



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16976/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2019
Prepared on 5 September 2019

Decision & Reasons Promulgated
On 13 September 2019

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

S. M.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain, from Edward Alam & Associates
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh, a child, who is enrolled in full-time education in the UK. He entered the UK lawfully in March 2013 on a family visit visa with his parents, but was left as a member of the household of his aunt and uncle (in fact, the husband of the aunt) when his parents returned to Bangladesh a few weeks later. On 31 May 2018 an application was made for a grant of ILR as the child of settled relatives, but this was refused. Instead, a grant of discretionary leave to remain outside the Immigration Rules was made which expired on 20 March 2018, when he was 16.

2. The Appellant made an in-time application for a variation of his leave, which was refused on 31 July 2018 with reference to paragraph 276ADE of the Immigration Rules. The Appellant's human rights appeal against that decision was heard on 7 March 2019 by First-tier Tribunal Judge I M Scott, and allowed in a decision promulgated on 14 June 2019.
3. The Respondent was granted permission to appeal by a decision of First-tier Tribunal Judge Alis, dated 25 July 2019, on the basis it was arguable the approach of the First-tier Tribunal ["FtT"] to the public interest in the Appellant's removal was flawed.
4. There is no cross-appeal from the Appellant that seeks to challenge any of the adverse credibility findings made by the FtT. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus, the matter came before us.

The findings of the FtT

5. The Appellant entered the UK as a child of 11. He has lived in the UK ever since as a member of the household of his aunt and uncle, and he has been enrolled in full-time education throughout. He sat his GCSEs in June 2018, and in September 2018 enrolled with the Newham Sixth Form College on a two-year course that would lead to the award of Level 3 BTEC in Sports Science; so he is today at the mid-point of that course, about to commence the second year. He is today 17 years old. As FtT found, and Mr Bramble accepts, the Appellant's education is a significant part of his "private life" in the UK.
6. As a result of the Appellant's membership of the household of his aunt and uncle, the FtT was satisfied that the Appellant had demonstrated that he had established "family life" in the UK with those relatives. The evidence as to who they are was somewhat opaque, but eventually Mr Hussain confirmed on instructions that besides the Appellant, his aunt and uncle, there was their adult daughter and her husband, and a cousin whose parents may also live outside the UK. As Mr Bramble accepts, the grounds offer no challenge to the finding that membership of this household constitutes "family life".
7. The FtT was also satisfied that the Appellant and his aunt had failed to tell the truth when they had asserted that the Appellant faced a real risk of harm at the hands of his own father. To the extent that the Appellant had tried to pursue a false claim through his own evidence, both written and oral, Mr Bramble argued that it was a matter that should be weighed in the assessment of the proportionality of the Appellant's removal. To the extent that his aunt had sought to do so in the course of her evidence, he accepted that this was not something for which the Appellant, as a child, could be held responsible. The usual inference would however be that it was the adults in the child's life who had decided that the false claim would be pursued, and that it was the child who had been persuaded to go along with that, in which case it would not be something that would carry any material adverse weight.

8. The FtT also found as a fact that the reality was that the Appellant had remained in a continuing relationship with his parents, and sister, which a social worker had described as involving “good contact”. They were important figures in his life. Although this is not perhaps set out as clearly as it might be, the only possible conclusion to be drawn from this finding is that “family life” between the Appellant as a minor, and his sibling and parents continued.
9. The FtT went on to find that the Appellant was brought to the UK by arrangement between his parents and his aunt and uncle, so that he might secure an education in the UK at public expense.
10. Mr Bramble accepted that since he was at all material times a child, the Appellant was not to be presumed to be responsible for the decisions of his adult relatives that had resulted in this situation. Thus, although the natural consequence of the FtT’s finding was that the ECO had been deceived as to the true purpose of the family’s visit to the UK, he accepted that there was no enhanced public interest in the removal of the Appellant as a child resulting from that deception. On the other hand, Mr Bramble did put the Respondent’s case on the basis that this deception was a matter that the FtT should have “taken into account” in the assessment of proportionality. It is extremely difficult to see how that was to be done, if there was no enhanced public interest in removal arising from that deception.

The challenge

11. The challenge set out in the grounds is that the FtT failed to identify why the Appellant’s removal from the UK would lead to unjustifiably harsh consequences, with no reason given as to why the uncle and aunt in the UK could not help with the costs of education in Bangladesh, and no finding concerning why the Appellant could not reasonably be expected to continue his education in Bangladesh.
12. In short, Mr Bramble argued that the FtT had unjustifiably elevated the “family life” enjoyed with the members of the household of the uncle and aunt, over the “family life” that he had always enjoyed with his sister and parents. The Appellant was not a “qualifying child”, and did not meet the requirements of paragraph 276ADE. He could return to Bangladesh in safety and resume his place in the household of his parents, retaining the benefit of the relationships he had formed with the family members in the UK. Should he wish to study in the UK, then he could make the appropriate application for entry clearance.
13. Mr Hussain submitted that there were no errors of law. The FtT had carried out a balancing exercise, and after giving adequate reasons, had reached conclusions that were open on the evidence.

Error of Law?

14. On any view, the Appellant had been a member of the household of his uncle and aunt from the age of 11 to 17. They were not his parents, but the FtT was perfectly entitled to find that they were discharging the day to day parental role, and that they had done so through key years in this young

man's development and passage towards adulthood. We accept that the finding that "family life" existed between the Appellant and the other members of this household was entirely open to the FtT in the circumstances, and indeed any other conclusion would have been perverse. We do not in any way seek in the course of this decision to belittle, overlook, or undermine the genuine and committed relationships that undoubtedly exist between the Appellant and the other members of the household of his uncle and aunt; we too would give very significant weight to that "family life".

15. Where the FtT erred, however, was in failing to recognise the full consequences of the decision to reject the evidence that the Appellant had severed his ties to his parents and sibling as a result of domestic violence, and to reject the claim that he was in any way at risk from them, or in Bangladesh [40]. The finding that (as his social worker had noted in January 2018) he retained "good contact" with his parents and sister [40(e)], meant inevitably that the *de facto* "family life" created between the members of his immediate family upon his birth continued to the date of the hearing. Its character had not altered, even if the Appellant's ability to enjoy its benefits day to day was limited by the fact of geographical separation, as a result of the decision to bring him to the UK in 2013. The decision to bring him to the UK for the purposes of gaining a free education at public expense did not terminate that "family life". Nowhere in the decision does the FtT recognise this, or weigh it in the balancing exercise, and we are satisfied that this significant consequence must have been overlooked.
16. In the circumstances we are satisfied that the FtT did materially err in the approach taken to the issue of proportionality, and that the decision must as a result be set aside and remade.

The decision remade

17. The Appellant has deployed no evidence to show proper enquiries have been made as to the availability of education in the Appellant's chosen field of sports science, within Bangladesh. The assertion is simply made that there was no suitable course to which he could transfer, or upon which he could embark. Although this was not rebutted with any evidence from the Respondent, a moment's pause suggests that it is highly unlikely to be true given the international sporting profile of Bangladesh. Ultimately, and whether or not the Respondent provided evidence on the point, the burden of proof rested with the Appellant to adduce evidence on relevant matters, one of which certainly included educational provision in his home country. He has clearly failed to discharge that burden.
18. A proper disclosure of the financial circumstances of the family members living in the household of his uncle and aunt has never been attempted on the Appellant's behalf. Indeed, it can reasonably be said that this appears to have been consciously avoided; a tactical stance that we would deplore, and one for which Mr Hussain had no explanation. Instead, there was a bald assertion that the Appellant's aunt was in receipt of state benefits, supported with a bank statement for an account held in her name for the one month of January 2018. There was no other disclosure of her financial position,

disclosure of the uncle's income, or, of their net asset position. There was no evidence of the financial position of the Appellant's parents, or, the financial disclosures that had been made in relation to them in the course of the 2013 entry clearance applications. There was no comment upon the financial position of his aunt and uncle's adult daughter and her husband.

19. Accordingly, whilst it is undoubtedly true that the Appellant's aunt received in January 2018 a number of payments from the DWP, the applications she had made for benefits that generated these payments were not disclosed. Moreover the payments received during this month is the only concrete financial information that has ever been disclosed in the course of this appeal about the financial circumstances of either the family living in the UK, or, the family living in Bangladesh. That failure to disclose material evidence must in our judgement be placed into the proper context of a family that used deception to bring the Appellant into the UK in 2015, and then sought to use deception in the course of the appeal in order to justify his remaining in the UK. Although the FtT accepted at face value the bald assertion that the Appellant's parents are poor, and the Respondent has not challenged this finding, the failure to disclose the full and true financial positions of the extended family means in our judgement that it can carry little weight.
20. As a consequence of the foregoing, the Appellant has in our judgement clearly failed to discharge the burden of proof of satisfying the Tribunal that funds are not available within the extended family to finance whatever educational path he may choose to follow, now, or in the future.
21. Whilst we note the FtT's assessment of the best interests of the Appellant as being to remain in the UK within the household of the uncle and aunt and to continue the course of education upon which he is enrolled, we are satisfied that this assessment is flawed for three reasons; (i) it took no account of the continuing "family life" with his immediate family in Bangladesh, (ii) it assumed in the absence of reliable evidence to that effect that no education in his chosen field was available in Bangladesh, and, (iii) it assumed in the absence of reliable evidence to that effect that the extended family did not have the financial ability to fund education outside the UK.
22. We undertake our own best interests assessment, having regard to ZH (Tanzania) [2011] UKSC 4 and section 55 of the Borders, Citizenship and Immigration Act 2009. Given the continuing family life between the Appellant and his parents, together with our finding that an absence of adequate financial support (either from his parents or relatives in the UK, or a combination of both) has not been made out, we conclude in the first instance that his best interests, at least to a significant extent, lie in his being reunited with his mother and father and sibling in Bangladesh. As a primary consideration, this factor would weigh significantly in favour of the Appellant's removal.
23. Even if we were to conclude that the Appellant's best interests did lie in remaining in the UK with his uncle and aunt, so that he could pursue his current course of education to its conclusion, this would not carry significant weight as a primary consideration, given the facts of this case. We accept that the years spent as a child in the UK are of importance, and that the period

from age 11 to age 17 would be of more significance than the period from age 4 to age 11. However the period spent in the UK does not meet the requirements of paragraph 276ADE, and, falls short of the 7-year threshold set out in the Rules and section 117B(6). The Appellant has been able to sit his GCSE examinations, and has acquired a fluency in English, thereby achieving an educational platform which is highly likely to be of assistance to him if he were returned to Bangladesh. It has not been shown that he would in reality be deprived of the ability to continue his education in Bangladesh within his chosen field, or indeed any other. In addition, the evidence before us discloses no medical problems.

24. Looking at the competing “family life” relationships, we are unable to identify any cogent evidence as to why the relationships with the members of the household of the Appellant’s uncle and aunt should be preferred over, or given greater weight than, the relationships he enjoys with his parents and sister. There is no reliable cogent evidence that would permit such a conclusion, because of the tactical decision to deploy the dishonest claim that he had no relationship with his parents and sister. We note Mr Hussain’s argument that there would be a significant effect upon the Appellant’s aunt who has treated him as a son over a number of years, but we also note that her witness statement did not make this claim. We consider that in the circumstances of this case we can place little weight upon this claim.
25. Finally, even if it could properly be said that the Appellant’s best interests lie in remaining in the UK, we remind ourselves that this could only be a primary consideration, and must not be elevated to the status of a “trump card”.
26. Bearing in mind the guidance to be found in KO (Nigeria) [2018] UKSC 53, we remind ourselves as noted above, that Mr Bramble accepted that there is in this appeal no enhanced public interest in the removal of the Appellant as a result of the deception employed by either his parents or his aunt. We make it clear that we do not in any way seek to visit the misconduct of his parents, or his aunt, upon the Appellant himself.
27. That is not to say however that there is no public interest in the Appellant’s removal. Parliament has clearly stated that there is: see sections 117A-B of the Nationality, Immigration and Asylum Act, as amended. The overall public interest in maintaining effective immigration control, as set out in section 117B(1), is a significant factor on the Respondent’s side of the balance sheet. So too is the fact that the Appellant is unable to satisfy any of the requirements of the Immigration Rules for a grant of leave to remain.
28. We note that the Appellant’s “private life” in the UK was formed at a time when, although he enjoyed a discretionary grant of leave, his status was “precarious”. Thus, in principle little weight should be given to it; see section 117B(5). We take account of the fact that the Appellant is a minor. We are however satisfied that the precarious nature of the Appellant’s status in the UK throughout must reduce the weight that the “private life” that he has established might otherwise attract.
29. We bear in mind that the Appellant does speak English. As set out in AM (S 117B) Malawi [2015] UKUT 260 (IAC) and Rhuppiah [2018] UKSC 58, the

- effect of section 117B(2) is that this does not weigh positively in his favour – it is a neutral consideration.
30. The Appellant is not financially independent, but given his minority this is of little surprise and represents a factor over which he has little or no control. Equally he cannot be held responsible for that fact that he has been educated at public expense as the result of the decisions made on his behalf by the adults with responsibility for him. Having had regard to section 117B(3), we conclude that we should treat this as a neutral consideration.
 31. We stand back to look at the evidence and all the relevant factors on a cumulative basis and to ask ourselves how a “fair balance” should be struck between the competing individual interests and the public interest, applying the proportionality test; see Agyarko [2017] UKSC 11. If the Appellant’s best interests lie in him returning to live with his parents and sister in Bangladesh, then the balance is self evidently and overwhelmingly in the Respondent’s favour. Even if we were to proceed on the basis that the Appellant’s best interests lie in him remaining in the UK, then we are satisfied that the factors on the Respondent’s side of the balance sheet outweigh those in his favour.
 32. We conclude therefore that the Respondent’s decision to refuse to grant leave to remain does not represent a disproportionate interference with the Appellant’s “private life” and/or “family life” in the UK. The Respondent’s decision is therefore not unlawful under section 6 of the Human Rights Act 1998. It follows that the Appellant’s appeal must be dismissed.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 14 June 2019 contained a material error of law in the decision to allow the Appellant’s human rights appeal which requires that decision to be set aside and remade.

Upon remaking the decision, we dismiss the human rights appeal.

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

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. 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.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 5 September 2019

