Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08582/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 09.02.18	**On 23.02.18**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

AH (BANGLADESH)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P. Glass, Counsel instructed by Blackrock Solicitors
For the Respondent: Mr S. Kotas, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Telford sitting at Hatton Cross on 3 October 2017) dismissing his protection and human rights appeal against the decision of the Secretary of State to refuse to recognise him as a political refugee, or, in the alternative, to grant him leave to remain on private life grounds under Rule 276ADE (1)(vi). Although the alleged error of law by the First-tier Tribunal for which permission has been granted only relates to the appellant's human rights claim under Article 8 ECHR, I was not asked to

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discharge the anonymity direction made by the First-tier Tribunal, In the circumstances, it is appropriate that the appellant continues to be accorded anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Bangladesh, whose date of birth is [ ] 1992. He entered the United Kingdom as a student in January 2012. In 2014 he made an out of time application for leave to remain as a student, which was refused with no right of appeal on 27 May 2015. The appellant eventually claimed asylum on 21 May 2017. His claim was that he could not go back because his past political opponents in Bangladesh were now in power, and he thereby faced a threat of persecution at their hands. He also advanced a *sur place* claim based on his activities for the BNP in the United Kingdom.

3. On 21 August 2017 the Secretary of State gave her reasons for refusing the appellant's protection and human rights claims. He was not credible in his account of (a) being a member of the student wing of the BNP in Bangladesh; (b) being active for the BNP in the UK; (c) facing prosecution in Bangladesh on criminal charges engendered by false allegations made against him by Awami League activists; or (d) facing persecution by the state for an alleged failure by him and his father to repay a business loan which his father had taken out. On the issue of risk on return, even if he was a member of the student wing of the BNP in the past, he had not held a high position within the party, and so there was no real risk of him being of adverse interest on his return.

4. With regard to a claim under Rule 276ADE(1)(vi), there would not be very significant obstacles to his reintegration into life in Bangladesh. He had lived there for most of his life, and his mother, father, sisters and brothers were still there.

The Decision of the First-tier Tribunal

5. Both parties were legally represented before Judge Telford. The appellant gave oral evidence, and he was cross-examined by the Presenting Officer.

6. Judge Telford found that the appellant had not shown that he was involved in anti-government opposition in Bangladesh, or that he had been involved in politics in the UK in such a way as to come to the attention of the authorities in Bangladesh.

7. Judge Telford found at paragraph [22] that he had failed to establish that Rule 276ADE(1)(vi) applied. His case under this Rule was not made out on the evidence:

> "It was based on his political profile coupled with the loan and the debt which would have made him known to those political opponents he claims would target him. I found his claim to be incredible and those insurmountable obstacles do not exist."

8. The Judge made further findings on the appellant's claim under Article 8 ECHR at paragraphs [23], [74] and [82]-[86].

The Reasons for the Grant of Permission to Appeal to the Upper Tribunal

9. On 23 November 2017 First-tier Tribunal Judge Brunnen granted the appellant permission to appeal on Grounds 4 and 5 only:

> "Grounds 4 and 5 submit that the Judge failed to give proper consideration to the Appellant's private life claim under paragraph 276ADE and outside the Immigration Rules. This is arguable. There is no consideration or finding in the Decision as to whether there are very significant obstacles to the Appellant's integration in Bangladesh. There is arguably no adequate consideration of the proportionality of the Respondent's decision."

The Hearing in the Upper Tribunal

10. At the hearing before me to determine whether an error of law was made out, Ms Glass, who did not appear below, developed Grounds 4 and 5. Mr Kotas adhered to the Rule 24 Response opposing the appeal which had been settled by a colleague.

Discussion

11. The format of the Judge's decision is that he briefly summarised his findings at paragraphs [17] to [23] – one page of A4 – before going on to provide an in-depth analysis of the reasoning underpinning these findings at paragraphs [24] to [86] – 12 pages of A4. In assessing whether there is any real merit in the error of law challenge it is thus essential not to overlook the Judge's detailed discussion of the Article 8 claim at paragraphs [82]-[86].

12. The Judge misdirected himself at paragraph [22] in referring to the test of "*insurmountable obstacles*" rather than the test of *"very significant obstacles"*. However, his error was not material. In view of the Judge's primary findings of fact on the protection claim, the appellant could not satisfy either test. Counsel for the appellant made a crucial concession which is recorded by the Judge at paragraph [10] of his decision:

> "It was accepted on his behalf that article 2 and 3 stood or fell with the credibility of his asylum claim *and it was also eventually accepted that this was the case for his article 8 case* (my emphasis). Outside the Rules he claimed to have an exceptional case."

13. In short, it was common ground that the claim under Rule 276ADE(1)(vi) stood or fell with the asylum claim. If the appellant was not credible in his asylum claim, he also necessarily failed to qualify for leave to remain on the basis that there were very significant obstacles to his reintegration. Absent a credible asylum claim, there were clearly no obstacles at all to his reintegration into life and society in Bangladesh, for the reasons given

in the refusal letter and also having regard to the guidance given by the Tribunal in **Kamara [2016] EWCA Civ 813.**

14. It is pleaded in Ground 4 that the Judge failed to ask himself whether the appellant could build a meaningful private life in Bangladesh, as opposed to simply being *“able to sustain his life”* there. But this was not a distinction which was drawn by Counsel who appeared for the appellant in the First-tier Tribunal. Moreover, there was no evidential platform for the proposition that the appellant would be an outsider, or that he would not have a reasonable opportunity to be accepted back into society, *“so as to be able to operate on a day to day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual’s private or family life”.*

15. Accordingly, the Judge gave adequate reasons for finding that Rule 276ADE(1)(vi) did not apply.

16. With regard to the appellant’s Article 8 claim outside the Rules, it is pleaded in Ground 5 that the proportionality assessment at paragraph [86] was inadequate as no weight was attached to factors which favoured the appellant in the balancing exercise.

17. Neither the pleader nor Ms Glass identified any factor which actually favoured the appellant in the proportionality assessment. Ms Glass mentioned the life which the appellant has enjoyed here as a student and as a political activist. However, in the light of the domestic jurisprudence on Article 8 claims by former students, it was clearly open to the Judge not to treat these aspects of the appellant’s private life in the UK as justifying a departure from the general rule that private life developed or established during periods of unlawful or precarious residence should be accorded little weight. Indeed, arguably it would have been an error of law if the Judge had attached more than little weight to these aspects of the appellant’s private life, or more than little weight to the multiple friendships which he claimed to have built up in the UK.

18. **Nasim and Others (Article 8) [2014] UKUT 0025 (IAC)** is the most pertinent of the pre-section 117B authorities. At paragraphs [14] and [15] of **Nasim**, the Tribunal observed that the concept of a private life for the purposes of Article 8 is inherently less clear. At one end of the continuum stands the concept of moral and physical integrity as to which, in extreme circumstances, even the State’s interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1), are so far removed from the core of Article 8 as to be readily defeasible by State interests, such as the importance of maintaining a credible and coherent system of immigration control. On this point on the continuum, the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person’s return to their home country. A student here on a temporary basis has no expectation of

a right to remain in order to further his social ties and relationships in the UK if the criteria of the points-based system are not met.

19. The Tribunal went on in paragraph [16] to cite with approval **<u>MG</u> (assessing interference of private life) Serbia Montenegro [2005] UKAIT 00113** as follows:

> "A person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements."

20. The Tribunal at paragraph [20] reached the following conclusion:

> "We therefore agree with Mr Jarvis that [57] of **<u>Patel and Others</u>** is a significant exhortation from the Supreme Court to refocus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

21. The Tribunal went on to address the scope of **<u>CDS</u> (Brazil) [2010] UKUT 305 (IAC)**. At paragraph [41], they declined Mr Jarvis's invitation to find that the obiter remarks in **<u>CDS</u>** regarding Article 8 were no longer good law in the light of **<u>Patel and Others</u>**. But the Tribunal in **<u>CDS</u>** did however expressly knowledge that it was unlikely a person would be able to show an Article 8 right by coming to the United Kingdom for temporary purposes:

> "The chances that such a right will prevail have, we consider, further diminished, in the light of the judgments in **<u>Patel and Others</u>**. It would, however, be wrong to say that the point has been reached where an adverse immigration decision in the case of a person was here for study or other temporary purposes can never be found to be disproportionate. What is clear is that, on the state of the present law, there is no justification for extending the obiter findings in **<u>CDS</u>**, so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Immigration Rules from staying on to do something else."

22. The Judge found that the appellant was supposed to have left the UK at the end of July 2013 after completing his studies: paragraph [46]. The Judge found that he had failed to attend college, with the result that a curtailment notice had been served on him. But even though he was not attending a college, he was still in the UK in October 2013: paragraph [46]. The Judge found that he was in the UK as an economic migrant: paragraph [71]. The Judge found that part of the appellant's motivation in coming to the UK was to make money from working: paragraph [72]. The Judge correctly directed himself that the appellant had no right to choose where

to exercise a private life: paragraph [85]. On the Article 8(2) side of the equation, the Judge treated as *"serious"* the appellant's unlawful presence in the UK since the exhaustion of his appeal rights as a student *"and lack of compliance with the life in the UK test and his lack of evidence of the necessary qualification to show the appropriate command of [the] English language."*

23. On a holistic assessment of the decision, I consider that the Judge gave adequate reasons for finding that the interference consequential upon the refusal decision was proportionate, and hence that an Article 8 claim outside the Rules was not made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 17 February 2018

Judge Monson
Deputy Upper Tribunal Judge