In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2023-001203

In the matter of an application for Judicial Review

The King on the application of
Faraz Mahboob

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Jackson

HAVING considered all documents lodged and having heard Mr A Nasim of counsel, instructed by Lee Valley Solicitors, for the Applicant and Mr T Cockroft of counsel, instructed by GLD, for the respondent at a hearing on 6 February 2024 at Field House.

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

(2) The Applicant pay the Respondent's reasonable costs, to be assessed if not agreed.

(3) No application for permission to appeal was made. In any event, I am obliged to consider whether to grant permission to appeal. For the reasons already given, this claim is refused, there is no arguable error of law in the decision and I refuse permission to appeal.

Signed: G Jackson

Upper Tribunal Judge Jackson

Dated: **16th April 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): **16/04/2024**

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-001203

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

16th April 2024

Before:

UPPER TRIBUNAL JUDGE JACKSON

- -

Between:

THE KING
on the application of
Faraz Mahboob

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Mr Z Nasim of Counsel
(instructed by Lee Valley Solicitors), for the Applicant

Mr T Cockroft of Counsel
(instructed by the Government Legal Department) for the Respondent

Hearing date: 6th February 2024

- -

J U D G M E N T

- -

Judge Jackson:

1. This is an application for Judicial Review by Faraz Mahboob challenging the Respondent's decision dated 16 May 2023, to maintain the earlier decision of 9 March 2022 to grant him leave to enter outside of the Immigration Rules from 6 April 2022 to 6 January 2025.
2. It is important in this case to set out in some detail the Applicant's immigration history and that of his two siblings. In 2015, the Applicant made an application for entry clearance to the United Kingdom under

paragraph 297 of the Immigration Rules to join his father who was settled here. The Respondent refused that application in a decision dated 30 September 2015 for the following substantive reason:

> "You state that you wish to settle in the UK with your father. I note that you currently live in Pakistan. Your mother also lives in Pakistan, whilst your parents are divorced, this does not give your father sole responsibility as required by paragraph 297(e), your mother has signed an affidavit that states in part, "I (your mother) have elaborately discussed these matters with my ex-husband Mr Ahmad and we made a mutual decision" this shows you mother still has a responsibility in your well-being. Therefore, I am not satisfied that your father has sole responsibility for your welfare."

3. The Respondent also considered the wider circumstances of the application and the best interests of the Applicant as a child, but did not consider that there were any exceptional circumstances consistent with the right to respect for family life contained on Article 8 of the European Convention on Human Rights which may warrant a grant of entry clearance outside of the Immigration Rules.

4. The only document available in the course of this application for judicial review pertaining to that original application is the affidavit from the Applicant's mother referred to in the decision above dated 27 June 2015. It refers to an unbearable psychological pressure on the Applicant and his siblings following her remarriage in 2014 with difficulties at school and their grades deteriorating every year. It refers to a mutual decision that the children were not live with their mother any more to avoid further unhappiness in unpleasant situations and that the father is now willing to take custody of the children and wants to take them to the United Kingdom to live with him. The Applicant's mother states that she has no objection to the children going abroad to join their father there.

5. The Applicant appealed the Respondent's refusal to the First-tier Tribunal, with an initial decision by First-tier Tribunal Judge Clapham promulgated on 4 July 2016 dismissing the appeal. That decision was set aside by a decision of Deputy Upper Tribunal Judge Saini promulgated on 9 February 2017, with the appeal being remitted for a de novo hearing before the First-tier Tribunal. It is therefore not necessary to say anything further about that earlier decision and the only point of relevance from the Upper Tribunal decision is in paragraph 7 which refers to a new document, namely a guardianship decision from the Pakistani courts demonstrating that the mother had relinquished guardianship of the children and they were now in the sole legal custody of their father.

6. The appeal came back before the First-tier Tribunal for hearing on 14 February 2018 and was dismissed by First-tier Tribunal Judge Clarke in a decision promulgated on 4 May 2018. The decision refers to documents which include Respondent's bundle, the grounds of appeal, the Appellant's bundle and various case law but does not include a list of any specific documents relied upon by the Applicant. The parties in this application for Judicial Review have not provided any further documents or statements as to what was before the First-tier Tribunal in terms of evidence on that occasion. In essence, Judge Clarke concluded that the responsibility for the Applicant's upbringing was shared by both of his parents and neither of

them had sole responsibility. It was noted that the Applicant was by then an adult, living with a guardian in Pakistan and the refusal of Entry Clearance was in all the circumstances proportionate and not in breach of Article 8 of the European Convention on Human Rights. The Applicant was refused permission to appeal by both the First-tier Tribunal on 13 July 2018 and the Upper Tribunal on 16 November 2018. No copies are available of the applications for permission to appeal nor the decisions refusing them.

7. There was, as referred to above, a guardianship order issued by the court of Sarwat Batool in Bahawalpur, Pakistan on 28 July 2016 in which sole custody of the Applicant and his siblings was granted to his father, with arrangements for continued visitation with their mother. There is no express reference to this document being before Judge Clarke in 2018, in the decision itself or otherwise. Mr Nasim stated his instructions were that this document was relied upon at the time and that it would be surprising if it was not available given there is evidence that it was before the Upper Tribunal the previous year.

8. In the meantime, the Applicant's two younger siblings had made an application for Entry Clearance also under paragraph 297 of the Immigration Rules as dependent children of their father on 1 March 2017. Those applications were initially refused on 30 October 2017 and 22 November 2017 by the Respondent. Both of the Applicant's siblings appealed those decisions to the First-tier Tribunal and their appeals were allowed by First-tier Tribunal Judge Conrath in a decision dated 26 February 2019, on the basis that they met the requirements of the relevant Immigration Rule and human rights grounds.

9. Judge Conrath referred to the applications by the Applicant's siblings as being made on the same basis of that of the Applicant and as such regard was had in accordance with the principles in *Devaseelan* to his previous appeal decision. By reference to the Applicant, it was noted that his original application was made and refused in 2015, whereas his siblings applications were made in 2017, during which time there had been considerable changes in their lives. In particular on 28 July 2016, the Applicant's father had been granted sole custody of all three children and the mother appears not to have played any part in any decision made about their care or welfare after this date.

10. It was noted that whilst Judge Clarke may have been aware of the guardianship order in 2018, it was strictly speaking not a relevant matter because the event had occurred after the decision in 2015. Judge Conrath stated *"whilst I accept that it can obviously be said, and indeed the Learned First-tier Tribunal Judge found, that the father was not exercising 'Sole Responsibility' for the care of his eldest son at the time of that son's Application, and the time of the decision made by the Entry Clearance Officer in respect of it, I have to look at the case, and the circumstances surrounding it, as they were at the time these two Appellants made their applications on 1st March 2017"* and the decisions in respect of those. Later in the decision, it was found as a fact that since July 2016, the Applicant's father had sole responsibility for all three children.

11. The Applicant made a further application for Entry Clearance on 10 September 2019, to which there was a cover letter setting out in detail the history outlined above and quoting from the decision of Judge Conrath. The Applicant specifically raised an issue of fairness that he and his two siblings were all in exactly the same situation but he was treated differently by not previously been granted indefinite leave to enter as they subsequently were. The Applicant refers to this as discriminatory and for that reason together with Article 8, the Respondent was invited to exercise discretion as necessary to grant the application for leave to enter.

12. The Applicant's application was refused by the Respondent on 28 November 2019. The Respondent noted that as at the date of application, the Applicant was over the age of 18 years and therefore did not meet the requirement in paragraph 297(ii) of the Immigration Rules. The decision went on to note that the Applicant had raised several exceptional circumstances in his application which it was said was taken into consideration but it was not sufficient for entry clearance to be granted outside of the Immigration Rules, and the refusal was considered to be proportionate under Article 8. There was no express refusal of the application on the basis of lack of sole responsibility by the Applicant's father, but there was reference to paragraph 297(i)(f) of the Immigration Rules as to whether there were any serious and compelling family or other considerations that would make the Applicant's exclusion undesirable.

13. The Applicant had a right of appeal against that refusal, which he duly exercised, the matter coming before First-tier Tribunal Judge Malone 16 March 2021. The decision clearly sets out what evidence was before the Tribunal on the last occasion, none of which was directly challenged by the Home Office Presenting Officer on the day and the background already referred to above is set out in some detail. It is fair to say that Judge Malone was critical of the Respondent's latest refusal of the Applicant's application in 2019 in respect of Article 8, which he said, on the facts available at the time, should have been more than enough to result in a grant outside of the Immigration Rules. There was a finding that the Applicant has always and continues to enjoy family life with his father for the purposes of Article 8, continuing to be wholly financially dependent on him.

14. It is helpful to quote directly from the findings in the decision, given that the Applicant relies heavily on these in the current application. The key findings are in paragraphs 56 onwards as follows:

> "56. Immigration Judge Conrath has found that Mr. Ahmad was awarded "full custody" of Ahsan and Maha in July 2016. Apart from having a different date of birth, the Appellant's circumstances were the same as those of his younger siblings. They had the same relationship with their father. They had lived together since birth. Immigration Judge Conrath's decision necessarily entails his finding that full custody of the Appellant had also been awarded to Mr. Ahmad as at July 2016. So much is apparent from his dealing with the Appellant's application history in accordance with Devaseelan.
>
> 57. This Tribunal and the Upper Tribunal refused the Appellant permission to appeal from Immigration Judge Clarke's determination promulgated on 4 May 2018. She found that, as at date of decision and date of hearing before her, Mr. Ahmed had not had sole responsibility for the Appellant's upbringing. No

> mention is made of the award to him of full custody in July 2016. It is possible the relevant documents were not put before her. Had the documents been before her, the result would probably have been different.
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> …
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> 59. Mr. Ahmad was awarded full custody of the Appellant in July 2016. Had that fact been appreciated in 2018, I consider it likely his appeal would have been allowed. Immigration Judge Conrath declined to follow the earlier decisions of this Tribunal, one having been set aside, relating to the Appellant primarily in light of the fact that Mr. Ahmad had been awarded full custody of him in July 2016. He allowed the appeals of Ahsan and Maha on that basis as well."

15. Judge Malone went on to find that the refusal of the Applicant's application would result in unjustifiably harsh consequences for the family and it was time for them to all be reunited. As such, the appeal was allowed on human rights grounds, that the decision was a disproportionate interference with the Applicant's right to respect for family life protected by Article 8.

16. On 9 March 2022, the Respondent granted the Applicant leave to enter the United Kingdom outside of the Immigration Rules from 6 April 2022 to 6 January 2025. The duration of the grant was challenged in pre-action correspondence dated 30 May 2022 on the basis that the Applicant should have been granted indefinite leave to enter as this was required to correctly implement the decision of Judge Malone and would be consistent with the grant to the Applicant's siblings on the same facts. In particular it was stated that the Applicant would have been granted indefinite leave to enter if his first application for the same had been correctly considered with reference to the Applicant's father being granted sole custody in July 2016. The Respondent agreed to reconsider.

17. On 16 May 2023, the Respondent stated that the matter had been considered afresh, but it was not recommended that the Applicant should be given a different grant of leave. It was noted that the Applicant's siblings had applied four years prior to the Applicant's latest application and were a year younger, meaning that they were minors at the relevant time whereas the Applicant was an adult. The leave can not mirror that given to the Applicant's siblings where there circumstances were not the same.

Grounds of challenge

18. The Applicant challenges the Respondent's decision on three grounds as follows. First, that the decision dated 24 May 2023 fails to engage at all in the representations that had the Applicant's first application, made when he was a minor, been considered correctly he would have been granted indefinite leave to enter. The erroneous refusal was therefore a historic injustice and fairness required a grant of indefinite leave to enter.

19. Secondly, the Respondent's decision failed to correct the injustice from a previous flawed decision of both the Respondent and the Judges in the earlier appeals. In particular it was alleged that the errors made by the Respondent, including erroneous submissions to Judge Clark, had the effect of depriving the Applicant of indefinite leave to enter and delaying the

process for a further application by which time he was over the age of 18 and could not therefore meet the requirements of the Immigration Rules.

20. Thirdly, the Respondent failed to exercise his discretion to grant indefinite leave to enter outside of the Immigration Rules and there was a failure to act fairly during the decision making process.

21. In summary, the Respondent's case is that first, there was adequate consideration of the Applicant's circumstances compared to his siblings and an adequate reason for rejection of this point given that the siblings were minors at the time of their applications.

22. Secondly, there was no wrongful operation by the Respondent in the discharge of his immigration functions in relation to the refusal of the Applicant's first application in 2015 (as the Applicant's father had not at that time been granted sole custody) and there is no evidence of any erroneous submissions to the First-tier Tribunal or Upper Tribunal in the appeal following that refusal, which was ultimately unsuccessful. The later departure from the decision of Judge Clarke was based on evidence which post-dated the original application and refusal in 2015. Further, there is no breach of Article 8 of the European Convention on Human Rights in circumstances where the Applicant has been granted limited leave to enter and has since joined family members in the United Kingdom where he can exercise his right to respect for private and family life without interference.

23. Thirdly, a grant of indefinite leave to enter would only be appropriate in the most compelling and exceptional circumstances, of which there are none in the present case such, that there is no failure to exercise a wider discretion to grant more than limited leave to enter (which is a route to apply for indefinite leave).

Ground 1 – failure to take relevant matters into account

24. In terms of the first point, as to whether the Respondent properly considered whether the Applicant should be treated in the same way as his siblings, this was expressly considered and a clear and cogent reason was given as to why the Applicant was not in an analogous position, namely that he had applied when he was over the age of 18. As such, he could only be considered for a grant of leave to remain outside of the Immigration Rules; whereas his siblings were under the age of 18 at the time of their applications and were found to have met all of the requirements in paragraph 297 of the Immigration Rules by the First-tier Tribunal for which the usual grant would be for indefinite leave to enter. There is no error in the Respondent failing to take this matter into account and a lawful and rational reason was given for distinguishing between the Applicant and his siblings as to the duration of leave.

25. I will deal with the second point as to whether the claimed historical injustice was considered under the second ground of challenge. On its face, the Respondent's refusal does not engage with any of these points, but for the reasons set out below, that can not be material to the decision in any event as there is no historical injustice on the facts here.

Ground 2 – historical injustice

26. In oral submissions, on behalf of the Applicant, Mr Nazim relied specifically on the findings of Judge Malone to show that the earlier findings of Judge Clarke in 2018 were unsafe and highlighted the critical findings of the Respondent's decision in 2019, at which point he knew that the Applicant's father had been given sole custody in July 2016 and that the Applicant's siblings had also been successful in their applications.

27. In relation to the Respondent's decision in 2015, Mr Nasim submitted that this had been made on the basis of a mistake of fact that there was not sole responsibility of the Applicant by his father when in fact there was; as shown by the evidence available in the application made in 2019. It was submitted that the Entry Clearance Officer had information which cast doubt on the correctness of the 2015 decision and should have looked at whether the Applicant's father had overall control. It was not suggested that the case law on the requirements for a mistake of fact could be satisfied in relation to the Respondent's decision in 2015.

28. Although the written pleadings on behalf of the Applicant alleged that the Respondent had made erroneous submissions to the Respondent which had been relied upon, leading Judge Clarke in particular in to error, Mr Nasim could not identify what these were or substantiate the allegation in any particular way. He had earlier confirmed that those instructing him had no access to any other documents or information prior to 2019. It is not known on what basis this allegation was ever made and given the seriousness of it, it should not have been, let alone repeated, without any evidential foundation. I attach no weight to this.

29. In Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC), the Upper Tribunal distinguished between cases of 'historic injustice' such as those of the families of Gurkha ex-servicemen in which a particular class of persons was wrongly treated, in immigration terms, in the past; and cases of 'historical injustice' on which the headnote summarises as follows:

> "(3) Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12; where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category.

30. The focus in historical injustice cases is therefore to assess whether on the individual facts, a person has suffered as a result of wrongdoing by the Secretary of State. The alleged wrongdoing in the present case has been aimed both at the Respondent in relation to the 2015 decision and at Judge Clarke in the 2018 appeal decision. In terms of the first refusal of entry

clearance in 2015, I find no error or wrongdoing by the Respondent. It was entirely lawful, rational and reasonable for the Respondent to find that the Applicant had not at that time established that his father had sole responsibility for him as required by paragraph 297 of the Immigration Rules. The only evidence available relating to that application, which is quoted in the decision letter, is an affidavit from the Applicant's mother which is strong evidence that she continued to have a role in decisions as to his future and welfare. The application predated the award of sole custody to the Applicant's father in July 2016 and that could not therefore have been a matter taken into account by the Respondent at the material time. The Respondent's refusal of that application is also fortified by the fact that the Applicant's appeal against it was dismissed.

31. For these reasons, that is a total answer to the second ground of claim (and also in substance to the second part of the first ground of claim) as there can be no historical injustice as there was no wrongdoing by the Respondent from which the Applicant suffered. The refusal of his application in 2015 was entirely lawful on the facts at that time. The Applicant's assertion to the contrary amounts to no more than disagreement with the outcome, mostly with the benefit of hindsight from later evidence.

32. For completeness I go on to consider the decision of Judge Clarke in 2018, however if there was any wrongdoing or error in that, the appropriate remedy was an application for permission to appeal that decision and it would not then be for the Respondent to remedy any issue with a Tribunal decision as a matter of historical injustice. The Respondent is bound by a decision of the First-tier Tribunal and can not arguably be acting unlawfully or wrongfully in any way by acting in compliance with it, particularly when permission to appeal was twice refused against it.

33. It is entirely unsatisfactory that the Applicant has seemingly not made any attempt to obtain and provide any documentary evidence as to the appeal before Judge Clarke in 2018, nor the applications for permission to appeal following it. In the absence of such evidence, he falls very far short of establishing any error in it. At its highest, Mr Nasim submitted on instructions that the guardianship order from July 2016 was before Judge Clarke, but it is not referred to at all in the documents and as above, other Judges have doubted that it was. If the document was before Judge Clarke but not taken into account in the decision with a finding on sole responsibility that on its face appears to be contrary to that evidence; that would appear to be a very strong ground for permission to appeal. In the absence of either of the applications for permission to appeal or the refusals of the same, it is unknown whether this was the position relied upon by the Applicant at the material time and it would be very surprising indeed if it was and permission was refused by both the First-tier Tribunal and the Upper Tribunal.

34. The evidence, or more appropriately lack of it in this case, points more towards the guardianship order not being before Judge Clarke in 2018 and there is absolutely nothing to suggest that that was any fault of the Respondent. The fact that with hindsight and evidence which post-dated the initial application and decision there was a different decision as to sole responsibility in a different and later appeal, does not of itself cast doubt on

the reliability of decisions previously made on evidence at that time. There is nothing in the decision of Judge Malone or otherwise that concludes any differently. In these circumstances, not only is there no wrongdoing by the Respondent, but there is nothing to suggest any error in the decision of Judge Clarke on the basis of evidence before him at that time. There is therefore nothing coming even close to a historic injustice for which the Respondent would be obliged to consider any remedy, nor which needed to be taken into account in any Article 8 assessment nor as to consideration of the appropriate period of leave to enter.

Ground 3 – failure to exercise discretion

35. On behalf of the Applicant, Mr Nasim accepted that in the pre-action correspondence there was no express request for the Applicant to be granted indefinite leave to enter; but it was submitted that read as a whole, it is clear that this is what was being requested given the express references to being treated the same as his siblings who had been granted indefinite leave to enter and for all of the circumstances to be taken into account so that the earlier wrong could be remedied. It was submitted that the refusal simply failed to engage with any of that detail.

36. I asked Mr Nasim to identify what factors in Judge Malone's decision or otherwise specifically pointed to the grant of indefinite leave to enter rather than a period of limited leave to enter for the Applicant to implement the appeal decision. On behalf of the Applicant this was said to be the finding that the Applicant had been in his father's sole custody since July 2016 and there was no difference between the Applicant and his siblings save for their dates of birth. There is nothing in Judge Malone's decision to point to any particular period of leave that should be granted to the Applicant; there is only criticism of the Respondent's failure to grant some form of leave on Article 8 grounds. In any event, the First-tier Tribunal no longer has any power to make directions to the Respondent on such matters.

37. In oral submissions, Mr Nasim stated that there were a number of practical differences to the Applicant in being granted limited leave to enter rather than indefinite leave to remain. The former would place him on a ten year route to settlement and only thereafter could he apply for citizenship, whereas with indefinite leave to enter he could apply after a year. The Applicant would need to apply ever 2.5 years for leave to remain, which involves a fee (currently £1200 - £1400) and payment of the immigration health surcharge (which has recently increased to almost £1000). In addition, the Applicant's current leave to remain is on the basis of family life, which he would have to maintain and not be able to lead a more independent life to make successful future applications. Whilst these identify the practical differences between a grant of limited leave and indefinite leave, Mr Nasim did not identify anything specific as to the Applicant's circumstances (beyond the points in the other grounds of claim) which warranted the latter or placed him at a particular disadvantage with only a limited grant of leave to enter. None of these matters could arguably be considered to be compelling or exceptional to warrant a grant of indefinite leave to enter and in any event, there is force in the Respondent's submission that there is no interference with the Applicant's right to respect for private and family life contrary to Article 8 in circumstances where he

has been granted leave to enter the United Kingdom and has in fact joined his family here since.

Conclusion

38. For the reasons set out above, this application for Judicial Review is dismissed on all grounds.

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