



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09222/2014

THE IMMIGRATION ACTS

Heard at North Shields
On 25 February 2015
Prepared on 26 February 2015

Decision and Reasons Promulgated
On 5 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

B. R.
(ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Ms Vidvadhanan, Home Office Presenting Officer
For the Respondent: in person

DECISION AND REASONS

1. The Respondent is a citizen of Bangladesh, now aged 18. He entered the UK in August 2008 as a visitor at the age of 12, using what he accepts was a legitimate Bangladesh passport and visa for entry to the UK, issued in his own name. He says that the individuals with whom he travelled were not related to him, although they were represented at the time of the visa application, and at the date of entry, to be his father, mother and younger sister.

2. The Respondent says that he was housed and cared for as an act of charity by a Bangladeshi family from the date of his entry into the UK until mid 2010. He denies that he is related to any member of that family, or that they were anything other than strangers that he had approached by chance for assistance.
3. In mid 2010 the Respondent was referred to East Sussex social services, and thereafter he has been a "looked after" child, housed with foster parents. He was enrolled in school upon arrival in the UK in 2008, and he is presently studying for A levels which ordinarily he would sit in May 2015.
4. In July 2010 an application was made by the Respondent, or on his behalf, for asylum. That application was refused, although in accordance with the Appellant's policy he was granted a period of three years discretionary leave to remain as an unaccompanied minor until November 2013. That leave expired without an application being made for its variation.
5. On 14 April 2014 the Respondent made an application for a grant of leave to remain based upon his Article 8 rights, but this was refused on 29 September 2014, and in consequence a decision was made by the Appellant by reference to s47 to remove him to Bangladesh. Although it is not clear, it is possible that the Appellant accepting that the Respondent was still a child, took no point in relation to the expiry of the previous grant of leave.
6. The Respondent's appeal against those immigration decisions was heard on 5 December 2014. It was dismissed on asylum and humanitarian protection grounds, but allowed on Article 8 grounds, in a Decision promulgated on 30 December 2014 by First Tier Tribunal Judge Shanahan.
7. By a decision of First Tier Tribunal Judge Simpson dated 19 January 2015 the First Tier Tribunal granted the Appellant permission to appeal on the basis it was arguable the Judge had erred in his approach to the Article 8 appeal; having arguably embarked upon a "free wheeling approach", having failed to apply s117B(5) of the 2002 Act, and having failed to identify why in the context of the findings of fact that he had made the removal to Bangladesh would result in unjustifiably harsh consequences for the Respondent.
8. Thus the matter comes before me.
9. The Respondent is not legally represented as a result of his own choice. As a "looked after" child he believes that he has the right to require the local authority to provide suitably qualified and experienced legal representation for him, but he told me that he wished to make his own arguments upon his appeal. I was content for him to do so, and I then had the benefit of well prepared, pertinent, and succinct submissions upon the nature

of his life in the UK, and the use that he had made of the opportunities that had been extended to him.

The unchallenged findings of primary fact

10. The Respondent has brought no cross appeal against the rejection of his asylum, Article 3, and humanitarian protection appeals.
11. There is no challenge from either party before me in relation to the Judge's findings upon the following matters, which I am satisfied were well open to him to make on the evidence before him, and which were adequately reasoned by him;
 - i) Although the Respondent might believe that there existed some danger for him in Bangladesh he had no well founded fear of persecution in the event of return [29].
 - ii) The Respondent was not the subject of threats of kidnapping in Bangladesh in order to extort money from his father prior to his departure from Bangladesh [33].
 - iii) Even if the Respondent was now an atheist he would not suffer persecution as a result of those views in the event of return to Bangladesh [50].
 - iv) The Respondent had not told the truth about his parents having cut off contact with him, either before, or after, his departure from Bangladesh [30].
 - v) The Respondent had not told the truth about his abandonment by an agent upon arrival in the UK, and then his ability to find by chance a Bangladeshi family who were strangers to him, who would care for him for so long. In turn he had not told the truth when he had claimed to have subsequently lost contact with that family [32].
 - vi) The Respondent was brought to the UK at the direction of his parents, even if that was effected by agents rather than them in person, and had been placed with the family with whom he had initially lived in the UK. Those steps were taken for the purpose of his educational and economic advantage [33].
 - vii) The Respondent did not satisfy the requirements of paragraph 276ADE, and did not otherwise qualify for a grant of leave to remain under the Immigration Rules, or Appendix FM thereto; either when he had made his applications for

leave, or, when his appeal was heard by the Tribunal.

12. It is a necessary consequence of his findings that the Judge made the adverse finding that the Respondent was in truth in contact with the members of his extended family, and that he could therefore be reunited with them upon return to Bangladesh, notwithstanding the fact that he had as yet not provided the details that would allow his family to be traced and identified.
13. These findings should have been the context in which the Article 8 appeal was considered by the Tribunal outside the Immigration Rules.
14. It was not suggested before the Tribunal that the decision to remove the Respondent to Bangladesh posed an interference in any “family life” established by the Respondent in the UK with either relatives (that would of course have been contradictory to his case about having no contact with them), or with the members of his foster family. The appeal was therefore quite properly considered by the Tribunal solely on the basis that the removal decision constituted interference in the Respondent’s “private life”.

Error of Law?

15. The Judge did accept that there was an established “private life” in the UK [41] and that the removal decision would amount to an interference in it to such an extent that it would engage his Article 8 rights. The decisions under appeal were however properly made pursuant to the Immigration Rules. Thus he considered that the outcome of the appeal turned upon the issue of the proportionality of the removal decision.
16. In consequence of his acceptance that this was only ever a “private life” appeal, the Judge ought to have considered the issue of proportionality in the light of the terms of ss117A-117D of the 2002 Act, and, the guidance to be found in the decision of the Supreme Court in Patel [2013] UKSC 72. Whilst s117B is set out in full within the Decision (even those subsections that have no obvious relevance to the appeal), I am not satisfied that there is an adequate analysis of the evidence in the light of the relevant statutory provisions, and thus it is not possible from the Decision to see how the Judge has applied the relevant provisions to the evidence before him in the light of the adverse findings of fact that he made. There is also no reference in the Determination to the guidance to be found in Patel, although the following statements of principle were in my judgement relevant to the evidence before him;

“a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit” [56].

“It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State’s discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ’s call in *Pankina* for “common sense” in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.” [57]

17. In my judgement, although the Judge’s initial approach to the Article 8 appeal was quite properly to direct himself that the Respondent could not meet the requirements of the Immigration Rules for a grant of leave to remain, and that “*there is significant weight on the Secretary of State’s case for removal*”, he nonetheless fell into error in his approach to the proper context in which that Article 8 should be considered. Article 8 did not afford either the Respondent, or the Tribunal, the opportunity to simply sidestep, or to otherwise ignore, the consequences of the adverse findings of fact that he had made earlier. The proper factual context in which the Article 8 appeal should have been considered were the findings that led to the rejection of the asylum and Article 3 appeals.
18. It followed that the proper context was that this young man could be returned to Bangladesh in safety, and, since he had never lost contact with his family, that he could be reunited with them upon return.
19. Whilst the Respondent had been cared for, and educated, in the UK at considerable public expense as a result of the actions of his parents, the fact that he wished to continue to be cared for, and to continue to further his education, at further public expense was not a good reason for the Appellant being required to facilitate that desire. As the Court of Appeal pointed out in *EV (Philippines)* [2014] EWCA Civ 874 the UK cannot be expected to educate the world, any more than it can be expected to provide health care facilities to the world. The Respondent had no right, or legitimate expectation to education at public expense in the UK.
20. It is plain from the Decision, even when it is read as a whole, that this was not the context in which the Article 8 appeal was considered. On the contrary great weight was attached by the Judge to the success that the Respondent had made of the opportunities that he had been given in the UK, and particularly to his interest in cricket, and to his assimilation into British culture. Thus very significant weight was given to the “private life” established in the UK, despite the clear terms of s117B.

21. Moreover, inconsistently with his findings in paragraphs 30, 32 and 33, the Judge in the course of his discussion in paragraph 51, appears to have considered the proportionality of the removal decision on the basis that the Respondent was a young man who had enjoyed no contact with his family since his arrival in the UK in 2008 at the age of 12, and who would have no family support system that he could access in Bangladesh upon his return. It was simply not open to the Judge to change tack in that way, and the clear impression is given that he overlooked the adverse findings of fact he had earlier made in the course of his rejection of the asylum appeal.
22. Even if it were open to the Judge to find that a young man who had lived in Bangladesh to the age of 12, and then with a Bangladeshi family to the age of 14, could genuinely have lost fluency in Bengali by the age of 17 (as the Judge appears to have found in the course of paragraph 50) – even the Respondent accepted in the course of his oral evidence that he could acquire full spoken fluency upon return to Bangladesh, although it would take him longer to attain written fluency.
23. Accordingly I am satisfied that the Judge considered the Article 8 appeal in the wrong factual context. Thus, the Tribunal's decision on the Article 8 appeal must be set aside and remade.

The decision remade

24. If that were my decision the parties were agreed that I could go on and remake the decision upon the Article 8 appeal without the need to hear any further evidence, or to revisit the findings of primary fact. There was no material change in circumstances on the Respondent's part since the date of the hearing. The parties were content that I should give written reasons for the remade decision.
25. There is no need to repeat the immigration history of the Respondent, or the adverse findings of fact made in relation to him by the Judge.
26. The Respondent is now an adult, having attained the age of eighteen before the appeal hearing in the First Tier Tribunal. Even if he had remained a child, the Tribunal's approach would have to be consistent with the guidance to be found in the decision in EV. Thus the assessment of his best interests would have to be made in the context that he is a Bangladeshi national with no right to remain in the UK, and whose parents are either in the UK illegally with no right to remain, or in Bangladesh. He is in contact with them and thus has the ability to be reunited with them in Bangladesh. He has benefited from both care and education at public expense in the UK since arrival. He has no right, or legitimate expectation to continue to receive education

at public expense in the UK, and he would face no lack of safety in the event of return to Bangladesh.

27. I bear in mind that the Respondent is the majority of the way through working towards his A level examinations. There is however no evidence that would permit a finding that he could not complete his preparation for those examinations from Bangladesh, or that he could not sit those examinations in Bangladesh. Indeed, as things stand at present he is unable to sit those examinations in the UK because he has no leave to remain.
28. To the extent that the Respondent has hopes for a University education in the UK, he acknowledges that he has not yet applied for a place at University, because he has no leave to remain, and, is unable to finance such study privately.
29. It obviously would be open to the Respondent to seek a University place in Bangladesh, relying upon the qualifications he has obtained to date, and those he hopes to obtain in the future. If he had access to the requisite funds through his extended family (and he has consistently claimed that his family is wealthy) then he could even apply for entry clearance as a student in order to allow him to study further in the UK.
30. The Respondent is plainly a talented cricketer, but Bangladesh is a nation in which that sport is held in high regard. There are opportunities there for him to pursue his love of that game, even to the extent of making a living from it, should he choose to do so.

Sections 117A, 117B of the 2002 Act

31. Since I am remaking the decision after 28 July 2014 I must (in particular) have regard to the considerations listed in s117B to the 2002 Act when considering whether an interference with a person's right to respect for private life is justified under Article 8(2).
32. I note that the maintenance of effective immigration controls is in the public interest; s117B(1). I also note that little weight should be given to a "private life" established by a person when their immigration status is precarious, or they are in the UK unlawfully; s117B(4)(5). I am satisfied that at all material times the Respondent has either had a lawful immigration status that is nonetheless "precarious" within the meaning of s117B, or, that he has been in the UK unlawfully. Since this appeal only concerns his "private life" Parliament has concluded that the effect is the same, whether he had a lawful immigration status or not.
33. The fact that the Respondent speaks writes and reads English fluently does not mean that he enjoys thereby a right to a grant of leave to remain that he does not otherwise qualify for

- pursuant to the Immigration Rules. Nor does that factor give substance to an Article 8 appeal that is otherwise without merit.
34. The Respondent is not financially independent. Although he believes his family to be a wealthy one, he is dependent upon public funds.

Conclusions

35. In my consideration of the Article 8 appeal pursued by the Appellant I have to determine the following separate questions:
- Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
 - If so will such interference have consequences of such gravity as to potentially engage Article 8?
 - Is that interference in accordance with the law?
 - Does that interference have legitimate aims?
 - Is the interference proportionate in a democratic society to the legitimate aim to be achieved?
36. This is an appeal that turns upon the issue of the proportionality of the decision to remove. I note the guidance to be found upon the proper approach to a “private life” case in the decisions of Patel, and Nasim [2014] UKUT 25. I note the public interest in removal; the following passage in Nasim sets out the relevant principles;
14. *Whilst the concept of a “family life” is generally speaking readily identifiable, the concept of a “private life” for the purposes of Article 8 is inherently less clear. At one end of the “continuum” stands the concept of moral and physical integrity or “physical and psychological integrity” (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state’s interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the “core” of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control.*
15. *At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person’s return to their home country. Thus, in headnote 3 of MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 0037 we find that:-*
- “3. When determining the issue of proportionality ... it will always be important to evaluate the extent of the individual’s social ties and relationships in the UK. However, a student here on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual’s “private life” relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK.”*
16. *As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-*
- “A person’s job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements.”*

17. *The difference between these types of “private life” case and a case founded on family life is instructive. As was noted in MM, the relationships involved in a family life are more likely to be unique, so as to be incapable of being replicated once an individual leaves the United Kingdom, leaving behind, for example, his or her spouse or minor child.*
18. *In R (on the application of the Countryside Alliance) v AG and others [2007] UKHL 52, Lord Bingham, having described the concept of private life in Article 8 as “elusive”, said that:*
“... the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose” [10].
19. *It is important to bear in mind that the “good reason”, which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen’s enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government’s ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.*
20. *We therefore agree with Mr Jarvois that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article’s core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).*
21. *In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, lies at the outer reaches of cases requiring an affirmative answer to the second of the five “Razgar” questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament.*
37. To the extent that the Respondent relies upon his good character, and his desire to complete his education within the UK the following passage in Nasim is applicable;
25. *A further seam running through the appellant’s submissions was that, during their time in the United Kingdom, they had been law-abiding, had not relied on public funds and had contributed to the United Kingdom economy by paying their students’ fees. Their aim was now to contribute to that economy by working.*
26. *We do not consider that this set of submissions takes the appellants’ cases anywhere. It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person’s right to remain here in reliance on Article 8.*
27. *The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants’ removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, for*

reasons we have already enunciated, as a general matter that public interest factor is, in the circumstances of these cases, more than adequate to render removal proportionate.

38. To sum up then, the appeal does not rely upon the core concepts of moral and physical integrity. In my judgement the evidence relied upon does not establish that there are any compelling compassionate circumstances that mean the decision to remove the Respondent to Bangladesh, leads to an unjustifiably harsh outcome.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 30 December 2014 did not involve the making of an error of law in the decision to dismiss the asylum and humanitarian protection appeals and that decision is accordingly confirmed.

The Determination did however involve the making of an error of law in the decision to allow the Article 8 appeal that requires that decision to be set aside and remade. I remake that decision so as to dismiss the appeal on Article 8 grounds.

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Respondent is granted anonymity in the interests of his son. No report of these proceedings shall directly or indirectly identify any member of the family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 26 February 2015