



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002366
First-tier Tribunal No:
HU/58446/2022
LH/00870/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 November 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Mehdi Hassan
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Hoare, H & S Legal

For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 2 November 2023

DECISION AND REASONS

1. The appellant's appeal against the respondent's decision of 8 November 2022 to refuse his application for permission to stay in the UK as a Family Member (Partner), was dismissed by First-tier Tribunal Judge Barker for reasons set out in a decision promulgated on 17 April 2023.
2. The appellant claims Judge Barker made perverse or irrational findings on a matter or matters that were material to the outcome and made a material misdirection of law on a material matter. The appellant claims the conclusion reached at paragraph [30] of the decision gives inadequate weight to the fact that the causation of the appellant's unlawful presence in the UK since 2014 was the respondent's flawed decision of 24 September 2014. The appellant claims that the proper approach in such an appeal, relying upon the decision of the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009, is to deal with the appellant, so far as

possible, as if that erroneous decision had not been made. That is, as if his leave to remain had not been invalidated. The appellant claims the respondent accepts the appellant's most recent application does not fall for refusal on grounds of suitability. He is in a genuine and subsisting relationship with a British citizen and meets the remaining eligibility requirements for leave to remain as a partner. It is said that had the proper approach been adopted by Judge Barker, the outcome of the appeal would have been different.

3. Permission to appeal was granted by Upper Tribunal Judge Pitt on 26 July 2023.
4. In summary, the appellant relies upon the family life he has established with his partner, Rabab Haiderali Mohamed, who is a British Citizen. They married according to the Islamic faith on 4 August 2017. In refusing the application the respondent accepted the application does not fall for refusal on grounds of suitability. The respondent was not however satisfied that the appellant meets the relevant eligibility requirements set out in Section E-LTRP of Appendix FM. In particular, the respondent was not satisfied that the appellant meets the eligibility immigration status requirement in paragraphs E-LTRP.2.1. to 2.2. The respondent noted that the appellant has remained in the UK unlawfully since the refusal of his application for leave to remain as a Tier 1 Entrepreneur in 2014. The respondent considered whether the appellant is exempt from meeting certain eligibility requirements but concluded that there are no insurmountable obstacles to the appellant's family life with his partner continuing outside the UK. The respondent concluded there are no exceptional circumstances which would render refusal of the application a breach of Article 8 because it would result in unjustifiably harsh consequences for the appellant, his partner or a relevant family member.

The hearing before me

5. At the outset of the hearing, I asked the parties whether the respondent's decision of 24 September 2014 refusing the appellant's application for leave to remain as a Tier 1 Entrepreneur was before Judge Barker, since there is no reference to that decision in Judge Barker's decision. Mr Hoare had represented the appellant before the First-tier Tribunal and his recollection was that a copy of the decision had been provided to the Tribunal. He was however unable to draw my attention to a copy of the decision in the any of the bundles (*appellant or respondent*) that were before the Tribunal. Despite a short adjournment so that Mr Hoare could furnish me with a copy of the decision that he recalls was before the First-tier Tribunal, he was unable to provide a copy.
6. In any event, Mr Hoare submits that in his witness statement dated 30 December 2022 the appellant had claimed that he did not engage in fraud in respect of his English language test. He claimed to have 'wrongly' lost his leave to remain as a result of the respondent's previous decision in which the fraud was alleged. He claimed that he has been unable to effectively challenge the allegation. Mr Hoare accepts the appellant does not explain why he did not challenge that decision shortly after he received

it, or at some other point before December 2021. Mr Hoare submits the appellant properly made an Article 8 application in December 2021, having made a series of repeated requests to the respondent for disclosure that started on 8th January 2021. Before the Article 8 claim was made, Mr Hoare wished to ensure that any material relevant to the allegation of fraud or dishonesty was considered and if necessary, addressed. There was some additional delay because the appellant then had to raise the funds necessary for the application fee.

7. Mr Hoare submits Judge Barker erred in her assessment of proportionality by failing to take into account the reasons why the appellant had been in the UK unlawfully. The only reason provided by the respondent for refusing the Tier 1 application in September 2014 was the language fraud and the respondent has failed to provide any evidence to support that allegation. The appellant therefore found himself without leave based upon an allegation made by the respondent that is not true. The appellant did not have a remedy before the guidance given by the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009 and Khan v Others v Secretary of State for the Home Department [2018] EWCA Civ 1684. Mr Hoare submits that the appropriate course is for the respondent to grant the appellant a period of leave to remain so that in any future application for leave to remain as a partner, he will be capable of meeting the immigration status requirements and the English language requirement. Mr Hoare submits that at present the appellant is unable to secure the specified evidence confirming the English language requirement is met because he has no leave to remain in the UK.
8. In reply, Ms Arif submits the grounds of appeal amount to nothing more than disagreement with a decision that Judge Barker was entitled to reach on the evidence before the Tribunal. She submits Judge Barker found the eligibility requirements for limited leave to remain as a partner are not met by the appellant, and she went on to have regard to the wider Article 8 claim. In reaching her decision the judge had regard to relevant factors including whether the appellant can properly be expected to make an application for entry clearance from Pakistan. Ms Arif submits that at paragraphs [29] and [30] of her decision, Judge Barker sets out why the respondent's decision to refuse the application for leave to remain is proportionate in all the circumstances.

Decision

9. Judge Barker recorded the agreed issues in the appeal in paragraph [7] of her decision. She heard oral evidence from the appellant and his partner. Her findings and conclusions are set out at paragraphs [9] to [31] of the decision. She accepted that the respondent's decision engages Article 8 and the appellant's removal from the UK would involve an interference with his family life. She noted that the real issue in the appeal is whether the interference with the right to respect for family life is justified and proportionate.
10. Judge Barker did not find the appellant to be a credible witness regarding his connections to Pakistan. She rejected his claim that he has no family in

Pakistan noting his oral evidence that his mother remains in Pakistan, and the evidence given by his partner, that the appellant's uncles and cousins assist his mother with her living arrangements in Pakistan. Judge Barker was led to the conclusion that the appellant was not willing to provide an accurate description of sources of support available to him in Pakistan and found his evidence to be unreliable. She found that the appellant has family in Pakistan who may be able to accommodate him and emotionally support him whilst he re-adjusts to life there. Judge Barker noted that although the appellant has made a life for himself in the UK, his status has always been precarious, initially because his status was dependent on further applications being successful, and since September 2014, he has remained in the UK unlawfully. Judge Barker found the appellant's partner, Rabab Haiderali Mohamed, was aware of the appellant's immigration status long before they began their relationship. Judge Barker found that the appellant has not demonstrated that there are insurmountable obstacles, as defined in EX.2 of Appendix FM, to the appellant's family life with his partner continuing outside the UK. None of the findings made by Judge Barker are challenged by the appellant.

11. Having found that the appellant does not meet the family and private life requirements set out in Appendix FM and paragraph 276ADE of the immigration rules, Judge Barker went on to address the Article 8 claim more generally. At paragraphs [29] and [30] of her decision she said:

"I have also considered the submissions by Mr Hoare in relation to the respondent's previous assertion of fraud on an English language test. However, I note that the respondent is not relying on any suitability ground for refusing the appellant's application. Whilst I accept as Mr Hoare submitted, that the requests for disclosure of such matters may have led to some delay in the appellant's application for leave to remain, I do not accept that this explains all of the delay. According to Mr Hoare, the first request was made on 8 January 2021, and whilst I accept that there was a need for chasing and the records were not made available until May 2021, this does not explain the delay between December 2017 and January 2021, and no explanation was provided by the appellant other than that noted above. Whilst Miss O'Mahoney submitted that the respondent was not relying on any previous assertion of cheating, she also said that the respondent did not accept the appellant's denial of such behaviour. I found these submissions to be unhelpful, particularly in assisting me in making the findings that I am required to make on all material matters. In those circumstances, and in the absence of any detail about the previous decision, I am unable to make any findings about whether or not the appellant engaged in fraudulent behaviour in the past. I do say this though, in the absence of any positive assertion of cheating by the respondent, and on the basis that the respondent did not conclude that the appellant's application fell for refusal on the grounds of suitability, I have disregarded any implied suggestion that he took part in such behaviour, and consider that relevant to the proportionality exercise I have carried out.

30. Notwithstanding the absence of any evidence of improper behaviour, I find that in all the circumstances here, the public interest in maintaining proper immigration control, and particularly when the appellant has overstayed for many years with no reasonable explanation given my findings above, is not outweighed by the appellant's personal circumstances

or any diminishing factor in relation to the likelihood of any entry clearance application being successful. In my judgment, there is no reason why it would be unreasonable for the appellant to return to Pakistan to make the proper application, rather than being permitted to jump the queue ahead of those making the proper applications simply because he has chosen not to regularise his stay in the UK for many years. Even bearing in mind the current delays to such applications, I find that it would be entirely proportionate for the appellant to return to Pakistan to make an entry clearance application in accordance with the rules.”

12. Judge Barker plainly attached weight on the fact that the appellant had, on the evidence before the Tribunal, remained in the UK unlawfully for many years. At paragraph [29], Judge Barker records that she has considered the submissions made by Mr Hoare in relation to the respondent’s previous assertion of fraud on an English language test. She noted however that the respondent, in deciding the present application, did not allege that the application falls for refusal on grounds of suitability. For the purposes of the hearing before her, Judge Barker made it clear that she disregarded any implied suggestion of fraud on an English language test previously.
13. Judge Barker said in paragraph [29] that in the absence of any detail about the previous decision she was unable to make any findings about whether or not the appellant engaged in fraudulent behaviour in the past. Mr Hoare accepted Judge Barker makes no reference to the respondent’s decision of 24 September 2014 having been provided to the Tribunal although there is reference at paragraph [29], to the requests for disclosure that may have led to some delay in the appellant’s application for leave to remain. Despite his best efforts, Mr Hoare was unable to provide me with a copy of the respondent’s decision of 24 September 2014 and so, even if that letter had been before the First-tier Tribunal, I am unable to say whether an allegation of fraud played a determinative role in the Tier 1 application being refused.
14. Even if the allegation of fraud had been determinative of the Tier 1 application made in 2014, there was no evidence one way or the other explaining why the respondent no longer maintained the position that the application falls for refusal on grounds of suitability. The application ‘may be refused’ on grounds of suitability, but paragraphs S-LTR.4.2 and S-LTR.4.3 do not require the respondent to refuse leave to remain where, amongst other things, false representations have been deployed in support of a previous application for leave to remain. The discretionary nature of the provisions was, I accept, relevant to Judge Barker’s assessment of the historical injustice submission, and she may have been assisted by some explanation. For example, the respondent might have reviewed the case and decided that there was convincing evidence of fraud but that she did not wish, in the exercise of her discretion, to now refuse the application on suitability grounds. Equally, the respondent may have realised that there was no proper foundation for the allegation of fraud, such that the condition precedent for refusal under S-LTR 4.2 was simply absent. On the evidence before the Tribunal, Judge Barker could not have known why the

respondent decided the application did not fall for refusal on suitability grounds.

15. However, I do not accept that Judge Barker failed to engage in a proper assessment of proportionality and the consequences of any historical injustice. Even if, as Mr Hoare submits, the sole ground for refusing the application on 24 September 2014 was that false representations have been deployed in support of a previous application for leave to enter or remain, Judge Barker had noted that there had been some delay in the appellant making his application for leave to remain on Article 8 grounds, and although some of the delay was caused by delay in receiving disclosure from the respondent, that did not explain all of the delay.
16. The appellant's Tier 1 application was refused on 24 September 2014. That decision was not challenged by the appellant. Instead, on 14 December 2014 the appellant made a claim for international protection which was refused by the respondent on 4 February 2015. A subsequent appeal to the First-tier Tribunal was dismissed on 26 July 2016 and by the Upper Tribunal on 20 March 2017. It was not until December 2021 that the appellant made the application for permission to stay in the UK that led to the decision that was the subject of the appeal before Judge Barker.
17. Judge Barker did not expect the appellant to establish that he would have been granted continuous periods of leave but for any error on the part of the respondent, but noted, as she was entitled to in my judgement, the significant gap between September 2014 and December 2021 before the appellant sought to address the allegation previously made by the respondent in his application for leave to remain as a partner.
18. Although I referred both Mr Hoare and Ms Arif to the decision of a Presidential panel of the Upper Tribunal in Ahmed (historical injustice explained) [2023] UKUT 00165 (IAC), neither sought to make any submissions on that decision. The Presidential panel of the Upper Tribunal said:

"1. As is clear from the decision in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC), the phrase "historical injustice" does not connote some specific separate or freestanding legal doctrine but is rather simply a means of describing where, in some specific circumstances, the events of the past in relation to a particular individual's immigration history may need to be taken into account in weighing the public interest when striking the proportionality balance in an Article 8 case. In relation to the striking of the proportionality balance in cases of this kind we make the following general observations:

- a. If an appellant is unable to establish that there has been a wrongful operation by the respondent of her immigration functions there will not have been any historical injustice, as that term is used in Patel, justifying a reduction in the weight given to the public interest identified in section 117B(1) of the Nationality, Immigration and Asylum Act 2002. Although the possibility cannot be ruled out, an action (or omission) by the respondent falling short of a public law error is unlikely to constitute a wrongful operation by the respondent of her immigration functions.

- b. Where the respondent makes a decision that is in accordance with case law that is subsequently overturned there will not have been a wrongful operation by the respondent of her immigration functions if the decision is consistent with the case law at the time the decision was made.
 - c. In order to establish that there has been a historical injustice, it is not sufficient to identify a wrongful operation by the respondent of her immigration functions. An appellant must also show that he or she suffered as a result. An appellant will not have suffered as a result of wrongly being denied a right of appeal if he or she is unable to establish that there would have been an arguable prospect of succeeding in the appeal.
 - d. Where, absent good reason, an appellant could have challenged a public law error earlier or could have taken, but did not take, steps to mitigate the claimed prejudice, this will need to be taken into account when considering whether, and if so to what extent, the weight attached to public interest in the maintenance of effective immigration controls should be reduced. Blaming a legal advisor will not normally assist an appellant. See *Mansur (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC)*."
19. It was not entirely clear on the evidence before the First-tier Tribunal whether there was an error in the respondent's decision of 24 September 2014, whether characterised as a public law error or otherwise. However, it is uncontroversial that the appellant did not challenge that decision, even within a reasonable time of the decisions of the Court of Appeal in Ahsan and Khan. He took no steps to mitigate any claimed prejudice he had suffered.
20. Mr Hoare's submissions in the end amounts to a broad submission that the historical injustice suffered by the appellant in September 2014 should, without more, have resulted in his appeal being allowed on Article 8 ECHR grounds. Despite the valiant attempt to persuade me otherwise, I am not persuaded that on the evidence before the First-tier Tribunal there is an error of law capable of affecting the outcome of the appeal. On the evidence before the First-tier Tribunal, and without the respondent's decision of 24 September 2014, Judge Barker said she was unable to make any findings about whether or not the appellant engaged in fraudulent behaviour in the past. There was, therefore, no finding that the appellant had suffered a historical injustice as he claims. Judge Barker referred to the appellant's inability to satisfy the requirements for leave to remain as a partner, the tenuous nature of his immigration status and the evidence before the Tribunal as to how the appellant's relationship with his partner began and developed. The relationship was established by the parties in the full knowledge that the appellant's immigration status was at the very least precarious. She found there is no reason to believe it would be unreasonable for the appellant to return to Pakistan and make a proper application for entry clearance. I am quite satisfied that Judge Barker had proper regard to all relevant factors and was entitled conclude, having regard to the appellant's individual rights and the public interest in his

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removal, that the decision to refuse leave to remain is not a disproportionate interference with his human rights. The judge's proportionality assessment was correct in law.

21. It follows that I dismiss the appeal.

NOTICE OF DECISION

22. The appeal is dismissed.

V.Mandalia
Upper Tribunal Judge Mandalia
Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 November 2023