



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08884/2016

THE IMMIGRATION ACTS

Heard at Field House London  
On 17 April 2018

Decision & Reasons Promulgated  
On 18 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SURESH JOSHI  
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer  
For the Respondent: None

DECISION AND REASONS

1. The Secretary of State for the Home Department (SSHD) appeals to the Upper Tribunal with permission against the decision and reasons statement of First-tier Tribunal Judge M B Hussain that was issued on 21 December 2017.
2. By the time the appeal was called on, there was no appearance by or for the respondent. This was of no surprise. The respondent's former solicitors notified the Tribunal on 3 April 2018 that they were no longer instructed and that the respondent would henceforth represent himself. On 10 April 2018, the Tribunal received the following communication from the respondent:

"Further to the notification of the intended Court Hearing on 17/04/18 relating to myself and the Secretary of State, I write to inform you that, due to my financial

situation, age and grave medical condition, I'm neither able to afford legal representation nor fit to appear in person. I appreciate the implications of not being legally or personally represented at the hearing and am willing to accept the Court's judgement made in my absence. Please advise me if any further information or action on my behalf is needed."

3. I indicated to Mr Bramble that I intended to proceed in the absence of the respondent as permitted by rule 38 of the 2008 Upper Tribunal Procedure Rules. The communication from the respondent and his former solicitors confirmed notice of hearing had been properly served. The respondent consented to the Upper Tribunal proceeding in his absence. The issues to be determined are those raised by the SSHD, who was represented. Mr Bramble had no objection to proceeding in the absence of the respondent.
4. The SSHD's grounds of appeal focus on whether Judge Hussain had jurisdiction to review the discretion exercised by the SSHD under paragraph S-LTR.2.3. It was accepted that the respondent had failed to pay charges in accordance with the relevant NHS regulations on charges to overseas visitors and that the outstanding charges have a total value exceeding £1,000. In fact, the respondent originally owed £36,508 for medical treatment, of which (according to a letter from the Citizen's Advice Bureau(CAB), Carshalton Branch, over £33,000 remained outstanding.
5. Mr Bramble explained that underlying the grounds are the broad changes made to the rights of appeal from 6 April 2015, when s.19 of the Immigration Act 2014 came into force. From that point, the Tribunal has no jurisdiction to review the exercise of discretion. This follows from the fact the Tribunal has no jurisdiction to decide that a decision is not in accordance with the immigration rules.
6. I agree with Mr Bramble. Judge Hussain had no power to review the exercise of discretion itself. Of course, Judge Hussain did not have the benefit of the guidance in Charles (human rights appeal: scope) Grenada [2018] UKUT 89, which explains why Mr Bramble's submissions are correct in law. Judge Hussain's jurisdiction was limited to undertaking a full balancing exercise to determine whether the decision was unlawful under s.6 of the Human Rights Act 1998.
7. This leads me to a further difficulty with the decision and reasons statement of Judge Hussain. He approached the appeal as if he had jurisdiction to review the decision under the immigration rules. This is evident from the judge's self-direction paragraphs and the fact he sought, from paragraph 37 of his decision and reasons statement, to review whether the respondent satisfied paragraph 276ADE(1)(vi) of the immigration rules. At paragraphs 46 onwards, Judge Hussain considered whether the respondent met the suitability requirements, again demonstrating the judge was reviewing the decision in terms of the immigration rules.
8. The problem with this approach is that the Tribunal has no jurisdiction to decide whether a decision is in accordance with the immigration rules. Judge Hussain was required to decide whether the decision appealed against was unlawful under s.6 of the Human Rights Act 1998. It is evident from the comment at the end of his

decision, that it was unnecessary to consider the article 8 grounds outside the rules, that he did not carry out the necessary balancing act.

9. To this extent, I observe that Judge Hussain failed to identify whether article 8 was engaged and if so on what basis. It would appear the respondent relied not merely on his private life rights but also his family life rights. It was necessary for the judge to determine whether the respondent enjoyed family life in the UK with his adult daughter and son-in-law. In carrying out an article 8 assessment, it is necessary to identify the degree to which a decision to exclude might interfere with a person's private and family life rights.
10. I mention that Judge Hussain's reliance on paragraph 276ADE(1)(vi) meant he focused solely on the respondent's private life rights. But it is unclear what private life was established in the UK. The respondent had no right to free medical treatment. The need for medical treatment does not automatically engage private life rights. The respondent had arrived in the UK as a visitor. Although paragraph 276ADE starts from the assumption that a person has established private life rights in the UK, that is not the starting point under the current appeal regime, which requires a "balance sheet approach" if the classic Razgar step by step approach is not adopted.
11. In addition, it is necessary to ascertain the public interest in expelling a person. In that context, whether a person meets the requirements of the immigration rules will be a factor. However, the changes made to the appeal regime by the 2014 Act mean that when conducting that exercise the Tribunal cannot go behind a concession. Of course, if the immigration rules are in fact met, then the public interest in expelling a person will be reduced, often decisively.
12. But the task of the judge does not end with identifying the factors for and against the respondent remaining in the UK. Once the competing factors have been identified, the task is to balance them against each other to decide if the personal interests of the respondent outweigh the public interests.
13. Unfortunately, Judge Hussain did not carry out these tasks. By not doing so he failed to determine the appeal in accordance with his jurisdiction. This means the decision is infected with serious legal error and must not only be set aside but the original appeal must be remitted to the First-tier Tribunal for a hearing afresh wherein the human rights issues can be properly considered.
14. One final comment is appropriate. Even had Judge Hussain had jurisdiction to review the exercise of discretion, he has failed to give adequate reasons for reversing the SSHD's decision. At paragraph 53, the judge records the possibility of a settlement being reached between the respondent's daughter and son-in-law with the relevant NHS body to repay the outstanding debt. But this was merely a possibility. There was no evidence that an agreement had been reached. It is unclear why the judge concluded that the sponsors were willing to settle the debt albeit reluctantly. He saw they were reluctant to pay the debt, which is also clear from the tone of the CAB letter. The lack of explanation by the judge is further evidence of legal error.

**Notice of Decision**

The First-tier Tribunal's decision and reasons statement contains an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal for a fresh hearing, before a judge other than Judge M B Hussain.

Signed

Date 17 April 2018

Judge McCarthy  
Deputy Judge of the Upper Tribunal