Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03533/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 October 2014	**On 20 January 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR SHIPON AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M B Hussain, Zahra & Co Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Bird dismissing the appeal on asylum and human rights grounds.

2) The appellant is a national of Bangladesh. He came to the UK as a visitor in 2003 aged around 16. He became an overstayer and in August 2011 was encountered by Immigration Officers working at a restaurant. He subsequently claimed asylum, alleging that he was unable to return to Bangladesh because of his father's involvement with the BNP. The judge

did not find the appellant's evidence in support of his asylum claim to be credible.

3) Under Article 8 it was argued on behalf of the appellant that he had established a private life in the UK and reliance was placed on the case of Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060. The judge found the appellant did not meet the requirements of paragraph 276ADE but accepted when considering Article 8 outside the Rules that the appellant had established a private life in the UK - the threshold for engaging Article 8 being a low one. The judge noted that the appellant claimed that he had no ties with Bangladesh but the judge found that the appellant had failed to explain why his parents had not left the country if his father faced difficulties because of his political beliefs. The judge did not believe the appellant's claim that his parents were in hiding. There was reference to the appellant's father having obtained entry clearances on two occasions and having travelled to the UK. The appellant had remained in the UK without authority since 2003 but did not bring himself to the attention of the authorities. He claimed asylum only after his arrest in 2011. There was a lack of evidence as to the extent and quality of the appellant's private life in the UK. The appellant had worked without permission. His parents and extended family were in Bangladesh and he would be able to re-establish both private and family life there.

4) Permission to appeal was granted principally on the basis that the Judge of the First-tier Tribunal had erred by failing to direct herself properly as to the correct approach to the application of paragraph 276ADE. In considering paragraph 276ADE she had taken into account paragraphs S-LTR1.2 to 2.3 and 3.1 and paragraph E-LRTP.2.2 of Appendix FM. The relevant passage of the determination is to be found at paragraph 23, which reads as follows:

> "Turning to consider whether the appellant meets the requirements of paragraph 276ADE I consider that in order to succeed under 276ADE the appellant has to show that he does not fall for refusal under any of the suitability grounds in section S-LTR1.2 to S-LTR2.3 and S-LTR3.1. The appellant has been in the United Kingdom in breach of immigration laws (E-LTRP.2.2) and further although the appellant is aged 18 years and above, he has not spent half of his life in the United Kingdom and has not shown that he has no ties in his own country. His application under this paragraph must fail as fails [sic] to meet the suitability requirement which he has also to meet."

5) In the application for permission to appeal it was submitted that the judge had no basis for making an assessment under paragraph 276ADE by reference to the provisions of E-LTRP2.2 or the cited provisions of S-LTR. It was further submitted that the judge had confused sub-paragraphs (v) and (vi) of paragraph 276ADE. In relation to sub-paragraph (v) there was no requirement to show that the appellant had no ties to his country of origin although this was relevant under sub-paragraph (vi). In this regard it was pointed out that the appellant had come to the UK as a minor and had

lived here continuously since 2003. It was further submitted in the application that the claim made on behalf of the respondent that the appellant's father had twice obtained entry clearance to travel to the UK was stated in the respondent's reasons for refusal letter but was not substantiated by evidence. The appellant had sought an adjournment and a direction to the respondent to produce evidence of the alleged visits. When the adjournment was refused prior to the hearing it was said that if the respondent sought to make an allegation the onus would be on the respondent to prove it. The judge said the same thing in her determination but appeared to have accepted the respondent's assertions without evidence.

6) A rule 24 notice was submitted on behalf of the respondent. This accepted that the Judge of the First-tier Tribunal had erroneously considered E-LTRP2.2 but the only limb of 276ADE that the appellant could possibly take advantage of would be 276ADE(vi). The judge had found that the appellant had parents and other extended family in Bangladesh. This being the case it would seem impossible to argue the appellant had "no ties", even within the meaning of that phrase in Ogundimu. It is further stated on behalf of the respondent that the appellant's father's "putative journeys to the UK were a peripheral matter". The live issues before the Tribunal were whether the appellant was at risk in Bangladesh and whether he had ties to Bangladesh.

7) In his submission at the hearing before me Mr Hussain began by referring to the rule 24 notice. He pointed out that it was accepted that the judge's approach to paragraph 276ADE was erroneous but the error was regarded by the respondent as immaterial because the appellant had no ties with his country of origin, the judge having found that he had family there. However, Mr Hussain continued, there was no evidence on which the judge could base these findings. If there was any evidence to show the appellant's father had travelled to the UK in 2007 and 2010 this was in the possession of the respondent. In his evidence at the hearing the appellant denied that his father had visited the UK in 2007 or 2010. There was nothing in the respondent's bundle to support the assertion at paragraph 28 of the reasons for refusal letter in relation to these alleged visits. The appellant had applied for an adjournment for the respondent to produce this evidence. The respondent's assertion had not been substantiated and the judge had no basis for making a finding with regard to the visits.

8) Mr Hussain continued that the second point he wished to make was that merely because the appellant had relatives in his country of origin was not a sufficient basis to support a finding that he had not lost ties with his country of origin. If that was the case no-one would succeed under this provision. Reference was again made to the case of Ogundimu. The findings made by the Tribunal in that case were reached in a case where there was extended family in the country of origin and the appellant had returned to his country of origin whereas this appellant had never been back to Bangladesh. Merely because the appellant might still have family

in Bangladesh was not sufficient to show that he had ties with that country.

9) For the respondent Mr Walker explained that visas had been issued for the appellant's father, as alleged, but it had not been possible to locate the Visa Application Forms for these visits. In the appellant's written statement, which was before the Judge of the First-tier Tribunal, the appellant confirmed that his parents were in Bangladesh. The judge took account of the appellant's circumstances in this country. He had arrived in 2003 using a visit visa and had gone to ground until he was apprehended in 2011. There must have been some evidence on which the statement was made in the reasons for refusal letter that visas had been issued to the appellant's father. It was accepted by the respondent that the judge had erred in relation to E-LTRP2.2 but it could not be said that the appellant had no ties with his country of origin. The reference to the appellant's father's journey to the UK was in any event a peripheral matter.

10) For the appellant Mr Hussain said the matter was not peripheral. If the appellant's father had made a visit to the UK in 2007 or 2010 this undermined the appellant's case that he had no ties to Bangladesh. This matter was now being described as peripheral because it could not be supported by evidence. It was not enough to say that the Secretary of State would not have stated this without evidence but the maxim applied "he who asserts must prove". The appellant's evidence at the hearing was that his parents were in hiding.

11) By way of further procedure Mr Hussain submitted that the judge's findings of fact could not be sustained and fresh findings should be made but he seemed to acknowledge that the asylum claim was not being pursued. When asked for confirmation of this Mr Hussain replied that the asylum claim was not being formally conceded.

Discussion

12) It is acknowledged that the judge made an error of law in her approach to paragraph 276ADE. This is a freestanding provision and is not related to the suitability or eligibility provisions in Appendix FM. For the judge to have referred to these was an error.

13) It was also clear at the hearing before me, however, that there was only one provision in paragraph 276ADE on which the appellant might rely and this was sub-paragraph (vi). The wording of this has subsequently been amended but I will refer to the wording at the time of the hearing before the Tribunal in July 2014. Paragraph 276ADE sets out the requirements to be met by an applicant for leave to remain on the grounds of private life. According to sub-paragraph (vi), an applicant aged 18 years or above would meet the requirements if the applicant has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has

no ties (including social, cultural, or family) with the country to which he would have to go if required to leave the UK. (Although this provision has been amended with effect from 28th July 2014, the amendments were made after the hearing before the First-tier Tribunal, which took place on 1st July 2014.)

14) The meaning of his provision was considered in Ogundimu as referred to above. The Tribunal made the following observations:

> "123. The natural and ordinary meaning of the word "ties" imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
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> 124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has "no ties" to such a country must involve a rounded assessment of all the relevant circumstances and is not to be limited to "social, cultural and family" circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support of the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be "unjustifiably harsh".
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> 125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country in which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left the country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members."

15) Some of the facts set out above are known. The appellant lived in Bangladesh till around the age of 16 and, at the time of the hearing before the First-tier Tribunal, had been in the UK for around 11 years. The appellant has relatives in Bangladesh, including his parents, although the manner of life of his parents is in dispute. The appellant claims that they

live in hiding because of his father's political activities but the judge did not accept this, although the supposed basis for her findings is disputed.

16) It is not the case though that the appellant left Bangladesh at an early age before he would have experienced the cultural norms of that country and before he would have learnt to speak the language of that country. In terms of Ogundimu the crucial issue in relation to paragraph 276ADE (vi) is the one which was identified at the hearing before me, namely the extent of the family and friends the appellant has in Bangladesh and the quality of the relationships that he has with those friends and family members.

17) Mr Hussain referred to an evidential burden on the Secretary of State to provide evidence of the alleged visas issued to and visits made by the appellant's father. There is merit in Mr Hussain's argument that this assertion by the Secretary of State has not been substantiated. Nevertheless, the legal burden of proof remains on the appellant to show that he has no ties with his country of origin, within the meaning of the term "ties".

18) There was little evidence on this recorded in the determination. In cross-examination at the hearing before the First-tier Tribunal the appellant said he had come to the UK with his parents but they were now in hiding in Bangladesh because of his father's political activities. As already stated, he denied that his father had visited the UK in 2007 or 2010. The judge made a finding at paragraph 26 to the effect that not only were the appellant's parents in Bangladesh but he had extended family there also. It is not clear where the evidence came from on which this finding is based but it does not appear to be disputed. In other words, it is not disputed that the appellant has family members in Bangladesh. It is only the situation in which his parents are alleged to be living that is in dispute.

19) At this juncture it is appropriate to look at the reasons given by the Judge of the First-tier Tribunal for her adverse credibility findings. The judge pointed at paragraphs 18 and 19 to the lack of any documentary evidence as to the appellant's father's alleged political activities or as to the problems the appellant claimed his father had encountered on account of these. The judge noted that according to the appellant's own evidence he had come to the UK to study but there was no evidence that he had undertaken any studies here. The evidence was that once his visa had expired he started working and he had worked in various restaurants until he was arrested in 2011. Indeed, in rejecting the appellant's asylum claim, at paragraphs 18-21 of the determination, the judge made no reference at all to the alleged visits by the appellant's father to the UK. These alleged visits do not form part of her reasoning in relation to the adverse credibility finding made against the appellant in respect of his asylum claim. The judge referred to the alleged visits only at paragraph 24, when considering Article 8 outside the Immigration Rules. Here the judge stated the following:

> "24. Turning to consider Article 8 outside the Rules, the appellant has been in the UK for a number of years and has established private life here (the threshold of engaging Article 8 is a low one). Although the appellant claims he has no ties with his country he has failed to explain why his parents have not left the country if his father faced difficulties because of his political beliefs. The appellant simply states that they are in hiding – I did not find this credible. There is evidence of the appellant's father obtaining entry clearances on two occasions and travelling to the UK. I find that the appellant has family in his own country."

20) Although in this paragraph the judge juxtaposed the finding to the effect that she did not believe the appellant's evidence that his parents were in hiding with an apparent acceptance of the appellant's father's visits to the UK, a full reading of her determination shows that the first finding was based upon her assessment of the credibility of the appellant's evidence in relation to his asylum claim. This adverse credibility finding was not made by reference to the alleged visits to the UK by the appellant's father but was based on other grounds, as summarised above. Accordingly the judge made the finding to the effect that she did not believe the appellant's parents were in hiding without regard to the assertion by the respondent that the appellant's father had visited the UK on two occasions. Mr Walker described the references to these alleged visits as peripheral to the judge's decision and on analysing the determination it is clear that they were indeed peripheral, and indeed did not form part of the judge's reasoning in relation to the asylum grounds of appeal and the adverse credibility findings made in this regard.

21) The judge made a finding, fully supported by reasons, to the effect that the appellant's evidence that his parents were in hiding in Bangladesh because of his father's political activities was not credible. This finding was relevant to the quality of the relationship that the appellant had with his parents and the question of whether he had no ties with Bangladesh. If the appellant's parents were living freely and openly in Bangladesh, as the judge found, then this greatly weakened the appellant's claim that he had no ties with Bangladesh. I would emphasise again that the judge's finding to the effect that she did not accept the appellant's evidence that his parents were in hiding in Bangladesh was not based upon the respondent's allegations as to the appellant's father's alleged visits to the UK but on other reasons, as summarised above.

22) The position is that although the judge erred in her approach to paragraph 276ADE the appellant could not have succeeded under paragraph 276ADE (vi) in showing that he had no ties with Bangladesh. The judge's findings in this regard are entirely sustainable, based as they are on reasons other than the alleged visits to the UK by the appellant's father. Accordingly, the judge's finding that the appellant would not qualify for leave to remain under paragraph 276ADE, although flawed could not have been otherwise.

23) The judge's decision under Article 8 outside the Rules was not challenged at the hearing before me, although it was only in relation to this assessment that the judge founded upon the alleged visits by the appellant's father to the UK. Notwithstanding this, the reasons given by the judge for finding that the appellant's removal would not be disproportionate are set out strongly at paragraph 25. The judge pointed out that the appellant had been in the UK without lawful authority since 2003. He did not bring himself to the attention of the authorities until arrested in 2011. Although there was a long delay by the respondent in making a decision this did not tip the scale in the appellant's favour and could not be described as an exceptional circumstance. At paragraph 26 the judge noted that there was a paucity of evidence of the extent and quality of private life the appellant had in the UK. There was no documentary evidence to support this. The evidence pointed to the appellant having worked without authority. The appellant had both parents and other extended family in his own country and could re-establish both private and family life there and it would be reasonable to expect him to do so. This reasoning is adequate to show that the removal decision was not disproportionate.

24) In conclusion, the position is that although the judge erred in her interpretation of paragraph 276ADE she could have reached no other decision under that provision on the findings she had made, which were entirely sustainable for the reasons which she gave at paragraphs 18 to 21 of the determination. Accordingly, the decision of the Judge of the First-tier Tribunal dismissing the appeal shall stand.

Conclusions

25) To the extent that the making of the decision of the First-tier Tribunal involved the making of an error on a point of law the error did not affect the outcome of the appeal and is not such that the decision should be set aside.

Anonymity

26) The First-tier Tribunal did not make an order for anonymity and I see no reason for making such an order.

Signed Date **2 October 2014**

Judge of the Upper Tribunal