Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07233/2015

THE IMMIGRATION ACTS

Heard at Birmingham Centre City Tower
On 14th April 2016

Decision and Reasons Promulgated
On 27th April 2016

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SANSAR SINGH

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr M Hoare of H & S Legal Solicitors

DETERMINATION AND REASONS

1. In a decision promulgated on 8th July 2015, First-tier Tribunal judge Shergill allowed Mr Singh's appeal against a decision to refuse to vary his leave to remain and to remove him from the UK pursuant to s47 Immigration, Asylum and Nationality Act 2006. The judge decided

> "19. I am satisfied that the appeal should be allowed.
>
> 20. That is on the basis that the respondent has failed to consider the impact on the community with regards to the Article 8 assessment; and/or that it has proceeded to deal with two like-cases in a different manner.

> 21. As there is no lawful decision the application remains outstanding before the respondent and must now be decided in accordance with the law and the respondent's own policies.
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> 22. The appeal is allowed on the Immigration Rules (to the extent that the respondent's refusal is not in accordance with the law and so is still outstanding before the Secretary of State)"

In concluding not to make a fee award, the judge says

> "... I note that the application for variation was on personal rights matters which I have not been persuaded by; the community issues which is the reason for my findings were only raised relatively recently. The respondent was entitled to reach the conclusion that they did (the fact that they should have reconsidered this after the appeal was lodged is immaterial as far as the fee award is concerned).

The SSHD sought and was granted permission to appeal on the grounds, in essence, that it was arguable firstly that the appeal was only ever a 'private life' appeal, based upon Mr Singh's employment and the judge should have reached his own conclusion upon the Article 8 ground of appeal; and secondly that reliance upon an un-evidenced assertion that another similar case had been returned to the SSHD for reconsideration thus meant that a similar process should have been undertaken in this case was plainly unlawful.

2. Mr Singh, date of birth 16 June 1971, arrived in the UK on 1st March 2002 for religious work with Shri Guru Ravidass. He returned to India on 2nd August 2002. He re-entered on 13th May 2003 for the same employer until 2nd November 2003 when he returned to India. Similar periods of entry occurred between 8th March 2004 and 10th August 2004, 12th October 2006 and 21st March 2007, 18th August 2007 and 30th January 2008. On 13th August 2008 he re-entered the UK and on 10th July 2010 he was granted an extension of leave to remain as a minister of Religion Tier 2 until 17th September 2012. A further application led to a further grant of an extension of stay until 30th September 2015. That leave was curtailed to expire on 15th December 2014 subsequent to the Gurdwara losing its licence. I was informed the licence had not been renewed by the date of the hearing before me although there is continuing correspondence between the Gurdwara and the SSHD in relation thereto. Before me Mr Hoare indicated that he had no other detailed knowledge of the position and no significant correspondence copies.

3. Judge Shergill in his decision found that the respondent acted properly in providing Mr Singh 2 months within which to find an alternate employer; that it was up to Mr Singh to make the appropriate arrangements to find another employer; that Mr Singh made an in-time application to the SSHD to vary his leave to remain. Judge Shergill found:

> "14. All things being equal, in an ordinary employment situation I would have been satisfied that the refusal letter was a lawful decision and correctly applied the provisions of 276ADE. I am also satisfied that the 'personal' aspect of any Article 8 rights, on the evidence, would have been adequately dealt with (such that the appellant failed). I would not have reached a different decision on the evidence before me if this was an 'ordinary employee'. I was not persuaded by the arguments put forward by

> the appellant of 'personal' Article 8 rights on the evidence. His status was "precarious" within the meaning of section 117B of the 2002 Act.
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> 15. However the employer is a religious establishment with charitable status. It serves a not insignificant number of people from the community. That has been ignored in the refusal letter despite the respondent being aware of: a) the nature of the employer; b) the specific role that the appellant himself had as of the date of appeal; c) that there was active pursuance by both the appellant and Gurdwara with the MP; and d) that the employer was attempting to re-apply for the licence. I was unclear whether the respondent would have been aware of any "duties" that the appellant would have undertaken by virtue of any Tier 2 application; but if it had this information on the original Tier 2 application then my reasoning is more apposite.
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> 16. ... Put simply the respondent should have considered the community aspect of Article 8 rights but it may still have decided that was not sufficient.
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> 17. ... I was made aware that a second priest from the Gurdwara had found himself in a similar position as this appellant. My understanding was that the other appellant's case has been "returned" to the Home Office. That is presumably for reconsideration or after a withdrawal. It cannot be right that the two appellants in ostensibly the same position have the potential for two differing outcomes."

4. In support of the proposition articulated in [15] and [16] the judge was referred to and relied upon *Zermani [2015] EWHC 1226 (Admin)*, a decision by HHJ Worster sitting as a High Court Judge. The first point to make in this regard is that *Zermani* was a judicial review of a decision by the SSHD challenging the claimed failure of the SSHD to consider Mr Zermani's application for leave to remain on Article 8 grounds 'outside the Rules'. It was not a statutory appeal. Mr Zermani had no statutory appeal rights, his application for leave to remain having been made whilst he was an 'overstayer'. The issue before the Administrative Court was whether the SSHD's decision adequately considered the matters placed before her in the context of an application for leave to remain on human rights grounds. Reference is made in that decision to the possible desirability of a decision maker considering the contribution made by an individual to society in determining whether the consequences of the SSHD's decision were disproportionate. In the circumstances of Mr Zermani's application, the court found that the SSHD should have considered those matters in reaching her decision. Her decision was thus quashed. That case is a far cry from the situation of Mr Singh. It cannot by any stretch of the imagination be said that *Zermani* is authority for the proposition that an asserted failure (or even an actual failure) on the part of the SSHD to refer to or apparently consider Mr Singh's contribution to the community amounted to the making of a decision not in accordance with the law such that the SSHD is required to reconsider her decision and make a lawful decision. Mr Singh made an application for leave to remain on Article 8 human rights grounds. He put such evidence before the SSHD as he thought relevant, such evidence including community involvement. The SSHD took a decision with which he did not agree and he exercised his statutory right of appeal. It is the function of the First-tier Tribunal judge to reach a decision on the grounds of appeal before him on the basis of the evidence adduced. It is not his function to fail to take a decision on the very matters which statute has empowered him to make.

5. In so far as Mr Hoare submitted that there had been a failure on the part of the SSHD to exercise her inherent jurisdiction and consider the application otherwise than under the Rules or Article 8 I admit to finding it difficult to recognise that application ever having been made to the SSHD never mind pleaded in the grounds of appeal to the First-tier Tribunal or in the Rule 24 response to the grant of permission. The Rule 24 response states that the Executive has failed to exercise a discretion vested in her and thus the proper course is for the Tribunal to require the decision maker to complete her task by reaching a lawful decision on the outstanding application – *Abdi [1996] Imm AR 148*. However nowhere is an 'outstanding application' identified. That the SSHD has an inherent discretion to make any lawful decision she chooses cannot be disputed but there has to be some sort of identification of the basis upon which she can be expected to exercise this. Mr Singh's application has been throughout that the refusal to vary his leave and to remove him is a disproportionate breach of the right to respect for his private life. In support of that he asserts that his value to the community is a matter to be taken into account. His asserted value to the community is a matter that is an integral part of his Article 8 claim. That the SSHD did not specifically refer to it in her decision is not reflective of a failure to make a lawful decision but an asserted failure on her part to take into account all relevant matters in reaching her Article 8 decision – an issue for which a statutory appeal provides the remedy and in accordance with his statutory duties the judge is required to reach a decision. The judge stated that the SSHD should make a decision in accordance with her own policies. No such policy has been identified to found such a direction.

6. The judge referred to a second priest from the Gurdwara having his claim "returned' to the Home Office; this is vague in the extreme. The judge does not identify the second priest, or the basis of that priest's claim, or the basis upon which it was "returned". He was unable to identify whether it was for "reconsideration" or "withdrawal". He refers to two appellants in "ostensibly" the same position and yet there does not appear to be any basis upon which he could draw such a conclusion. He was no more than "made aware" of the situation. In the Rule 24 response Mr Hoare refers to what appears to be an unreported decision of *Singh IA/42721/2014*, a copy of which is not produced and I have been unable to find. In any event there has been no compliance with the practice direction for the quoting of unreported decisions and Mr Hoare does not appear to have taken account of *Nasim and others (Article 8) Pakistan [2014] UKUT 25 (IAC)*. There is plainly no basis upon which the judge could legitimately make a finding that the respondent had made an unlawful decision on such flimsy information as he had before him.

7. For all these reasons it is plain that the decision of the First-tier Tribunal is significantly legally flawed. I set it aside to be remade.

8. I gave Mr Hoare a short adjournment to enable him to take instructions and prepare his submissions as to the remaking of the decision.

Remaking the decision

9. I heard submissions from Mr Hoare and Mr Diwyncz. I had before me the documents that were before the First-tier Tribunal including the decision the subject of the appeal and the reasons for that decision; witness statements of Mr Singh and Mr Ram Heer, the grounds of appeal to the First-tier Tribunal, the decision of Judge Shergill which set out the oral evidence heard; the application which resulted in the adverse decision, a letter dated 13th October 2014 from the SSHD. The First-tier Tribunal decision is clear that Mr Singh does not meet the requirements of the Immigration Rules. There has been no challenge to that finding and there is no evidence before me in any event to dislodge that finding.

10. It is not disputed that, given the length of time Mr Singh has been in the UK, he has developed a private life, and that his removal from the UK will interfere with his enjoyment of that private life. His application was of course for a period of discretionary leave on human rights grounds to await the grant of a licence to the Temple. That licence has not yet been granted and there was no evidence whether it was likely to be granted in the future. He has been in the UK continuously since 13 August 2008, i.e. a period of nearly 8 years, and throughout that time he has undertaken religious work for Shri Guru Ravidass Temple. He does not state in his witness statement what he does for the Temple but does say that he has grown accustomed to life in the UK and would find it difficult to adjust to life in India. He does not explain why he would find it difficult to adjust and provides no information on what he did in India prior to his arrival in 2008. He had spent some periods of time in the UK undertaking religious work for the same Temple since 2002 but there was no information what he did or where he lived during the time he was in India in between those periods or prior to 2002. There is no indication why he did not seek similar work in another Temple in the UK after his leave to remain was curtailed. He refers in his witness statement to the Temple performing an important religious, cultural and social role for around 500 to 1000 regular members. He does not explain what he does in that context. There are no witness statements from other members of the Temple or friends or acquaintances.

11. The only other witness statement is from Jasbir Ram Heer who is the General Secretary of Shri Guru Ravidass. His statement does not say when he took this position up but it does refer to the previous holder of the position dying on 7th June 2013 in India. It is difficult to ascertain from the statement how long he has known Mr Singh but it does say that Mr Singh was a great asset to the Temple and the community it serves. He does not specify what Mr Singh does but says that the Temple undertakes community work including providing food and shelter to the poor and homeless, counselling on alcohol and drug abuse, outreach sessions to promote community cohesion and mutual interfaith respect. He says that permitting the appellant to remain would benefit the wider community in Leicester and beyond.

12. Whilst it is clear from this that the General Secretary of the Temple holds Mr Singh in high regard, there is a paucity of evidence of what he actually does whether for the Temple or for the wider community. There is no indication of what his daily duties were, whether he had any special responsibilities that could only be carried out by him and why that was the position. There is no

indication how or why the Temple and its community would suffer if Mr Singh were not given leave outside the Rules and/or removed from the UK. There is no indication of why any impact on the Temple, such as it may be which has not been disclosed, could impact on Mr Singh's private life.

13. The Temple appears, from Mr Hoare's submissions, to have an outstanding application for a licence to employ two religious workers. A copy of that application was not provided. There is nothing to indicate that the Temple is of the view that Mr Singh is essential to their work and if so why.

14. As Judge Shergill said in paragraph 14 of his decision (see above), on a purely personal basis Mr Singh could not succeed in his claim that to refuse to vary his leave and to remove him was disproportionate. On the basis of the evidence before me there is nothing else that could be added to that assessment that would make any difference to that conclusion. There is nothing in the evidence from the Temple that could even begin to show that Mr Singh's contribution to the Temple and the community was to such an extent or of such great value that his employment there should be a significant factor to be taken into account. There is no evidence other than assertion that Mr Singh would have difficulty integrating back to his home country. The most that he can call upon to support his claim is the length of time he has been in the UK (which is on a temporary time-limited visa). There is a dearth of evidence of the extent of and nature of his links to the community.

15. In all these circumstances I dismiss his appeal against the decision of the SSHD.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision such that it is remade by me.

I remake the decision and allow the SSHD's appeal such that Mr Singh's appeal against the decision of the SSHD to refuse to vary his leave to remain and to remove him from the UK is dismissed.

Date 15th April 2016

Upper Tribunal Judge Coker