



IAC-FH-AR-V1

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

Appeal Number: IA/43068/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4<sup>th</sup> December 2015**

**Decision & Reasons Promulgated  
On 5<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**MUKUBUR RAHMAN NAYMEE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B Hussain, Counsel, instructed by Zahra & Co Solicitors  
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Bangladesh whose date of birth is recorded as 10<sup>th</sup> March 1979. He first entered the United Kingdom on 23<sup>rd</sup> September 2006 as a student with valid leave to 31<sup>st</sup> January 2010. His visa was extended and on 8<sup>th</sup> August 2012 he was granted leave to remain on the basis of post-study work valid until 8<sup>th</sup> August 2014. On that date, in time, he made application for leave to remain in the United Kingdom outside of the Immigration Rules. The grounds of appeal do not challenge the contention that the application was made outside the rules.

2. On 14<sup>th</sup> October 2014 a decision was made to refuse the application and I note specifically at paragraph 2 of the Decision and Reasons that the judge observed that there was no request for the Respondent to consider the application either under Appendix FM or paragraph 276ADE of the Immigration Rules. Again there is no challenge to that. I also note from the judge's notes that the very first note that he has on his Record of Proceedings is that it was agreed on both sides that the issue for him was Article 8 outside the Rules, being the only issue.
3. The judge therefore looked, as he was required to do, given the basis upon which the appeal had come before him, to the wider application of Article 8. He noted that the Appellant had been educated to university level in Bangladesh, obtaining a law degree, and in the United Kingdom had obtained a level 7 diploma in strategic management and an MBA in innovative management. Although in unskilled employment, the Appellant was noted to be working.
4. Whilst the Appellant relied on an established private life, the judge attached considerable weight to the absence of evidence other than that of the Appellant. He specifically refers to no letters of support and no witness statements from others. That there were no witness statements and no letters of support from others is not in issue; there were none.
5. Having regard to the various factors which the judge considered relevant in respect of which there is an issue, the judge came to the view that the Appellant had simply not made out his case and that the public interest in the Appellant leaving the United Kingdom outweighed the individual circumstances of the case.
6. Not content with that decision, by notice dated 22<sup>nd</sup> May 2015 the Appellant, through his solicitors, made application for permission to appeal to the Upper Tribunal. There are seven subparagraphs relied upon in support of the contention that the judge erred in law but the principal factors, and I do not ignore the others, is that the judge gave undue weight, it is said, to the precariousness of the Appellant's status in the United Kingdom, I refer to paragraph 2(iv), and further, that in making the proportionality assessment the judge did not have sufficient regard, it is submitted, to all of those factors which weighed in the Appellant's favour; those are set out at (v). Importantly it is further submitted that there was procedural unfairness on the part of the judge in attaching weight to the absence of witnesses when if the judge was going to attach such weight he should have alerted the Appellant and his representatives to give them the opportunity to address the deficit.
7. On 10<sup>th</sup> August 2015 Judge of the First-tier Tribunal Hollingworth granted permission. He noted that the weight which had been attached by the judge to the absence of supporting evidence by way of additional witnesses and documents, and also found that it was at least arguable that there was insufficient analysis of the Appellant's own case, that is to

say the individual factors relied upon in the Appellant's contention which would outweigh the public interest considerations.

8. I have listened with care to Mr Hussain. He submits that it was not open to the judge to come to the conclusion that he did given the eventual finding, and it is Mr Hussain's submission that absent the failure on the part of the judge to analyse sufficiently those factors, there would have been a different outcome.
9. Mr Hussain further invited me to find, although it was not clear to me whether he maintained that position, that in looking at Section 117B of the Nationality, Immigration and Asylum Act 2002 there were factors set out there which in fact weighed in the Appellant's favour. I observe at this stage that that is a point which was considered in the case of **AM (Section 117B) Malawi [2015] UKUT 0260**. That case provides authority for the proposition that an Appellant can obtain no positive right to a grant of leave to remain from either Section 117B(2) or (3) whatever the degree of fluency in English or the strength of his financial resources. And in fact it is clear to me that 117B is a provision directed towards determining the weight that is to be given to the public interest considerations. When one looks to the wider application of Article 8, the starting point, and this is trite law, is the Immigration Rules and whether or not they have been met. It is common ground in this case that they have not been met. That is the starting point. If, and only if, there is a sufficient gap between the Immigration Rules and the factors relied upon to take the matter outside of the Immigration Rules, ought a Tribunal in fact to go on to consider the wider application of Article 8 although in this case the judge did so.
10. In the case of **VW (Sri Lanka) [2013] EWCA Civ 522** McCombe LJ said at paragraph 12:

"Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal has given a judgment explaining the why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgement, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact."
11. So far as the judge attaching weight to the absence of the additional evidence by way of witness statements or documents, I am assisted by the guidance in the case of **TK (Burundi) -v- Secretary of State for the Home Department [2009] EWCA Civ 40** in which the Court of Appeal said that where there were circumstances in which evidence corroborating the Appellant's evidence was clearly or easily obtainable the lack of such evidence must affect the assessment of the Appellant's credibility. It followed that where a judge in assessing credibility relied on the fact that there was no independent supporting evidence where there should be, and there was no credible account for its absence, he committed no error

of law when he relied on that fact for rejecting the account of the Appellant.

12. In this case it is clear from the judge's notes that in the course of cross-examination it was put to the Appellant whether there were other people at court. He said that there were not. In the course of closing submissions the Home Office Presenting Officer took the point, yet no application was made on behalf of the Appellant by his representatives to adduce any further evidence. I cannot know whether the application would have been successful but the failure to make that application renders the point that the judge acted unfairly, a point without substance.
13. I turn then to whether the findings of the judge were open to him. Quite properly the judge had regard to paragraph 117B. The public interest considerations did lead to a view that the public interest required removal. As I have already said, factors which are not met do not weigh to the advantage of the Appellant, it is simply that they did not weigh against him. The lesser of the factors in 117B, the fact that an Appellant offends the less evidence he would need to bring in support of the individual circumstances.
14. In this case the judge took the view that the evidence was insufficient. It is suggested that the judge did not have regard to all of the factors. I disagree. It was perfectly proper for the judge to find on the basis of the evidence being the Appellant's qualifications that he would be able to earn a living in his home country, indeed the evidence was that he was working in unskilled employment in the United Kingdom. It was also open to the judge to have regard to the fact that the Appellant had family in his home country.
15. The starting point more generally as I said at the outset would be to start with the Immigration Rules and look for additional factors that would weigh in the Appellant's favour. In this case the judge found that they were insufficient. I find nothing perverse or irrational in the approach taken by the judge and that is the test. Put in other words, were the findings made by this judge open to him? In my judgement they were and this case turns on its facts.

### **Notice of Decision**

16. I detect no error of law in this case, certainly none that is material, and in those circumstances the appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.
17. No anonymity direction is made.

**Signed**

**Date**

**Deputy Upper Tribunal Judge Zucker**

