Upper Tribunal
(Immigration and Asylum Chamber) **Appeal No: UI-2022-002497**
On appeal from HU/53694/2021; LP/00035/2022

THE IMMIGRATION ACTS

Heard at Field House
On 6 October

Decision & Reasons Promulgated
On 22 November 2022

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

NASIR AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr M Biggs, instructed by Zyba Law
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 1 January 1984.

2. The appellant's skeleton argument to the FtT narrates that he came to the UK as a student on 3 October 2008, obtained further leave as such successively until 20 March 2016, and on 26 August 2016 "applied in time for leave to remain, relying on the respondent's discretion outside the

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immigration rules … varied on 18 January 2017 to one relying upon his private life."

3. On 20 September 2017 the respondent refused that claim and certified it as clearly unfounded ("the 2017 decision").

4. The appellant did not challenge the 2017 decision by the appeal open to him from outside the UK or by judicial review.

5. On 3 October 2017 the appellant applied for leave "relying upon … discretion outside the immigration rules … varied on 31 May 2018 to one seeking ILR pursuant to paragraph 276B of the rules".

6. On 2 August 2019 the respondent refused that application (having considered also further submissions made on 8 April 2019) and found no "fresh claim" in terms of paragraph 353 of the rules. Such a decision does not carry a right of appeal.

7. After sundry procedure and initiation of judicial review, the parties agreed on 19 February and 3 March 2021 a consent order, to lead to a new decision which would accept submissions as a "fresh claim".

8. The respondent on 8 July 2021 again refused the application of 3 October 2017, in terms carrying a right of appeal, leading to these proceedings.

9. In the FtT, the appellant contended that there were exceptional circumstances such that requiring him to leave breached his right to private life, and "more particularly … that he is the victim of an historical injustice" because he was deprived of an in-country appeal from the decision of 20 September 2017. His argument is developed in the skeleton argument of Mr Biggs dated 8 December 2021 which was before the FtT.

10. In his decision dated 21 March 2022 FtT Judge Fox noted that the appellant had acted since 2017 on professional advice. He said at [30] that it was inappropriate to find that the 2017 decision was "an act of wrongful operation by the respondent" and at [31] that it could not be "re-categorised as a wrongful act for the purpose of historical injustice". At [32 - 36] he found that the appellant's submissions were speculative, based on timing and outcome of appeal rights which might have flowed, and declined to find "an inference of administrative error due to the terms and circumstances of the consent order". At [37 - 49] he explained why he did not agree that there were exceptional circumstances by which to allow the appeal on private life grounds outside the rules.

11. The appellant applied for permission to appeal to the UT. Ground (1) contends that it was an error not to resolve whether there was an historical injustice [i.e., to decide whether the 2017 decision was unlawful]. Ground (2) at [18] contends that even a degree of uncertainty over the outcome of an appeal should have counted in the appellant's favour in the proportionality assessment as "… a lost chance can

constitute an historical injustice". The grounds end at [21] with the contentions that the FtT was required to make findings on the extent to which the appellant was prejudiced by the 2017 decision and that "in so far as there was uncertainty this fell to be considered … in the … proportionality balance".

12. On 19 May 2022 Judge Povey granted permission on the view that arguably the Judge should have decided whether the 2017 decision was a wrongful operation of the respondent's immigration functions.

13. Mr Biggs submitted along the lines of the skeleton argument to the FtT and the grounds of appeal to the UT.

14. Mr Clarke sought to distinguish the circumstances of this case from those in the authorities cited by Mr Biggs on historical injustice. He said that the appellant's case was entirely speculative, as he had shown no prejudice by reference to any point of substance in his private life. He was not entitled to succeed by hypothesising that he might have strung out an unsuccessful appeal to a period of residence which might have resulted in a right to remain.

15. In reply, Mr Biggs said that the respondent's argument failed to recognise that there were two stages in the historical injustice argument, as it had to be decided whether certification was an historic wrong before proceeding to decide how much weight that carried in the proportionality analysis. He contended that the respondent had not said and could not say that the outcome must have been the same, or that a challenge to certification might not have succeeded. He said that the decision should be set aside, and the case listed again for remaking of it, either in the FtT or in the UT, for full argument on the illegality of the 2017 decision.

16. I reserved my decision.

17. Crucially, the appellant has not specified, either in the FtT or in the UT, anything by which he might rationally have been found in September 2017 to have a right on private life grounds to remain in the UK.

18. There is nothing to suggest that the 2017 decision, if promptly and thoroughly challenged, might have been found to stray beyond the bounds of law or reason.

19. The resolution in 2021 of the 2019 decision yields no inference that there was substance in any private life case even then; and not at the earlier stage.

20. In so far as the appellant relies on being deprived of proceedings of no underlying substance, which might have used up time to his benefit, that is indeed speculative, and no injustice. There is no principle requiring the SSHD to refrain from certifying hopeless cases because benefit might flow from an unsuccessful appeal.

21. The appellant has not shown from the case law any doctrine of historical injustice which applies in his favour. He has not shown that the FtT erred on any point of law, such that its decision should be set aside.

22. The decision of the FtT stands.

23. No anonymity direction has been requested or made.

H Macleman

13 October 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.