



IAC-AH-KEW-V1

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

Appeal Number: AA/12954/2015

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated
On 28th April 2016**

Reasons

On 14th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR JAKIR AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the : Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Ms K Hacker, Legal Representative

DECISION AND REASONS

EX TEMPORE JUDGMENT

1. The Secretary of State brings this appeal against a decision of First-tier Tribunal Judge Mill's decision promulgated on 25th February 2016 allowing this Bangladeshi claimant's appeal on Article 8 grounds outside of the rules. The disputed refusal followed an application to extend discretionary leave granted when a minor in the context of an earlier refusal of asylum.

2. Permission was granted on the ground that the judge had failed to apply Section 117B of the 2002 Act correctly in that the judge had given weight to the claimant's private life which had been accrued in the context of precarious leave in a manner which was inconsistent with the provision of Section 117.
3. Before me there was some elaboration in respect of the argument as to whether or not the judge was entitled to look at the claimant's circumstances outside the remit of the Immigration Rules in any event. The judge expressly did so erroneously finding that the claimant would have been entitled to make and succeed in an application under a discretionary leave policy predicated upon his having completed discretionary leave of six years. Erroneous, as the claimant's representative accepted, when the position was scrutinised, because in fact the claimant has no opportunity to complete six years with discretionary leave before making an application, to the point that the policy has no application to him, and can afford him no benefit.
4. The point as to whether the judge was entitled to proceed to consider Article 8 outwith the rules fell away because Mr Jarvis acknowledged that irrespective of the erroneous understanding outlined above, the judge was entitled to look at the claimant's case outside of the provisions of the Immigration Rules because the character and quality of his family life with his foster parents fell for consideration outside of the remit of Appendix FM and paragraph 276ADE.
5. Mr Jarvis maintained however that the judge had fallen into error in bringing forward his mistaken belief as to applicability of the benefits of the discretionary leave policy and the opportunity of the claimant to succeed under the terms of it, into the overall balancing exercise conducted in respect of the wider Article 8 ECHR assessment. Outside of that erroneous understanding the facts revealed an insufficient basis upon which to allow the appeal as per s 117.
6. In response Ms Hacker argued that looking at the judge's decision in the round, and accepting the finding of no entitlement under paragraph 276ADE, the judge was entitled, having opened the door to the wider ambit of Article 8, to revisit the position as he found it to be in respect of the claimant's private life, and to give weight to his relationship with his foster parents, and cumulatively to find that the particular strength of the claimant's private life allowed for a different outcome. The overall consideration followed sufficiently correct self-direction, accurate findings of fact and an appreciation of the factors set out at Section 117, to the point that the judge had not made any material error.
7. Both representatives were in agreement that in the event that I found that there was an error that I would be in a position to re-make the decision and there being no application to submit further or additional evidence that I would be in a position to do so today.

8. In my consideration I note firstly that the judge considered the position under the Rules and concluded that there were not very significant obstacles to the integrating or re-establishing himself in Bangladesh, and the judge had set out those conclusions in some detail following consideration of why it is that he has chosen not to be in contact with his family in Bangladesh and the support that he had had from foster parents and the State in the United Kingdom through Norfolk Children's Services, the qualifications that he has obtained and his enjoyment of various sporting activities in the United Kingdom. The judge finds at [29] to [31]:

"29. The Appellant is a native citizen of Bangladesh. He was brought up there until the age of around 11/12 years. He was educated there. The Appellant, I believe, will retain a good command of the Bengali language which would enable him to communicate with others readily and enable him to establish life there.

30. The Appellant is ambitious and determined. He has a number of skill sets having undertaken his secondary and tertiary education, participated actively in a range of sports and undertaken vocational training. He is unlikely to return to impoverished village life but instead seek to establish himself in the capital of Dhaka."

31. I believe that the Appellant could, with a degree of difficulty, establish a meaningful life for himself in Bangladesh. He may be deeply unhappy about the prospect and have a lack of desire initially but I do not consider, on the basis of all the evidence before me and the facts which I find established, that the Appellant has established that there would be very significant obstacles to his integration into Bangladesh for the purposes of paragraph 276ADE."

9. The judge revisits those issues at [47] and [49] in the context of the ECHR consideration. I am satisfied that in doing so he has given significant weight to his mistaken belief set out at [36] of his decision and set out at [37] of his decision that the claimant would have the opportunity, or would be entitled to an opportunity, to have the weight of that private life considered again, this time in the context of the Immigration Rules and discretionary leave policy, where Section 117 would not be a significant factor not being relevant to the consideration by the Secretary of State but addressed to the judicial function.
10. I pause to note that although Mr Jarvis had some concerns about the judge's dealings in respect of the historical mental health evidence that was evidence which was not relied upon as having any significant impact in respect of paragraph 276ADE or in respect of the overall balancing exercise. Ms Hacker described it as being something which was in the background of the judge's mind but not something which carried significant weight. I think she is right in that because the judge states in the decision that it would not have a significant impact in terms of the seriousness of the difficulties he would face on return. I say that because it is plain that if he did think so he would have included it at [26] and also

at [31], and it is reflected in his finding that although the claimant might be deeply unhappy about the prospect of return, his mental state carried no additional weight.

11. Ms Hacker took me to [45] and argued that the judge has reached his own assessment with the public interest as reflected by a snapshot of the information set out at [45] i.e. that the public support for the claimant gave a good indication that the public interest lay not in removing him but in allowing him to remain. The difficulty with that approach is that Section 117 fixes the public interest, and it fixes it firmly to the point that those who do not meet the requirements of the Immigration Rules should, without significant countervailing factors, have no other entitlement to remain.
12. I find there has been misdirection with the inclusion of an irrelevant issue in the assessment of proportionality and a failure to take account of the little weight Parliament has indicated a private life developed in the context of precarious leave should have in the overall balance in the context of removal of someone who does not meet the requirements of the Immigration Rules. The correct starting point is the finding in respect of 276ADE. There is no opportunity for a further application in the context of any beneficial policy. On the evidence considered and facts found at the First-tier there are no countervailing factors capable of warranting leave outside of the rules in the context of Article 8 ECHR.
13. It follows that I am satisfied that the judge has fallen into an error of law and that it had been material in the context of the outcome of the decision requiring the decision to be set aside. It falls to me to re-make the decision today and for all the reasons that I have set out above I do so dismissing the claimant's appeal on human rights grounds. There was no counter appeal before me in respect of the Immigration Rules findings and the appeal is already dismissed on those grounds.

Decision

14. The decision of the First tier tribunal reveals a material error and I set it aside and remake it dismissing the Appellant's appeal.

Signed

Date

Deputy Upper Tribunal Judge Davidge