have evolved over time” (para. 104) but reached legitimate findings that whatever the adverse elements of society towards Hindus were (para. 107), the appellant would be well-placed to navigate them.

25. In relation to the “subjective” elements of the appellant’s claim to face very significant obstacles as a Hindu, as Mr Khan put it, the judge recorded the Secretary of State’s submissions that the appellant’s family had remained living in the same part of Bangladesh (para. 75), and that any difficulties likely to be experienced by the appellant or his family were insignificant. It is against that background that his findings at paras 106 to 109 must be viewed; there was no evidence that the appellant would not be able to gain employment, and he would be able to navigate difficulties encountered by the broader Hindu community. Other than broad assertions in his witness statement, there was precious little evidence before the judge concerning the threats the appellant had claimed to face. He had not provided details of the threats he claimed to have received via Facebook (see para. 14 of his witness statement at AB126), or documents from the legal proceedings he claims his family faced as a result of religious discrimination. The judge would have had in mind the concluding remarks of the 24 June 2020 refusal letter, which invited the appellant to claim asylum if he feared persecution in his home country, and the fact the appellant had not done so. The judge dealt adequately with the appellant’s claims to face very significant obstacles in Bangladesh.
26. Turning to ground 4, while the judge dealt briefly with the best interests of the appellant’s daughter, he did so adequately. At the time of the hearing before the judge, the appellant’s wife had limited leave to remain as a student, valid until September 2021. The judge recognised that the best interests of the child were to be with both parents, and that that was a primary consideration. The judge correctly recognised that the appellant and his family have a choice: the appellant’s wife and daughter could choose to return to Bangladesh with him, or they could stay in the UK without him, potentially for a short period until the expiry of his wife’s leave, which was then less than six months after the hearing. The judge identified benefits to the family unit if the appellant were to return ahead of his wife and daughter, in that he would have the opportunity to establish himself before their return. Those were factors that the judge was entitled to consider, and which were not infected by any material omission. There was no error of law in the judge’s analysis of the best interests of the appellant’s daughter.
27. That leaves the remaining analysis conducted by the judge of the broader Article 8 proportionality assessment. The judge’s discussion of this issue was detailed and thorough, from paras 111 to 128. We find the judge took into account all relevant factors. He identified the potential impact on the appellant’s family life in the event the appellant’s wife chose to remain in the UK without him. He directed himself pursuant to the weight provisions contained in section 117B(6) of the 2002 Act. The reality is that the appellant’s private and family life attracted little weight; the appellant had only ever held limited leave to remain. His immigration status has been at best precarious and had been unlawful since 1 September 2015. His wife, Mrs Sudha, is a citizen of Bangladesh, present with limited, and therefore precarious, leave to remain; the fact she held such leave was not capable of weighing significantly against the “normative guidance

relating to the appellant's ineligibility for a grant of leave under the Rules" (para. 126).

28. We reject the suggestion, made in the grounds of appeal, that the judge erred by taking into account his findings concerning the absence of very significant obstacles faced by the appellant in Bangladesh; on the contrary, that was a highly relevant consideration for the judge to take into account (para. 124).
29. Against that background, it was open to the judge to conclude that the public interest in the maintenance of effective immigration controls outweighed the factors militating in favour of the appellant being permitted to remain in the country.
30. Properly understood, grounds 3 and 4 are disagreements of fact and weight and do not demonstrate an error of law.

Notice of Decision

The decision of Judge T Lawrence did not involve the making of an error of law such that it must be set aside.

The appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 January 2023