



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-004772
First-tier Tribunal No:
HU/56652/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

BROOK SUN
(ANONYMITY ORDER NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford, Counsel

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on Thursday 5 April 2024

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge M B Hussain (“the judge”) promulgated on 13 September 2023 (“the Decision”) dismissing the Appellant’s appeal against the Respondent’s decision dated 14 September 2022 refusing his human rights claim.
2. The Appellant is a national of Vanuatu. His human rights claim was based, first, on his family life with his partner, Baozhen Guo (she is a Cypriot national with pre-settled status in the United Kingdom), and second, on his private life. He was unable to succeed in his application to remain with his partner in the United Kingdom within the Immigration

Rules (“the Rules”) due to his immigration status (he entered as a visitor), and he could not therefore satisfy the eligibility requirements of the Rules. Nor had he established that he met the financial requirements of the Rules. The Appellant could only satisfy the partner Rules if he met paragraph EX.1(b) of Appendix FM to the Rules. This required him to show that there are insurmountable obstacles to family life with his partner continuing in Vanuatu. In terms of his private life under the Rules, the Appellant was required to show that there are very significant obstacles to his integration on return to Vanuatu or, that his removal would result in unjustifiably harsh consequences for him and/or his partner.

3. The appeal came before the judge as a face-to-face hearing on 31 July 2023. The Decision itself has caused some confusion as to what occurred at the hearing, most likely in consequence of the judge’s use of a template decision which unfortunately was not updated and amended to reflect the position at the hearing. For example, the first page of the Decision records the parties were not represented and the Crown Copyright year is stated as 2022. There is no dispute the Appellant was not legally represented at the hearing. Nor is there any dispute that the Appellant failed to attend the hearing without explanation. The judge records at [8] of the Decision that by 11.27 a.m. there was a “no show by the appellant” and proceeded to hear the appeal in his absence. At [13] of the Decision the judge refers to a submission made by the “respondent’s counsel”, which satisfies me that the Respondent was represented before the judge, and the header of the Decision stating the contrary is incorrect. Mr Bedford, who was instructed a day prior to the hearing before me, and who did not draft the grounds of appeal, canvassed the possibility of whether in the circumstances the Appellant received a fair hearing. That is not a ground that is advanced by the Appellant in his grounds of appeal, there was no application to amend the grounds, and I am not satisfied that there was a procedural irregularity giving rise to unfairness.
4. The judge noted the basis of the Appellant’s application at [10] of the Decision and further noted that the Appellant could not succeed under Appendix FM to the Rules because he could not meet the immigration status requirements thereof. The judge then turned to consider the Appellant’s claim on the basis of his private life at [11]-[16]. The judge considered the Appellant’s “representations” which suggested/inferred that the Appellant is stateless at [13]. It was the Appellant’s case that he was originally a national of the People’s Republic of China, a nationality he claims to have lost when he became a national of Vanuatu, which was time limited to a period of two years. It is not clear what “representations” the judge was referring to – they are not before me, but these are matters raised by the Appellant in his grounds of appeal to the First-tier Tribunal.
5. The judge gave the Appellant’s representations short shrift at [13]-[15]. The judge found the Appellant is a national of Vanuatu; that his nationality was not time limited and that he could seek legal advice if he believed that he was stateless. In his concluding paragraphs the judge said:

“16. The appellant takes issue with the respondent's claim that he can be returned to Vanuatu now that travel restrictions are over. The appellant states that that is not so and that fact is recognised in the Home Office granting him Exceptional Assurance Leave. The grant of this leave does not in my view prove that there are no flights available to Vanuatu. The burden of proof is on the appellant to show that he has a legitimate claim to remaining in this country. He has not made good his case.

17. The appellant can only succeed outside the Immigration Rules if he is able to show that his circumstance is exceptional, meaning not to grant him leave would result in unjustifiably harsh consequences. There is no evidence before me from which I can infer that not to grant the appellant leave would result in unjustifiably harsh consequences.”

6. The judge accordingly dismissed the appeal.
7. The grounds of appeal are drafted by the Appellant himself. In consequence they are not delineated into separate heads of challenge, but they can be paraphrased as follows:

Ground one: the judge failed to give adequate consideration to the Appellant's claim that he lost his right to Chinese citizenship.

Ground two: the judge failed to consider the Appellant's lack of ties to Vanuatu; a country to which he is unfamiliar.

Ground three: the judge failed to consider family life.

8. Permission to appeal was granted on renewed application by Upper Tribunal Judge Norton-Taylor on 6 December 2023.
9. The matter comes before me to determine whether the Decision contains an error of law. If I conclude that it does, I must then consider whether to set aside the Decision. If I set aside the Decision, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

The proceedings before the Upper Tribunal

Procedural History

10. This appeal first came before me on 17 January 2024. I adjourned the appeal on the Appellant's written application that he and his partner could not attend because they had Covid and directed he file medical evidence within 10 days. The Appellant did not comply with that Direction. The appeal next came before me on 12 March 2024. The Appellant made the same written application for an adjournment, and this time attached a jpeg image of a positive Covid test. I adjourned the appeal giving the Appellant the benefit of the doubt, and, because Ms McKenzie who then represented the Respondent, adduced a file note (purporting to show the Appellant had claimed to live in Vanuatu from birth until 2021) which had not been served on the Appellant. I issued Directions to the Appellant to file medical evidence within 10 days (making it clear that I may not be sympathetic to any further applications for an adjournment in similar terms), and to the

Respondent to serve his file note on the Appellant no later than 19 March 2024. The Respondent complied with Directions, but the Appellant did not. The appeal was scheduled to be listed on 5 April 2024. On 4 April 2024 the Appellant filed a letter from Everwell Chinese Medical Centre dated 11 March 2024 in response to my last direction. The letter is signed by a “Dr.” whose name is not identified and nor can it be discerned from the signature. What is clear, is that this is not a letter from an NHS GP. It is stated therein that the Appellant is being treated for flu (not Covid) and is not fit for work for a period of one week.

The hearing

11. At the hearing on 5 April, the Appellant attended with his partner. He was represented by Mr Bedford. Both representatives made brief submissions. I do not recite all the submissions except to explain why I have reached my decision, which I now turn to do.

Decision on Error of Law

12. The judge’s decision is relatively short. The Decision comprises of seventeen short paragraphs over three pages. That is possibly because the evidence was not extensive. Nonetheless, although brevity is to be commended, a party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases, it may be perfectly obvious without any express reference to it by the Tribunal; in other cases, it may not. A party is also entitled to expect a judge to consider their entire claim and the evidence supportive of it. I bear in mind that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding Tribunal.
13. Although Ms Isherwood sought to defend the judge’s decision in respect of the Appellant’s private life claim, she acknowledged, fairly and properly without making any concessions, that she was in difficulties in defending the judge’s decision in respect of the Appellant’s family life claim. Mr Bedford submitted that whilst he was not maintaining the Appellant’s claim that he is stateless, the judge nonetheless failed to consider properly, or at all, the Appellant’s private and family life claim.
14. In granting permission to appeal, Judge Norton-Taylor did not formally restrict the grant of permission. I shall thus deal with the grounds in turn.

Ground one: the judge failed to give adequate consideration to the Appellant’s claim that he lost his right to Chinese citizenship.

15. There is no merit in Ground one. The judge considered the Appellant’s claim at [12]-[15]. Whilst the judge did not expressly find one way or another whether the Appellant held Chinese citizenship which he subsequently lost at [13], there does not appear to have been any evidence before the judge to support the Appellant’s claim that he held and subsequently lost his Chinese citizenship. Even if the Appellant did

lose his Chinese citizenship, I fail to understand how it could be material to the outcome, in light of the judge's finding that the Appellant was not stateless and is a national of Vanuatu. That conclusion was no doubt reached on the basis of the Appellant's Vanuatu passport valid until 8 December 2031 which was before the judge. The judge's consideration of this claim was more than adequate given the paucity of evidence that was before him, and indeed no contrary conclusion could have been open to him.

Ground two: the judge failed to consider the Appellant's lack of ties to Vanuatu; a country to which he is unfamiliar.

Ground three: the judge failed to consider family life.

16. I shall consider Ground two and three together because essentially, they complain the judge failed to properly consider, or at all, the Appellant's private and family life claim. I am satisfied that these grounds establish that the judge materially erred in law. In the Grounds of Appeal to the First-tier Tribunal (and indeed in his covering letter of application) the Appellant asserts that he has only visited Vanuatu on a single occasion, lacks ties to that country, and in any event could not return there in light of his relationship with his partner. There was evidence of the relationship in the Respondent's bundle and this was considered in detail by the Respondent in his review letter - addressing both private and family life claims with particular reference to paragraph EX.1.(b) of Appendix FM and Article 8 ECHR.
17. I accept as Mr Bedford submits that the judge did not adequately engage with the Appellant's private life claim, there being no assessment of the "very significant obstacles" test and is a claim that the judge conclusively determined by reference to the Appellant's nationality. The Appellant's family life claim was not considered at all (at [17]). Whilst the prospects of success do not seem great on the evidence, it was nevertheless incumbent on the judge to engage with the evidence in light of the Appellant's claim(s), and the Appellant was entitled to a legally sound decision. I am not satisfied that that has been achieved in this case and Ms Isherwood was right to recognise that difficulty.
18. I am satisfied therefore that the judge's failure to consider the Appellant's claims adequately or at all, is such that the Appellant has established that there is a material error of law in the Decision and that in consequence it must be set aside and the appeal must be reheard.
19. As to disposal, I bear in mind the guidance provided in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC). The parties agreed, considering (i) the amount of fact finding needed, and (ii) the loss of the two-tier decision-making process if the decision is retained in the Upper Tribunal, that the appropriate course of action is for the matter to be remitted to the First-tier Tribunal for hearing afresh. I see no reason not to preserve the judge's finding that the Appellant is a national of Vanuatu.

20. The file note adduced by the Respondent before this Tribunal is not relevant to my consideration as I am only concerned with the evidence that was before the judge. However, the Respondent is not prevented from relying on that evidence at the remitted hearing. Further, I observed at the hearing that the application form exhibited in the Respondent's bundle does not relate to this Appellant. This is a matter the Respondent ought to remedy in due course and action should be taken to file and serve a copy of the Appellant's application form, if possible, in accordance with any directions issued by the First-tier Tribunal.
21. I set out the procedural history of these proceedings above. The First-tier Tribunal may consider that history to be relevant should the Appellant seek to adjourn the rehearing of his appeal for any reason at a future date.

Notice of Decision

The Decision of the First-tier Tribunal involved the making of a material error on a point of law. The decision is set aside. The finding of the judge that the Appellant is a national of Vanuatu is preserved. The appeal will be reheard afresh by the First-tier Tribunal by a judge other than Judge M B Hussain.

R.Bagral

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
5 May 2024