Neutral Citation Number: [2023] EWCA Civ 1353

Case No: CA-2023-000018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRUBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE GLEESON
IA/06589/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2023

Before:

LORD JUSTICE HOLROYDE
LORD JUSTICE BAKER
and
LORD JUSTICE STUART-SMITH

- -

Between:

GURDEEP KAUR

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

Zeeshan Raza (instructed by **Charles Simmons Immigration Solicitors**) for the **Appellant**
Émilie Pottle (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 1 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

Introduction

1. In this appeal we have been assisted by submissions of sustained high quality and clarity from Mr Zeeshan Raza, who appears for the Appellant, and Ms Émilie Pottle, who appears for the Respondent Secretary of State.

2. On 19 February 2015 the Respondent cancelled the Appellant's leave to remain because it had been procured by relying upon a fraudulent English Language test certificate. By a convoluted and extremely protracted route, the case came before UTJ Gleeson for hearing in June 2022. Before the UTJ the Appellant maintained that her reliance on the test certificate was not fraudulent and that the Respondent's decision to cancel her leave was not compatible with her rights pursuant to Article 8 ECHR.

3. By a decision and reasons promulgated on 14 July 2022, the UTJ held that the Appellant's appeal should be dismissed on the grounds that the deception was proved and the Respondent's decision was compatible with the Appellant's rights pursuant to Article 8 ECHR. The case now comes before us by an appeal against that determination of the Upper Tribunal, with limited leave granted by Andrews LJ. The sole issue on this appeal is whether the UTJ erred materially in her approach to and conclusions regarding the Appellant's Article 8 claim outside of the rules.

4. For the reasons I set out below, I would allow the appeal and remit the case to the Upper Tribunal for a rehearing.

Factual and procedural background

5. The Appellant is a citizen of India. She first came to the United Kingdom for two weeks as a visitor in October 2006. She was later granted entry clearance on a Working Holiday Maker Visa which was valid from 3 September 2008 until 3 September 2010. She returned to India and was then granted Leave to Remain as a Tier 4 (General) Student on 8 April 2011, valid until 8 December 2012.

6. In 2009 she met Harjinder Singh. He had entered the United Kingdom clandestinely and, when he and the Appellant met, had no lawful basis for being here. He was discovered in 2009 in the course of a raid at the premises of a business called Ocean Glazing, of which he was part owner. It was then proposed that he should be given ILR on the basis of unlawful residence of 14 years, and ILR was granted ILR on that basis on 27 May 2010. On 27 June 2010 the Appellant married Harjinder Singh. In November 2012 her husband became a naturalised British citizen. After an unsuccessful application (which was refused in July 2012 because she had failed to produce the required English certificate), the Appellant made a second application for LTR as a spouse, which was granted on 20 March 2013, conferring LTR until 20 September 2015. In support of this application the Appellant relied upon a fraudulently obtained TOEIC certificate from Educational Testing Service ["ETS"]. At the same time as submitting the ETS certificate, she supplied a copy of a letter from UK NARIC evidencing that she had qualified as a Bachelor of Science at Punjabi University and that the course had been taught in English ["the UK NARIC letter"].

7. On 18 February 2015, upon her return to the UK from a visit to India, the Appellant was stopped at Heathrow Airport and served with a decision refusing her leave to enter and cancelling her existing LTR. The stated reason for the decision was that she had made false representations in her application for the purpose of obtaining LTR. The decision to curtail her leave attracted a full in-country right of appeal under s.82(1) of the Nationality, Immigration and Asylum Act 2002 ["the 2002 Act"]. The Appellant exercised her right of appeal, challenging the allegation of deception in relation to the ETS certificate and asserting a claim under Article 8 ECHR. In response, the Respondent submitted an Explanatory Statement which, at paragraph 24, set out the Respondent's case that the Applicant would have failed the "suitability" test under Appendix FM had it been known that the ETS certificate had been obtained by the use of a proxy, that this would "normally" lead to refusal of the application unless the Appellant could satisfy Ex 1, which she could not because there were no insurmountable obstacles to family life with her husband continuing outside the United Kingdom.

8. On 20 August 2015, the FtT dismissed the appellant's challenge. After the FtT and the UT had refused permission to appeal against that decision, the Appellant issued JR proceedings on 5 February 2016; but it was not until November 2017 that permission to bring the JR proceedings was given by Singh LJ on appeal from a refusal of permission by the High Court. Because of various further interlocutory steps, there was then a further period without progress until 24 February 2020, when the UT set aside the FtT decision of August 2015 both in relation to the issue of deception and the appellant's Article 8 ECHR claim. The appeal was retained in the UT to be heard de novo. Thus it was that the case came before UTJ Gleeson who, as I have said, dismissed the Appellant's appeal on both issues.

The hearing and judgment below

9. The witness statements provided by the Appellant and Harvinder Singh were relatively short and concentrated primarily on the deception claim. Each, however, provided some evidence that was at least potentially relevant to the Article 8 issue. In brief outline, they spoke of their marriage being a love-match which is genuine and subsisting; of their attempts to have children including by IVF; of how she could not take the second course of IVF because the Respondent had her passport; of other health issues suffered by each of them; of the Appellant having helped her husband in his thriving business until her LTR was cancelled; of how she had not otherwise worked or engaged in further education; and of social difficulties that they would face in India because their families disapproved of their marrying for love, which Harvinder Singh described as "the biggest social difficulty if my wife is refused any right to stay in the UK". Harvinder Singh said in his witness statement that he is a British National. There was no evidence that he held dual citizenship. In his oral evidence he said that he would not return to India because of the social difficulties they described. Curiously, he did not say that it would be impossible or unfeasible for him to return to India because he does not hold dual nationality.

10. The UTJ identified that she had to decide two issues. First, whether the Respondent was entitled to reach the conclusion that she did on the deception issue; and, second, whether the Appellant's removal now would be disproportionate under Article 8 ECHR even if the deception allegation was made out. She conducted a thorough review of the evidence, which reflected the pattern set by the witness statements to which I have

referred above. Although it concentrated mainly on the deception issue, the judge also recorded relatively limited evidence that could be relevant to the Article 8 issue.

11. In my judgment it is not necessary for this Court to go into any further detail about the evidence concerning the deception issue save for one limited area which Mr Raza says may be relevant to the outcome of the Article 8 issue. He submits that there was no need for the Appellant to have submitted the fraudulent ETS certificate because the UK NARIC letter would have satisfied the English language requirement. Somewhat optimistically he submitted that the ETS certificate was therefore "irrelevant" to the decision to grant the Appellant LTR. More realistically, he submitted that the potency of the deception allegation for the Article 8 issue would be reduced if, as a matter of fact, it was not a necessary part of the Respondent's decision-making process. In support of this submission he points to an entry in the Respondent's records which stated:

> "Applicant meets the English Language Requirement: E-LTRP.4.1. Has TOEIC Certificate with a total score of 550 and NARIC letter to confirm language proficiency."

12. Having identified the Appellant's University and Bachelor of Science qualification, the UK NARIC letter said:

> "Level of English: The level of English language for the above degree course does not meet the requirements of CDFR level C1.
>
> Additional information:
>
> Although it is confirmed that English is the medium of instruction in the teaching and examination system of the department providing this award, it unfortunately has not been possible to confirm that the necessary English language requirements for CEFR Level C1 are met upon completion.
>
> Nonetheless, as English was the medium of instruction for the above course of study, it is therefore possible for us to confirm that the individual will have at least met the required proficiency expressed for CEFR A1 …"

13. It is plain that the Respondent had the UK NARIC letter when considering whether the Appellant met the English Language Requirement. It is at least possible that the Respondent took the UK NARIC letter as confirmatory evidence of general proficiency. However, on the information available to us, it is not self-evident that the UK NARIC letter satisfied the requirements of E-LTRP.4.1, which are as follows:

> "English language requirement
>
> E-LTRP.4.1 … [T]he applicant must provide specified evidence that they –
>
> (a) …

> (b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;
>
> (c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's … degree … in the UK, which was taught in English; …"

14. Ms Pottle submits that (b) is not satisfied as the UK NARIC letter does not say or imply that the Appellant took and passed a test; and that (c) is not satisfied as there is no evidence that the Appellant's degree is recognised by UK NARIC to be equivalent to the standard of a Bachelor's degree in the UK. She also points to the Appellant's evidence that she took the ETS test on the advice of her solicitors, which would appear to be an unnecessary waste of £250 if in fact the UK NARIC letter on its own could satisfy the requirements of E-LTRP.4.1. Ms Pottle's submissions are persuasive; but in the absence of evidence about the status attached to the Appellant's degree by UK NARIC, I do not think that this Court is in a position to form a reliable view on the submission that the UK NARIC letter on its own would have been sufficient to satisfy the requirements of E-LTRP.4.1. It would therefore be unwise for me to express any view on Mr Raza's submission save that, even if the UK NARIC letter could have been sufficient to satisfy the requirements of E-LTRP.4.1, I would not accept that the ETS certificate was rendered irrelevant. At its lowest, the Respondent's note indicates that the ETS certificate formed part of the reasoning supporting the conclusion that the Appellant met the English Language Requirement.

15. Having summarised the evidence the UTJ provided her analysis. She found against the Appellant on the deception issue, concluding that the Respondent did not err in treating the Appellant as a person who had used deception by using a proxy test taker at an acknowledged "fraud factory". There is no appeal against that finding.

16. Turning to the Article 8 claim, the UTJ's analysis was contained in two short paragraphs as follows:

> "73. I remind myself that the appellant cannot bring herself within the Article 8 ECHR element of the Rules. As regards Article 8 outside the Rules, there is no evidence of the family disapproval relied upon. The appellant's account, and that of her husband, as to what she did when she went back to India is discrepant: the appellant says she went in 2015 to see her mother, but her husband says she went in 2014 to a friend's wedding and did not see her family.
>
> 74. The appellant is not currently receiving any in-vitro fertilisation treatment because the respondent has her passport, on her account. There are no significant obstacles to her reintegration in India on return, nor indeed are there any insurmountable obstacles to this couple living together in India, of which they are both citizens, if they choose to do so."

17. Accordingly, the UTJ dismissed the appeal.

The appeal

18. It is now accepted that the effect of the adverse finding on the deception issue is that the Appellant could not meet the suitability requirement under Appendix FM of the Immigration Rules. Accordingly, pursuant to provision S-LTR.2.1, the application would "normally" be refused.

19. The principles to be applied where an Article 8 claim such as the Appellant's is made outside the Immigration Rules are well established and are essentially common ground. The relevant policy is set out in section 9 of the document entitled "Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b/ Family Life (as a Partner or Parent) and Private Life: 10-Year Routes" dated August 2015. The decision maker must in every case consider whether there are exceptional circumstances which warrant a grant of leave outside the Rules on Article 8 grounds. In doing so, the decision maker must consider all relevant factors raised by the applicant. "Exceptional" does not mean that the circumstances must be "unusual" or "unique". It means circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate under Article 8.

20. In determining whether there are exceptional circumstances, the decision-maker must consider all relevant factors raised by the applicant and weigh them against the public interest under Article 8. Examples of relevant factors are listed in the Instructions and include: the nature of the family relationships involved, such as the length of the applicant's marriage; the immigration status of the applicant and their family members; the nationalities of the applicant and their family members; how long the applicant and their family members have lawfully lived in the UK; the likely circumstances the applicant's partner would face in the applicant's country of return; and whether there are any factors which might increase the public interest in removal, for example where the applicant has failed to meet the suitability requirements because of deception.

21. Guidance on the application of these principles has been given by both the Supreme Court and this Court. It is not necessary to conduct a comprehensive review and I do not attempt to do so. We were referred to *R (Agyarko) v SSHD* [2017] UKSC 11, [2017] 1 WLR 823, and to *GM (Sri Lanka) v SSHD* [2019] EWCA Civ 1630 for convenient summaries of the approach to be adopted. What is not in doubt is that national authorities are required to carry out a proportionality assessment and have a margin of appreciation that is real and important but not unlimited when setting the weighting to be applied to various factors when carrying out the assessment. The Court must accord "considerable weight" to the policy of the Secretary of State at a "general level", which includes the policy weightings set out in Section 117B of the 2002 Act: see *GM* at [28]. The list of relevant factors to be considered in the proportionality assessment is not closed and there is in principle no limit to the factors which might, in a given case be relevant to an evaluation under Article 8, which is a fact sensitive exercise: see *GM* at [32]. And where the issue is raised on the merits on an appeal, as it was here in the UT, the court or tribunal should (subject to section 85 of the 2002 Act) carry out the assessment having regard to the relevant facts as at the time of its decision rather than that of the original decision maker.

22. The issue on the appeal is narrow and the submissions of the parties can be shortly summarised. For the Appellant, Mr Raza submits that the UT failed to conduct a proper

proportionality assessment in two respects. First, it failed to conduct a balancing exercise at all in [73]-[74] of its reasons or anywhere else. Second, if and to the extent that it can be said that the UT conducted a balancing exercise as was required for a proper proportionality assessment, it made at least one material error of fact and failed to bring into account other matters that were plainly material to the assessment. For the SSHD, Ms Pottle responds that we can be confident that the UTJ had all relevant matters in mind because she mentioned them in her review of the evidence; and that the limitations of the analysis in [73]-[74] are attributable to the limitations of the evidence advanced by the Appellant. For those reasons she submits that the UTJ conducted a proportionality assessment that was appropriate and sufficient on the facts of the present case. If her primary submission were to fail she submits, perhaps slightly faint-heartedly, that the result would inevitably have been the same if a more thorough assessment had been conducted.

23. As a preliminary point, I accept that the relevant evidence before the UTJ was limited. In particular, there was either no or virtually no documentary evidence to support the Appellant's claims e.g. about her IVF treatment. To that extent, I accept that a proportionality assessment could properly be relatively short, reflecting the fact that the evidence at the hearing and, consequently, the judgment appear to have been primarily taken up with the deception claim. I cannot, however, accept that the mere fact that the UTJ mentioned something in her review of the relevant evidence earlier in the judgment demonstrates that it was taken into account in the course of a proportionality assessment. The structure of the UTJ's reasons is clear: her reasons for rejecting the Appellant's Article 8 claim are to be found in [73] and [74]. Her proportionality assessment must therefore be judged by reference to the contents of those two paragraphs, together with any necessary implication from what appears there, since what the UTJ relied on and brought into her assessment is set out in those two paragraphs.

24. Approaching the assessment in this way, it is plain from [73] that the UTJ rejected the Appellant's case that family disapproval was a relevant factor. Mr Raza accepted (and I would agree) that the UTJ was entitled to reach that conclusion for the reasons she gave.

25. Turning to [74], there are three aspects to the paragraph. First, the UTJ records the Appellant's account that she was not currently receiving IVF because the Respondent had her passport. But she makes no finding about whether this account is accurate or not; nor does she explain what, if any weight, she attributes to this factor – it is not even clear whether she is treating it as a factor in the Appellant's favour or as contrary to her interest.

26. Second, she states that there are no significant obstacles to the Appellant's re-integration in India. It may be that the reason underlying this statement is the UTJ's rejection of the asserted social difficulties; or it could be for other reasons that are not stated; or both. While it seems inevitable that the UTJ regarded this as a factor that told against the Appellant's Article 8 claim, there is no indication of the weight that is attributed to it: that is perhaps not surprising as the UTJ does not identify the reasons that lead her to the stated conclusion that there are no significant obstacles.

27. Third, the UTJ says that there are no insurmountable obstacles. Once again, there is no reasoning to explain this conclusion and no explanation of the weight that is being

attached to it. What does appear, however, is that the conclusion is influenced by the UTJ's statement that both the Appellant and Harvinder Singh are citizens of India. This statement was wrong since there was documentary evidence (in the form of his United Kingdom Passport) that Harvinder Singh is a British national and no evidence that he held dual United Kingdom/Indian citizenship. To my mind, this was a material error because there was no basis for assuming that Harvinder Singh would be able to live in India with the Appellant as if he were an Indian citizen.

28. More generally, I am unable to accept that [73] and [74] can pass as a sufficient and proper proportionality assessment, for two main reasons. First, paragraphs [73] and [74] do not address a number of potentially relevant factors. The UTJ does not mention the length of the Appellant's marriage or the nature of her relationship with her husband; nor does it mention that, although Harvinder Singh had originally been a clandestine migrant, by the time that he and the Appellant married they were both lawfully present in the United Kingdom and that Harvinder Singh has been a naturalised British Citizen since 2012. There is no proper consideration of the difficulties that Harvinder Singh may face if the Appellant were removed to India or whether his difficulties in turn would create or exacerbate the difficulties that the Appellant herself would face. On the other side of the coin, there is no mention of the finding of deception and what weight should be given to that fact. This is not necessarily a comprehensive catalogue of the potentially relevant matters that are not mentioned and, accordingly, cannot be seen to have been brought into account.

29. Second, there is no attempt in [73] or [74] (or elsewhere) to conduct a balancing exercise that weighs the features on either side of the argument or explains the ultimate conclusion that the Appellant's Article 8 claim fails. Typically such balancing exercises may be done by drawing up a "balance sheet", which has the twin advantages of clarity of method and transparency of process; but the manner and form in which the exercise is done is not critical, provided that it can be seen (a) what features have been weighed in the balance and (b) why the balance has come down in favour of one side or the other. That is absent in the present case.

30. For these reasons, though I have some sympathy with the UTJ in a case where the primary focus was on the deception issue, I am driven to the conclusion that there was no proper proportionality assessment, that the UTJ did not bring into account potentially relevant factors (or explain why they should not be brought into account), and that, to the extent that that the UTJ did identify reasons for her conclusion, she fell into material error in relation to Harvinder Singh's citizenship and its potential consequences.

31. I am unable to accept Ms Pottle's subsidiary submission that the outcome of a properly conducted proportionality assessment would necessarily be that her Article 8 claim must fail. I have identified matters that can (at least in theory) be brought into account in support of a submission that there are exceptional circumstances in this case; and those matters are not necessarily exhaustive. It would, however, be inappropriate for me to say anything that would appear to pre-judge the approach to the assessment of those matters or the outcome of a properly conducted proportionality assessment. Equally, in my judgment, it would be inappropriate to say anything about the relevance or otherwise of the matters that are the subject of section 117B of the 2002 Act.

Conclusion

32. For these reasons I would allow the appeal and quash the determination of the UT on the Appellant's Article 8 Claim. The Article 8 claim should be remitted to the UT for a fresh determination. It is remitted on the basis that (a) the deception claim has been resolved against the Appellant for the reasons given by UTJ Gleeson and (b) the factual issue of the alleged social difficulties based upon the families' disapproval of the marriage has been resolved against the Appellant.

Lord Justice Baker

33. I agree.

Lord Justice Holroyde

34. I also agree.