IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002285

First-tier Tribunal No:
HU/52561/2021
IA/07835/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31st May 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MD TAWHIDUL ISLAM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z. Malik, Counsel instructed by City Heights Solicitors
For the Respondent: Mr N. Wain, Senior Home Office Presenting Officer

Heard at Field House on 19 February 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh, born in 1991. He arrived in the UK in 2011 with leave to enter as a student. He was subsequently granted further leave to remain as a student until May 2015.

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2. On or about 20 September 2020 he made an application for leave to remain on human rights grounds, with reference to Articles 3 and 8 of the ECHR. In support of his application he provided various medical reports in relation to his mental health. That application was refused in a decision dated 25 May 2021. The appellant appealed and his appeal came before First-tier Tribunal ("FtT"), Judge Cary who dismissed the appeal.

3. The further background to the appeal, as set out in Judge Cary's decision, is that the college at which the appellant was studying notified the respondent on 22 April 2014 that they had withdrawn their sponsorship as the appellant was no longer studying with them. As a result the respondent wrote to the appellant at an address in East London, as described in Judge Cary's decision, on 2 June 2014, curtailing his leave to remain with effect from 5 August 2014. However, the respondent's records reveal that this letter may not have been delivered as there is an entry stating that the letter was returned on 24 June 2014.

4. The appellant then applied on 27 May 2015 for leave to remain on Article 8 (private life) grounds. However, he failed to provide his passport and the application was, therefore, rejected on 24 July 2015. The appellant then made a further Article 8 application (private life) on 21 August 2015 which was subsequently withdrawn on 13 January 2016. He had also applied on 16 December 2015 for a residence card on the basis of his relationship with his uncle, a citizen of Portugal, as an extended family member. That application was refused on 7 June 2016.

Judge Cary's decision

5. The following is a further summary of Judge Cary's decision. At paras 8 and 31 he noted that counsel for the appellant confirmed that the appellant was relying solely on paragraph 276ADE(1) of the Immigration Rules ("the Rules") and Article 8 of the ECHR outside the Rules, and that Article 3 was not relied on. Judge Cary summarised the appellant's evidence and the evidence of the appellant's friend Md Liton Hossain, and the parties' submissions.

6. Under a subheading "Decision and Reasons", which include his findings, Judge Cary referred to the medical evidence from a GP, Dr Christine Nallet, and from Ms Georgia Costa, a psychologist.

7. At para 43 he concluded that although it may be difficult for the appellant to re-establish himself in Bangladesh, there would not be very significant obstacles to his integration there. He found that it was not established that the appellant would be unable to establish a private life in Bangladesh. He noted that the appellant was born and brought up in Bangladesh and there was no evidence that he would have difficulty understanding and adapting to the cultural norms there, and that he speaks the language of Bangladesh. He found that there was no evidence that the appellant has not continued to mix in Bangladeshi society in the UK. At para 50 he found that the appellant would have the benefit of the voluntary returns

package, and such education as he had undertaken in the UK would assist him in finding work in Bangladesh.

8. Judge Cary further concluded that there was no evidence that the appellant's medical problems would impact on his ability to integrate. He found that the evidence of some stigmatisation of those with mental illness did not indicate that such persons would be shunned by society, and there was no reason to think that treatment would not be available in Bangladesh. At para 46 he referred to background evidence as to the availability of such treatment. At para 45 he noted that the appellant's treatment in the UK "seems limited to" talking therapy by phone and medication. There was no evidence that he had received inpatient treatment. He also noted that a letter from Tower Hamlets Talking Therapies, dated 10 October 2022, confirmed that he was being discharged as he had not responded to their attempts to contact him.

9. At para 47 Judge Cary concluded that the appellant may well be able to resume contact with his father and sister on return, notwithstanding his claim that his father has rejected him because of his failure to obtain any qualifications in the UK because of the closure of various colleges. He said that he had doubts about the appellant's claim to have been disowned by his father given that Home Office records in the appellant's bundle show that he successfully completed his first course at Manchester College of Higher Education and Media Technology Limited in 2012. He referred to a letter from the college written to the Home Office stating that he had completed the course subject to the awarding body fees and tuition fees and would be considered for the final award subject to the approval of assignments. The letter goes on to state that the appellant was in arrears of tuition fees and was believed to have serious maintenance problems, and that he was no longer a student there.

10. At para 48 Judge Cary referred to the appellant having switched to Opal College to study for a diploma in Management, commencing on 22 July 2013, but their records indicated that the appellant has missed 10 consecutive contact points and they had, therefore, stopped sponsoring him. That resulted in his leave to remain being curtailed on 2 June 2014 with effect from 5 August 2014.

11. In the next paragraph Judge Cary concluded that there was no evidence that the closure of either college played any part in the appellant's failure to obtain any qualifications in the UK. He found that the appellant had not produced any evidence from any official source as to when either college closed down. He further noted that the appellant had said in evidence that if he had been able to find another college his family would have continued to pay for his education. On that basis he concluded that his family did not disown him as he had initially claimed and may well, therefore, be prepared to assist him on return, in particular in relation to accommodation and accessing medical treatment.

12. As regards Article 8 outside the Rules, he concluded at para 52 that the appellant had clearly established a private life in the UK "in view of his length of residence". He referred to s.117A-B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

13. At para 53 he said that in considering Article 8 he took into account the appellant's immigration history. At para 54 he referred to the appellant's claims that he had attended regularly at Opal College and passed all his exams with good grades, but that before he could finish the college closed down, an account he also gave to Ms Costa and Dr Nallet. He expressed doubts about "what purports to be" a letter from the college dated 22 October 2014 addressed to the Spanish embassy confirming that he was then a full-time student of the college. He found that that could not be correct because of the information provided some months earlier about his lack of attendance. He gave other reasons for having doubts about that letter. Ultimately, he said that he did not accept the appellant's claim to have studied up until the time that Opal College closed down.

14. At para 55 Judge Clary said that there was no evidence that the curtailment letter (of 2 June 2014) was not sent and that sending a letter to a person's last known address was generally sufficient proof that the letter had been received. He referred in this context to *R (Alam) v Secretary of State for the Home Department* [2020] EWCA Civ 1527.

15. He referred at para 56 to the return of the curtailment letter to the Home Office on 24 June 2014 which, he said, may have meant that the appellant was unaware of the curtailment. He concluded, however, that the appellant must have been aware that from 31 May 2015 he would no longer have leave to remain in the UK even if he was unaware that his leave had been curtailed in 2014. He found that the appellant still had the opportunity to seek an alternative college. If that was right, the information that he gave to Ms Costa and Dr Nallet "on which they presumably based their assessment of the appellant's mental state, would [seem] to be incorrect", he concluded. Although the appellant claimed that no college or university would accept his TOEIC English language qualification, even the appellant recognised that he had the option of taking the alternative IELTS test.

16. At para 57 Judge Cary said that although the appellant blamed his failure to achieve an alternative English language qualification on the pressure for places, he had provided no evidence to substantiate that claim. According to the letter from Opal College dated 29 July 2013, his course was due to finish on 30 January 2015 and the appellant, therefore, had several months in which to obtain an alternative English language qualification if he wished to continue his studies and was financially able to pay for them, as he claims that he was, before his leave expired. He concluded that the appellant had produced no evidence that he made any realistic effort to find an alternative college.

17. Judge Cary referred to a letter from Neuron Educare dated 27 March 2023 which stated that the appellant only contacted them at the end of April 2015 for help. Although they were unable to help him find a college they told him to come back once he had obtained an approved English language test such as IELTS. He said that "presumably" the appellant never did obtain such a qualification. He thus rejected the contention that the appellant has been unfairly hindered in achieving educational success in the UK by anything done or not done by the respondent.

18. He concluded that the appellant had every opportunity to find an alternative college following the "termination/cessation" of his studies at Opal College. In addition, he found that given that the TOEIC certificate was found to be 'questionable', and therefore invalid, that should have incentivised the appellant to obtain an alternative qualification.

19. At para 58 Judge Cary referred to criticisms made of the rejection of the Article 8 application made on 27 May 2015 on the basis that it was invalid for a failure to provide his passport (which was being renewed). He concluded that if the appellant was aggrieved by that decision he could have applied for judicial review, which he did not do. He rejected the suggestion that there was in that respect a "historical injustice", and referred to the decision in *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 351(IAC).

20. He concluded at para 59 that the appellant was unable to establish on a balance of probabilities that the respondent had failed to give him the benefit of any particular immigration policy when refusing that application, and that the appellant had only himself to blame if he had not renewed his passport in time to make a private/family life application. He found that the appellant had known for many months that his leave to remain was coming to an end and if he wished to make a further application for leave to remain he should have taken the necessary steps to ensure that he was ready to proceed with such an application. He said that the appellant always had the option of renewing that application when he received his new passport, and duly did so on 21 August 2015. After considering the public interest and the issues of financial independence and English language, Judge Cary went on to consider other matters within s.117B of the 2002 Act. He referred to his precarious immigration status and the temporary nature of his stay in the UK.

21. He concluded at para 63 that the respondent's decision was proportionate and that there were no exceptional circumstances that would merit allowing the appeal under Article 8.

The grounds of appeal

22. There are two grounds of appeal in relation to Judge Cary's decision. The first is that Judge Cary erred in law in failing to recognise that the appellant was a vulnerable witness. Ground 2 argues that he erred in law in holding that there was no historical injustice.

23. Ground 1, summarises the medical evidence and argues that there is nothing in Judge Cary's decision which shows that he followed the Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance ("the Guidance") and the dicta in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, in particular at para 30, which states that a failure to follow the guidance "will most likely be a material error of law".

24. It is argued that Judge Cary asked himself the wrong question. It was not correct simply to ask whether the appellant was fit to instruct his solicitors or to give evidence, but whether he was a vulnerable adult falling within the definition in s.59 of the Safeguarding Vulnerable Groups Act 2006 (as originally enacted), which includes a person who receives any form of health care. His mental health problems brought him within paragraph 2 of the Guidance. The grounds also rely on *SB (vulnerable adult: credibility) Ghana* [2019] UKUT 398 (IAC). It is argued that Judge Cary was obliged to ensure "the best practicable condition" for the appellant to give evidence and to make due allowance for his vulnerability when making his decision.

25. Although no application was made on behalf of the appellant for him to be treated as a vulnerable witness, it was Judge Cary's responsibility to ensure compliance with the Guidance.

26. Ground 2 argues that Judge Cary misunderstood the appellant's key submission on the issue of historical injustice. The Secretary of State's own records indicate that there was no consideration of whether to "hold a decision" on the validity of the 27 May 2015 application or to permit it to proceed without the appellant's passport, despite it having been explained on 7 July 2015 that the appellant was in the process of renewing his passport and thereby indicating that the requirement to submit a passport should be excused. There was no engagement with that request on the part of the respondent. It was argued before Judge Cary that this was unlawful because where the Secretary of State is requested to exercise a statutory discretion in respect of her immigration functions, that request must be addressed. Various authorities are referred to in the grounds.

27. It is further argued in the grounds that the fact that the appellant had the option of applying for judicial review was no answer. In this respect *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009 is relied on, in which the fact that a judicial review was unsuccessful was not thought to be relevant to whether there was a historical injustice. *Patel* did not decide otherwise, it is argued.

28. Following *Patel*, it is contended that Judge Cary was required to determine first, whether the appellant had suffered as the result of the wrongful operation, or non-operation, of her immigration functions. It was not relevant that, in Judge Cary's view and with the benefit of hindsight, the appellant could or should have acted differently. He was required to consider how this injustice affected the Article 8 evaluation.

Submissions

29. In his oral submissions Mr Malik relied on the grounds of appeal and his skeleton argument, which mirrors the grounds. My attention was directed to various aspects of Judge Cary's decision. It was submitted that the appellant was plainly a vulnerable adult within the meaning of the Guidance and it was an error of law to have failed to treat him as such. It was submitted that it was not necessary for an application to be made for him to be treated as a vulnerable adult. Relevant to this issue is that certain adverse credibility findings had been made by Judge Cary.

30. It was further submitted that the question should have been whether it was "fair and appropriate" to proceed. There was the need to consider any adjustments during the hearing, for example regular breaks, recourse to the papers when giving evidence, and directing the presenting officer on the need for appropriate questioning, or repeating questions where necessary.

31. In answer to a question from me as to what it is about the appellant's evidence that shows that it was affected by his not being treated as a vulnerable adult, Mr Malik submitted that one just does not know how his evidence was affected.

32. As regards ground 2, again the grounds were relied on. It was submitted that the key point put to Judge Cary was that the rejection of the invalid in-time application of 27 May 2015 brought to an end the appellant's leave to remain. Mr Malik referred to the Home Office minute/case notes dated 24 June 2015 which state that the application fell for rejection for want of the appellant's passport being provided, although it also refers to the appellant's representatives having informed the Home Office that the appellant was in the process of renewing his passport, which had expired.

33. Mr Malik referred to the Rules that applied in 2015, in particular paragraphs 34BB(1) and (3). These make provision for cases where an applicant for leave to remain is unable for good reason to provide, for example, a passport. At para 59 Judge Cary had described the failure to provide his passport as no more than a technical error, and said that the appellant only had himself to blame. However, the question was whether the Secretary of State acted unlawfully in rejecting the application as invalid. All of this should have featured in the proportionality assessment, it was submitted.

34. It was submitted that this was a case where the Secretary of State's discretion is contained within the Rules.

35. Mr Wain submitted that as regards ground 1, in substance Judge Cary had considered the case in line with the Guidance. In support of that submission Mr Wain also referred to various paragraphs of the decision. In particular, it was submitted that the start of para 33 is consistent with the Guidance. There Judge Cary had said that "I have considered the impact of

the Appellant's medical issues on his credibility and more generally on the merits of his claim." At para 35 he had clearly addressed the issue of "any difficulties in giving his account".

36. It was accepted, however, that regardless of any application to treat an appellant as vulnerable a judge needs to ensure that the hearing proceeded appropriately, but the question is whether the appellant was deprived of a fair hearing. It was submitted that there was no evidence of his having had difficulties dealing with cross-examination, or the need for questions to be repeated, any request for breaks, or any discomfort on the part of the appellant.

37. It was further submitted that nothing was raised in the submissions on behalf of the appellant in relation to any difficulties he may have had in giving his evidence. Mr Wain submitted that if one was to apply the Guidance retrospectively, the overarching question is whether the appellant was deprived of a fair hearing.

38. Even if there was an error of law in this respect, it was submitted that it was not material. There were no express adverse credibility findings. At paras 47-49 Judge Cary referred to the chronology and the appellant's claim that he successfully completed his first course, and the letter from the college of March 2012. Paragraph 351 of the Rules refers to "objective indications" of risk (in asylum claims) as does para 15 of the Guidance. It was submitted that the objective indicators from the letter from Manchester College were that the appellant had completed the course. The evidence from Opal College was that he had missed 10 consecutive contact points and the college had stopped sponsoring him.

39. In relation to ground 2, Mr Wain submitted that the grounds do not challenge the judge's findings at paras 55-56 that the curtailment letter was sent and that the appellant must have been aware in any event that his leave was to expire on 31 May 2015. Furthermore, he then still had the opportunity to seek admission to another college if he had wanted to continue his studies and was financially able to do so. That all fed into the Article 8 assessment, it was submitted.

40. It was further submitted that the GCID notes show that the issue or request in relation to the appellant needing to renew his passport was considered but rejected. There was nothing to indicate that the Secretary of State was required to act any differently.

41. Mr Wain referred to paras 57-58 of Judge Cary's decision, submitting that he had considered and rejected the contention that there was any unlawfulness on the part of the respondent in rejecting the application for leave to remain made in 2015. At para 59 he found that the appellant could have renewed his passport prior to submitting the application for further leave to remain.

42. It was submitted that *Munir v Secretary of State for the Home Department* [2012] UKSC 32, relied on by the appellant, is distinguishable on the basis that that case concerned the withdrawal of a policy where a relevant period of residence had been accrued before the withdrawal of the policy.

43. Similarly, Mr Wain submitted that *Ahmed (historical injustice explained) Bangladesh* [2023] UKUT 165 (IAC) does not assist the appellant either. At paras 45-46 and 50c. the Upper Tribunal ("UT") decided that an appellant would have to show that he had suffered as a result of the Secretary of State's actions. In this case, Judge Cary found at para 57 that he had not suffered as a result of the respondent's actions.

44. It was accepted that the appellant did not receive the notice of curtailment of his leave. He had, however, withdrawn the leave to remain application dated 21 August 2015 and made an application for a residence card which was refused on 7 June 2016. His immigration history, it was submitted, does not demonstrate any detriment to the appellant as a result of anything done or not done by the Secretary of State.

45. In reply, Mr Malik submitted that the respondent's submissions conflate fairness with the Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses' (2008) and the Guidance on vulnerable adults and witnesses. *AM (Afghanistan)* at para 31 sets out their key features including, for example, whether a person should give evidence at all. It was submitted that the respondent was asking that the Guidance be applied retrospectively, but that was not the correct approach.

46. As regards ground 2, it was submitted that Judge Cary did not consider whether the respondent had acted unlawfully. It is true that Judge Cary's finding at para 55 (that there was no evidence that the curtailment letter was not sent) was not challenged by the appellant in the grounds seeking permission to appeal. However, that was because of what Judge Cary said in the first sentence of para 56 about there being a note in the Home Office records that the curtailment letter was returned in the post such that he may not have been aware of the letter.

47. If the rejection of the application for further leave to remain made in 2015 was unlawful, this is a matter that Judge Cary ought to have considered within his proportionality assessment.

Assessment and Conclusions

48. As regards ground 1, there was medical evidence before Judge Cary in relation to the appellant's mental health, and which Judge Cary referred to in detail.

49. On behalf of the appellant it is argued that the question for the tribunal was whether the appellant was "a vulnerable adult falling within the

definition section 59 of the Safeguarding Vulnerable Groups Act 2006 (as originally enacted)" (para 6 of the appellant's skeleton argument and para 8 of the grounds of appeal). That, it was submitted, follows from the terms of the Guidance at para 2.

50. However, although no submissions were made by either party on the point, it appears that s.59 of the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act") was repealed on 10 September 2012 by s.65 of the Protection of Freedoms Act 2012 ("the 2012 Act"). I was not referred to the detailed provisions of the 2012 Act which replaced s.59 but they are to be found in s.65(2) and paragraph 7(1) of schedule 4 of the 2012 Act. Broadly speaking for present purposes, the provisions of the 2012 Act are similar to s.59. The appellant being a person receiving care for his mental health is a vulnerable adult within the meaning of the 2012 Act.

51. In the appeal before Judge Cary, no application was made on his behalf to treat him as a vulnerable adult. The issue does not appear to have been raised prior to the hearing, for example at any case management review. No submissions were made during the course of the hearing on the point. Judge Cary himself referred to it at para 35, without the benefit of any submissions from the parties.

51. Having said that, I agree with the submission on behalf of the appellant that it is the responsibility of the judge to ensure that the Guidance is applied in the case of a vulnerable adult, which this appellant is, as so defined. Similarly, as pointed out in the grounds, the Guidance states at para 5 that representatives may fail to recognise vulnerability, which it appears that they did in this case.

52. What the grounds fail to refer to, however, is that the Guidance also states at para 5 that the *primary* responsibility for identifying vulnerable individuals lies with the party calling them. In this case, the appellant's representatives failed to discharge that responsibility.

53. The representatives' failure in this respect is a matter that has significance for the contention in the grounds that there was a *material* error of law on the part of Judge Cary in not applying the Guidance because no difficulties that the appellant may have had were brought to his attention in terms of his evidence. No submissions were made to Judge Cary after the evidence had been given, in relation to, for example, the cross-examination of the appellant, any apparent difficulty that the appellant had in giving his evidence, any aspect of his demeanour or presentation during the hearing, or otherwise in relation to his account in terms of his vulnerability having affected his evidence in any way.

54. In one sense Mr Malik was right to submit that one just does not know how the appellant's evidence was affected by his not having been treated as a vulnerable adult. However, neither the grounds, nor the oral submissions on behalf of the appellant identify any specific aspect of his evidence which even *might* have been adversely affected for that reason.

The grounds do not take issue with the accuracy of any aspect of the appellant's detailed evidence given to Judge Cary. Furthermore, there is no witness statement from the appellant explaining any difficulty he had giving evidence before the FtT. Such a witness statement could have been the subject of an application to the UT pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

55. In addition, whilst Judge Cary did not consider at the outset of the hearing, of his own motion whether, or what, special arrangements should be made at the hearing in relation to the appellant, it is apparent that Judge Cary, in substance, applied the Guidance when considering the appellant's credibility and the effect his mental health may have had on his ability to give evidence and on his credibility. This is illustrated in paras 32, 33, 35, 36 and 37.

56. Although the then Senior President of Tribunals said at para 30 of *AM (Afghanistan)* that failure to follow the Guidance (and the 2008 Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses) will most likely be a material error of law, two observations may, respectfully, be made about what he said there. Firstly, it was not said that a failure to follow the Guidance *would* be a material error of law. Inevitably, one would have to consider the nature of the appeal and whether a failure to follow the Guidance could have had any impact on the outcome, for example in a case where on any view of the facts an appellant simply could not succeed. Secondly, the *extent* to which there was a failure to follow the Guidance must surely be relevant.

57. Whilst I am satisfied that Judge Cary ought to have identified the appellant as a vulnerable adult at the outset of the hearing and considered the Guidance before the appellant gave evidence, I am not satisfied that any error of law in that respect is material. Judge Cary substantially applied the Guidance in his assessment of the evidence, as I have explained above.

58. The further submission before me on behalf of the appellant, that that the question should have been whether it was "fair and appropriate" to proceed, implies that Judge Cary should have given consideration to adjourning the hearing. However, that submission was not made good in terms of any indication as to what could have been achieved by such an adjournment, and does not take into account the unchallenged finding made by Judge Cary at para 35 that the medical evidence did not reveal that the appellant was unfit to give evidence.

59. In relation to ground 2, Mr Malik referred me to paragraphs 34BB(1) and (3) of the Rules as they were in 2015 (at the date of the rejection of the leave to remain application). Those paragraphs of the Rules do not appear to have been referred to at the hearing before Judge Cary. They do not feature in either of the skeleton arguments (by separate counsel) that were before him. Nor do they appear in the grounds seeking permission to appeal to the UT.

60. Those paragraphs of the Rules, materially, provided as follows:

> "34BB. (1) Where an application for limited or indefinite leave to remain in the United Kingdom is made by completing the relevant online application process, the supporting documents submitted in accordance with paragraph A34(iii)(c) must be accompanied by an original, valid passport, travel document or (unless the applicant is a Points Based System Migrant) national identity card issued to the applicant and to any dependant included in the application, unless sub-paragraph (3) applies.
>
> (2) Where an application for limited or indefinite leave to remain in the United Kingdom is made, for which an application form is specified, the application must be accompanied by an original, valid passport, travel document or (unless the applicant is a Points Based System Migrant) national identity card issued to the applicant and to any dependant included in the application, unless sub-paragraph (3) applies.
>
> (3) This sub-paragraph applies where…
>
> (iii) the Secretary of State considers that there is a good reason beyond the control of the applicant or (as the case may be) the dependant, given in or with the application, why an original, valid passport, travel document or (unless the applicant is a Points Based System Migrant) national identity card cannot be provided, e.g. where it has been permanently lost and there is no functioning national government to issue a replacement.
>
> (4) Where sub-paragraph (3)(iii) applies, the Secretary of State may require the person to provide alternative satisfactory evidence of his or her identity and nationality."

61. The grounds of appeal assert that the respondent acted unlawfully by rejecting as invalid his in-time application for leave to remain made on 27 May 2015. The argument in the grounds is that there was no consideration of whether to "hold" a decision on the validity of that application or to allow it to proceed without his passport.

62. The appellant relies on *Munir v Secretary of State for the Home Department* [2012] UKSC 32 [2012] at para 44, *Anwar v Secretary of State for the Home Department* [2017] EWCA Civ 2134 at para 66, and *Behary v Secretary of State for the Home Department* [2016] EWCA Civ 702 [2016] at para 39, in relation to the respondent's statutory discretion in immigration cases.

63. However, paragraph 34BB does not make provision for an application to be put on "hold". It is not clear, therefore, on what basis it is suggested that the respondent failed to exercise a discretion to do so, unless it is said that there is a general discretion in this respect under the Immigration Act 1971, or an inherent discretion to delay consideration of any application, although I was not addressed on the point specifically. Indeed, as I have said at para 34 above, the submission before me was that this was a case where the Secretary of State's discretion is contained within the Rules.

64. Paragraph 34BB(3)(iii) applies where the Secretary of State considers that there is good reason beyond the control of the applicant why, in this

case, the passport could not be provided. The GCID notes to which I was referred do say that the appellant's representatives stated on 6 July 2015 that his passport had expired and that he was in the process of obtaining a new one. However, I was not referred to the 6 July 2015 letter itself and any explanation in it as to why the appellant allowed his passport to expire and failed to renew it prior to its expiry. I do not accept the contention that merely on the basis that his passport had expired, without more, the respondent was required to accept that as a good reason *beyond the control of the appellant* (to use the words of paragraph 34BB(3)(iii)) as to why his passport could not be provided.

65. However, even assuming that the respondent did fail to exercise a discretion to, for example, require the appellant to provide alternative satisfactory evidence of his identity and nationality, or even to dispense with the requirement to provide such evidence (if paragraph 34BB(3)(iii) can be interpreted in that way), and that the appellant is, therefore, to that extent, the victim of a historical injustice, there is force in Mr Wain's submission that the appellant must establish that he has suffered as a result of the respondent's actions, following the decision in *Ahmed*.

66. As was found by Judge Cary at para 59, after that application was rejected, the appellant had the option of renewing the application, which he did on 21 August 2015, less than a month later. He then withdrew that application on 13 January 2016. On 16 December 2015 he applied for a residence card as an extended family member on the basis of his relationship with his uncle, a citizen of Portugal. That application was refused on 7 June 2016.

67. The appellant was able to, and did, make the same application after it was rejected for want of his passport. He was thus not prevented from making the same, or a similar, application. He then decided to withdraw the application, presumably because he considered that it was not likely to succeed or because he decided that a more appropriate option for him was the application for a residence card. I was not referred to anything in the evidence that indicates that the appellant has suffered any detriment at all as a result of what is said to have been the unlawful rejection of his application in July 2015.

68. The grounds take issue with Judge Cary's conclusion at para 58 that the appellant could have, but did not, apply for judicial review of the decision to reject the application as invalid. *Ahsan* is said to be authority for the proposition that an unsuccessful judicial review application, or not bringing one, is not determinative of the question of whether there was a historical injustice. However, Judge Cary did not decide that the failure to apply for judicial review was determinative. Furthermore, it was a matter that he was entitled to take into account in assessing whether the appellant had in fact suffered as a result of the respondent's decision to reject the application made in July 2015.

69. Judge Cary referred at para 58 to the question of whether the decision to reject the 2015 application was unlawful with reference to “any published guidance” and at para 59 to whether the respondent had failed to give the appellant the benefit of “any particular policy”. However, I was not referred by either party to any policy or guidance on this issue and it is not apparent that Judge Cary was either.

70. In all the circumstances, I am not satisfied that there is any error of law in Judge Cary’s conclusion that the appellant was not the victim of a historical injustice. His decision in relation to Article 8 was not, therefore, flawed because of any defect in his assessment of the historical injustice issue. I have already given my reasons for rejecting ground 1.

Decision

71. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal, therefore, stands.

A.M. Kopieczek

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17/05/2024