



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/01510/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 4 February 2016**

**Decision & Reasons
Promulgated
On 22 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE H J E LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**SALIM AHMED KHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer.
For the Respondent: Ms C Bexson, counsel, instructed by Charles Simmons,
solicitors.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge O'Garro) allowing an appeal by the applicant against the Secretary of State's decision made on 18 December 2014 refusing to vary his leave to remain and to remove him from the UK. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The background to this appeal can briefly be summarised as follows. The appellant is a citizen of Bangladesh born on 21 November 1971. He entered the UK on 21 April 1996 with entry clearance as a family visitor and thereafter remained without leave. On 25 May 2005 he applied for indefinite leave to remain on the grounds of long residence and under article 8 and on 10 October 2011 his application was refused but the respondent exercised her discretion in the appellant's favour and he was granted discretionary leave to remain until 9 October 2014.
3. Following this grant the appellant has returned to Bangladesh on three occasions from 27 November 2011 to 22 February 2012, from 7 August 2012 to 18 September 2012 and from 25 June 2013 to 21 September 2013. During his last visit he married and his wife has four children aged between 7 and 15. On his return on 21 September 2013 the appellant was stopped by immigration officers, questioned and interviewed. On 1 October 2014 he applied for further leave to remain.
4. This application was refused for the reasons set out in the decision letter of 18 December 2014. The respondent noted that since the appellant had been granted discretionary leave he had returned to Bangladesh on three separate occasions and had formed a family life by marrying his wife who has four children. It was her view that the appellant had established family life with his wife and four stepchildren and she was not satisfied that the grounds on which he had previously been granted discretionary leave is still persisted. She was not satisfied that he was able to meet the requirements of the immigration rules for a grant of leave in relation to his private life or that there were any exceptional circumstances justifying a grant of leave to remain outside the rules.

The Findings of the First-tier Tribunal Judge

5. The appellant appealed against this decision and gave oral evidence through an interpreter at the hearing before the First-tier Tribunal. He confirmed the chronology of his arrival in the UK and the subsequent grant of discretionary leave and accepted that he had family life in Bangladesh with his new family. He hoped that he would be able to bring them to join him in the UK where he had a well established private life. He had been in the UK for 18 years and believed that all his ties were here such as friends, relatives and employment [16]-[18].
6. The judge set out the relevant part of the respondent's policy on discretionary leave at [23] noting that according to the policy guidance if there were any significant changes in an applicant's circumstance's the application for a grant of discretionary leave was to be refused [27]. She found that the appellant's marriage was such a significant change and that it was reasonable for the respondent to refuse a further grant of discretionary leave [28]. She found that the appellant could not bring himself within the provisions of paragraph 276ADE. He had lived

continuously in the UK for less than 20 years and was unable to meet the requirement of showing that there would be very significant obstacles to his integration into Bangladesh.

7. The judge then referred to R (otao Ganesabalan) v Secretary of State [2014] EWHC 2712 relying on that judgment for the proposition that there was always a "second stage" in which the respondent must consider the exercise of discretion outside the rules. The judge therefore went on to undertake an article 8 assessment following the step by step approach set out by Lord Bingham in Razgar [2004] UKHL 27.
8. The judge accepted that article 8 was engaged on the basis of the appellant's private life and that removal would be in accordance with the law and for a legitimate purpose. The final question was whether the respondent's decision was proportionate. The judge referred to the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 as amended. She noted that there was no evidence before her that the appellant was able to speak English but she was expected that he must have achieved good understanding of English language and about life in the UK having lived and worked in the UK over the past 18 or more years [52]. She was satisfied that the appellant had continued to be financially independent as there was no evidence that he had claimed public funds. There was documentary evidence about previous earnings and she accepted that the appellant was willing and able to work in the future [53].
9. The judge concluded her decision as follows:

"54. The appellant was granted three years Discretionary Leave which was up to October 2014. He had a reasonable expectation when he made his application that he would be granted further discretionary leave having lived in the United Kingdom for 18 years. Although he visited Bangladesh on three occasions, following his grant of leave and even got married on the last visit, he viewed the United Kingdom as his country of residence and returned to the United Kingdom to the private life he had established, at the end of each visit.

55. I have taken note of the fact the appellant has a wish for his family to join him but I bear in mind that this is not automatic and his newly acquired family will have to meet the requirements of the immigration rules before they can do so. I do not find the fact that the appellant has established a family life in Bangladesh should prevent him from enjoying the long established private life he has formed in the United Kingdom which the respondent had acknowledged by her grant of Discretionary Leave in October 2011.

56. I find that after 19 years living and working in the United Kingdom the appellant would have formed very strong bonds and in the particular circumstances of this case, where he would not be reliant upon public funds, it is disproportionate to remove him from the United Kingdom."

Accordingly the appeal was allowed under article 8.

The Grounds of Appeal and Submissions

10. In the grounds it is argued that the judge erred by failing to conduct the article 8 assessment through the lens of the rules, an approach endorsed by the Court of Appeal in Secretary of State v SS (Congo) [2015] EWCA Civ 387 at 44. Private life arising from length of residence in the UK was clearly catered for in the rules and the appellant could not meet those requirements. Secondly, it is argued that despite reciting the provisions of section 117B the judge failed to acknowledge that as a starting point the tribunal was required to attach little weight to private life established at a time when a person's immigration status was precarious or to have due regard to all the public interest factors.
11. Thirdly, it is argued that the judge erred by giving weight in the proportionality assessment to the claim that the appellant had a reasonable expectation that he would be granted further leave: he had no such expectation not least as there had been a material change of circumstances. Finally, the grounds assert that whilst the appellant would have formed some private life in the UK this was limited to his working connections and friendships as a result of his residence and that he would be able to establish a comparable private life in Bangladesh with the support of his new family unit. The circumstances advanced by the appellant in support of this application were insufficient to disclose a disproportionate breach when compared to the relevant legitimate aim.
12. Ms Isherwood adopted her grounds. She made the point that the appellant had spent a number of years in the UK when he had no lawful right to remain and the limited leave granted was precarious. He could have had no expectation of a grant of further leave. His only expectation was for a proper consideration under the relevant rules and policies and the judge had accepted that the respondent's decision had been reasonable. The judge had failed to give proper weight to the fact the appellant could not meet the requirements of the rules contrary to the judgment in SS (Congo).
13. Ms Bexson submitted that the judge was entitled to reach her decision on the available evidence. It had been open to her to find that article 8 claim was reasonably arguable and she had looked at all matters in the round when assessing at [46] - [48] whether article 8 was engaged. She had considered the provisions of section 117B. There was nothing unusual in someone living in this country but getting married abroad. The judge had been entitled to conclude that the appellant was able to speak English and was financially independent and to take those factors into account in his favour. She argued that the judge had considered all relevant matters and reached a decision open to her on the evidence.

Assessment of Whether there is an Error of Law

14. The issue for me is whether the judge erred in law such that her decision should be set aside. I am satisfied that she has for the following reasons. The judge relied on Ganesabalan as authority for the proposition that she was required to carry out an article 8 assessment but it appears that she

was not referred to SS (Congo) where the Court of Appeal reviewed the authorities about how article 8 should be approached in the light of the changes to the immigration rules introduced in 2012.

15. At [44] of the judgment the Court said that the proper approach would always be to identify firstly the substantive content of the relevant immigration rules both to see if an applicant satisfied those conditions and to assess the force of the public interest given expression in those rules which would be relevant to the balancing exercise under article 8. If an applicant did not satisfy the rules he might seek to maintain a claim for leave outside the substantive provisions of the rules under article 8 if there was a reasonably arguable case which had not already been sufficiently dealt with under the substantive provisions of the rules. In considering that case the individual interests of the applicant and others whose article 8 rights were in issue should be balanced against the public interest, including as expressed in the rules, in order to make an assessment whether a refusal was disproportionate.
16. In summary, when assessing proportionality, proper consideration must be given to the public interest which includes the immigration rules as they set out the respondent's policy on the requirements to be fulfilled before leave is granted. There is nothing in the judge's decision to indicate that any weight was given to the fact that the appellant could not meet the requirements of paragraph 276ADE particularly in the light of her findings of fact that he would not face very significant difficulties on return to Bangladesh and that the respondent's decision to refuse further discretionary leave was reasonable.
17. I am also satisfied that the judge failed to take into account that the appellant's private life was established at a time both when his presence in the UK was unlawful and when his immigration status was precarious: see AM (S.117B) Malawi [2015] UKUT 260 (IAC) where the tribunal held that a person's immigration status is precarious if their continued presence in the UK will be dependent upon obtaining a further grant of leave. The judge also failed to give proper weight to the fact that the appellant's circumstances had drastically changed since the grant of discretionary leave. He now has a family life in Bangladesh with his wife and four stepchildren. No consideration appears to have been given to how that impacted on his private life in the UK and whether and to what extent he could and would have private life in Bangladesh. Finally, I am satisfied that the judge erred in by placing reliance on the fact that the appellant had a reasonable expectation that he would be granted further discretionary leave. It has not been suggested or argued that appellant had a legitimate expectation. The appellant may have had a hope of a further grant but his expectation could only be that a further application would be considered in accordance with the current rules and policies.
18. I am therefore satisfied that the judge erred in law by leaving a number of relevant matters out of account and by taking into account the appellant's expectation of a further grant. The errors are such that the decision should be set aside. Both representatives agreed that the proper course would be

for me to re-make the decision in the light of the fact that there had been no significant change in circumstances since the hearing before the First-tier Tribunal and no application has been made to adduce further evidence. Ms Isherwood adopted her previous submissions and argued in particular that little weight should be given to private life developed when his leave was precarious. Ms Bexson also relied on the fact that the judge had found the appellant to be credible and the fact that he had been granted three years discretionary leave following the period when he had overstayed.

Assessment of whether the appeal should be allowed or dismissed

19. It has not been disputed that article 8 is engaged as the appellant has established private life in the UK and that the respondent's decision to remove him would be an interference with that right. The decision is in accordance with the law and is for a legitimate aim within the provisions of article 8 (2). The sole issue is whether the decision is proportionate to that aim.
20. In carrying out that assessment I must have regard to the provisions of s.117A(3) of the 2002 Act and when assessing proportionality take proper regard of the public interest factors set out in s.117B. In [52] and [53] the First-tier Tribunal judge accepted that the appellant must have achieved a good understanding of the English language and of life in the UK and that he had been financially independent having worked in the past and she accepted that he was willing and able to work in the future and in consequence there would be no reliance on public funds. There is no reason to take any different view on those factors.
21. However, s117B also provides that the maintenance of effective immigration control is in the public interest and that little weight is to be given to a private life established when a person's immigration status was precarious. The appellant's private life was established both when he had no lawful right to be in the United Kingdom, the period after the expiry of his leave to remain as a visitor following his arrival in April 1996 and the grant of discretionary leave in October 2011, and then in the period of discretionary leave, which was also time when his leave was precarious and dependent upon the outcome of a further application. Therefore, only little weight is to be given to his private life established in these circumstances. In addition proper weight has to be given to the public interest in the maintenance of effective immigration control.
22. The judge gave weight to the fact that the appellant had a reasonable expectation that when he made his application he would be granted further discretionary leave having lived in the UK for 18 years [54]. She commented that although he had visited Bangladesh on three occasions he had returned to the private life he had established in the UK at the end of each visit. However, it is not argued that the appellant had a legitimate expectation, simply a reasonable expectation but that expectation was limited to having a decision assessed in accordance with current rules and policies. The judge accepted that the respondent's decision to refuse

further leave was reasonable [28] and it must follow that the appellant received a decision under the policy properly open to the respondent.

23. Further and more significantly the appellant was not able to meet the requirements of the rules. This is a factor must be given proper weight in assessing whether the respondent's decision was proportionate. The appellant's case was based in substance on his length of residence and the rules have set out the circumstances in which such a claim will be granted. The appellant failed to meet those requirements.
24. The judge said in [55] that she did not find that the fact that the appellant had established a family life in Bangladesh should him prevent from enjoying the long established private life he had formed in the UK as acknowledged by the respondent in her grant of discretionary leave on October 2011. However, this fails to take into account the significant change of circumstances in the appellant's private and family life following his marriage in Bangladesh. The strength of his family life with his wife and four stepchildren in Bangladesh is a family bond which should properly be taken into account in the assessment of proportionality. When the appellant's private and family life is looked at as a whole, his family life in Bangladesh and the fact that there are no significant obstacles to him reintegrating there is a factor of greater weight than his continuing private life in the UK. Taking this into account together with the fact that the appellant cannot meet the requirements of the rules and will have a private life in Bangladesh, I find that the respondent's decision is proportionate.
25. In summary, looking at the evidence as a whole I am satisfied that the respondent's decision was proportionate to a legitimate aim. I therefore substitute a decision dismissing the appeal.

Decision

26. The First-tier Tribunal erred in law and I set aside the decision. I re-make the decision by dismissing the appellant's appeal. No anonymity order was made in the First-tier Tribunal and no further application has been made. No application has been made in relation to costs.

Signed H J E Latter

H J E Latter
2016
Deputy Upper Tribunal Judge

Date: 15 February