



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005091

First-tier Tribunal No: PA/00406/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 August 2023

Before

UPPER TRIBUNAL JUDGE NORTON -TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

AA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Stedman, counsel (direct access)
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 26 July 2023

DECISION AND REASONS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Introduction

1. Because this is a protection appeal, we preserve the anonymity direction made by the Upper Tribunal on 06/07/2023.
2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Davey (“the Judge”), promulgated on 28/04/2022, which dismissed the Appellant’s appeal on asylum and article 8 ECHR grounds, but bore to allow the appeal under the Immigration Rules.

Background

3. The appellant is a Pakistani national who was born in the Kingdom of Saudi Arabia on 23/10/1971.
4. (a) The appellant entered the UK in September 2000 with leave to enter as a student. Leave to remain was extended until 30 March 2003. The appellant made an application for leave outside the Immigration Rules on 26 July 2003, which the respondent refused on 14 September 2004.

(b) On 29 April 2004 the appellant claimed asylum. The respondent refused that application on 14 September 2004, but confusion surrounded the service of that decision. In July 2014 the appellant attended an asylum interview, and, on 22 April 2015, the respondent refused the appellant’s asylum application.

(c) The appellant appealed the refusal of his asylum application unsuccessfully. The appellant made an application for leave to remain on article 8 ECHR grounds. On 26 February 2016, his application was rejected. The appellant’s appeal rights were exhausted by 1 March 2016.

(d) On 31 January 2017, the appellant made an application for leave to remain as a stateless person but withdrew his application on 9 October 2017. On 21 November 2017, the appellant made further submissions to pursue a protection claim. The respondent treated those submissions as a protection claim, but refused the appellant’s protection claim on 17 February 2021.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. The Judge dismissed the appeal on Asylum and ECHR grounds, but purported to allow the appeal under the Immigration Rules.

6. Grounds of appeal were lodged and on 06/10/2022 First-tier Tribunal Judge Hatton gave permission to appeal stating,

The grounds assert that the Judge made multiple material errors of law, primarily for allowing the appellant's appeal under the immigration rules based on 20 years residency in the United Kingdom [see p. 6 of 7]. In accordance with section 84(1) of the Nationality, Immigration and Asylum Act 2002 (" the 2002 Act") an appeal under section 82(1)(a) (refusal of protection claim) can only be brought on one or more of three grounds: (a) that removing the appellant from the UK would breach the Refugee Convention, (b) that such removal would breach the U.K.'s Humanitarian Protection obligations, (c) that such removal would be contrary to the Human Rights Convention. I am mindful the Judge refused the appellant's appeal on Refugee Convention and on Human Rights grounds [see p.6 of 7]. Correspondingly, as a matter of law, there is plainly no scope within the 2002 Act to alternatively allow the appeal under the Immigration Rules, because this does not constitute one of the above three grounds upon which a protection claim can be brought. In any event, the Judge's finding that the appellant's appeal succeeds under the Immigration Rules based on 20 years residency is arguably erroneous, because paragraph 276 ADE(1)(i) stipulates that an applicant must not fall for refusal under S-LTR: suitability and the respondents impugned decision expressly refused the appellant's application for failing to meet the applicable suitability requirements, as articulated at [13] of the grounds. Having regard to the above circumstances, permission is granted on all grounds.

The Hearing

7. For the respondent, Mr Melvin moved the grounds of appeal.

8. For the appellant, Mr Stedman indicated that he could not oppose the appeal. He conceded that the Judge had no jurisdiction to consider the appellant's appeal under the Immigration Rules. Even if the history of applications could be interpreted as an application for leave to remain on the basis of 20 years' continuous lawful residency, the appellant's position has always been that he entered the UK in 2000 and made the submissions (which resulted in the respondent's decision of 17 February 2021) in 2017, three years before the 20th anniversary of the appellant's arrival in the UK.

9. Mr Stedman accepted that the Judge's article 8 proportionality assessment is superficial, and almost entirely restricted to wrongful consideration of the

Immigration Rules. The consideration of the Immigration Rules (if competent) is incomplete because it elides consideration of the suitability requirements of the Rules.

10. Mr Stedman accepted that there has been no cross appeal, so no challenge is taken to the Judge's decision in relation to the protection claim, but he agreed that the Judge's article 8 assessment is fundamentally flawed.

11. Mr Melvin and Mr Stedman joined in asking us to set aside the Judge's decision on article 8 ECHR grounds (and under the Immigration Rules) and to remit the appeal to the First-tier Tribunal on article 8 ECHR grounds only.

Analysis

12. Between [1] and [12] of the decision, the Judge considers the appellant's protection claim. The Judge considers the appellant's history of claims and the quality and nature of evidence produced. Following the guidance given in Devaseelan 2002 UKIAT 00702, the Judge rejects the appellant's appeal on asylum grounds and article 3 ECHR grounds. That conclusion stands unchallenged.

13. It is at [13] of his decision that the Judge takes a significant wrong turn. It is right that the Immigration Rules can be relevant to an appeal brought on article 8 grounds. Indeed, satisfaction of those Immigration Rules can be decisive of an appeal: see TZ (Pakistan) [2018] EWCA Civ 1109. However, the Immigration Rule in question must be considered properly. In his analysis, the Judge calculates the passage of time from the appellant's entry in the UK to the date of hearing. In fact, paragraph 276ADE(1)(iii) of the Immigration Rules stipulate that the continuous residence requirement must have been satisfied *as at the date of application*. Clearly, given that the appellant's application (in the form of further representations, which were in turn treated as a human rights claim) was made on 21 November 2017, the requisite 20 years' residence had not been accrued at that point in time. Therefore, the Judge's conclusion that the appellant had satisfied the Immigration Rules is fundamentally flawed.

14. There is a second fundamental error. The reasons for refusal letter clearly raised the issue of suitability, in light of the appellant's past convictions. The Judge failed to address this issue.

15. The third error of law lies in the Judges failure to address and made findings on the evidence provided by the appellant in relation to his claimed 20 years' continuous residence.

16. A fourth problem with the Judge's decision is that raised in the grant of permission. Although this specific point was not raised in the grounds of appeal, the fact that it relates to jurisdiction and was plain on the face of the decision leads us to conclude that we are able to address it. The First-tier Tribunal has no jurisdiction to allow an appeal "under the Immigration Rules" and has not since 2014. This constitutes a further error of law.

17. The Judge's erroneous approach to the appellant's case is compounded by incorrectly identifying the Home Office presenting officer. Twice in [13] the Judge rehearses submissions from a representative who took no part in the hearing.

18. Because there are material errors of law in the decision in the article 8 ECHR appeal, we set the Judge's decision on article 8 ECHR grounds (and the purported decision under the Immigration Rules) aside.

19. For the avoidance of doubt, there is no appeal before us directed at the Judge's decision on the appellant's protection appeal. The Judge's decision to dismiss the appellant's appeal on asylum grounds stands.

Remittal to First-Tier Tribunal

20. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21. We have determined that the case should be remitted because a new fact-finding exercise on article 8 ECHR grounds only is required. None of the findings of fact relating to article 8 ECHR grounds of appeal are to stand and a complete re hearing on this issue is necessary.

22. We remit the matter to the First-tier Tribunal sitting at Taylor House to be heard before any First-tier Judge other than Judge Davey.

Decision

23. The decision of the First-tier Tribunal is tainted by a material error of law.

24. We set aside the Judge's decision on article 8 ECHR grounds. The appeal is remitted to the First-tier Tribunal to be determined on article 8 ECHR grounds only.

signed **Paul Doyle**
August 2023
Deputy Upper Tribunal Judge Doyle

Date 1

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email.

