Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10613/2017

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals Liverpool	**Decision & Reasons Promulgated**
On 12th September 2018	**On 25th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MOHAMED KALIDH MOHAMMED SIDDIQUE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G McIndoe (Counsel)
For the Respondent: Mr A Tan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Tully, promulgated on 22nd May 2018, following a hearing at Manchester on 15th May 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 24th July 1987. He appealed against the decision of the Respondent dated 17th August 2017, refusing his application for entry clearance to join his sponsoring wife, Fazila Salea. The basis of the refusal was that the Appellant could not satisfy the "suitability" grounds because of his previous criminal conviction in Canada.

The Appellant's Claim

3. The essence of the Appellant's claim is that the Appellant, who had been unable to join his mother and siblings in the UK, when his mother travelled as a British citizen to this country in 2005, because he was over the age of 18 at the time of the application, and so could not accompany them, had gone on to emigrate to Canada where he began studying engineering in Winnipeg in August 2008. Life there was difficult. He started a relationship with a girl there. The relationship broke down temporarily. This affected his studies. He received counselling. On 16th March 2012, his girlfriend was flying from Winnipeg to Toronto. The Appellant claimed to be under extreme pressure. He had just dropped out of all of his classes. He made a hoax call to the police and told them that he overheard two people talking about an Air Canada flight going down.

4. He claimed his motivation in making the hoax call was to portray himself in a good light with his girlfriend's parents by seeming to be helpful and supportive to her. The police found out that the call was a hoax one. He was taken to the police station. He was questioned. He was offered a plea bargain. The prosecution dropped the hoax, terrorism and public mischief charges when he pleaded guilty.

5. He was eventually deported to India from Canada in October 2015. The Appellant accepts that his actions were stupid and reckless. He claims, however, that he was at the time mentally ill and has not committed any offence ever since.

The Judge's Findings

6. The judge heard evidence from the Appellant's sponsoring wife and his sister, Nasila Siddique, in English. He noted that the mental illness defence was not raised in the covering letter to his application (which appears at page 39 of the bundle) and there was nothing to suggest that he had submitted a medical report with his application.

7. The judge went on to hold that the decision maker "had cause to make a decision on a discretionary basis", but that the judge could only interfere with that decision

> "on the basis that, 'no reasonable decision maker or public body could have arrived at such a decision'. I do not accept that this applies to this case. the decision reached might not have been one that every decision maker would have reached, especially had

> detailed medical evidence been produced, but it was one that was properly open to the decision maker on the evidence before him" (paragraph 29).

8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that when carrying out an Article 8 assessment the provisions of Section 85 of the NIAA 2002 were not applicable because these were repealed in October 2015 and what applied presently was Section 85(4) which states that, "[the Tribunal] may consider any matter which it thinks relevant to the substance of the decision, including … a matter arising after the date of the decision", thus requiring a consideration of every relevant matter, rather than the decision maker simply being restricted to circumstances appertaining at the time of the decision, as was previously the case.

10. Second, it was asserted that the judge, in considering the "suitability" provisions applicable in the Immigration Rules erred by looking at the matter under the prism of "**Wednesbury** unreasonableness" principles, rather than proportionality principles, because this restricted the assessment of Article 8 proportionality provisions, contrary to what had been established in **SA (human rights challenges: correct approach) [2015] UKUT 00536**.

11. On 18th July 2018, permission to appeal was granted.

The Hearing

12. At the hearing before me on 12th September 2018, Mr McIndoe, appearing as Counsel on behalf of the Appellant, made two submissions. First, although it was the case that the Immigration Rule in S-EC.1.1 and S-EC.1.5, were referred to by the judge (especially at paragraph 14), as being applicable, the judge failed to have regard to the full extent of Home Office policy, which allowed for the measure of discretion, even in cases where there had been the commission of a criminal offence, because the Article 8 right to family life was at stake between a husband and a wife.

13. Thus, the Rule in S-EC.1.5, states that,

> "The exclusion of the applicant from the UK is conducive to the public good because for example the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4), character, associations or other reasons make it undesirable to grant them entry clearance" (see paragraph 14 of the determination),

nevertheless, at page 168 of the Appellant's bundle, the Home Office policy allows for a measure of discretion, which the judge was duty bound to consider, in the proportionality assessment.

14. This policy makes it clear that,

> "In doing so, the decision maker should also look at whether the applicant's conduct (including any convictions which do not fall within paragraph S-LTR.1.3 to S-LTR.1.4) means that their presence in the UK is undesirable or not conducive to the public good under conduct, character, association or other reasons*. It is possible for the applicant to meet the suitability requirements where there is some criminality".*

The judge failed to weigh this in the balance when making the proportionality assessment. Second, such an approach failed to be applied by the judge because he had wrongly taken the view that the matter had to be assessed on the basis of "**Wednesbury** unreasonableness" principles (at paragraph 29), which was not the case.

15. For his part, Mr Tan submitted that, although the judge had taken what was "probably not the most ideal approach" he does, in concluding his determination, end with the sentence that, "the decision to refuse in this case was proportionate in light of all the circumstances" (paragraph 39). This showed that the judge did embark upon a proportionality assessment.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

17. First, it is well-known that the distinction between an "appeal" and a "review" is that an appeal goes to the "merits" and a "review" goes to the "legality" of the decision in question. The judge fell into error in construing this appeal on a human rights matter as if the application was one for judicial review, thus leading him to approach the matter as if the principles of "**Wednesbury** unreasonableness" applied. As a result, it was not enough to say (at paragraph 29) that the judge "could only interfere with that decision on the basis that no reasonable decision maker or public body could have arrived at such a decision".

18. Second, the effect of this approach was that the judge was prevented from considering whether, even in cases of "some criminality" (and it was the case that there was only one offence in this case which took place some years ago), the "suitability requirements" can be met by the applicant. This is an important exception to consider because were it not for this, the Appellant would be shut out forever from being able to join his British citizen wife in this country.

19. Given that a proper evaluation needs to be made of this particular aspect of the Appellant's past, the matter must be remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Tully, under Practice Statement 7.2(a) because the effect of the error has been to

deprive a party before the First-tier Tribunal of a fair hearing or of an opportunity for that party's case to be put and considered by the First-tier Tribunal.

Notice of Decision

20. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be heard by a judge other than Judge Tully.

21. No anonymity direction is made.

22. I allow the appeal.

Signed Date

Deputy Upper Tribunal Judge Juss 22nd October 2018