IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000526
First-tier Tribunal No:
HU/50590/2021
IA/04435/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 May 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NURUL HAQUE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Mr Z Malik KC, of Counsel, instructed by JKR Solicitors

Heard at Field House on 9 May 2023

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Bangladesh born on 5th June 1981. He arrived in the UK on 20th April 2009 with leave to enter as a visitor until 30th July 2011. He applied to remain as a student on 27th July 2011 and was refused with a right of appeal. The appeal was allowed by Judge of the First-tier Tribunal Callow on 21st September 2011 and as a result the claimant was granted leave to remain as a Tier 4 student migrant until 30th January 2013. On 29th January 2013 the claimant applied for

further leave to remain as a student and was granted this until 31st January 2014. An intime application was made for further leave as a student which was refused without a right of appeal on 12th March 2014. A judicial review challenged this decision, and the judicial review concluded with a consent order in which it was agreed that this decision was unlawful and the claimant was entitled to a new decision. A new decision refusing his application was made on 11th March 2015 but this time granting him a right of appeal. The claimant succeeded in his appeal in a decision of Judge of the First-tier Tribunal Kainth promulgated on 22nd December 2015. The claimant was then granted a 60 day extension of his leave to remain as his sponsor had lost its licence: so he was given leave to remain from 22nd April 2016 to 21st June 2016 to find a new college.

2. The claimant was unable to seek further leave as a student during this 60 day period as the Immigration Rules had changed so as to make it impossible for him to apply to do an ACCA and also to impose requirements as to academic progress which he could not meet due to the period he had not been studying due to the refusals, and so he applied for further leave to remain on human rights grounds on 21st June 2016. This application was refused on 21st June 2017. On 25th June 2017 the claimant applied for indefinite leave to remain which was refused without a right of appeal on 11th December 2017. The claimant brought a judicial review challenge to this decision which resulted in a reconsideration, and a new decision of 6th August 2018 again refusing the application for indefinite leave to remain. The claimant applied for further leave on private life grounds on 17th August 2018, this was varied to ILR outside of the Immigration Rules and was refused on 2nd July 2019. A judicial review of this decision was refused permission.

3. The claimant applied to remain in the UK on the basis of his private life ties on 17th July 2020 and was refused on 17th February 2021. His appeal against the decision was allowed by First-tier Tribunal Judge Davey on Article 8 ECHR grounds in a determination promulgated on the 19th January 2023.

4. Permission to appeal was granted by Judge of the First-tier Tribunal ID Boyes on 7th March 2023 to the Secretary of State on the basis that it was arguable that the First-tier judge had erred in law in allowing the appeal with reference to the findings on the grounds of historical injustice.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error is material and the decision needs to be remade.

Submissions – Error of Law

6. In the grounds of appeal and in oral submissions from Mr Wain it is asserted that there was no historical injustice as found by the First-tier Tribunal Judge as whilst it is accepted that the Secretary of State wrongly refused the claimant leave as a student in 2014, as a judicial

review challenging this decision concluded with a consent order in which the Secretary of State agreed this decision should be withdrawn and a new one made, the mistake was rectified as he was granted an exceptional period of 60 days leave pursuant to Patel (Tier 4 – no '60 day extension') India [2011] UKUT 187 as his Tier 4 sponsors' licence had been revoked following his successful appeal against the replacement decision which gave a right of appeal. The First-tier Tribunal erred in law in failing to consider, Patel (Tier 4 – no '60 day extension') India, which finds that the policy of the Secretary of State operated to restrict leave where a Tier 4 sponsor licence to 60 days and in failing to acknowledge the corrective action of the Secretary of State. It was noted that at paragraphs 32 and 33 of this decision in the particular case there were reasons relating to the appellant's command of English that meant that it was doubted she could do her course, and so it was not found to be a matter relevant to an Article 8 ECHR claim. This claimant failed to secure a place at a college during this period, but he was granted a period of leave to apply for further studies on 22nd April 2016, so the Secretary of State's legal mistake in her 2014 decision was corrected by the 60 day grant, and thereafter there was no historical injustice on which the claimant could rely. After this, if the claimant had wished to study further, he should have returned to Bangladesh and reapplied. The only evidence that a university has refused him a place due to the gap his studies cause by the Home Office/ his failure to make academic progress is at pages 50 to 52 of the bundle, and not at pages 49 to 62 as set out at paragraph 15 of the decision. There was therefore also no proper factual basis for any finding of historical injustice by the First-tier Tribunal.

7. In a Rule 24 response and in oral submissions from Mr Malik it is argued, in summary, that firstly I should be slow to find an error of law simply because another Tribunal might have reached a different decision and should exercise judicial restraint, and should not necessarily require that all steps in reasoning are set out in the decision. It is argued that it was open to the First-tier Tribunal to find that there was a historical injustice on the facts before it applying Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 at B of the headnote and paragraph 47 of the decision: what was needed was wrongful operation of immigration functions which meant that leave to remain was not given . The accepted to be unlawful 2014 decision of the Secretary of State had significantly prejudiced the claimant as he was unable to complete his ACCA course and could not do a postgraduate course as he could not show academic progress. The grant of 60 days exceptional leave did not correct those prejudices. The claimant's witness statement clearly supported this prejudice, and was added to by the correspondence between the claimant and education providers in the appeal bundle at pages 49 to 62. It was open to the First-tier Tribunal to find that historical injustice was an exceptional circumstance which weighed heavily in the claimant's favour when conducting the Article 8 ECHR proportionality exercise.

8. In the Rule 24 response there are also submissions cross-appealing the decision under Article 3 ECHR and paragraph 276ADE(1)(vi) but Mr Malik agreed that he did not wish to pursue these when I indicated that I did not find the First-tier Tribunal had erred in law in allowing the appeal on Article 8 ECHR grounds.

Conclusions – Error of Law

9. The representative of the Secretary of State is recorded as having agreed that historical injustice could amount to an exceptional circumstances at paragraph 15 of the decision. It is on the basis, as a result of the finding of an historical injustice, that the appeal succeeds under Article 8 ECHR, on the basis that the claimant's removal would be a disproportionate interference with his right to respect for private life, as set out at paragraph 21 of the decision.

10. The First-tier Tribunal articulates, at paragraphs 6 and 7 of the decision, that the historical injustice it ultimately relies upon in allowing the appeal is a combination of the legally wrong decision in 2014 refusing further leave as a student and changes in the Immigration Rules which prevented the claimant being able to reapply to do an ACCA course, and by way of his lack of academic progress prevented him applying in-country to remain to do other postgraduate degree courses. At paragraph 14 of the decision it is found that there are no reasons put forward that the claimant did not have the ability to have completed an ACCA course, and so in this way I find that this claimant materially differed from the appellant in Patel (Tier 4 – no '60 day extension') India who it was found would not have been able to complete her intended course. I do not therefore find that this case precludes the events identified by the First-tier Tribunal from amounting to a historical injustice which might weight in the claimant's favour in an Article 8 ECHR balancing exercise. I find, as argued for by Mr Malik, that the two components of a legally wrong operation of immigration functions resulting in leave not being granted have come about, and the requirements of Patel (historic injustice; NIAA Part 5A) are therefore met. It was also accepted by Mr Wain that there was some documentary evidence in the claimant's bundle, at pages 50 to 52, which directly supported the contention that a lack of academic progress, due to the gap in his studies, meant he was not eligible to take a higher degree which was in addition to the claimant's witness evidence on the issue.

11. As Mr Malik identified the First-tier Tribunal fully considered that the claimant had received a 60 day grant of discretionary leave as this is mentioned at the following paragraphs of the decision: paragraph 5 as there is reference to the claimant's chronology of which this is a part, paragraph 6 where it is directly mentioned; paragraph 11 where it is directly mentioned; paragraph 12 where it was concluded that there was no real challenge to the factual matters; and paragraph 14 where it is set out again that the factual circumstances as per the claimant's

chronology were unchallenged. I find that the finding of historical injustice by the First-tier Tribunal was made in the clear understanding that the claimant had been granted 60 days discretionary leave in 2016 but on the basis that this did not remedy the fact that leave was not granted as a result of a wrong operation of immigration functions in 2014 in the context of subsequent changes in the Immigration Rules.

12. As a result I find that the decision of the First-tier Tribunal, allowing the Article 8 ECHR appeal, was one rationally open to it on the particular facts of the case and properly applying both Patel (Tier 4 – no '60 day extension') India and Patel (historic injustice; NIAA Part 5A).

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. I uphold the decision of the First-tier Tribunal allowing the appeal on Article 8 ECHR grounds.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th May 2023