UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBERS: HU/01134/2016**
HU/13788/2015
HU/01605/2016
HU/01135/2016

THE IMMIGRATION ACTS

Heard at: Field House **Decision and Reasons Promulgated**
On 6 February 2018 **On 27 February 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

SUSHIL [R]
SWAPENA [M]
[D S R]
[D R]
(NO ANONYMITY DIRECTION MADE)
Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation
For the Appellants: **Mr S Karim, counsel instructed by Thamina Solicitors**
For the Respondent: **Ms A Brocklesby-Weller, Senior Home Office Presenting Officer**

DECISION AND REASONS

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1. The appellants are nationals of Bangladesh. The first two appellants are the parents of the third and fourth appellants. Their respective dates of birth are [ ] 1972; [ ] 1976; [ ] 2007 and [ ] 2011.

2. The appellants appeal with permission against the decision of the respondent dated 27 November 2015 refusing their applications for leave to remain in the UK on human rights grounds.

3. The background to the appeal as set out in the reasons for decision notice is as follows.

4. The first appellant entered the UK on 7 September 2005 as a student. He was granted further leave to remain on several occasions after that until 30 November 2010. On 6 September 2010 he made an application for leave to remain as a highly skilled post study worker which was granted until 17 September 2012.

5. In 2009 the second and third appellants entered the UK as dependants and were granted leave in line with the first appellant.

6. The mother and children returned to Bangladesh in 2011 and returned to the UK in 2012.

7. On 12 September 2012 the first appellant made an application for leave to remain as a Tier 1 (Entrepreneur) and the others as his dependants. Those applications were refused on 7 March 2013. Their appeal was allowed to the limited extent that the respondent was required to reconsider the Tier 1 application.

8. On 4 February 2014 the respondent refused the first appellant's application as well as those of his dependants. They were refused under paragraph 322(1A) of the Rules on the basis that false documents were submitted in relation to the first appellant's third party sponsor's bank account. His subsequent appeal was dismissed on 11 February 2015.

9. The appellants then applied for leave to remain on the grounds of family and private life on 27 July 2015 which was refused on 7 October 2015.

10. On 17 August 2015 the first appellant made an application for indefinite leave to remain on the basis of ten years' lawful residence. The dependants made applications at the same time.

11. His application was refused on 27 November 2015 and the remaining appellants' applications were refused on 24 December 2015.

12. Their appeal against that decision was heard by First-tier Tribunal Judge Dean on 21 February 2017 on the basis of ten years continuous lawful residence and on human rights grounds [8]. Paragraph 276D requires that the appellant must have at least ten years' continuous lawful residence in the UK and having regard to the public interest

there are no reasons why it would be undesirable for the appellant to be given indefinite leave to remain on the grounds of long residence, taking into account, inter alia, personal history including character, conduct, associations and employment records.

13. Judge Dean found that the first appellant had not met the requirements under paragraph 276D(ii)(c). The starting point was the earlier decision of Judge Plumptre dated 11 February 2015 who found that the first appellant submitted false documents. She heard 'new evidence' from Mr Rahman. She found his account implausible and it undermined the veracity of his account of the facts [20].

14. Judge Dean had regard to Judge Plumptre's decision and found that it left no doubt that he submitted false documents and that the refusal under paragraph 322(1A) was correct. She upheld the respondent's decision to refuse the application under paragraph 322(2), as the appellant had submitted false documents in an earlier Tier 1 application [23]. She the found that he did not meet the requirement under paragraph 276B(ii)(c) and his ILR appeal failed. His dependants fell in line with that finding [24].

15. She went on to consider family and private life. The appellants made their current applications on 17 August 2015. The third appellant had not lived in the UK continuously for seven years as at the date of application. In relation to the first and second appellants, EX.1 did not apply [28].

16. With regard to private life under paragraph 276ADE, she found that there were not very significant obstacles to the first and second appellants' re-integration in Bangladesh [30].

17. She found with regard to the third appellant, that she had lived in the UK continuously for two years and two months. She was under the 18 and had not lived continuously for seven years in the UK. Accordingly, paragraph 276ADE(iv) does not apply and her appeal fails [31].

18. Judge Dean found that the fourth appellant entered the UK on 13 June 2016 and her appeal under paragraph 276ADE also failed [32].

19. She considered the appeal under Article 8 of the Human Rights Convention. In assessing the evidence in the round, she found that the reasons for dismissal of the first appellant's appeal did not provide compelling circumstances which would give rise to the legitimate expectation of ILR as the appellants were only ever here on a temporary basis. This was a situation of a student whose family came to the UK having no expectation of being able to remain on a permanent basis. Their applications and appeals have been fully considered and determined. There was nothing in a factual matrix which established compelling circumstances to consider their appeals under the provisions of Article 8 [36].

20. On 25 October 2017 Upper Tribunal Judge Bruce noted that Judge Dean's determination prima facie contained a careful examination of the evidence with regard to the false documents. It was however arguable that the evaluation did not extend to addressing the main points made by the appellant on the issue, as set out in paragraphs 9 and 10 of the grounds.

21. She found that it was arguable that the Tribunal had not conducted a "best interests assessment". The analysis appeared to be consigned to assessing the first limb of paragraph 276ADE(1)(iv). Judge Bruce stated that whether that area is material may be doubtful in the light of the guidance in EV (Philippines) [2014] EWCA Civ 874.

Error of law hearing

22. Mr Karim, who did not represent the appellants before the First-tier Tribunal, submitted that Judge Dean had failed to have regard to relevant evidence before making negative credibility findings, particularly in respect of the evidence of Mr Rahman and the appellant at [16-24].

23. He referred to the email chain at pages 44-45 of the appellants' bundle. It appears that the respondent asked the bank whether the customer has or has ever had £21,094.54 in his account on 10 December 2013. However, the bank should have been looking at 9 December 2013 which was what the letter of 10 December 2013 was purporting to deal with. He submitted that it is plausible that the writer of the email from the bank which formed the basis of the allegation of fraud, failed to realise that deducting the amount of £26.94 from £21,121.48 (which was the closing balance on the Santander receipt at page 46) left £21,094.54 which was the amount claimed. It would make no sense to perpetrate the fraud alleged because there was in fact more money in the account than claimed.

24. He submitted that the Judge should have looked at all the evidence in the round which undermined the respondent's allegation of fraud.

25. With regard to ground 2, he submitted that Judge Dean showed no engagement with s.55 in respect of the two children. He referred to the findings at [28]. Since 2012 the third appellant child had lived in the UK continuously.

26. He referred to the judgment of the Court of Appeal in R (on the application of M) Lebanon v SSHD [2017] UKSC 10 at paragraph [92]. There the Court held that s.55 of the 2009 Act stands on its own feet as a statutory requirement apart from HRA or the Convention. It applies to the performance of any of the secretary of state's functions including the making of the rules. While the detailed guidance may be given by instructions, it should be clear from the rules themselves that the statutory duty has been properly taken into account. In that respect, it was declared that both the rules and instructions are unlawful.

27. He also referred to the recent decision of the Supreme Court in Makhlouf v SSHD [2016] UKSC 59 at [46-47]. Lady Hale in a separate judgment stated at [47] that the best interests of children must be treated as a primary consideration and considered separately from the adults and from the public interest. The duty stems first from s.55 of the 2009 Act. Even without that section, s.6(1) of the Human Rights Act 1998 requires public authorities to act compatibly with the rights contained in the European Convention on Human Rights, including the right to respect for family life contained in Article 8. This has been interpreted by the European Court of Human Rights to include the duty in Article 3(1) of the United Nations Convention. Children must be recognised as rights holders in their own rights and not just as an adjunct to other people's rights. That does not however mean that their rights are inevitably a passport to another person's rights [47].

28. On behalf of the respondent, Ms Brocklesby-Weller referred to paragraph [3] of Judge Dean's decision. It was noted that the bundle of documents included a copy of the determination of Judge Plumtre dated 11 February 2015 relating to a previous appeal by the appellants. There was also a witness statement signed by Mr [MH] Rahman dated 9 February 2017.

29. She submitted that the Judge had proper regard to the principles in Deevaseelan at [12]. She noted that it was submitted on behalf of the appellants that the third party sponsor was not a witness before Judge Plumtre.

30. This was in the form of Mr [ ] Rahman's witness statement and oral evidence which, it was asserted, provided a comprehensive explanation as to the problems of the Santander documents which enabled her to go behind the adverse credibility findings of Judge Plumtre.

31. Judge Dean considered this evidence in the round and found that it did not advance the first appellant's claim that this was not a false document. It was firstly on the basis that the email from the Santander fraud department stated that at no time did the balance match the amounts stipulated in the letter. Further, she found that Mr Rahman's account of going to various branches before finally persuading someone at the Watney Market Town branch of Santander did not have the ring of truth because had the employee been so persuaded she would have recorded an accurate balance, but the fraud department stated that the account had at no time had the stipulated sums [18].

32. It was submitted that she had the benefit of hearing and seeing Mr Rahman when he was cross examined. She also had regard to other features in the evidence from Mr Rahman, including the Santander letter dated 10 December 2013. She had regard to the analysis of the evidence at [20 -21]. She found at [21] that Mr Rahman was unable to provide any answer as to what had happened to the amount of money which was claimed to have been in his account, namely £21,094.54. That undermined the veracity of his account on the facts [21].

33. She submitted that a proper approach was therefore taken by the Judge with regard to the first ground of appeal.

34. With regard to ground 2, the third appellant arrived in the UK in 2009. She went back to Bangladesh in 2011 and only returned in 2012. The Judge correctly found that she could not succeed under paragraph 276(1)(ADE) of the rules. There was no reason why the parents could not return to Bangladesh. They are integrated into Bangladesh.

35. The third appellant was only two when she came to the UK in 2009. When the application was made she had only lived in the UK continuously for three years and two months. That was the factual matrix against which the best interests of the children had to be assessed.

36. She referred to the first appellant's witness statement at page 34. It was noted that his wife and children arrived in 2012 and they have also developed strong links with the UK, with the "eldest child" being in full time education.

37. The children have formed strong ties of their own with this country. They have immersed well with society, enjoyed the culture and traditions as well as their school days. Returning them to Bangladesh would have a detrimental effect on their education and development.

38. In the circumstances she found at [36] that there were no compelling circumstances about this case.

39. In reply, Mr Karim stated that at the date of hearing the third appellant was just shy of ten years old. She was on the verge of going to secondary school. The Judge did not properly engage with the children. There was evidence relating to the child's education from page 62 of the appellant's bundle. She had accordingly lived continuously in the UK from about 2012 until 2017.

Assessment

40. Judge Dean has undertaken a detailed assessment of the evidence, which included a full and detailed assessment of the evidence of both the appellant and his witness, Mr Rahman.

41. She directed herself properly in accordance with the principles enunciated in Deevaseelan**.**

42. Mr Karim submitted that there is a plausible explanation as to why the writer of the email from the bank set out at page 44 of the bundle failed to realise the deduction of the amount of the closing balance on the Santander receipt at page 46 left £21,094.54, which was the amount claimed.

43. However, Judge Dean did have regard to the evidence from Mr Mohammed Rahman, which included his witness statement and oral evidence, which related to the asserted provenance of the Santander documents.

44. She ultimately concluded that when taken in the round, Mr Rahman's account was implausible and undermined the veracity of his account of the facts.

45. The reliance on the email from the Fraud Department was not the only basis on which she concluded that Mr Rahman's account was not plausible.

46. She found that his account of going to various branches before finally persuading someone at the Watney Market branch did not have the ring of truth [17]. He had stated that he visited the Watney Market branch to collect the statement of his account on 9 December 2013. In his oral evidence Mr Rahman stated that he visited "a few branches".

47. She also noted that he stated that after the appellant received the Home Office letter dated 14 November 2013, he handed him a copy of that letter. A Home Office letter dated 3 December stated that the information requested was required by 10 December 2013. Judge Dean found at [18] that Mr Rahman was aware of what information was required and visited the Watney Market on 9 December 2013. She found that his claim to have visited other branches on 10 December 2013 in order to obtain a letter was implausible given that on 9 December he had already collected a bank statement from that branch where, it was alleged, he finally acquired the letter. That undermined the veracity of his account on the facts.

48. She also had regard at [19] to the Santander letter dated 10 December 2013. It was signed by the "Director of Operations". However, in his witness statement Mr Rahman stated that he persuaded someone at the front desk to provide the letter and this was handed over to him later that day. Whilst not determinative, when taken in the round she found that it was implausible that the Director of Operations was sitting at the front desk of the bank, which also undermined the veracity of Mr Rahman's account.

49. In addition she noted at [20] that Mr Rahman stated in evidence that he showed the Home Office letter dated 14 November 2013 to the person at the bank. However, the Home Office letters are addressed to the first appellant and nowhere is Mr Rahman named as a third party sponsor. When asked how he was able to obtain the Santander letter when there was no information linking him to the first appellant, who is in fact named in the Santander letter, Mr Rahman said he "just asked verbally." Judge Dean found that, taken in the round, the account is implausible and again undermines the veracity of his account of the facts.

50. Finally, when asked what happened to the money which was claimed to have been in his account in the amount of £21,094.54, he stated that he "gradually gave it to the first appellant." However, he stated that he had no evidence of this. When again

asked what had happened to the money, given that over three years had passed since the letter and the bank statements showing a similar amount, he was unable to provide any answer. That, she found, also undermined the veracity of his account on the facts.

51. She found at [22] that Mr Rahman was an unimpressive witness. His account of how he obtained the Santander documents was not plausible. She found it to be a "narrative of convenience" which did not advance the first appellant's claim that the Santander documents were not false. The evidence lacked veracity and did not provide a credible basis for going behind the detailed findings of Judge Plumtree regarding the appellant's submission of false documents.

52. After arriving at that conclusion, she further found that the appellant did not meet the requirements of paragraph 276B(ii)(c) in that the character and conduct were not of a type expected of an applicant for ILR because he had engaged in deception.

53. With regard to the Article 8 claim, whilst there is no explicit reference to s.55 of the 2009 Act, she has considered family and private life under Appendix FM as well as paragraph 276ADE. The third appellant had not been in the country for seven years at the date of the application in August 2015. Moreover, the appellant's wife and child have returned to Bangladesh in 2011 where they remained for a year, returning in 2012.

54. Accordingly, as at the date of the application the third appellant had not lived continuously in the UK for at least seven years prior to the date of application and had only lived in the UK continuously for three years and two months. The Judge noted that having failed under the rules, there would have to be compelling reasons for allowing it under Article 8.

55. As noted by Upper Tribunal Judge Bruce, the analysis appears to be confined to assessing the first limb of paragraph 276ADE(1)(iv). She also cautioned that whether the error is material may be doubtful in the light of EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 and in particular paragraphs [35-49].

56. In EV, Lord Justice Lewison stated that in the real world the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to "piggy back" on their rights. He stated that the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world [58]. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, it is the background against which the assessment is conducted. The ultimate question will be whether it is reasonable to expect the child to follow the parent with no right to remain in the country of origin.

57. Judge Dean had regard to the fact that the third appellant had only lived in the UK continuously for three years and two months. Her school report for 2016 was produced. There was also a document produced at page 105 of the appellant's bundle indicating that she was in Class 9 during 2014 and there is a record of achievement produced dated 13 February 2015.

58. There was no evidence that the third appellant had any specific educational or other needs for which she was receiving any treatment. It was never contended that her removal might cause her any damage. There was no evidence that the appellants, including the children, could not re-establish private life in Bangladesh. There was no evidence that appropriate education would not be available to them on their return.

59. The third appellant came with her mother to the UK in 2009 and then returned to Bangladesh in 2011 where she remained for a year until returning to the UK in 2012. The family would be returning together. It is evident that the best interests of the children would be served by remaining with their family.

60. Although the Judge might have given a more structured determination in respect of the best interests of the children, I am satisfied that she has in fact properly appreciated and considered the significance of all the evidence relating to their circumstances in the UK.

61. I also find that Judge Dean has given sustainable reasons for concluding that the reasons for dismissing the first appellant's appeal against the refusal of ILR did not provide compelling circumstances or give rise to legitimate expectations as the appellants were only ever here on a temporary basis. There was no expectation for the appellant or his family of being able to remain here on a permanent basis.

62. The finding that there were no compelling circumstances is sustainable on the evidence.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed Date 22 February 2018

Deputy Upper Tribunal Judge C R Mailer