Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21750/2016

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 13 April 2018	**On 17 April 2018**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

FAHEED [S]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr Mynott, Latitude Law
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. By permission of First-tier Tribunal Judge Saffer, granted on 31 October 2017, the appellant appeals against the decision of First-tier Tribunal Judge Herwald, promulgated on 17 July 2017, dismissing his appeal on human rights grounds. Judge Saffer considered it arguable that there may have been an error of law in failing to consider whether the appellant fulfilled 276B of the Immigration Rules (10 years lawful residence).

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2. At the beginning of the hearing, Mr McVeety acknowledged that there was a clear error of law in the decision and that as the First-tier Tribunal had resolved the only issue of concern to the respondent in the appellant's favour, the appropriate remedy was to remake the decision by allowing the appeal on the basis of Article 8. Mr Greer agreed with this course. As the parties agree, I can set out the background and my reasons more briefly.

Background

3. The appellant, a citizen of Pakistan, entered the UK as a student on 10 September 2005. His spouse joined him as his dependent in 2010 and they have two children, born in the UK. The appellant has remained in the UK lawfully since September 2005, first as a student and then as a Tier 1 General Migrant. On 16 October 2015, having accrued 10 years lawful residence in the UK, the appellant applied for indefinite leave to remain ('ILR').

4. This was refused in a decision dated 3 September 2016. The respondent considered that the appellant had been dishonest in his dealings with the HMRC and concluded it would be undesirable for him to remain in the UK as a result of his conduct. The application was therefore refused under the general discretionary grounds of refusal: namely 322(5) of the Immigration Rules. In light of this, the respondent also concluded that there were no exceptional circumstances to support a grant of leave on the basis of Article 8.

5. The appellant appealed against this decision. The First-tier Tribunal Judge correctly noted that the appeal was limited to human rights grounds. He however regarded it as common ground that the only issue before him was whether the appellant had practiced deception or dishonesty to bring him within the ambit of 322(5). He also considered it common ground at [20(a)] "*that if he had not practised such deception, then his application might indeed have been granted*". The judge then reached the conclusion, for reasons set out at [20(b)] to [20(h)] that the appellant had not at any stage practiced deception such that 322(5) could be invoked. The judge went on to consider Appendix FM and 276ADE of the Immigration Rules, before turning his attention to Article 8. In dismissing the appeal, the judge said this at [31]: "*I am not persuaded on the evidence presented that there are compelling circumstances not sufficiently recognised under the Rules for granting leave to remain*".

Error of law discussion

6. This case plainly involved the refusal of a human rights claim, and therefore, the ultimate issue in accordance with the amended legislation should have been whether that refusal was unlawful under section 6 of the Human Rights Act 1998. As this is an Article 8 case, it required consideration of the five questions posed by Lord Bingham at [17] of the opinions in R (Razgar) v SSHD No 2 [2004] 2 AC 368.

7. As set out in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) at [46] to [48], a person whose human rights claim turns on Article 8 will not be able to advance any criticism of the Secretary of State's decision-making under the Immigration Rules, unless the circumstances engage Article 8(2).

8. There has been no criticism of the First-tier Tribunal's finding that 322(5) did not apply. As Mr McVeety conceded, the respondent did not raise any other concerns regarding the application under 276B and as such on the judge's findings, his application for ILR should have been successful. It is now clear that the judge could not have allowed the appeal on this basis, as he did not have jurisdiction to do so. How should the judge have given effect to this finding, in the context of an appeal solely on Article 8 grounds? In my judgment, the judge certainly should not have left it entirely out of account when making his decision under Article 8. This in itself is a material error of law, as conceded by Mr McVeety.

9. As set out in Charles (supra) at [48] and then at [65] after citing from Ahsan and others v SSHD [2017] EWCA Civ 2009, a human rights appeal can provide a suitable forum for the adjudication of a factual matter such as deception, which if decided in favour of the appellant may necessitate the finding that Article 8 would be breached. Although the First-tier Tribunal Judge made a factual finding on the deception element there was a failure to go on to consider, whether in light of this, the appellant's removal from the UK would be contrary to Article 8.

Re-making the decision

10. Mr McVeety accepted that I should remake the decision myself by allowing the appeal on Article 8 grounds.

11. The appellant and his dependents have built up longstanding, entrenched and entirely lawful private lives in the UK, and it is uncontroversial that the Razgar questions (1) to (4) can be answered positively. The issue is whether the interference with these private lives would be proportionate for the purposes of question (5). Proportionality is the "public interest question" within the meaning of Part 5A of the Nationality Immigration and Asylum Act 2002. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B, and do so below.

12. I start with the children's best interests. They were born in the UK and have lived here all their lives albeit not for the period of seven years required for section 117B(6) to bite, together with their parents in a stable family unit. They are relatively young and would adapt to life in Pakistan with their parents but I am satisfied on the limited evidence before me that given the extent to which the family has become immersed in life in Britain, their best interests marginally favour remaining in the UK.

13. The public interest in the maintenance of effective immigration controls is not engaged. This is because the respondent now accepts, in light of the

First-tier Tribunal's findings regarding the absence of any deception or dishonesty on the part of the appellant, that he meets the requirements of 276B.

14. There is no infringement of the "English speaking" public interest as the appellant speaks fluent English. The economic interest is not engaged because the appellant has demonstrated his employment at all material times, as well as his payment of taxes to support the social and education benefits his family receives.

15. Although limited weight can be attached to the appellant's private life, weight can still be attached and I find that private life to be entrenched and firmly established.

16. Having considered all the relevant circumstances, I find that it would be disproportionate to remove the appellant, and any such removal would be contrary to Article 8.

Notice of Decision

(1) The decision of the First-tier Tribunal contains an error of law and is set aside.

(2) I remake the decision by allowing the appeal on human rights grounds.

Signed Date 13 April 2018

Ms Melanie Plimmer
Judge of the Upper Tribunal (Immigration and Appeal Chamber)