



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

Appeal Number: HU/12810/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13<sup>th</sup> May 2019**

**Decision & Reasons Promulgated  
On 30 May 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**MR SHAHIN ISLAM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Karim of Counsel

For the Respondent: Miss Pal, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a citizen of Bangladesh (date of birth 19<sup>th</sup> March 1979), appeals with permission against the decision of First-tier Tribunal Judge Herlihy dismissing his appeal against the Respondent's decision of 4<sup>th</sup> June 2018 refusing his application to remain in the U.K. The Respondent was not satisfied that the Appellant met the requirements of the Immigration Rules. The appeal is brought under Article 8 private life grounds.
2. In summary the Appellant made his application for leave to remain on the basis that he first entered the UK in 1992 (aged 13 years) and has remained here continuously ever since. The Secretary of State considered

that the Appellant did not meet the requirements of paragraph 276ADE(1) (iii) to (iv) because he failed to meet paragraph 276ADE(1)(iii) as he had not shown that he had resided continuously in the UK for twenty years. Also he did not meet paragraph 276ADE(1)(iv) because the Secretary of State did not find that there would be very significant obstacles to his integration in Bangladesh, the country to which he would have to go if required to leave the UK. The Secretary of State considered there were no exceptional circumstances in his case which would render refusal in breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for him. The Secretary of State further considered that the Appellant did not fall for a grant of leave to remain outside the Immigration Rules on the basis of compassionate factors.

### **Hearing Before the First-tier Tribunal**

3. The Appellant appealed the Respondent's refusal and his appeal came before First-tier Tribunal Judge Herlihy. The judge heard evidence from the Appellant and from one witness, Mr Hafez. In addition, there was submitted a statement from a further witness, Mr Miah, together with other documentary evidence which the judge considered.
4. The judge summarised the Appellant's evidence and accepted that there was evidence to show that he had entered the UK aged 13 years. She also accepted that in 2006 the Appellant had submitted an application for ILR based on fourteen years long residence. This application was voided in 2007 as the Appellant had no valid leave and indeed the Appellant was required to voluntarily depart. His claim is that he did not do so.
5. She noted evidence of correspondence between the Appellant and the Home Office in 2010 and also that the Appellant was encountered working illegally in a restaurant in Norfolk in 2011. He was served at that time with reporting directions and there was evidence before the FtTJ to show that the Appellant reported between September 2011 and March 2015.
6. Drawing those strands together, she found that she was satisfied that the Appellant was in the UK in 1992 and that it was likely that he was in the UK in 2006 and possibly 2008. She accepted that there was evidence that he was in the UK from 2011 to March 2015.
7. However when considering the Appellant's oral account of his movements since his claimed entry 26 years ago, she noted he had on his own account drifted from place to place [11]. She found as set out in [24] to [30] that she could not be satisfied that the Appellant had given a credible account or indeed any meaningful account at all of his movements from entry in 1992 up to around 2006, such as to satisfy the twenty year Rule requirement.
8. The FtTJ then turned to the supporting evidence. She noted that the Appellant had submitted a witness statement from Mr Miah. She discounted his evidence on the basis that Mr Miah did not attend the

hearing and submit to cross-examination. No challenge is mounted to that finding. With regard to the evidence of Mr Hafez, the FtTJ set it out at length in [16] to [18]. In summary Mr Hafez recalled the Appellant living at his family home when he (the Appellant) first arrived in the U.K. After a short stay, the Appellant left Mr Hafez's home but he would return to visit the house every couple of months or so.

9. The judge compared Mr Hafez's account with the Appellant's and found the Appellant not credible. She dismissed the appeal.

### **Onward Appeal**

10. The Appellant appealed the decision on three grounds - the primary ground being that the FtTJ had failed to make adequate/clear findings on whether or not she accepted or rejected Mr Hafez's evidence. Since this evidence was crucial in terms of supporting the Appellant's case because it covered the gap in the Appellant's account of his early years in the UK, a failure to properly take into account this evidence amounted to a material error.
11. Permission was refused initially by the FtT but granted upon a renewed application before the Upper Tribunal. Thus, the matter comes before me to decide if the FtTJ's decision contained a material error sufficient to require the decision to be set aside and remade.

### **Error of Law Hearing**

12. Before me Mr Karim appeared on behalf of the Appellant and Miss Pal for the Respondent. Mr Karim's submissions followed the lines of the grant of permission. He drew my attention to [25] to [28] of the decision. He submitted that the FtTJ had accepted that the Appellant arrived in the UK in 1992 - there was credible evidence from the immigration service at Luton Airport to confirm this.
13. It was therefore unclear why the FtTJ had criticised the Appellant by saying he could have brought further evidence from relatives and friends with whom he had stayed. That criticism was materially wrong, because this was the very evidence which Mr Hafez had given in his statement. Nowhere does the judge expressly make a finding on whether or not she finds Mr Hafez's evidence credible. Indeed a reading of parts of the decision would seem to imply that she did find his evidence credible. As this evidence is crucial in terms of supporting the Appellant's case it is necessary that a clear analysis of this evidence is carried out and that clear findings are made on the credibility or otherwise of this witness.
14. Miss Pal responded by saying that the judge's findings were adequate. She pointed to [25] and said that the judge had taken account of Mr Hafez's evidence and noted the difference between his evidence and that of the Appellant. She noted that there could have been considerably more produced in terms of evidence from other friends and relatives. The judge

was entitled to conclude in any event that there were gaps in the Appellant's evidence which meant that he could not demonstrate continuous residence for twenty years.

### **Consideration of Error of Law**

15. Following submissions from both parties, I am satisfied that the decision of FtTJ Herlihy must be set aside for material error. This is a decision where the judge to her credit has expended considerable time and effort in setting out the evidence before her in detail. There may have been no sustainable criticism of her decision if the only witness before her had been the Appellant. However, that was not the case and therein lies the difficulty in this decision. It is a narrow point but one which is material.
16. Whilst I accept that she has fully set out Mr Hafez's evidence, nowhere do I see that she has made explicit findings that she does not accept the credibility of his evidence. The crucial parts of Mr Hafez's evidence are contained in paragraphs 2 and 3 of his statement. In paragraph 2 he says the following:

"I confirm that Mr Islam has lived at our address when he arrived in the United Kingdom. He then moved out and started living at different addresses throughout the last 24 years. However, he had a well communication with us throughout this period. He used to come and visit us almost every two months. I had a very good bonding with him."

He follows this up in paragraph 3 by saying the following:

"I confirm that Mr Islam remained in the United Kingdom for these years. He did not leave the United Kingdom at all. In fact it would have been impossible for him as he did not have a leave to remain in the United Kingdom."

Those are the crucial parts of Mr Hafez's evidence. I accept that she has referenced Mr Hafez's evidence when comparing it to the Appellant's account but I cannot find that that is sufficient for me to conclude that his evidence is discounted. I cannot discount therefore that were a proper analysis of his evidence with credibility findings be made, this may possibly result in a different interpretation of the Appellant's evidence and thus a different decision.

17. I find I have no alternative but to set aside the decision in its entirety in order for it to be remade. It would not be proper to preserve the FtTJ's findings on the Appellant's evidence.
18. I canvassed with the representatives their views on the venue for the remaking of the decision in the event that I found an error of law in the FtTJ's decision. Mr Karim submitted that I had sufficient evidence before me to remake the decision allowing the appeal. Miss Pal's view was that as this was a reasons challenge, it was right that there should be a full

