IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000465
UI-2023-000466
First-tier Tribunal No:
HU/52913/2021
HU/52909/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 September 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

VINODA TAMMINA
RAJASEKHAR TAMMINA
(NO ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: In person
For the Respondent: Mr Melvin, Senior Presenting Officer

Heard at Field House on 29 August 2023

DECISION AND REASONS

1. My first decision in these linked appeals was issued to the parties on 7 July 2023. By that decision, I found that the FtT had erred materially in law and I set aside that decision in part. I ordered that the decision on the appeals would be remade in the Upper Tribunal insofar as the proportionality assessment under Article 8(2) was to be revisited so as to encompass consideration of the appellants' argument about a historical injustice they are said to have suffered in 2017/2018. I ordered that the remaining findings made by the FtT would be preserved.

Background

2. The appellants are Indian nationals who were born on 24 March 1985 and 13 August 1984 respectively. The first appellant is the second appellant's wife. They have a three year old daughter named Sai who is dependent upon their appeals.

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3. The appellants' immigration history is central to the outcome of this appeal and I must describe it in some detail. I take what follows largely from the front of the respondent's bundle before the FtT but have also been particularly assisted by the chronology attached to Mr Melvin's written submissions.

4. The second appellant entered the United Kingdom lawfully in October 2008. He subsequently sought and was granted leave to remain as a student until September 2011. He then made an in-time application for leave to remain as a Tier 1 Post Study Work Migrant. That application was successful and he was granted leave to remain until August 2014.

5. The first appellant entered the United Kingdom lawfully in 2012 and her immigration status has until recently been as a dependant of the second appellant's.

6. The second appellant made another in time application for leave to remain in 2014 and was granted leave to remain as a Skilled General Worker, under Tier 2 of the Points Based System. His leave was valid from 9 April 2014 to 31 March 2017.

7. There was another in-time Tier 2 application made in March 2017 but that application was refused on 20 July 2017. The refusal is before me. The respondent concluded that a compliance visit to the second appellant's sponsoring company (Ratna Marble and Granites) had shown that the vacancy was not a genuine one because the second appellant's duties were at a more junior level than had been claimed. The second appellant sought Administrative Review of that decision on 3 August 2017. The decision was upheld on 30 August 2017, however.

8. The second appellant stopped working for Ratna Marble and Granites ("Ratna") on 31 August 2017. The Administrative Review decision stated that he was no longer entitled to work in the UK and the company's lawyers advised that his employment should be ceased.

9. In order to protect his position, the second appellant made an application for leave to remain on Family and Private Life grounds on 13 September 2017. That application was ultimately withdrawn by the second appellant on 19 January 2018, however.

10. In the meantime, the respondent had also taken action against Ratna as a result of the compliance visit. On 20 October 2017, she wrote to the company to state that she had suspended its sponsor licence as a result of various breaches of the code of conduct for sponsors, including but not limited to its conduct in relation to the second appellant.

11. The second appellant challenged the refusal of his Tier 2 application by way of judicial review in the Upper Tribunal under reference JR/8401/2017. The grounds are not before me. The challenge brought by Messrs Fernandez Vaz Solicitors was seemingly on the basis that the conclusions reached by the respondent were not rationally grounded in the handwritten notes of the interview conducted during the compliance visit.

12. The judicial review proceedings were settled by consent. On 6 December 2017, the parties signed a Consent Order by which applicant withdrew the proceedings upon the respondent agreeing to reconsider the second appellant's application

for leave to remain under Tier 2. The respondent undertook to do so 'within three calendar months of the status of his sponsor's licence having been resolved'.

13. The Consent Order was approved by Upper Tribunal Judge Freeman on 29 December 2017. By that stage, a final decision had actually been taken on Ratna's licence. The licence had been revoked on 22 December 2017.

14. The respondent reconsidered the second appellant's application on 8 February 2018. She refused it because the 'Certificate of Sponsorship reference number you provided [...] has been cancelled by UK Visas and Immigration'. That resulted in the second appellant failing to secure the requisite number of points for sponsorship or salary. No other reasons were given.

15. The second appellant applied for Administrative Review of the refusal on 23 February 2018. That review was completed, and the decision upheld, on 15 March 2018.

16. The second appellant applied for Indefinite Leave to Remain on 26 September 2018. The first appellant was dependent upon this application, as before. The application was made on the basis that the second appellant had accrued ten years' continuous lawful residence such that he satisfied paragraph 276B of the Immigration Rules. The application was refused because the respondent concluded that the refusal of leave to remain earlier in 2018 had 'stopped the clock'.

17. The latter conclusion was the subject of an appeal to the First-tier Tribunal, which was heard by Judge Meah on 18 December 2019. In his reserved decision following that hearing, Judge Meah concluded that the second appellant was not able to show ten years' continuous lawful residence and that the appellants' removal would not be unlawful under section 6 of the Human Rights Act 1998. Applications for permission to appeal were refused and the appellants' appeal rights were exhausted on 28 August 2020.

18. On 3 September 2020, the appellants made an application for leave to remain on human rights grounds. The main focus of this application was on the first appellant's medical conditions, which I need not describe in this decision. The application was refused in a long letter dated 10 June 2017, with the respondent concluding that the first appellant's removal would not be in breach of the Immigration Rules or Articles 3 and 8 ECHR. Similar conclusions were reached in a separate and rather shorter letter addressed to the second appellant.

Proceedings on Appeal

19. The appellants' appeals were dismissed in the First-tier Tribunal. On appeal to the Upper Tribunal, I held that the judge had erred in law by failing to consider an argument which had clearly been advanced before it. The argument was based on what is now referred to as 'historical injustice': *Patel (historic injustice: NIAA Part 5A) India* [2020] UKUT 351 (IAC); [2021] Imm AR 355 and *Ahmed (historical injustice explained) Bangladesh* [2023] UKUT 165 (IAC).

20. In essence, the argument is that the respondent acted unfairly in 2018 and that she should have alerted the second appellant to the revocation of his sponsor's licence. The appellants submit therefore that there was in 2017/2018 a wrongful operation by the respondent of her immigration function which reduces the weight which is to be attached to the public interest in immigration control. I

ordered that the Upper Tribunal would remake the decision on the appeal having considered that argument.

21. I suggested at the end of my first decision that the parties might wish to adduce further evidence about the revocation of the sponsorship licence in 2017. I am grateful to Mr Melvin and the second appellant for their research in this connection. Mr Melvin provided additional material by email on 18 July 2023. The second appellant provided additional material by email on 23 August 2023. There is also a helpful skeleton argument from Mr Melvin, which was filed on 25 August 2023, and a document entitled 'Preliminary submissions', which was filed in compliance with directions after the first hearing. At the outset of the hearing, both parties confirmed that they had received these materials.

22. I indicated to the second appellant that I had no questions for him. He did not wish to add anything evidentially to the documents he had produced. Mr Melvin cross-examined him very briefly before I heard submissions. I will refer to his oral evidence only insofar as it necessary to do so to explain my findings of fact.

Submissions

23. In his oral submissions, Mr Melvin relied on the skeleton argument and the preliminary submissions he had filed. He submitted that the only remaining question was whether there had been any procedural unfairness or historical injustice in 2017/2018. In his submission, there had not been. He submitted that the second appellant would have been aware of the fact that Ratna's licence had been revoked before the re-refusal of his application in February 2018. The solicitors retained by the second appellant at that time were also retained by Ratna and they would have told him about the revocation. The second appellant had made a further application for leave to remain whilst the licence was suspended. There was no real similarity between this case and R (*Pathan) v SSHD [2020] UKSC 41; [2020] 1 WLR 4506*, in which the decision of the Supreme Court turned solely on the revocation of the sponsor licence. Here, the second appellant had been informed quite clearly that his role was not considered to meet the requirements of Code 3545. There was no historical injustice in this case and the events of 2017-2018 had no effect on the balance of proportionality.

24. In his submissions, the second appellant made reference to the fact that the 2017 Guidance which had been filed by Mr Melvin applied on its face only to applications which had been made after 6 April 2017. The second appellant's application was made in March 2017 and his CoS was assigned in February 2017 so the guidance was of no effect. He had tried to find the earlier version but had not been able to do so.

25. The second appellant stated that it was clear from the 2023 guidance that he should have been given sixty days' leave as he was not complicit in the reasons that Ratna had lost its licence. In deciding to re-refuse without notice of the revocation, the respondent had fallen into error. Nothing had been said in that decision about the genuineness of the vacancy; all turned on the revocation of the licence. There was no material difference between his case and *Pathan v SSHD*. *Patel (revocation of sponsor licence – fairness) India* [2011] UKUT 211 (IAC) was also relevant. He had explained why he had stopped working for Ratna in August 2017; it was not because the licence was suspended but because the company's lawyers had taken a decision in light of the decision on his Administrative Review. It had been confirmed in writing by Ratna that the second appellant had stopped working for them in August 2017. They had also confirmed in writing that they had not informed him on the revocation of the

sponsor licence in December that year. In answer to my question at the end of his submissions, the second appellant confirmed that his status was dependent on the outcome of this appeal; he did not have leave to remain otherwise.

26. I reserved my decision at the end of the submissions.

Analysis

27. I must decide firstly whether the second appellant was the victim of a historical injustice. In *Patel* and *Ahmed*, the question was framed in the way I have mentioned above: whether there was in the past a wrongful operation by the respondent of her immigration functions. In the latter case, the Upper Tribunal (Dove P and UTJ Sheridan) held that an action or omission falling short of a public law error is unlikely to constitute a historical injustice.

28. It is necessary to consider carefully, and separately, what occurred in 2017 and 2018. In order to do so, it is necessary to examine the chronology which I have set out above with care and with the benefit of the additional documents which were provided for the purpose of this remaking hearing. The picture which emerges as a result of that additional material is rather clearer than it was at the time of the hearing before the FtT or the first hearing before me.

29. The second appellant made his 'in time' application for further leave to remain in March 2017. He was sponsored by Ratna, which held the requisite licence at that time. On 22 June 2017, compliance officers from the Sponsor Compliance Team visited Ratna's premises. Mr Melvin has been able to produce various documents which establish what happened during and after that visit. The revocation decision of 22 December 2017 and the 9 February 2018 response to Ratna's pre-action correspondence are both particularly informative.

30. Concerns were expressed about the extent to which the roles undertaken by the second appellant and another employee truly met the descriptions previously given for those roles. That led the respondent to conclude that Ratna had provided her with false information in respect of the two employees in question, which suggested that Ratna posed a threat to immigration control. Such conduct led the respondent to conclude that Ratna was in breach of its sponsor licencing obligations in several important respects. None of the arguments or evidence presented within the subsequent pre-action letter persuaded the Secretary of State to reverse her decision and she responded accordingly to the pre-action correspondence on 9 February 2018. In respect of the second appellant's role, she concluded that:

> Your client has failed to provide any plausible evidence that Mr Tammina is performing the duties listed on his CoS or any evidence to demonstrate that the duties he is performing meet the minimum RQF Level 6 threshold required for Tier 2 sponsorship.

31. The Secretary of State reached her first decision on the second appellant's Tier 2 application on 20 July 2017. She recalled in that decision that there had been a compliance visit to Ratna in June 2017. She noted that the officers had determined the second appellant's 'position of Account Manager (Sales) is not a genuine one'. She considered that the duties which the second appellant had described to the compliance officer were of a junior level and not at the level required by the Standard Occupational Code. She therefore refused the application under paragraph 245HD(f) with reference to paragraph 77H of Appendix A of the Immigration Rules.

32. When I wrote my first decision, I was concerned to understand whether the respondent's decision was in compliance with her published policy at the time. I was concerned, in particular, to know whether she had followed her published policy when she refused the second appellant's application at a time that Ratna's licence was merely suspended, rather than revoked. I am grateful to Mr Melvin for providing the 2017 guidance, entitled *Tiers 2 and 5: guidance for sponsors*, version 5/17. (Although the second appellant is correct in his submission that this guidance post-dates his application, it is clear from the record of changes at the start of the document that the relevant section was no different in the previous iteration.)

33. At pp91-92 of the 2017 guidance, there is a sub-heading: "What happens to my sponsored migrants if my licence is suspended." I need not reproduce all of that section. It suffices to set out the following paragraph:

> While your licence is suspended, if a migrant makes an application supported by a valid CoS that you assigned before your licence was suspended, we will not decide their application until the reason for suspension has been resolved, unless the application falls for refusal on other grounds (including where we consider that the job is not a genuine vacancy).

34. It is the caveat conveyed by the final words of this paragraph which are important in the second appellant's case. Because the respondent had decided that the vacancy was not a genuine one, her decision to refuse the second appellant's application was in line with the policy despite the fact that the licence was only suspended at that stage.

35. What happened thereafter is that the second appellant asserted that the respondent's decision was flawed, not because she had failed to act in accordance with her policy or because she had failed to provide the second appellant with notice of the problem. It was instead asserted by the second appellant that the evidence gathered during the visit did not support the conclusions reached. Specifically, he contended that the handwritten notes of the compliance officer did not tally with what was said in the refusal letter. A copy of the handwritten notes is exhibited to the second appellant's witness statement. I see also what was said in the second appellant's pre-action correspondence about those notes.

36. The pre-action correspondence did not persuade the Secretary of State to revise her position, however, and the second appellant issued judicial review proceedings. As I have recorded earlier, those proceedings were resolved by consent in December 2017, with the respondent agreeing to reconsider and serve a new decision within three calendar months of the sponsor's licence having been resolved. That, in my judgment, represented a clear indication to the second appellant that the final decision on his application would be informed by the decision taken in respect of the sponsor's licence.

37. As we have seen, Ratna's licence was revoked in December 2017 and the Secretary of State went on in February 2018 to reject the complaints advanced in the company's pre-action letter.

38. It was in this context that the Secretary of State came to reconsider the second appellant's application on 8 February 2018. It is this decision which is critical to the second appellant's historical injustice argument. He notes, correctly, that

there is no reference in this decision to any concern that his role at Ratna was not a genuine vacancy. There is also no reference to the SOC Code or to his role being below SQF Level 6, for example. The sole reason which was given was that the CoS reference number provided had been cancelled by UK Visas and Immigration. The second appellant submits that this goes to show that the Secretary of State had abandoned her previous conclusion (that the vacancy was not genuine) as a result of the concerns expressed in his application for judicial review. He therefore submits that his case is indistinguishable from *Pathan*, in which the Secretary of State fell into public law error by failing to notify the individual of the revocation of the sponsor licence.

39. Having considered the additional evidence and submissions made by the Secretary of State before me, I do not accept the second appellant's argument in this respect. It is clear from the Secretary of State's decision to revoke Ratna's licence and from the subsequent response to Ratna's pre-action correspondence that the Secretary of State continued to believe that the second appellant's vacancy was not a genuine one. It is notable that she resolved to consider the second appellant's application for leave to remain after she had concluded her consideration of Ratna's licence, thereby indicating her intention to consider all of the objections raised by Fernandez Vaz Solicitors (who represented the second appellant and the company at that time) in the context of the licencing decision.

40. As I explained towards the end of my first decision, I had initially been attracted to the second appellant's argument that the 8 February 2018 made no reference to the genuineness of the vacancy. With reference to the Secretary of State's guidance, he argued that he was in no way 'complicit' in the reasons for the revocation of the licence and he suggested that he should have been granted 60 days' leave, or at the very least notified of the revocation so that he could search for a new sponsor. In my judgment, however, the documents addressed to Ratna tell the rest of the story. The Secretary of State had not changed her mind in relation to the vacancy but there was a more fundamental difficulty in the second appellant's way, given the revocation of the licence. There would have been little point in the Secretary of State stating in terms whether or not she considered the vacancy to be a genuine one when the company was no longer able to offer a job.

41. I therefore consider Mr Melvin to be correct in his submission that this case is distinguishable from Pathan. I consider there to be three distinguishing features.

42. Firstly, Mr Pathan was unaware of there being any difficulties with his sponsor's licence and he only came to learn that the licence had been revoked when his application for leave to remain was refused three months later. In this case, the second appellant had prior knowledge of the difficulties. He was interviewed during the compliance visit and he was aware that the sponsor's licence had been suspended following the compliance visit. He evidently knew the reason for that suspension because of the respondent's first decision in his case. He confirmed before me that he discussed the suspension with his employer.

43. The second appellant stated, and I accept, that he left his employment with Ratna on 31 August 2017. It is understandable that the company felt unable to employ him from that point onwards, given the terms of the Administrative Review decision. He also stated, and I accept, that Ratna did not tell him that its licence had been finally revoked in December 2017. That assertion is supported by the recent email exchange between the second appellant and a man identified only as Richard within Ratna. But the fact that the second appellant was not told of the revocation does not place him in the same boat as Mr Pathan. He was well

aware of the difficulties six months or so before the revocation decision. He had discussed those difficulties with his employer and he knew that his Tier 2 application was to be reconsidered after Ratna's licence was resolved one way or the other.

44. Secondly, because of the second appellant's prior knowledge of the situation with his sponsor, he had an opportunity to take steps to address his predicament before the final decision on his Tier 2 application. I appreciate that his employment relationship with Ratna had come to an end in August 2017 but it was open to him to remain in touch with the company so that he would know whether its sponsor licence had been revoked.

45. Mr Melvin was obviously wrong in his submission that Fernandez Vaz Solicitors, who acted for the second appellant and the company, would simply have told the second appellant about the company's affairs; a solicitor would never disclose commercially sensitive information about one client to another. But that is immaterial here; there is no suggestion that the second appellant had fallen out with the company and there was every reason for him to remain in touch with them, given the jeopardy into which his Tier 2 application would be thrown in the event that the licence was revoked. Mr Pathan, on the other hand, had no way of knowing about the difficulties with his sponsor's licence, whereas the second appellant could have kept in contact with Ratna. Had he done so, he could have taken steps to address his position between the revocation of the licence in December and the decision on his Tier 2 application in February. I note that this period equates to sixty days or so.

46. Thirdly, and as Mr Melvin submitted, the second appellant's case is distinguishable from Pathan's because the revocation in the latter case had 'nothing whatever' to do with Mr Pathan: [107] of Lord Kerr and Lady Black's joint judgment refers. In the second appellant's case, the respondent's concerns about his employment at Ratna were clearly to the fore in the decision to revoke the licence and it is fallacious, as I have explained above, to suggest that those concerns had evaporated in the face of the second appellant's application for judicial review. The second appellant's complicity in the reasons for the revocation serves not only to distinguish the case from *Pathan*; it also means that the respondent had no obligation under her policy to notify the second appellant of the revocation or to allow him sixty days' grace in which to address his situation.

47. For all of these reasons, therefore, I do not consider that there was a public law error perpetrated by the respondent when she came to re-refuse the second appellant's Tier 2 application in 2018. There was no historical injustice then, or in 2017, and these events have no impact on the scales of proportionality. Given the preservation of the FtT's findings in all other respects, the decision on the appeals will be remade by dismissing them.

Notice of Decision

The decision of the FtT having been set aside in part, I remake the decision on the appeals by dismissing them.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 August 2023