IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14789/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 September 2021	**On the 28th October 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MRS RUFIA BEGUM CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel instructed by Zahra & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Bangladesh, born on 15 October 1952, who on 6 August 2016 entered the UK as a visitor with leave until 2 January 2017. On 30 December 2016, which was a few days before her leave as a visitor expired, she applied for Indefinite Leave to Remain ("ILR") in the UK.

On 16 August 2019 her application was refused. She appealed to the First-tier Tribunal, where her appeal came before Judge of the First-tier Tribunal Black ("the judge"). In a decision promulgated on 20 January 2020 the judge dismissed the appeal. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

The appellant's case before the First-tier Tribunal was that:

(i) she feared for her safety in Bangladesh because she had been threatened in the context of a relative trying to take over her property; and

(ii) she suffers from poor health (both physical and mental) and needs the full-time care and support of her family in the UK, in particular her son with whom she lives.

The judge accepted that the appellant has the subjective belief that she will be harmed by a family member in Bangladesh, but not that, objectively, there was any risk of this occurring.

The judge found that the appellant has considerable health issues and that her physical and mental health needs are presently met by her family in the UK. However, the judge found that the appellant would not face very significant obstacles returning to, or integrating into, Bangladesh. The reasons given for this were that

(iii) the appellant has lived all of her life in Bangladesh;

(iv) she has accommodation available to her in Bangladesh;

(v) she would receive financial support from her family in the UK, as she had done before coming to the UK as a visitor in 2016;

(vi) her family could engage a carer for her in Bangladesh, as they had done before 2016;

(vii) she has friends and a sister-in-law in Bangladesh;

(viii) her family in the UK could visit her; and

(ix) no evidence had been presented to show that she would not be able to obtain necessary medication in Bangladesh.

After finding that the appellant was unable to meet the conditions of paragraph 276ADE(1)(vi) (very significant obstacles to integration), the judge turned to consider Article 8 ECHR outside of the Rules.

The judge found that, since arriving in the UK in 2016, the appellant had established a relationship with her adult children that engaged Article 8 because it went "over and above the norm for a mother and adult children".

The judge found that the public interest in effective immigration controls outweighed the interference with the appellant's family life in the UK. Amongst other things, the judge found that:

(x) the appellant's grandchildren would not face any significant detrimental impact as a result of the appellant's removal;

(xi) the appellant's family in the UK would be in a position to provide her with support in Bangladesh and "ensure that her home environment in Bangladesh is safe and secure";

(xii) although she will find it difficult to return to Bangladesh, she would have emotional and practical support from friends.

The judge stated at paragraph 56:

> "I give weight to the nature and quality of the family life between the appellant and the various members of her family in the UK, but bear in mind the circumstances in which it was established: the current degree of interdependence between the appellant and her adult children in the UK has been established at a time when the appellant had precarious or no leave to remain. This is also the case for the appellant's relationship with her extended family and her grandchildren in the UK."

In paragraph 58 the judge stated:

> "The appellant has no leave to remain in this country and has had none since 2016 when her leave to enter as a visitor expired. She and the adult members of her family in the UK have known, since that date, that she was at risk of removal. She does not meet the Immigration Rules and must have known this when she made her application in 2016, given that she was able to manage in Bangladesh before her arrival in 2016. She has established a family and private life in the UK at a time when her immigration status was precarious (as a visitor) or non-existent. I give it weight nonetheless."

The judge concluded in paragraph 60 that the public interest in the maintenance of effective immigration control outweighed the interference with the appellant's family life and therefore that her removal from the UK would not breach Article 8 ECHR.

Grounds of Appeal

There is a single ground of appeal, which is that the judge assessed proportionality under Article 8 ECHR on the basis that the appellant was an overstayer, and had established a family life with her adult children whilst in the UK unlawfully, when in fact she was not an overstayer, and has had leave pursuant to Section 3C of the Immigration Act 1971.

With respect to the materiality of this error, the grounds state that:

> "The public interest in removing an overstayer is plainly greater than that which arises in the case of a person with lawful presence, and the error therefore necessarily infects the balancing exercise".

Analysis

It was common ground that because the appellant applied for ILR prior to the expiry of her visit visa her leave was extended by operation of Section 3C of the Immigration Act 1971 and therefore she was not an overstayer. The parties were in agreement, therefore, that the judge erred by finding that the appellant had no leave to remain when she established a family life with her children in the UK.

The issue in contention before me was whether this error was material. This requires me to address whether the outcome of the balancing exercise under article 8 ECHR could have been materially different if the judge had proceeded

on the basis that the appellant applied for ILR before (rather than after) her leave as a visitor expired and she was therefore not an overstayer.

Mr Jesurum, on behalf of the appellant, argued that there is an important distinction between private life and family life in an article 8 ECHR proportionality assessment. He noted that, pursuant to sections 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), only little weight could be attached to the appellant's private life in the UK (established since arriving in 2016) irrespective of whether it was established when she was in the UK unlawfully (subsection (4)(a)) or as a visitor with precarious immigration status (subsection (5)). Mr Jesurum submitted, however, that the appellant was not relying on her private life. Rather, she was relying on the family life she had established with her adult children since coming to the UK. Subsection (4)(b) of section 117B requires that little weight should be attached to a relationship established when a person is in the UK unlawfully but there is no equivalent "little weight" provision for a family life established when a person is in the UK with a precarious immigration status (such as a visitor). Mr Jesurum acknowledged that subsection 4(b) is concerned with a "qualifying partner" and therefore is not applicable in this case, but argued that this does not undermine his point, which is that there is no statutory provision in section 117B (or elsewhere) stipulating that "little weight" should be given to a family life (whether or not with a qualifying partner) established when a person's immigration status was precarious. To support this argument, Mr Jesurum relied on the Court of Appeal decision in *Lal v SSHD* [2019] EWCA Civ 1925. The appellant in *Lal* had, whilst lawfully in the UK as a Tier 4 (General) Student - and having lived in the UK lawfully for over four years - married a British citizen. The Court of Appeal observed that there was not a statutory basis under the 2002 Act to attach only little weight to the family life she enjoyed with her husband.

Mr Jesurum also argued that the appellant had a strong case, in terms of the family life she has established in the UK, and therefore it could not be said that the same outcome would have been reached had the judge recognised that her immigration status was precarious rather than unlawful.

Mr Clarke argued that it was open to the judge to attach little weight to the appellant's private life because it was formed at a time when it was known to her and her family that she had no right to remain in the UK. He argued that this was not a case where the appellant had any realistic prospect of succeeding, whether or not her status was precarious or unlawful.

I agree with Mr Clarke. There are several reasons why the appellant's family life with her adult children, established when she was in the UK as a visitor, could not, on any legitimate view, have been given more than little weight by the judge. An alternative way of formulating this is that there are several reasons why the public interest in the maintenance of effective immigration controls was not materially reduced because the appellant was a visitor, rather than an overstayer, when she applied for ILR. The reasons are as follows:

> In order to enter the UK as a visitor, the appellant would have had to state – and to have satisfied the respondent - that she

intended to leave the UK after her visit. This was not the first time she had entered the UK as a visitor and neither she nor her family in the UK could have been under any doubt that she was not permitted to remain permanently in the UK and that she was not on a route to settlement. It is well-established that in such circumstances it is likely only to be in exceptional circumstances that removal will constitute a violation of Article 8. In paragraph 49 of *Agyarko v SSHD* [2017] UKSC 11 it is stated:

> "In *Jeunesse*, the Grand Chamber said, consistently with earlier judgments of the court, that an important consideration when assessing the proportionality under Article 8 of the removal of non-settled migrants from a contracting state in which they have family members, is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Where this is the case, the court said, 'it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8'."

Whether or not this was the intention of the appellant (or her family), the consequence of allowing her appeal would be to enable her to circumvent the Adult Dependent Relative ("ADR") rules, which is the route by which a parent, who needs (or seeks) support from her adult children in the UK, should apply to enter the UK. There is a strong public interest in not permitting people to circumvent these rules by entering the UK and then presenting the respondent with a fait accompli. This is explained in *Mobeen v Secretary of State for the Home Department* [2021] EWCA Civ 886, as follows:

> 68. It is common ground that whether or not the appellant would have qualified for entry under the ADR ECR is not determinative of the question of whether or not the refusal decision was compatible with Article 8. However, as set out above, the fact that the SSHD, in the discharge of her statutory duty to regulate immigration, has set out a clear policy, reflected in the ADR ECR, as to the requirements to be met by ADRs seeking to settle in the UK will be a powerful factor in any Article 8 assessment of proportionality. This proposition is clearly established on the authorities (for example in Agyarko (at [47])).
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> 69. Whilst Mr Gill was not in a position formally to concede the position, it cannot realistically be suggested that the appellant would have met the requirements in 2.4 and 2.5 of the ADR ECR. Her physical condition comes nowhere near the threshold (of requiring long-term personal care to perform everyday tasks) and she could obtain the required level of care in Pakistan. The fact that the appellant may not burden the UK taxpayer's purse because she can access private healthcare in the UK is no answer to the SSHD's position, in the sense that she would still not meet the relationship requirements of the ADR ECR. In any event, the appellant's reliance on the fact that her children are wealthy is at odds with the second limb of the SSHD's policy as identified in

> Britcits at [58], which is to avoid disparity between ADRs depending on their wealth.
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> 70. The ADR ECR, reflecting the SSHD's policy as approved by Parliament and upheld as lawful in Britcits, provide the conventional pathway for entry to the UK as an ADR. Whether deliberately or otherwise, the appellant circumvented that route by coming as a visitor to the UK, overstaying and then applying for leave to remain outside the Immigration Rules. She presented the SSHD with the sort of "fait accompli" referred to by Lord Reed in Agyarko at [54]:
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> > "… the Convention is not intended to undermine [a state's right to control the entry of non-nationals into its territory and their residence there] by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a fait accompli. On the contrary, "where confronted with a fait accompli the removal of the non-nationals family member by the authorities would be incompatible with article 8 only in exceptional circumstances": Jeunesse, para. 114."
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> It is clear from the Immigration Rules, which, as explained in paragraph 53 of *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, reflect the respondent's assessment of the general public interest, that there is a public interest in not allowing a person who enters the UK as a visitor to apply for leave to remain on the basis of her family life. For example, a person who satisfies the conditions of paragraph EX.1 of Appendix FM is eligible for limited leave to remain if, when they made the application, they were an overstayer, but not if they were a visitor (see E-LTRP.2.1.(a) to (c) of Appendix FM).
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> There are degrees of precariousness and the appellant's precariousness is of the highest order. This is apparent from comparing her case to that of the appellant in *Lal*. When Ms Lal applied for leave to remain in the UK on the basis of her family life, she had been in the UK lawfully as a student for over four years. In contrast, when the appellant applied for ILR on the basis of her family life, she had been in the UK for less than six months as a visitor.

Even if I am wrong, and greater weight should have been given to the appellant's private life (or less weight given to the public interest in effective immigration controls) because of her immigration status, that would not in any event be material, because, as argued by Mr Clarke, this was a case in which the balancing exercise under Article 8 ECHR fell firmly on the respondent's side of the scales. The appellant did not come close to establishing that there were insurmountable obstacles to her integration into Bangladesh, for the cogent reasons given by the judge. The only possible route open to her under the Immigration Rules would be to make an application for entry clearance as an ADR but this would have been hopeless given the unchallenged findings about the support she could be given in Bangladesh. In my view, this is a case in

which there could only be one answer to the proportionality question, which is that removal from the UK would not be incompatible with respect for the appellant's family life under article 8.

Notice of decision

The decision of the First-tier Tribunal did not involve the making of a material error of law. The decision therefore stands.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan Date: 1 October 2021