



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004805

First-tier Tribunal No:
HU/50722/2021;
IA/03663/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated:
On the 17 January 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

CHIRAG SHAMALDAS MALLI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Patrick Lewis, instructed by Kidd Rapinet LLP

For the Respondent: Arifa Ahmed, Senior Presenting Officer

Heard at Field House on 22 December 2022

DECISION AND REASONS

1. The appellant is an Indian national who was born on 9 November 1991. He appeals, with the permission of the First-tier Tribunal, against the decision of Judge Malcolm. By her decision of 27 May 2022, Judge Malcolm (“the judge”) dismissed the appellant’s appeal against the refusal of his human rights claim.

Background

2. I need only set out a summary of the salient parts of the appellant's immigration history. He entered the UK as a student and subsequently acquired leave to remain under Tier 1 of the Points Based System ("PBS"), as a Post Study Work migrant. The appellant subsequently sought to obtain further leave to remain as a student but that application was refused and an appeal against that decision was dismissed by First-tier Tribunal Judge Moore. The appellant was refused permission to challenge that decision. The appellant made further submissions on Article 8 ECHR grounds in 2014 but the respondent refused to treat those submissions as a fresh claim.
3. Then, in February 2020, the appellant made further submissions again, relying on his relationship with his spouse, who was pregnant at that time. She was said to enjoy leave to remain under Tier 2 of the PBS. The letter which was supplied with these further submissions was drafted by the appellant's current solicitors and included, amongst other things, a submission that the dismissal of the appellant's appeal before Judge Moore had been brought about by the incompetence of his previous solicitors and a failure on the part of the respondent to disclose relevant evidence to the FtT.
4. These further submissions were accepted to amount to a fresh claim and were refused on 27 February 2021. The application was refused under Appendix FM of the Immigration Rules because: the appellant's partner was not British; he was present without leave; he did not meet the English language requirement; and because there were no insurmountable obstacles to their relocation to India as a couple. It was not accepted that there would be very significant obstacles to the appellant's integration to India. The respondent did not accept that there were any exceptional circumstances which warranted granting leave to remain outside the Immigration Rules with reference to Article 8 ECHR. She chose not to deal with the argument I have summarised in the final sentence of the preceding paragraph in coming to that conclusion.

The Appeal to the First-tier Tribunal

5. The appellant appealed and the parties filed and served an Appeal Skeleton Argument and a Review, as required by the amended Procedure Rules. The respondent's review contained a response to the historical injustice argument which was advanced by the appellant.
6. The appeal came before the judge, sitting (remotely) at Hatton Cross, on 27 April 2022. The appellant was represented by Mr Lewis, as he was before me, and the respondent was also represented by counsel. Mr Lewis prepared an additional skeleton argument for the hearing. The judge heard oral evidence from the appellant and his wife and submissions from counsel before reserving her decision.
7. In her reserved decision, the judge recorded the concession made quite properly by Mr Lewis that the appellant did not meet the Immigration Rules: [59]. She therefore determined to consider the appeal on an Article 8 ECHR basis only. At [61], she recorded that

Mr Lewis confirmed that the appellant was not relying on the argument which had been put forward that there had been historic injustice but

that this was more of a secondary issue to be considered in the context of the history of the case.

8. At [63], the judge found that the appellant is the primary carer of his daughter, who was nearly two years old at that stage. She accepted, at [64], that this arrangement enabled the appellant's wife to work full time. There would, she found at [65], be an impact on the appellant's wife's ability to work in the event of the appellant's removal. The judge then considered whether the appellant could meet paragraph 276ADE(1)(vi) of the Immigration Rules and concluded at [73] that he could not.
9. The judge then set out Article 8 ECHR and the five stage test in R (Razgar) v SSHD [2004] 2 AC 368, as well as s117B of the Nationality, Immigration and Asylum Act 2002. At [78]-[79], the judge accepted that Article 8(1) was engaged in its family and private life aspects and that the real question was proportionality under Article 8(2).
10. At [80]-89], the judge undertook a consideration of proportionality. That assessment was not undertaken in a 'balance sheet', as suggested in the authorities, and the matters which militate for and against removal are, frankly, somewhat jumbled. The judge noted that the appellant and his wife had always been fully aware of his immigration status: [84] and [88]. She noted that the appellant had been undertaking voluntary work: [85]. At [87], she found that the financial difficulty which the appellant's wife would suffer in the event of his removal was not 'sufficient reason to find that the appeal should succeed'. At [88], the judge concluded that the historical injustice argument did not weigh 'heavily in the balance'. Although she accepted that the appellant had undertaken charitable work, she did not consider that the public interest in removal was outweighed by the matters relied upon by the appellant. So it was that the appeal was dismissed.

The Appeal to the Upper Tribunal

11. There are three grounds of appeal. The first is that the judge failed to provide any adequate reasons for rejecting the historical injustice argument. The second is that the judge failed to undertake any real assessment of the proportionality of the appellant returning to India to apply for entry clearance. The third is that the judge failed to consider the best interests of the child. Permission was granted on each of these grounds.
12. A rule 24 response was filed and served by the respondent, resisting the appellant's appeal.
13. At the outset of the hearing, I asked Ms Ahmed whether (despite the rule 24 response) there was any common ground between the parties. She helpfully asked for an indication of any provisional view I might have formed. I indicated that I was unable to discern any consideration of the best interests of the appellant's child in the decision and that I could not immediately see how it could be said, in those circumstances, that the judge's assessment of proportionality (such as it was) was lawful. Ms Ahmed was content to accept, firstly, that this was an error of law and, secondly, that the decision should be set aside as a result of that error.
14. I indicated that I would find that the judge had erred in law for that reason and that the decision would be set aside. I asked for submissions on relief. Ms Ahmed

was content to leave the matter to me but suggested that the historical injustice argument might justify retention of the case in the Upper Tribunal. Mr Lewis asked for the appeal to be remitted de novo. I reserved my decision on relief so that I could give that question further thought.

Analysis

15. It is quite clear that the judge erred in law as described in ground three. The best interests of a relevant child are a primary consideration in an appeal of this nature and it is a matter of concern that there is no analysis of that statutory question in circumstances in which the judge found, in terms, that the appellant is the primary carer of his young daughter. That error alone suffices to vitiate the judge's assessment of proportionality, as Ms Ahmed quite rightly accepted.
16. The second ground also discloses an error of law. As I have observed above, the assessment of proportionality is somewhat jumbled, and the judge failed to undertake a balance sheet assessment of that question. That is not a requirement, but the value of that methodology has been highlighted in decisions of the courts and of the Upper Tribunal. Had the judge adopted that method of assessment, I suspect that she would not have lost sight of factors which were relevant to the assessment of Article 8(2). It is a matter of concern that the judge failed to consider the public interest considerations in s117B, despite the fact that she set those considerations out in full in her decision. She failed in any meaningful sense to come to grips with the argument which relied on what she described as the 'Chikwamba principal [sic]', by which Mr Lewis contended that the appellant would clearly meet the Rules for an entry clearance application and there was insufficient public interest to justify his 'joining the queue'. The assessment of proportionality is unfortunately wholly deficient.
17. Ground one reveals a further error in the assessment of proportionality, in that the judge gave demonstrably insufficient reasons for resolving the historical injustice argument against the appellant. The argument was, in basic outline, that Judge Moore had erred in finding that the appellant's application for leave to remain as a student was properly refused under Part 9 of the Immigration Rules. Mr Lewis submitted that Judge Moore had erred in failing to realise that the appellant had not studied at Cambridge College of Learning and that he was not caught, therefore, by what was said in NA & Ors (Pakistan) [2009] UKAIT 31. He also submitted that the judge had erred in treating the relevant ground of refusal as mandatory, since deception in a *previous* application resulted in a discretionary refusal.
18. It is quite clear that this argument was not abandoned by Mr Lewis. Whether or not he indicated that it was to be treated as 'secondary' it was clearly a point he made in relation to the proportionality of the decision under challenge and it had to be resolved by the judge. It did not begin to suffice, with respect, for the judge to say merely that it did not weigh heavily in the appellant's favour. The judge was required to consider whether there had been any injustice and, if so, whether it reduced the public interest in the appellant's removal. The failure to consider either question represents a further legal error in the judge's decision.

19. I was initially minded to retain the appeal in the Upper Tribunal in order to consider the arguments in ground one for myself. As Mr Lewis noted, however, the reality of this case is that the judge's assessment is so deficient that the appellant has not had the benefit of a first instance consideration of questions which are highly material to the assessment of proportionality. With some hesitation, but bearing in mind what was recently said by the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512, I have therefore decided to accede to Mr Lewis's request for the appeal to be remitted to the FtT for a de novo hearing.
20. In doing so, however, I should note that I do not necessarily accept the premises upon which Mr Lewis's historical injustice argument is based. Even if the appellant did not study at Cambridge College, he must (it seems to me) still persuade the Tribunal that he believed the certificate to be a genuine one. I do not consider that statement to represent a misdirection on the burden of proof, since this is not a case in which the respondent presently relies on a General Ground of Refusal under Part 9 of the Rules. It is for the appellant to show, in other words, that the finding of fact reached by Judge Moore was incorrect. That is not necessarily a straightforward matter, and it is a question of fact which will need to be considered very carefully on remittal.
21. Even if that point is resolved in the appellant's favour, and even if it is shown that Judge Moore erred in fact and law in 2010, however, I have some difficulty in accepting that such an error on the part of the FtT is material to the assessment of proportionality. As the Upper Tribunal stated in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 3651 (IAC); [2021] Imm AR 355, a 'historical injustice' for Article 8 purposes arises 'where the individual has suffered as a result of the wrongful operation (or non-operation) *by the Secretary of State* of her immigration functions'. The complaint in this case, however, is that the appellant has suffered as a result of an error or errors made not by the respondent but by the FtT. As presently advised, I cannot see how an error made by a court or tribunal might properly be said to diminish the weight which is to be attached to the respondent's legitimate interest in immigration control. This is not, in other words, the paradigm case in which the respondent's erroneous action or inaction serves to reduce or negate the public interest in immigration control.
22. For the avoidance of doubt, I heard no argument on ground one and what I have said in the preceding paragraphs is said in the hope of assisting the FtT on remittal and in the hope of alerting the advocates to what might be thought to be a point which should be addressed on remittal. Nothing I have said in this respect should be seen to bind the hands of the next judge, who will no doubt benefit from full argument on the factual and legal basis upon which this point is advanced and defended.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and is set aside. The appeal is remitted to the FtT to be heard de novo by a judge other than Judge Malcolm.

M.J.Blundell

Appeal Number: UI-2022-004805; **HU/50722/2021**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 December 2022