Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15023/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 January 2014	**On 5 February 2014**

Before
UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE REEDS

Between

Harjinder Singh

Appellant

and

The Secretary Of State For The Home Department

Respondent

Representation:
For the Appellant: Mr Z. Malik, Counsel instructed by Malik Law Chambers, Solicitors
For the Respondent: Mr N. Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India who was born on 7 January 1964. He appeals against the determination of First-tier Tribunal Judge Chamberlain promulgated on 15 November 2013 dismissing his appeal against the Secretary of State's decision to refuse his application for leave to remain on compassionate grounds outside the Immigration Rules and on the basis that removal would violate his human rights. The appeal to the Tribunal was on different grounds alleging the Secretary of State's decision was unlawful and that, accordingly, removal would violate the appellant's human rights.

2. The compass of the appeal is very limited. In essence, it centres upon the remedy to which an appellant is entitled when the Secretary of State has made an error of law in the decision. The Judge made the same error in his determination but it is

not, principally, the Judge's error that is the focus of this appeal; rather it is the lawfulness of the Secretary of State's decision.

3. The facts are simply stated and, for the purposes of this hearing, uncontroversial. The appellant arrived in the United Kingdom on 27 September 2001, some 12 years ago, as a visitor with leave to remain until 6 March 2002. He did not return to India at the expiration of the time permitted to him and remained as an overstayer. On 18 November 2010, by which time he had been in the United Kingdom for over 9 years, he applied for further leave to remain on the basis that removal would violate his human rights. The application was refused on 18 December 2010. On 5 July 2012, by which time the appellant had been in the United Kingdom for almost 11 years, he sought leave to remain outside the Immigration Rules on compassionate grounds which the respondent considered but ultimately concluded did not merit the grant of leave and, as the variation of leave to enter or remain was being sought for a purpose not covered by the Rules, was subject to mandatory refusal pursuant to paragraph 322(1).

4. The appellant was served with an IS151A on 24 April 2013 in which he was informed of his immigration status and his liability to detention and removal. On the same day, the respondent decided to remove the appellant as an illegal immigrant and/or as a person subject to administrative removal under section 10 of Immigration and Asylum Act 1999.

5. In her decision letter, the respondent then went on to deal with the appellant's human rights by reference, amongst other things, to Appendix FM of the Immigration Rules and paragraph 276ADE to DH. It is apparent that the assessment of the appellant's Article 8 claim was conducted by the respondent entirely in accordance with the Statement of Changes to the Rules that had been introduced on 9 July 2012. There was no further consideration of whether the respondent's decision violated his human rights outside a consideration of the factors enumerated by the respondent in the new rules.

6. The appellant's application was, as we have said, made on 5 July 2012. The changes to the Immigration Rules set out in the Statement of Changes took effect on 9 July 2012 (HC 194). The changes were, however, subject to transitional implementation such that if an application for entry clearance, leave to remain or indefinite leave to remain had been made before 9 July 2012 and the application had not then been decided, it was to be decided in accordance with the Rules in force on 8 July 2012.

7. Accordingly, the decision of the Secretary of State was not made in accordance with the law and this expression includes not being made in accordance with the policies embodied by the Secretary of State in the Immigration Rules.

8. This point does not seem to have been raised by the appellant's counsel who appeared before the First-tier Tribunal (but not before us). There is no reference

to the point in the Judge's determination; the grounds of appeal to the Upper Tribunal do not allege that the First-tier Tribunal Judge failed to deal with it. Nevertheless, it was the sole ground relied upon by the appellant in his grounds of appeal to the Upper Tribunal. It is not suggested by the respondent before us that the appellant is prevented from taking the point now.

9. It is, however, important to mention the way in which the Judge dealt with the claim on 6 November 2013. He relied upon the decision of the Upper Tribunal in *MF (article 8-new rules)* Nigeria [2012] UK UT393 (IAC) without thereby referring to the subsequent decision of the Court of Appeal *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 decided on 8 October 2013.

10. Accordingly, the Judge did not confine himself to the question of whether the appellant came within the provisions of Appendix FM and paragraph 276ADE pointing out in paragraph 7 of the determination that the respondent did not consider the appellant's case '*under Article 8 more generally*'. We construe this to mean a consideration of the Article 8 outside the Immigration Rules. He found that the appellant did not meet the requirements of the new rules but also found, in paragraph 11, that there was a need to consider the appellant's Article 8 claim more generally. He went on to do so, recounting the appellant's immigration history and the evidence given by the appellant. He said in paragraphs 16 to 19:

> "The appellant gave evidence of his ties in the community which form the basis of his private life. He gave evidence that he has been involved in a voluntary capacity with the Gurudwara since his arrival. In his witness statement to paragraph 12 he said that he "played a vital role in the various religious functions and programmes". At the hearing his representative asked him what he did at the Gurudwara and said that he helped in the kitchen cleaning dishes and serving food, he cleaned shoes, he showed the children how to wear a turban, he taught the children in Punjabi, he opened the door for old people and helped them to get to the bus stop, and, if the priest was not there, he read the holy book. He said that he performed these tasks daily. I do not find that these activities constitute "a vital role in the various religious functions". He said in his witness statement that he performed a vital role in religious functions, yet at the hearing he said he only read the holy book "if the priest was not there". In the appellant's bundle was a letter from Daljit Singh Saggu, who also gave evidence at the hearing. In his letter he said that the appellant "participates in most of our religious programmes as a congregation". This does not support the appellant's claim to perform "a vital role in the various religious functions".
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> While I acknowledge that the Gurudwara also provides a service to the community as a community centre, I do not find that the appellant's role there is vital. I do not find that the appellant is bringing particularly unique or special qualities to the Gurudwara that could not be performed by someone else. I do not find that anyone at the Gurudwara has a dependency on the appellant which could not be met by someone else. Furthermore I find that the appellant would be able to perform these tasks at a Gurudwara in India. I find that there is nothing to stop him offering his services to the community in India in a similar way. He could continue his service in India.

> The only other evidence given at any private life was evidence that he had assisted in cleaning up after the riots…
>
> I find that at its highest the appellant has formed relationships with other adults through his involvement with the Gurudwara …

11. The Judge then went on to deal with the evidence the appellant had provided of family and friends in India. Although the appellant initially said there were none, he went on to talk of his wife in India, from whom he was not divorced and his mother and brother living there. The Judge found the appellant had strong family ties in India and would be able to receive support from his family there. Furthermore, his sister and nephew and niece in the United Kingdom who had supported him both financially and emotionally neither attended the hearing nor offered letters of support enabling the Judge to conclude, notwithstanding the evidence from a distant cousin, that the appellant did not have any significant relationships sufficient to render his removal a violation of his private or family life. He did find, correctly in our judgment, that the respondent's decision would interfere with his private life.

12. We had rather hoped the necessity of again setting out the words of Lord Bingham in *Razgar* [2004] UKHL 27 had long passed, so familiar are they to all decision-makers. However, in the context of this appeal, it becomes necessary to do so. In paragraph 17 of his opinion, Lord Bingham identified the 5 questions – or stages - in a case where removal is resisted in reliance on Article 8 that a decision-maker is likely to ask himself:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

13. We construe the determination as including a finding that the appellant had no protected family life but that removal would be an interference with his private life; notwithstanding this, removal was in accordance with the law "*as being a regular immigration decision taken by UKBA in accordance with the Immigration Rules*".

He then went on to deal with proportionality and concluded that removal would be a proportionate response having balanced all the material factors together.

14. The significance in this appeal lies in the third of Lord Bingham's fives questions ('*is the interference in accordance with the law*?') which acts as a threshold criterion for the operation of the remaining two and, most importantly, the operation of a consideration of proportionality. It is to be noted that the issue is whether the *interference* is in accordance with the law, not whether the decision to interfere is in accordance with the law. Nevertheless, submitted Mr Malik, this is one and the same as, if the decision is an unlawful one, the interference which is contemplated within it, must also be unlawful. He submits the Tribunal is therefore prevented from even embarking upon a consideration of proportionality and is confined to taking the single step open to it: to declare that the appellant's application has yet to receive a lawful decision by the Secretary of State (on which a lawful appeal is predicated) and to state (it has no power to direct) that the application awaits a fresh and lawful decision. The process is sometimes inaccurately said to be '*remitting the matter back to the Secretary of State*'.

15. For the reasons we have already given, we accept that the decision of the Secretary of State (a) directed as it was towards the wrong Immigration Rules and (b) omitting a decision on Article 8 in its scope outside the Immigration Rules was not in accordance with the law. That is uncontroversial.

16. Whilst the Judge did not appreciate that the new rules had no application, he provided a comprehensive consideration of the appellant's private and family life by reference to a detailed and specific consideration of the material. No criticism is made of this in the grounds of appeal because it is said that the appeal should never have reached a consideration of these factors. The decision, it is said, was an unlawful one and the Judge should not have gone on to deal with the consideration of Article 8 on its merits because this first required a lawful decision to have been made.

17. This singular jurisdiction of the Tribunal now has a long legal history, first identified by the Court of Appeal in *Abdi v SSHD* [1996] Imm AR 148. Mr Malik contends that where a decision is unlawful, there is only a single remedy open to the Tribunal: it has to exercise the power identified in *Abdi* and require the Secretary of State to make a fresh and lawful decision, a process which might have to be repeated if the Secretary of State makes a series of successive unlawful decisions. In such a case, the Tribunal's hands are tied; the decision is not in accordance with the law, the Secretary of State has to make a fresh appealable decision, the appellant is permitted to appeal if the decision is adverse and the machinery of justice rolls on.

18. The range of unlawful decisions is broad. For example, a failure to take into account a medical report or a piece of documentary evidence may render the decision unlawful or Wednesbury unreasonable. Were the Tribunal permitted

only to make a declaration to that effect and require the Secretary of State to make a fresh decision, the Tribunal's function would be substantially emasculated and its original jurisdiction to make a decision for itself (or, on appeal, to re-make a decision), would be significantly reduced. It would be a surprising result if the Tribunal and the Courts have, in the past, overlooked what Mr Malik submits is the central importance of first identifying whether the Secretary of State's decision is lawful and only when it has concluded that it is, going on to consider whether it is the correct one.

19. The issue raised in Mr Malik's submissions is, essentially, in what circumstances is the Tribunal permitted to conclude the process initiated by the Secretary of State, notwithstanding the fact that the Secretary of State's decision is unlawful?

20. *Abdi* was a case in point. The Somali family reunion policy was not part of the Refugee Convention; nor could it be brought within the ambit of the Immigration Rules. The Secretary of State's decision not to depart from the Rules carried with it no right of appeal to the Tribunal and the Tribunal had not been vested with the power to review the Secretary of State's application of the policy. The respondent had, however, applied the policy on the basis of a misapplication of the facts, thus his decision was not in accordance with the law. The Tribunal was permitted to say so, effectively quashing the decision and sending the matter back to him for a decision to be made on the basis of the true facts. It was a case in which the application depended upon the exercise of a function vested in the Secretary of State which the Tribunal did not possess on appeal. Accordingly, there was no alternative but to require a decision from the Secretary of State. In broad terms, the *Abdi* remedy was required because the Tribunal could not decide the matter for itself whereas returning the application to the Secretary of State provided the appellant with a remedy that went beyond what the Tribunal was able to offer on appeal.

21. The matter was touched upon in *Ukus (discretion: when reviewable)* [2012] UKUT 00307 (IAC) in which the Tribunal (the Vice President and Upper Tribunal Judge Jordan) spoke of circumstances where a decision maker in the purported exercise of a discretion vested in him notes his function and reaches a decision in accordance with it. In such a case, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002). In contrast, where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision '*not in accordance with the law*' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course must be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application.

22. In such a case, the Tribunal is required to limit its function because it is not permitted to usurp the role accorded in law to the Secretary of State. That,

however, is a limited jurisdiction; the limitation arising from the existence of a specific function vested in the Secretary of State, and her alone, and not given to the Tribunal to exercise afresh pursuant to the Immigration Acts on appeal.

23. The fact that the Secretary of State always retains a discretion outside the Immigration Rules, outside the Refugee Convention or the ECHR or European law does not mean the Tribunal has to divest itself of jurisdiction where an unlawful decision is made by the Secretary of State. Since, by reason of his immigration history and the facts of his case, the appellant had no right to remain under the Immigration Rules, his application for leave to remain was perforce made outside the Immigration Rules and seeking a discretionary remedy. The Secretary of State reached a decision to refuse that application and, disjunctively as it were, reached an unlawful decision on the appellant's human rights' claim. That, alone, however, does not cause the need to arise for the Secretary of State alone to re-make her decision. The First-tier Tribunal, in assessing the wider Article 8 claims of the appellant, is capable of righting the error that has crept into the decision-making process and where (as happened here) the First-tier Tribunal inadvertently fell into error, the Upper Tribunal is able to correct the error.

24. There are obvious advantages for a litigant who wishes to remain in the United Kingdom to prolong his presence here in an attempt to improve his ultimate chances of remaining. We do not suggest that such a cynical attitude to litigation was involved in this appeal because the issue merited consideration, as established by the grant of permission. However, the Tribunal is alive to the advantages to a litigant of requiring the Secretary of State to make multiple decisions. Clearly this is not merited unless there is a necessity for doing so. The overriding objective enshrined in paragraph 4 of the Rules to secure the proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible in the interests both of the parties to the proceedings and to the wider public interest, as well as the breadth of scope of the Article 8 considerations, is sufficient to ensure that where an error has been made by the Secretary of State in her decision-making process, the error can be rectified by the Tribunal without unfairness, save where the Tribunal's function is limited by law.

25. In his submissions to us, Mr Malik referred to *SC (Article 8 – in accordance with the law)* Zimbabwe [2012] UKUT 00056 (IAC), in which the Upper Tribunal (Blake J, President and Deputy Upper Tribunal Judge Juss) considered the appeal of one who had made further representations in support of an asylum claim for herself and her family based on the developing case law since her appeal had been dismissed. On refusal by the Secretary of State, her appeal was allowed because the First-tier Tribunal Judge had heard the Secretary of State had a policy not to remove failed asylum seekers to Zimbabwe and so the intended removal was not in accordance with policy and therefore not in accordance with the law. The panel found it was wrong for the First-tier Tribunal to conclude that the decision to remove was not in accordance with the law. In the course of its determination, the panel said:

> 10. We recognise that there are cases where a decision to refuse an extension of stay or remove a person may be so contrary to a requirement contained in an established policy or practice as to be not in accordance with the law. In such a case the analysis does not move on to justification for Article 8 purposes and the decision must be re-made in accordance with the law, either by the Secretary of State or the judge. However, in our judgment this was not such a case.

26. This no more that re-iterates that there are cases where a decision classified as '*not in accordance with the law*' may result in the Tribunal requiring the Secretary of State to make a fresh decision upon it. That is one of the several permissible outcomes in appeals heard before the Tribunal. However, the case does not support the contention that this is the inevitable, or indeed normal, outcome where the Tribunal finds a decision of the Secretary of State is so contrary to a requirement contained in an established policy or practice as to be not in accordance with the law. If justification for this approach were needed, we need look no further than the closing words of the passage that we have set out above: '*the decision must be re-made in accordance with the law, either by the Secretary of State or the judge*.' A decision that is not in accordance with the law does not automatically need go back to the drawing-board; this will depend upon what additional purpose is to be served by doing so. Whilst Blake J's acknowledgment of the principle that a decision that is not in accordance with the law may stop the Article 8 consideration in its tracks, it does not support Mr Malik's wider contention that it must do so, far less that it will *always* do so. We do not therefore read the words, '*…[in]cases where a decision…[is] not in accordance with the law… the analysis does not move on to justification for Article 8 purposes'* as bearing the general implication that this will be the norm.

27. This is demonstrated in the circumstances of this appeal. The substance of the Article 8 claim, using the widest possible approach to the scope of the balance to be operated (including the compassionate circumstances necessarily attracting to an individual in the appellant's position) was that removal was a disproportionate interference with his human rights. We agree that the Secretary of State's approach was constrained by her self-denying ordinance that consideration was limited to the Immigration Rules and this may have skewed the balance by improperly attaching weight to the need to meet the requirements of the new rules. Although we consider that the First-tier Tribunal Judge expressed himself in much wider terms, it may be the case that his consideration of the Article 8 claim '*more generally*' (as he described it) was also tainted by his understanding that the new, more restrictive, rules applied.

28. For the first time in the decision-making process, we approach the appellant's case on the basis that the new rules had no bearing on the appellant's appeal and that the Article 8 claim was no more and no less than a consideration that this appellant was owed a right to respect for his private and family life and that there shall be no interference with the exercise of this right by the respondent except such as is in accordance with the law and is necessary in a democratic society in

the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

29. We see no reason to depart from the Judge's summary of the facts of this appeal which we have set out in paragraph 10 above. Even adopting the widest margin to the private life developed by this appellant, it did not approach a case where removal was not a proportionate response. Whilst the appellant might well be entitled to a decision based upon the correct legal rules, the outcome from a consideration of the correct ones was never in doubt. The decision to remove the appellant was, in our view, a proportionate one. This conclusion reinforces, but does not prompt, our conclusion that the sole purpose in requiring the Secretary of State to reach a fresh and lawful decision would be to reach the same ultimate conclusion, albeit by a different and lawful route and that her re-consideration of the application has no realistic prospect of a different result although it would, or might, give rise to a further appealable decision. That appeal would have the same inevitable result. There would therefore be no discernible benefit to the appellant in this process, save the accumulation of further time in the United Kingdom. It would not provide him with a benefit that the Tribunal is unable to offer. In refusing this remedy to the appellant, the process nevertheless accords with the operation of the overriding objective. These are powerful reasons why Mr Malik's attempts to enlarge the category of cases which require the Secretary of State to decide afresh are not warranted.

30. We have found that the Secretary of State made a decision which was not in accordance with the law and that the First-tier Tribunal Judge was similarly in error. In both cases, however, the ultimate decision would have been the same even if the error had not occurred. In accordance with section 12(2) of the Tribunals, Courts and Enforcement Act 2007, having found the decision of the First-tier Tribunal Judge involved the making of an error on a point of law, we decline to set aside his decision.

DECISION

The determination of the First-tier Tribunal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
31 January 2014