IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003116

First-tier Tribunal No: HU/06643/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of October 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S McKenzie, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Field House on 30 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

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 appellant is a citizen of Bangladesh who in 2017 was sentenced to six years' imprisonment for an extremely serious offence. A deportation order was made against him in May 2019.

3. In a decision promulgated on 7 June 2024, Judge of the First-tier Tribunal Ferguson ("the judge") allowed an appeal by the appellant on the basis that refusing to grant him leave to remain in the UK would violate article 8 ECHR. The respondent has been granted permission to appeal against this decision.

4. The case was listed before me for a Case Management Review ("CMR"). However, with the agreement of the parties I converted the CMR to an error of law hearing.

5. For reasons summarised at the hearing and set out in further detail below, I have decided to set aside the decision of the First-tier Tribunal and remit the case to the First-tier Tribunal to be decided afresh.

Decision of the First-tier Tribunal

6. The issue before the judge was whether the appellant's removal would violate Article 8 ECHR.

7. The judge applied the framework in Section 117C of the Nationality, Immigration and Asylum Act 2002, which provides:

> 117C Article 8: additional considerations in cases involving foreign
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where -
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the

> extent that the reason for the decision was the offence or offences for which the criminal has been convicted

8. The judge firstly considered the Exceptions specified in sub-sections (4) and (5) and found that neither applied.

9. The judge then proceeded to consider whether there were very compelling circumstances "over and above" the Exceptions, in accordance with Section 117C(6).

10. When considering Section 117(6), the judge placed significant weight on a finding of fact that the an application for British nationality was made on behalf of the appellant in 2003 but was not decided until 2014. In fact, the judge treated this as determinative, stating in paragraph 53:

> "But for this one factor, the balance of all factors would come down on the side of the deportation order".

11. The judge made multiple references to this delay and its significance. For example, he stated:

> "At the hearing it was accepted on behalf of the respondent that the delay in making a decision on the 2003 application was lengthy and unexplained".
>
> …
>
> "The application for British citizenship was made for [the appellant] when he was aged just 2 years old. The application was determined ten years later by which time he was aged 13 and was refused for reasons of character".
>
> …..
>
> "Had the respondent determined the application within a reasonable period of it being made, it is extremely unlikely that it could have been refused on grounds of character or 'criminality'".

Grounds of Appeal

12. The respondent's grounds of appeal submit that the judge's assessment of Section 117C(6) was based on a factual mistake; the mistake being that the application for citizenship was made in 2013, not 2003; and therefore the decision refusing the application made in 2014 was a timely one.

Submissions

13. Before me, it was common ground between Ms McKenzie and the appellant that the application for citizenship was made in 2013 and therefore that the judge made a factual mistake.

14. The appellant submitted – and Ms McKenzie did not dispute – that the factual error arose from a mistake by the respondent in the refusal letter that was not corrected by the Presenting Officer before the First-tier Tribunal, and the appellant was not responsible for the mistake.

Error of Law

15. It is well established that a decision can be set aside on the basis of unfairness resulting from misunderstanding or ignorance of an established and relevant fact. See paragraph 91(ii) of *E & R v SSHD* [2004] EWCA Civ 49.

16. This is, plainly, such a case. The judge treated as determinative a finding that an application for citizenship was made in 2003 when, in fact, and as agreed by the parties, the application was made in 2013.

17. For the avoidance of doubt, I am satisfied that the mistake was made by the respondent and that the appellant is not, in any way, responsible for it.

Disposal

18. It was common ground before me that the nature of the error is such that the decision would need to be re-made. Ms McKenzie did not express a view one way or the other as to whether the matter should remain in the Upper Tribunal. The appellant expressed a preference for the case to be remitted to the First-tier Tribunal.

19. In my view, the nature of the error (unfairness arising from a factual error) is such that the appellant should not be denied the benefit of a two-tier decision-making process, as explained in *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). I have therefore decided to remit the case to the First-tier Tribunal to be made afresh.

Notice of Decision

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

The appeal is remitted to the First-tier Tribunal to be made afresh by a different judge.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 October 2024