



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003949
HU/53418/2021; IA/09710/2021**

THE IMMIGRATION ACTS

**Heard at Bradford IAC
On the 16 December 2022**

**Decision & Reasons Promulgated
On the 23 January 2023**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SA

(Anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer.

For the Respondent: Mr Shah of Taj Solicitors (via Microsoft Teams).

DECISION AND REASONS

- 1.** The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Bircher ('the Judge') who in a decision promulgated following a hearing at Newcastle on 24 June 2022 allowed SA's appeal pursuant to Article 8 ECHR.

2. SA is a citizen of Bangladesh who was born on 21 February 1980. On 17 December 2020 he submitted an application for leave to remain under paragraph 276ADE of the Immigration Rules which was refused by the Secretary of State on 28 June 2021.
3. The Judge records at [14] that SA pursued his application for leave to remain on the basis of his having lived continuously in the UK for at least 20 years or having lived in the UK for less than 20 years but there being very significant obstacles to his integration into Bangladesh.
4. The Judge noted a previous decision of another judge of the First-tier Tribunal who heard an appeal by SA on 15 April 2020, which was dismissed. The earlier judge recorded evidence from SA as being “inconsistent, implausible and vague” and specifically found that his evidence was incredible and was rejected in its entirety.
5. The Judge finds that it is unlikely there will be very significant obstacles to SA’s integration into Bangladesh today [18] and states that even if the requirements of paragraph 276ADE are not met, and there are no significant obstacles, that it remains open to her to consider what exceptional circumstances if any would make refusal a breach of Article 8 ECHR.
6. At [19] the Judge sets out paragraph GEN.3.2 of Appendix FM.
7. The Judge’s findings leading to the appeal being allowed are in the following terms:

20. I recognise that the appellant entered the UK illegally and for a number of years worked illegally. It was only in 2008 that he attempted to engage with the UK immigration authorities. However, I do find his explanation as to why he came to be in the UK a credible one. The decision for him to come to the UK was not made by him alone. It could not be because his father sold land, mortgaged the home and other family and friends helped fund the appellant’s travel to the UK with the assistance of an agent. In essence the family decided that one member would be sent to the UK to work illegally in the UK. The arrangement was that having paid a very large sum of money to an agent the appellant would then be able to enter the UK, work hard and send regular money home to his family. It seems likely that for the first few years of his illegal stay in the UK the appellant was able to generate income and send it home. However, once he disclosed his presence to the UK immigration authorities it became more difficult for him to work illegally and in any event the changes in the law were making it increasingly difficult for employers to employ illegal immigrants and for which they would face fines of several thousand pounds if caught. Given this set of circumstances I find it credible that because the appellant was no longer able to generate money to send to friends and family this in turn resulted in him becoming estranged from friends and family in Bangladesh. He in effect continues to owe money to members of his family and community in Bangladesh and he has essentially defaulted on an agreement to work in the UK

and send money back to Bangladesh which had been used to pay the agent to get him here to the UK.

21. The appellant has spent many years living in the UK and may also have spent more years living in the UK than his home country of Bangladesh. He simply has not been able to work illegally and there is no evidence from the respondent to suggest that he has worked illegally. It is clear from the witness statements that he has developed a network of close friends in the community over many years in the UK. It is worth noting that such friends are not only prepared to offer emotional support but also practical and financial support. Mr Miah in his witness statement dated 3rd August 2020 explains how the appellant is a volunteer cleaner at the mosque in South Bank and Mr Kibria states that the appellant is someone who is always willing to help the community. Several of the witnesses confirm that the appellant is a volunteer cleaner at the mosque and also worked in the British Heart Foundation shop. Other witnesses such as Mr Hussain in a witness statement dated 31st July 2020 have explained that the appellant has embarked upon a 3-year English course.
22. It is reasonable to conclude that within the community in which he has established himself in the UK, the appellant is regarded as a decent man. The very fact that Mr Luthfur Roham (witness statement 3.1.22) confirms he has been providing accommodation to him since 2015 and Mr Syed Muthakim in a witness statement dated 4th January 2022 has confirmed that he is willing to provide the appellant with a job in his restaurant called Spice of India is testament to this. Similarly, Mr Ishfaque Choudhry also states in his witness statement dated 3rd January 2022 that he is willing to offer the appellant a job in his restaurant. People do not give a home, income and a job to a person they do not trust. The infrastructure is in place for the appellant to commence work immediately and make a legitimate contribution to the UK economy. He has basic English skills and is already settled within his local community in the UK. The appellant is unlikely to be a drain on the UK economy and seeks to make a contribution as soon as he is able. During the course of the last 10 years or so the appellant has not sought to 'disappear' without trace. He has complied with reporting to the UK immigration authorities on a regular basis and when he has not been able to work legally or illegally for that matter, he has committed to volunteer work cleaning the mosque and working for the British Heart Foundation charity.
23. I am satisfied that the appellant has established a private life in the UK. He is a valued member of the Bangladeshi community in the UK. Clearly having established a private life in the UK, were he to return to Bangladesh his right to a private life under Article 8 would be interfered with. Such an interference would be in accordance with the law given that he would not have secured the appropriate Leave to Remain and that interference would also be in pursuit of one of the

legitimate aims set out in Article 8(2). By his own admission this appellant left Bangladesh for the sole purpose of entering the UK to work illegally. He is not a refugee and has never been found to be one. The appellant could have no legitimate expectation that he would be granted Leave to Remain. In the UK. The (sic)

24. UK Citizens and Citizens of other nations need to have confidence in the Immigration Rules and processes which they follow. The rules should be firm but fair and future applicants need to have confidence in the process required to secure student visas and Leave to Remain. The maintenance of effective immigration control is in the public interest and in particular in the interests of the economic well-being of the UK. Without such controls many people would be free to enter the UK and by doing so would be eligible for social security benefits, medical treatment from the NHS, social housing and free to compete at will in the UK employment market.
25. However, as already identified above I must also consider if removal of the appellant from the UK would be proportionate to the permissible aim or aims set out under Article 8(2). For the reasons set out below I am satisfied that it would not be proportionate to remove this appellant from the UK. The appellant has resided in the UK for many, many years. No one is quite sure for how long. Given that he has submitted an application for Leave to Remain as far back as 2008 it is reasonable to assume that the appellant has been in the UK for a minimum of 14 years. He was wrong to enter illegally albeit with the support of his family in Bangladesh. The appellant worked illegally for a number of years in the UK which does impact upon the UK economy in so many ways. Firstly, because he was working illegally in the UK his employer was not deducting tax and national insurance at source for the benefit of the UK economy. Furthermore, by virtue of the fact that his employer was not paying tax and national insurance his employer's business's overheads were less than that of any competitor who only employed workers on a legal footing. Consequently, those businesses with greater overheads were at greater risk of collapsing whilst those who employed illegal workers remained in operation.
26. I recognise that the appellant could return to Bangladesh. He is still fluent in Bengali and he has lived amongst the Bengali community in the UK which has enabled him to remain close with the Bengali culture in general terms. I accept however that the appellant has lost contact with his family and friends in his home area of Bangladesh. His family made sacrifices to raise a very large sum of money to forge the appellant a new life in the UK. The arrangement in return was for the appellant to send regular sums of money home to his family. Since he made himself known to the UK immigration authorities and the penalties against employers who employ illegal immigrants have become much more draconian, he has been unable to send money home. He is unlikely to be

welcomed back by his family and may be ostracised in his home community in Bangladesh. The appellant has now spent more than half of his life in the UK. He already has a home and a job is promised to him in an industry he knows well. I accept that his friends in the Bangladeshi community in the UK are unlikely to offer any support to him in the event of his return to Bangladesh. Living with a family in the UK, as part of the family, adds little in the way of additional expense in terms of food and a room. Meals are being provided for the family in any event as are the day to day running costs of the home. Mr Rohman confirmed that it would be a very different proposition were the appellant to return to live in Bangladesh and he indicated that he would not in such circumstances be prepared to offer financial assistance in the event that the appellant was to be returned to Bangladesh. The appellant despite not being able to participate in paid employment has sought to make a contribution to the Bengali community in which he lives in the UK. He volunteers at the mosque and the Heart Foundation charity and has sought to improve his English language skills via an ESOL course.

27. On balance I am satisfied that given the excessive number of years in which the appellant has resided in the UK, and more latterly the contribution he has made to his community, it would be disproportionate for the appellant to be returned to Bangladesh. He already has a home in which he has been living in the UK for 7 years and a job awaits him. The appellant within a relatively short period of time is likely to establish himself as someone who contributes to the UK economy and will continue to contribute to the Bangladeshi community and extended community in which he resides in the UK.
28. In conclusion therefore I am satisfied that it would be disproportionate for the appellant to return to Bangladesh.
8. The Secretary of State sought permission to appeal noting that the Judge had held that SA cannot meet the requirements of paragraph 276ADE of the Immigration Rules [18] yet allowed the appeal as it was found to be disproportionate for SA to return to Bangladesh.
9. The grounds assert a misdirection in law by referring to Gen.3.2 of Appendix FM as the application was made on the basis of private life pursuant to paragraph 276ADE and not under Appendix FM. The Grounds argue that in considering the application of Gen.3.2 the Judge materially erred.
10. The grounds also argue the Judge erred in relation to the application of the Devaseelan principle in failing to adequately take account of the previous findings in respect of credibility which is said to be a material error of law.
11. In relation to the proportionality argument, the grounds argue the Judge essentially allowed the appeal because she held SA had lived in the UK for “excessive years” and the contribution made to the community which was understood to be that he volunteered to clean the mosque and at the British Heart Foundation. The grounds assert

that the Judge referring to SA having lived in the UK for a minimum of 14 years at [25] is not supported by an explanation for the finding such length of residence is excessive or could override the requirements of the Immigration Rules, which require a minimum period of residence of 20 years. The grounds argue there is no consideration of paragraph 117B(4)(a) of the Nationality, Immigration and Asylum Act 2002 and that despite finding SA could return to Bangladesh the Judge failed to provide adequate reasons for why it would not be reasonable for him to do so.

12. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis it was considered arguable that the Judge had erred in her consideration of proportionality as set out in the grounds. The grant of permission states the Judge makes no clear findings about the length of time SA has lived in the UK beyond the fact it is a minimum of 14 years and that her findings are arguably inconsistent as she says that SA may have spent more years living in the UK than his country home of Bangladesh [21] but also that he has now spent more than half of his life living in the UK [26], and that he spent the first 20 years of his life in Bangladesh [17], which would suggest that he had indeed spent more than 20 years in the UK. The grant also notes the Judge did not consider section 117B(4)(a) not even in her self-direction at [11].

Error of law

13. Consideration of Appendix FM, specifically Gen.3.2 ,is not explained at all in the determination when, as stated, the basis of claim was not made under Appendix FM. Doing so does raise the question whether the Judge fully understood the issues at large in the appeal.
14. In relation to the assertion the Judge failed to properly apply the Devaseelan principles, it is settled law that earlier findings do not tie a later judge who, if the interests of justice dictate, is able to depart from the findings made in the first decision. The earlier judge found SA's claim lacked credibility for the reasons set out in that decision. Even though the Judge was entitled to make alternative findings it is not clear in the determination how or whether the Judge factored the earlier conclusion into the findings in the decision under challenge. It may, of course, be that evidence was made available to the Judge that was not available to the earlier tribunal.
15. The main concerns in relation to this decision are twofold. The function of a judge is to make a decision which enables a reader to understand firstly what the core decision is and, secondly, why the judge came to that conclusion.
16. In this appeal the Judge makes a specific finding SA has lived in the United Kingdom for 'excessive years' without defining what she means by that term. There is merit in the Secretary of State's claim that there are inconsistencies in the determination in relation to how long SA has been in the United Kingdom, meaning the overall conclusions lacks clarity and adequate reasoning. There is merit in the claim in the grounds that as 14 years does not meet the minimum requirement of

20 years residence as required by paragraph 276ADE it is unclear why the Judge concludes this was sufficient to warrant the appeal being allowed, when it was not made out SA can satisfy the Immigration Rules.

17. Of greater concern is that the Judge has allowed the appeal on the basis the consequence of interference in SA's private life he has formed in the United Kingdom makes his removal disproportionate without considering the statutory provisions. The purpose of a decision-maker considering this aspect is to arrive at a decision that is compatible with Article 8 ECHR. The Secretary of State's view of how this question should be approached is set out in statute in section 117 of the Nationality, Immigration and Asylum Act 2002. At section 117 B(4) is a specific statutory provision that little weight should be given to a private life formed whilst the person's status is precarious. It cannot be disputed that SA's presence in the United Kingdom has always been precarious and that any private life he has formed and seeks to rely upon has been developed at that time. There is no reference, not even in the legal self-direction, to this provision or in the Judge's conclusions. It cannot be inferred from reading the decision that the Judge considered this provision or has justified the weight that she chose to apply to the private life being relied upon and how that outweighed the public interest.
18. Whilst the Judge notes SA's private life includes cleaning at the local mosque and working at the Heart Foundation that in itself, arguably, warrants little weight in light of the statutory provisions.
19. There is merit in the assertion in the ground seeking permission to appeal that it is unclear when reading the determination and evidence why it has been held to be unreasonable for the appellant to return to Bangladesh and why his removal will amount to a disproportionate interference in a protected right.
20. Having had regard to the Presidential Guidance concerning remittance of appeals, and in light of the lack of clarity in the Judge's findings in relation to the length of time the appellant has been in the United Kingdom and the legal impact of the same, and the failure to factor into the human rights assessment the mandatory statutory provisions, giving rise to a need to undertake a further detailed assessment of the evidence and extensive fact-finding, I consider it appropriate in all the circumstances to remit the appeal to the First-tier Tribunal sitting at Newcastle to be heard afresh by a judge other than First-tier Tribunal Judge Bircher.

Decision

21. **The Judge materially erred in law. I set the decision aside. This appeal shall be remitted to the First-tier Tribunal (IAC) sitting at Newcastle to be heard afresh by a judge other than Judge Bircher.**

Anonymity.

- 22.** The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the appellant/respondent, likely to lead members of the public to identify the appellant/respondent. Failure to comply with this order could amount to a contempt of court.

Signed.....
Upper Tribunal Judge Hanson

Dated 22 December 2022