Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2024-002358**

[PA/03888/2020]

THE IMMIGRATION ACTS

Decision and Reasons Promulgated
On 9 August 2024

Before

Deputy Upper Tribunal Judge MANUELL

Between

K T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Heard at FIELD HOUSE on 26 July 2024

Representation:
For the Appellant: Mr A Maqsood, Counsel
(instructed by Iconsult Immigration)
For the Respondent: Miss H Gilmour, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Dempster dated 13 May 2024 against the decision of First-tier Tribunal Judge Hoffman who had dismissed the appeal of the Appellant against the refusal of

his international protection and human rights claims. The decision and reasons was promulgated on or about 25 March 2024.

2. The Appellant is a national of Uzbekistan, born on 4 June 1985. The Appellant had entered the United Kingdom as a student on 4 September 2006. His visa was extended in stages until 18 July 2011. On 6 August 2011 the Appellant married W (also from Uzbekistan). On 11 August 2011 he applied for leave to remain in the United Kingdom as W's spouse. The application was refused by the Respondent on 7 September 2011 because W was under 21 years of age. The Appellant's appeal against that decision was dismissed on 19 December 2011. The Appellant became appeal rights exhausted as of 15 February 2012. He remained in the United Kingdom without any form of leave thereafter.

3. The Appellant made further applications for leave to remain, which were respectively refused on 20 March 2014, 10 June 2014, 4 September 2015 and 7 September 2018. The Appellant appealed the last refusal decision which appeal was dismissed on 16 October 2019 on the basis that the Appellant would claim asylum, which he did on 6 November 2019. The Appellant's asylum claim in summary was that he was at risk on return from the government of Uzbekistan because of his wife's family's connection to an HIV+ medical negligence scandal.

4. Judge Hoffman reviewed the Appellant's evidence in detail. He found, to the lower standard, that the Appellant was of no likely adverse interest to the Uzbek authorities. Much of the asylum claim was incredible. There has been no challenge to those findings and the consequent dismissal of the asylum claim.

5. As to the Appellant's Article 8 ECHR claim, Judge Hoffman found that, while the Appellant and W remained legally married, their relationship was no longer genuine and subsisting. They had ceased to live together as husband and wife for a number of years. Thus there was no family life claim.

6. Concerning the Appellant's private life claim, Judge Hoffman adopted a balance sheet approach. It was not

argued that the Appellant would face any very significant obstacles in re-establishing himself in Uzbekistan.

7. The Judge recorded at [41] (pages 12-13 of his decision) that "Mr Maqsood (the Appellant's counsel) sought to argue that a factor to be considered when carrying out the Article 8 assessment was whether the appellant has been the victim of an historic injustice because on 10 August 2011 his application for leave to remain as a spouse was rejected on the basis of a rule that was subsequently found to be unlawful by the Supreme Court, i.e., his application was refused because W was under the age of 21 at the time. That age requirement was found to be unlawful by the Supreme Court in Quila and Bibi v Secretary of State for the Home Department [2011] UKSC 45. Judgment in that case was handed down on 12 October 2011, therefore two months after the refusal of the appellant's spousal application. Neither party has provided the tribunal with a copy of the 10 August 2011 refusal letter although Mr Philips [the Home Office Presenting Officer] did not seek to argue that the appellant was wrong in claiming that the sole reason for the refusal of his application was the age requirement rule. In the case of Patel (historic injustice: NIAA Part 5A) [2020] UKUT 00351 (IAC) the Upper Tribunal made a distinction between cases where they had been an "historic injustice" – which should be reserved for cases involving certain British Overseas citizens of families of Gurkhas – and cases where there has been an "historical injustice", i.e., an individual has suffered as the result of the wrongful operation (or non-operation) by the respondent of his immigration functions. Examples given include: where the respondent has failed to give a person the benefit of an immigration policy; where a delay in reaching a decision is the result of a dysfunctional system; or where the respondent forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision, but his view turns out to be mistaken. In the present case, the appellant's application was refused in August 2011 based on the rules extant at that time. The fact that the Supreme Court later found an element of those rules to be disproportionate under Article 8 ECHR does not in my view inevitably lead to conclusion that the respondent was wrongfully operating his immigration functions at that time: at the date of decision

the respondent was correctly applying the rules in force. Furthermore, following the judgment in Quila, the appellant would have had the opportunity to ask the respondent to revisit his case. It is unclear from the evidence before me whether he did so, although he certainly made further Article 8 applications to the Home Office in the following years, all of which were unsuccessful. Moreover, the appellant had an appeal against the 10 August 2011 decision which was dismissed on 19 December 2011– therefore after the Quila judgment had been handed down. He has therefore already had the opportunity to ask this tribunal to consider the refusal in the light of the Supreme Court's findings. I therefore find that the refusal of the appellant's spousal application in 2011 does not add significant weight to the appellant's side of the scale for the purposes of the present appeal. Nor does it lessen the weight to be attached to the public interest considerations."

8. Judge Hoffman went on to find that the various factors raised by the Appellant did not outweigh the public interest in his removal to Uzbekistan. Thus the Appellant's Article 8 ECHR appeal was dismissed.

9. When granting permission to appeal, Judge Dempster recorded that the grounds submitted that the Judge had misunderstood the meaning of "historical injustice". If the Appellant had been found to be such a victim, the proportionality balance under Article 8 ECHR should have been found to be in his favour. It was arguable that the Judge did not have regard to the significance of Quila (above), that the Immigration Rules in force at that time were incompatible with an appellant's Article 8 rights. This would not simply be a decision overturned by subsequent case law; rather it was an example of a wrongful operation by the respondent of their immigration functions and one in respect of which the appellant arguably could demonstrate that they had suffered as a result.

10. There was no Respondent's rule 24 notice but Miss Gilmour indicated that the appeal was indeed opposed.

11. Mr Maqsood for the Appellant relied on the grounds of appeal and the grant, as summarised above. He confirmed

that no copy of the First-tier Tribunal's decision dated 19 December 2011 which dismissed the Appellant's appeal was available. The appeal was however heard after Quila had been handed down. Counsel submitted that Judge Hoffman had not understood that the Respondent had erred first and foremost in making an Immigration Rule which was not Article 8 ECHR compliant. The Respondent should have suspended consideration of the Appellant's spouse application pending the Supreme Court's ruling, particularly as the Court of Appeal had already ruled that rule 277 was not Article 8 ECHR compliant. The Respondent's reliance on an Immigration Rule which was not Article 8 ECHR compliant was the only reason why the Appellant's spouse application was refused. At the time the relationship was not in any doubt. Had the Respondent not invoked rule 277 of the Immigration Rules, which the Respondent had imposed, the Appellant's spouse application would have been granted and he would have achieved settled status in the United Kingdom long ago. The Judge should have given substantial weight to that in the assessment of proportionality.

12. Neither Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC) nor Ahmed (historical injustice explained) Bangladesh [2023] UKUT 165 (IAC) (03 July 2023) provided authority for the proposition that the Respondent is entitled to make and apply Immigration Rules which are incompatible with the Human Rights Act 1998. Where the Respondent makes Immigration Rules the operation of which will be incompatible with relevant human rights, that amounts to wrongful operation by the Respondent of his immigration functions. In Quila (above) the expectation evident from the observations of Lady Hale is that even where there is a rule such as para 277 (as it stood on 7 September 2011), the Respondent will act compatibly with the Convention rights of the people with whom she is concerned: see [61]. As the explanation given by the Upper Tribunal in Patel and Ahmed does not deal with this facet of historical injustice, Judge Hoffman had confused it with the situation where the Respondent applied the law as he understood it to be at the time of the decision through the case law and had no choice but to apply the interpretation of the court at the time. If Judge Hoffman were right then the Respondent can make Immigration Rules (the

operation of which is incompatible with the Convention rights) and refuse applicants until the rule is challenged successfully and amended consequently. The applicants who suffer as a result of the pre-amendment refusals will have no redress, as the Respondent will be able to contend in his defence that he simply applied his rules applicable at the time. This cannot be right as the duty to act compatibly with the convention rights arises from primary legislation.

13. Miss Gilmour for the Respondent resisted the appeal. The Appellant could not show that he had been the victim of an injustice within the terms of Ahmed (above): see 1(c) of the headnote. There had been no less than four applications which the Appellant had made when he could have raised the historical injustice issue, if it existed. All that the grounds of appeal did was express disagreement with the decision.

14. In reply, Mr Maqsood submitted that Ahmed applied. The Judge had fallen into error at the first hurdle. The proper analysis of the Article 8 ECHR private life claim had yet to be carried out. Counsel contended that the Article 8 ECHR elements of the decision should be set aside and that part of the appeal reheard in the Upper Tribunal.

15. The Tribunal reserved its decision, which now follows. As noted above, the dismissal of the Appellant's protection claim and Article 8 ECHR family life claim were not challenged. It must be observed that this was never a meritorious appeal, as Judge Hoffman demonstrated in a meticulous and comprehensive decision. Mr Maqsood's "historical injustice" submission rested on a fallacy, i.e., on the argument that "but for" the Respondent's introduction in 2008 of a minimum age for foreign spouses, rule 277 of the Immigration Rules, which was not Article 8 ECHR compliant, the Appellant would have been given leave to remain as a spouse and after five years would have been entitled to settled status.

16. As Judge Hoffman showed in the passage cited above at [7], the nexus with the refusal decision to create an historical injustice did not exist. By the time the Appellant had appealed the rule 277 refusal decision, Quila had been handed down by the Supreme Court. No copy of the First-

tier Tribunal's decision was available. Judge Hoffman was entitled to infer that the First-tier Tribunal Judge had Quila cited to him or her by the parties and had taken that decision fully into account. Indeed, a Supreme Court decision of such significance is hardly likely to have been overlooked. The First-tier Tribunal decision was not appealed, which underlines the validity of the inference. If that were wrong for any reason, Immigration Rules 277 was revoked and the Appellant had thereafter made no less than four further applications for leave to remain, so had ample opportunity to raise any historical injustice point with the Secretary of State. Judge Hoffman correctly found that there was no historical injustice to take into account in the Article 8 ECHR balancing exercise.

17. Mr Maqsood submitted that Judge Hoffman fell into error when he said "The fact that the Supreme Court later found an element of those rules to be disproportionate under Article 8 ECHR does not in my view inevitably lead to conclusion that the respondent was wrongfully operating his immigration functions at that time: at the date of decision the respondent was correctly applying the rules in force." There may be some force in that submission for the reason given by Mr Maqsood, namely that the Secretary of State in fact made the unlawful Immigration Rule in question (the Immigration Rules being a statement of ministerial policy rather than legislation). The position was thus different from the clarification of an existing law or case by the courts. Nevertheless, any error of law here cannot be not material because the Judge's alternative and/or additional reasons for finding that there was no historical injustice set out in the same passage were complete in themselves and were obviously sound.

18. Accordingly, the Tribunal finds that there was no material error of law. Judge Hoffman's decision stands unchanged.

DECISION

The onwards appeal is dismissed. There was no material error of law and the original decision stands unchanged.

Signed R J Manuell **Dated** 31 July 2024
Deputy Upper Tribunal Judge Manuell