IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000405

First-tier Tribunal No: HU/58101/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE G BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FARHAN SULTAN ALAM FARIDI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Terrell (Home officer presenting officer)
For the Respondent: Mr A Maqsood (Counsel instructed by Archbold Solicitors Ltd)

Heard at Field House on 23 May 2023

DECISION AND REASONS

1. This is an error of law decision. The Secretary of State is the Appellant in this matter and I shall refer to her as "the SSHD" and to the respondent as "the Claimant".

2. The Claimant is a citizen of Pakistan and was born on 19.4.1983. He claimed that he established 10 years lawful residence under paragraph 276B. It is helpful to set out a summary of the chronology of the Claimant's immigration history. The Claimant entered the UK in January 2011 with entry clearance as a student. His student leave was granted until 2015. A letter of curtailment was sent to him on 13.8.2014 for leave to expire in October 2014. An application was made for further leave with a new CAS but while that was pending the college's licence was revoked. No further CAS was obtained and the application was refused. That decision was challenged by the appellant and dismissed. He became appeal rights exhausted on 5.12.2016 and he was issued with immigration bail and temporary admission. The Claimant then applied as a dependent family member of an EEA citizen, which was refused on 3.6.2017 without a right of appeal. Judicial Review was pursued but withdrawn following advice from his solicitors.

3. In a decision promulgated on 29th December 2022 (FTJ Munonyedi) ("FTT") the Claimant's appeal was allowed on human rights grounds. The FTT accepted that argument put on behalf of the Claimant that he had suffered an injustice (no right of appeal) because of the decision in Sala [2016] UKUT 411 which was subsequently overturned (Khan v SSHD [2017] EWCA Civ 1755). The FTT accepted that as a result the Claimant ought to have been placed in the position had Sala not been decided and thus given a right of appeal against the refusal of EEA application. The FTT [27] accepted the argument following the principles in Ahshan V SSHD (Rev 1) [2017] EWCA 2009 and Khan, Islam & Hussain v SSHD [2018] EWCA 1684, notwithstanding that those cases were TOIEC matters. The FTT found the Claimant to be a credible witness. The FTT found that the appellant had suffered a "gross" injustice [30] and this amounted to an exceptional case following on from which his removal would amount to a breach of Article 8. The FTT found that he should be afforded the opportunity to appeal the EEA decision and/or apply for further leave.

Grounds of appeal

4. The SSHD argued that the FTT failed to give adequate reasons for findings on a material matter. The FTT in essence carried out a free standing Article 8 consideration as to unfairness in relation to not being granted a right of appeal in previous proceedings. The Claimant did not meet the requirements under paragraph 276ADE and the FTT failed to consider requirements under section 117B Nationality, Immigration & Asylum Act 2002 (as amended).

Permission to appeal

5. Permission to appeal was granted by UTJ L Smith on renewal. Whilst accepting that the FTT made reference to section 117B, the FTT arguably erred in failing to explain how the proportionality assessment was conducted having regard to a) the fact that the appellant had no leave to remain in the UK since 2017 and could not meet paragraph 276AB, b) the appellant could not meet paragraph 276ADE(1)(vi), c) his precarious and unlawful status meant that his private life carried little weight and d) that he could not meet the Rules weighed in the public interest. UTJ Smith expanded on the scope of the grant in lengthy and detailed observations in paragraphs 3-6 considering the historical injustice point.

Skeleton argument dated 22.5.2023

6. In a skeleton argument submitted on the day before the hearing, the SSHD sought permission to amend her grounds of appeal under the UT Procedure Rules 2008 5(3) in light of the observations made by UTJ Smith. She sought to argue the point that the FTT erred in wrongly applying the principles in Ahsan to the appellant's circumstances following Sala which were not applicable in the appellant's circumstances. Mr Terrell indicated that he intended to make an application to amend the grounds of appeal.

The hearing

Adjournment application

7. At the hearing before me Mr Maqsood made an application for an adjournment under Rule 23 (1)(a) and applied to set aside the grant of permission to appeal by UTJ Smith. He reiterated the arguments drawing an analogy with the ETS cases

and alternatively argued that the Claimant would be able to make up 10 years with the temporary admission/ bail accepting this was within the discretion of the SSHD but which had been an issue that the FTT failed to determine. He argued that UTJ Smith had granted permission on grounds not actually pleaded by the SSHD in paragraphs 3-6 of the permission. The UTJ was mistaken in stating that the Claimant had been granted a right of appeal regarding the EEA decision. Mr Maqsood took the view that there was a procedural irregularity (Rule 43), although he accepted that there was controversy as to whether a grant of permission could be viewed as a disposal of the proceedings. In any event there ought to be a new decision made on permission based solely on the grounds as pleaded. To that end an application could be made to UTJ Smith to set aside her decision.

8. Mr Terrell opposed the argument which was unclear and whose prospects of success were at most dubious. The UTJ had made observations in paragraphs 3-6 which did not detract from the terms of the grant set out in the preceding paragraphs. No procedural irregularity had been identified. Rule 43 was not applicable to a grant of permission which in any event had been granted in March 2023 and the Claimant had ample time in which to have raised the point.

Decision on adjournment application

9. I refused the application for an adjournment and to set aside of the grant of permission. The crux of the grant of permission was set out by UTJ Smith in the first two paragraphs and the remaining paragraphs were observations albeit detailed and did not amount to distinct grounds of appeal that had not been pleaded. The decision as to error of law was for this Tribunal to determine and it was upto the Tribunal to have regard to those observations or not. I took the view that the grounds as pleaded necessarily incorporated all of the points raised in the grant terms and observations in the permission as the central issue was the question of unfairness.

10. Having given my decision I indicated to Mr Terrell that there was no need for him to make any application for amendment of the grounds in light of my stated view.

The EOL hearing

11. The FTT found that the Claimant suffered a gross injustice following Sala because he had not been granted a right of appeal against the refusal of his EEA application [30-31]. Sala was subsequently overturned. The FTT accepted the Claimant's argument that he ought therefore to be placed in the position whereby he be given a right of appeal or put in a position to exercise a right of appeal. The FTT accepted the Claimant's argument that his situation was analogous to persons who had been found not to be dishonest in their TOIEC applications, following Ashan & Khan. The FTT treated the injustice as the main factor carrying weight in the proportionality assessment under Article 8.

12. I am satisfied that the FTT erred in finding that the Claimant suffered a gross injustice and in adopting the principles applied in TOIEC appeals. At the time of his EEA application Sala was a statement of the correct law and that law subsequently changed. The SSHD applied the law applicable at the time and so it cannot be argued that the SSHD caused any injustice as is the case in TOIEC appeals where the SSHD had acted wrongly. In any event the Claimant would not

have gained any real advantage in being returned to that position of having a right of appeal, as there is no guarantee that had he been given a right of appeal that he would have been successful. I conclude that the FTT erred in finding that there was an injustice caused to the Claimant. I further conclude that any purported injustice was not capable of affecting the proportionality assessment under Article 8 (Patel (historic injustice; NIAA Part5A) India [2020] UKUT 351 (IAC) – see headnote and 46-47). This was not a case where the SSHD formed an incorrect view of the Claimant's behaviour which turns out to be mistaken.

13. I find some merit in the submissions made by Mr Terrell that the Claimant could have submitted a late application, asked for a reconsideration after Sala was overturned in Khan or sought to make a fresh application, neither of which he had done and which could have given him a right of appeal. The Claimant was therefore in a position following the clarification of the law in Khan to regain what he had lost namely a right of appeal. It was acknowledged that if he was given a right of residence under EEA Regulations that could be treated a lawful residence but that is entirely speculative. It is far from certain that the Claimant would have been granted a residence card.

14. I further conclude that the FTT failed to clearly explain why weight was placed on that injustice factor as determinative of the proportionality assessment and failed to consider factors under section 117B. The FTT concluded that the Claimant failed to comply with paragraph 276B as to 10 years lawful leave and similarly failed to meet paragraph 276ADE as he provided no evidence of very significant obstacles to his reintegration in Pakistan [15-17]. The FTT refers to section 117B 2002 Act at [33] but fails to specifically consider the relevant factors and /or to explain why the weight is in favour of the Claimant as against the public interest. There is no consideration of the differing factors or any balancing exercise. This amounts to an error in law.

15. The argument put by Mr Maqsood that any error was not material because the Claimant had established 10 years lawful residence on the basis of his temporary admission/bail lacks merit. The SSHD has a discretion to grant 6 months leave in order for an application under paragraph 276B to be made. Mr Maqsood argued that this is an alternative route for the Claimant's appeal to be allowed. The SSHD has not exercised any discretion in this regard and it is not open to the Tribunal to do so.

Notice of Decision
There is a material error of law in the decision which shall be set aside.
The appeal by the SSHD is allowed.

GA Black

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

31.5.23