



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

**Appeal Number: UI-2022-001530**  
on appeal from HU/01597/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 August 2022**

**Decision sent to parties on:  
On 27 September 2022**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**REZA UL KARIM  
[NO ANONYMITY ORDER]**

Appellant

**and**

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

Respondent

Representation:

For the appellant: Mr Shahadoth Karim of Counsel, instructed by Liberty  
Legal Solicitors LLP

For the respondent: Ms Amrika Nolan, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 17 July 2020 to refuse him leave to remain on human rights grounds, pursuant to paragraph 276ADE, alternatively outwith the Immigration Rules HC 395 (as amended) pursuant to Article 8 ECHR.
2. The appellant is a citizen of Bangladesh.
3. **Mode of hearing.** The hearing today took place face to face.

## Background

4. The appellant was born in 1984 and is 38 years old. He lived in Bangladesh until 2009, when he was 25. The appellant worked as a tutor while studying in Bangladesh, where he achieved a Master's degree in Chemistry. His father is a retired factory worker for a pharmaceutical company, and his mother a housewife. His parents contributed to the cost of his studies, partly out of money sent by his brother in Ireland after the appellant's father retired in 2000. The appellant earned money from his tuition, which helped.
5. The appellant entered the UK on 23 November 2009 as a Tier 4 (General) student. He remained, with various forms of student and post-study leave, until 15 September 2015 when his studies ended. He had then been in the UK for less than 6 years.
6. In 2011, following his UK studies, the appellant achieved a Master's degree in Business Administration.
7. In 2014, he returned to Bangladesh, where he married his wife who joined him in the UK on 9 April 2015. The appellant's wife is also highly qualified, having achieved a Master's degree in English in Bangladesh. Her father paid for her education. He is a retired civil servant, with a small pension. Her mother is a housewife.
8. On 15 September 2015, as the First-tier Judge found, the appellant made an in-time application for leave to remain outside the Rules. The respondent accepts that this decision was incorrectly rejected for non-payment of the Immigration Health Surcharge (IHS), which he paid on 16 October 2015.
9. The appellant did not challenge that decision at the time, choosing instead to make another application. He challenged it out of time by making a complaint on 3 September 2018, to which the respondent responded on 11 October 2019.
10. The appellant and his wife have two daughters, born in the UK on 26 January 2016 and 2018 (so now 6 and 4 years old). The appellant's wife developed gestational diabetes mellitus during her second pregnancy in 2018 and the younger daughter has suffered a number of past illnesses, including eczema, atopic dermatitis, and respiratory tract infections.
11. On 24 October 2015, the appellant made a private and family life application, which was refused on 16 May 2016 with an out of country right of appeal. Following notification by the appellant that he would challenge that second decision by judicial review, the respondent reconsidered the decision and refused again, on 7 February 2017, with an in-country right of appeal. He was appeal rights exhausted in relation to that appeal on 6 December 2018.

12. On 28 March 2019, the appellant made the present human rights application.

### **Refusal letter (17 July 2020)**

13. On 17 July 2020, the respondent refused the appellant's human rights application.
14. After setting out the history, the respondent noted that the appellant could not show 20 years' continuous residence in the UK as at the date of decision: he had not yet lived here for 10 years and paragraph 276ADE (1) (iii) did not avail him. He also could not bring himself within paragraph 276ADE (1)(vi) as he had not demonstrated 'very significant obstacles' to his reintegration in Bangladesh, where he had lived until he was 25. He spoke Bengali, his parents still lived there, and he had married his wife in Bangladesh in 2014.
15. The respondent then considered the 10-year partner and private life routes, by reference to paragraph 276CE, and sub-paragraphs 276ADE(1) (iii) and (v) of the Rules.
16. There were no exceptional circumstances for which leave to remain should be given outside the Rules.
17. The appellant appealed to the First-tier Tribunal.

### **First-tier Tribunal decision 2018 ('the Swaney decision')**

18. The decision of First-tier Judge Swaney in 2018 dealt with human rights claims by the appellant and his wife, who was then pregnant with their second daughter.
19. This decision is the *Devaseelan* starting point for consideration of the appellant's appeal by the First-tier Judge in 2022. In her summary of the factual background, Judge Swaney said this:

"3. On 15 September 2015, the appellants applied for further leave to remain outside the Immigration Rules. That application was refused on 16 October 2015, because they had failed to pay the relevant Immigration Health Surcharge (IHS). They resubmitted the application/made a further application for leave to remain on 25 October 2015. The application was refused on 16 May 2016 with an out of country right of appeal. The appellants put the respondent on notice that they intended to challenge the decision by way of judicial review following which the respondent agreed to reconsider the application. It is the decision made following reconsideration that is the subject of this appeal."
20. The First-tier Judge criticised the badly drafted refusal decision made by the respondent on 16 May 2016. She summarised the grounds of appeal

to the First-tier Tribunal as 'essentially that the respondent failed to carry out a proper proportionality assessment and that he failed to conduct a proper assessment of what is in the best interests of the appellant's child'. Reference in the 2016 refusal letter to a previous criminal offence by the appellant could not be amplified by the presenting officer on the day: the appellant denied it, and the judge gave it no weight.

21. An international protection issue was raised, but the judge refused to admit it in the human rights appeal. That was a 'new matter' and the presenting officer on behalf of the respondent did not consent to its admission at such a late stage. It does not appear that a protection claim was made subsequently, although at the hearing, the presenting officer put to the appellant that the respondent's records included an asylum claim in his name which was refused and the appellant against that decision dismissed on 13 August 2014. The appellant denied that the protection claim referred to him.
22. In submissions for the appellant, his Counsel raised the IHS thus:

"40. Ms Ferguson submitted that the appellant's position is that he has continuing leave pursuant to section 3C of the Immigration Act 1971. She noted that the reason for refusal was the failure to pay the IHS and that when the application was resubmitted, it should have been treated as the same application rather than a new one. If he has section 3C leave, Ms Ferguson submitted the appellants do not have an adverse immigration history. She submitted they have paid the IHS, were able to support themselves when they both had permission to work, and in light of the lack of any evidence to the contrary, they do not have any criminal history. "
23. Judge Swaney then dealt with the section 3C point at [69]:

"The appellants claim that they should be regarded as having continuing leave under section 3C of the Immigration Act 1971. This is because an in-time application was apparently wrongly rejected and when it was re-made, was treated as a new application. I simply do not have any documentary evidence before me to determine this issue. "
24. The judge accepted that the protection issues were a new matter, and absent consent from the respondent, could and did make no finding thereon. No member of the family was a British citizen and paragraph EX.1 did not apply.
25. In a carefully reasoned decision, the judge noted the lack of external evidence about the parties' private life ties to the UK. She did not find that the appellants' removal, with their elder daughter, would be unjustifiably harsh. She dismissed the appeals.
26. The appellants appealed to the Upper Tribunal. The decision of Deputy Upper Tribunal Judge Eshun on 15 October 2018 does not engage with the section 3C argument, which does not seem to have been in issue before her. The challenge to the First-tier Judge's decision was on the basis of procedural unfairness and/or the best interests of the appellant's elder

daughter. The appeal was dismissed and that dismissal was upheld by the Court of Appeal.

### **First-tier Tribunal decision 2022 ('the Cameron decision')**

27. On 28 January 2022, the First-tier Tribunal promulgated the decision of First-tier Judge Cameron, dismissing the appellant's appeal. He considered whether there was a historic (or historical) injustice which could outweigh the public interest, having regard to the error which the respondent had made about the IHS payment in 2015. Even had the application made on 15 September 2015 been accepted, the judge found that it would not have extended the appellant's section 3C leave sufficiently to meet the 10-year qualifying period.
28. Nor was the judge satisfied that compelling circumstances had been demonstrated warranting a grant of leave outside the Rules.
29. The appellant appealed to the Upper Tribunal.

### **Permission to appeal**

30. The appellant advanced four grounds of appeal:

**(1) Ground 1** Applying *Basnet (validity of application – respondent) Nepal* [2012] UKUT 113 (IAC) and the line of auth flowing therefrom, the First-tier Judge erred in failing to find that the September 2015 application remained outstanding throughout, such that his section 3C leave continued and he could meet the 10-year qualification period;

**(2) Ground 2.** The First-tier Judge had erred in fact by concluding that the section 3C leave ended on 6 December 2018, given that the Court of Appeal had refused permission on 15 March 2019. Had the respondent not made the error that she did in relation to the 15 September 2015 application, the appellant would not have had to make the October 2015 application and/or pursue judicial review. He should be returned to the position in which he would have been, but for the respondent's error: see *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009.

The 2018 decision of First-tier Judge Swaney, which was the *Devaseelan* starting point for the 2022 decision, was made without knowledge of this error, which should have been factored into the consideration of whether it was unjustifiably harsh for the appellant to be removed;

**(3) Ground 3.** The respondent's actions led to the appellant and his family, including his daughters, being exposed to the 'hostile environment' with his right to work and so on being taken away on an incorrect basis. This should be taken to diminish the weight to be given to the public interest in removal and the consideration of 'effective

immigration control': see *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 highlighted the dysfunctional system.

The judge should not have given weight to the respondent's indication that even if the September 2015 application had not been erroneously rejected, she would not have granted leave. The appellant would have had a right of appeal as a person lawfully present in the UK with section 3C leave and the outcome might have been different.

**(4) Ground 4.** The Independent Social Worker's report indicated that the appellant's daughters did not speak Bengali, which would restrict their access to education in Bangladesh. The children's best interests had not been treated as a primary consideration: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

31. First-tier Judge Rhys-Davies granted permission to appeal on all grounds, but in particular on ground 1, finding that:

"2. There is merit in ground 1. In an otherwise careful decision, it is arguable that the judge materially erred after finding that the respondent had wrongly rejected the appellant's application of 15 September 2015 [28], by failing to go on to address the consequences of that finding in terms of the application being outstanding and the appellant's s.3C leave continuing. The same issue has a bearing on the points taken in grounds 2 and 3, which are also arguably material errors.

3. I am less persuaded by ground 4, but, having granted permission on the others, do [not] refuse permission on that point. All the grounds may be argued."

### **Rule 24 Reply**

32. There was no Rule 24 Reply by the respondent.

33. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

34. I have the benefit of a skeleton argument by Mr Shahadoth Karim, prepared for the First-tier Tribunal hearing. Mr Karim also appears today. After summarising the factual matrix, Mr Karim identified three issues for the First-tier Tribunal to decide:

- (1) Whether the appellant can bring himself within paragraph 276B of the Immigration Rules and whether he has completed 10 years' lawful residence (incorporating the historical injustice in September 2015);
- (2) Whether removal of the appellant would be contrary to paragraph 276ADE (1)(vi) of the Rules; and
- (3) Whether the appeal should be allowed on Article 8 ECHR grounds [outside the Rules].

35. In relation to (1) above, the appellant's case was that on the balance of probabilities, he had section 3C leave uninterruptedly from 15 September 2015 to date. He relied on paragraph (3) in the judicial guidance in *Patel (historic injustice; NIAA Part 5A) India* [2020] UKUT 351 (IAC) to contend that the historical injustice suffered was determinative of the appeal and it should be allowed.
36. In relation to (2) and (3), the appellant contended that the further evidence advanced (in particular the birth of his second daughter) required fresh consideration and findings subsequent to the Swaney decision, which was merely the *Devaseelan* starting point on the facts as then known. That interpretation was derived from [31] and [37]-[38] of *Secretary of State for the Home Department v BK (Afghanistan)* [2019] EWCA Civ 1358. The second Tribunal could lawfully depart from a previous conclusion on the facts, after careful examination of changes to the factual matrix, in the interests of fairness and maintenance of proper immigration control.
37. The appellant continued to contend that the requirements of paragraph 276ADE(1)(vi) were met in his case - see [19]-[20] of the skeleton argument.
38. As regards Article 8 outside the Rules and issue (3), the skeleton argument asserts a strong private and family life and that the children, having been born here, had spent all of their lives here. The elder daughter was then 5 years old and her sister was 3. It would be unjustifiably harsh to expect them to relocate with their parents to Bangladesh, particularly given the historical injustice already mentioned.
39. In conclusion, the appellant sought an opportunity to reply to the respondent's submissions. If the respondent were to adduce any new evidence, the appellant objected in advance to its admission and submitted that if admitted, he should be given the opportunity to respond and permitted to make a wasted costs application. The reason for that submission is not clear to me.

## **Analysis**

40. I have had careful regard to the eloquent submissions made by Mr Karim at the hearing, and the case law to which he took me. However, I am not persuaded. The appellant's appeal turns primarily on the section 3C point, which is without arguable merit.
41. The respondent by not treating the October 2015 application as out of time, and recognising that the appellant had paid the IHS, took all relevant steps to correct her September 2015 error and remade the decision with an in-country right of appeal. The section 3C issue was raised by the appellant in his the Swaney appeal, although he provided no supporting documents. At the latest, his section 3C leave ended when the Court of Appeal refused permission in March 2019.

42. The September 2015 application, even if conflated into the October 2015 application, was then at an end. That was too early to give the appellant the 10 years' lawful residence he required for settlement because his entry to the UK was in November 2009, so it was 6 months short. The section 3C leave issue, even taken with an asserted historical injustice, does not give the appellant 10 years' lawful presence in the UK and the First-tier Judge did not err in so finding.
43. Nor has the appellant established that he has no ties with Bangladesh. He has his parents there, as well as those of his wife. He lived there until the age of 25 and in 2014, he returned there to marry. The First-tier Judge did not err in finding that paragraph 276ADE(1)(vi) did not avail the appellant.
44. As regards Article 8 outside the Rules, and the best interests of the appellant's daughters, they are still very young and the First-tier Judge did not err in considering that their primary purpose would be their immediate family. The daughters have no serious health or social problems and are young enough to learn to speak Bengali, even if it is not spoken at home now.
45. The evidence of private and family life is limited to assertions by the appellant and his wife that it exists. There is no corroborative evidence and in any event, because they have always been in the UK either precariously or unlawfully, little weight can be given to private life. The parties would be removed together, along with their daughters, so there is no impact on their family life. The assertion, without more, that they have been subjected to a hostile environment and unable to work or support themselves is not sufficient to establish that they have had any difficulties at all. Their ability to support themselves without working remains unexplained.
46. Overall, I am satisfied that the grounds of appeal and Mr Karim's oral argument do not identify any material error of law in the decision of the First-tier Tribunal, which is upheld.

## **DECISION**

47. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)  
Upper Tribunal Judge Gleeson

Date: 10 August 2022