IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004177
UI-2023-004178
First-tier Tribunal Nos: HU/14448/2019
HU/14455/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31 July 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

ASIF UDDIN AHMED
&
AYESHA TAMANNA ZEBIN
(no anonymity order made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Saini, Counsel, instructed by Direct Public Access
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 19 December 2023

DECISION AND REASONS

1. The appellants are citizens of Bangladesh and are married to each other. The second appellant is the first appellant's wife. They appeal a decision of the First-tier Tribunal promulgated on 31 July 2023 dismissing their appeals against the decision of the respondent on 9 August 2019 refusing them indefinite leave to remain in the United Kingdom, particularly with reference to paragraph 322 of HC 395 and Article 8 of the European Convention on Human Rights.

Background

2. Although we have the benefit of a full skeleton argument prepared by Mr Saini as well as detailed grounds and his submissions, we begin by considering carefully the First-tier Tribunal's Decision and Reasons. This shows that the first appellant arrived in the United Kingdom in October 2009 with leave as a student and his wife, the second appellant, joined him in August 2010 with leave as his dependant. The first appellant applied to extend his leave but was unsuccessful so that his appeal rights were exhausted on 13 February 2017. He applied out of time on 16 February 2017 for further leave which was refused and the decision maintained on review in August 2018. He then applied for a visa based on "exceptional circumstances" saying that he had lived in the United Kingdom for ten years with his family and varied this application for indefinite leave to remain on 8 March 2019. The application was refused on 9 August 2019. It has previously been appealed but there was error and the decision was set aside and ordered to be reheard and it is the rehearing of that decision that we have to consider now.

3. The judge summarised the appellants' case. They are nationals of Bangladesh but have children aged 7 years and 4 years who were born in the United Kingdom. The eldest child is attending school in the United Kingdom and speaks English as his first language at school. The younger child has some difficulties with eczema. The point urged before the First-tier Tribunal is that the eldest child had been living in the United Kingdom for over seven years and that was a good reason to allow the whole family to remain, but alternatively there were insurmountable obstacles to returning to Bangladesh.

4. Mr Saini, who appeared before us, appeared before the First-tier Tribunal. The judge then dealt with Mr Saini's skeleton argument, where it was asserted that the appellants had been ill-treated in a way that amounted to procedural unfairness. The point was that the unlawful action of the respondent reduced the weight to be given to the public interest in removal. It was described as an historic injustice.

5. The judge noted that it was the respondent's case that the first appellant was not eligible under the discretionary leave policy and was not thought to have sufficiently compelling circumstances outside the Rules. His appeal rights were exhausted in February 2017. The implication is that it was not considered the respondent's fault that he chose to remain in the United Kingdom.

6. The respondent maintained that the appellants were not eligible to apply for leave with reference to Appendix FM because they had never had leave to remain in the United Kingdom and the respondent was concerned only with "private life". It was not an asylum claim and it was the respondent's case there was nothing to stop them going back. The respondent noted that there were children involved but found there would not be severe impediment on return to Bangladesh. Without trivialising the younger child's eczema and it is said that can be treated in Bangladesh.

7. When the case came before the First-tier Tribunal, the Secretary of State chose not to attend. In the event, only the first appellant gave evidence.

8. He said that he had applied for a job at the beginning of 2017. A certificate of sponsorship was assigned dated 31 January 2017 and the start date of the employment was given as 20 February 2017 and the job was expected to end on 19 February 2020. The job was described as "junior management consultant"

based in Swindon with an annual gross salary of £25,000. Sponsorship was withdrawn on 16 March 2017.

9. The first appellant had made a "Tier 2 priority application" on 16 February 2017 and the judge noted that "… it would appear that after that the CoS was assessed and granted prior to the March 2017 withdrawal". Mr Saini's arguments maintained that this was very important. The appellant had made an application in good faith, had paid for an express service and appeared to have qualified for that leave that he sought. It was not his fault that the sponsorship was withdrawn.

10. The judge noted that the First Appellant had obtained information about the internal administration and decision making and asked for a Subject Access Report. This revealed there appeared to have been concerns about the sponsor because the sponsor was apparently "dormant".

11. The judge found, unremarkably, that the application had not been treated as a priority. The service normally led to an answer in five working days, but it took seventeen months to reach the decision. The judge noted that the application should have been decided when the CoS was withdrawn in March 2017. Also, there was no indication that the sponsor's licence had been suspended pending an investigation which was the normal consequence of an inadequately explained withdrawal of sponsorship. It was the appellant's contention, as the judge noted, that if he had been told promptly that sponsorship had been withdrawn on 16 March 2017 he would have had a further fourteen months in which to make investigations, possibly taking issue with the sponsor possibly finding another employer. The judge noted at paragraph 26:

> "It is this failure to communicate the notice of withdrawal of the Sponsor which the Appellants rely on as being procedurally unfair to them."

12. The judge particularly considered the decisions of the Supreme Court in **R (on the application of) Pathan v SSHD [2020] UKSC 41** and of the Court of Appeal in **R (Khan on the application of) v SSHD [2021] EWCA Civ 1655**. The judge was particularly impressed with parts of the judgment in **Khan** that distinguished the facts in **Khan** from **Pathan**, where the person who was the victim of delay had a substantial right to be in the United Kingdom, whereas in **Khan**, and in the instant case, the right to be in the United Kingdom had expired and the consequences of delay were just not the same. The judge noted at paragraph 27 that:

> "…it cannot be said that informing the First Appellant that his CoS had been withdrawn in March 2017 then gave him until July 2018 to find another employer. He was by that stage an overstayer".

13. However, the judge went on:

> "It is important to bear in mind that the application made on 17 February 2017 would not have been affected by his overstaying because of Paragraph 39E of the Immigration Rules but this is dependent on his application being successful within a limited time frame. However this does not give an applicant additional leave – it is a grace period of only 14 days and not a further grant of leave to remain".

14. The judge decided, unsurprisingly and unequivocally, at paragraph 29 of the Decision and reasons that:

> "I would regard the failure to consider or communicate the decision for a further 16 months for no apparent reason as a failure to act fairly. It would appear that the facts were or ought to have been known to the Respondent on or shortly after 16 March 2017 which is the date of the withdrawal and the fact that the Appellant requested a priority application and paid for it should have led the Respondent to make a faster decision than the further delay of 16 months".

15. The judge noted that it was the first appellant's case that his prospective employer stopped answering telephone calls when the application had been made and the judge found this should have alerted the appellant to the prospect of there being a problem.

16. The judge also found no evidence of the respondent being chased to make a decision and the judge said:

> "I reject the proposition that the Appellants may have been granted a further period of leave to remain during this time period. There is a vacuum of information on the First Appellant's part to show what efforts were made to communicate/chase either the Sponsor or the Respondent. There is no information to show that he sought an alternative Sponsor".

17. Paragraph 31 of the Decision and Reasons is particularly important. There the judge said:

> "I accept that the delay in communicating the refusal decision of the Tier 2 leave itself indicates that the Respondent acted in a procedurally unfair manner and the extreme delay in making a decision and then communicating that decision to the Appellant has meant his private life considerations are stronger. For example, the Appellants' eldest child has now been in the United Kingdom for a period of seven years. I take into account the case of **Patel** and the more recent case of **Ahmed (historical injustice explained) [2023] UKUT 00165**. The latter case which I think has only just been published makes general observations regarding the need for an appellant to show that he or she suffered as a result of the wrongful operation by the Respondent of her immigration functions. In the First Appellant's case he suffered a delay in learning that his application was unsuccessful and that refusal was subject to an administrative review in August 2018. I do not accept that there is an arguable prospect of him succeeding in an appeal on the facts and documents presented to me. There is no evidence as I have stated of the First Appellant making efforts to chase the employer who had withdrawn sponsorship and the fact that the sponsorship was withdrawn does not assist in any argument that an appeal would be successful. In addition, the First Appellant presented no evidence before me of attempting to obtain alternative sponsorship".

18. The judge then looked at Article 8 "outside the Rules".

19. The judge found that family life existed as a family unit and the family would be returning to Bangladesh. The judge found that the decision was not an interference with their family life and said:

> "The interference in potentially removing the Appellants does not have sufficiently grave consequences to engage Article 8 of the ECHR with respect to that family life".

20. However, the judge found that the decision did interfere with the private life of the family members. This was summed up by reference to fourteen or thirteen years' residence in the United Kingdom and having established ties in the country with friends and the children having lived in the country in the case of the oldest for seven and a half years.

21. The judge found it in the children's best interests to remain with their parents. The judge reminded himself again that the eldest child had been in the United Kingdom for over seven years and also noted at paragraph 38 that:

> The seven year residence period does not however create a presumption in favour of his parents being granted leave. The common sense starting point is that it is necessary to evaluate whether it is reasonable to expect the child to leave the United Kingdom with his parents.

22. No authority was given for that proposition and it should not be an alternative to making clear findings about the private life that the child established and whether, in all the circumstances, it is proportionate to interfere with it.

23. The judge further found that the adults appellants said they would find it difficult to return to Bangladesh and obtain employment at least in the government sector because of their age.

24. Nevertheless the judge concluded that it was not unreasonable for the appellants' eldest child to return with them to Bangladesh. The judge reached that conclusion after purporting to strike a balance between the private life of the appellants and their sons on the one hand, and the public interest on the other.

Grounds of Appeal

25. The grounds of appeal were drawn by Mr Saini although provided by the appellants in person.

26. Ground 1 is headed "Failure to make Findings of Fact on unopposed submissions and supporting evidence and Unlawful Assessment of applicability of Historic Injustice".

27. The contention is that the judge erred by adding to the requirement that there had been a public law error the requirement that the appellants would need to show they would have succeeded in an appeal. It was Mr Saini's contention that, particularly following **Ahmed**, it was sufficient that there was a public law error for historic injustice to be established.

28. Ground 2 complains that the qualifying child's position was not assessed lawfully. As indicated above, the judge had referred to the seven years' period of residence not creating a presumption in favour of the parents being granted leave. Mr Saini described this as "correct and consistent with NA (Bangladesh) & Ors v SSHD [2021] EWCA Civ 953". However this did not have regard for the Respondent's Private Life Guidance (version 2, published 18.05.2023) which Mr Saini said made the policy more generous than that required by the Court of

Appeal in **NA**. We refer to this below. Mr Saini drew attention to that part of the policy which stated in terms: "The starting point is that we would not normally expect a qualifying child to leave the UK".

29. Whilst recognising there is no presumption of law in favour of the parents being granted leave, Mr Saini argued that the starting point set out in the guidance is not a long way behind that proposition. He noted that the guidance was not in force when the decision was given in **NA**. He said that the judicial analysis should have reflected the published policy rather than **NA**.

30. It was also said that the assessment of the reasonableness of the child's return was unlawful. The judge did not give any preparatory regard to the difficulties inherent in transferring him to a school where he would be taught in Sylheti and where the general conduct of school life would not be the same.

31. Ground 4 alleges an unlawful assessment of precariousness. The judge had determined that little weight should normally be given to private life in cases where the immigration status is precarious but that weight should have been reduced by reason of the decision in **Lal v SSHD [2019] EWCA Civ 1925** at paragraph 66.

Findings and reasons

32. The children were born on 19 February 2016 and 29 May 2019. We have considered the Respondent's Private Life Guidance (version 2) which we have taken from the internet. As we would expect Mr Saini has quoted from it accurately and it give a strong indication of where the public policy lies. The guidance came into force on 18 May 2023. The salient parts of this guidance we consider relevant are:

> "The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.
>
> In the caselaw of KO (Nigeria) & Others v Secretary of State for the Home Department 2018 UKSC53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.
>
> This assessment must take into account the child's best interests as a primary consideration.
>
> You must carefully consider all the relevant points raised in the application and carefully assess any evidence provided. Decisions must not be taken simply on the basis of the application's assertions about the child, but rather on the basis of an examination of all the evidence provided. All relevant factors need to be assessed in the round.

> There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent or parents. In deciding such cases you must consider the best interests of the child and the facts relating to the family as a whole. You should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family)"

33. Although the Upper Tribunal, when granting permission, was particularly impressed with the challenge to the historic injustice findings we were less persuaded by them than might have been expected when we read the terms of the grant. The idea of historic injustice was indeed looked at by this Tribunal (Dove J President and UTJ Sheridan) in **Ahmed**. The important point there as we understand it is the Tribunal was rowing away from a developing idea that historic injustice is some distinct freestanding legal doctrine but rather it is a convenient way of recognising that there may be features of a person's immigration history which should be given particular weight because they are the result of an injustice by the Secretary of State. However we find it is going too far to say that the judge insisted on there being the probability of the appellants winning any appeal. What the judge was doing was looking for the materiality of the error.

34. We find that, with respect, the judge was wrong. The point is surely this, that the appellants extended their stay in the United Kingdom over the period of seven years in the life of the younger child largely by reason of the Secretary of State's failure to tell them that their priority application had been refused. This failing is itself a public law error in failing to lawfully notify the appellants of the outcome of their application. Simply prolonging the stay, which is the only consequence of the delay here, does not assist very much in private and family life terms for the adults. However, it does weaken the Secretary of State's indignation in insisting the public interest requires removal when one of the reasons the appellants have stayed is his own dilatory behaviour. It was argued that the judge should have given some weight to that which was not addressed by looking for evidence of success in a hypothetical appeal. It is a subtle point. We think, with respect, Mr Saini overstated it in his grounds and we accept Ms Cunha's arguments that that is not really what happened. Nevertheless, as indicated, we find there was an error because the judge did not seem to appreciate that the seven year qualifying period for the child was clearly the result of the Secretary of State's delay.

35. We find that the policy does show the public interest generally in favour of allowing a child to remain when the child has seven years' residence. That guidance properly identifies that all relevant considerations should be taken into account, we consider that what happened in the past, as identified in this case, are relevant considerations, which includes the respondent's delay. It should be emphasised it is not the child's fault or even the appellants' fault that there is this long period of delay. It is what the Secretary of State did.

36. The child has the benefit apparently of a loving family. We do not doubt the child would cope in the event of return because the child would go with the support of parents who would make the situation work for the child's sake but the child has been in the United Kingdom for long enough to know life there and nowhere else and to adopt to a school system that we would not expect to be replicated in Bangladesh. It would not be in their eldest child's best interests to have to relocate given he has spent his entire life in the UK, is seemingly well

adapted to school here, and has no experience of living in Bangladesh. For similar reasons we consider it would not be in their younger child's best interests to go to Bangladesh. The children's best interests are merely a primary consideration, rather than a paramount consideration, but they are nevertheless a weighty consideration.

37. The starting point is that the child should stay because that is what the guidance says. The public interest that normally goes with removal is diminished because the stay has been extended by public law error on the part of the Secretary of State. That is probably not very much to the appellants' advantage but it is to the advantage of the child and that should be weighed in. The impact of the public law error, and the subsequent delay, is in our judgment one which significant weight to be attached, and adds further weight to it being unreasonable to expect their eldest child to leave the UK for the purposes of s117B(6) of the 2002 Act.

38. We find that the judge did err. The error lay in undervaluing the child's case and not factoring in something for the public law error. We set aside the decision of the First-tier Tribunal and we re-make it allowing the appeal for the sake of the oldest child.

Notice of Decision

The appeal is allowed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 July 2024