Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17933/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 July 2019	**On 25th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

HARBANS SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Raza, counsel
For the Respondent: Ms Jones, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 22 August 1954. He appealed against the decision of the respondent on 24 July 2018 to refuse his human rights claim. His appeal was dismissed by Judge of the First-tier Tribunal Dunne and Judge of the First-tier Tribunal Kelly ("the panel") in a decision promulgated on 15 April 2019.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Keane. Hence the matter came before me.

3. At the outset of the hearing Mr Raza applied to amend the grounds of appeal to include an additional ground relating to the panel's approach to the Article 8 analysis. He said the relevant date for consideration of the human rights appeal was the date of hearing, rather than the date of application: [16]. The issue for the panel to decide had been whether the appellant's removal would be a disproportionate interference with his protected rights at the date of hearing, particularly as the panel had found he had lived in the UK for over twenty years at that state, a highly material factor.

4. Ms Jones, for the respondent, opposed the application on the ground that the point was not **Robinson** obvious and the respondent had not been put on notice of this proposed amendment.

5. I allowed the appellant to amend the ground of appeal because this additional issue should have been readily identifiable to the respondent notwithstanding the failure of the appellant to refer to it specifically in the grounds of appeal. The issue to be decided by the panel was whether, on the evidence before it at the date of hearing (not the date of application), the respondent's decision gave rise to a breach of his protected rights pursuant to Article 8. The reference to consideration of the "facts" at the date of application was an arguably material error of law. Ms Jones had not cited any prejudice to the respondent as a result of the proposed amendment and it was in the interests of justice for it to be addressed at the hearing before me. Of relevance is the guidance in **AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC),** confirmed recently in **Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC)**. In the latter case the Upper Tribunal advocated reference by the permission judge to the relevant sub-paragraph in paragraph (3) of the headnote in **AZ**. In the present case, permission should be granted on the ground that there is a strong prospect of success for the appellant.

6. Mr Raza adopted the amended grounds of appeal. He focussed on the panel's finding was at [27] to the effect that the appellant had lived in the UK since 1 October 1997, a period of more than twenty years. Despite this finding, there was no further reference to it in the analysis outside the Rules, pursuant to the Article 8 jurisprudence. The appellant did not dispute the finding at [34] that the appellant did not meet the requirements in the Immigration Rules for the grant of leave to remain on the basis of his private life at the date of application. Mr Raza relied on [34] of **TZ (Pakistan) v SSHD [2018] EWCA Civ 1109.** He submitted that the Court of Appeal had found that, where the only missing event was a further application for leave to remain, the outcome would be in the appellant's favour.

7. The respondent had lodged a Rule 24 in response to the original grounds of appeal to the effect that those grounds were merely a disagreement with the decision. Ms Jones submitted that [17] of the decision should be read in its entirety; the appellant had made an application under paragraph 276ADE(1)(vi). It had been submitted, before the panel, that he could have made an application under paragraph 276ADE(1)(iii). The panel had found at [34] that he did not meet the Rules. She submitted that this appeal was being pursued on the basis of a near miss. The panel had carried out an appropriate analysis at [29], looking at whether there were very serious obstacles to integration on return (paragraph 276ADE(1)(vi)). That was the starting point. It was not the tribunal's role to speculate as to the possible outcome of a long residence application. The appellant was inviting this tribunal to find the panel had made an error with regard to the application of the long residence provisions; these were not before the panel and the panel correctly did not speculate or make assumptions about what may happen in the future. She submitted the panel had adopted the correct approach; there was no error of

law. It might have been the case that the appellant could have met the long residence provisions but it was not for the panel to speculate as to the outcome of such an application.

Discussion

8. Mr Raza accepted as justified the finding at [34] that the appellant did not meet the requirements of the Immigration Rules for the grant of leave to remain on the basis of his private life. That is an appropriate concession in light of the evidence before the panel.

9. The panel's statement at [16] of its task, under the heading "The legal framework" is misleading:

> "… We must make that decision [whether the respondent's decision places the UK in breach of Article 8] by considering the facts at the date of the appellant's application (that is 26 April 2017), although we must consider any evidence before us that may bear upon the facts as of that date, whether or not available at the time of the decision".

10. The panel's understanding on this issue appears to be repeated at [17] where it states that its task was "to consider the lawfulness of the respondent's decision to refuse the application that was made, on the basis of the facts that existed at the date of application".

11. That statement would be correct if the panel were referring to its analysis of whether the appellant met the criteria in paragraph 276ADE(1)(vi) which required it to consider the position at the date of application. I agree with Mr Raza that [16] and [17] suggest the panel applied this principle to the Article 8 analysis in addition to the analysis under paragraph 276ADE(1)(vi). The panel does not appear to have taken into account the requirements of s85(4) of the Nationality, Immigration and Asylum Act ("the 2002 Act"), namely that, this being an in-country appeal, the tribunal may consider evidence about any matter which it considers to be relevant to the substance of the decision, including evidence which concerns a matter arising after the decision. Those requirements applied here because this was an appeal on human rights grounds. The inference from [16] and [17] is that the panel limited the evidence it took into account in his assessment of the human rights claim outside the Rules. This inference is corroborated by the panel's subsequent findings as discussed below.

12. The panel was right to find that the issue of whether the appellant met the criteria in paragraph 276ADE(1)(iii) at the date of hearing was a new matter pursuant to paragraph section 85(6) of the 2002 Act and could not be considered by the panel without the consent of the respondent (**AK and IK (S.85 NIAA 2002 - new matters) Turkey [2019] UKUT 67**). That said, the length of the appellant's residence was highly relevant to the analysis of his Article 8 claim outside the Rules.

13. The panel found at [36] that the appellant had established a private life in the UK and "it is now of long standing". It accepted "the decision to refuse him leave to remain will disrupt that private life, and to that extent amounts to an interference with it". Thus it found Article 8 was engaged by the respondent's decision. The panel then went on to conduct a proportionality analysis, albeit rather briefly. It identified at [36] that "the many connections between the Sikh community in the UK and the Punjab region of India to which the appellant would have to return, and the many possibilities for both future communication and travel between India and the UK" would not be "cut … completely". This is the only finding on the impact of the interference on the appellant's established private life in this country. As regards the public interest, the panel had regard to s117B(1)-(4), namely that little weight was to be given to a private life established while the applicant was in the UK unlawfully, that

there was a clear public interests in the maintenance of effective immigration controls, that the appellant could not speak English and that he was not financially independent. The panel did not consider the impact of it earlier finding at [27] that the appellant had lived in the UK for over 20 years continuously and its relevance to the maintenance of immigration control.

14. Article 8 being engaged, the failure to have regard to the appellant's length of residence in the proportionality analysis was an error of law: the appellant had referred to it specifically in his grounds of appeal to the First-tier Tribunal submitting the length of residence as an exceptional circumstance. It was a highly relevant factor.

15. I was referred by Mr Reza to **TG (Pakistan)** at [34]. I also have regard to **OA & Ors (human rights; "new matter"; s120) Nigeria [2019] UKUT 65** where it was held that in a human rights appeal under s82(1)(b) of the 2002 Act, a finding that a person satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.

16. The panel's error was material to the outcome: had the panel taken into account its earlier finding as to the appellant's length of continuous residence, it would have found that the appellant fulfilled the residence requirement in paragraph 276ADE(1)(iii). The respondent identified no particular public interest issues over and above those in the 2002 Act. The evidence before the panel did not point to an application under paragraph 276ADE(1)(iii) being refused (paragraph 33 of **OA**). The respondent could not therefore rely on the maintenance of effective immigration controls in the proportionality balance. Thus it was unarguable that the public interest outweighed the degree of disruption to the appellant's protected rights resulting from the respondent's decision. Pursuant to **OA**, it would be disproportionate to remove the appellant or to require him to leave the UK before he was reasonably able to make an application for indefinite leave to remain.

Decision

17. The decision of the panel of the First-tier Tribunal contains a material error of law and I set it aside and remake it, allowing the appellant's appeal on human rights grounds.

18. No application was made for anonymity and none is required.

A M Black

Deputy Upper Tribunal Judge Dated: 22 July 2019

Fee Award

This appeal having been successful, I make a whole fee award of any fee which has been paid by the appellant.

A M Black

Deputy Upper Tribunal Judge Dated: 22 July 2019