Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29648/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 September 2015	**On 16 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMAD ABDUL MONAF
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondent: Mr M Hasan, Solicitors from Kalam Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. The Secretary of State is therefore the Respondent and Mr Monaf is the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge C A Parker (Judge Parker), promulgated on 13 April 2015, in which she allowed the Appellant's appeal. That appeal was against the

Respondent's decision of 3 July 2014 to refuse to vary the Appellant's leave to remain and to remove him from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The Appellant was born on 6 June 1932 and is a citizen of Bangladesh. He entered this country as a visitor on 4 January 2014 and then, on 2 May 2014 applied to the Respondent for further leave on the basis of human rights. The Respondent refused the application having considered Paragraph 276ADE of the Immigration Rules and whether any exceptional circumstances existed.

4. In a detailed decision, Judge Parker sets out the evidence in support of the Appellant's claim and concludes that a credible account of his circumstances had been provided to her. She finds that the Appellant was in a poor state of health and was dependent upon his family here both emotionally and physically. There were deep and significant bonds between the Appellant and his family members in this country. Following the death of his wife and notwithstanding that some care had been provided for in Bangladesh by a non-relative, the Appellant's health and wellbeing had been "seriously compromised". It was found that he now requires practical assistance with washing, dressing, toileting, and eating. He is wheelchair-bound. A return to Bangladesh would, it was found, deprive him of familial support (he having no one else there) and leave him isolated and vulnerable. It was found that his family could not be expected to go and live in Bangladesh themselves. There was no attempt to deliberately circumvent the Rules, as the Appellant's true circumstances only became apparent once he had arrived in this country. Judge Parker found that was an application for entry clearance to be made on the basis of the Appellant being an Adult Dependent Relative, it would succeed.

5. In respect of the legal approach to the appeal, Judge Parker acknowledged that the Appellant could not rely on the Adult Dependent Relative route under Appendix FM because he arrived in this country as a visitor. She declined to substantively consider the Appellant's case under Paragraph 276ADE of the Rules. Instead, and having considered MM (Lebanon) [2015] EWCA Civ 985, she deals with the claim outside of the Rules. She finds there to be family life with the family in the United Kingdom, and that removal would interfere with that protected right. Having conducted a balancing exercise, Judge Parker ultimately concludes that removal would be disproportionate.

The grounds of appeal

6. The grounds are twofold. First, it is asserted that Judge Parker failed to have regard to the fact that the Appellant was unable to meet the Rules as

they relate to Article 8. Second, there was an "inadequate explanation" as to why the judge found family life to exist. Within the same ground it is said that the judge failed to "adequately consider" the facts as they pertained to the United Kingdom-based family going to live in Bangladesh.

7. Permission to appeal was granted by First-tier Tribunal Judge Cheales on 23 June 2015.

The hearing before me

8. Mr Hasan suggested that the grant of permission was limited to ground 2 only. This was on the basis that in the grant the judge had only expressly referred to the substance of ground 1. I directed myself to the decision in Ferrer [2012] UKUT 00304 (IAC), and concluded that the grant was not limited. There were no express words to that effect, as there should be if a restricted grant is intended. The grant could have been worded more clearly, but I was satisfied that both grounds were before me. Mr Hasan was content with this decision.

9. Ms Holmes accepted that ground 2 was weak, but that ground 1 was made out and was material. Mr Hasan accepted that Judge Parker failed to spell out clearly what weight if any she was attaching to the public interest and/or the Appellant's inability to meet the Rules. He did not concede the point however, and submitted that any error was immaterial.

Decision on error of law

10. I informed the parties at the hearing that I found there to be a material error of law in Judge Parker's decision based on ground 1 only. Ground 2 had no merit. My reasons for this conclusion are as follows.

11. In most respects, Judge Parker's decision is unimpeachable. There are clear findings following a careful consideration of the evidence. However, a material omission arises in respect of the interlinked issues of the public interest and the Appellant's inability to meet the Rules. The sole reference to the public interest is a line in paragraph 36 in which Judge Parker states, "I have had regard to the need to maintain effective immigration control." There is no reference to what weight is being attached to this important factor. There is nothing on the relevance of the Appellant's inability to meet the Rules to the effect that it would count against him under the proportionality exercise.

12. In my view, Judge Parker did not engage with these matters adequately, whether by her reasoning or attribution of weight. This is an error of law. It

is material because the Appellant's case was not bound to succeed on any view, albeit that it is a strong one.

13. In respect of ground 2, Judge Parker's conclusion that family life existed was well supported by her findings and reasons (see, for example paragraphs 24 and 27). The conclusion that family members in the United Kingdom could not go to live in Bangladesh was also adequately reasoned (see paragraph 27).

14. I therefore set aside the decision of Judge Parker on the basis of ground 1 only.

The remaking of the decision

15. Both representatives were agreed that I should remake the decision on the evidence before me. Given the detailed findings by Judge Parker, this was clearly the appropriate method of disposal.

16. Both representatives were also agreed that I should consider the Appellant's case under Paragraph 276ADE(vi). It was somewhat unclear why Judge Parker had declined to do so in her decision, given that this was the basis upon which the Respondent has initially refused the Appellant's application.

17. There has been no successful challenge to any of Judge Parker's findings and I preserve them in their entirety. In addition, I have had regard to the Respondent's bundle and Appellant's bundle which were before the First-tier Tribunal. No oral evidence was called before me.

Paragraph 276ADE(vi) of the Rules

18. I find that there would be "very significant obstacles" to the Appellant reintegrating into Bangladeshi society if he were to be removed at this time. I base this finding upon the following matters.

19. The Appellant has no one to offer support in Bangladesh. His family are now all in the United Kingdom and, for the reasons given by Judge Parker at paragraph 27 of her decision, it would not be reasonable for them to relocate to Bangladesh, particularly in light of the existence of his daughters' British citizen children and grandchildren.

20. The Appellant is clearly a fragile and vulnerable individual, who requires not only emotional support but direct physical assistance with almost all of the basic personal tasks encountered in daily life: washing, eating, dressing, toileting, and moving around.

21. The Appellant's significant bonds with his daughters in the United Kingdom are a core aspect of his private life, which is of course relevant to Paragraph 276ADE(vi). As Judge Parker found, "the very nature of the family life he now enjoys with them is central to his wellbeing…"

22. In light of the foregoing, the dislocation of the Appellant from this emotional and practical care environment, provided as it is by immediate family members, and the consequences thereof, will represent very significant obstacles to any meaningful reintegration into Bangladeshi society.

23. The possibility of care provision from outside of the family does not reduce the significance of the obstacles. There would be no means of adequately monitoring any such care (even assuming it was available), or of intervening if there was a problem. There is also the matter of social interaction and the lack thereof if the Appellant were returned to live, in effect, alone. His current state of wellbeing would, I find, make it extremely unlikely that he could engage in meaningful social interaction with others, especially strangers. This would apply even if he were in a residential home (assuming these exist in Bangladesh). Such residential care would not lessen the impact of the severing of ties with the care and support provided by his own family in this country. It would not defeat his satisfaction of Paragraph 276ADE(vi).

24. I make it clear that I have not treated this case as a 'medical claim'. Health is of course relevant to the case under Paragraph 276ADE(vi), but the question to be addressed under this provision is wider than a simple consideration of medical treatment availability in one country compared to that in another.

25. I am aware of the argument that when considering Paragraph 267ADE, or indeed any other part of the Rules dealing with Article 8, regard should be had to the mandatory factors under section 117B of the Nationality, Immigration and Asylum Act 2002. Although this point has not been raised before me, I will, for the purposes of my decision, take these factors into account.

26. The need to maintain immigration control is in the public interest. The Appellant entered as a visitor only and the public interest is thus engaged. I attached considerable weight to this factor. It is right of course that the Appellant's status here has always been precarious. To this extent I place much less weight upon his private life than I otherwise would. The Appellant does not speak English, but the adverse effect of this is reduced by virtue of his advanced years. He is being supported financially by his family and has not had recourse to the NHS as yet. It is his family who are supporting him.

27. Although the mandatory factors significantly narrow the margin by which I have concluded that the Appellant's appeal succeeds, they do not reduce it to a vanishing point. This is and always was a strong case. Whilst the test posed in Paragraph 276ADE(vi) is not, if one takes the section 117B factors as being relevant at all, a trump card, nor can it simply be automatically displaced because a claimant is here on a precarious basis, or such like: to conclude otherwise would deprive sub-paragraph (vi) of any utility. On the facts of this case, the very significant obstacles exist and are not outweighed by the countervailing effect of the mandatory factors.

28. If I had not taken the section 117B factors into account, the margin of success would have been substantially greater.

29. The appeal succeeds under the Immigration Rules. I do not consider it necessary to go on and consider the case outside of the Rules.

Anonymity

30. No direction has been sought and none is appropriate in this case.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal under the Immigration Rules.

Signed Date: 15 October 2015
H B Norton-Taylor
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award. This is because the appeal clearly required adjudication by the Tribunal to resolve contentious matters.

Signed Date: 15 October 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal