Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/01002/2019 (V)
HU/01004/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 June 2021	**On 29 June 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MD HABIBUR RAHMAN
MITA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: Mr Karim, Counsel instructed by Liberty Legal Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

2. The appellants are a married couple from Bangladesh. The first appellant came to the UK in 2009 as a student. The second appellant, his wife, joined him as a dependent in September 2016. They have two children born in the UK (in 2017 and 2020).

3. The appellants claim that (a) they are entitled to indefinite leave to remain in the UK under paragraph 276B of the Immigration Rules on the basis that the first appellant has resided in the UK lawfully for over 10 years; (b) removal of the second appellant would violate article 3 ECHR because of her mental health condition; and (c) removal of the appellants and their children would breach article 8 ECHR.

4. Following the refusal their human rights claims on 2 January 2019, the appellants appealed to the First-tier Tribunal. Their appeal was allowed by Judge of the First-tier Tribunal Oliver. However, his decision was set aside and remitted to the First-tier Tribunal. The appeal then came before Judge of the First-tier Tribunal Aldridge ("the judge"). In a decision promulgated on 3 February 2021, the judge dismissed the appeal. The appellants are now appealing against this decision.

Decision of the First-tier Tribunal

Paragraph 276B

5. It was common ground that the first appellant had leave from 13 October 2009 until 24 January 2018, when an application made on 28 January 2017 (varied on 29 June 2017) was refused and certified as clearly unfounded under section 94(1) of the Nationality Immigration and Asylum Act 2002.

6. The first appellant advanced two arguments as to why, notwithstanding that his leave ended on 24 January 2018, he had accrued 10 years of continuous lawful leave. His first argument is that he made a further application on 28 February 2018 (14 days after the refusal decision on 24 January 2018) and therefore he benefited from the 14 day exception under paragraph 39E of the Immigration Rules. The judge rejected this argument because, as the appellant was not granted leave following the application on 28 February 2018, he was an "open ended", rather than "book-ended", overstayer, and therefore, in accordance with *Hoque & Ors v The Secretary of State for the Home Department* [2020] EWCA Civ 1357, he did not meet the conditions of paragraph 276B(i).

7. The first appellant's second argument was that the decision of 24 January 2018 was unlawful and therefore his application of 28 January 2017 (varied on 29 June 2017) remained (and remains) outstanding, and therefore by operation of section 3 Immigration Act 1971 he has accrued 10 years of leave. The reason the appellant maintained that the respondent's decision on 24 January 2018 was unlawful was that it determined his application made on 28 January 2017

rather than the variation of 29 June 2017. The appellant advanced this argument in the First-tier Tribunal even though it was rejected in an application for permission to judicially review the respondent's decision. The decision to refuse permission (in the judicial review application) was made by Upper Tribunal Judge Hanson on 7 September 2018. Judge Hanson found that although the respondent's decision of 24 January 2018 referred to the appellant's original, rather than the varied, application, in substance the varied application was considered fully by the respondent and the appellant's case was not arguably made out. The appellant did not renew the application. The judge rejected this argument on the basis that it was not for him to go behind the decision of Judge Hanson. At paragraph 34 the judge stated:

> "I further reject the argument that the tribunal can, in effect, look behind the decision of the Upper Tribunal when leave to appeal the refusal of the respondent was rejected and, in any event, the appellant was at liberty to appeal that decision of the Upper Tribunal and did not do so."

Article 3

8. It was argued before the First-tier Tribunal that because of her mental health problems removal of the second appellant to Bangladesh would violate article 3 ECHR. Reliance was placed on several reports as well as objective evidence about circumstances faced by people with mental health conditions in Bangladesh. The evidence included, inter alia:

    a. A report by a psychologist, Ms Costa, dated 17 September 2019, who described the second appellant as being very upset and worried about the threat of being returned to Bangladesh. She stated that the second appellant suffered from depression, poor memory, difficulties with concentration and headaches. She noted that the appellant was taking antidepressant medication and has received counselling.

    b. A letter from a doctor in Bangladesh (Dr Mohammed Hunayun) stating that there is very limited provision in Bangladesh for mental health inpatients and that private treatment in Bangladesh "is very much cash".

    c. A report from an expert on Bangladesh, Prof Aguilar, describing a shortage, and inadequacy, of mental health facilities in Bangladesh. The report contrasts private sector to the public sector medical treatment in Bangladesh and concludes that because the second appellant would be reliant on the latter there would not be necessary treatment available to her. The report states that the second appellant's mental health will deteriorate such that she will suffer a significant reduction in life expectancy.

d. A report from a social worker, Mr Chester, who stated that both appellants suffer from depression, which they associate with their uncertain future, and strong desire to avoid returning to Bangladesh. Mr Chester does not appear, from the description of his qualifications, to have any expertise about Bangladesh. Nonetheless, he described the education available to the appellants' child in Bangladesh, based on what the appellants had told him, as worrying, and stated that based on what he had "gleaned" the family will lack access to adequate health, housing and employment.

e. Various reports describing problems with the health system in Bangladesh including in particular the provision of mental health services.

9. The judge found the report of Ms Costa to be reliable and accepted that the second appellant suffers from a depressive illness and that she has been prescribed medication.

10. The judge stated that he had reservations about the report of Prof Aguilar because, inter alia, it was not within Prof Aguilar's expertise to express a view on the appellant's life expectancy.

11. With respect to the social worker report, the judge stated that he treated the conclusions with caution as they were based on a presumption that the family will be destitute and the first appellant will be unable to find employment.

12. The judge concluded in paragraph 42 that the evidence did not establish that the second appellant would face a significant reduction in her life expectancy were she returned to Bangladesh. The judge also found that because the first appellant is highly qualified and would be able to find employment, the second appellant would be able to access (private) medical assistance and medication. The judge also found she would have the support of her family in Bangladesh.

Article 8

13. The judge found that there would not be very significant obstacles to either the first or second appellant integrating in Bangladesh.

14. The judge then assessed the proportionality of the appellants removal. On the public interest side of the scales, the judge found that the appellants speak English and are financially independent and therefore these "public interests" do not weigh against them. The judge gave significant weight, however, to the public interest in the maintenance of effective immigration controls.

15. On the appellants' side of the scales the judge attached only little weight to their private life in the UK as this was established when their immigration status was precarious. The judge gave weight to the second appellant's health but did so in the context of finding that she would be able to obtain support, including from family, in Bangladesh. The judge concluded that "the considerable public interest in maintaining effective immigration control" outweighed the private and family life established by the appellants in the UK.

Grounds of Appeal and Submissions

16. Mr Karim, on behalf of the appellant, has advanced seven grounds of appeal.

17. Ground 1. The first ground of appeal argues that the judge applied the wrong burden of proof in respect of both article 3 and article 8. In respect of article 8, it is submitted that the judge erred by stating (in paragraph 18) that the burden was on the appellants when the correct legal position is that once the appellants have shown article 8 is engaged the burden lies with the respondent to show that removal is lawful and proportionate. With respect to article 3, it is argued that the judge erred by failing to recognise that it was for the respondent to show that treatment and medication is available in Bangladesh in accordance with the procedural requirements required in Article 3 cases as set out in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17.

18. Ground 2. The second ground argues that the judge, when assessing the appellant's argument that he satisfied the conditions of paragraph 276B, failed to engage with the argument that the first appellant's application of 28 January 2017 (varied on 29 June 2017) remained (and remains) outstanding, and therefore by operation of section 3 Immigration Act 1971 he has accrued 10 years of leave. It is also argued that the judge erred by treating Judge Hanson's decision as binding.

19. Ground 3. The third ground of appeal argues that the judge (a) failed to take Ms Costa's opinion into consideration when assessing Article 8; (b) did not give adequate reasons for rejecting Prof Aguilar's report; and (c) did not adequately explain why the social worker report was not accepted.

20. Ground 4. The fourth ground of appeal argues that the judge erred in respect of article 3 by speculating about the first appellant's ability to obtain work, not considering the Covid situation, not addressing the lack of childcare and not considering the inadequacy of medical treatment.

21. Ground 5. The fifth ground argues that the judge, when assessing paragraph 276ADE(1)(vi), failed to properly consider whether the appellants would be able to integrate. It is argued that the judge did not consider the stigmatisation of mental health and Covid situation in Bangladesh.

22. Ground 6. The sixth ground submits that the judge erred because there were no clear credibility findings.

23. Ground 7. The seventh ground submits that the judge failed to adequately explain why he found it to be in the best interests of the children to relocate to Bangladesh when this was inconsistent with Prof Aguilar and "purely speculative".

Analysis

24. At the hearing, I heard submissions from Mr Karim, on behalf of the appellant, and Ms Everett, on behalf of the respondent. I reserved my decision.

25. Having carefully considered the arguments made before me, as well as the evidence that was before the First-tier Tribunal, I am satisfied that the judge did not materially err and therefore the decision of the First-tier Tribunal should stand. Rather than address Mr Karim's arguments sequentially, I have structured my analysis in the same order as the judge: by looking first at paragraph 276B, then at Article 3, and then at Article 8.

Paragraph 276B

26. The first appellant's leave to remain in the UK ended on 24 January 2018. By that date, he had not been lawfully resident in the UK for 10 years.

27. In the First-tier Tribunal, the appellant sought to overcome this by advancing two arguments. The first argument was that, because the first appellant made a further application on 28 February 2018 (14 days after the refusal decision on 24 January 2018), he benefited from the 14 day exception under paragraph 39E of the Immigration Rules. Applying *Hoque*, the judge found that this argument could not succeed because the appellant was not granted leave following the application on 28 February 2018 and therefore he was an "open ended", rather than "book-ended", overstayer. Mr Karim has not challenge this finding.

28. The second argument (which was pursued before me by Mr Karim) is that the decision of 24 January 2018 was unlawful and therefore the appellant's application of 28 January 2017 (varied on 29 June 2017) remained (and remains) outstanding, and therefore by operation of section 3 Immigration Act 1971 he has accrued 10 years of leave. Relying on *Patel (historic injustice; NIAA Part 5A*) [2020] UKUT 00351(IAC), Mr Karim also argued that the unlawfulness of the respondent's decision of 24 January 2018 was a "historical injustice", which should have been taken into consideration in the article 8 assessment.

29. The difficulty with Mr Karim's argument is that, for the clear and cogent reasons given by Judge Hanson, the respondent's decision of 24 January 2018 was not unlawful. Although the respondent's decision did not refer to the variation on 29 June 2017, it is plain, as explained by Judge Hanson, that the decision of 24 January 2018 addressed in substance the varied application. There was nothing before the judge (just as there is nothing before me) to warrant a different conclusion to that reached by Judge Hanson. The judge was therefore clearly entitled to find that the appellant's leave ended on 24 January 2018 (the decision on that date being lawful); and, therefore, that he did not satisfy the requirements of paragraph 276B(i).

30. For these reasons, the appellant cannot succeed on the basis of ground 2.

Article 3

31. In order to resist removal under article 3, the second appellant needed to provide medical evidence capable of demonstrating (ie she had to raise a prima facie case) that there were substantial grounds for believing she would be exposed to a serious, rapid and irreversible decline in her health in Bangladesh resulting in intense suffering or a significant reduction in life expectancy as a result of the absence of appropriate medical treatment. As is made clear in paragraph 32 of *AM*, the prima facie case made by the appellant must be such that if not challenged or countered it would establish the infringement of article 3. As explained in paragraph 33 of *AM*, it is only where an appellant presents evidence to this standard that it falls to the respondent to challenge or counter it by, inter alia, providing evidence about the availability of treatment in the receiving state.

32. The medical evidence submitted in respect of the second appellant does not, on any legitimate view, come even close to establishing a prima facie case that removal would violate artice 3. At its highest, it shows that she suffers from depression for which she is prescribed antidepressants and counselling. It is fanciful to suggest that the evidence that was before the First-tier Tribunal was capable of meeting the high article 3 threshold. As a prima facie case had not been made, it was not necessary for the respondent to adduce evidence to counter it. The grounds of appeal that seek to challenge the decision in respect of article 3 therefore have no merit.

Article 8

33. Mr Karim argues that the judge erred in respect of the burden of proof. I disagree. Although the self-direction in paragraph 18 refers only to a burden on the appellant, it is plain, when reading the decision as a whole, that the judge approached article 8 correctly.

34. The first task for the judge was to assess whether the appellants would face very significant obstacles integrating in Bangladesh (the test in paragraph 276 ADE(1)(vi)), the burden being on the appellants to establish this. The judge gave a range of reasons why they would not face significant obstacles. These were (a) they would have the emotional support of the second appellant's family, (b) the second appellant, once in Bangladesh, would no longer face the stress and uncertainty of her current situation, (c) the appellants both have meaningful ties to Bangladesh and speak the language, and (e) the first appellant is highly educated and would be in a position to obtain employment. These are sustainable findings that were open to the judge, which justify the conclusion reached – that the threshold of "very significant obstacles" was not met.

35. The judge also, in my view, plainly approached article 8 "outside the Rules" correctly. He took into consideration the factors listed in section 117B of the Nationality Immigration and Asylum Act 2002, the best interests of children, the second appellant's mental health, and the availability of family support. Having identified the relevant and material considerations, the judge balanced them and found that the public interest in the maintenance of effective immigration control outweighed the private and family life of the appellants in the UK.

36. The specific challenges in the grounds to the article 8 assessment are not sustainable because the judge was entitled to find that:

    a. a person with the first appellant's education, background and experience would be able to find work in Bangladesh;

    b. the (relatively modest) medical needs of the second appellant (antidepressants and therapy) could be paid for privately by the first appellant;

    c. the report of Prof Aguilar was not of significant assistance because he mistakenly assumed that the appellants would be destitute and unable to access private medical care;

    d. the report of Mr Chester added little of value to the assessment given he lacked expertise on the situation in Bangladesh;

    e. it is in the interests of very young children to remain with their parents in the country of their nationality where they have the benefit of extended family; and

    f. objective evidence about stigmatisation of mental health and the mistreatment of the severely mentally ill in Bangladesh did not materially support the second appellant's case as she would have the

support of her husband and extended family in Bangladesh and did not have a mental illness of the type and severity that the objective evidence indicates might lead to mis-treatment.

37. The grounds raise numerous challenges but, ultimately, cannot succeed because the judge applied the correct legal framework to evaluating article 8, engaged with the material evidence, and made sustainable findings supported by adequate reasons. The grounds do not identify any material errors.

Notice of decision

38. The appeal is dismissed. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 23 June 2021