IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001789
UI-2021-001790
First-tier Tribunal No:
HU/00849/2021
HU/00850/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 30 November 2022

Decision & Reasons Promulgated
On the 15 February 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SUBHENDU PHILIP D COSTA
MARGARET TAMANG D COSTA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Saifolahi, Counsel instructed by Gulbenkian Andonian Solicitors

For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

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1. By a decision promulgated on 28 October 2021 following a hearing on 10 August 2021, First-tier Tribunal Judge Ian Howard ("the judge") dismissed the linked appeals brought by the appellants against the Secretary of State's decisions to refuse their human rights claims. The appellants now appeal to this tribunal against the judge's decision, with the permission of First-tier Tribunal Judge Singer.

2. The appellants' appeals to the First-tier Tribunal were brought under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

Factual background

3. The appellants are citizens of India, born on 4 April 1977 (Subhendu D Costa, "the first appellant") and 30 September 1976 (Margaret D Costa, "the second appellant"). They are a married couple. They arrived in the UK with leave as a student and dependent respectively on 8 February 2009. Their leave was renewed or extended until 10 July 2018, which was the date of the refusal of their in-time applications for further leave to remain under the 10 year family and private life route. On 31 October 2018, the appellants each applied for indefinite leave to remain on the basis of their claimed ten years' continuous lawful residence. Those applications were refused on 17 January 2020 in circumstances that did not attract a right of appeal. The decisions were each upheld upon being reconsidered following pre-action judicial review correspondence, on 21 September 2020. The reconsidered decisions were served on 22 September (the second appellant) and 26 September (the first appellant) 2022. Those decisions attracted a right of appeal and were the decisions under appeal before the judge.

4. At the hearing before the judge on 10 August 2021, unfortunately only Mr D Costa had been able to attend. Mrs D Costa was in hospital being treated for Covid-19. The judge heard evidence from Mr D Costa concerning his studies in the UK, the appellants' friends here, and their links to India. Mr D Costa's evidence was that there would be age-based and faith-based barriers to his return and integration to India. As Christians, they would face discrimination. They would be returning without the financial backing he and his wife would need to establish themselves, and there would be no support for them.

5. The judge reserved his decision.

Post-hearing, pre-decision developments

6. By 1 October 2021, over seven weeks after the hearing, the judge had not promulgated his decision. Those representing the appellants contacted the tribunal seeking to rely on post-hearing material relating to the second appellant's health. The representations said that the judge was still seized of the appeal, since the decision had not been promulgated, and invited

him to admit the material. The post-hearing material primarily took the form of a letter from the second appellant's GP, Dr Samuel, which summarised her health conditions, treatment requirements, and stated that she was not fit to fly for three to six months.

7. The judge issued directions dated 4 October 2021 inviting the respondent's submissions in relation to whether (i) the Secretary of State would give her consent to this "new matter" being considered by the tribunal; and (ii), if so, setting a date by which the Secretary of State should inform the tribunal if she wished to make further submissions orally or in writing on the matters to be considered by the judge.

8. By a letter dated 6 October 2021, the "Feltham Directions Team" replied on behalf of the Secretary of State. The Secretary of State consented to the "new matter" being considered, but added that:

> "… the SSHD would wish to make oral submissions and be allowed to carry out cross-examination of the Appellant's [sic] if so required by the Presenting Officer."

9. The judge did not reconvene the hearing. Rather, despite having been invited by the Secretary of State to reconvene the hearing, he dealt with the new materials on the papers (see para. 24).

10. The judge summarised the new medical evidence in these terms at para. 26:

> "In a letter dated the 22 September 2021 the second appellant's GP Dr R Samuel tells me that she is now at home on home oxygen support under the care of an anticoagulant clinic and is an anticoagulant medication. She has been advised to continue with this medication for six months. She has further been advised not to fly for at least three to six months. That is the extent of the new evidence."

The decision of the First-tier Tribunal

11. The judge's operative findings commence at para. 27. He found Mr D Costa to be an honest witness and accepted his evidence that his family in India are not "financially strong", and that there is no family home there. He noted that Mr D Costa's evidence had been that his Christian faith would result in obstacles to him finding work (para. 28) but went on to find that his accountancy qualifications and work experience would place him in good stead to find employment (para. 29). Although Mr D Costa's family would be able to offer little support, that was immaterial, found the judge, because his "skill based resources" mean that his life in India would not be characterised by dependence upon his extended family.

12. The judge noted that Mr D Costa's evidence about his own health conditions had been limited. He had mentioned that he had possible diabetes and a heart condition, but there was no detailed evidence (para.

31). As to the second appellant's health-based concerns, the judge said this:

> "32. The evidence of his wife's Covid-19 is a little more comprehensive. Her GP sets out the treatment she is currently receiving and that she will need looking [after] into the future.
>
> 33. There is no evidence from which I can properly conclude that [the second appellant's] investigations currently underway or treatments currently enjoyed will not be available in India."

13. The judge directed himself on the law concerning article 8 at paragraphs 34 and 35, citing a number of well-known authorities from 2015 and 2016. He addressed the five questions identified by Lord Bingham in *Razgar* [2004] UKHL 27 in the following terms, at paragraph 37:

> "(1) Will the proposed refusal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> Yes. The appellants have established a private lives for themselves in the UK during the twelve and a half years they has now been living here. The focus of that private life has been the first appellant's studies and the employment he has had. As one might reasonably expect, in that time they have also formed personal friendships with others. The proposed removal would constitute an interference by a public authority with the exercise of the appellants' right to respect for their private lives.
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> The short answer is no. The first appellant travelled to the UK to study. He has exhausted his leave in that endeavour. Along the way he has worked and gained valuable skills. He and his wife have made friends. Both have had the benefit of medical treatment whilst in the UK, but nothing of that treatment has been shown to be unavailable in India. In the circumstances of this case as I find them to be there is nothing about the respondent's refusals against this background that has consequences grave enough to engage Article 8."

14. The judge dismissed the appeal.

Grounds of appeal

15. There are two grounds of appeal.

    a. <u>Ground 1</u>: the judge failed properly to take into account the medical evidence or provide sufficient reasons for rejecting it. The post-hearing material from Dr Samuel stated that the appellant would not be fit to fly for three to six months, yet the judge concluded at paragraphs 32, 33 and 37 that there were no medical barriers to the second appellant's removal.

b. Ground 2: the judge was wrong to conclude that the appellants' removal would not even *engage* Article 8 of the ECHR, and so unlawfully failed to conduct a proportionality assessment concerning their prospective removal.

Submissions

16. Ms Saifolahi submitted that the judge's analysis of the post-hearing material was inadequate and failed to engage with the contents of Dr Samuel's letter. In addition to the second appellant being unfit to fly at the date of the judge's consideration of the medical evidence, she still required oxygen at home and attendance at the anticoagulation clinic. The judge did not consider those factors, Ms Saifolahi submitted. In addition, since the judge's Article 8 analysis abruptly and incorrectly concluded that Article 8 would not even be engaged by the appellant's removal, the judge unlawfully omitted to conduct a proportionality assessment, which could have considered these matters. It is trite law that the *engagement* of Article 8 requires only a relatively modest threshold to be met. It was plainly engaged on the facts of this case, and the judge should have considered the remaining *Razgar* criteria.

17. Mr Whitwell for the Secretary of State submitted that the judge dealt with the relatively limited medical evidence to the extent required. The appellant's then unfitness to fly was a temporary impairment and would primarily impact the Secretary of State's removal arrangements. It did not provide a basis upon which the judge could rationally have allowed the appeal.

18. In relation to the judge's findings concerning Article 8, Mr Whitwell accepted that the judge's terminology was perhaps odd in places, but in substance, he had considered all matters that would fall to be considered as part of a proportionality assessment in any event. There was no material error.

The law

19. Article 8 of the European Convention on Human Rights ("the ECHR") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

20. In *Razgar*, Lord Bingham said that the five questions that are likely to be asked by a judge determining an Article 8 ECHR appeal are:

> “(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?” (See paragraph 17)

Discussion

21. In relation to ground 1, I accept that, in principle, the human rights implications of an appellant’s putative return must be assessed by reference to the date of the hearing. However, while it may have been helpful for the judge expressly to have addressed the impact of the second appellant’s unfitness to fly as at the date of his post-hearing consideration of the new evidence, any error in this respect was immaterial. Dr Samuel’s prognosis, on 22 September 2021, was that the second appellant would be unfit to fly for three to six months. Over a year has passed since then and there was no suggestion at the hearing before me that the poor state of the second appellant’s health has continued to the extent she remains unfit to fly. In relation to the other matters raised by the medical evidence, while the judge’s treatment of it was brief, I consider that he gave sufficient reasons, that were open to him on the evidence, for concluding that nothing in the medical evidence demonstrated that the appellant was in need of treatment that would not be available in India.

22. I turn to ground 2. While it may be said that any judge enjoys a degree of latitude to conduct proportionality assessments in accordance with his or her own judgment, the judge’s conclusion that Article 8 ECHR would not even be *engaged* by the appellants’ removal *following thirteen years of residence* pushes at the boundaries of appellate restraint.

23. The threshold for engaging Article 8 is relatively modest, and Article 8 is either engaged or it is not. Yet the judge did not direct himself as to the modest threshold, for example by reference to *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801:

> “28. It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art. 8(1), the threshold of engagement (the "minimum level") is **not a specially high one**. Once the article is engaged, the focus moves, as Lord

> Bingham's remaining questions indicate, to the process of justification under art. 8(2). It is this which, in all cases which engage article 8(1), will determine whether there has been a breach of the article." (Emphasis added)

24. The authorities the judge summarised at paragraphs 34 and 35 related primarily to the proportionality assessment at point (5) of the *Razgar* criteria, rather than to the separate question of whether Article 8 would be engaged by an individual's removal in the first place. The authorities themselves were of some vintage. They pre-date both the statutory public interest considerations now contained in Part 5A of the 2002 Act: see for example, *R (oao Devindra Sunassee) v Secretary of State for the Home Department* [2015] EWHC 1604 (Admin) at [4]; *SS (Congo)* [2015] EWCA Civ 387 at [68]. They also pre-date the now leading Supreme Court authorities on the approach to proportionality assessments under Article 8 generally, such as *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11.

25. When one looks to the judge's analysis of whether Article 8 is engaged, the focus of the judge's analysis lies in questions pertaining to the proportionality of removal, rather than the question of whether the appellants' removal would engage Article 8. For example, at paragraph 37(2), the judge noted the fact that the medical treatment the appellants have enjoyed in this country would be available in India, and that they had made friends, and worked and studied here.

26. I consider that the judge's failure to direct himself concerning the relatively modest threshold for the engagement of Article 8 pursuant to the second *Razgar* question was an error of law. It led to him conflating it with the quite separate assessment of proportionality of removal. The judge's conclusion on the engagement issue was, with respect, plainly wrong. Article 8 would be engaged on a private life basis by the appellants' removal.

27. I therefore turn to whether the judge's error was material. Throughout the course of his decision, the judge addressed the following factors which would have been relevant in any proportionality assessment. The following factors weigh in the Secretary of State's favour:

    a. The appellants did not meet the long residence requirements of the rules and would not face any very significant obstacles to their integration in India (and so could not qualify under the Immigration Rules on that basis, either). The first appellant has skills and experience in a transferrable field, namely accountancy, retain finance management, and book-keeping: see paragraphs 29 and 30.

    b. The first appellant's skills would be such that, despite the modest resources of the appellants' extended family in India, their lives upon

their return would not be characterised by dependence upon their extended family: paragraph 30.

c. There was minimal evidence of the first appellant's health conditions. He had mentioned possible diabetes and a heart condition, but there was no further evidence: paragraph 31.

d. While the appellant's wife was, at the time of the judge's decision, undergoing treatment, there was no evidence that such investigation or treatment would not be available in India: paragraph 33.

e. There were no additional Article 8 factors in support of the appellants other than those set out in the decision: paragraph 37.

28. The only matters that were before the judge that could have militated against the public interest in removal related to the length of their residence here, the friendships and private life they had built up, and the second appellant's health conditions. As the judge found, nothing about the appellant's health conditions would have justified a conclusion that adequate treatment would not be available in India. Their private lives were established at a time when they were resident unlawfully, or with a precarious immigration status, and so would have attracted little weight (see section 117B(4) and (5) of the 2002 Act). Further, as confirmed by the judge at para. 37, there were no other Article 8 factors the couple could rely upon.

29. Drawing this together, I find that the decision of the First-tier Tribunal involved the making of an error of law, however the question for my consideration is whether I should set the decision aside. The Tribunals, Courts and Enforcement Act 2007 empowers the Upper Tribunal to set aside such decisions but does not oblige it to do so: see section 12(2)(a). It is very difficult to see on the evidence it had been before the judge how he could have allowed the appeal, had he proceeded to conduct a full proportionality assessment. While Ms Saifolahi challenged the brisk nature of the judge's evaluation of the post-hearing medical evidence, she did not challenge the judge's findings of fact that any treatment that the second appellant still requires would be available in India.

30. In my judgment, the error in the judge's reasoning lay in his conflation of substantive proportionality-based considerations with the earlier and separate question of whether Article 8 is engaged. Put another way, the judge's decision addressed all the correct issues, albeit under the wrong headings.

31. I therefore conclude that the judge's error was immaterial and dismiss this appeal.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law such that it must be set aside.

The appeal is dismissed.

Signed Stephen H Smith Date 5 December 2022

Upper Tribunal Judge Stephen Smith