



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/15791/2013

THE IMMIGRATION ACTS

Heard at Field House

On 20 August 2014

Determination

Promulgated

On 3 September 2014

**Before
UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

Between

**MR VISHAL JIGNESHKUMAR PAREKH
(NO ANONYMITY ORDER)**

Appellant

and

ENTRY CLEARANCE OFFICER - MUMBAI

Respondent

Representation:

For the Appellant: Mr R Toal (Counsel instructed by Wesley Gryk Solicitors)

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

DETERMINATION AND REASONS

1. This matter comes before us for consideration as to whether or not there is a material error of law in the determination by the First-tier Tribunal (Judge Wiseman) promulgated on 30 May 2014. Judge Wiseman dismissed the appeal against a refusal of entry clearance as a returning resident and under Article 8 ECHR in a decision made by the respondent on 17 July 2013.

2. The appellant whose date of birth is 26 June 1984 is a citizen of India.

Background

3. The brief background facts are as follows. The appellant lived in the UK with leave from September 2002 until March 2012. In a decision dated 13 December 2011 the respondent refused indefinite leave to remain as a work permit holder under paragraph 134(iv) of the Immigration Rules, finding that the appellant had failed to establish that he was paid the appropriate rate as specified in the occupational codes. No appeal right arose from that decision as the appellant had extant leave until 20 March 2012.
4. The appellant did not make a further application to extend his leave but in March 2012 returned to India because his father was seriously ill. His leave to remain in the UK expired on 20 March 2012. His UK employment was terminated on 26 March 2012 as he no longer had leave to enter or remain.
5. The appellant issued judicial review proceedings in relation to the decision of 13 December 2011, relying on the judgement in **Alvi v SSHD [2012] UKSC 33, issued on 18 July 2012**. After permission was granted, on 17 April 2013 the respondent made a new decision to refuse indefinite leave to remain. No appeal right arose from that decision.
6. The appellant then applied for entry clearance as a returning resident and on Article 8 grounds but this was refused on 17 July 2013. That decision is the subject of this appeal.
7. In summary, the appellant's case before the First-tier Tribunal and before us was that the decision of 13 December 2011 was unlawful to the extent that the later decision to refuse entry clearance breached his right to a private life under Article 8.
8. The First-tier Tribunal accepted at [40] that the appellant had established a private life in the UK. It also found from [40] to [41] that it was not solely the respondent's decision of 13 December 2011 that had led to the refusal of entry clearance but also the appellant's decision to return to India in March 2012. Judge Wiseman described that decision as "fatal" at [41], such that "I do not believe that it can properly be said now that it is disproportionate" to refuse entry clearance.

Grounds of appeal

9. The written grounds of appeal were set out as follows.

10. Ground one - the Tribunal erred in failing to determine whether the Secretary of State had unlawfully refused indefinite leave to remain to the appellant in the decision dated 13 December 2011.
11. Ground two - the Tribunal misdirected itself in terms that the Secretary of State applied “what the law was thought to be” when she refused indefinite leave to remain.
12. Ground three - the Tribunal erred by treating the appellant’s position resulting from the Secretary of State’s historical legal error as being equivalent to that resulting from a lawful change in the Rules.
13. Ground four - the Tribunal erred in law in its evaluation of the legal significance of the appellant’s departure from the UK.

Error of Law Hearing

14. It appeared to us that, at heart, the grounds of appeal were really a challenge to the approach taken to or weight apportioned in the proportionality assessment by the First-tier Tribunal regarding the respondent’s decision of 13 December 2011 to refuse indefinite leave to remain.
15. Ms Isherwood helpfully conceded that the appellant had, indeed, suffered an historic injustice regarding the decision of 13 December 2011. The decision was unlawful where the respondent had refused the application on the basis of occupational codes that did not form part of the Immigration Rules, such reliance being found to be unlawful in **Alvi v SSHD [2012] UKSC 33.**
16. Ms Isherwood submitted, however, that notwithstanding the unlawful decision made on 13 December 2011, the appellant had retained the option to remain in the UK and to pursue a fresh application but had, shortly before his leave expired, decided to return to India, albeit for urgent and compassionate reasons. Given that fact, the First-tier Tribunal could not be said to have erred in finding the decision to refuse entry clearance to be proportionate.

Discussion and Decision

17. Our starting point is that the respondent’s decision dated 13 December 2011 was unlawful for the reasons conceded by the respondent above. We do not however find any material error in the Tribunal’s failure to make a finding on the lawfulness of that decision or the approach taken to that earlier decision, in what we accept is an unsustainable comparison at [35] of the **Alvi** principle to a change in the Immigration Rules or elsewhere in the determination of Judge Wiseman.

18. The reasoning of the First-tier Tribunal at [37] is that the acknowledged “past failures” were not sufficient to show that the decision to refuse entry clearance was disproportionate. That was a decision open to the First-tier Tribunal where the unlawfulness of decision of 13 December 2011 was taken into consideration. We are satisfied that the Tribunal set out the appellant’s circumstances and the legal and factual issues arising correctly at [35-37]. The Tribunal was entitled to take into account at [41] the fact that it was only subsequent to his departure from the UK and loss of his UK employment that the decision in **Alvi** rendered the earlier decision unlawful. It was open to the Tribunal at [39] to place weight on the appellant being able to continue family life in India, family and private life falling to be considered cumulatively.
19. For the above reasons we find that the First-tier Tribunal made no material error of law and the determination shall stand.

Signed

Date 2.9.2014

Deputy Upper Tribunal Judge G A Black

No anonymity order.

No fee award as the appeal is dismissed.

Signed

Date 2.9.2014

Deputy Upper Tribunal Judge G A Black