



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000696, UI-2024-000697, UI-2024-000698
First-tier Tribunal No: HU/00966/2023, HU/00967/2023, HU/00972/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MRS BERIVAN ENDAM AYDURAN
(2) MASTER AREN BARIS AYDURAN
(3) MISS IPEK LENA AYDURAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr M. Parvar, Senior Home Office Presenting Officer
For the Respondent: Mr B. Ali, Solicitor Advocate, Aman Solicitors Advocates (London) Ltd

Heard at Field House on 17 April 2024

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.
2. The Respondent appeals against the decision of First-tier Tribunal Judge Hosie ("the FTT Judge") promulgated on 28 December 2023 allowing the Appellants' appeal on Article 8 grounds outside of the Immigration Rules. Permission to appeal was granted by Upper Tribunal Judge Hanson ("the permission Judge") on 13 March 2024.

3. No request was made for any anonymity order and there is nothing about this that would in my view outweigh the importance of open justice. I therefore do not make an anonymity order.

The FTT Judge's Decision

4. The FTT Judge summarised the Appellants' immigration history at paras. 3-7 as follows:

3. *"They were issued with entry clearance on the first Appellant's husband's EC business visa valid from 18 November 2019 until 2 December 2020. They entered the UK between September 2019 and February 2020 due to administrative problems with visa documents.*
4. *On 14 August 2020 the first Appellant's husband submitted an application for further leave to remain under the ECAA agreement with the Appellants' [sic] as his dependents. Leave to remain was granted from 12 February 2021 until 2 September 2021.*
5. *On 2 September 2021, the first Appellant's husband submitted a further application for further leave to remain under the ECAA agreement with the Appellants' [sic] as his dependents. The first Appellant's husband left the UK on 8 October 2021 while his application was outstanding and his application was therefore treated as withdrawn on 9 December 2021.*
6. *On 23 December 2021 the Appellants' [sic] applied for leave to remain on Article 8 ECHR grounds and outside the Immigration Rules on human rights grounds and this was refused by the Respondent on 31 December 2022. It is this decision which forms the basis of the present appeal.*
7. *The Appellants' [sic] assert the right to remain on the basis of their private lives because they meet the requirements of paragraph 276 ADE (1) (vi) of the Immigration Rules on the basis that there would be very significant obstacles to their reintegration to Turkey. Furthermore, the Appellants' [sic] assert that refusal of leave to remain would result in unjustifiably harsh consequences for them and that it would be contrary to the best interests of the second and third Appellants' [sic] who are children."*

8. At para.8 the FTT Judge summarised the material facts not substantially disputed as follows:

"(a) the first Appellant's husband left the UK on 8 October 2021 to attend his father's funeral and to fulfil his family duties. At the time of his departure from the UK the first Appellant's husband's application for extension of leave to remain with the three Appellants' as his dependents was outstanding. He tried to obtain the agreement of the Respondent prior to his departure from the UK in the compelling circumstances of his father's death but the Respondent did not reply to communications from the first Appellant's husband. Due to his departure from the UK, his extant application was treated as withdrawn. He sought to return to the UK and continues to do so to continue his business activities in the UK.

(b) the first Appellant's husband came to the UK under the Turkish Workers Agreement to set up business and under this agreement he was entitled to bring his family with him. The family prepared for a move to the UK and

they made several trips to the UK to acclimatise the second and third Appellants' [sic] to their new home and schools. They rented out their property in Turkey and make preparations to settle themselves in the UK and to settle the children in education in the UK.

(c) under the Turkish Workers Agreement, the first Appellant's husband should have been granted a period of three years leave to remain but he was only granted one year. The Turkish Workers Agreement provides a route to settlement within five years. However, since Brexit the Turkish workers agreement is no longer operational. The first Appellant's husband's initial leave to remain having been withdrawn due to his absence from the UK to attend his father's funeral, cannot be reinstated under the Turkish Workers Agreement.

(d) the three Appellants' remain in the UK and the first Appellant's husband remains in Turkey living with his parents who are elderly and who have health issues. The second and third Appellants' are in education and they are orientated and settled in the UK where they are thriving at school and in their social lives and hobbies."

9. I assume the reference to the First Appellant's husband ("Mr Ayduran") living with his parents must be a slip, given that his father has, as the FTT Judge noted above, passed away.
10. The FTT Judge then summarised various legal principles, and turned to their findings at para. 15, which were in summary as follows:
 - a. The Appellants came to the UK as a family to set up life here as they were entitled to do under the ECAA.
 - b. Through no fault of their own and due to the mistake of the Respondent there was a delay in the First Appellant receiving her BRP which meant that there was a delay in them being able to come to the UK. This has had a knock-on effect on the length of leave Mr Ayduran had to set up his business in the UK.
 - c. Mr Ayduran should have been granted a period of three years leave to remain which would have been extended in compliance with rules. Instead, he was granted only 12 months leave to remain.
 - d. Instead of questioning that, he applied to extend his leave. However, in the meantime his father fell ill and subsequently passed away.
 - e. According to Turkish traditions and culture he needed to return to Turkey for the funeral. His leave was withdrawn and he remains in Turkey.
 - f. The Appellants remain the UK having closed off all aspects of their lives in Turkey, ready to begin a new life in the UK as a family. The children are settled and doing well at school. They have dreams and aspirations for the future. Mr Ayduran has set up and invested in his business in the UK.
 - g. The First Appellant supports the Second and Third Appellant. She has previously been in charge of a private nursery school in Turkey.
 - h. Prior to coming to the UK, their family home in Turkey was rented out. It is not clear how long it would take to get this back. Mr Ayduran is currently living with his parents (again, I think this must be a reference to him living with his mother), whose property would be insufficient to accommodate the whole family. They could however rent alternative property.
 - i. The opportunities as an actor and professional footballer are greater in the UK for the Second and Third Appellants, but they are also available in

Turkey. The children were in private education in Turkey and could return and continue their education in the same way if necessary.

- j. The Appellants are all suffering psychologically as a result of family separation. The First and Third Appellant receive counselling, as does Mr Ayduran. The FTT Judge accepted the medical evidence in relation to this.
- k. The Appellants are self-supporting and are not a burden on public funds. They have shown the ability to contribute positively to the UK economy.
- l. As the family are Alevi, who suffer discrimination in the workplace in Turkey, this would be an additional difficulty for them on return.
- m. The best interests of the children are for there to be family reunification in the UK.
- n. Treatment is available for mental ill-health in Turkey. Drama lessons and football are both available in Turkey.
- o. The First Appellant and Mr Ayduran have both previously worked in Turkey.

- 11. At para.32 the FTT Judge accordingly concluded that there would not be very significant obstacles to the Appellants' reintegration. While there would be hardships, they would not amount to very significant obstacles.
- 12. At para.35, the FTT Judge then appears to have turned to his consideration to other factors for the purposes of his assessment of Article 8 outside the rules. At para. 35 the FTT Judge noted that the Appellant relocated to the UK in good faith under the ECAA and spent time and resources settling their children in school in the UK after several visits and summer schools to learn English.
- 13. At para 36, the FTT Judge noted that the Appellants were "clearly prejudiced by the delays in BRP cards being issued in time" and that the Respondent had accepted that the substantial delay was its mistake and had apologised for the error. The result of this, the FTT Judge found, was delayed entry to the UK until February 2022, which had a knock-on impact because under the ECAA Mr Ayduran needed to show that he had set up his business. He received an initial 12-month period, but lost the first four months of this due to the BRP mistake. The family applied for an extension but were in effect only granted six months, whereas the normal practice as specified in ECAA.6.3 is for a grant of up to 3 years.
- 14. At para.37, the FTT Judge noted that the ECAA is no longer available post-Brexit and that Mr Ayduran made strenuous attempts to contact the Home Office when his father was gravely ill and even went to his MP to contact the Home Office in order to seek permission to return to Turkey for funeral arrangements following his father's death. The Respondent did not reply to any communications, and he was left, the FTT Judge found, with no option but to leave the country. He did so without being fully aware of the consequences of this action and the impact it would have on the family. The FTT Judge considered that there had in effect been a "double historic injustice" done to the Appellants by the Respondent's errors and delays. The FTT Judge considered that these together amounted to exceptional circumstances.
- 15. At para.38, the FTT Judge undertook a balance sheet approach to proportionality under the Article 8. He considered that while the maintenance of effective immigration controls is in the public interest, the delays have had a significant adverse effect on the Appellant's family, reducing the strong weight normally to be given to this public interest. The fact that the Appellants speak English and have not been a burden on the taxpayer were neutral factors. The Appellant's private life was weighed in their favour, noting that the children were settled and

would face further upheaval if they were required to relocate and their best interests were to remain, though the FTT Judge gave little weight to this, given that their private life was developed while they had precarious immigration status. He also weighed the difficulties that would be faced, even though they do not amount to insurmountable obstacles.

16. At para. 40, the FTT Judge concluded that the factors raised in the Appellants' favour outweighed the public interest:

“But for the errors and delays caused by the Respondent the Appellants would be remaining together as a family in the UK within the terms of their leave. The [F]irst Appellant’s husband would be running his business and contributing to the UK economy and the [children] would be continuing to thrive with continuity and enjoy stability of education. The Third Appellant was at an important stage in her development and peer groups and emotional connections in the wider world will have significance for her psychological development.”

17. The appeal was accordingly allowed on human rights grounds outside of the Immigration Rules.

The Appeal to the Upper Tribunal

Inadequacy of the Grounds of Appeal

18. Before setting out the grounds that are now relied on by the Secretary of State, it is necessary to say something about the standard of drafting in this case. It falls significantly below the standard to be expected of the Secretary of State's officials in cases before the Upper Tribunal.
19. At paras. 1-3 of the Respondent's Grounds of Appeal, the Respondent sought to suggest that delay was, in principle, an irrelevant factor in the Article 8 proportionality balance, in reliance on Reid v Secretary of State for the Home Department [2021] EWCA Civ 1158. Mr Parvar withdrew reliance on those paragraphs at the hearing. He was right to do so. It has been established at the very highest level since at least 2008 that delay may be relevant to an assessment of proportionality under Article 8: EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] 1 AC 1159. This decision has been applied on numerous occasions since then, including by Courts binding on this Tribunal: see e.g. Laci v Secretary of State for the Home Department [2021] EWCA Civ 759. Moreover, the paragraph cited from Reid (§59) held that delay was irrelevant to the question of whether removal would be unduly harsh on a qualifying child, while *expressly* recognising that delay could be relevant in relation to Article 8 more broadly. The Grounds recognise that, unlike Reid, the Appellants are not the subject of a deportation order, but fail to appreciate the obvious point that whether removal is unduly harsh is a fundamentally different (if sometimes linked) question to whether a removal is proportionate. This ground was in my judgment totally without merit and its inclusion has led to the Appellants unnecessarily having to spend time and cost dealing with it.
20. Similarly, at para. 4, the Respondent sought to make three submissions.
- a. First, the Respondent sought to appeal on the ground that the Second and Third Appellants are not “qualifying” for the purposes of Part 5A of the

Nationality, Immigration and Asylum Act 2002. Yet no-one, least of all the FTT Judge, had suggested they were.

- b. Second, it was suggested that “There is no evidence that the appellants have formed a private life in the UK. There is no evidence from friends, the children’s schools or other sources that they have formed a private life”. This is obviously incorrect. In the bundles before the FTT Judge there was evidence of the children’s integration in the application form itself, in the First Appellant’s and Mr Ayduran’s witness statements, and in various documents relied on. For example, there were photos of birthday parties, letters from the children’s friends and from school, and other documents all of which attest to the private life the children have developed in the UK. I am afraid I struggle to understand how it could be properly suggested by anyone with even a passing familiarity with the papers in this appeal that there was “no evidence” that the Appellants have formed a private life in the UK.
- c. Third, it was said that “any private life would have been formed when the appellants’ immigration status was precarious and should therefore be afforded little weight.” Yet this is precisely what the FTT Judge said at para.39.

21. Although Mr Parvar did not expressly disavow the first and third points made in para.4 of the Grounds, he did not make oral submissions on them, and I infer from this that they too are, quite properly, no longer relied on. His submission on the second point was modified to suggest that there was an inconsistency in the reasoning of the Judge in relation to the children’s private life.
22. The drafter of the Grounds’ lack of familiarity with (a) relevant law, (b) the evidence that was before the FTT Judge, and (c) the FTT Judge’s decision, is, to put it mildly, concerning.

The Grounds relied on

23. In light of the above, the remaining grounds of appeal were as follows:
 - a. that contained in para.5, which stated, “It is submitted that the FTTJ has erred in failing to give adequate reasons that there are exceptional reasons such that the appellants’ [sic] succeed outside the immigration rules”; and,
 - b. that there was an inconsistency in the Judge’s reasons in relation to the weight to be accorded to the children’s private life.
24. The latter of these is not, strictly, within the scope of the Grounds, but there was no objection to the case being put on that basis, and I therefore permit the Respondent to amend his grounds to make that argument.

Grant of permission

25. As already noted, permission was granted by the permission Judge on 13 March 2024. He did not specify the grounds on which he was granting permission. It therefore follows that permission was granted in respect of the grounds contained in the Grounds of Appeal.
26. However, after having summarised the background and the FTT Judge’s reasoning, the permission Judge noted at para. 6 *et seq.* as follows:

“6. There is merit in the grounds indicating that as the children had not lived in the UK for seven years they were not qualifying children and there is insufficient analysis of the nature of the private life formed in the UK in that any private life would have been formed when the immigration status of the appellants was precarious, warranting little weight being afforded to it.

7. There is no evidence that an application was made by way of judicial review to challenge the delay in the issue of the BRP or any indication that the delay, even though Secretary of State apologised, was unlawful in public law terms. The grounds referred to the case of Reid versus Secretary of State for the Home Department [2021] EWCA Civ 1158 at [59]. It is settled law that delay might reduce the public interest and warrant greater weight being given to protected rights which had been developed within a period of delay, but perhaps of more significance is the decision of the Upper Tribunal in Ahmed v Secretary of State for the Home Department [2023] UKUT 165. In that case in which it was found “historical injustice” was a means of describing where, in some specific circumstances, the events of the past in relation to a particular individual’s immigration history might need to be considered in weighing the public interest when striking the proportionality balance. It was found, however, that the appellant would have to establish a wrongful operation by the Secretary of State of her immigration functions and the appellant to show they suffered as a result. It was found that 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.

8. It is clear that the Judge was sympathetic towards the appellant but that does not, per se, enhance an individual’s article 8 claim. It is also arguably legal error for the Judge to try and “fix” what may have gone wrong in the past without any legal basis for doing so. In addition to the issues concerning the BRP the Judge also appears to try to compensate for the fact the statutory consequence of the first appellant’s husband leaving the United Kingdom whilst his application was pending resulted in the application being treated as withdrawn. The first appellant’s husband could have taken legal advice but clearly did not do so.

9. I find the Judge has arguably erred in law in failing to establish that any delay caused by the Secretary of State was sufficient to amount to a wrongful operation by the respondent of her immigration functions by reference to establishing whether it amounted to a public law error or otherwise, and in failing to adequately identify the consequences of the same, if made out, were sufficient to show the appellants has suffered, bearing in mind the findings of the Judge that appeared to show that but for this element the appeal would not have succeeded as they would have been able to continue with their family life together in Turkey.”

27. Thus the permission Judge appears to have considered it to have been arguable that the FTT Judge erred as to the application of the authorities on historical injustice. What is less clear is whether he was granting permission to appeal on that ground. The starting point for the analysis of any decision by a specialist judge is that unless there is an express misdirection, or unless one can be confident from the express reasoning that there is an implicit misdirection, that he or she knows and has applied the relevant law: ASO (Iraq) v Secretary of State for the Home Department [2023] EWCA Civ 1282 at [41]. The relevant law here

comprises two decisions of this Tribunal, namely AZ (error of law; jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) and Durueke (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC). They make clear that:

- a. Permission to appeal may only be granted to the Secretary of State on a ground not advanced by him if a permission judge is satisfied that the ground is one which has “strong prospects of success” and where the ground relates to a decision which, if undisturbed, would breach the UK’s international Treaty obligations, or (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address.
 - b. If permission is granted on a ground that has not been raised by the parties, it is good practice and a useful aid in the exercise of self-restraint for the permission judge to indicate which aspect of the headnote in AZ (which sets out the different bases on which a permission judge might do so) applies.
28. I can see nothing in the permission Judge’s express reasoning which either demonstrates an express or implicit misdirection. There is nothing to indicate that the permission Judge considered he was granting permission to appeal on a ground not identified by the Respondent. Had he been doing so, he would necessarily have asked not whether the Judge “arguably erred”, or there was an “arguabl[e] legal error” as he did in paras. 8 and 9, but would rather have asked whether there were “strong grounds”, as required by AZ. The fact that he did not set out which aspect of the headnote in AZ he was seeking to apply is also indicative that he did not consider he was granting permission outside the scope of the Grounds.

Rule 24 response/skeleton argument

29. By the Appellants’ rule 24 response (as it is described in their supplemental bundle index) or skeleton argument (as it is described in the document itself) dated 3 April 2024, the Appellants, after summarising the background and the FTT Judge’s decision sought to resist the Grounds of Appeal at paras. 4-7 and then, at para. 8 took issue with the permission Judge’s identification of to the historical unfairness point, noting that “The [Respondent] did not plead those grounds and they should form no part of the appeal before the Upper Tribunal”. It then takes issue with the substance of the permission Judge’s conclusion on the point, in particular by reference to para.33 of Ahmed.

Scope of the original grounds

30. The permission Judge not having granted permission beyond the grounds as pleaded and the Appellants having taken issue with whether the historical injustice point forms part of those grounds, I now need to decide what the scope of the grounds in fact is.
31. Mr Parvar accepted that historical injustice was not expressly raised in the grounds, but contended that the grant of permission was “an expansion of the grounds”, rather than a completely new ground, as he submitted AZ had been. He sought to make good that submission by reference to the fact that the grounds had taken issue with the Judge’s treatment of delay.
32. I cannot accept these submissions. First, while I accept that the permission granted in AZ was a fairness point whereas the grounds pleaded had only related to whether the decision accorded with Country Guidance – two very different sorts of alleged errors - this seems to me to be a distinction without a difference.

The question is whether the error which the Respondent now seeks to rely on is contained in the Grounds of Appeal, the importance of the proper particularisation of which has been emphasised on numerous occasions. While it is true that the Grounds took issue with the Judge's reliance on delay, the ground posited in that respect was that delay was irrelevant in principle to the Article 8 proportionality analysis. That is not the same ground of challenge as that identified by the permission Judge, namely whether the problems caused to the Appellants by the Respondent's delay in granting the First Appellant's BRP, the failure to grant a 3-year extension and the failure to respond to Mr Ayduran's request that his pending application be withdrawn so that he could visit his ill father, were sufficient to constitute "historical injustices".

33. I raised with the parties at the hearing whether it might be said that a failure to explain why the delays etc were sufficient to constitute exceptional circumstances might be said to be contained with para.5 of the Grounds. Mr Parvar submitted that this ground was sufficiently broad to encompass such a failing. Mr Ali's response was that this was insufficiently particular.
34. Having reflected on this, I consider that Mr Ali has the better of the argument on this point. In Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC), the Tribunal held at para.6 that that "It is axiomatic that every application for permission to appeal to the Upper Tribunal should identify, clearly and with all necessary particulars, the error/s of law for which the moving party contends... A properly compiled application for permission to appeal will convey at once to the Judge concerned the error/s of law said to have been committed. It should not be necessary for the permission Judge to hunt and mine in order to understand the basis and thrust of the application" [emphasis added]. These were described as "elementary requirements and standards". By contrast with what required by Nixon, the Respondent's para.5 is nebulous and wholly lacking in particularity. Had the Respondent wished to plead that there was a failure to give reasons why the Respondent's delays etc fell within the definition of historical injustices, he was required to have said so. Having failed to do so, it would not be appropriate - and would be contrary to the procedural rigour to be expected of parties to public law litigation such as this - to construe the ground in such a broad way as that contended for by the Respondent.
35. In those circumstances, I do not consider that any points relating specifically to the Respondent's delays and in particular whether they are sufficient to constitute historical injustices and/or whether the FTT Judge failed to explain why they were such as to reduce the weight to be accorded to the maintenance of proper immigration control, has been pleaded by the Respondent.
36. Mr Parvar's alternative submission, if I were not with him on the scope of the grounds as pleaded, was to seek permission to amend his grounds of appeal so as to include the points raised by the permission Judge.

Application to amend

37. Mr Parvar submitted that he should be permitted to rely on the grounds identified by the permission Judge as there was no prejudice to the Appellants in dealing with the point, given that they had been on notice of it since the permission decision. Mr Parvar accepted that "in an ideal world" there would have been something in writing, but submitted that as it would simply have been a rehearsal of the permission decision. Mr Ali's response was to suggest that it would be unfair to permit the Respondent's application to amend. The Respondent could

have made the present application on receipt of the rule 24 response, but chose instead to wait until the hearing before doing so.

38. The power to permit a party to amend a document (contained in r.5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008) must be exercised so as to seek to give effect to the overriding objective: r.2(3)(a). On balance, I consider that on the facts of this case it would not be in accordance with the overriding objective to allow the Respondent's application to amend. This is for the following reasons.
39. First, it is well established that fairness and the orderly management of litigation require that there must be an appropriate degree of formality and predictability in the conduct of litigation, and that unfortunate trends towards evolving grounds of appeals should be discouraged, using whatever power the Tribunal has to impose procedural rigour in proceedings: see R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841, at [67]-[69] per Singh LJ. This is a case that is characterised by a lack of such procedural rigour by the Secretary of State. As already noted, the grounds displayed a woeful lack of familiarity with basic, well-known, principles of immigration law, the decision under challenge and the documents that were before the FTT Judge. Moreover, they were in part vaguely drafted. Even now, no amended grounds of appeal document has been produced.
40. Second, in that context, the lateness of this application to amend is in my view particularly significant. The rules provide for a response to an appeal to be provided under rule 24 and for a reply to that response to be provided by an appellant under rule 25. A rule 25 reply is to be provided to the other party and the Tribunal no later than 5 days prior to the hearing. This is to ensure that the issues to be decided are well ventilated in advance and everybody knows what they have to argue about and decide. The Respondent knew from about 3 April 2024, when the Appellants' rule 24/skeleton was served that the scope of the grounds of appeal were in issue. The Respondent therefore had a week in which to put in a rule 25 reply indicating why he considered the grounds were sufficient to cover the grounds in the permission Judge's decision and/or apply to amend, but chose not to do so.
41. Third, I do not accept that there is no prejudice to the Appellants in allowing this amendment. While it is correct that the Appellants had notice of the permission Judge's decision, until they heard from the Respondent they did not know whether they would need to address the points therein or whether the Respondent accepted, in light of the Appellants' rule 24 response or otherwise, that the grounds were insufficiently broad to include the permission Judge's points. I therefore consider that there was a degree of prejudice to the Appellants in allowing the amendments.
42. Fourth, on the other side of the balance, it is obvious that the Respondent is prejudiced in not being able to put forward the amended grounds of appeal. However, the Respondent is the author of his own misfortune in this regard and so it is not a factor to which I attach much weight.
43. The application to amend is accordingly refused.

Consideration of the grounds

44. As noted above (para.22) there are two pleaded grounds.

45. The first is that the Judge failed to give adequate reasons for finding that there were exceptional circumstances, such that the Appellants' removal would be a disproportionate interference with Article 8 ECHR outside of the rules.
5. Appellate case law is replete with descriptions of what is required by way of reasons by lower courts and tribunals. Many of the relevant cases were reviewed in Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413, [2019] 4 WLR 112 by Males LJ (with whom Peter Jackson and McCombe LJ agreed) at [39]-[47]. The key points for present purposes that come out of that review are as follows:
- a. A failure to give reasons may be a ground of appeal in itself even where the conclusion reached is one that would have been open to the judge on the evidence.
 - b. The extent of the duty to give reasons, or rather the reach of what is required to fulfil it, depends on the nature of the case. Nonetheless, a judgment needs to make clear not only to the parties but to an appellate court the judge's reasons for his or her conclusions on the critical issues.
 - c. This does not mean that every factor which weighed with the judge in his or her appraisal of the evidence has to be identified and explained, but the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he or she resolved them explained.
46. It is also to be noted that a reasons challenge is not to be confused with a challenge based on the irrationality or perversity of the reasons given. As Singh LJ (with whom Longmore and Treacy LJ agreed) noted in MD (Turkey) v Secretary of State for the Home Department [2017] EWCA Civ 1958 at [26], "The duty to give reasons requires that reasons must be proper, intelligible and adequate", however an assessment of adequacy does not "provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits."
47. Applying those principles, in my judgment the FTT Judge provided adequate reasons for concluding that there were exceptional circumstances. As set out above, the Judge made findings about each of the aspects of the Appellants' claim and then undertook the balance sheet approach to weighing up the various factors recommended in the authorities. He considered that the maintenance of effective immigration control is in the public interest, but considered that it was reduced as a result of the delays which has had a significantly adverse effect on the Appellant's family, which dilutes the weight otherwise to be given to this public interest. He noted that the Appellants speak English and have not been a burden on the taxpayer, but that these were neutral factors. He then considered the Appellants' private life factors, in particular that the Second and Third Appellants are settled at school and thriving in the UK and had invested their future in remaining in the UK and embracing a new life here. He considered the best interests of the children (having concluded that it was to remain in the UK with both parents). He noted that relocating to Turkey would involve upheaval and interrupt the Second and Third Appellants' education and the stability they have achieved in the UK. Nevertheless, the Judge applied the statutory reduction in weight to be given to private life established with precarious leave. Having set out the various factors, bearing in mind the 'double historic injustice' the Judge considered that the factors on the Appellants' side of the balance outweighed the public interest on the Respondent's. The Respondent may disagree with some or

all of those reasons, but they are in my view ample to discharge the Tribunal's duty to give reasons. This ground is accordingly rejected.

48. The second ground was that the FTT Judge had adopted an inconsistent approach to the weight to be given to the private lives of the Second and Third Appellant. Mr Parvar submitted in this respect that paras. 38(c)(i) and 39 of the FTT Judge's decision were contradictory because in the former the FTT Judge weighs in the Appellants' favour the private life of the children, whereas in the latter the FTT Judge accords it little weight. I can detect no inconsistency in this reasoning. In para. 38(c)(i), the Judge is explaining that the Appellants' private life weighs on their side of the scales, and explains the nature of the Second and Third Appellants' private life in the UK. In that passage he is not deciding how much weight to give it. It is then, at para.39, that the FTT Judge correctly notes that statute requires little weight to be given to this. That does not mean that it is not a factor on the Appellants' side of the scale. This ground is also rejected.
49. It follows from the above that this appeal must be dismissed and the decision of the FTT Judge allowing the Appellants' appeals shall stand.
50. However, in case I am wrong as to the scope of the grounds, the scope of the grant of permission or wrong to have refused the Respondent's application to amend the grounds of appeal, I deal briefly with the historical injustice grounds in any event. As to these, it is appropriate to begin by considering the principal "historical injustice" cases.
51. In Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC), [2021] Imm AR 355, the Tribunal gave guidance on the difference between historic and historical injustice cases. In para.3 of the Headnote, it stated (omitting references),

"Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy; where delay in reaching decisions is the result of a dysfunctional system; or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken. Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category."

52. Although I have omitted references to the previous authorities from this paragraph it is worth noting that the category where the Secretary of State forms a mistaken view about an individual's activities or behaviour derives from Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009, in which the Court of Appeal considered that a Tribunal may reach its own findings of fact in relation to the alleged activities or behaviour on a statutory appeal and it is not necessary for the Tribunal in such a case to find that the Secretary of State's view about those activities or behaviour was vitiated by any public law error. It is sufficient for it to have been wrong.
53. In Ahmed (historical injustice explained) Bangladesh [2023] UKUT 165 (IAC), the Tribunal held that, as is clear from Patel, above, 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.

54. In relation to the striking of the proportionality balance in cases of this kind, the Tribunal made the following general observations of relevance:
- a. First, 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 justifying a reduction in the weight given to the public interest.
 - b. Second, 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.
 - c. Third, 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.
 - d. Fourth, absent good reason, where 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 the public interest in the maintenance of effective immigration controls should be reduced.
55. There is a danger in elevating these general observations into legal rules. In particular, they have to be seen in the context of both the holding set out in para.1 of the Headnote (set out in para.51 above) that historical injustice is not some separate or freestanding legal doctrine, but rather a way of articulating how in certain cases it may be appropriate to accord less weight to the public interest in effective immigration control than would otherwise be the case, as a result of the wrongful operation of the Respondent's immigration functions.
56. In particular, while I have no doubt that the observation in para.52(b) above is correct as a description of the cases to date, I do not consider that it is intended to be prescriptive as to the type of error that can qualify as an historical injustice. This is clear from the caveat contained in the observation itself ("the possibility cannot be ruled out"), but also from the previous authorities, where errors falling short of public law errors have sufficed to constitute "historical injustices". I also do not consider that the Tribunal can have intended by this observation to require that the First-tier Tribunal, which has no judicial review jurisdiction, to effectively determine the lawfulness in public law terms, of any errors that the Respondent has made, perhaps many years ago, as part of its proportionality analysis. To the extent that the permission Judge may appear, in para.9 of the permission decision, to have considered that it was a legal prerequisite for the FTT Judge to consider whether there was a public law error before concluding that there was an historical injustice, in my respectful judgment he was mistaken.
57. I turn then to the question of whether the FTT Judge erred in his assessment of the Respondent's errors. I do so with the presumption well in mind that the FTT Judge is an expert tribunal who is taken to know and to have applied the law, in the absence of something in the decision itself suggesting otherwise.

58. It seems sensible at this juncture to recall certain findings that are not challenged on this appeal.
- a. First, there were administrative problems with the issuing of the First Appellant's BRP that the Appellants (and in particular the First Appellant) were issued. This had a knock-on effect on the length of leave the First Appellant had to set up his business in the UK. When Mr Ayduran came to apply to extend his leave, he should have been granted a period of three years' leave to remain which would have been extended in compliance with rules. Instead, he was granted only 12 months leave to remain.
 - b. Second, Mr Ayduran sought the Respondent's permission to leave the UK without his (and the Appellants') applications for further leave to remain being treated as withdrawn, but received no response at all from the Respondent in relation to this.
59. In relation to the first of these, I have no hesitation in concluding that the FTT Judge was entitled to consider that this was sufficient to amount to an historical injustice. The First Appellant was granted a BRP with different dates of validity to that of Mr Ayduran and the Second and Third Appellants. No reason, even less a rational one, has been given for this inconsistency. Indeed, the Respondent has apologised for the error. There plainly therefore was a wrongful operation by the Respondent of his immigration functions. Moreover, the FTT Judge properly identified the detriment suffered by the Appellants. They were not granted leave that they would otherwise have been granted. The knock-on effect of that was that they had to make a further application (at cost) sooner than they otherwise would have and this fell when Mr Ayduran needed to leave the UK to see his dying father, which would otherwise not have been the case. It is true that the Appellants (and Mr Ayduran) did not challenge this at the time, but as Mr Parvar accepted, the Appellants could not realistically have challenged the BRP issue at the time, at least in any way that would have had any real-world effects, given the time it would have taken for the judicial review to take its course.
60. In relation to the second set of findings, I also consider that the FTT Judge was entitled to consider that this amounted to an historical injustice. The permission Judge considered that the withdrawal of Mr Ayduran's and the Appellants' application was "the statutory consequence" (see para.8 of the permission decision cited above) of him leaving the UK. That is not correct. Unlike an appeal, which is withdrawn when an appellant leaves the UK, by operation of law, an application for leave to enter/remain is deemed withdrawn by virtue of paragraph 34K of the Immigration Rules. The Respondent accordingly has a discretion not to treat an application as withdrawn (see Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673 at [98]). It follows that she is required as a matter of law, when requested to do so on proper grounds, to consider whether to exercise that discretion. In this case, she failed to consider whether to do so. That is on any view a public law error and a non-operation of the Respondent's immigration functions. The withdrawal of the Appellants' and Mr Ayduran's applications have also had detrimental effect on them. As a result, they are ineligible for leave under the ECAA which is no longer in effect and, subject to a successful entry clearance on Article 8 grounds, Mr Ayduran is stuck in Turkey, while his family are in the UK.
61. There is, moreover, nothing in the FTT Judge's decision that is indicative of the Judge having misapplied the caselaw on historical injustice.

62. For completeness, I consider that the Judge's reasons in this respect are also adequate. He did not expressly consider the Ahmed observations, but it is clear from the reasons that he gave that they were effectively met.

Conclusions

63. As set out above, this appeal is dismissed. I acknowledge that different Judges of the First-tier Tribunal might have come to different conclusions on whether the events that took place in this case were sufficient to reduce the weight to be given to the public interest in the maintenance of effective immigration control. That however is not the test that I am required to apply, which is whether the FTT's decision involved the making of an error on a point of law.

64. I add for completeness that, although it will be for the Respondent to assess what leave to grant to the Appellants and Mr Ayduran in due course, in Ahsan, cited above, it was held that where the Respondent has made a decision on the basis of an error, he is obliged to deal with the relevant applicants so far as possible as if that error had not been made (see [120] per Underhill LJ). Here, I note that it would appear from the FTT Judge's findings that if the Respondent's error with the BRPs had not been made, Mr Ayduran and his family would have been entitled to leave for 3 years and would have been entitled to ILR under the ECAA after 5 years in the UK.

Notice of Decision

The decision of First-tier Tribunal Judge Hosie promulgated on 28 December 2023 does not contain an error of law and shall stand.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 April 2024