



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2023-002460

HU/51908/2021

IA/05653/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On the 10 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

**NIRMOL DEBNATH
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr K Mukherjee of Counsel, instructed by Lawmatic Solicitors

For the respondent: Ms S Cunha, a Senior Home Office Presenting Officer

Heard at Field House on 27 September 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh. He appeals against the decision of First-tier Tribunal Judge (FtTJ) Athwal following a hearing on 21 March 2023. The FtTJ dismissed the appellant's appeal against the decision of the Secretary of State dated 5 May 2021 refusing the appellant's leave to remain on human rights grounds. Permission to appeal was granted by Upper Tribunal Judge Reeds on 14 August 2023.

2. The hearing today took place in person.

Background

3. Before the FtTJ, the appellant asserted that he was entitled to remain in the UK on the basis of what is accepted by the respondent to be a genuine and subsisting relationship with Ms Nanson. He asserted that there would be insurmountable obstacles to family life continuing in Bangladesh.
4. The respondent contended that he did not meet the suitability requirements S-LTR 4.2 of the Immigration Rules as a result of fraudulent conduct in relation to his TOEIC English test and failure to disclose a 2015 caution to the respondent. The appellant's appeal against those aspects of the respondent's decision was dismissed and there is no appeal against those findings.
5. The appellant also argued that he was entitled to leave to remain on the basis of exceptional circumstances under GEN 3.2 of Appendix FM or alternatively on a residual basis under Article 8.
6. In his skeleton argument for the First-Tier Tribunal hearing, the appellant identified at paragraphs 9 to 11 of his counsel's skeleton argument the following matters as being the reasons why there were insurmountable obstacles to family life continuing in Bangladesh:
 - (a) Ms Nanson has learning difficulties, asthma and severe depression and would not be suited to any long-term relocation to Sylhet;
 - (b) Ms Nanson has two children, one aged 17 who has a diagnosis of global developmental delay and one aged 16 who live with Ms Nanson's grandparents but with whom Ms Nanson has regular weekly contact;
 - (c) Ms Nanson also provides help to her own mother;
 - (d) Ms Nanson is wholly dependent on the appellant.
7. It was further argued (para 13) that there were several factors that make the appellant's case exceptional with regards to Article 8, including:
 - (a) He and Ms Nanson commenced their relationship in 2013 at which point the appellant had leave to remain;
 - (b) They have lived together since 2015 at which point the appellant was expecting his leave to be extended;
 - (c) There had a been nearly a three-year delay in the consideration of the appellant's application of 31 July 2018;

- (d) As a result of his and Ms Nanson's mental and physical health problems neither of them would be able work in Bangladesh;
 - (e) Ms Nanson could not reasonably be expected to leave her children in the UK, even for a short period.
8. The appellant and Ms Nanson provided witness statements for the first-tier tribunal hearing and were cross-examined.

First-tier Tribunal decision

9. The FtTJ directed herself to the legal framework at [4]-[6], noting so far as the Article 8 claim was concerned that she should take into account the factors in s 117 of the Nationality, Immigration and Asylum Act 2002 and that normally unless an appellant has a specific rules-based entitlement the public interest is normally in favour of removal, the exception being "*where refusal would result in unjustifiably harsh consequences for the appellant or a family member such that refusal would not be proportionate*". She directed herself to take a balance sheet approach on the balance of probabilities.
10. FtTJ concluded that the appellant had used dishonesty to achieve his test results and had acted dishonestly when failing to disclosure the 2015 caution, so that he did not meet the suitability requirements of the Immigration Rules.
11. The judge found at [28]-[31] there were not very significant obstacles to the appellant's reintegration in Bangladesh. In so concluding, he rejected the appellant's case that he had any current mental health difficulties.
12. The FtTJ then turned to Gen 3.2 in Appendix FM and the question of whether there would be unjustifiably harsh consequences for Ms Nanson if he were not granted leave to remain. She rejected Ms Nanson's evidence that she suffers from a number of health issues (asthma, knee, bi-polar disorder, depression and learning disabilities) so that she is unable to manage day-to-day tasks and finances and is reliant on the appellant to look after her. She also rejected her evidence that she receives "personal assistance benefits". Her reason for rejecting that evidence was set out at [36] as follows:-
36. There is no evidence before me from any medical professional that establishes that the Ms Nanson suffers from any of the conditions she has listed, receives disability benefits, or requires any assistance with day-to-day living. Mr Mukherjee was unable to provide me with an explanation for why this evidence had not been provided, when in the circumstances it would have been reasonable to do so.
13. She then considered Ms Nanson's evidence that her mother was dependent on her, but rejected that because ([37]), "*I was not provided*

with a cogent explanation for how Ms Nanson is able to care for her mother when she is dependent on the appellant for her own needs”.

14. She concluded that the appellant had not shown that Ms Nanson has serious health conditions (no medical evidence having been provided), and that neither her children or her mother were dependent on her in the UK ([38]) so that there were “*no exceptional circumstances*”.
15. She went on at [39]-[45] to consider Article 8 outside the rules. In applying the balance sheet approach, the FtTJ placed a number of factors in the balance against the appellant, including at (iv) “*For the reasons set out above I am not satisfied that Ms Nanson would be unable to relocate to Bangladesh with the Appellant*”. The FtTJ concluded that the immigration decision was not disproportionate.

The parties’ submissions

16. Mr Mukherjee submitted that the test the FtTJ should have been applying in considering Ms Nanson’s position was whether there would be unjustifiably harsh consequences for her if leave to remain were refused, which depends in this case on whether there would be insurmountable obstacles to family life continuing Bangladesh. Mr Mukherjee referred, by way of example of the sort of factors that are normally considered on such an assessment, to the Home Office staff guidance *Family Policy: Family life (as a partner or parent) and exceptional circumstances* Version 19.0, page 63, arguing that all relevant factors need to be considered, including such matters as language, ability to integrate and impact on all family members.
17. He submitted that in this case, the FtTJ has not given adequate reasons for concluding at paragraphs 32-38 that there were not insurmountable obstacles for Ms Nanson of moving to Bangladesh. He submitted that Ms Nanson has three children in the UK, one who is in care. The judge finds that none of them are dependent on her, but that is not the test when it comes to the existence of family life. There should have been analysis of the ties between Ms Nanson and her children. Similarly with Ms Nanson’s mother, this is dismissed on the basis that she is not dependent, meaning financially dependent. There should have been consideration of the ties between Ms Nanson and her mother and consideration of the fact that Ms Nanson’s only sibling does not live in the UK. There is a dismissal of Ms Nanson’s medical conditions because there was no medical evidence, but that does not mean that Ms Nanson does not suffer from the medical problems that she says she does. In short, there is no proper consideration of unjustifiably harsh consequences. Nor is there proper consideration of the same points for the basis of Article 8 outside the Rules.
18. Ms Cunha in response relied on the respondents Rule 24 response and on Catherine Lal [2019] EWCA Civ 1925 at [36]-[39]. There needs to be an objective approach to the evidence. She accepted that the judge has not

referred to ‘insurmountable obstacles’ when looking at exceptional circumstances in this case, but emphasised the limited basis on which the appellant’s case on this ground was advanced in the skeleton argument. She submitted that much flows from the FtTJ’s unimpeachable rejection of the evidence as to Ms Nanson’s medical conditions and findings that the children and her mother are not dependent on her. She submitted that there was also no error in the FtTJ’s Article 8 proportionality assessment.

19. As to remaking if it is required, Ms Cunha submitted this would be a case that it is appropriate to retain in the UT.
20. Mr Mukherjee in reply submitted that it is only if this case could not succeed if the proper legal approach had been taken that the error in not addressing insurmountable obstacles could be immaterial. He submitted that it was clear from the substantive issues at paragraph 4.2 in the appellant’s skeleton argument that insurmountable obstacles was raised as an argument. The consideration of insurmountable obstacles has to be part of the consideration of Article 8. The judge’s consideration of the issues at paragraphs 32-38 has not addressed the acid test or the actual threshold under the rules. That has not been done. It is a complicated and detailed exercise. It has not happened.
21. Mr Mukherjee agreed that the appeal was suitable for remaking in the UT if an error of law is found.

Analysis

22. Both for the purposes of GEN 3.2 of Appendix FM and consideration of Article 8 outside the Rules, the FtTJ needed to consider whether refusal of leave to remain for the appellant would result in unjustifiably harsh consequences for Ms Hanson. The parties are agreed that it was necessary in order for the judge to answer that question to consider whether there are insurmountable obstacles to Ms Hanson relocating to Bangladesh with the appellant.
23. It is apparent from [44.iv] of the decision that the FtTJ considers that she has in the section of the judgment addressing GEN 3.2 set out the reasons why Ms Hanson would be able to relocate to Bangladesh with the appellant. However, when one looks back to [32]-[38] one does not find any reasons expressly addressing the question of whether Ms Hanson would be able to relocate to Bangladesh with the appellant, or alternatively, whether and to what extent she would be able to maintain a relationship with him if she remained in the UK.
24. The failure to set out any reasons on that important point is itself an error of law, but in the light of Ms Cunha’s submissions I need to consider whether the error is material. I can see the force in Ms Cunha’s argument that the evidence and submissions put forward in relation to Ms Hanson was thin and that each of the factual matters relied on in relation to her

(learning difficulties, health conditions, children, mother, dependence on the appellant) has been addressed by the FtTJ in the decision and rejected. However, I am not satisfied that the rejection of the appellant's and Ms Hanson's evidence on those points is adequately reasoned either.

25. It must be remembered that although the appellant had been found to have practised dishonesty so as not to meet the suitability requirements, there were no credibility issues raised in relation to Ms Hanson. In those circumstances, the wholesale rejection of all of her evidence about her learning difficulties, asthma, difficulties walking, depression and inability to manage day-to-day tasks and finances simply because she had produced no supporting documentary evidence is not in my judgment adequate. It is tantamount to just saying that her evidence was found to be implausible, incredible or unreliable, which is unlikely to be sufficient in any case (cf *MK (duty to give reasons) Pakistan* [2013] UKUT 641 (IAC)) and in my judgment is insufficient in this.
26. While there is no doubt that documentary evidence of medical conditions should normally be produced, it does not follow that simply because it is not that a witness's own evidence should be rejected. Or, at least, it is in my judgment an insufficient reason for rejecting a person's evidence if there is no other reason to doubt their own evidence. There may be other reasons in a particular case for rejecting a person's evidence about their personal circumstances, such as someone claiming to have difficulty walking who walks without difficulty to the Tribunal and into the hearing room, but no such reasons are identified by the judge in this case. The judge's question to Mr Mukherjee as the appellant's representative as to why such documentation had not been provided (see [36] of the decision) adds nothing on this point: it was Ms Nanson who the judge was disbelieving and thus it was to her that the question about why she did not have that evidence should have been put.
27. I also observe that the FtTJ's focus on the absence of medical evidence is misplaced for someone like Ms Nanson who claims to have learning difficulties. Although it might be expected that there would be reports from childhood about such matters, learning difficulties are not matters that in adulthood normally require medical intervention. That is a further reason why mere reference to the absence of medical evidence does not in my judgment provide an adequate reason for rejecting Ms Nanson's evidence.
28. It was also in my judgment insufficient for the FtTJ to treat her conclusion that Ms Nanson's children were not dependent on her as determinative of the issue that refusing the appellant leave to remain would not have unjustifiably harsh consequences for her. The fact that her children were not dependent on her (the grandparents having as the FtTJ notes at [33] been granted parental responsibility for two of them when they were young) in itself provided some support to her own claimed difficulties as it would otherwise be very unusual for grandparents to be given parental responsibility in this way. However, there also needed to be analysis by the

FtTJ of the nature and extent of the emotional ties between Ms Nanson and her children. Given her youngest daughter's disabilities, that assessment required especially careful handling. The FtTJ needed to consider what the impact would be on Ms Nanson if she had to leave her children (and her mother) behind and move to Bangladesh to maintain her relationship with the appellant, or alternatively what the impact on her would be of losing the physical relationship and support that she claims the appellant provides to her if she remained in the UK while he returned to Bangladesh.

29. None of the foregoing should be taken as indicating that this is necessarily an appeal that ought to have succeeded. However, I am satisfied that the FtTJ has erred in law in failing to address the relevant factors in relation to the 'unduly harsh' test for the purposes of both GEN 3.2 and Article 8 outside the Rules, in particular in failing to address and give reasons for rejecting the appellant's case on insurmountable obstacles, and that the reasons for the decision were not adequate.

Disposal

30. For all these reasons, I find that the FtTJ erred in law and the decision must be set aside insofar as it concerns Ms Nanson's position for the purposes of GEN 3.2 of Appendix FM and Article 8 outside the rules only.

31. Paragraphs 7.2 to 7.3 of the Senior President's Practice Statement 2012 provides:

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

32. I have also considered the guidance *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512, where the Court of Appeal emphasised the importance of remitting a case where a party had been deprived of a fair hearing, the logic being that even if little further fact-finding is required, a party is still entitled to have a fair hearing before the FtT and then enjoy a right of appeal to the UT if need be, rather than being required to go straight to the CA.

33. In this case, both parties were agreed that the decision could be remade in the Upper Tribunal, but I am afraid I disagree. Although the evidence in the bundle before the FtTJ was limited, I anticipate that the appellant will, on reflection, wish to make good the deficiencies in the supporting documentary evidence identified. There may need to be further oral evidence from Ms Nanson on the issue that needs to be re-made. She is likely to be a vulnerable witness and needs to be treated as such.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside insofar as it concerns Ms Nanson's position for the purposes of GEN 3.2 of Appendix FM and Article 8 outside the rules only.

The case is remitted to the First-Tier Tribunal for rehearing before a different judge.

Signed H Stout

Date: 27 September 2023

Deputy Upper Tribunal Judge Stout