Case Nos UI-2023-002679

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

First-tier Tribunal No: HU/53539/2021
IA/11165/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Praveen Kumar Kuttath SUBRAMANIAM
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar of Counsel, instructed by Legend Solicitors
For the Respondent: Mr A Melvin, Senior Home Office Presenting Officer

Heard at Field House on 16 October 2023

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Mulready dated 11 April 2023 refusing on human rights grounds an appeal against a decision of the Respondent dated 5 July 2021 refusing the Appellant leave to remain in the United Kingdom.

2. The Appellant is a national of India born on 22 May 1988.

3. The details of the Appellant's immigration history are set out in the documents on file, and are summarised at paragraphs 2-4 of the Decision of the First-tier Tribunal. It is unnecessary to re-rehearse such details here.

4. Suffice to note for present purposes that it was the Appellant's contention that he had completed 10 years continuous lawful residence and as such satisfied the requirements for a grant of indefinite leave to remain. In contrast the Respondent considered that the Appellant's application fell for refusal on grounds of general refusal under paragraph 276B(iii) and paragraph 322(3) of the Immigration Rules because he had breached the terms of his Tier 2 General Migrant leave in respect of employment, and also because it was not accepted that leave had been statutorily extended under section 3C of the Immigration Act 1971 such that the Appellant's leave had expired on 22 February 2017 (i.e. short of the requisite 10 year period).

5. Further to the above, it may be seen that the issues in the appeal were agreed between the parties in the following terms, as per paragraph 11 of the First-tier Decision:

> "*Both counsel agreed that the issues in dispute were confined to the following:*
>
> > *a. Was the Appellant genuinely employed by Malabar Hut Limited?*
> >
> > *b. Do the periods during which the Appellant was engaged in pre action protocol correspondence and/or judicial review proceedings count as periods of lawful residence for the purposes of the Immigration Rules, by virtue of section 3C of the Immigration Act 1971?*"

6. The First-tier Tribunal Judge concluded the first issue in favour of the Appellant. The Respondent had failed to establish on a balance of probabilities that the Appellant was not genuinely employed at Malabar Hut: see paragraph 31.

7. However, the Judge found against the Appellant in respect of the second issue: see paragraph 46.

8. Thereafter the Judge gave consideration to Article 8 of the ECHR, ultimately concluding that a proportionality balance exercise did not favour the Appellant: see paragraph 57

9. The appeal was dismissed accordingly for the reasons set out in the Decision and Reasons of Judge Mulready.

10. The Appellant applied for permission to appeal to the Upper Tribunal. Permission was refused in the first instance on 4 July 2023 by First-tier

Tribunal Judge Chohan. Upon renewal, permission to appeal was granted on 22 August 2023 by Upper Tribunal Judge Macleman.

Consideration of the 'error of law' challenge

11. The renewed Grounds of Appeal, drafted by Mr Gajjar, submitted in support of the renewed application for permission to appeal, raise two arguments: Ground 1 – 'Historical injustice', and Ground 2 – 'Failing to properly consider the purpose of the Secretary of State's policy'.

12. This second ground of appeal relates to the issue in respect of statutory variation of leave under section 3C of the Immigration Act 1971. In the event Mr Gajjar now accepts that paragraphs 68 and 69 of **Akinola [2021] EWCA Civ 1308** defeat the submissions in this regard. Accordingly the challenge before me was pursued by reference to the historical injustice submission only.

13. The historical injustice submission arises in this way. An application for variation of leave to remain made on 13 May 2016 was refused in 2017 on the basis that the Appellant's employment by Malabar Hut had not been genuine. Further, reconsiderations of this decision resulted in the refusal being maintained both in 2018 and 2019. The finding of the First-tier Tribunal in respect of the first agreed issue in the appeal - that the Respondent had failed to demonstrate that the Appellant was not genuinely employed by Malabar Hut – meant that the refusal to vary leave in 2017 was in error. But for this error the Appellant would have continued to enjoy leave with no disruption to its continuity. This was a matter that should have been factored into the proportionality balance as an 'historical injustice'. However, the First-tier Tribunal has not given any consideration to an aspect of historical injustice.

14. Further to this submission my attention was directed to passages in the cases of **Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC)** and **Ahmed (historical injustice explained) [2023] UKUT 00165 (IAC)**. In particular I note:

> (i) The distinction drawn in **Patel** between cases of 'historic injustice' and 'historical injustice', and the example of historical injustice illustrated with reference to the case of **Ahsan [2017] EWCA Civ 2009** - "*where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken*".
> (ii) An historical injustice may have an effect on an individual's Article 8 case, but this will differ from the historic injustice category which is reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen.

15. It may readily be seen that there is, in the abstract, scope for the argument that is the foundation of Ground 1. However, the issue that has arisen before me is whether or not such an argument was advanced

before the First-tier Tribunal. For example, in this context the grant of permission to appeal observes "*This may be an attempt to bulk up, with hindsight, a line which is hard to fit into the agreed issue*" (my emphasis).

16. I make the following observations:

(i) It is not possible to identify the articulation of an 'historical injustice' argument as is now presented in any of the written pleadings before the First-tier Tribunal. There is no reference to such an argument in any of the representations in support of the Appellant's application, or in the Grounds of Appeal, in the Appellant's statements, or - perhaps most crucially - in the Appellant's Skeleton Argument.

(ii) The first written articulation of the argument appears to be at paragraphs 8-11 of the initial Grounds of Appeal submitted in support of the application for permission to appeal. These grounds, dated 20 April 2023, were drafted by the counsel that represented the Appellant before the First-tier Tribunal. The Grounds do not in terms plead that such an argument was raised before the First-tier Tribunal. It seems to me that the fact that counsel that appeared before the First-tier Tribunal does not state in terms that such an argument was raised is of very considerable significance.

(iii) The renewed Grounds of Appeal, drafted by Mr Gajjar, similarly do not in terms identify that such a submission was advanced before the First-tier Tribunal. Instead, what in my judgement are essentially circumstantial matters are emphasised as giving rise to an implication that it was common ground that if the Respondent failed to establish the case in respect of the employment issue, the appeal should succeed. In this context it is emphasised in the Grounds that the representative for the Respondent before the First-tier Tribunal did not offer any oral argument in relation to the second issue, seemingly characterising the respondent's position "*as boiling down to the question of the genuineness or otherwise of the Appellant's employment*" (Decision at paragraph 12 – see Grounds at 15).

(iv) However, notwithstanding the substance of paragraph 15 of the renewed Grounds, at paragraph 16 Mr Gajjar very properly acknowledged that there was no formal concession. I go further: it is clear that there was no withdrawal from the substance of the matters set out in the Respondent's Review; the fact that the advocate declined to amplify those matters orally does not for a moment indicate any concession in any material respect of the issues identified. Indeed it is clear that the Judge did not understand there to be a concession because the Judge went on to consider the issue identified at paragraph 11(b) and determined it against the Appellant.

(v) A transcript of the proceedings makes it clear that there was no concession by the Respondent's advocate: "*I am not going to concede it*…" - transcript at pg 3 line 26.)

(vi) In my judgement it is impossible to read into the words of the Decision the notion that an historical injustice point was expressly raised by the Appellant, and either conceded or acquiesced in by the Respondent. Specifically I find that it is not possible to infer such a matter from the circumstance of the Respondent's advocate not offering any oral argument in respect of the section 3C issue.

(vii) In so far as any further issues in respect of Article 8 were concerned, the Decision suggests that little further was said by either party including the Appellant's representative – see paragraph 13 of the Decision.

(viii) My attention has also been directed to page 19, lines 20-31 of the transcript, which cover the closing stages of the submissions made on behalf of the Appellant before the First-tier Tribunal. Paragraph 17 of the renewed Grounds pleads that such submissions "*have the hallmark of a historical injustice argument*". This pleading – realistically - falls short of an assertion that an historical injustice argument was made in terms. In any event, I do not agree that the submission in the transcript is the same, or a similar, submission to the one now articulated in the grounds of challenge. In substance the submission was being made in the alternative: even if the Appellant cannot establish that he should have the benefit of continuity of residence by virtue of section 3C of the Immigration Act 1971, fairness would demand that he should not be penalised in this regard because he was doing what he could to achieve continuity by challenging decisions of the Respondent. It seems to me that this was more by way of an extension, or refinement, of the arguments set out in the Appellant's Skeleton Argument in respect of the long residence policy and small gaps in periods of leave – that such matters should be considered by analogy even if the Appellant did not squarely satisfy the Rules. Indeed, direct reference is made to "*the discretion available under the long residence guidance*". Mr Gajjar acknowledged that there was nothing in the language that reflected the phrase 'historical injustice', but suggested that it was a matter of substance rather than form. I do not consider that to be adequate evidence that a submission pleading historical injustice as a matter that should inform a proportionality assessment under 8 was advanced before the First-tier Tribunal. Further in this context, it seems to me that it is not without significance that there was no reference to any relevant case law on point: this reinforces the notion that no such point was being made.

17. Drawing all of the above matters together, in my judgement it is adequately clear there was no written articulation of an historical injustice argument at any of the stages of the proceedings before the First-tier

Tribunal. Were such a novel argument to have been introduced at the hearing before the First-tier Tribunal fairness would have required that it had been raised at the outset not in the closing stages of the closing submission. It is accordingly inherently unlikely that such an argument was being raised. Moreover I find there is nothing in the language of the closing submissions that makes it apparent that such a submission was being articulated.

18. It may be seen from my paragraph 13 above that the historical injustice argument can be stated with comparative simplicity and brevity: in effect, but for the error in respect of employment the Appellant would have continued to enjoy leave with no disruption to its continuity, and such a matter required to be factored in favourably to the proportionality balance as an 'historical injustice'. There was nothing presented to the First-tier Tribunal approaching the substance of such a submission.

19. In the circumstances I do not accept that the matter now relied upon was raised before the First-tier Tribunal. Nor, do I consider that it was a 'Robinson obvious' point that the Tribunal was required to consider of its own motion.

20. It follows that the decision of the First-tier Tribunal is not to be impugned for failing to engage with a submission not raised. The challenge fails accordingly.

Notice of Decision

21. The decision of the First-tier Tribunal contained no material error of law and accordingly stands.

22. The appeal remains dismissed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

15 January 2024