



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/03292/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 27 January 2016

Decision & Reasons Promulgated  
On 02 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR MD HASNAT AZADI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance  
For the Respondent: Ms Fijiwala, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision taken on 20 December 2013 to refuse to vary his leave to remain in the United Kingdom.

## **Background Facts**

2. The claimant is a citizen of Bangladesh who was born on 1 January 1988. He applied for leave to remain in the UK on the basis of his private life under the Immigration Rules HC395 (as amended) (the 'Immigration Rules'). That application was refused because the respondent did not accept that, having spent 20 years in Bangladesh, in the period of time that the appellant has been in the UK that he had lost ties to his home country. The respondent was not satisfied that the appellant met the requirements of paragraph 276ADE of appendix FM to the Immigration Rules.
3. The respondent considered whether there were particular circumstances which would warrant consideration of the grant of leave to remain outside of the immigration rules under Article 8 of the European Convention on Human Rights ('ECHR') finding that there were none.
4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 15 January 2016, Judge Metzger dismissed the appellant's appeal. The First-tier Tribunal considered paragraph 276ADE of the Immigration Rules. The tribunal took into account the qualifications obtained by the appellant and his admission to Lincoln's Inn. The judge found that the appellant has just established a private life in the UK under Article 8(1) of the ECHR. The judge found, however, that the legitimate interest in immigration control outweighed the appellant's Article 8 interests and therefore that it would not be disproportionate for the appellant to be returned to Bangladesh.

## **The Appeal to the Upper Tribunal**

5. The appellant sought permission to appeal to the Upper Tribunal. On 23 March 2015 Upper Tribunal Judge Martin (sitting as a First-tier Tribunal judge) refused permission to appeal. On 29 June 2015 Upper Tribunal Judge Holmes granted the appellant permission to appeal. In granting permission, it was stated that the appellant produces now in support of the application a document said to be an email sent on the day of the hearing at 10:41 hours in which he says he did request an adjournment, although it will be for the appellant to establish that it was sent. Thus, the appeal came before me.

## **The hearing on 27 January 2016**

6. An application was made by the appellant on 25 January 2016 to adjourn the hearing on the basis that he was suffering from back pain and had been advised to take full bed rest for 4 weeks and advised not to travel or work by his homeopathic practitioner. That application was refused. The reasons given were that it was not apparent that the person writing the letter was qualified to give a medical opinion on whether the appellant can attend court and additionally the appeal has already been adjourned once by the Upper Tribunal and without better medical evidence it is not in the interests of justice for the matter to be delayed further. A further letter was faxed to the Upper Tribunal by the appellant on 26 January providing details

of the appellant's homeopathic practitioner's qualifications and renewing his request for an adjournment.

7. I have considered the renewed adjournment request. I note that the appellant has in fact had his appeal before the Upper Tribunal adjourned on two previous occasions. The appellant is suffering from back pain from which he has been suffering since October 2015. One of the grounds of his appeal is that an adjournment request to the First-tier Tribunal was not considered by the judge.
8. There have therefore been in this case a number of adjournment requests. I will deal with the adjournment request to the First-tier Tribunal below. I have considered the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and the principles and test set out by the Upper Tribunal when considering the adjournment request. I am not persuaded that there would be any unfairness to the appellant or that he would be deprived of a fair hearing if I proceed in his absence. I have considered the overriding objective (Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and Rule 38 of those Rules particularly the requirement in the overriding objective for fairness. This is an appeal on a point of law. The appellant has had sufficient opportunity to provide his submissions in writing, permission being granted in June 2015. Directions were given that the parties shall prepare for the hearing on the basis that any further evidence including supplementary oral evidence that the Upper Tribunal may need to consider can be considered at the hearing. The parties were reminded of the need for any further evidence to be served in accordance with Rule 15(2A). The appellant was notified that his application for an adjournment was refused. This is not a case where credibility is in issue. The issues in dispute can very easily be dealt with by written submissions. The appellant has a law degree and has successfully completed the bar course. He is clearly able to present his case in writing but has not submitted anything further in support of his appeal. Further, for the reasons given below, I consider that this appeal was doomed to fail. The attendance of the appellant would not make a difference. Having considered that there is no unfairness I consider that it is in the interests of justice to proceed in the absence of the appellant.

### **Summary of the Submissions**

9. The grounds of appeal assert that the judge erred by considering that the appellant had contacted the First-tier Tribunal to indicate that he would not be attending and that the case should proceed in his absence. It is asserted that the appellant in fact requested that the tribunal adjourn the date of hearing and rescheduled dates that the appellant and his representatives could attend.
10. The First-tier tribunal erred in determining that the appellant did not produce any other evidence of his private life in the UK. The first-tier Tribunal judge agreed the fact that the appellant has been in the UK since 2008 and obtained a degree in June 2012 and a postgraduate diploma in the bar professional studies on 9 July 2013. It is submitted that following the tribunal determination in case CDS (PBS "available" Article 8) Brazil [2010] UKUT 305 (IAC) ('CDS') completion of these academic degrees

is adequate enough to establish the appellant's private life in the UK and therefore no other evidence is necessary.

11. The first tier Tribunal judge further erred by determining that it would not be disproportionate for the appellant to be returned to Bangladesh bearing in mind that he spent his first 20 years although he has a bar qualification and a law degree and it would not be a disproportionate interference with his Article 8 rights. It is submitted that the First-tier Tribunal has fallen into error by reaching this contradictory conclusion.
12. It is asserted that the appellant has established a solid private life in the UK by staying in the UK for more than six years and successfully completing his academic qualifications. The judge should have considered the fact that the appellant was called to the bar by the Honourable Society of Lincoln's Inn while considering proportionality. If the judge had considered it carefully he could have reached a different conclusion. The appellant has established private life in the UK and that deserves respect.
13. Reliance is placed on Paragraph 8 of Razgar, R (on the application of v Secretary of State for the Home Department [2004] UKHL 27 ('Razgar') submitting that in line with Razgar the appellant's best interest will be served by allowing his appeal so that the can continue his practical work experience in the UK and prepare to practice as a lawyer in Bangladesh.
14. Reliance is placed on the case of Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 ('Patel') where Lord Canwath confirms that the balance drawn by the rules may be relevant to the consideration of proportionality but only where the appellant's circumstances engage Article 8 of the European Convention on Human Rights. It is submitted that refusal to allow the appellant further leave to remain will seriously harm the appellant's ability to obtain practical knowledge and work experience in the UK and is an error of law. It is also submitted that the first-tier Tribunal judge erred by determining it would not be disproportionate to return the appellant to Bangladesh whereas it would be a clear interference with the appellant's right to private life which deserves respect.
15. The Secretary of State submitted a rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. It is asserted that the respondent has not been provided with the alleged email cannot therefore comment. The respondent asserts that whether or not it was received is not material. There was no evidence that supported any possible decision that the refusal could be a disproportionate interference with the appellant's private life. The appellant's stay in the UK was always precarious and the application of Section 117 at the 2002 Act would have inevitably resulted in an adverse decision. No properly directed tribunal would have found otherwise.
16. Ms Fijiwala relied on the Rule 24 response. She submitted that if there was any error it was not material. The appeal was doomed to fail. It is clear that the judge addressed paragraph 276ADE at paragraph 4 of the decision. Although the judge does not refer to the appellant failing to satisfy the 'no ties' test it is clear that the

appellant cannot satisfy this. The judge considered Article 8 outside of the Immigration Rules finding that the appellant had only just established private life. She submitted that the case of CDS has been superseded by the cases of Patel and Nasim and others (Article 8) [2014] UKUT 00025 (IAC) ('Nasim'). She relied on paragraph 57 of Patel submitting that it is clear that education cannot be sufficient to found a claim under Article 8. She relied on paragraph 20 of the case of Nasim which reminds the court to refocus attention on the purpose of article 8 and that the public interest will prevail in such cases as this.

17. She submitted that the judge did not consider s117B but if he had it would have made the respondent's case stronger. The appellant's status in the UK has always been precarious. It was open to the judge to conclude that the interference on the appellant's private life was proportionate.

### Legislative Provisions

#### Nationality and Immigration Act 2002 ('2002 Act')

18. As from 28 July 2014 statutory provisions in a new Part 5A of the 2002 Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

19. Section 117A sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

#### 117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person's right to respect for private and family life under Article 8, and
- (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

- (a) in all cases, to the considerations listed in section 117B, and
- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

20. The considerations listed in s.117B are applicable to all cases and are:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

...

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

...

21. The requirement in s.117A to “have regard” to the considerations in s.117B means a court or Tribunal must have regard to those considerations in substance even if no explicit reference is made to the statutory provisions (see Dube (ss.117A - 117D) [2015] UKUT 90 (IAC)).

22. As a consequence, the court or Tribunal is required to give the new Rules (at [47]): “greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights” (see also SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

23. Article 8 of the ECHR states:

(i). Everyone has the right to respect for his private and family life, his home and his correspondence.

(ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### The Immigration Rules

24. The relevant part of Paragraph 276ADE (in force from 9 July 2012 to 27 July 2014) sets out:

The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

...

(vi) is aged 18 years or above, 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."

## **Discussion**

### **The adjournment request to the First-tier Tribunal**

25. The appellant has produced a copy of an email that he asserts was sent to the First-tier Tribunal requesting an adjournment of the hearing. There was no evidence on the court file of that being received. The appellant has not provided evidence of a read receipt. However, giving the appellant the benefit of the doubt I find that there was an error of law in the First-tier Tribunal's failure to consider that adjournment request. In so finding I do not suggest that the First-tier Tribunal would have been bound to accede to the request or that it would have necessarily resulted in any unfairness to the appellant if the adjournment was refused. This is an appeal that does not involve credibility issues. The appellant has not suggested that he had other evidence but rather that he would have made submissions to the First-tier Tribunal. The issue is whether or not that error of law is material.

### **The Article 8 claim under the Immigration Rules**

26. The appellant asserts that he has established a private life in the UK. The relevant provision under the Immigration Rules is paragraph 276ADE(1)(vi). The judge considered paragraph 276ADE(1). However, the judge refers only to the first part of sub-paragraph (vi). The judge merely states that at the time of the application the appellant was aged 25 years old and had spent twenty years in Bangladesh before arriving in the UK (paragraph 4). He does not consider whether or not the appellant has no ties with Bangladesh. The failure of the judge to consider whether

or not the appellant has no ties (including social, cultural or family) to Bangladesh is an error of law.

27. The test is whether or not the claimant has lost his ties to Bangladesh. In YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 the court of appeal approved the construction of the concept set out by the Upper Tribunal in the case of Ogundimu (Article 8 - new rules)(Nigeria) v SSHD. In that case the Upper Tribunal stated, at paragraph , that:

"The natural and ordinary meaning of the words 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation and 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".

28. There has been no evidence submitted as to why the appellant who has lived in Bangladesh for 20 years and in the UK for 7 years has lost his ties to Bangladesh. The evidence is to the contrary. The appellant intends to return to Bangladesh to practice as a lawyer. Any error on the part of the judge in this regard is therefore not material.

#### The Article 8 claim outside the Immigration Rules

29. The appellant relies upon the case of CDS as authority that completion of degrees is enough to establish the appellant's private life in the UK. I have considered the obiter remarks of the Upper Tribunal in that case which set out:

17. It is apparent from these principles that Article 8 does not provide a general discretion in the IJ to dispense with requirements of the Immigration Rules merely because the way that they impact in an individual case may appear to be unduly harsh. The present context is not respect for family life that can in certain circumstances require admission to or extension of stay within the United Kingdom of those who do not comply with the general Immigration Rules. It is difficult to imagine how the



private life of someone with no prior nexus to the United Kingdom would require admission outside the rules for the purpose of study. There is no human right to come to the United Kingdom for education or other purposes of truly voluntary migration.

18. However, the appellant has been admitted to the UK for the purpose of higher education and has made progress enabling extension of stay in that capacity since her admission in 2007. We acknowledge that that gives no right or expectation of extension of stay irrespective of the provisions of the Immigration Rules at the time of the relevant decision on extension.

19. Nevertheless people who have been admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as misrepresentation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay.

20. In the present case a change in the sponsorship rules during the course of a period of study has had a serious effect on the ability of the appellant to conclude her course of study. Some requirements of the Immigration Rules or applicable public policy scheme may be of such importance that a miss is as good as a mile, but this is not always the case.

30. It is clear from these passages that the Upper Tribunal acknowledged that it is possible for a private life, built up as a result of a combination of factors in connection with a course of study, to engage Article 8. It is not clear where this submission and reliance on CDS takes the appellant as the judge found (at paragraph 5) that the appellant has just established his private life in the UK. In any event, this case must be considered in light of subsequent case law. That is not to say that it can no longer be considered good law as found by the Upper Tribunal in Nasim (Para 41).

31. The Supreme Court in Patel clearly set out that the opportunity to complete a course of education is not **in itself** a right protected under Article 8. The appellant

has finished his studies so if anything his claim is even less compelling. In the judgment of Lord Carnwath at Para 57:

57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in Pankina for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see Para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.

32. In Nasim the Upper Tribunal recognised that Article 8 has limited utility in private life cases that are far removed from an individual's moral and physical integrity. At paragraph 20 the Upper Tribunal considered that:

'... Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)'

33. As summarised in the headnote in Nasim:

'The judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity'.

34. The appellant's reliance on CDS is misplaced. The circumstances of the appellant are not analogous to those of the appellant in CDS. There has been no change in the sponsorship rules and the appellant in this case has completed his studies. The appellant's claim is, in essence, that the ability to gain work experience is a right protected by Article 8. In Nasim the Upper Tribunal held:

41...But what is clear is that, on the state of the present law, there is no justification for extending the obiter findings in CDS, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else.

42. We conclude our general Article 8 findings with the following observation. Each of the appellants' representatives on 19th December confirmed to us that the extent of their clients' Article 8 ambitions was to be granted two years' leave to remain, with permission to work (the case for the dependants of Mr Mughal being based on his desire to obtain such leave). Their cases are, accordingly, not put on the basis that the Article 8 rights upon which they rely are necessarily such as to facilitate their indefinite presence in the United Kingdom. Whilst not resiling from what we have said about the case of CDS, this confirmation serves to underline the general problems facing the appellants in seeking to use human rights law to give effect to their short term socio-economic aspirations.

35. In the light of the above cases as applied to the facts of this case it is clear that the appellant's Article 8 claim was bound to fail. It is doubtful that the judge was correct to find that Article 8 was even engaged in this case.

36. The appellant relies on the case of Razgar. Although very briefly the judge (in paragraph 5) did consider Razgar. He moved straight to the fifth question in Razgar namely, whether any interference would be proportionate. Any error in not considering the first four questions would not assist the appellant on the facts of his case. The judge did conduct a balancing exercise weighing in the balance the respondent's legitimate interest in immigration control and the appellant's Article 8 claim that he had a private life finding that it would not be a disproportionate interference with his Article 8 rights for him to return to Bangladesh. As set out above it is doubtful that Article 8 was even engaged in this case.

37. In any event, the appellant has not provided any or any convincing reasons as to why the interference in his private life would be disproportionate. He merely asserts essentially that he has a private life in the UK by staying in the UK for more than six years and successfully completing his academic qualifications and that of itself deserves respect. The right protected by Article 8 is a qualified right. The right can be interfered with as long as that interference is as is in accordance with the law and is necessary in pursuit of a legitimate aim. The judge has identified the legitimate aim as the respondent's legitimate interest in immigration control (paragraph 5) which is acknowledged to be an aspect of the economic well-being of the country. He found that the public interest outweighed the appellant's interests. This was a conclusion that any properly directed Tribunal would inevitably have come to on the facts of this case.
38. The judge has erred in failing to take into consideration all of the relevant statutory requirements under s117A-B of the 2002 Act. The judge clearly weighed in the balance s117B (1) as he referred to the public interest in immigration control. He did not however consider the other factors in s117B. This error, however, does not assist the appellant. Had the judge considered all the factors set out in s117B he would have been required to place little weight on the appellant's private life because it was formed whilst he was in the UK when his immigration status was precarious - s117B(5).
39. Although the judge of the First-tier Tribunal made errors of law, for the reasons set out above, these was not material errors. The appellant's appeal is therefore dismissed. The decision of the respondent stands.
40. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

**Decision**

41. The appellant has not discharged the burden upon him of showing that there is any material error of law in the First-tier Tribunal decision, without which that decision is not susceptible to being set aside. The appeal is therefore dismissed. The decision of the respondent stands.

Signed *P M Ramshaw*

Date 30 January 2016

Deputy Upper Tribunal Judge Ramshaw