



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24097/2015
IA/24098/2015

THE IMMIGRATION ACTS

Heard at Field House
On 20 March 2018

Decision & Reasons Promulgated
On 29 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

MR MD HAMIDUR RAHMAN (+1: PARVEEN)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. As long ago as March 2017 my decision in respect of an error of law was promulgated. Thereafter the matter was listed for hearing before me for a resumed hearing. Both parties attended but for some unclear reason neither of the parties knew that the case was listed for a resumed hearing. They had both attended for an error of law hearing. Both parties made a joint application for an adjournment and ultimately, I reluctantly adjourned the matter.

2. At the error of law hearing I had made it quite clear in rather robust terms that I did not think that the Appellant's grounds in respect of paragraph 134 of the Immigration Rules had any substance. However, I was concerned that although Article 8 ECHR had been placed for consideration before the judge, it had not been considered and I referred at paragraphs 15 and 16 as follows:

"15. This morning I was referred to the decision of the President which was promulgated yesterday in Treebhawon and Others (NIAA (2002) Part 5A compelling circumstances test) [2017] UKUT 13 (IAC). That is a very helpful decision in which it is made clear that there is indeed a line of authority from the Court of Appeal and Upper Tribunal that the test to be applied in Article 8 private life cases is that of compelling circumstances. At paragraph 47 the Upper Tribunal said,

'We return to the question posed above. What is a legal test to be applied in a case such as the present? The answer which we deduce from a combination of the governing statutory provisions and in particular the decision of Rhuppia is that these Appellants must demonstrate a compelling (not very compelling) case in order to displace the public interests in trying to forward their removal from the United Kingdom. In formulating this principle, we do not overlook the question of whether the adverb very in truth adds anything to the adjective compelling given that the latter part partakes of an absolute flavour. It seems to us that the judicially formulated test of very compelling circumstances has been driven by the aim of placing emphasis on the especially elevated threshold which must be overcome by foreign national offenders particularly those convicted of the more serious crimes who seek to displace the potent public interests favouring their deportation. In contrast immigrants such as these Appellants confront a less daunting threshold.'

16. This is not the case in which the Appellant's immigration status is precarious in the classic sense. That is because the Appellant has been here in the United Kingdom on the basis of a five year work permit. There is no evidence that he has breached any. He made I am sure what he thought was a relatively routine application for indefinite leave to remain and he failed in that application for the reasons which have already been outlined. He has in one sense therefore a relatively unusual Article 8 claim which differs significantly from the Treebhawon case and perhaps the majority of cases which come before the Tribunal. It is for that reason and also because he has not been able to have his Article 8 claim properly considered that I conclude that there was a material error of law in respect of the Article 8 assessment. That aspect of the case and that aspect of the case alone shall be considered at a further resumed hearing in fact paraphrased."

3. At the hearing before me today, the Appellant has given evidence. He relied on a new short bundle under cover of a letter of 14th March 2018 and he relied

on his witness statement. A summary of that being that he has been working at the Bengal Brasserie as a second chef since November 2009. He explains that he has been residing in the UK since that period of time, he spent a continuous period of around eight and a half years here with leave to remain as a work permit holder. He says he has been able to engage in stable life with many relatives and friends here in the United Kingdom and that he has established a "safe standard and established lifestyle". He says he has family members and lots of close relatives scattered around the country including brothers, cousins, nephews, nieces, etc. He said from childhood he wanted to be a skilled worker and he has had an interest in cooking. He said he is very happy living here in the UK and that he cannot go back to Bangladesh as the stigma of returning after a long time working here as a work permit holder would strongly undermine his standard of living in Bangladesh and indeed people would treat him harshly and unfairly in Bangladesh. He said he would be facing degrading treatment by his neighbours.

4. The Appellant's wife Mrs Parveen is dependent on his case and nobody submits anything other than her case depends entirely on Mr Rahman's case. During cross-examination, through an interpreter, the Appellant said that he has family members in Bangladesh including his parents who occasionally come to visit here in the UK, that the Appellant has four brothers here in the United Kingdom and that his wife came here in 2014. Asked whether there was any reason why he could not return to Bangladesh the Appellant said it has been a long time that he has been here in the UK it was nearly ten years and that most of his relatives are in the UK. As for why it would be a shame as he put it for him to be returned to Bangladesh he said he has been out of the country for some time and that he was out of touch with people back home. He was asked why he could not continue to work as a chef which he had done in Bangladesh before he came to the UK and again the Appellant said he had stayed here in the UK for a long period of time. He said there are a lot of opportunities here and he wanted to learn more about life here. He agreed he was aged 31 when he came to the UK and he said he had undertaken The Life in the UK test and he has undertaken some B1 English exams. He confirmed he had no medical problems. There was no re-examination.
5. In his submissions Mr Melvin on behalf of the Secretary of State said that he relied on the reasons for refusal letter. The Appellant could not meet the Immigration Rules as a work permit holder and so he relies on Article 8 outside the Rules. It is not a case where Appendix FM or paragraph 276ADE can appear to be relied upon, so it looked like said Mr Melvin this was a case to be considered via Article 8 outside the Immigration Rules. Therefore, the Appellant needed to show compelling reasons why he could not return together with his wife to Bangladesh. Of course, it was accepted that they would prefer to remain here in the UK, but they were not compelling circumstances. The Appellant could just as easily enjoy private and family life in Bangladesh. The Appellant had spent the first 31 years of his life in

Bangladesh it was unclear why he would be shamed by family members by returning.

6. Insofar as Mr Karim's submissions are concerned, he said insofar as the need to maintain immigration control was relevant he asked how is it that if the Rules are now met that it would be in the interests of immigration control or proportionate to return the Appellant to Bangladesh. It was the work permit route which ordinarily led to indefinite leave to remain and indeed the Appellant had an expectation that he would have settled here in the UK. The Appellant has many relatives here in the UK which he referred to during his oral evidence. He referred to the valuable work experience that the Appellant has, but there is a shortage of chefs and the industry is in decline. This was not a PBS case and therefore Section 85A did not apply. There could not be any public interest in requiring the Appellant's removal and that it would not be proportionate.
7. As I indicated at the error of law hearing, this is a very different case to the types of case which ordinarily come before the Tribunal. Firstly, it is different because the Appellant's leave here in the UK is not precarious in the classic sense and indeed this is not a Points Based System case and therefore secondly, as I have been reminded, Section 85A NIAA 2002 does not apply. The effect of that is that the Appellant can produce evidence as at today's hearing which indicates that he could meet the Immigration Rules. That evidence, unchallenged, is at pages 5, 6, 7 onwards. It confirms that the Appellant is employed at a salary of £19,500 by his employers, there is the appropriate payslip showing the pay and there are then appropriate bank statements showing that the funds are transferred from the employer to the employee (the Appellant). There is other supporting documentation of the restaurant business as well. So, in the circumstances in my judgment this Appellant can properly look to distinguishing his case from the very different cases which have recently been handed down by the Court of Appeal in relation to evidential flexibility following on from the Supreme Court's decision in **Mandalia v Secretary of State for the Home Department**. [2015] UKSC 59. [2016] 1 WLR 4546. Those cases being **Mudiyanselage and others v Secretary of State for the Home Department** [2018] EWCA Civ 65, [2018] WLR 55.
8. In the circumstances when I consider Article 8 and I consider **Razgar** to assess compelling circumstances, in my judgment it is plain that although the Secretary of State seeks to argue the case on the basis that a similar outcome ought to apply as would in the PBS cases (dismiss the appeal) such an approach would be an error of law. In my judgment, if such similar rules existed for work permit holders, then they would have been set out. In relation to the applicability of Section 85A, both parties agree that Section does not apply in this case. Therefore, it enables the Appellant, properly in my judgment, to be able to say that he can produce the necessary evidence as at today's hearing.

9. Immigration control and the public interest are very weighty matters. They cannot be downplayed. A harsh result for an Appellant is not sufficient to enable those weighty considerations to be put to one side. In this case though, there are very different considerations which apply as compared with PBS cases and indeed the evidence which was missing is now available. I am well aware that the Appellant's leave is still precarious as he has no Indefinite Leave to Remain but is not the sort of case in which he is in a similar position to those who are in PBS categories. In my judgment, there is just enough in his case to put his precarious leave at a slightly less disadvantageous position. I conclude that there are different levels of precariousness and this Appellant's case comes in lower level of precarious leave. There are compelling circumstances in this Appellant's case. Specifically, as at the date of the hearing, he meets the requirements for his work permit.
10. In the circumstances in my judgment it would not be proportionate to seek to conclude that the Appellant cannot remain in the United Kingdom or that he should be removed. It is also relevant for me to say that insofar as the evidence is concerned there was nothing in relation to the Appellant's credibility or his time here which is of any adverse concern whatsoever. All of the evidence indicates that the Appellant has had a strong work ethic, he has stayed out of trouble, there was a very serious omission in relation to the provision of his documents in relation to the Immigration Rules aspect of his appeal that was very unfortunate, but he was still able to rely upon the Article 8 assessment which was omitted some period of time ago.
11. In the circumstances having considered the evidence I conclude that the appeal of the Appellant (and thereby that of his wife) is allowed pursuant to Article 8 ECHR outside of the Immigration Rules.

No anonymity direction is made.

Signed: **A Mahmood**

Date: 20 March 2018

Deputy Upper Tribunal Judge Mahmood