



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004318

First-tier Tribunal No: HU/50298/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

MR MOHAMMED ALTAB ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms I. Mahmud, counsel, instructed by Lextel Solicitors
For the Respondent: Mr S. Walker, Senior Presenting Officer

Heard at Field House on 27 September 2024

DECISION AND REASONS

1. The Appellant is a Bangladeshi citizen aged 47 years who made an application for leave to remain on the basis of his private life in the UK. In a decision (“the Decision”) issued following a hearing on 17 July 2023 First-tier Tribunal Judge Stedman (“the Judge”) allowed the Appellant’s appeal of the Respondent’s refusal of his application.
2. Following a hearing on 24 November 2023 I decided that there was a material error of law in the Decision such that it should be set aside with the findings made in paragraph 15 thereof retained. That Decision is attached in the annex hereto.
3. This decision addresses the remaking of the Decision.

The Evidence

4. In addition to the evidence before the Judge there is also an updated Witness Statement from the Appellant. His evidence therein was not challenged by the Respondent. The hearing proceeded by way of submissions alone.

The Issue

5. The issue in dispute is whether the Respondent's decision to refuse the Appellant's application is a proportionate interference with his private and family life in the UK.

The Appellant's case

6. Ms Mahmud submitted that account should be taken of the fact that the Appellant had resumed contact with his daughter and had been in the UK for more than 20 years now. While he can speak English he had asked for an interpreter in case a court hearing might include technical language with which he would struggle. The Judge had found the Appellant capable of work and he would therefore be financially independent once he was able to work with leave. He now also has a relationship with a Bangladeshi student living in the UK with whom he has a baby son.
7. I asked Ms Mahmud to address the application of s117B(6) Nationality, Immigration and Asylum Act 2002 ("NIAA"). She submitted that it would not be reasonable to expect the Appellant's British citizen daughter to leave the UK.

The Respondent's case

8. Although Mr Walker did not concede the appeal, he submitted that I should take into account the fact that the Appellant had been in the UK for more than 20 years and the fact of increased contact between the Appellant and his daughter.

My decision

9. The Appellant is unable to rely upon qualifying under the Immigration Rules on the basis that he has been living in the UK continuously for more than 20 years as the rule is determined by reference to the date of application (31 January 2022), not the date of hearing.
10. The level of contact with his daughter does not show that the Appellant is taking an active role in her upbringing and therefore he does not qualify for leave to remain under the Immigration Rules on the basis of being a parent. There is no other basis of qualification under the Immigration Rules relied upon by the Appellant.
11. That means that a proportionality exercise must be undertaken and in so doing the provisions of s117B NIAA must be taken into account.
12. The Appellant did not previously rely upon his relationship with his daughter as the basis of his case before the Judge. The Respondent did not address the application of s117B(6) NIAA in the refusal of the application.
13. As at the hearing before me the Appellant's relationship with his daughter has changed and he has resumed contact with her. In any event, it is not disputed

by the Respondent that the Appellant has a genuine and subsisting parental relationship with her. His daughter is 9 years old and a British citizen. The Appellant and his daughter's mother separated some while ago and his daughter's mother has sole custody of her. However, she is a "qualifying child" for the purposes of s117B(6) NIAA. Accordingly, applying s117B(6) NIAA, as explained in the case of Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC), requires asking whether it is reasonable to expect the qualifying child or children to leave the UK and that is not dependent upon whether they will in fact do so. It is clear that it would not be reasonable to expect the Appellant's daughter to leave the UK.

14. While I am unable to find that the Appellant speaks English or is financially independent and these factors weigh against the Appellant in the proportionality exercise, the application of s117B(6) NIAA means that the public interest does not require the Appellant's removal. That therefore determines the case in the Appellant's favour.

Notice of Decision

1. The appeal is allowed on human rights grounds.
2. A fee award is not appropriate given the extent to which the decision relies on evidence and matters raised at the hearing.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9/10/2024

Annex



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004318

First-tier Tribunal No: HU/50298/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MOHAMMED ALTAB ALI
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr E. Waheed, counsel, instructed by Lextel Solicitors
For the Respondent: Mr Wain, Senior Presenting Officer

Heard at Field House on 24 November 2023

DECISION AND REASONS

1. The Appellant in the appeal before me is the Secretary of State for the Home Department and the Respondent to this appeal is Mr Ali. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Ali as the Appellant, and the Secretary of State as the Respondent.
2. The Appellant is a Bangladeshi citizen aged 47 years who made an application for leave to remain on the basis of his private life in the UK. In a decision ("the Decision") issued following a hearing on 17 July 2023 First-tier Tribunal Judge Stedman ("the Judge") allowed the Appellant's appeal of the Respondent's refusal of his application. In a decision dated 28 September 2023 First-tier Tribunal Judge Khurram granted permission to appeal on the basis that there were arguable errors of law in relation to the human rights proportionality

exercise carried out by the Judge and in particular, the application of s117B NIAA 2002.

The FTT Decision

3. The Judge found that the Appellant would not face very significant obstacles to reintegration into Bangladesh.
4. The Judge then proceeded to consider the proportionality exercise under Article 8 and said:
 - a. He apportioned significant weight to the public interest to the removal of individuals who pay scant regard to the legality of their status in the UK. There were long periods of overstaying which added weight to the respondent's side of the balance;
 - b. The law required little weight was given to the Appellant's private life in the UK;
 - c. On the Appellant's side of the balance was the fact that he was only one year away from having been in the UK for 20 years; his mental health; and the fact that he had a daughter in the UK with whom he was not in contact at the time of hearing but with whom he intended to reconnect.
5. The Judge decided that factors on the Appellant's side of the balance led to the conclusion that the Appellant's removal would breach Article 8.

The Respondent's Grounds of Appeal

6. In summary, the Respondent's grounds of appeal are as follows:
 - a. the Judge failed to take account of, or give weight to, the Appellant's lack of English as required by s117B NIAA 2002;
 - b. the Judge failed to take account of or give weight to the Appellant's financial independence as required by s117B NIAA 2002;
 - c. the case of *Dube (s117A-D)* [2015] UKUT 00090 makes clear that the factors in s117B NIAA 2002 must be addressed;
 - d. the Judge failed to give weight to the Appellant's inability to satisfy the Immigration Rules in accordance with the principles of *Alam v Secretary of State for the Home Department* [2023] EWCA Civ 30
 - e. the Judge erred in giving weight to the Appellant's plans to re-establish a relationship with his daughter when there was no ongoing relationship at the time of the hearing.
7. In his submissions Mr Wain submitted that there was insufficient evidence for the Judge to give any weight to the Appellant's claimed intention to re-establish a relationship with his daughter.

The Response of the Appellant

8. A Rule 24 response had been provided by the Appellant. In that the Appellant opposed the Respondent's application and submitted that there is no material error in the Decision. There was no evidence that the Appellant had an inadequate command of English or was not financially independent. The Respondent had not taken the opportunity to cross-examine the Appellant about these matters. Therefore any error to address them was not material.

9. The Respondent's reliance on *Alam* is misplaced as that case was considering the application of the *Chikwamba* principles.

My decision

10. The grounds all address different elements of the proportionality exercise conducted by the Judge in the Decision and I therefore consider them together.
11. The Judge said that regard was had to the little weight provisions of s117B(4) and (5) NIAA 2002. However, there is no reference to s117B(2) and in particular the requirement to consider an appellant's ability to communicate in English and financial independence. There is no finding made in respect of either of these factors. Mr Waheed submits that there is no evidence that the Appellant is not financially independent or unable to speak English but that fails to recognise that the Judge is required by the legislation to address these matters. Failing to do so is an error of law. The evidence and the Judge's findings are insufficient to identify that the errors are not material.
12. While the Judge says that significant weight should be given to the Appellant's immigration history and scant regard to his status, the Judge does not say that any weight is given to the inability of the Appellant to satisfy the Immigration Rules. I agree with the Appellant that this is an error. The case of *Alam* states clearly that the courts must give "great weight" to a person's inability to meet the Immigration rules.
13. Mr Wajeed submitted that *Alam* is purely concerned with the application of the *Chikwamba* principles. I do not agree. Lady Justice Laing engaged in a much fuller analysis of the approach to Article 8 claims. Indeed, for both Appellants 1 and 2 in that case, *Chikwamba* was found to be irrelevant (at para 113).
14. Furthermore, *Kaur v Secretary of State* [2023] EWCA Civ 1353 has confirmed that while there is a margin of appreciation to the weighing exercise, that margin is not unlimited. The court must attribute significant weight to the Secretary of State's policy at a general level which includes the policy weightings set out at s117B NIAA 2002 (see paragraph 21). The court must say what weight is attached to other factors.
15. The Judge's proportionality exercise implies that the weight of the Appellant's time spent in the UK, his mental health and his hopes of engaging with his daughter together with the little weight given to his private life in the UK, outweighed the significant weight given to his poor immigration history. Yet the weight given to each of the factors on the Appellant's side of the scales is not stated as *Kaur* makes clear the Decision should. It may be that the Judge was only giving the Appellant's plans to re-establish relations with his daughter little weight, but the reader does not know. The Judge simply identifies the matter as being on the Appellant's side of the balance.
16. Furthermore, while *Ruppiah* confirms that little weight does not mean no weight when considering the private life of a person such as the Appellant whose status has never been more than precarious, as the Court of Appeal stated in *Alam*, what the court was recognising in *Ruppiah* was that inbuilt into the concept of "little weight" itself is a small degree of flexibility. It is the limited degree of flexibility recognised to be necessary to encapsulate Article 8. So, the Court of Appeal explained, it is possible, without violence to the language, to say that the general guidance may be overridden in an exceptional case by particularly strong features of the private life in question. This margin of appreciation was

confirmed in *Kaur*. However, given the Judge's conclusion about the factors weighing in the Appellant's favour it appears that significant weight was given to his private life beyond that margin of appreciation.

17. I am satisfied that these errors of law are material and therefore the Decision must be set aside.

18. Given the nature of the errors of law a rehearing is required. I have applied the guidance in *Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC)* and have had regard to the extent of fact finding which will be required as well as the extent of loss of the two-tier decision-making process if the decision is retained. I am satisfied that the rehearing should take place in the Upper Tribunal.

19. Neither party challenged the findings of fact otherwise made by the Judge and therefore the findings made in paragraph 15 of the Decision are retained.

Notice of Decision

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside but with the findings made at paragraph 15 retained.

2. The decision will be re-made at a resumed hearing on a date to be notified to the parties. This will take place in the Upper Tribunal.

3. In the circumstances, full and detailed skeleton arguments need to be produced for the resumed hearing setting out the case for each party.

4. I therefore DIRECT that:

No later than 7 days before the hearing, the parties shall file and serve skeleton arguments setting out in full their legal submissions in relation to the ability of the Appellant to qualify for protection.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11/12/2023