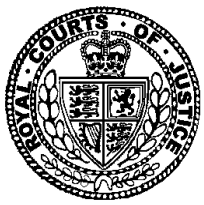

Neutral Citation Number: [2022] EWCA Civ 310

Case No: CA-2021-001904

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

UPPER TRIBUNAL JUDGE RIMINGTON

HU/12417/2019 and HU/12419/2019

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11 March 2022

Before:

LADY JUSTICE THIRLWALL

LADY JUSTICE ANDREWS

and

LORD JUSTICE LEWIS

- -

Between:

MR MD MIJANUR RAHAMAN

MRS MAHFUZA AKTER **Appellan**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respond**

- -

- -

Zane Malik Q.C. and Mansoor Fazli (instructed by **Wildan Legal Solictors**) for the **Appellants**

Richard Evans (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 8 March 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 11 March 2022.

Lord Justice Lewis:

INTRODUCTION

1.
This appeal concerns an alleged procedural irregularity on the part of the First-tier Tribunal in failing to have regard to written submissions and authorities before reaching its judgment on an appeal against the refusal of an application for leave to remain. At the hearing of the appeal, the First-tier Tribunal had given permission for submissions to be lodged within seven days alleging that the first appellant, Mr Rahaman, had suffered an earlier historic injustice when he had been refused leave to remain. The submissions were filed late but due, it seems, to administrative error, were not in fact considered by the First-tier Tribunal before reaching its decision.

2.
The appellants appealed to the Upper Tribunal which dismissed the appeal on a number of grounds. In particular, it considered that any procedural error was immaterial as the submissions relied upon did not demonstrate an historical injustice. Further, it considered that the allegations amounted to a new matter within the meaning of section 85 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and so could not have been considered by the First-tier Tribunal in any event. The Upper Tribunal also made observations about the circumstances in which a First-tier Tribunal could receive submissions after a hearing and on whether it was appropriate to seek to challenge the earlier decision refusing leave to remain. The appellant contends that the Upper Tribunal erred in respect of each of these matters.

3.
We had written submissions on behalf of the appellants. We also heard oral submissions from Mr Malik Q.C. who appeared, with Mr Fazli, for the appellants. We had written submissions from Mr Evans on behalf of the respondent but we did not need to hear oral submissions from him. At the end of the hearing, we announced that the appeal would be dismissed and reasons would be given in writing later. These are my reasons for dismissing the appeal.

THE FACTS

4.
Mr Rahaman is a national of Bangladesh born on 31 December 1983. He arrived in the United Kingdom on 29 September 2009 with entry clearance as a student valid until 17 April 2011. That leave was extended to 31 July 2012. He was subsequently granted leave to remain as a Tier 1 (Post Study Work) Migrant until 1 September 2014. The second appellant, Ms Mahfuza Akhter, is his wife. Her leave to remain was dependant on her husband having leave.

The Earlier Application for Leave to Remain

5.
On 1 September 2014, Mr Rahaman applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. On 29 January 2015, the respondent refused that application. Mr Rahaman had not provided documentation that he was required to provide under the rules governing the points based system applicable to such applications. He had not provided documents confirming that his business was registered for corporation tax and he had not provided other documents in the form required by the rules.

6.

Mr Rahaman appealed to the First-tier Tribunal which dismissed his appeal. Under the provisions of the law then in force (section 85A of the 2002 Act), the First-tier Tribunal could only look at material which was submitted to the respondent with the application for leave to remain and it could not look at documentary evidence provided later. The documentation provided by Mr Rahaman to the respondent had not, in fact, established that he qualified for Tier 1 (Entrepreneur) Migrant leave. The First-tier Tribunal also made findings to the effect that the claim that Mr Rahaman was running a viable business was not credible.

7.
Permission to appeal against that decision was refused by the Upper Tribunal. An application for permission to apply for judicial review of that refusal was refused by the High Court. The Court of Appeal refused leave to appeal on 26 April 2017. At that stage Mr Rahaman had exhausted his rights of appeal. He and his wife, therefore, were unlawfully in the United Kingdom from 26 April 2017 onwards.

8.
Thereafter, Mr Rahaman made a number of unsuccessful applications for leave to remain.

The Present Application

9.
On 25 January 2019, Mr Rahaman and his wife each applied for leave to remain outside of the Immigration Rules. They relied upon the risks to them if they returned to Bangladesh, the fact that they lacked strong ties with Bangladesh, their strong ties in the United Kingdom, their dependence on a sponsor in the United Kingdom, and the fact that the second appellant was undergoing in vitro fertilisation treatment in the United Kingdom. The applications were deemed to include a human rights claim, that is a claim that removing the appellants from the United Kingdom would be a disproportionate interference with their right to respect for their private life guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). The respondent refused that claim on 8 July 2019.

10.
Mr Rahaman and his wife appealed to the First-tier Tribunal against the rejection of their human rights claims. That appeal was heard on 9 December 2019. Mr Rahaman’s wife was pregnant at that stage and evidence was included in the bundle for the hearing dealing with the alleged effect on his wife of removing her to Bangladesh whilst she was pregnant. At the hearing, counsel for Mr Rahaman (not his present counsel) raised another issue, namely that Mr Rahaman had suffered an historic injustice when refused Tier 1 leave as an entrepreneur in 2015. That issue had not been referred to in the application to the respondent for leave to remain. It was not one of the grounds of appeal on which the appeal to the First-tier Tribunal was brought. Counsel is recorded as having apologised for not producing a written skeleton argument and authorities. He was granted permission to produce those within 7 days, that is by the end of 16 December 2019. The appellants’ then counsel filed the written submissions and authorities, late, on 18 December 2019. The explanation given for the late submission, included in a footnote, did not explain the entirety of the delay. It recorded that counsel had professional engagements in a case heard on 12 December 2019. It did not explain the delay from 13 to 16 December 2019.

11.
The written submissions alleged that Mr Rahaman had been the subject of an historic injustice in that his application for leave as a Tier 1 (Entrepreneur) made on 1 September 2014 should have succeeded

in the light of the facts and evidence now before the First-tier Tribunal. The submissions noted that leave had been refused because Mr Rahaman had not provided specific documentary evidence such as his company's registration with HMRC for corporation tax and because the respondent did not consider the business was genuine. They noted that the missing documents had been put before the First-tier Tribunal. Further the submissions contended that it could be seen from the evidence presented in this appeal that the Mr Rahaman's business was genuine. The submissions contended that:

"23) As a result, the appellants have wrongly been made overstayers because their … applications made in 2014 were, in the light of the evidence now properly before the Tribunal, well founded and should have been allowed. The appellants should not have been made overstayers by the incorrect refusal of the [2014] application. If they were not made overstayers by the incorrect refusal of the [2014] application, the first appellant would now be eligible for a grant of ILR all else being equal, because he would have accrued 10 years' lawful residence in the UK (having entered on 29 September 2009…). In this event, the second appellant would be eligible to apply for leave to remain as the spouse of a settled person."

24) Accordingly the appellants have suffered a serious historic injustice, which is highly significant on the facts of this case in determining whether requiring them to leave the UK is disproportionate for the purposes of article 8(2) [of the Convention]. The general principles in respect of historic injustice and article 8 [of the Convention] were set out in Gurung and Ohers v Secretary of State [2013] EWCA Civ 8 at [27]-[43] to which the Tribunal is referred"

…..

26) It is submitted that the same approach, which is an application of the historic injustice analysis, should be followed in the instant case, so that the appellants should be treated as having held leave to remain at all times. If this is accepted, it follows that they are eligible for ILR/LTR, or should be treated as such, and so there is no public interest in their removal at the date of the Tribunal's consideration of the appeal. The appeal should therefore be allowed."

12.
As we have said, by what appears to be an administrative oversight, the written submissions and authorities were not placed before the First-tier Tribunal judge. He gave his written determination on 7 January 2020. The determination notes that no skeleton argument or authorities had been received by him. The First-tier Tribunal, therefore did not deal with the argument relating to the alleged historic injustice.

The Appeal to the Upper Tribunal

13.
Mr Rahaman and his wife appealed to the Upper Tribunal contending that there had been a procedural irregularity because of the failure to have regard to the written submissions and a failure to give reasons addressing the issue raised in those submissions.

14.
The Upper Tribunal dismissed that appeal. There are a number of strands to its reasoning. First, it concluded that the question of any alleged historic injustice arising out of the earlier, 2015 refusal of leave, was a new matter within the meaning of section 85 of the 2002 Act as it involved new factual allegations which constituted a ground of appeal. Secondly, in any event, this was not a case involving

any historical injustice in the sense described in Patel v Secretary of State for the Home Department (historic injustice): NIAA Part 5A [2020] UKUT 00351 (IAC). There had been no wrongful operation or "non-operation" by the respondent of her immigration functions. Rather, the matter had been properly litigated before the courts under the relevant legal provisions in force at the time. The Upper Tribunal considered that the submissions did not take the matter forward and that any alleged defect or procedural impropriety was not material (see paragraph 59 of the reasons of the Upper Tribunal). The Upper Tribunal also made observations about the receipt of post-hearing submissions and whether the appellants were, in effect, seeking to appeal against the decision refusing leave in 2015.

THE APPEAL

15.
The appellants appeal on five grounds, namely, that the Upper Tribunal erred in:

(1)
Its construction of what constitutes a "new matter" in section 85 of the 2002 Act;

(2)
holding that the principles in Ladd v Marshall were applicable in the present case;

(3)
applying the principle of res judicata in its approach to the First-tier Tribunal's decision on 21 August 2015 in relation to the earlier application for leave;

(4)
its interpretation of section 16 of the Interpretation Act 1978; and

(5)
concluding that the submissions were made late and without explanation.

16.
A prior issue, however, is whether any procedural irregularity was material. If in fact, there is no basis upon which a First-tier Tribunal could properly treat the claim as involving historical injustice, the fact that the written submissions were not put before the First-tier Tribunal judge would be immaterial as they could not have led to any different decision.

THE PRIOR ISSUE – THE MATERIALITY OF ANY PROCEDURAL ERROR

The Submissions

17.
Mr Malik Q.C for the appellants submits that it would have been open to the First-tier Tribunal in this case to consider the reasons why Mr Rahaman had failed to provide the relevant documents with the 2014 application for Tier 1 (Entrepreneur) Migrant leave. Further, in the light of the evidence now available, the business run by Mr Rahaman could be seen to be genuine. Mr Malik accepted that the respondent had correctly refused leave in 2015 as Mr Rahaman had not provided the relevant documents and it could not be said that the appellants became overstayers because the respondent made an unlawful decision. Nevertheless, he submitted that the fact that there was a reason for the failure to provide the relevant documentation, and that the business could now be shown to be genuine, were factors that were sufficient to bring the case within the definition of historical injustice in Patel.

18.
In his written skeleton argument, Mr Evans, for the respondent, submitted that the characterisation of the First-tier Tribunal decision of 21 August 2015 on the earlier application as an "historic injustice" is misconceived. The earlier application for leave to remain had been refused because the first appellant had not provided the information required by the applicable rules. An appeal had been dismissed and permission for a further appeal refused. That did not amount to an historical injustice of the type referred to by the Upper Tribunal in Patel.

Discussion and Conclusion

19.
I am satisfied that there is no basis upon which a First-tier Tribunal, properly directing itself as to the law, could find that the circumstances relating to the refusal of the earlier, 2014 application for leave to remain as a Tier 1 (Entrepreneur) gave rise to an historic (or historical) injustice.

20.
The courts and the Upper Tribunal have recognised that there are cases of what has been called "historic injustice" where there has been a belated recognition that a particular class of persons have been wrongly treated: see the summary given by the Upper Tribunal in Patel v Secretary of State for the Home Department. This case does not involve any such class of persons.

21.
The case law also has recognised that there may be arguments that an individual has suffered what has been described as an "historical injustice" and which, it is said, is relevant to the way in which the respondent (or a tribunal) should deal with an applicant's case. Such cases are generally regarded as raising issues where it is said that an individual has suffered injustice as the result of the wrongful operation or non-operation by the respondent of her immigration functions: see Patel at paragraph 42.

22.
The present case is not one that could conceivably be treated as involving any wrongful operation by the respondent of her immigration functions. The fact is that the first appellant applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant in 2014. Under the relevant rules then in place, he was required to produce certain documentation in order to qualify, under the rules, for the grant of leave to remain on that basis. He did not produce that documentation. Consequently, the respondent refused the application for leave to remain on that basis. He appealed. Under the law then in force, the First-tier Tribunal was required to proceed on the basis of the material before the decision-maker. That material did not include the relevant documentation required to be eligible for the grant of leave to remain as a Tier 1 (Entrepreneur). Accordingly, the First-tier Tribunal dismissed the appeal. Permission to appeal was refused (correctly, on the basis of the law in force). An application for permission to apply for judicial review of that refusal was refused by the High Court and an application for permission to appeal to the Court of Appeal was refused. As the appellants' leave to remain had expired, and all avenues of appeal had been exhausted, the appellants were unlawfully in the United Kingdom from 26 April 2017.

23.
None of that involves any injustice, historical or otherwise, in relation to the appellants. The earlier application for leave to remain had been refused because the first appellant had not provided the documentation required by the applicable rules. On the law in force at the material time, the First-tier Tribunal could only look at the documents that were submitted to the respondent with the application. It could not look at documents provided later to the First-tier Tribunal. On the basis of the law in force

at the time, it therefore dismissed the appeal. The first appellant had therefore been treated lawfully in accordance with the rules and the law in force at the material time. Put simply, there cannot be an historical injustice where a case has been decided in accordance with the law in force at the relevant time.

24.
The law may change so that, if an application were subsequently made for leave to remain as a Tier 1 (Entrepreneur) Migrant, the application might (or might not) succeed on the rules and the law then applicable. That, however, does not demonstrate that there was any historical injustice in relation to an earlier refusal of leave as a Tier 1 (Entrepreneur). In particular, it does not mean that the applicant should be treated as if he had been granted leave as a result of the earlier application and as if he had been lawfully in the United Kingdom when he was not.

25.
The earlier, lawful refusal of leave in 2015 could not, therefore, conceivably give rise to any historical injustice which would be relevant to whether or not removal from the United Kingdom was disproportionate in the circumstances as they were in 2019. In particular, the appellants cannot claim that they should be treated now as if leave had been granted and as if they had been lawfully in the United Kingdom when in fact they were here unlawfully. For that reason alone, if there were any procedural irregularity arising out of the failure to have regard to the submissions of 18 December 2019, it was not material.

26.
In those circumstances, it is not necessary to decide whether or not the issue raised was a new matter within the meaning of section 85 of the 2002 Act. That question is better addressed in a case where it is necessary to decide the issue. Nor is it necessary to express any opinion on res judicata or the extent to which a tribunal in a second appeal may depart from findings of fact made in an earlier appeal. In terms of the applicability of Ladd v Marshall, I doubt that that case applies to the provision of written submissions and authorities after a hearing where the tribunal itself has given written permission for those to be lodged after the hearing. What should have happened in the present case is clear. The appellants had permission to file written submissions and authorities on one issue only, namely the allegation of historical injustice, by the 16 December 2019. They did not do so and filed them late, on 18 December 2019, and did not explain the entirety of the delay. In those circumstances, the submissions should have been drawn to the attention of the First-tier Tribunal judge who would have had to consider whether to allow late submissions. In the event, none of that happened. But whether or not that is characterised as a procedural irregularity, it was not material as the issue raised in those submissions could not affect the outcome of the appeal. There has simply been no historic (or historical) injustice as alleged. For those reasons, I would dismiss the appeal.

Lady Justice Andrews

27.
I agree.

Lady Justice Thirlwall

28.
I also agree