Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03969/2020**

THE IMMIGRATION ACTS

Heard at: Field House
On: 27 September 2021

Decision & Reasons Promulgated
On: 08 November 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHIFUL ISLAM

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr J Martin, instructed by Londonium Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Islam's appeal against the Secretary of State's decision of 10 February 2020 refusing his human rights claim/ application for indefinite leave to remain on the basis of long residence.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Islam as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Bangladesh, born on 31 January 1985. He entered the UK on 25 September 2009 with leave to enter as a Tier 4 student until 30 June 2011. He was granted further leave as a Tier 4 student until 4 August 2012 and as a Tier 1 post-study work migrant until 25 August 2014. On 23 August 2014 he applied for further leave to remain as a Tier 1 Entrepreneur but his application was refused on 8 December 2014 and an appeal against that decision was dismissed by the First-tier Tribunal on 24 July 2015. The appellant was refused permission to appeal to the Upper Tribunal and became appeal rights exhausted on 5 January 2016. On 1 February 2016 the appellant applied for leave as a Tier 2 general migrant, with his partner as his dependent. His application was refused on 7 June 2016 and that decision was maintained on an Administrative Review on 6 July 2016.

4. On 5 February 2020 the appellant submitted an application for indefinite leave to remain on the basis of ten years' continuous lawful residence in the UK. It was stated in the lengthy submissions accompanying that application, with regard to the appellant's previous Tier 2 application, that the application had failed because the sponsor, a restaurant Tamarind (South West) Limited Trading as "Viceroy", had its licence revoked by the Home Office. It was submitted that, in accordance with the arguments made to the Supreme Court in Pathan & Anor v Secretary of State for the Home Department [2018] EWCA Civ 2103, and in reliance upon the principles in Patel (revocation of sponsor licence - fairness) India [2011] UKUT 211, he should have been given at least 60 days' leave in which to make a new application since he had been unaware of the sponsor's licence having been revoked. It was submitted that, on a correct application of the immigration rules and the law, the appellant had not overstayed and had accumulated ten years' lawful residence in the UK. Further, there were very significant obstacles to the appellant's integration in Bangladesh, including a risk of prosecution due to family debts in Bangladesh and his lack of connections to that country, having lived in the UK for many years.

5. The appellant's application was refused on 10 February 2020. The respondent considered that the appellant did not meet the requirements for indefinite leave to remain on the basis of long residence under paragraph 276B of the immigration rules as his valid leave to remain came to an end on 25 August 2014 and his 3C leave came to an end on 5 January 2016 when he became appeal rights exhausted. At that point he had only resided in the UK for six years and four months. The respondent considered that, whilst the appellant had made an application on 1 February 2016 for Tier 2 leave within 28 days of his leave ending, he could not benefit from paragraph 39E of the immigration rules. As for Article 8, the respondent considered that the appellant was not eligible to apply as a partner or parent under Appendix FM as his partner was not British or settled in the UK and his daughter had not lived in the UK for seven years. The respondent considered further that there were no very significant obstacles to the appellant integrating in Bangladesh and that he could not meet the requirements of paragraph 276ADE(1) on the basis of his private life. The respondent considered further that there were no exceptional circumstances which would render refusal a breach of Article 8.

6. The appellant appealed against the refusal decision and his appeal was heard by First-tier Tribunal Judge Abebrese on 29 March 2021. The appellant gave oral evidence at the hearing before the judge. The judge noted that the appellant's wife had been in the UK

since 2013 and their daughter was born on 30 June 2016. The appellant gave evidence that he owed £8000 on his Barclaycard and did not know how he would pay it back. He claimed that his immigration situation was affecting his mental health.

7. Judge Abebrese accepted that the appellant met the requirements of the immigration rules. He found that the appellant's application for Tier 2 leave had been made with a valid certificate of sponsorship which had become invalid after the sponsor's Tier 2 licence was revoked by the Secretary of State on 21 April 2016 and that he should, therefore, have been granted 60 days of leave in order to find another sponsor. The judge found that the respondent had made an error of law by not doing so. The judge found further that the appellant would face insurmountable obstacles if he were to return to Bangladesh. He had formed strong connections in the community in the UK and had been away from Bangladesh for a long time such that he would find it difficult to integrate into that country. The requirements of paragraph 276ADE(1)(vi) were therefore met. In the alternative the judge found there to be exceptional circumstances outside the rules because of the appellant's family life formed in the UK and the unjustifiably harsh consequences of removal. He allowed the appeal.

8. The respondent applied for permission to appeal to the Upper Tribunal on the basis that the judge had failed to provide reasoning as to why removal to Bangladesh would result in unjustifiably harsh consequences for the appellant and his family and what those consequences were. The judge's findings on paragraph 276ADE(1)(vi) and proportionality outside the immigration rules were flawed.

9. Permission was granted by the First-tier Tribunal on 22 June 2021.

10. The appellant did not produce a rule 24 response. However, he made an application to adduce further evidence, pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, in the form of medical evidence confirming his wife's miscarriage on 28 August 2021 which resulted from the mental stress of the uncertainty of their immigration status.

11. The matter then came before me for a face-to-face hearing.

The Hearing

12. Both parties made submissions on the error of law. Ms Isherwood submitted that the judge was wrong to find that the appellant met the requirements of the immigration rules when he clearly did not. She relied on the case of The Secretary of State for the Home Department v Ali [2021] EWCA Civ 1357 in submitting that he could not use paragraph 39E of the immigration rules to bridge the gap in his leave. The judge was also wrong to find that the appellant should have been given 60 days leave when Pathan did not suggest that he should. The judge had applied the wrong test when considering paragraph 276ADE(1)(vi) at [18] and had failed to explain why this was an exceptional case.

13. Mr Martin submitted that the appeal had effectively been allowed on long residence grounds. The judge had found that there had been procedural unfairness in the absence of notice to the appellant of the revocation of the sponsor's licence in his Tier 2 application

and therefore the refusal of his Tier 2 application had been unlawful. Had that application been successful the gap in his residence would have been permitted. The respondent's grounds had not included any challenge to the judge's findings in that regard and had only challenged the judge's findings on paragraph 276ADE(1(vi) which were accordingly immaterial in the absence of a challenge to the findings at [16] and [17]. Mr Martin accepted that the reasoning in [18] was inadequate but he submitted that the judge had clearly accepted the appellant's evidence which had included various significant difficulties he would face on return to Bangladesh including his wife's family's disapproval of their marriage and his own family's financial hardship endured as a result of his studies in the UK. When taking that together with the procedural unfairness issues identified at [16] and [17] there was sufficient to entitle the judge to allow the appeal.

14. Ms Isherwood, in response, submitted that the judge had not made any findings on the appellant's evidence and it could not be assumed that he had accepted his account of the difficulties he would face in Bangladesh.

15. I asked the parties for their views on the disposal of the appeal in the event that I set aside the judge's decision. Mr Martin was content that all the evidence was available before me and that I could re-make the decision on the basis of that evidence without a further hearing. Ms Isherwood was content for me to re-make the decision and she made further submissions. She asked me to dismiss the appeal as the appellant could not meet the requirements of the immigration rules and the evidence did not demonstrate that there were very significant obstacles to integration in Bangladesh or that there was any basis of stay in the UK. Mr Martin, in response, submitted that there was evidence supporting the appellant's account and showing the difficulties he would face in Bangladesh.

Discussion

Error of Law

16. I have no hesitation in concluding that Judge Abebrese's decision cannot stand and must be set aside. It is clear that the appellant cannot meet the long residence requirements of the immigration rules and the judge gave no explanation why he concluded at [16] that the requirements of the rules were met. His findings are confused and difficult to understand, but appear to be based upon a misconceived interpretation of the judgment in Pathan, whereby it was found that procedural unfairness arose from the respondent's failure to give notice of the fact that the sponsor's licence had been revoked and failure to give the appellant an opportunity to rectify his situation and avoid becoming an overstayer. However this appellant is in a very different position to Mr Pathan, in that he was an overstayer when he made his application for Tier 2 leave and was a person whose leave had been extended since 25 August 2014 under section 3C of the Immigration Act 1971, ending on 5 January 2016 when he became appeal rights exhausted following an unsuccessful application and appeal. He had not been an existing employee of his sponsor, as Mr Pathan was, and the Supreme Court made it clear at [71] that they were not concerned with a new applicant or an applicant for a new position. Section 39E of the immigration rules which Judge Abebrese clearly relied upon at [16], albeit not mentioning it in terms, did not assist the appellant in bridging gaps in his residence for the

purposes of paragraph 276B. That was made clear in the judgments in Hoque & Ors v The Secretary of State for the Home Department) [2020] EWCA Civ 1357 and Waqar Ali [2021] EWCA Civ 1357.

17. Mr Martin sought to resist the challenge in that regard on the basis that it did not form part of the grounds of appeal. The grounds were clearly not well-drafted, but there is certainly no indication therein that the judge's findings as to the requirements of the rules being met were accepted – indeed ground 2 refers to the judge having failed to give significant weight to the public interest in maintaining immigration control by applying the existing rules. It seems therefore that the relevant challenge was made as part and parcel of the challenge to the judge's proportionality assessment and I find that challenge to be made out.

18. As for the judge's findings on paragraph 276ADE(1)(vi) and the issue of 'very significant obstacles to integration', there can be no doubt that the findings at [18] were wholly unsatisfactory and showed a misunderstanding of the high threshold to be met for the purposes of the relevant test. Mr Martin asked me to accept that those findings also took account of all the evidence at [14] to [16] about the appellant's family's financial circumstances, his wife's family rejection of their marriage and other difficulties. However I agree with Mr Isherwood that it would wrong to extrapolate the judge's findings and make such assumptions, when there were no findings on that evidence.

19. In any event, even if those matters were all taken into account and accepted, there is still no proper basis for saying that they amounted to very significant obstacles to integration. The evidence produced suggests nothing more than difficulties adjusting to a return to Bangladesh but there is no reason why the appellant would be unable to re-establish his life in Bangladesh with his wife and daughter and find a job there and support his family. His rejection by his wife's family, even if true, cannot be considered to be a significant obstacle to integration. He has his father in Bangladesh who has always tried to support him in the past. His daughter could attend school in Bangladesh and the mental strains of his unknown immigration status would dissipate. There is no evidence to suggest that the appellant and his wife suffer from any significant medical or psychological conditions beyond anxiety and stress at the uncertainty of their status. Neither could it possibly be said that the additional factors considered by the judge at [19] of his decision amounted to compelling or exceptional circumstances outside the rules. The appellant's daughter has not been in the UK for seven years and there is no evidence to suggest that her best interests lie in anything other than being with her parents. There was simply nothing in the evidence before the judge which went anywhere near demonstrating compelling or exceptional circumstances and the judge's decision fails to provide any reasons for having concluded as he did.

20. Accordingly I set aside Judge Abebrese's decision on the basis that it contains numerous errors of law.

Re-making the Decision

21. As already stated above, both parties were content for the decision to be re-made on the basis of the evidence before me together with the additional submissions made, without a further hearing.

22. The appellant cannot meet the requirements of the immigration rules. He has been in the UK as an overstayer from the date his appeal rights were exhausted on 5 January 2016. He has accumulated only eight and a half years of lawful residence in the UK. He has not made a successful application for leave to remain since the expiry of his Tier 1 leave on 25 August 2014 and his leave has been extended by 3C leave and further periods as an overstayer. There is no evidence to suggest that he would face very significant obstacles to integration in Bangladesh and I refer to the observations and findings above in that regard. There is very little to balance against the public interest in his removal and certainly nothing of a compelling or exceptional nature which could justify a grant of leave outside the rules. Again, I refer to the observations and findings above in that regard.

23. The appellant relies upon further evidence in the form of confirmation of his wife miscarrying their baby on 28 August 2021. The appellant claims that the miscarriage occurred as a result of the mental pressures arising from their immigration status. The medical evidence shows in fact that the pregnancy was terminated for fetal abnormalities on 26 August 2021 rather than a miscarriage and that this followed the detection of an abnormality in the brain. There is nothing to suggest that that was a result of any mental trauma by the appellant's wife. In any event, as tragic as the termination is, I cannot see how that would possibly amount to compelling circumstances justifying a grant of leave outside the immigration rules, even when taken together with all the other factors relied upon the appellant as mentioned above.

24. Accordingly, the respondent's decision is a proportionate one and does not give rise to a breach of the appellant's Article 8 human rights. The appeal has to be dismissed.

DECISION

25. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside. I re-make the decision by dismissing Mr Islam's appeal.

Anonymity Order

There being no reason for this case to be anonymised, as agreed by the parties, the anonymity order previously made by the First-tier Tribunal is hereby discharged.

Signed: *S Kebede*
Upper Tribunal Judge Kebede Dated: 4 October 2021