IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001162
First-tier Tribunal Nos: HU/51272/2023
LH/04091/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28th May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MANJINDER KUMAR
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Wain, Senior Home Office Presenting Officer
For the Respondent: Mr Collins, counsel, (instructed by Pillai & Jones Solicitors)

Heard at Field House on 13 May 2024

DECISION AND REASONS

Background

1. To avoid confusion, I shall refer in this decision to the parties as they were before the First-tier Tribunal i.e. to Mr Kumar as the 'Appellant' and the Secretary of State as the 'Respondent'.

2. This matter concerns an appeal against the Respondent's decision letter of 5 December 2022 ("the Refusal Letter"), refusing the Appellant's application made on 23 August 2021.

3. The Appellant applied on the basis of his private life, having spent over 10 years in the UK and suffering mental health conditions, whilst also saying he faced risk on return due to his religious beliefs.

4. The Respondent refused the Appellant's claim in the Refusal Letter. This stated that the Respondent did not accept that there would be very significant obstacles to the Appellant's integration into India pursuant to immigration rule 276ADE(1)(vi). The Respondent also considered the Appellant's credibility was undermined pursuant to Section 8 of the Asylum and Immigration (Treatment of Claimants) Act 2004 because he had a long history of non-compliance with immigration laws (including having worked illegally in the UK), he did not raise his fear of return at the earliest opportunity and his account was inconsistent. Even if his account were accepted, the letter said there was sufficiency of protection in India and internal relocation was reasonable; his mental health conditions were not such as to mean a breach of article 3 ECHR was likely on return and medical treatment was available and accessible in India.

5. The Appellant appealed the refusal decision and later sought to also rely on his relationship with his partner and child who were in the UK.

6. His appeal was heard by First-tier Tribunal Judge Rae-Reeves (the "Judge") at Taylor House. The Judge subsequently allowed the appeal in his decision promulgated on 1 February 2024.

7. The Respondent applied for permission to appeal to this Tribunal on the grounds that the Judge had erred by making a material misdirection of law on a material matter and had failed to provide reasons or any adequate reasons for findings on material matters. Specifically:

   (a) The Judge went beyond his duty as adjudicator and stepped into the role of a primary decision maker when deciding the facts, which infected his overall conclusions.

   (b) The Judge gave significant weight to the outstanding application of the Appellant's partner and child, making the assumption that this would be granted and using this to find the Appellant satisfied the immigration rules [28-29]; this was arguably irrational, if not perverse. The Judge also failed to identify which rule(s) was satisfied, meaning the finding was inadequately reasoned.

   (c) The Judge found that there were no insurmountable obstacles to the Appellant's relationship with his partner and child continuing in India [24] and he had a poor immigration history [26] (which contradicted a finding of his being of 'good character' in [27]). Against this background, the Judge failed to adequately reason why the Appellant's removal was considered to be disproportionate with regard to article 8.

8. Permission to appeal was granted by First-tier Tribunal Judge Austin on 15 March 2024, stating:

> "1. The application is in time.
>
> 2.The grounds assert that the Judge erred in making a material error in law by considering that the appellant's wife's forthcoming application for eave was likely to succeed and that this assumption weighed in the balancing exercise carried out by the tribunal, favourably to the Appellant. It is arguable that this presumption of the outcome of an application not yet decided may have infected the decision in this appeal. Permission is granted."

The Hearing

9. The matter came before me for hearing on 13 May 2024 at Field House.

10. I received the Appellant's rule 24 response to the appeal on the morning of the hearing, in respect of which Mr Collins apologised but did not explain the reason for the delay. However Mr Wain confirmed that he had seen and reviewed the response such that no prejudice had been suffered by the Respondent and I was content to admit it.

11. Mr Wain took me through the grounds of appeal. He added that the rule 24 response highlights that the Judge says at [27h] that "It is not for me to decide that application" (being the outstanding application of the Appellant's partner and child), however he then goes on to say in [28] that "Realistically, he will not be removed from the country in the short term if refused and his dependency application will be decided by the respondent and most likely in his favour". Mr Wain submitted that, although this is contradictory, the Judge effectively assumes the application will be granted. As part of the article 8 proportionality exercise, the Judge was to look at matters as at the date of the hearing, the position being that the applications were outstanding. To assume they would be granted is a clear material error as it was key to the Judge's reasoning.

12. Mr Collins replied to take me through the rule 24 response, saying:

    (a) When the Judge made his finding that the Appellant is of 'good character', he clearly had in mind the Appellant's lack of criminal convictions rather than immigration history, given he had set out the Appellant's poor immigration history before making this finding. However, Mr Collins admitted that there is nothing in the decision referring to a lack of criminal convictions and it may be that this should have been only a neutral factor and not taken positively in the Appellant's favour.

    (b) The Judge's comments in [28] are 'a world away' from actually deciding the outstanding application or assuming it would be granted. The Judge specifically makes clear that it was not for him to decide the dependency application. Mr Collins said he was present at the hearing at which the Respondent's representative confirmed that no decision would be made on the outstanding dependency application pending the result of this appeal.

    (c) It is clear from [9-10] that the Judge canvassed the issues with the parties and was proceeding on the basis that the only issue was that of article 8; he correctly carried out the proportionality exercise in [26-27] reaching findings both in favour and against the Appellant.

    (d) Caselaw shows that the Upper Tribunal should not rush to find errors of law and should exercise judicial restraint when it comes to reasoning. Whilst the decision may seem generous in its conclusions; these were open to the Judge on the evidence.

13. Mr Wain replied to say that the good character point should only have been neutral, as with financial independence and English-language in terms of s.117B factors, as is confirmed by the case of Rhuppiah [2018] UKSC 58. The Judge should also have treated the fact of the outstanding application as neutral but instead he finds that it weighs positively and tipped the balance in the Appellant's favour.

14. The parties agreed that if material error were found, the appropriate method of disposal would be to remit the appeal back to the First-tier Tribunal for hearing afresh.

15. At the end of the hearing, I reserved my decision.

Discussion and Findings

16. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the decision under challenge.

17. The Judge's decision is fairly brief. Whilst brevity is often to be lauded, it must not be at the expense of sufficient explanation and reasoning (see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), including as to the origin of the point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal – see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).

18. The Judge correctly sets out the background to the appeal in [2]-[6]. At [7] he records that the Respondent consented to the 'new matter' of the Appellant's relationships with his partner and child being considered within the appeal.

19. At [8] the Judge records that the partner and child had made an application which was "pending resolution of the current appeal". I take this to mean, as Mr Collins confirmed it did mean, that the application was not going to be decided until the outcome of the Appellant's appeal was known. Mr Wain did not disagree with this.

20. At [9] the Judge records that the appeal was being made only on the basis of article 8 outside the rules. It therefore appears that there had been acceptance that the Appellant did not meet the requirements of the immigration rules. Mr Collins confirmed this was correct and again Mr Wain did not disagree with this.

21. In [10] the Judge records a series of questions which the parties had agreed needed to be resolved as relevant to the proportionality balancing exercise, being: whether the Appellant could speak English; whether he was financially independent; what were the best interests of the child; and "What is his wife's status and would he be likely to have a visa based on her status?".

22. The evidence is discussed in [11]-[17]. Notably in [12], the Judge records that:

> "His wife states that she arrived in the UK on 28/09/2020 under a student visa. Having completed her LLM she switched to a skilled worker visa. She states that on 07/08/2023 the appellant and their child made applications based on her immigration status."

23. At [14] he records that:

> "She is currently on unpaid maternity leave, living off savings and will return to work on 15/2/2024".

24. The correct legal framework is set out in [18].

25. The Judge's findings are contained in [19]-[29] and can be summarised as follows:

    (a) the Appellant's partner is employed on a salary of £20,500 and her job is available from 16/2/2024. She has a skilled worker visa on the basis of this employment. Because of her work, the Appellant will not be dependent on the state [19].

    (b) the Appellant, his partner and child are all Indian nationals [20].

    (c) the Appellant has been in the UK illegally since 2012; he and his partner must have known about his illegal status, and that her status was precarious, when they undertook their religious marriage ceremony in May 2021 [21].

    (d) the Appellant cannot speak English competently [22].

    (e) the best interests of the child are to be with the parents whether they are in India or elsewhere [23].

    (f) there are no reasons why the couple cannot return to India and they are both fit and able to work and support themselves [24].

    (g) article 8 is engaged but the immigration rules are not met [25].

    (h) there are several factors weighing against the Appellant in the proportionality exercise, being that: he has been cynical in his approach to the immigration rules; it is a "major factor" that he does not meet immigration rules; the family could return to India; the Appellant's family life has been established whilst he had illegal status such that little weight is attached to it; he cannot speak English [26].

    (i) there are several factors in the Appellant's favour, being: he is of good character; his partner is a skilled worker in a shortage occupation; and "significant weight" is attached to the fact that the appellant and his child have an outstanding application which, "taking a real world view…will succeed based on her occupation and income"[27].

26. At [28] the Judge repeats that the outstanding application will most likely be decided in the Appellant's favour. At [29] the Judge finds that:

> "I accept Mr Collins' submission that the existence of that application tips the balance in the appellant's favour because it means that at the present time, the appellant is capable of coming within the immigration rules. For this reason, it would not be in the public interest to remove him".

27. For reasons which I shall go on to discuss, I accept and agree with all of the criticisms the Respondent makes of the Judge's decision.

28. It is clear that the Judge finds that the outstanding application of the Appellant's partner and child will succeed, as he says as much at least once. The basis on which he finds that the application will succeed appears to be due to the Appellant's partner's occupation and income [27]. However, he had earlier referred to the fact that she earned £20,500 [21] and was currently on maternity leave and living off savings [14]. There is no discussion of what the minimum required income for a partner application was and whether the Appellant's partner earned more than that minimum. As at the date of the hearing, she was not working. Whilst the Judge accepted that the partner was due to return to work on 16 February 2024,

this was something that had not yet happened. There is no reference to the rules which the Appellant's partner and child would need to meet in order for their application to be successful and so it is unclear how the Judge was able to find that it was most likely to succeed. Even if it did succeed, it is unclear how this would mean the Appellant himself came within the rules for his own appeal, when it was accepted that he could not otherwise meet them.

29. I consider it was an error to even consider the likely outcome of the partner and child's application given that this was based on speculation and events outside the Appellant's appeal and involved looking into the future. That error is compounded by the Judge then using it a factor to find the proportionality balance is tipped in the Appellant's favour. There is a lack of reasoning as to why this factor was considered sufficient to come near outweighing the numerous other factors found to weigh against the Appellant, including the 'major factor' that he did not meet the rules in his own right. In addition, the Judge applying "significant weight" to the outstanding application makes no sense given that the Judge acknowledges in [26d] that little weight was to be applied to the relationship as it was formed when the Appellant lacked lawful status and his wife status was precarious. These findings are contradictory.

30. These errors are clearly material because, as I have said, the Judge refers in [27] to attaching "significant weight" to the outstanding application and his assessment that it would likely succeed. The only other two factors found to be in the Appellant's favour are that the Appellant is of good character and his partner is a skilled worker in a shortage occupation. For reasons which I will discuss, it is unclear how these factors, either individually or collectively, could be sufficient in themselves to outweigh the numerous other factors weighing against the Appellant.

31. There is no explanation behind the Judge's finding in [27f] that the Appellant is of good character and it is clearly at odds with the earlier finding at [26a] that the Appellant has been "cynical in his approach to the immigration rules". I reject Mr Collins' submission that, in finding the Appellant was of good character, the Judge had in mind the Appellant's lack of criminal convictions. There is nothing in the decision to indicate that this was the case. There is a lack of reasoning and, without this, the finding simply cannot be understood. This is an error. Even if the finding were sound, I agree that this should only have been a neutral factor rather than one in the Appellant's favour, as it is expected that applicants should comply with the law.

32. There is also a lack of reasoning as regards the finding that the Appellant's partner's occupation was something that held weight in the Appellant's favour. The Appellant himself was not in work, and having found that little weight was to be attached to the relationship, I do not understand how the wife's occupation could have been something that held any particular weight. It was a factor only tangentially related to the Appellant and so required more in the way of explanation.

33. I do not consider either the factor of good character (being neutral) nor the partner's occupation, which was insufficiently explained, are things which could have been determinative in their own right when viewed in the context of the weight of factors against the Appellant. As such, without the error concerning the outstanding application to which 'significant weight' was attached, the overall decision could well have been different.

Conclusion

34. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.

35. I find the errors found infect the decision as a whole such that it cannot stand. I preserve no findings.

36. In the light of the need for extensive judicial fact-finding, and having regard to paragraph 7(2) of the Practice Statements of the Immigration and Asylum Chambers of the First tier Tribunal and the Upper Tribunal as well as Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Rae-Reeves.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.

3. No anonymity order is made.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
16 May 2024