



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05123/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 9 January 2018**

**Decision & Reasons Promulgated
On 18 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**T N
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Colvin (“the FTTJ”) promulgated on 1 August 2017, in which she dismissed the appellant’s appeal against the refusal of leave to remain on human rights grounds on 3 February 2016.
2. Given my references to appellant’s health, an anonymity order is appropriate.

Background

3. The claimant is a citizen of Bangladesh born on [] 1975. He entered the UK in February 2003 as a student with a visa valid to September 2003. This was extended on various occasions until expiry in January 2008. A further application for leave to remain as a student was refused but allowed on appeal and the appellant was granted a short period of leave to remain in order to make a fresh student application. He then applied for further leave to remain, on grounds of long residence, in September 2012. This was refused in October 2013. He applied again in September 2015 for leave to remain on human rights grounds and it is the refusal of this latest application which was at issue on appeal before the FTTJ.
4. Permission to appeal was refused in the First-tier Tribunal but granted by Upper Tribunal Judge Jackson in the following terms:

“ ...

The appellant primarily appeals on the basis that Judge Colvin failed to give proper consideration to the respondent's error in sending his passport to a previous representative following his appeal being allowed by the Court of Appeal in 2009 which led to his irregular immigration status. This part of the appellant's history was taken into account by Judge Colvin expressly in paragraph 16 in which the original error was noted but it was also found that the appellant then did nothing after 2010 about the issue, for example that he made any attempts to obtain a new passport or even contact the respondent to ensure he had the benefit for the further short period of leave to remain granted in 2009. Following an application in 2012 there was then another period of over 2 years before any attempt was made to regularise his immigration status. This lack of action is not caused by the passport error in 2009 and in any event, could not materially have affected the outcome of the appeal. Permission is therefore refused on this ground and also on the medical grounds set out on which findings were made by Judge Colvin that he was entitled to reach on the evidence before him.

The appellant's grounds of appeal otherwise set out his immigration history and circumstances in the United Kingdom. As part of that, he encloses a letter that was not before the First-tier Tribunal from his nephew about dependency and family ties in the United Kingdom which he did not think was required previously, although he did raise the issue of dependence on family in the United Kingdom during his appeal.

Judge Colvin found that the appellant was living with family in the United Kingdom and that he was financially dependent on them, but for the purposes of Article 8 of the European Convention on Human Rights, found that the appellant had not established family life as it did not go beyond the normal emotional ties in a family. Those findings are arguably inconsistent – living with a sibling and being financially supported by them arguably does go beyond normal emotional ties between adult siblings such that Article 8 may be engaged. I therefore grant permission to appeal on this ground only, that Judge Colvin arguably erred in law in concluding on the facts found, that the appellant had not established family life in the United Kingdom.

The First-tier Tribunal's decision arguably contains an error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted, limited to the arguable error identified above as to whether the appellant had established family life in the United Kingdom for the purposes of Article 8.”

Error of Law Submissions

5. The appellant was not represented at the hearing before me. He was accompanied by his

nephew, Mr Rubait Hussain. I explained the proceedings to the appellant and that permission to appeal had been granted on limited grounds. He confirmed he understood. I endeavoured to ensure that he addressed the relevant issues during the hearing. I summarised his submissions to ensure that I had understood them and he confirmed that I had done so.

6. The appellant adopted his detailed grounds for permission to appeal to this tribunal. In summary, insofar as they are relevant to the issues to be decided pursuant to the grant of permission to appeal, his case is as follows. The appellant had not been aware, prior to the hearing before the FTTJ, of the “arguments” on which the respondent would rely; the appellant had prepared for the hearing on the ground of “Article 6”. The FTTJ had found there was no evidence of the appellant’s dependence on his sister and family in the UK yet the appellant had sent the respondent, with his application, a letter from his nephew to confirm such dependence. That material was not before the FTTJ having not been produced by the respondent in her bundle of documents. The appellant had various medical conditions which required emotional and physical support; only his family could provide this. The FTTJ had drawn adverse inference from the failure of the appellant’s family members to attend the hearing but this was due to the absence of a “respondent’s notice” so the appellant had had “no idea about which document to rely on or any witness to bring”. The appellant appended to his grounds of appeal a further letter from his nephew to evidence his dependence on his family in the UK; that letter was produced after the FTTJ’s decision was promulgated.
7. For the respondent, Mr Tufan submitted the appellant did not fulfil the criteria in the Immigration Rules. Even if there had been further evidence before the FTTJ of financial dependence, this would not have materially affected the outcome. The respondent relied on **AAO v ECO [2011] EWCA Civ 840** at [35] which referred to **Kugathas v SSHD [2003] EWCA Civ 31**, where the only element of dependency was financial. He submitted this was not the case which would change that trend. Even if Article 8 were engaged, little weight should be given to the appellant’s private or family life, given the appellant’s lack of financial independence (s117B of the Nationality, Immigration and Asylum Act 2002). Mr Tufan accepted that a letter had been sent to the respondent by the appellant in support of his application and that this had not been included in the respondent’s bundle which was before the FTTJ. He said the absence of this evidence was not material to the outcome; it did not demonstrate ties beyond the norm between the appellant and his nephew. He noted that financial dependence had been “amplified” in the grounds to this tribunal. He submitted that these suggested the financial dependence of the appellant on his family here amounted to no more than a loan; the appellant saw it as a debt to be repaid. This undermined his claim to be financially dependent.
8. In reply, the appellant accepted he had appreciated from the notice of hearing that he could have called witnesses at the hearing before the FTTJ; he had not however received a copy of the respondent’s bundle before the hearing; he had not known what the respondent’s representative would ask of him; he had not known what the arguments would be. The appellant had very strong emotional, financial and practical ties to his family in the UK: his sister, brother-in-law, nephew and the children of the family. He described his sister as having raised him. He submitted that the FTTJ had erred in failing to take account of his close relationship with his family in the UK, on whom he was dependent financially and emotionally.

Discussion

9. There is no challenge to the FTTJ's decision under the Immigration Rules. Thus the appellant did not fulfil the criteria in the Rules insofar as his family and private life was concerned. The issue to be decided by the FTTJ was whether Article 8 was engaged outside the Rules in both respects and whether, if so, the degree of interference with the appellant's protected rights was proportionate to the public interest. The grant of permission to appeal is limited to the FTTJ's findings as regards the engagement of Article 8 insofar as the appellant's family life is concerned. The FTTJ's brief findings on this are at [13].
10. The appellant confirmed the FTTJ had accurately summarised the appellant's case at [3] – [6] of her decision. Those paragraphs refer to the appellant's education in the UK being paid for by his sister. It states the appellant "has grown up with his nephew and his brother-in-law takes care of him as his son". The FTTJ noted at [8] the submission for the respondent that "The appellant has had significant financial assistance whilst in the UK from his sister, her husband and nephew including all student fees. He has been wholly reliant on this family since ceasing work ... The relationship with his sister in the UK does not amount to family life as there is no evidence to show emotional ties that go beyond the normal emotional ties." There is no challenge to the findings of the FTTJ at [12] that
- "He has his sister and brother and their families in Bangladesh and the family of his brother-in-law with whom he lives in the UK. He has been financially supported by his sister, brother-in-law and nephew whilst in the UK including payment of all his student fees over a number of years."
11. At [13] the FTTJ finds
- "The appellant has raised the issue of dependency on his sister and her family in the UK but there is no evidence to show that there is a dependency that goes beyond the normal emotional ties in a family. I therefore do not find that family life under Article 8 outside of the Immigration Rules is engaged."
12. It is implicitly accepted by the FTTJ, as indeed it had been in the respondent's submissions, that there was financial dependence between the appellant and his family in the UK. This had existed over a number of years; further, the appellant lived with his sister and her family. It is not clear on what basis the FTTJ found that this did not constitute family life pursuant to Article 8. She merely asserts "there is no evidence to show that there is a dependency that goes beyond the normal emotional ties in a family". There is no reference to the authorities on the issue of dependence. There is no assessment of the appellant's evidence on the issue and the acceptance of the respondent that there was financial dependence should have caused the FTTJ to carry out such an assessment. It is not clear from the decision why the FTTJ rejected the appellant's case that he had a family life in the UK with his sister and other members of the family on whom he claimed to be financially and emotionally dependent.
13. The FTTJ's assessment of the evidence as to whether Article 8 was engaged in respect of the appellant's family life is inadequate as are her findings on the issue. Furthermore, they are, on their face, inconsistent for the reasons set out in the grant of permission to appeal. They have not been fully reasoned and are therefore not sustainable. The FTTJ has erred in law insofar as her assessment and findings are concerned.
14. I turn to the issue of materiality.

15. I have been referred to the additional evidence which has been adduced by the appellant, his two letters from his nephew dated 16 September 2015 and 15 August 2017. Mr Tufan accepted that the first of these should have been before the FTTJ, yet was not. The FTTJ should have taken it into account. I therefore take it into account in considering the issue of materiality.
16. The appellant asserts he did not know the respondent's case or what had been expected of him at the hearing. I do not accept this: he had seen the reasons for refusal and this makes clear the reasons for refusal of leave to remain on human rights grounds: the appellant did not meet the criteria in Appendix FM or paragraph 276ADE. The respondent did not consider there were very significant obstacles to the appellant's reintegration on return to Bangladesh. The respondent also stated, with regard to the issue of whether there were exceptional circumstances the following:
- “We have considered whether your application raises any exceptional circumstances relating to yourself, any dependants on your application, or any wider family members, which consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules”.
17. Furthermore, the appellant had provided the respondent, in support of his application, the evidence of his nephew with regard to his family life in the UK, including the history of financial support from family members. This suggests the appellant was aware this was at issue at the time of application. It can be reasonably inferred that the appellant would have appreciated that the same issues were to be decided by the FTTJ. Whilst the appellant told me he had not received a copy of the respondent's bundle, that bundle was very limited. I am unable to find that the appellant was disadvantaged by the absence of the respondent's bundle. He has not referred me to any evidence or other material, apart from the letter from his nephew cited above, held by the respondent, which would have impacted on the outcome of the appeal.
18. I now deal with the second letter from the appellant's nephew, dated 15 August 2017. This was provided by the appellant with his grounds of appeal to this tribunal. It was not before the FTTJ: it did not exist at the date of hearing in the First-tier Tribunal. This is therefore new evidence. Reliance on fresh evidence to establish the existence of a mistake of fact is covered by the principles in **Ladd v Marshall [1954] 3 All ER 745**, although these principles might be departed from in exceptional cases where the interests of justice require, according to **R v SSHD [2005] EWCA Civ 982**. The principles in **Ladd v Marshall** are (i) the new evidence could not with reasonable diligence have been obtained for use at the trial; (ii) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive) and (iii) the new evidence was apparently credible although it need not be incontrovertible.
19. The evidence of the appellant's nephew in his letter of 15 August 2017 is largely repetition of earlier evidence in his letter of 16 September 2015, save that it is more detailed and addresses the adverse findings of the FTTJ as regards the appellant's family life. It is evidence which could have been obtained by the appellant prior to the hearing before the FTTJ. The appellant states that he did not call his nephew or other family members to give oral evidence at the hearing before the FTTJ because he did not know what issues would be addressed at that hearing. I do not accept that submission for the reasons set out above.

20. As regards the issue of materiality, it is highly relevant that there is no challenge, before me, to the findings of the FTTJ as regards the appellant's status pursuant to the Immigration Rules; Appendix FM insofar as his family life is concerned and paragraph 276ADE insofar as his private life is concerned. He does not meet the criteria in the Rules.
21. Article 8 provides:
- “(1). Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) 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.”
22. In **Razgar [2004] UKHL 27** the House of Lords set out five steps to follow in determining Article 8 outside of the Rules: (i) Does family life, private life, home or correspondence exist within the meaning of Article 8? (ii) If so, has or will the right to respect for this been interfered with? (iii) If so, is the interference in accordance with the law? (iv) If so, is the interference in pursuit of one of the legitimate aims set out in Article 8(2)?; and (v) If so, is the interference proportionate to the pursuit of the legitimate aim?
23. The threshold which has to be crossed for a finding that Article 8 is engaged, at the first **Razgar** stage, is not especially high (**AG (Eritrea) v SSHD [2007] EWCA Civ 801**).
24. In **Kugathas v SSHD [2003] INLR 170** the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son (as was the issue in that case) would not, without more, be enough.
25. In **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)** the Tribunal said that a review of the jurisprudence discloses that there is no general proposition that Article 8 can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.
26. In the present case, the evidence before the FTTJ was that the appellant was aged 40. He came to the UK at the age of 27. He was married in Bangladesh and had a daughter there (albeit he was not in contact with her). He has adult siblings in Bangladesh. His sister had moved to the UK when the appellant was little (paragraph 5 of the FTTJ's decision refers).
27. The appellant came to the UK as an adult student and would have appreciated that he would be expected to leave the UK at the end of his studies. The appellant's studies in the UK were funded by his sister in the UK. This, without more, is not indicative of family life because it is common for a foreign student's studies to be funded by a family member. At the time this arrangement was put in place the adult siblings were living in different countries. I do not

accept the submission of the appellant before me that his sister had “raised” him. This submission is not consistent with the appellant’s sister having come to the UK when he was little. Nor is it consistent with his having lived independently in Bangladesh as an adult. There was no family life between the appellant and his adult sister at the time this financial arrangement came into being. The appellant has previously worked in the UK. While the evidence on the issue is not detailed, this appears to have been at a time when the appellant was here as a student. His current inability to work appears to result from his lack of immigration status and perhaps his poor health. The existence of financial dependence is not therefore, without more, indicative of family life.

28. In his grounds of appeal to this tribunal the appellant states that his family in the UK has supported him financially and he has “accumulated quite a good amount of debt”. This is not evidence which was before the FTTJ and I do not take it into account in the assessment of the materiality of the FTTJ’s error in the assessment as to whether Article 8 is engaged by the respondent’s decision. Rather, I adopt the findings of the FTTJ that the appellant is financially dependent on family members in the UK.
29. There is very little information about the children of the appellant’s extended family. While their best interests are a primary consideration, there is no evidence that they would come to any harm or would suffer any detriment in the event of the appellant’s return to Bangladesh. That said, they would, undoubtedly miss him. There is insufficient evidence for a finding that the appellant has a caring role in relation to the children. Nonetheless, it is in their best interests for their family environment to remain stable and unchanged with the appellant continuing to live in the family home.
30. The appellant’s relationship with his sister, brother-in-law, nephew and the children has only developed into a close one since his arrival in this country at the age of 27, his sister having previously come here when he was little. There is scant evidence as to how that development has taken place: for example, where he has lived since his arrival in the UK and whether solely with his family. The evidence is that he has worked in this country in the past but it is not clear whether he lived with his sister or other members of the family while doing so. The appellant’s sister and brother-in-law did not give oral evidence before the FTTJ. Their perspective of the relationship is not known.
31. The letter from the appellant’s nephew of 16 September 2015 adds little to the evidence already before the FTTJ: it refers to the appellant’s living with family, having a close family relationship and the existence of financial support, issues which are not in dispute.
32. This is a case which is marked by a paucity of evidence before the FTTJ. The burden of proving Article 8 is engaged rests with the appellant. While the threshold is not an especially high one, the evidence before the FTTJ was very limited. It is not in dispute that the appellant lives with his adult sibling and other members of his family in the UK and is financially dependent on them; this is an arrangement which is both historical and has resulted from his lack of immigration status, his inability to earn a living and his health issues. Notwithstanding the family’s financial commitment to the appellant’s studies, their current financial support is a temporary arrangement brought about by the appellant’s inability to work. It is not one which would continue were the appellant to be granted leave to remain: his history of working in the UK suggests that he would work here and live independently if permitted to do so. Such a finding is consistent with his having lived independently in the past, having been married and fathered a child of his own. Payment of the appellant’s tuition

fees was an arrangement which was initiated while the appellant was living in Bangladesh and not within his sibling's family unit. The family members are undoubtedly close but this is consistent with their living in the same household and the appellant's inability to work and his current reliance on his family for financial support.

33. The very limited evidence is not sufficient for a finding of a bond between family members which is over and above the norm for adult siblings, nephew and small children. Rather, theirs is a relationship which has developed over time as a result of proximity and necessity. Even given that background, the evidence is not sufficient for a finding of real and committed ties over and above the norm for adult siblings and their families. The evidence suggests that, were the appellant able to work, he would live independently as he did in Bangladesh before his arrival in this country. The evidence suggests the current arrangement is no more than a temporary one brought about by the appellant's current immigration and health situation. As was said in **MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040** the assessment is one to be made in the round, taking account of past, present and likely future circumstances: the fact that an appellant is economically dependent on adult children (as in that case) whilst in the United Kingdom under immigration conditions which prevent her from working was not determinative of the question of whether she was in a position of real dependency.
34. For these reasons, there is no material error of law in the FTTJ's decision. It must stand.
35. Even if Article 8 were engaged, the interference with the appellant's and his family's protected rights is in accordance with the law, being in accordance with the Immigration Rules. The public interest factors in s117A-s117D of the 2002 Act include a provision that the maintenance of effective immigration control is in the public interest (s117B(1)). The appellant speaks English (s117B(2)); he is not financially independent, being dependent on his family in the UK (s117B(3)); he would be a burden on the taxpayer were he to remain in the UK. His financial dependence would impact on his ability to integrate into society.
36. The appellant's personal circumstances are summarized at [3] – [5] of the FTTJ's decision and unchallenged by the appellant. The appellant has medical issues which have been resolved but he continues to be monitored in respect of his hepatitis and his hips. He has family in Bangladesh. His dependence on his family in the UK has developed at least in part as a result of his illness. He is now at the stage of being monitored, rather than receiving intervention treatment. Thus his dependence on his family for practical support will reduce over time.
37. The appellant's sister has paid for his education here. He lives with family in the UK. He has a very close relationship with all family members. The appellant came to the UK as a student at the age of 27; he is now aged 40. He has only ever been granted (apart from a short period which was granted to enable him to re-apply as a student) leave to remain as a student. His ties with his family in the UK have developed in the knowledge of the adult parties that he would have to leave the UK once his leave to remain expired. Neither they nor he could have had any expectation of his being granted leave to remain on any other basis.
38. In assessing proportionality, regard should be had to the interference with the protected rights of the appellant's family members. There is little evidence on the issue. In his letter of 16 September 2015 the appellant's nephew gives no evidence as to the impact on family members of the appellant's return. This includes the children of the family whose best

interests are a primary consideration. There is no evidence of detriment to the children as a result of the appellant's return to Bangladesh. That said the appellant has a close relationship with all family members including the children. They would miss him on return, as would other family members. The children live with their parents who would continue to support them on the appellant's departure from the UK; there is no evidence he has a caring role in the lives of the children. According to the appellant's nephew, the appellant is "very generous and affectionate towards them ... regularly spend[s] time with them and buys them gifts and presents at special occasions". It would be in the best interests of the children for the status quo to be maintained.

39. The nature of the bond between the appellant and his family in the UK is relevant to the issue of proportionality. He is a man of 40 whose health has stabilized, albeit it requires monitoring. There is no evidence that he could not receive appropriate monitoring and, when required, treatment in Bangladesh, paragraph 15 of the FTTJ's decision refers). While the appellant told the FTTJ his family in Bangladesh (he has a sister, brother and daughter there) would not help him financially, the evidence suggests his family in the UK would continue to support him financially as they have done here. The FTTJ found accordingly at [12] and that finding is sustainable on the evidence.
40. The appellant's financial dependence on his family in the UK could continue on return to Bangladesh. Contact can be maintained by means of the internet, telephone calls and visits by family from the UK to Bangladesh. Significant weight should be given to the appellant's lack of immigration status and his failure to meet the criteria in the Immigration Rules. The maintenance of effective immigration control is in the public interest: the appellant's leave to remain expired in January 2008 (although he was permitted a short further period of remain to apply for further leave as a student); his further application for leave to remain as a student was refused and he has not had leave to remain since. His applications for leave to remain on grounds of long residence and human rights grounds were similarly refused. There are not very significant obstacles to his integration on return to Bangladesh (paragraph 12 of the FTTJ's decision). The appellant is not financially independent.
41. For these reasons, even if Article 8 were engaged, the public interest outweighs the degree of interference in the appellant's and his family members' family lives.
42. Irrespective of the error of law in the FTTJ's decision, the appeal would have been dismissed in any event. The error of law was not material to the outcome.

Decision

43. The making of the decision of the First-tier Tribunal did not involve a material error of law, as set out above.
44. I do not set aside the decision of the First-tier Tribunal to dismiss the appeal. That decision stands.
45. This appeal is dismissed.

Signed **A M Black**
Deputy Upper Tribunal Judge A M Black

Date 17 January 2018

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *A M Black*
Deputy Upper Tribunal Judge A M Black

Date 17 January 2018