IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46213/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 April 2016	**On 28 April 2016**
Judgment given orally at hearing	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HIREN RAMNIKBHAI BHINGRADIYA

Respondent

Representation:

For the Appellant: No appearance by or on behalf of the Appellant
For the Respondent: Mr S Staunton, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of India born on 4 April 1990. He made an application for leave to remain on 3 September 2014. That application was refused with reference to paragraph 322(1) of the Immigration Rules in a decision dated 10 November 2014. At the same time a decision was made to remove him under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The respondent's decision identifies the basis of the application for leave to remain as being that the appellant required a short period of leave whilst a pending judicial review application against a previous refusal of leave was concluded. The respondent did not accept that this was a truly exceptional basis warranting leave outside the Immigration Rules. It was concluded that the fact that the appellant still has a pending judicial review itself ensures that no removal action would be taken against him until the matter was completed. To summarise, it appears that the appellant had a pending judicial review application in relation to a leave to remain application under Tier 1 and sought further leave to remain outside the Rules pending the determination of that judicial review.

4. The appeal against the respondent's decisions came before First-tier Tribunal Judge Haria ("the FtJ") at a hearing on 22 May 2015. The FtJ referred to the appellant's immigration history as including that he arrived in the UK on 1 January 2011 having been granted entry clearance as a student. He referred to the appellant having made an application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system and that that application was refused on 15 July 2014. A challenge to that refusal by way of judicial review was pending at the time of the hearing before the First-tier Tribunal. There is then reference to the application which is the subject matter of the appeal before me, namely the application for leave to remain outside the Rules. In his consideration of paragraph 322(1) the FtJ said that he had no power to exercise the Secretary of State's discretion outside the Rules. In passing, it is important to recognise that paragraph 322(1) is a mandatory ground for refusal.

5. The FtJ went on to consider Article 8 of the ECHR and noted at [19] that there were no witness statements from any friends, colleagues or family in support of the appellant's claim of having established a strong private and family life in the UK. Again, it is important to remember that the appellant arrived in the UK in January 2011.

6. At [23] the FtJ noted that the appellant does not have a wife and/or children and had not produced any evidence to show that there were insurmountable obstacles to his continuing a family life in India, bearing in mind that he had lived most of his life there. He did not own property in the UK and lived in rented accommodation.

7. The FtJ concluded that the appellant had not advanced any evidence to establish that there may be problems in returning to India although noting that the appellant claimed to have become accustomed to living in the UK.

On the other hand the FtJ pointed out that he had only been in the UK from January 2011, a period of just over four and a half years, and therefore the time that the appellant had spent in the UK was much shorter in comparison to the time he had spent in India. He had produced no evidence to show that he has no cultural or family ties in India. The FTJ's view was that the appellant had merely indicated a preference for living in the UK as opposed to living in India.

8. The only tie that the appellant evidenced was a fairly recent business started by him in which he employs a handful of people. The contention that it would be disproportionate to remove him as his employees may face redundancy was referred to. However the FtJ also pointed out that that was not something that was in the appellant's witness statement and there was no information as to what the appellant's intentions are in the event that he is required to leave the UK in relation to the business. It would not necessarily result in all his employees having to be made redundant, it was concluded.

9. In considering Article 8 of the ECHR the FtJ referred to relevant authority and concluded at [28] that the maintenance of effective immigration control outweighed any interference with the appellant's rights to a family or private life.

10. However the FtJ then went on to reflect on Article 6 of the ECHR, being the right to a fair trial in the context of the outstanding judicial review proceedings. He referred to the decision in *MH (pending family proceedings – discretionary leave) Morocco* [2010] UKUT 439 (IAC) which relates to family court proceedings and what was considered to be the appropriate course where such proceedings are pending, namely for the respondent to grant a period of discretionary leave. The appropriate course it was said in that case was for the appeal to be allowed pursuant to Article 8 of the ECHR rather than for the proceedings to be adjourned and that it was for the respondent to decide on the period of leave in each case.

11. The FtJ noted that although the case of *MH* concerned family proceedings he concluded that the principles applied equally to other court proceedings, such as judicial review proceedings, finding therefore that in the circumstances the respondent ought to have granted a short period of discretionary leave merely to cover the period whilst the judicial review proceedings were pending. His conclusion at [31] was that "As a result the decision to remove is therefore disproportionate".

12. He then went on at the end of the determination under the sub-paragraph "Notice of Decision" to state that the appeal was allowed "on human rights grounds and under the Immigration Rules".

13. There was no appearance before me by or on behalf of the appellant. There was a letter submitted on his behalf by his representatives, that letter being dated 31 March 2016. It stated that the representatives had

just received instructions to the effect that the appellant does not wish to appear at the Upper Tribunal and does not wish to be represented. I note that there is no application for an adjournment of the proceedings before me and it is not suggested that it is appropriate for the appeal to be decided 'on the papers'. There is provision for that in the Tribunal Procedure (Upper Tribunal) Rules 2008 but its circumstances do not apply here.

14. I heard submissions from Mr Staunton on behalf of the respondent who relied on the respondent's grounds, and raised the issue of Article 6 although not in the terms in which I now consider that issue.

15. I am satisfied that the FtJ erred in law in allowing the appeal, seemingly with reference to Article 6 of the ECHR. In the first instance it is not explained why the outstanding judicial review proceedings would be affected in Article 6 terms were the appellant not to be granted further leave to remain. Apart from anything else, there is no reason as to why he could not pursue the judicial review proceedings from outside the UK.

16. Secondly, and perhaps more importantly, it is recognised that Article 6 has no application to immigration and asylum proceedings such as those that are before me. It is not necessary for me to set out in detail all the authorities on the point. They are referred to at paragraph 7.77 of the 9th Edition of Macdonald's Immigration Law and Practice at pages 596-597. It is sufficient only to refer to part of paragraph 7.77 in which it states that:

> "…the right to a fair trial guaranteed by Article 6 has been held not to apply to decisions about the entry and residence of aliens, nor about the determination of British citizenship, since 'civil rights' is an autonomous concept equated by and large with private law rights as opposed to administrative decisions"

In the footnotes a number of authorities are referred to including a starred decision of the then IAT, *MNM* [2000] INLR 576 which stated that Article 6 does not apply to asylum appeals, for example.

17. I am satisfied that the FtJ's conclusion that there was a parallel with family court proceedings and the decision in *MH*, is misconceived. Apart from anything else, those proceedings related to Article 8 of the ECHR and concern decisions affecting children of which notably this is not such a case.

18. Furthermore, the FtJ in this appeal expressly dismissed the appeal with reference to Article 8 ECHR (see [28]) and the parallel is not therefore apparent.

19. In addition, the FtJ had already in his decision stated that he dismissed the appeal under the Immigration Rules so it is not clear the basis on which he expressed himself as allowing the appeal under the Immigration Rules at the end of his decision. He had concluded at [18] that he was not able to interfere with the respondent's Rules-based decision.

20. I am satisfied therefore, that the FtJ erred in law in terms of Article 6 of the ECHR, and seemingly, but inconsistently, allowing the appeal under the Immigration Rules. The errors of law are such as to require the decision to be set aside. In the re-making of the decision the appropriate course on the facts is for the appeal to be dismissed.

21. In conclusion, I am satisfied that the decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and I re-make the decision dismissing the appeal on all grounds.

Upper Tribunal Judge Kopieczek 26 April 2016