Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Numbers: HU/13657/2019**

HU/14423/2019

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

Heard On: 27th October 2020 **On: 30th October 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Sukanta Malik

Puja Bhowmick

(no anonymity direction made)

Respondents

For the Appellant: **Mr Tan Senior Presenting Officer**

For the Respondents: **Ms McCall, instructed by Waterstone Solicitors**

DECISION AND REASONS

1. The Respondents are husband and wife. They are both nationals of Bangladesh. On the 21st January 2020 the First-tier Tribunal allowed their appeals on human rights grounds. The Secretary of State now has permission to appeal against that decision.

2. The appellants before the First-tier Tribunal – here the Respondents – were overstayers at the time that they made their applications for leave to remain. Mr Malik held valid leave to be in the United Kingdom between the 10th October 2009 when he arrived, and the 6th July 2018 when his last grant of leave expired. His wife, who only arrived on the 3rd January 2017, had been granted leave in line with him. The applications were made on the 18th July 2018. The case put was that Mr Malik had accrued 11 years long residence in this country, and given that much of that was lawful should enjoy the benefit of discretion being exercised in his favour under paragraph 276B of the Immigration Rules. Alternatively, it was argued that it would be a disproportionate interference with the composite Article 8 rights of the family – the Respondent's and their young child – should they be refused leave now.

3. The First-tier Tribunal first tackled the question of 276B. That paragraph of the rules provides that applicants will be granted indefinite leave to remain where they can establish that they have held ten years of continuous lawful residence in the United Kingdom. Mr Malik had held such leave only for 8 years and 9 months. The First-tier Tribunal considered, and discounted, the possibility that paragraph 39E of the rules would avail him. That paragraph permits the Secretary of State to exercise her discretion where the applicant has made an application for further leave within 14 days of the previous leave expiring. That paragraph would of course only be of assistance to Mr Malik if it operated to cover a short gap between periods of lawful residence, i.e. where the out of time application resulted in leave being granted. Since it had not been granted in this case, it was irrelevant. The Tribunal correctly noted that it did not operate to extent existing leave in the manner provided for by section 3C of the Immigration Act 1971.

4. The Tribunal then turned to consider Article 8 'outside of the rules'. It appears to proceed on the assumption that Article 8 was engaged and that the "first 4" *Razgar* questions could be answered positively [at §22]. It made the following findings of fact:

    i) There are no unsurmountable obstacles to the Respondents re-integrating in Bangladesh. They have family support there, are well educated and have already demonstrated their resourcefulness by establishing a business in a foreign country;

    ii) The couple's child is not 'qualifying' as defined by s117D of Nationality, Immigration and Asylum Act 2002;

    iii) It is in the child's best interests to remain with her parents and return to Bangladesh;

iv) Although the Respondent's believed the legal advice that that they had been given, and thought that their application would be successful, the solicitors were not in fact at fault and so no weight could be attached to that matter.

5. Having taken those matters into account the Tribunal concluded as follows:

> "The issue is whether it is proportionate to now ask him leave. The one matter that the respondent advances is the maintenance of an effective immigration control. There being no issues with regard to suitability. The Respondent was content to allow the appellant to make his application within the 14 day period and take payment for the same. The Respondent was content for him to remain in the UK whilst this application / the subsequent variation was considered. There was no effort to remove the Appellant or his family. The Respondent would no doubt hope that an Appellant would leave voluntarily, but having lodged a further application and paid for the same it is understandable that the appellant would seek to remain until this was concluded. Once the application was considered he was provided with an in-country right of appeal, so again, despite being an overstayer, the Appellant was allowed to stay in the UK to see his appeal through to its conclusion. Yet it is the Respondent's position it is now, having been in the UK for over 10 years, proportionate to remove the appellant and his family and it would be in pursuance of an effective immigration control to do so. I do not find that it is. I find the length of time the Appellant has spent in the UK, together with the money invested in his business and the Respondent's acquiescence in him remaining in the UK after the application of July 2018 was lodged means to remove him now would be a disproportionate interference in the family and private life that he has developed in the UK".

6. The First-tier Tribunal thereby allowed the appeal.

7. Having heard the submissions of the parties I am satisfied that this reasoning is unsustainable.

8. The Tribunal appears to give substantial weight to the fact that the Secretary of State has quite properly permitted the Respondents to make human rights claims and allowed them to remain in the country whilst these claims are processed and appealed. It is very difficult to see how that could possibly reduce the public interest in refusing leave to those who do not qualify under the rules: there was for instance no legitimate expectation that leave would flow from the claims. Nor can I readily understand why the Tribunal might have thought that it would add weight to the Respondents' side of the scales: there was no significant delay in the decision being made and so it was not confronted with an EB (Kosovo) type situation in which Article 8 rights had demonstrably strengthened whilst the Home Office dallied. It was an error of law to take this immaterial factor into account.

9. The decision makes no reference at all to s117B Nationality, Immigration and Asylum Act 2002. The Tribunal has referred to "the maintenance of an effective

immigration control" but contrary to the passage cited above, this was not the "one matter" relied upon by the Secretary of State. No consideration was given, for instance, to the injunction that only a little weight may be given to a private life established whilst the subject's immigration status is precarious. That was of material significance in this appeal. It was an error of law to fail to take s117B into account.

10. Two matters are identified that weighed in the Respondent's favour: Mr Malik's relatively long residence and the fact that he has invested a considerable amount of money into his business in the United Kingdom. It may be that in the final analysis, these matters could legitimately weigh in his favour in a properly conducted proportionality balancing exercise. At this stage I am however unable to say that they are of such weight that the errors set out above are rendered immaterial. For that reason I consider that the most appropriate disposal is for the decision to be set aside and the matter remitted to the First-tier Tribunal for hearing *de novo* by a judge other than Judge GD Davison.

Decisions

11. The determination of the First-tier Tribunal contains material error of law and it is set aside.

12. The decision in the appeal is to be remade *de novo* in the First-tier Tribunal by a Judge other than Judge GD Davidson.

13. There is no order for anonymity.

Upper Tribunal Judge Bruce Date 27th October 2020