



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/33879/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6 February 2018**

**Decision & Reasons  
Promulgated  
On 7 March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**KHALEDA BEGUM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Islam of Counsel

For the Respondent: Mr S Kotas, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Rodger promulgated on 21 March 2017 dismissing the Appellant's appeal against the Respondent's decision of 25 September 2015 refusing leave to remain thereby refusing a human rights claim.
2. The Appellant is a citizen of Bangladesh born on 19 June 1966. On 1 June 2009 she married Mr Mohammed Hussain (date of birth 20 January 1930), a British citizen. Mr Hussain had been living in the United Kingdom since 1957 and had previously been married for a period of some 40 years before he was divorced in early 2009. Mr Hussain has 10 children, all of

whom live in the United Kingdom, and all of whom are adults; he has a number of grandchildren, also all present in the United Kingdom.

3. On 19 May 2012 the Appellant entered the United Kingdom pursuant to entry clearance as a spouse valid until 3 July 2014. On 6 August 2014 the Appellant applied for further leave to remain. The application was made after the expiry of her leave to enter. Indeed, it was made approximately 6 days beyond the 28 day period of grace now permitted under the Immigration Rules in respect of late applications. In consequence the Appellant's application for leave to remain was refused on 18 December 2014 as having been made out-of-time. The nature of the refusal decision at that time carried no right of appeal. In such circumstances, on 8 January 2015 the Appellant made a further application for leave to remain, relying on her relationship with her husband and in effect pleading in substance human rights grounds. This application was made by way of form FLR(FP).
4. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 25 September 2015.
5. The Appellant appealed to the IAC. The appeal was dismissed for the reasons set out in the decision of First-tier Tribunal Judge Rodger.
6. The Appellant applied for permission to appeal, which was in the first instance refused by First-tier Tribunal Judge Alis on 20 October 2017, but was subsequently granted by Upper Tribunal Judge Bruce on 12 December 2017.
7. In the premises I note that Mr Hussain, even if he is no longer enjoying 'family life' - within the very particular meaning of Article 8 - with his adult children, is an individual who at the time of the hearing before the First-tier Tribunal had been living in the United Kingdom for approximately 60 years. Further the Appellant entered the United Kingdom pursuant to a provision designed to protect and promote family life. There is nothing to suggest that there has been any breach of the Appellant's conditions of entry, or any change in her purpose in being here.
8. However, as identified above, the Appellant became an overstayer. The Appellant has explained this by reference to awaiting the renewal of her passport before she was able to submit her application for variation of leave to remain. At no point has the Respondent challenged the facts of this explanation. The First-tier Tribunal Judge does not make any adverse finding in this regard either - albeit perhaps it may be said that the Judge

has not made any clear finding in this regard. It seems to me that by default the explanation has in substance been accepted. It is to be acknowledged that it is ultimately the responsibility of an applicant to ensure that she is in a good position to make the appropriate application at the appropriate time: however, on the particular facts here it is the case, in my judgment, that there is no particular threat to the integrity of immigration control by reason of the Appellant's oversight in failing to ensure the process of renewing her passport was not completed in good time in 2014. Be that as it may, as I have already indicated, the Appellant's application in 2014 was refused under the Rules: I do not suggest by my preceding observation that that was not the correct decision. The Appellant's more recent application was also refused.

9. The 'Decision and Reasons' of the First-tier Tribunal Judge is for the main part a very thorough and well-reasoned document. The Judge had regard to all of the various disparate elements of the case that were put before her, and for the main part appropriately directed herself with regard to the applicable law and tests in cases such as this. However, I consider that notwithstanding the thoroughness of the Decision there is error of law such that it is necessary to set aside the Decision.
10. In particular, I note the following in respect of the Judge's consideration of the private life of Mr Hussain and the question of whether Article 8 was engaged at all in the appeal. At paragraph 27 the Judge says this:

*"In considering this appeal outside of the rules, I am firstly satisfied that there is a genuine marital relationship between the appellant and her husband. However, I am not satisfied that the refusal decision adversely interferes with their family life together because as set out above, I am satisfied that their family can continue in Bangladesh or through regular visits to the appellant in Bangladesh and through modern forms of communication between visits. As regards her private life, the appellant came to the UK in May 2012, when aged 46 years, and whilst she may have built up a private life in the UK, of which there is limited evidence, she would be able to continue her private life in Bangladesh. Therefore, I am not satisfied that the refusal decision adversely interferes with the family or private life of the appellant or her spouse such that Article 8 is potentially engaged."*

The Judge hereby in effect concluded that the Appellant's case did not get past the first two **Razgar** questions. Whilst, as will be seen in a moment, the Judge goes on to consider proportionality in the alternative, the *ratio* of the Decision is that Article 8 was not engaged.

11. I am particularly concerned in respect of the Judge's finding to the effect that there would be no adverse interference with the private life of the Appellant's spouse such that Article 8 is not potentially engaged. The Judge has given no reason for such a conclusion.
12. Whilst I note that the Judge has given very particular consideration at paragraph 21(b) to Mr Hussain's relationships with his children and grandchildren she has done so in the context of family life, concluding that in the absence of anything more than the normal emotional ties between adult relatives there is nothing to suggest that the family life aspect of Article 8 is engaged. Similarly, the Judge makes comments and observations in respect of Mr Hussain's brothers, nieces, and nephews.
13. Notwithstanding the challenge brought by the Appellant in this regard it seems to me that the Judge has clearly and sustainably reached conclusions in respect of *family* life. However, the Judge does not seem to have recognised that these various relationships were a significant and important aspect of Mr Hussain's private life in the United Kingdom.
14. In any event, I can detect no reasoning offered at paragraph 27 of the Decision - or indeed anywhere else - for the conclusion that Article 8 was not potentially engaged in respect of the Mr Hussain's private life.
15. It seems to me the proposition is simple and straightforward. If Mr Hussain remains in the United Kingdom without his wife then - even if they maintain the marital relationship by way of visits and frequent communication - there is an interference in their mutual family life. If in the alternative Mr Hussain leaves the United Kingdom with his spouse in order to set up home in Bangladesh, then there is an interference in his private life established in the UK over the last 60 years or so. Given the very low threshold of the first two **Razgar** questions, a finding to the effect that a man who has lived in the United Kingdom for 60 years and has present in the United Kingdom ten children, a number of grandchildren, and siblings does not clear the first two **Razgar** questions would be in essence perverse.
16. Accordingly, in my judgment the First-tier Tribunal Judge fell into error in respect of evaluation of the Appellant's spouse's private life. She did not offer any reasons for a conclusion that was in any event perverse.
17. I note that the Judge seeks to consider matters in the alternative. From paragraph 28 she states that she is going on to consider matters as if she had found that Article 8 was potentially engaged; then at paragraph 29

she begins by stating: *"In considering whether the refusal decision was proportionate ..."*. The difficulty with such an approach is that it is unclear precisely what it is that the Judge is weighing in the proportionality balance, given her findings in respect of the first two **Razgar** questions. It seems to me that if the Judge has erroneously concluded that Article 8 is not engaged then the 'alternative' proportionality balance is at substantial risk of starting off on an erroneous basis. The assessment of proportionality in the alternative will necessitate a complex and nuanced evaluation that moves away from the adverse finding in private/family life, if it is to defeat criticism of the evaluation of the first two **Razgar** questions as being immaterial.

18. In this context, insofar as any consideration was given again to Mr Hussain's private life it appears to be limited to the following:

*"Further, I am not satisfied that Mr Hussain's age alone or together with a combination of the amount of time that he has spent in the UK are factors that can be considered to be exceptional such that they are capable of outweighing the public interest in the removal of the Appellant."* (paragraph 29).

In my judgement, absent evidence of being a recluse, there is inevitably so much more to an individual's private life than his mere age and the amount of time spent in the UK. The principal findings underlying the *ratio* of the First-tier Tribunal's decision, as I have already indicated, is devoid of any recognition, findings or reasons in respect of such matters in the context of private life. I find nothing in this 'alternative' treatment that suggest a fuller or adequately nuanced approach as a premise to the 'proportionality' balancing exercise.

19. Further in this regard, it seems to me that the Judge inappropriately disregards the circumstance and period in which the Appellant had become an overstayer before the attempt to regularise her status by way of the application made on 6 August 2014. The Judge says this:

*"I have considered the reasons provided by the appellant for overstaying and I have considered the short period in which she had overstayed, but this appeal is limited to that of human rights and given that I have made findings that the Appellant's husband has connections with Bangladesh and that he is able to travel and does travel to Bangladesh I am not satisfied that it can be said that the Appellant or her spouse would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship or that there are exceptional circumstances in this appeal such that would justify a grant of leave outside of the rules."* (paragraph 29).

20. It have noted above that the Judge makes no express finding on the Appellant's explanation (although necessarily does not indicate its rejection either). The absence of a clear finding suggests that although the Judge referred to this circumstance, she did not factor it in to the overall consideration of proportionality. Indeed, in my judgement the use of the word "*but*" before "*this appeal is limited to that of human rights*" underscores that the First-tier Tribunal considered that she should disregard this element of the Appellant's history. In my judgment, that was in error. The nature of the Appellant's breach of the term of her leave is relevant because the balancing exercise requires consideration of all relevant matters, including in particular matters relating to the integrity and system of immigration control. The circumstance of how the Appellant's predicament - of finding herself an overstayer without leave and having to rely upon a human rights based application and appeal - arose is very pertinent to the overall consideration of where proportionality lies.
21. Indeed, albeit this is not directly informative of my conclusions on error of law, on the particular facts of this case I would go further with regard to the public interest consideration under section 117B. In my judgment, it is positively harmful to the integrity of immigration control, and therefore harmful to the public interest in maintaining effective immigration control, if the system of control cannot show itself to be flexible enough to disregard such a breach in an otherwise compelling case.
22. Be that as it may, for all of the reasons given I find that there was a material error of law on the part of the First-tier Tribunal Judge and in those circumstances the decision of the First-tier Tribunal Judge is set aside.
23. I have heard brief submissions from both representatives as to the remaking of the appeal. Neither thought it necessary for there to be a further hearing; both considered that the appeal could be remade on the basis of all of the materials available to the Tribunal. Accordingly, I remake the decision in the appeal without a further hearing.
24. Mr Islam for the Appellant essentially relied upon the grounds of appeal and the manner in which the case had been put before the First-tier Tribunal. Mr Kotas in substance relied upon the Respondent's RFL and invited consideration to adopting a similar approach and outcome to that of the First-tier Tribunal Judge.

25. I allow the appeal. If the Respondent's decision is left to stand the integrity of the mutual family life of the Appellant and Mr Hussain would only be preserved if he were to leave the UK to establish a home in Bangladesh. In my judgment, it would be a wholly disproportionate interference with his private life established over 60 years in the UK to expect him so to do. This, in combination with the fact that the Appellant's predicament - and indeed Mr Hussain's predicament - only arises by reason of a minimal breach of the limits of her leave for a reason (the too late completion of the renewal of her passport) that is understandable even if it does not completely exempt the Appellant from responsibility, makes this, in my judgment, an exceptional case within the contemplation of Lord Bingham in **Razgar** as explained by the Supreme Court in **Agyarko [2017] UKSC 11** (see in particular at paragraph 60).

### **Notice of Decision**

26. The decision of the First-tier Tribunal contained a material error of law and is set aside.

27. I remake the decision in the appeal. The appeal is allowed on human rights grounds.

28. No anonymity direction is sought or made.

Signed:

Date: **5 March 2018**

**Deputy Upper Tribunal Judge I A Lewis**

### **TO THE RESPONDENT** **FEE AWARD**

I have allowed the appeal and in all of the circumstances make a whole fee award.

Signed:

Date: **5 March 2018**

**Deputy Upper Tribunal Judge I A Lewis**  
**(qua a Judge of the First-tier Tribunal)**