



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/05429/2015

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 19 July 2017**

**Decision & Reasons Promulgated
On 11 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MRS TASHIN SULTANA
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Sharma, counsel instructed by Malik Law Chambers

For the Respondent: Mr T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appeal came before me for an error of law hearing on 4 May 2017. In a decision dated 8 June 2017, I found an error of law and adjourned the appeal for a resumed hearing, confined to

consideration of Article 8 outside the Rules. A copy of that decision is appended.

Hearing

2. At the outset of the hearing I established who was in attendance and whether it was proposed to call any oral evidence. Mr Sharma informed me that the Appellant and her friend were in attendance but no other family members as it was not proposed to call any evidence. Nor did he propose to rely on any further evidence. Mr Melvin stated that no application had been received by the Home Office of any application to renew his leave to remain by the Appellant's husband.

3. Mr Sharma sought to rely on his written submissions dated 18 July 2017. He stated that his starting point was that the Appellant does not meet the suitability requirements of the Rules. He submitted that the Appellant seeks to rely on the contents of two witness statements - hers and her husband's - in relation to her witness statement in her amended bundle at pages 6-7 at [22]-[24] she addresses the serious medical conditions of her husband and explains it has essentially rendered her husband disabled. He is also suffering from depression. At [23] she also explains her husband is forgetful and sometimes suffers from erroneous thoughts and ideas and is not able to maintain himself and she has provided him with care and support.

4. Mr Sharma submitted that the Appellant's husband remains dependant on his extended family members but they also have their own responsibilities. He stated that the Appellant, sponsor and his mother live under one roof and the Sponsor's siblings live separately. He drew attention to the fact that at [24] the Appellant addresses the issue of separation from the husband which would permanently damage any relationship she has with him. At [25] she states that the sponsor is required to take medication and both to manage his depression and other medical conditions from which he suffers. At [26] she makes reference to the Sponsor's witness statement and supports what is said therein in relation to the relationship between them. The Appellant also has a strong and profound relationship with her mother in law and siblings and these would be damaged by her removal. The evidence from the Sponsor is at page 9 onwards - see [9] page 11 and the fact that any decision requiring the Appellant to leave would require him to leave. Mr Sharma submitted that the evidence points to a strong and loving relationship between these two individuals and if the Appellant were to leave the UK the Sponsor would follow her to Bangladesh due to the effect of separation and the background to the relationship.

5. In respect of article 8 outside the Rules, Mr Sharma sought to rely on [9]-[12] of his skeleton argument and submitted that the question is whether a family life exists that needs to be considered and whether the effect of the decision would be disproportionate. He submitted that the balance is just struck in favour of her husband but it was sufficient for the grant of leave and the Appellant does not meet requirements of the Rules. The Judge at [54] found that the Sponsor was a particularly vulnerable individual and found he should not be removed from family members and the Upper Tribunal can uphold this decision, notwithstanding that the application falls foul of the Rules.

6. Mr Sharma submitted that there were sufficient reasons for the Sponsor not be required to speak English. He submitted that the Sponsor also has close family ties with his mother and siblings and they are integrally involved in his recovery process. The Sponsor is entitled to remain in the UK on the basis of his family life, which would be permanently damaged if he had to leave and thus the only option is to remain with his wife. He submitted that the fact the Sponsor only has leave until September 2017 is not fatal and it was open to the Respondent to grant a further period of discretionary leave to remain.

7. Mr Melvin sought to rely on his written submissions. He submitted that it was necessary for the Upper Tribunal to deal with the question of whether or not there are compelling circumstances not addressed in the Rules. He submitted that it was almost inconceivable in an appeal involving article 8 outside the Rules that no updated evidence has been produced in terms of any medical conditions that the Appellant seeks to rely on in relation to her husband, with the result that the Upper Tribunal is simply unaware of current medical condition. He accepted that three years ago the Judge accepted the medical condition of the sponsor but there is no evidence before the Upper Tribunal that there are severe medical difficulties and little weight should be attached to the assertions of forgetfulness. Mr Melvin submitted that there was little in the way of evidence outside the bold assertion that the Appellant's husband is taking any medication or being treated for depression.

8. Mr Melvin submitted that there was no evidence before the Upper Tribunal of the family situation *vis a vis* the family members and the fact that the Appellant asserts she is living together with the husband and his mother and the siblings are elsewhere and it was unclear whether this is the same situation as in 2014, regarding emotional ties going over and above normal ties and he was not prepared to accept that 3 years later. He submitted that any application by her husband is purely speculative as no application has been made as yet. There was no witness statement from the mother or siblings that reveals to the court the current

circumstances.

9. Relying on his written submissions Mr Melvin submitted that there is insufficient evidence to find compelling circumstances that outweigh the public interest in immigration control, particularly when she has been found to be dishonest. Without updated medical evidence he submitted that little weight can be placed on the 2014 decision and *Devaseelan* does not apply in this particular case. He sought to rely on the judgments of the Court of Appeal in *Rhuppiah* and that of the Supreme Court in *Agyarko*. He accepted that the Appellant speaks English but this cannot be taken as a positive *cf. Rhuppiah*. She is not financially independent but dependent on family members in the UK and this is a negative under section 117B(1) and (2) of the NIAA 2002. Mr Melvin submitted that the circumstances on the facts do not warrant a finding that requiring the Appellant to return to Bangladesh would be contrary to Article 8.

10. In reply, Mr Sharma submitted that in respect of updating evidence, all the points upon which the Appellant seeks to rely are contained in the 2014 decision and her claim to be part of an extended family assisting with the Sponsor's care. Page 4 at [17] refers to the evidence of the Sponsor's sister and position as a carer but she cannot do everything for him, which the Appellant can. She was living separately at that time. See also [22] where the Judge refers to medical reports and there is reference to depression at [25] and at [26] to his prognosis and the fact that the medical team are focused in managing his condition for which there is no cure. The Respondent was unsuccessful in attempting to appeal the Appellant's husband's decision and whilst *Devaseelan* does not apply strictly, it merits weight being attached to it in respect of the findings of fact in relation to Sponsor. Mr Sharma asked me to allow the appeal.

11. I reserved my decision, which I now give with my reasons.

Decision and reasons

12. I should state at the outset that I was not assisted by the fact that neither the Appellant's husband nor any members of his family attended to give evidence before me nor were there any updating statements as to the current family circumstances. I note that this was also the position before the First tier Tribunal Judge, who found at [23] this to be indicative of the fact that the connections between the appellant, her husband and in-laws are not as close as has been indicated.

13. I have taken full account of the decision of First tier Tribunal Judge Boyes, who in a determination promulgated on 17 September

2014, allowed the Appellant's husband's appeal with regard to Article 8 outside the Rules. However, it is clear from that decision that it was predicated upon Mr Rahman's high level of dependency on his family members in the UK and the fact that they are integrally involved in his recovery process and that he is a particularly vulnerable individual [54] refers. The Judge further found at [49] that "*he needs the emotional and psychological support only his close family can provide.*" Whilst the Appellant gave evidence at her husband's appeal, her role in supporting her husband was not part of the Judge's reasoning in allowing her husband's appeal. Whilst this may be because the Appellant did not have any form of settled status whereas her husband's family members are British citizens, it is also the case that Mr Rahman came to the United Kingdom on 22 October 2009 and the Appellant did not arrive until 28 January 2010, thus he was cared for by his mother and siblings in the absence of his wife, prior to his arrival.

14. I have concluded that whilst I can attach some weight to the decision and reasons of Judge Boyes as to the circumstances of the family as a whole up to August 2014, I have to consider the current position. The most recent evidence is that before First tier Tribunal Judge Cohen on 28 September 2016. In the Appellant's statement dated 28 September 2016 she states at [23]-[24]: "*I have always assisted my husband to do and manage his daily life activities. I have always provided my husband with important care and support. Due to their own responsibilities, my mother in law, my brother in law and my sisters in law are not able to help and support my husband....My husband would be substantially affected if I was separated from him.*" There is also a statement from Mr Rahman dated 26 September 2016 which is in very similar terms [at 12] and [13]. There is also a psychological report from Kevin O'Doherty dated 24 August 2016, which records that the Appellant "*is a full time carer for her husband that she helps him with the following daily activities: showering, toilet, making food, changing clothes and other aspects of personal care. The client apparently cannot travel by himself and needs to be accompanied.*" Mr O'Doherty diagnosed the Appellant's husband as suffering from a moderate level of depression and the existence of a severe level of anxiety related symptoms. A letter from the Appellant's GP, Dr Alam, dated 21 July 2016 states that the Appellant is the carer of her husband and helps him with his day to day activities.

15. First tier Tribunal Judge Cohen found at [21] that the Appellant's presence was not essential for her husband's health and that he could return to Bangladesh with her. Whilst the second of those findings was tainted by error of law, in light of the decision of First tier Tribunal Judge Boyes and the *Devaseelan* principle, the first of those findings - that the Appellant's presence in the United Kingdom is not essential to her husband's health - was not challenged and is

thus maintained. Therefore, I proceed to determine Article 8 on the basis that the Appellant's husband would remain in the United Kingdom, pursuant to the grant of discretionary leave to remain.

16. I find that there are compelling reasons to consider Article 8 outside the Rules, given that the Appellant does not qualify for leave within the Rules on the basis of her private or family life with her husband, who has discretionary leave and is thus not obliged to leave the United Kingdom. I find, applying the *Razgar* tests, that the Appellant has established and family and private life in the United Kingdom, the decision to remove her to Bangladesh would constitute an interference with her family and private life, the question is whether this would be proportionate.

17. I take account of the public interest, set out at section 117B of the NIAA 2002. I am unable to make a clear finding as to whether or not the Appellant speaks English, given that the First tier Tribunal Judge found that there was no evidence that the Appellant actually took an English test; there was no other evidence before me as to her English language ability and I did not hear evidence from her. There is also an absence of evidence as to how the Appellant is financially supported, apart from an unspecified reference in her statement to being financially supported by her husband's family. Consequently, I cannot find in the Appellant's favour in respect of section 117B (2) and (3). Nor is it in doubt that the Appellant's private life has been formed at a time when her immigration status has been precarious: section 117B(5). Consequently, the public interest would weigh in favour of the Respondent's maintenance of immigration controls. I also take into account that the Appellant is unable to meet the suitability requirements of the Rules [S-LTR 1.6], due to the fact that the First tier Tribunal Judge found that the Appellant had used deception to fraudulently obtain an English language test certificate which is contrary to the public interest.

18. Whilst I accept that the Appellant has established a private life since her arrival in the United Kingdom on 28 January 2010, the primary factor in the assessment of proportionality is her family life with her husband and the fact that, in light of the evidence summarised at [14] above, she is his primary carer. I accept that if the Appellant is required to leave the United Kingdom this will have a negative impact on her husband. However, I also take account of the fact that he is not settled in the United Kingdom but has discretionary leave to remain in the United Kingdom only until September 2017, albeit it is open to him to seek to extend his leave to remain. I also take account of the fact that the Appellant and her husband reside with his mother and that his siblings reside elsewhere, however, it was the clear finding of First tier Tribunal Judge Boyes that Mr Rahman is dependant on his mother and siblings, financially and emotionally and that they assist in his care

and were his only carers for several months prior to the arrival of his wife on 28 January 2010.

19. I have taken full account of the submissions of both parties and the material jurisprudence. In *Agyarko* [2017] UKSC 11 their Lordships considered appeals by foreign nationals and set out and endorsed the decision of the ECtHR in *Jeunesse v Netherlands* at [108]:

“whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be “precarious”. Where this is the case, the court said, “it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8”

Their Lordships concluded at [60]:

“60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word “exceptional”, as already explained, as meaning “circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate”. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8.”

20. Applying *Agyarko*, I find that whilst family life was established between the Appellant and her husband in Bangladesh, it was then maintained whilst both parties had a precarious immigration status, which remains the position. The starting point is that *“it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8.”* Exceptional circumstances have been defined as *“unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.”*

21. I have concluded in light of the evidence and jurisprudence set

out above that removal of the Appellant does not reach the exceptional circumstances threshold and that a fair balance favours the public interest. Whilst the consequences for the Appellant may be harsh and may be harsher for her husband, his mother and siblings are British and are willing and able to care for him in all material respects thus removal of the Appellant would not be unjustifiably harsh. Moreover, given that his status in the United Kingdom is not settled, it is open to him to return to Bangladesh with his wife in order to continue family life.

Decision

22. The appeal on human rights grounds is dismissed.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

10 August 2017

ANNEX



**Upper Tribunal
(Immigration and Asylum Chamber)
HU054292015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 4 May 2017**

**Decision & Reasons
Promulgated**

.....

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MRS TASHIN SULTANA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Balroop, counsel instructed by Malik Law
Chambers Solicitors
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh, born on 7 January

1988. She entered the United Kingdom on 28 January 2010 with entry clearance as a Tier 4 student and was subsequently granted an extension of stay. She made an in-time application for an extension of stay on human rights grounds outside the Rules on 8 April 2015 and this application was refused on 18 August 2015 on the basis that the Appellant did not meet the requirements of S-LTR 1.6 of the Rules in that her presence in the United Kingdom was not conducive to the public good. This assertion was based on reports that indicated that the Appellant had relied on a proxy test taker in respect of a TOEIC relied upon in a previous application for leave to remain made on 19 October 2012.

2. The Appellant's appeal against this decision came before First tier Tribunal Judge Cohen for hearing on 28 September 2016. In a decision promulgated on 7 October 2016, he dismissed the appeal on human rights grounds.

3. An application for permission to appeal to the Upper Tribunal was made in time on 20 October 2016, on the basis that the First tier Tribunal Judge made perverse or irrational findings on matters material to the outcome and erred in his approach to the burden of proof and erred in the approach to Article 8.

4. Permission to appeal to the Upper Tribunal was granted in a decision dated 14 March 2017 by Judge of the First tier Tribunal Chohan, for the following reasons:

"3. At paragraph 16 of the decision, the judge concludes that the respondent had discharged the burden of proof in respect of dishonesty/fraud and went on to state that there was a burden of proof on the appellant to establish that she had undertaken the English test.

4. In cases of dishonesty, fraud or deception, there is an evidential burden on the respondent to establish the same. Although the overall burden of proof is on the appellant however, there is no evidential burden on the appellant to establish her innocence. Having said that, that does not mean that the appellant is not free to submit evidence to establish that she had taken the test and not by a proxy. It does seem that the judge may have confused the burden of proof, which in turn, had a significant bearing on the article 8 assessment."

5. Accordingly there is an arguable error of law."

5. The Respondent filed a rule 24 response on 28 March 2017, opposing the appeal.

Hearing

6. At the hearing before me, Mr Balroop submitted that the Judge applied the incorrect test in respect of the burden of proof in that, whilst the initial burden of proof is placed on the Respondent, this requires sufficient evidence to be adduced to raise an issue as to the existence or non-existence of a fact in issue. The Appellant denied the accusations put against her which then shifts the burden of proof back on to the Respondent and it is then for the Respondent to prove that the Appellant's innocent explanation is to be rejected *cf. Shen (paper appeals; proving dishonesty) [2014] 00236 UKUT (IAC)*.

7. Mr Balroop submitted that the Judge took the position that the Appellant has not discharged the burden of proof and that her evidence was vague and unconvincing. It appears the Judge has taken this view due to the discrepancy in the number of test takers that day, as is set out at [16] *viz* 128 people undertook tests rather than the 8 to 12 stated by the Appellant and recorded by the Judge at [9]. The Judge also placed reliance on the fact that despite scoring highly, the Appellant required an interpreter, however, his instructions are that an interpreter was present but not used and the Appellant answered in English. The Judge's finding that the Appellant failed to submit any cohesive evidence that she failed to take the test is erroneous in the context. Consequently, his argument regarding the burden of proof has more merit when looked at in that context.

8. In respect of Article 8, Mr Balroop submitted that the Appellant's husband won his appeal so it is not proportionate for him to be removed, given that he has been granted 3 years leave to remain by the Home Office. At [21] the Judge found it would not be disproportionate to return him to Bangladesh, but more would be needed to justify this given that a (different) Judge has already said he should not be removed *cf. Devaseelan [2002] UKAIT 00702*.

9. On behalf of the Secretary of State, Mr Norton submitted that in respect of the test result at D1 of the Respondent's bundle, there was no indication that it was wrong and it specifically relates to the Appellant and her test was invalid. The test must also be considered in conjunction with the statements from Ms Collins and Mr Millington. The Appellant's explanation is that she took the test and the Respondent is wrong. Mr Norton submitted that the Judge cannot be criticized given that the Appellant has not taken any further steps as to why that particular result is recorded and the Judge simply decided the Respondent's evidence is better than the Appellant's.

10. In respect of the second ground of appeal, that undue reliance

was placed on the Appellant's deception in light of the public interest, it has to be remembered that the Appellant's husband is not someone regarded legally as present and settled as he has only 30 months leave.

11. I reserved my decision, which I now give with my reasons.

Findings and reasons

12. In respect of the first ground of appeal, that the First tier Tribunal Judge misapplied the burden of proof, I find no material error of law in his decision. At [16] the Judge correctly identified that the burden of proof was upon the Respondent and this has been discharged in light of the evidence submitted regarding the test taken by the Appellant and the result. The Judge then correctly considered whether the Appellant had discharged the burden of proving that she actually took the test and found her evidence on this issue to be vague and unconvincing.

13. In *Shen (paper appeals; proving dishonesty)* [2014] 00236 UKUT (IAC) the Upper Tribunal held as follows:

"(2) Where an application form etc is false in a material way, this may be relied on by the Secretary of State as prima facie evidence establishing dishonesty. The inference of deliberate deception can be strengthened by other facts: eg if a criminal conviction (not disclosed in an application) occurred shortly before completion of the application form. Here, the conviction must have been high in the applicant's mind and any explanation based on oversight would carry little weight. But it is always open to an appellant to proffer an innocent explanation and if that explanation meets a basic level of plausibility, the burden switches back to the Secretary of State to answer that evidence. At the end of the day the Secretary of State bears the burden of proving dishonesty."

14. However, on the facts of this case, the Judge considered the Appellant's explanation but found at [16] that it did not meet a basic level of plausibility, thus he was not then required to go on to the third stage *viz* whether the Secretary of State has discharged the burden of disproving the Appellant's explanation. Consequently, there is no error of law in his finding that the Appellant had acted dishonestly in respect of her English language test at Synergy Business College.

15. However, the Judge's findings in respect of his consideration of Article 8 of ECHR outside the Immigration Rules were also challenged on the basis of the weight he attached to the test results in his Article 8 assessment and the failure to consider the impact of the decision on the Appellant and her family. Whilst the Appellant

has resided in the United Kingdom with leave to remain since 28 January 2010, the current application underlying this appeal was for leave to remain outside the Rules on the basis of her family life with her husband, Mr Ziaur Rahman. The marriage took place in Bangladesh on 9 March 2007 and both the Appellant and her husband came to the United Kingdom to study. Prior to coming to the United Kingdom Mr Rahman suffered a car accident as a consequence of which he was seriously injured viz he was admitted to hospital unconscious on 4 August 2006 with a severe head injury, multiple cerebral, cerebellar and brainstem contusions and a broken arm. As a consequence of his injuries he requires ongoing care.

16. Mr Rahman's appeal came before Judge of the First tier Tribunal Boyes for hearing on 1 August 2014 when he, his wife, his brother, sister and mother all gave evidence. In a very detailed and careful decision, Judge Boyes made *inter alia* the following material findings:

"43. I accept the Appellant has been living in his mother's household since 2009 and that he is dependent upon his wife and his mother and siblings. In addition, because of that degree of dependency, I consider that removal of the Appellant would be likely to have a serious adverse effect on his psychological state and mental health..."

"47. If he were to be removed to Bangladesh he would not be able to access the day to day support of his mother and siblings. He would be with his wife in Bangladesh but this cannot replace the support that he also receives from his mother and siblings."

48. The Appellant suffers from poor anger control, amongst other symptoms, as a direct consequence of his disability ... I am aware that traumatic brain injuries can result in difficulties in controlling emotions and rapid mood changes which may lead to outbursts of anger. Because of this I accept the oral evidence that I have heard that his wife would find it difficult to manage his condition on her own."

17. However, First tier Tribunal Judge Cohen held at [21]:

"In light of the totality of the circumstances I do not find that the appellant's presence in the UK is essential to her husband's health. Furthermore, the appellant confirmed that her husband received adequate medical treatment in Bangladesh for his physical and mental health prior to him coming to the UK. In these circumstances, I do not find that there are sufficient exceptional circumstances meaning that the appellant's husband could not return with her to Bangladesh and be cared for by the

appellant and access adequate medical facilities. The previous Immigration Judge found that the appellant provided assistance for her husband and both and she and her husband have family members remaining in Bangladesh who can provide additional support if required. Family members in the UK can provide financial support if required."

18. There is no consideration by the First tier Tribunal Judge of the decision in *Devaseelan* [2002] UKAIT 00702 and the fact that, albeit the decision of First tier Tribunal Judge Boyes concerned the Appellant's husband rather than the Appellant herself, she made findings with regard to this Appellant, as well as her husband, which should have been taken into account by Judge Cohen in consideration of Article 8 in the Appellant's appeal. Whilst Judge Cohen was, of course, not bound to follow the findings of Judge Boyes, given that he reached a conclusion in respect of the Appellant's husband that was entirely contrary to her findings and decision on the basis of the evidence, I consider that he should have provided reasons for reaching a different conclusion at [21] above that the Appellant's husband could return with her to Bangladesh. I find that the Judge materially erred in this respect.

19. Moreover, whilst the Judge at [26] made reference to removal of the Appellant being in the public interest in light of the fraudulent English test results, there is no reference to or consideration of the wider public interest considerations set out at section 117B of the Nationality, Immigration & Asylum Act 2002 either directly or by implication. This too is a material error of law.

Decision

20. For the reasons set out at [18] and [19] above, I find that the First tier Tribunal Judge erred materially in law in his consideration of Article 8 outside the Immigration Rules. I adjourn the appeal for a resumed hearing before me, confined to this issue. Directions are appended.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

8 June 2017

DIRECTIONS

1. The appeal is adjourned to a date to be fixed for a resumed hearing in the Upper Tribunal to be listed for 1 hour for consideration of Article 8 only.
2. If the Appellant's solicitors intend to call oral evidence at the resumed hearing then it is incumbent upon them to request that an interpreter be booked.
3. Any request to adduce further evidence should be made in accordance with paragraph 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

8 June 2017