



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: **UI-2022-006048**
First-tier Tribunal: **HU/50547/2022**
IA/00869/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

ENTRY CLEARANCE OFFICER

Appellant

and

RINKU JASSAL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Ms Amrika Nolan, Senior Presenting Officer
For the Respondent: Ms Harleen Masih, Counsel, instructed by Charles Simmons

Heard at Field House on 19 July 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer from the decision of First-tier Tribunal Judge Thapar promulgated on 16 November 2022. By that decision, the Judge allowed Mr Rinku Jassal's appeal from the Entry Clearance Officer's decision to refuse his human rights made in an application for entry clearance to the United Kingdom.

Factual background

2. Mr Jassal is a citizen of India and was born on 4 May 1980.

3. Mr Jassal arrived in the United Kingdom as a visitor in 2006 and overstayed. He was encountered working illegally and was subsequently listed as an absconder following his failure to report as required. He made various unsuccessful applications and claims to regularise his stay in the United Kingdom. He married Mrs Reena Chopra, who is a British citizen, in 2017 and left the United Kingdom voluntarily in 2019.
4. Mr Jassal made an application for entry clearance to the United Kingdom on the basis of his marriage to Mrs Chopra on 23 December 2019. The Entry Clearance Officer refused that application on 23 January 2020 by reference to Paragraph 320(11) of the Immigration Rules. His appeal from that decision was heard by First-tier Tribunal Judge Wood on 16 July 2021 and dismissed on 23 August 2021. He made a fresh application for entry clearance on 7 October 2021. The Entry Clearance Officer refused that application on 6 January 2022 by reference to Paragraph 9.8.2 of the Immigration Rules. His appeal from that decision was heard by First-tier Tribunal Judge Thapar on 21 October 2022 and allowed on 16 November 2022. The Judge held that the Entry Clearance Officer's decision was incompatible with Article 8 of the European Convention on Human Rights.
5. The Entry Clearance Officer was granted permission to appeal from the Judge's decision 20 December 2021.

Grounds of appeal

6. The grounds of appeal pleaded by the Entry Clearance Officer contend that the Judge overlooked certain findings made in the previous appeal proceedings. It is further contended that the Judge misdirected herself in law and failed to identify adequate reasons for allowing the appeal.

Submissions

7. I am grateful to Ms Nolan, who appeared for the Entry Clearance Officer, and Ms Maish, who appeared for Mr Jassal, for their assistance and able submissions. Ms Nolan developed the pleaded grounds of appeal in her oral submissions. She invited me to allow the appeal and set aside the Judge's decision. Ms Masih resisted each of the Entry Clearance Officer's grounds of appeal. She referred me to *KM (Zimbabwe) v Secretary of State for the Home Department* [2021] EWCA Civ 693 [2021] Imm AR 1361 and submitted that the Judge's findings were open to her and disclosed no error of law. She invited me to dismiss the appeal and uphold the Judge's decision.

Immigration Rules

8. Paragraph 9.8.2 of the Immigration Rules provides:

"An application for entry clearance or permission to enter may be refused where:

- (a) the applicant has previously breached immigration laws; and
- (b) the application was made outside the relevant time period in paragraph 9.8.7; and
- (c) the applicant has previously contrived in a significant way to frustrate the intention of the rules, or there are other aggravating circumstances (in addition to the immigration breach), such as a failure to cooperate with the redocumentation process, such as using a false identity, or a failure to comply with enforcement processes, such as failing to report, or absconding.”

Discussion

9. The Judge, at [20], found that Mr Jassal has previously breached immigration law and contrived in a significant way to frustrate the intention of the rules, and that there were aggravating circumstances. The Judge, accordingly, held that the conditions in sub-paragraphs (a) and (c) of Paragraph 9.8.2 of the Immigration Rules were satisfied. The Judge then noted that the question was whether, taking into account all of the relevant facts, entry clearance should in fact be refused on those grounds.
10. The Judge, at [21], referred to the time passed since the previous appeal decision and took into account the life that Mrs Chopra has established in the United Kingdom. The Judge also considered her health condition and recorded that she suffers from depression and anxiety, and believes that she cannot relocate to India. The Judge, at [22], considered the public interest in maintenance of immigration control and weighed in balance various matters relating to Mr Jassal. The Judge, at [23], found that Mrs Chopra has established a substantial private life in the United Kingdom and has been receiving medical treatment. The Judge took into account the recent miscarriage and her wish to continue residing in the United Kingdom. The Judge also considered the time passed since Mr Jassal’s departure from the United Kingdom. The Judge noted that the Entry Clearance Officer’s decision effectively prevents Mr Jassal from ever having the opportunity of living in the United Kingdom with Mrs Chopra. The Judge, at [24], conducted the balancing exercise under Article 8 and found that the public interest does not justify refusal of Mr Jassal’s application for entry clearance to join Mrs Chopra in the United Kingdom. The Judge, ultimately, held that the Entry Clearance Officer’s decision is disproportionate and incompatible with Article 8. The Judge, at [25], allowed the appeal on human rights grounds.
11. The immediate difficulty with the Judge’s decision is that she simply failed to consider and determine whether there are any insurmountable obstacles to the continuation of family life between Mr Jassal and Mrs Chora in India. The question as to whether there are such obstacles is plainly relevant to the issue of proportionality. In any event, there is no consideration by the Judge as to whether it is

reasonable to expect Mrs Chopra to relocate to India. The Judge, as I note above, acknowledged that Mrs Chopra wishes to stay in the United Kingdom and believes that she cannot relocate to India. There is, however, no assessment of whether she would face any significant difficulties in India which could not be overcome or would entail serious hardship. The Judge considered Mrs Chopra's health issues but there is no consideration as to whether those issues can be effectively managed in India. The Judge was obliged to engage with these matters and make reasoned findings on them.

12. Ms Masih sought to persuade me that the Judge in fact allowed the appeal under the Immigration Rules. She submitted that the Judge's analysis at [21]-[24] concerns the discretion under Paragraph 9.8.2 of the Immigration Rules. I cannot accept that submission. It is, in my judgement, clear that the Judge, at [21]-[24], was seeking to conduct the conventional balancing exercise under Article 8 outside the Immigration Rules. This is quite obvious from the Judge's references to the public interest, balancing of various factors and private and family life of Mr Jassal and Mrs Chopra. In fact, the Judge, at [22], observed that Mr Jassal could have qualified for entry clearance under the Immigration Rules but for his immigration law breaches. This reinforces the view that the Judge held that Mr Jassal was not unable to qualify under the Immigration Rules. Further, the Judge, at [24], made it clear that she was balancing the matters that she had identified under Article 8. If the Judge wanted to allow the appeal by reference to the discretion under Paragraph 9.8.2 of the Immigration Rules, she would have said so in her decision. There is no finding by the Judge that the discretion under Paragraph 9.8.2 of the Immigration Rules should be exercised differently, or that the exercise of discretion under provision by the Entry Clearance Officer was unlawful.
13. In any event, if I were persuaded by Ms Masih's submissions on this point, I still would have held that the Judge erred in law in making her decision. The questions as to whether Mrs Chopra can reasonably be expected to relocate to India and whether her health issues can be effectively managed in that country are equally relevant to the exercise of discretion under Paragraph 9.8.2 of the Immigration Rules. The Judge's failure to engage with those matters in a reasoned manner would have rendered any favourable decision under Paragraph 9.8.2 of the Immigration Rules legally flawed.
14. I entirely accept, as Ms Masih submitted, that I should not rush to find an error of law in the Judge's decision merely because I might have reached a different conclusion on the facts or expressed it differently. Where a relevant point is not expressly mentioned, it does not necessarily mean that it has been disregarded altogether. It should not be assumed too readily that a judge erred in law just because not every step in the reasoning is fully set out. Experienced judges in this specialised field are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer

to them specifically. In this instance, for the reason set out above, I am satisfied that the Judge's decision is materially wrong in law.

Conclusion

15. For all these reasons, I find that the Judge erred on a point of law in allowing Mr Jassal's appeal and the error was material to the outcome. I set aside the Judge's decision in its entirety. I apply the guidance in *AB (preserved FtT findings; Wisniewski principles) Iraq* [2020] UKUT 268 (IAC) and conclude that no findings of fact are to be preserved.
16. Having regard to paragraph 7.2 of the Senior President's Practice Statement for the Immigration and Asylum Chambers, and the extent of the fact-finding which is required, I remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than First-tier Tribunal Judge Thapar.

Decision

17. The First-tier Tribunal's decision is set aside and the appeal is remitted to the First-tier Tribunal for a fresh hearing.

Anonymity

18. In my judgement, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective, an anonymity order is not justified in the circumstances of this case. I make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Zane Malik KC
**Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 6 September 2023**