



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12855/2018

THE IMMIGRATION ACTS

Heard at Field House
On 10 April 2019

Decision & Reasons Promulgated
On 8 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MD MUTAHARUL HASSAN
(NO ANONYMITY ORDER)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Mr P Turner, instructed by Universal Solicitors

DECISION AND REASONS

The appellant and proceedings

1. The appellant Secretary of State was the respondent before the First-tier Tribunal and for ease of reference I refer to the parties as they were then.
2. The appeal is brought with permission granted by the First-tier Tribunal on 21 January 2019.
3. The grounds in summary are that the First-tier Tribunal Judge (FTTJ) erroneously self-directed when allowing the appellant's appeal against the last in a series of decisions refusing to regularise his immigration status on article 8 grounds.

Background

4. The immigration history as set out in the reasons for refusal was not disputed. The appellant entered the United Kingdom as a visitor with his mother and sister on 11 June 2006. On arrival he was 12 years 8 months and 22 days old. The respondent had been made aware that the appellant had not left when he was listed as a dependent in an application that his sister made in 2007. The application as a dependent was refused in 2010, and the appellant advised he should put in an application in his own right. In the event the appellant made his 1st application 2 years later in 2012, and when it was refused 2 weeks later he applied again in March 2012, and that application was refused in April 2013. In November 2014 the appellant made an EEA application as a carer for his maternal grandmother. That application was refused in January 2015. Next an application was made in 2018 on the basis of family and private life and long residence, the refusal decision is the subject of this appeal.
5. The refusal set out that no partner, parent or dependent children bringing him within the family life rules of appendix FM. So far as his private life arising from his length of residence, applying the Immigration Rules at paragraph 276 ADE (1), he had not obtained the necessary eligibility either through the requisite pathways of:
 - (a) 10 years lawful residence, or
 - (b) 20 years continuous residence, or
 - (c) being under 25 years of age having lived continuously in the UK for at least half of his life, or
 - (d) there were no significant obstacles to his integration into Bangladesh: his argument that his 11 years 11 months residence combined with the strong relationships he had established with his sister's aunts and uncles and cousins and friends in the United Kingdom, loss of contact with people in Bangladesh, absence of financial resources or accommodation in Bangladesh would result in degrading and inhumane conditions, was rejected. In this regard the respondent gave prominence to the demonstrated contact with the appellant's mother in Bangladesh and his ability to return to her, the appellant's continued cultural links to Bangladesh through extended family members in the UK of Bangladeshi origin, his language abilities, including his A grade in Bengali, his numerous other educational qualifications. The conclusion is that the appellant would be able to use his qualifications to obtain employment in Bangladesh.
 - (e) the respondent concluded the application revealed no exceptional circumstances outside of the rule and removal would not cause unjustifiably harsh consequences for him or others as those here had close family ties with others and their immediate family life and private lives would be maintained even were the appellant not here. The appellant would be able to rebuild his life in Bangladesh with support of family.

The decision at the First-tier Tribunal

6. The FTTJ held the decision to return the appellant to Bangladesh disproportionate taking as his starting point in the context of the immigration rules at paragraph 276 ADE that although the appellant did not meet the requirements I set out at paragraph 5 (c) above, at the date of application or decision or hearing, he would be able to do so four months later when he would be able to show that he had spent half his life in the United Kingdom as opposed to Bangladesh. Further the FTTJ found that the delay or failure to take enforcement proceedings against the appellant reduced the public interest in the appellant's removal.

The hearing before me in the Upper Tribunal

7. Mr Kandola submitted, in line with the grounds, that the FTTJ had erroneously self-directed in respect of the article 8 balancing exercise in the following ways:
- (a) Wrongly concluding that the appellant would ever be able to bring himself within the rule at 276 ADE requiring the applicant have spent half their life under the age of 25 in the United Kingdom because given his age even at the point of entry he had already spent more than half of his life under the age of 25 in Bangladesh.
 - (b) Wrongly reducing the weight to be attached to the public interest in immigration control when saying that because there had been no enforcement proceedings there is shown no strong public interest in his removal. Although the FTT J says that he is following the case in fact his conclusion runs contrary to EB (Kosovo) v SSHD 2008 UKHL 41. Whilst the respondent had not taken enforcement action that was an insufficient basis to say that the appellant's immigration history cannot be criticised, and in doing so the FTTJ failed to take into account that the appellant ought to have left the UK when his application was refused.
 - (c) In light of the finding that the position in Bangladesh did not amount to very significant obstacles to integration, and the fact that his private life, allowing that when he arrived as a teenager in 2006 he had no agency, since he became an adult in September 2011, has been unlawful, the judge needed to give full reasons for concluding why there were compelling circumstances in the context of article 8.
8. Mr Turner for the appellant argued that the grounds amounted to an irrationality challenge because there had been no misdirection as the FTTJ was entitled to find that delay in initiating removal proceedings was a relevant matter which acted to reduce the public interest attached to immigration control, as was the fact that the appellant would, shortly after the hearing date, be able to show that he had spent half his life in the United Kingdom.
9. In those circumstances given the finding that the appellant enjoyed a strong private life in the United Kingdom and little if anything to return to in Bangladesh he was

entitled to reduce the weight to the public interest in immigration control and draw the proportionality balance in favour of the appellant.

Discussion

10. Paragraph 276 ADE of the Immigration Rules sets out that to be eligible under the private life rule the FTTJ found pertinent the appellant would have to have shown as at the date of application, which in this case was 13 March 2018, that he was under 25 years old and had spent half of his life in the United Kingdom. It is self-evident on the undisputed chronology he had not. Mr Kandola reiterated the point correctly made in the grounds that the appellant was never going to be able to succeed under that rule because he had already reached the age of 12 years and 8 months in 22 days before he entered the UK on 11 June 2006.
11. The FTTJ does not set out the rule. As the decision at paragraph 46 shows the FTTJ was not assisted by the appellant's representative Mr Saini of counsel when he submitted that because the appellant was born in September 1993 and entered at 12 years and 9 months in June 2006: *"he is about 4 months away from meeting the rule at 276 ADE (1)."*
12. The FTTJ plainly found the argument significant as shown at paragraph 41, *"I suggested that the appellant has spent about half his life here and that brings in the private life rules."*
13. The FTTJ goes on to mis-state the position at paragraph 58 *"the appellant is only months away from meeting the Private Life Rules"*. Self-evidently no regard is paid to the age cap of 25 years. The FTTJ considers the human rights position at paragraph 64 *"through the lens of my findings above"*, and again at paragraph 67 refers to the appellant *"being very close to success under the rules which affects proportionality."* I am satisfied the FTTJ has misapprehended the rule and incorrectly believed that the appellant would be able to meet the rules shortly.
14. The FTTJ concludes that the decision was correct at the date that it was made, which was May 2018, but that the duty on him was to look at the position as at the date of hearing and that was *"the key difference"* because as at the date of hearing *"there is a nudge over the centre point founded on material facts"*, plainly the only matter which had changed between the date of application of the date of hearing was the passage of time and the FTTJ's mistaken belief that as a result the appellant would shortly be able to satisfy the private life immigration rules.
15. I find it is evident that on the face of the decision the misdirection about the rule infected the proportionality exercise as conducted by the FTTJ, and so is material. Mr Turner asserts that it was open to the judge to find that the policy as set out in the rules should not be restricted to a bright line of 25 years in the proportionality exercise, that is a different argument than that before the FTTJ and offers an alternative reasoning to that of the FTTJ as justification for the allowing of the appeal and does not deal with the FTTJ's misapprehension of the rule.

16. I find the error means that the FTTJ's article 8 assessment is flawed, and the decision cannot stand.
17. There is the additional matter of the treatment of the absence of enforcement proceedings.
18. The FTTJ concludes that the failure of the respondent to take enforcement proceedings reduces the public interest. The FTTJ found the absence of enforcement proceedings significant as can be seen from his reference at paragraph 64 that since the appellant was never subjected to any attempt at removal:
- (a) *"there are shown no strong public interest in his removal"*, and
 - (b) at 67: *"has a long track record of precarious status but the Home Office never removed him and he has nearly half his lifetime here, which means he is very close to success under the rules and that does affect proportionality. The Home Office have given no sign that they actively seek to prevent that outcome"*, and
 - (c) at 69: *"the balancing exercise under Razgar should not give great weight to the public interest in lawful immigration control. The appellant has on his side the infringement of his own rights and those of British citizens in his circle. It would be unjustifiably harsh to be separated from them all after some 12 years, with no clear return date. I might not have not formed that view had removal procedures been started but my information is that they never were."*
19. E B Kosovo (FC) (Appellant) v SSHD [2008] UKHL 41 says this about delay:
Delay

13. *In Strbac v Secretary of State for the Home Department [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held Shala v Secretary of State for the Home Department [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that Shala was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.*

14. *It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties*

and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. *Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boultif v Switzerland (2001) 33 EHRR 1179, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.*

16. *Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone), heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25:*

"Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"

20. Applying that here, this is not a case where it has been shown there has been delay by the respondent in reaching a decision on an application, so that what ensued was a catalogue of failures to deal with the application, and over a very long period, and for which no explanation was ever made.
21. This is not a case where it can be said:
- “delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.”*
22. The history of applications and refusals as an adult shows the appellant has long been aware that the respondent does not consider that because he came here as a visitor at the age of 12 with his mother and sister, and his mother returned to Bangladesh leaving him in the care of her sister and brother in the United Kingdom, or his family and private life with his relatives and school and community as developed here, gives him any entitlement to remain.
23. Following the rationale of the Supreme Court at [25] – [35] of the judgement in Patel v SSHD [2013] UK at 72 the Secretary of State is entitled to proceed on the basis that those unlawfully in the UK will leave of their own accord; s/he is not obliged to remove an individual or issue a removal decision.
24. This is however a case where the failure to take enforcement action has allowed the appellant to deepen the character and quality of his ties in the UK relevant to the article 8 assessment, and in that sense strengthen factors which can operate in his favour in the balancing exercise. Accordingly, whilst the failure to remove the appellant is relevant in the first two ways described in EB Kosovo there is no basis upon which to find, as the judge did here, that the third has any application. I am satisfied that this error has also infected the assessment of the public interest and the article 8 assessment.

Error of law decision

25. In summary the approach of the FTTJ has been to treat the failure to enforce removal as a culpable delay detracting from the weight to be attached to the public interest, and appears to have concluded that a character and quality of private life which would not otherwise have resulted in a breach of article 8, when viewed through the lens of that culpability and taking account of the likely prospect of success in a future application, allowed a factual matrix which he would not otherwise have found sufficient to “tip” the weight of the balancing act in the article 8 assessment from the usual position of it resting with the public interest in immigration control to the interests of the individual. For all the reasons above I find the approach to the proportionality exercise conducted by the FTTJ is flawed by incorrect self-direction and set the decision aside.

The remaking of the decision

26. On the face of the grounds the factual matrix was not significantly in contention. The First-tier Tribunal hearing was recent (January 2019), and there has been no rule 32

application to adduce any additional evidence. I indicated I proposed remaking the decision. I canvassed with the representatives whether I would need to hear any further evidence before re-making the decision. Mr Turner briefly took instructions and told me that there had been no change in circumstance but invited me to allow his client to adopt his witness statement and I concurred. Mr Turner had no supplemental questions. Mr Kandola briefly confirmed with the appellant his recollection of his responses to the First-tier Tribunal, and in particular he could return to live with his mother in the family home in Bangladesh. He queried with him as to why it was that he thought he would not, as a 25-year-old, be able to establish himself in Bangladesh and obtain work, particularly as his evidence was that he has now obtained an accountancy qualification. The appellant told me that as his spoken Bengali was the Sylheti dialect he did not have the language skills to be able to use his accountancy qualification in Bangladesh, and that his obtaining an "A" grade in his Bengali qualification would not help him because it was some years old and he had not practised the language or script. There was no re-examination.

27. Mr Kandola submitted that given that at paragraph 73 the FTTJ had found the position to be finely balanced only being nudged over the centre point to the appellant's side following erroneous self direction, and nothing new had transpired in the evidence today, once the errors were corrected, it was plain that this was a perfectly ordinary private life case adequately covered by the application of the rules. Applying section 117 little weight should be attached to the private life at least since the appellant was an adult as the entirety was established in the face of unlawful status. The findings were that there were not very significant obstacles to his integration to Bangladesh, he would be able to readapt, had the language skills, support of his mother and family, accommodation was available, and he was employable. Removal was proportionate.
28. Mr Turner on the other hand, submitted that the appellant's circumstances were exceptional and compelling. My error of law decision was horribly wrong but even discounting the errors I had found the positive outcome would not be affected. The facts were exceptional: the appellant had now lived half his life here, and the policy rule should not be treated as having a bright line at the age of 25. He pointed to the FTTJ's finding that the appellant had a strong private and family life in the UK with his maternal aunt and her family with whom he had initially lived, and his maternal uncle and his family with whom he now lived, he was very well integrated into the country as shown by the number of people who had attended the first-tier tribunal to support him, and with his long residence and the finding that he had little private or family life in Bangladesh (as he barely knows his mother) the decision was plainly disproportionate. To suggest he could use his accounting qualifications was akin to suggesting that Mr Turner could expect to use his bar qualifications in a common-law jurisdiction; plainly without the necessary language it was not possible. Mr Turner said that the appellant should not be punished for his mother's decision to dump him here. The failure of the respondent to take enforcement action meant that his private life was entitled to respect and commanded leave to remain.

Discussion

29. The framework for my decision is Article 8 ECHR and I am guided by the case of Razgar 2004 UKHL. Whilst Mr Kandola in response to Mr Turner's submission sought to persuade me that there was no relationship of dependence in the Kugathas sense so as to establish ties beyond the normal emotional ties between a young adult and his family. The grounds challenged the self-direction rather than the factual findings. Specifically, there had been no challenge in the respondent's grounds to the FTTJ's conclusion that there was family life, and I had found no error of law in that regard. The threshold is not high. The appellant has always lived in the household of either his aunt or his uncle and remains living in the uncle's home now. His evidence to me is that he has continued in education, obtaining an accountancy qualification. Looked at in the round I am satisfied that I should not disturb the FTTJ's finding on family life.
30. I adopt the factual findings of the FTTJ that this Bangladeshi appellant has a strong family and private life in the UK with his close relatives and within his local community and that the disruption precipitated by removal amounts to a significant interference. I find the first two questions in Razgar are answered positively and the case turns on the question of proportionality.
31. My decision in respect of remaking this human rights appeal is not governed by the Immigration Rules but I must not disregard the respondent's decision. If a rules-based entitlement is not shown, but the refusal of the application would result in unjustifiably harsh consequences such that refusal would not be proportionate, then the appeal will succeed on the basis that outside the Rules-based provisions there are "exceptional circumstances". It remains the position that the ultimate question for me is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. As Hesham Ali v SSHD 2016 UKSC 60 makes clear the desired practice is to list out and weigh the competing factors put forward and balance them, informed by the provisions of section 117 of the Nationality, Immigration and Asylum Act 2002.

Factors argued in favour of removal

32. The Immigration Rules specify a number of routes relevant to types of family relationships and or lengths of residence at appendix FM and paragraph 276 ADE, and of very significant obstacles to integration. The appellant does not meet any of them. The appellant has no basis to remain under the rules, not just in terms of his length of residence but also in the context of the findings I have adopted that there are no very significant obstacles to his integration in Bangladesh. In particular he has close relatives in Bangladesh, accommodation is available albeit cramped, he has the right accent and dialect for life in that part of the country. More widely he has a qualification in Bengali so there is "really strong proof of ties of language"; he has qualifications sufficient to go to University; he is employable in Bangladesh and can save his earnings to pay for further study there, or his family can be relied on, according to the evidence. He is an adult with agency who has adapted to a different country and could re-adapt if he left. He has family support for fees. The FTTJ found

that he could also come back if given leave as a student, but “that is not a certainty” and “would break his continuity”.

33. The policy as reflected in the rules results in the public interest lying in the removal of the appellant. That then must be my starting point in my article 8 proportionality or balance sheet assessment. I give considerable weight to a decision which, as here, is correct in terms of the Secretary of State’s policy in relation to the assessment of proportionality as set out in the rules and endorsed by Parliament. He has also never been a qualifying child in the context of section 117B (6) because due to the age at which he arrived in the UK he has never accumulated 7 years residence as a minor and so cannot pray in aid s117 B (6) of the NIAA 2002.

Neutral factors

34. The appellant has been educated in the UK, and it is not disputed that he has good English language abilities. Although he is not working it was not suggested that he would not be self-sufficient if his immigration status permitted him to work. There is no dispute that the appellant is a fit and healthy young adult.

Factors argued for against removal

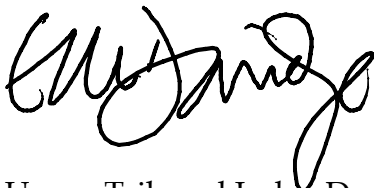
35. Whilst section 117 of the Nationality, Immigration and Asylum Act directs that I should give little weight to a family or private life obtained in the face of a precarious or unlawful immigration status, as here, that is not to say that I can give it no weight. Every case is fact sensitive and it is for me to decide. The character and quality of family and private life is well described in the FTTJ decision and has not been challenged in the appeal to the UT and I have adopted those findings. I do give it positive weight, not least because it commenced when the appellant was a minor, and, in line with the respondent’s concluding in the reasons for refusal letter that the appellant’s immigration history does not contravene the suitability requirements of the Immigration Rules, I do not penalise him on that account.
36. The appellant arrived as a young teenager at the age of 12 and so most of his teenage development has occurred here. The appellant has adapted well to life in the United Kingdom. He is happily ensconced in the bosom of his maternal family here, he has done well in school, and subsequently in obtaining accountancy qualifications, he enjoys good relationships with his sister, maternal aunt and uncle, and their children. He has integrated in the local community as reflected in the witness evidence and his involvement in local cricket. Although this is not a case where for example the evidence shows that any other person will be significantly detrimentally affected by his absence, none being dependent on him, and he being at an age where naturally, and as the arguments acknowledge, he would be focussed on developing his independent life spending time outside of his uncle’s home, by working for example, or by studying at university, I count positively the length of his residence from the age of 12, the strength of his family and social ties, and the level of integration obtained over the period.

37. In terms of the character of family and private life here Mr Turner emphasised that his mother had “dumped” him, inferring this gave his residence and development of family and private life here a quality not adequately encompassed in the Rules. Further he argued significant weight should be given to the difficulties he would face in re-establishing himself and for example finding accountancy employment because of his limited abilities in Bengali because he ordinarily uses the Sylheti dialect. I attach little weight to either point. They are answered on the evidence relevant to the issue of obstacles on return. Contrary to the points initially made in the application process of his having lost contact with those in Bangladesh, as the FTTJ noted, the evidence subsequently shows that the relationship is maintained, with his mother remaining in contact and supporting his appeal. Further the FTTJ noted that whilst the appellant says his mother cannot financially support him, her financial position is not explained, and his family here have in any event said they will fund his further education at university. There is nothing to suggest that support is dependent on his being here. In respect of language he has a Bengali language qualification and so plainly has some ability, and the evidence of his having obtained a raft of qualifications shows he has the educational skills to improve as necessary. From the evidence he appears a well-adjusted resilient and personable young man in his mid-twenties, with an established ability to build relationships with others and engage socially. I am satisfied he will be able to integrate without significant difficulty.
38. Standing back and weighing the positives and the negatives of all factors relied upon I find that the balance falls clearly in favour of the public interest in immigration control. There is nothing in the appellant’s family and private life circumstances individually or cumulatively which outweighs the weight to be attached to the public interest.

Decision

39. The SSHD has shown that the First-tier Tribunal decision allowing the appellant’s appeal is marred by legal error and I have set it aside. I re-make the decision dismissing the appellant’s appeal.

Signed



Date 11 April 2019

Deputy Upper Tribunal Judge Davidge