Neutral Citation Number: [2019] EWCA Civ 369

Case No: C5/2016/1287

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

LORD JUSTICE HAMBLEN
and
LORD JUSTICE HADDON-CAVE

- -

Between :

KK (INDIA) — **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondent**

- -

Mr Rowan Pennington-Benton (instructed by **Ma Solicitors**) for the **Appellant**
Mr Eric Metcalfe (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 20th February 2019

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

LORD JUSTICE HADDON-CAVE:

Introduction

1. The Appellant was born on 8th July 1998. She is a 26 year-old Indian national.

2. On 3rd October 2010, the Appellant arrived in the United Kingdom, aged 17 years old, together with her mother and younger brother. The Appellant had leave to remain ("LTR") as a Tier 4 (General) Student, valid until 30th September 2014. She, her mother and brother intended to live with the Appellant's father who had entered the UK clandestinely in 2002 but had since been granted British citizenship.

3. On 30th June 2011, the Appellant applied for indefinite leave to remain ("ILR") as a dependent child of her father. On 24th August 2011, the Respondent ("the Secretary of State") refused the Appellant's application for leave. In 2013, the Secretary of State granted the Appellant's mother and brother LTR as dependents of the Appellant's father.

4. On 25th October 2013, the Appellant applied for LTR outside the Immigration Rules. On 25th February 2014, the Secretary of State refused the Appellant's application for LTR.

5. On 29th September 2014, the Appellant applied for ILR in the UK on family and private life grounds, having obtained a BSc (Hons) in Pharmacology from the University of Hertfordshire.

Reasons for refusal

6. On 2nd December 2014, the Secretary of State refused her application for ILR on the basis that:

    (1) the Appellant had not met the requirements of paragraph 276ADE(1) of HC395 ("the Immigration Rules"), in particular she had not spent at least half of her life living in the UK;

    (2) it was not accepted that there would be very significant obstacles to the Appellant's reintegration in India since she had lived there for the first 17 years of her life;

    (3) the Appellant was now an adult and such family life as she maintained in the United Kingdom did not fall within the scope of Appendix FM;

    (4) as to her claim to be financially dependent on her father, there was nothing to prevent her father providing financial support from abroad in the event that she returned to India; and

    (5) there was nothing that constituted exceptional circumstances which might warrant a grant of leave outside the Immigration Rules.

7. Following this decision, the Secretary of State made directions for the Appellant's removal to India under s. 47 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act").

8. The Appellant appealed against the Secretary of State's decision of 2nd December 2014.

FTT decision

9. On 8th July 2015, the First-Tier Tribunal ("FTT") allowed the Appellant's appeal against the Secretary of State's decision of 2nd December 2014. FTT Judge Roopnarine-Davies found that:

   (1) the Appellant and her family lived together as a close family unit (paragraph 7);

   (2) she has family in India but her close family are in the UK (paragraph 7);

   (3) the Appellant was not living an independent life and was financially and emotionally dependent on her family (paragraph 8);

   (4) the documentary evidence produced did not relate to the sale of the family home in India nor has it been shown that the family home has been sold as claimed (paragraph 7); and

   (5) the Secretary of State had failed to demonstrate that she had exercised her discretion whether to grant leave outside the Rules (paragraph 11).

10. On 28th October 2015, the FTT granted the Secretary of State permission to appeal against its decision.

Correspondence regarding Punjabi translator

11. On 18th November 2015, the Appellant's solicitors asked the Upper Tribunal to provide an Indian Punjabi dialect interpreter.

12. On 19th November 2015, the Upper Tribunal refused the Appellant's request.

13. On 23rd November 2015, the Appellant's solicitors renewed the request for an interpreter on the basis that the Appellant's father "*is the main sponsor who is unable to speak English, and the evidence of both parents is extremely important in this application*".

14. On 23rd November 2015, the Upper Tribunal responded materially as follows:

> *"This is an error of law hearing at which oral evidence will not be required, whether from Miss K directly, or as you now indicate, Miss K's father. Please be aware that in any case Miss K's father is not noted on the Tribunal database as acting as a recognised sponsor in this appeal. If an interpreter is required simply so that the parties may follow the proceedings, they or your offices are welcome to engage one, but this would not be a matter for the Tribunal."*

UT decision

15. On 1st February 2016, the Upper Tribunal ("UT") allowed the Secretary of State's appeal against the FTT's decision made on 8th July 2015. The UT set aside the FTT's decision on the grounds that it involved an error of law and reheard the matter itself and dismissed the Appellant's appeal against the Secretary of State's decision dated 2nd December 2014. In his decision, Deputy UT Judge Woodcraft held as follows:

(1) The FTT had erred in law by concluding that the Secretary of State had not exercised her discretion whether to grant leave outside the Rules (paragraphs 18-21);

(2) The FTT had also erred in failing to determine the Appellant's Article 8 claim for herself rather than remitting it to the Secretary of State (paragraph 21);

(3) The Appellant has a family life with her father, mother and brother who are all in the United Kingdom (para 30). It was relevant that her father had indefinite leave to remain but that her mother and brother had not yet been granted such leave (though they had applied for it). It was therefore possible that her mother and brother could return to India as well (paragraphs 30-31);

(4) The Appellant has a financial dependence on her family since (as a student) she is not able to work. If she were to return to India, her family in the UK could continue to support her financially. The Appellant also had a qualification that would enable her to obtain employment and become self-sufficient upon return. The issue of financial dependency was therefore not a factor *"afforded any significant weight"* (paragraph 32);

(5) The Appellant's relationship with her parents and brother "did not amount to more than the normal emotional ties that one would expect to see in a family" (paragraph 33);

(6) There was no evidence to show that the family property in India has been sold and therefore *"there is accommodation for the Appellant to return to"* although it was *"a matter for her whether she chooses to live in such a property or to relocate"* (paragraph 34);

(7) There was *"no background evidence to support the Appellant's contention that as a single female she would be at particular or indeed any risk"* and the judge found that he did not *"consider that I have been given a full account of the Appellant's family's circumstances in India or indeed who remains there"* (paragraph 35).

(8) He did not accept that the Appellant would face insurmountable obstacles in returning to India: *"Indeed it is my view that it would be reasonable to expect that she could return"* (paragraph 35);

(9) It would not be a disproportionate interference with the family life the Appellant has with her family in the UK to refuse her application for further leave and to require her to return to India (paragraph 36);

(10) The Appellant's private life in the UK *"was established whilst her status here was precarious as such little weight can be ascribed to it in the proportionality exercise"* and the judge did not accept that the Appellant had *"lost all contact with her friends in India"* (paragraph 37).

Permission to appeal

16. The Appellant appealed against the UT's decision of 1st February 2016. Permission to appeal was refused by UT Judge Kebede on 23rd February 2016. Permission to appeal was refused by Maurice Kay LJ on 21st June 2016. Permission to appeal was, however, granted by Bean LJ on 13th November 2017.

17. It is regrettable that it is now over three years since the instant decision of the UT under appeal.

18. The Appellant was represented by Mr Rowan Pennington-Benton and the Secretary of State was represented by Mr Eric Metcalfe, for whose helpful written and oral submissions the Court was grateful.

Grounds of Appeal

19. The Appellant appeals against the UT's decision of 1st February 2016 on two grounds:

(1) Ground 1: The UT erred in finding that the FTT had made an error of law in finding that the Secretary of State had wrongly determined that there was no arguable Article 8 claim outside of the Rules which engaged his powers to remit the decision.

(2) Ground 2: it was procedurally irregular and unfair in the premises not to provide an interpreter and/or to hold a rehearing with no translator present.

Secretary of State's submissions

20. On behalf of the Secretary of State, Mr Eric Metcalfe invites the Court to dismiss the Appellant's grounds on the following reasons:

(1) The UT was right to conclude that the Secretary of State had properly considered whether the Appellant should be granted leave to remain outside the Immigration Rules on the grounds of her right to family and private life under Article 8 ECHR; and

(2) There is nothing to show that the UT's refusal to arrange a translator for the Appellant's parents at the rehearing of her appeal, or any other aspect of the proceedings before the UT, was procedurally unfair.

The legal framework

Immigration Rules

21. Paragraph 276ADE(1) of the Immigration Rules, introduced by HC 194, provides *inter alia* as follows:

> "*Private life*
>
> **Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE(1). The requirements to be met by an applicant for leave to remain on grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment); or …"

22. The Secretary of State issued instructions regarding the approach to be applied by her officials in deciding whether to grant LTR outside the Immigration Rules, in the exercise of her residual discretion to grant such leave. The Secretary of State requires such leave to be granted in exceptional cases. In paragraph 3.2.7d of the instructions she has amplified the guidance for the approach to be adopted to *"exceptional circumstances"*, in the following terms:

> *"**3.2.7d Exceptional circumstances***
>
> *Where the applicant does not meet the requirements of the rules refusal of the application will normally be appropriate. However, leave can be granted outside the rules where exceptional circumstances apply. Consideration of exceptional circumstances applies to applications for leave to remain and leave to enter. "Exceptional" does not mean "unusual" or "unique". Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead, "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely."*

23. In *R (Nagre) v. Secretary of State for the Home Department* [2013] EWHC 720 (Admin), Sales J (as he then was) states:

> *"14. The definition of "exceptional circumstances" which is given in this guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of Article 8. The practical guidance and illustrations given in the passage quoted above support that interpretation. No challenge is brought to the lawfulness of this guidance. In my view, it gives clear and appropriate guidance to relevant officials that if they come across a case falling outside the new rules, they nonetheless have to consider whether it is a case where, on the particular facts, there would be a breach of Article 8 rights if the application for leave to remain were refused."*

Application of Article 8 and Immigration Rules

24. The correct approach to the application of Article 8 ECHR in the context of the Immigration Rules was explained by the President of the UT in *Secretary of State for the Home Department v Izuazu* [2013] UKUT 45 as follows:

> *"40. ... [J]udges called on to make decisions about the application of Article 8 in cases to which the new rules apply, should proceed by first considering whether a*

> *claimant is able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. If he or she does, there will be no need to go on to consider Article 8 generally. The appeal can be allowed because the decision is not in accordance with the rules.*
>
> *41. Where the claimant does not meet the requirements of the rules it will be necessary for the judge to go on to make an assessment of Article 8 applying the criteria established by law.*
>
> *42. When considering whether the immigration decision is a justified interference with the right to family and/or private life, the provisions of the rules or other relevant statement of policy may again re-enter the debate but this time as part of the proportionality evaluation. Here the judge will be asking whether the interference was a proportionate means of achieving the legitimate aim in question and a fair balance as to the competing interests.*
>
> *43. The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom."*

Sales LJ's gloss

25. In *R (Nagre)* (*supra*), Sales J said that he agreed with the guidance in *Izuazu* subject to the following 'slight modification':

> *"... [I]f, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules." (emphasis added)*

26. This approach was approved by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 (*per* Lord Dyson MR at paragraphs [44]-[46], Davis and Gloster LJJ concurring).

27. In *R (Ganesabalan) v Secretary of State for the Home Department* [2014] EWHC 2712 (Admin) the Court of Appeal considered counsel's submissions that the Secretary of

State must be able to demonstrate exercise of discretion outside the Rules at the 'second stage', and commented as follows (at paragraph [66(10)]:

> *"66(1). Sales J's point is that the second stage can, in an appropriate case, be satisfied by the decision-maker concluding that any family life or private life issues raised by the claim have already been addressed at the first stage – in which case obviously there is no need to go through it all again."* (emphasis added)

28. In *R (Singh and Khalid) v Secretary of State for the Home Department* [2015] EWCA Civ 74, the Court of Appeal confirmed that there is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules (*per* Underhill LJ at paragraph [64], Lewison and Arden LJJ concurring).

29. The focus of any assessment of whether an interference with private life pursuant to the requirements of immigration control is proportionate should be whether the Secretary of State's decision is in accordance with those provisions; and, accordingly, the Immigration Rules should be given *"greater weight than as merely a starting point of the consideration of the proportionality of an interference with Article 8 rights"* (*per* Sullivan LJ in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558, at paragraphs [42] and [47]).

Further considerations

30. The following further legal considerations are also relevant.

31. First, the effect of removal on the family unit must be taken into account when considering Article 8 rights. In *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] 1 AC 115, Lord Brown (with whom Lord Bingham, Lord Hope, Lord Scott and Lady Hale agreed) said at paragraph [20].*:*

> "[20]. … [Section 65 of the Immigration and Asylum Act 1999] *allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.*"

32. Second, whether or not 'family life' exists between adult family members depends on the circumstances of the particular case and requires proof of dependency *"more than normal emotional ties"* (*per* Arden LJ in *Kugathas* [2003] EWCA Civ 31, at paragraph [35]). Financial dependency is a relevant factor but there is no case in which it alone has been held to be sufficient.

Procedural fairness and the provision of an interpreter

33. The following principles of procedural fairness were distilled by the President of the Immigration and Asylum Chamber in *MM (unfairness; E&R) Sudan* [2014] UKUT 105

(IAC) (from the decision of the Court of Appeal in *R v Chief Constable of Thames Valley Police ex p Cotton* [1990] IRLR):

(1) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the merits of the decision under review or appeal. Rather, the superior court's enquiry focuses on the process, or procedure, whereby the impugned decision was reached.

(2) It is doctrinally incorrect to adopt the two stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.

(3) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.

(4) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

Analysis

Ground 1: Did the Secretary of State's original decision involve an error of law?

Submissions

34. Mr Pennington-Benton submitted on behalf of the Appellant in summary as follows:

> "2. *This argument supporting this ground runs as follows:-*
>
> *(i) The article 8 assessment remains a two-stage test (first applying the Rules, followed by an assessment outside of the Rules if warranted);*
>
> *(ii) If the claim before the SSHD discloses no arguable grounds for looking beyond the Rules, then it may be sufficient (after clearly setting out the facts and explaining why) to simply state so in the decision letter;*
>
> *(iii) The SSHD decided in this case that there were no arguable grounds for consideration of article 8 outside of the Rules, and said so in the decision letter.*
>
> *(iv) The FTTJ found as a matter of fact and law that, although the Appellant clearly and admittedly did not meet the Rules, there existed article 8 family life between the Appellant and her parents and brother (who all had leave, and would be eligible to apply for ILR at the end of that leave).*
>
> *(v) It follows that there was contrary to the SSHD's decision letter an arguable case outside of the Rules.*

To the extent that the decision letter held otherwise, it disclosed an error of law (i.e. the article 8 assessment was on its face wrong).

(vi) The above was sufficient to engage the FTTJ's power to remit the matter to the SSHD. It was alternatively open to her to decide the article 8 and, if appropriate, determine that removal would be unlawful. In the premises however it was perfectly open to the FTTJ to decide that the most appropriate order (given the fact that applications for ILR from the other family members would soon be considered by the SSHD) to remit the matter to be considered in the round."

35. Mr Metcalf submitted on behalf of the Secretary of State that it is clear from the Secretary of State's decision letter dated 2nd December 2014 that she gave full and proper consideration to the Appellant's right to family and private life under Article 8 ECHR and the UT was right to set aside the FTT's decision and re-make the decision.

36. It was common ground on appeal and below that the Appellant did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules because she had not spent half her life in the UK and had only been here since 2010.

37. The relevant part of the Secretary of State's decision letter dated 2nd December 2014 is as follows:

> *"It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. In support of your claim you state that your family are in the UK and you are financially dependent on your father and that you have made many friends in the UK. This has been carefully considered. However, the family life that you claim to have with your relatives does not constitute family life as set out in Appendix FM of the Immigration Rules. It is considered the relationship with your family can continue from overseas via other methods of communication. It is also accepted that you could apply for appropriate entry clearance should you wish to return to the UK to visit your family and friends. It would be open to your father to financially support you from the UK if he wishes, it would also be open to you on your return to India to seek employment which is something that you are currently unable to do in the UK lawfully.*
>
> *It has therefore been decided that there are no exceptional circumstances in your case and a refusal to grant leave outside the rules would not result in unjustifiably harsh consequences for you. Consequently your application does not fall for a grant of leave outside the rules."*

38. The FTT Judge Roopnarine-Davies said that the Secretary of State was required to "*demonstrate that she has considered article 8 as a discrete other question including the effect on third parties*" (paragraph 9), and held that the Secretary of State had failed to "*substantively engage with the particular circumstances of [the] appellant and the impact of the appellant's separation from her family and their rights to respect for their family life under article 8*" (paragraph 10).

39. Deputy UT Judge Woodcraft held that the FTT was wrong to have found as it did and was in error of law. Deputy UT Judge Woodcraft's detailed reasoning is to be found in paragraphs [18]-[21] of his judgment:

> *"18. The refusal letter states that the Respondent has considered whether the particular circumstances of the Appellant constitutes exceptional circumstances outside the Rules. Whilst the refusal letter is concise, that of itself does not make it unlawful. The question is whether the Respondent is aware of the salient features of the case and has directed her mind to them .... Those were not exceptional circumstances in the Respondent's view which meant that the Appellant's application should be granted outside the Rules. When the Respondent stated that the family life the Appellant claimed did not constitute family life "as set out in Appendix FM" the Respondent was stating that the Appellant's claim to a family life did not fall within the Immigration Rules.*
>
> *19. I see nothing muddled in that approach. The Respondent was obliged to consider first whether the Appellant's claim could succeed under the Immigration Rules and she decided for the reasons that she gave that it did not. What the Respondent did acknowledge in the refusal letter was what was referred to as "the relationship with your family". It was that relationship, outside the Rules which the Respondent did not consider constituted exceptional circumstances such that the application fell to be refused. It is correct that the Respondent did not set out as one might expect a Tribunal Judge to do an analysis following a step-by-step Razgar approach. That of itself would not make this decision not in accordance with the law such that it remained outstanding before the Respondent to take. The Appellant was well aware that her claim had been refused and why it had been refused. ...*
>
> *21. It was an error for the Judge to find that the Respondent's decision was not in accordance with the law because the Judge was mistaken in finding that the Respondent had not considered the exercise of her discretion...."*

Discussion

40. In my view, the UT was right to find that the FTT had erred in law and the UT was entitled then to re-make the decision for the following reasons.

41. First, it is clear from a fair reading of the decision letter (cited above) that the Secretary of State did give specific consideration to (i) the Appellant's Article 8 rights, (ii) the

Appellant's "*relationship with [her] family*", and (iii) the impact that separation would have. Indeed, the decision letter states in terms that the Secretary of State has given consideration as to whether the *"particular circumstances"* set out in the Appellant's application constituted *"exceptional circumstances"* which *"consistent with the right to respect for private and family life contained in Article 8"* might warrant a grant of LTR outside the Immigration Rules.

42. Second, Mr Pennington-Benton asserts that the Secretary of State's analysis of the Appellant's circumstances was 'simply not adequate'. I disagree. Whilst (as the FTT judge observed) the decision letter was somewhat terse, in my view, the UT was right to conclude that conciseness did not render the decision letter unlawful and the letter contained a sufficient analysis of the Appellant's case and circumstances.

43. On a careful reading, the decision letter was far from devoid of detail or analysis. It outlined four specific reasons why the Appellant's *"particular circumstances"* did not amount to *"exceptional circumstances"* and why a refusal to grant leave outside the rules would not result in *"unjustifiably harsh consequences"* for the Appellant. First, her *"relationship with [her] family"* could continue from overseas via other methods of communication. Second, the Appellant could apply for entry clearance to return to the UK *"to visit her family and friends"*. Third, it would be open to her father to financially support her from the UK. Fourth, it would also be open to the Appellant to seek employment on her return to India. In my view, it is clear from the letter that the Secretary of State applied her mind to the question of the Appellant's family life and gave reasons which provided a rational basis for her conclusion that the consequences of the Appellant's separation from her family could reasonably be ameliorated upon her return to India and why her case did not amount to exceptional circumstances justifying ILR outside the rules.

44. Third, there was no need for the decision letter to be unnecessarily repetitious (*c.f.* Sales J in *Nagre, MF (Nigeria), Ganesabalan* and *Singh and Khalid* (*supra*)). Nor was it necessary for the decision letter to contain a step-by-step *Razgar* analysis. It was sufficient that, in the decision letter, the Secretary of State acknowledged consideration of the Appellant's relationship with her family and explained that her claim had been refused and why it had been refused (as the UT Judge observed at paragraph [19]).

45. Fourth, whilst not express, it was implicit from the decision letter's reference to the consideration of *"the relationship with your family"*, that the Secretary of State had considered the reciprocal relationship, *i.e.* the effect of the Appellant's return to India on both (a) her relationship with her parents and brother and (b) her parents' and brother's relationship with her. As Mr Metcalfe pointed out, 'family relationships' are reciprocal.

46. Fifth, having concluded that the FTT's decision was wrong in law, it was properly open to the UT to rehear the matter itself rather than remit it to the FTT for rehearing. In my view, the UT Judge was entitled to conclude that, although the Appellant had a family life with her father, mother and brother, her relationship with her parents and brother did not amount to more than *"the normal emotional one would expect to see in a family"* (paragraph [33]). At the date of the Secretary of State's decision, the Appellant was 21 years-old and a university graduate.

47. Mr Pennington-Benton sought to argue that the fact that the Appellant's mother and brother might obtain ILR was a relevant factor which the UT Judge ought to have taken into account. This is misconceived. It is axiomatic that the UT Judge was bound to

have regard to the facts as they stood at the time before the decision-maker when determining the lawfulness of the decision in question. The fact that the Appellant's mother and brother were granted ILR in April 2018 is separate matter which may, or may not, lead to a further application.

48. For these reasons, I would dismiss Ground 1 of the Appellant's grounds.

Ground 2: Did the UT act in a way which was procedurally unfair?

49. The Appellant contends that the UT acted in a manner which was procedurally unfair in that it failed to accede to her requests for a translator for her parents.

50. Mr Pennington-Benton submits that her legal advisors were, in effect, misled by the UT who assured them in a letter dated 23rd November 2015 that the hearing on 1st February would be an *"error of law hearing at which oral evidence will not be required"*. In the event, the Deputy UT Judge held a re-hearing but the Appellant's parents could not give evidence because they did not have a translator present.

51. During oral argument, Mr Pennington-Benton raised a further point, namely, that the UT Judge had acted unfairly by indicating to the parties that he intended to *"preserve the findings of fact which the judge made"* when re-making the decision. This, he submitted, was wrong and unfair because the UT Judge went on to make different findings of fact from the FTT Judge.

52. Mr Metcalfe pointed to the fact that (i) the Appellant's solicitors, Ma Solicitors, admit receiving the standard letter from the court making it clear that parties must be prepared in the event a of re-hearing; (ii) the parents' written statements were in English and that it was unclear that the parents, in fact, needed a translator to give evidence; and (iii) there was no evidence that the Appellant raised any objection at the rehearing concerning any inability of her parents to give evidence on her behalf at the hearing.

Discussion

53. The short answer to Mr Pennington-Benton's main point is that, exercising due caution, I am satisfied that whether or not the Appellant's parents had given live evidence at the hearing on 1st February 2016, it would have made no difference to the outcome.

54. The Appellant states that the parents' evidence was relevant to the question of whether the family home in India had been sold. The FTT had found that it was not satisfied on the balance of evidence *"that the family home has been sold as claimed"*. In her evidence before the UT, the Appellant explained that *"[t]here was no documentary evidence regarding the sale of the family home because it was in a village and it was sold to a rich person"*.

55. The UT concluded, however, that *"[t]here was still no real evidence that the house in India had been sold"* (paragraph [26]). The UT went on to state as follows (at paragraph [33]):

> *"If the property had been brought as the Appellant says by a rich person, how would that person be able to prove ownership without some form of documentation to support it? <u>This Tribunal is familiar with evidence regarding the sale of properties in the Indian subcontinent and if it is to be argued that a house has been sold legally with no</u>*

> *supporting documentation one would expect to see some background information to support such an otherwise unusual assertion"*. (Emphasis added)

56. In my view, therefore, absent supporting documentation, mere oral evidence from the Appellant's father or mother about the sale of the family property in India would inevitably have made no difference to the UT's decision. Accordingly, any procedural irregularity arising by reason of the UT's letter was not material and involved no unfairness.

57. As to Mr Pennington-Benton's second point, the answer is that the FTT Judge did not make any positive findings about the question of the Appellant's *"family ties"* but merely said that the point was arguable. Thus, the UT Judge was untrammelled by any express findings of the FTT Judge as to the Appellant's family circumstances. Accordingly, having held that the FTT was in error of law, there was no reason why the UT Judge should not have gone on to make her own findings as to the Appellants' family circumstances when re-making the decision on the merits.

58. For these reasons, I would dismiss Ground 2 of the Appellant's grounds.

Conclusion

59. For the above reasons, I reject both Appellant's grounds 1 and 2 and would dismiss this appeal.

LORD JUSTICE HAMBLEN

60. I agree.