IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002600
First-tier Tribunal No: PA/53938/2021
IA/11545/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 19 February 2023

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MD ABDUL MUKIT
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Iqbal instructed by Taj Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 15 December 2022

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh who was born on 25 November 1977. He arrived in the United Kingdom on 29 April 2010 with entry clearance as a student valid until 31 December 2011. The appellant overstayed. On 24 September 2020, the appellant was served with notice that he was an overstayer and he claimed asylum. He claimed to be a supporter of the BNP and to be at risk from the Awami League and its supporters in Bangladesh.

2. On 26 July 2021, the Secretary of State refused the appellant's claims for asylum and humanitarian protection and under Art 8 of the ECHR.

3. As regards the appellant's international protection claim, the Secretary of State did not accept the appellant's account to be credible and that he was, therefore, at risk on return to Bangladesh.

4. As regards Art 8, the appellant relied upon his relationship with Suzia Begum, a British citizen whom the appellant had met in 2008 and with whom, in August 2020, he had gone through an Islamic religious marriage. They had been unable to have a civil marriage because the respondent had retained the appellant's passport. The respondent concluded that the appellant had not established that he was a "partner" as defined in GEN.1.2. of Appendix FM, in order to fall within the "partner" rules in Section R-LTRP of Appendix FM because they had not lived together for at least two years, having only moved in together on 10 August 2020. In addition, the respondent was not satisfied that there would be "very significant obstacles" to the appellant's integration in Bangladesh on return and so the respondent concluded that para 276ADE(1)(vi) of the Immigration Rules did not apply. Finally, the respondent was not satisfied that there would be "unjustifiably harsh consequences" if the appellant were removed so as to succeed under Art 8 outside the Rules.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. At the hearing before Judge M Symes on 22 February 2022, the appellant's legal representative did not pursue the appellant's international protection claim relying exclusively upon Art 8 of the ECHR.

6. Judge Symes dismissed the appellant's appeal under Art 8. First, the judge accepted that the appellant could, in principle, be considered to be a "partner" for the purposes of Appendix FM. However, recognising that the appellant could only succeed under partner rule if para EX.1. was satisfied, the judge found that there were not "insurmountable obstacles" to the appellant's family life with his partner continuing in Bangladesh. Second, the judge found that there were not "unjustifiably harsh consequences" if the appellant were removed such as to outweigh the public interest, having regard to s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended). The judge concluded that therefore the appellant's removal would be proportionate and not a breach of Art 8.

The Appeal to the Upper Tribunal

7. The appellant appealed to the Upper Tribunal on a number of grounds. On 25 May 2022, the First-tier Tribunal (Judge Aldridge) granted the appellant permission to appeal. Judge Aldridge did not consider that there was any merit in the appellant's grounds which first, challenged the judge's adverse finding in relation to para EX.1. of Appendix FM, namely that there were not "insurmountable obstacles" to the appellant's integration into Bangladesh and secondly, challenged the judge's assessment of Art 8 outside the Rules. However, Judge Aldridge concluded that it was arguable that Judge Symes had erred in law by failing to consider the appellant's case under para 276ADE(1)(vi).

8. On 23 June 2022, the Secretary of State filed a rule 24 response seeking to uphold Judge Symes' decision.

9. The appeal was listed for hearing on 15 December 2022 at the Cardiff Civil Justice Centre. The appellant was represented by Mr Iqbal and the respondent by Ms Rushforth. We heard oral submissions from both representatives.

The Submissions

1. The Appellant

10. In his oral submissions, Mr Iqbal refined the grounds upon which permission to appeal had been granted.

11. First, Mr Iqbal submitted that the judge had erred in law in concluding that para EX.1. was not satisfied on the basis of "insurmountable obstacles" to the family life of the appellant and his partner continuing in Bangladesh. In particular, he criticised the judge's reasoning in para 27 of the decision and he submitted that the judge's conclusion that para EX.1. was not satisfied was a conclusion not properly open to the judge.

12. Second, Mr Iqbal submitted that, relying on his submissions that the judge had inadequately reached a conclusion in relation to para EX.1., the judge had failed properly to consider the "fair balance" between the public and private interests under Art 8 in concluding that there were not "unjustifiably harsh consequences" sufficient to outweigh the public interest.

13. Thirdly, Mr Iqbal submitted that the judge had failed to consider para 276ADE(1)(vi) and had erred in law by failing to make any finding in relation to the issue of whether there were "very significant obstacles" to the appellant's integration on return to Bangladesh.

2. The Respondent

14. On behalf of the respondent, Ms Rushforth relied upon the rule 24 response.

15. First, Ms Rushforth submitted that there was no merit in the ground challenging the judge's finding in relation to para EX.1. and in respect of the issue of "insurmountable obstacles". The judge was entitled to find, as he did in para 27, that the appellant and his partner would have family support and resources in Bangladesh upon which they could rely and it was no longer being contended that the appellant had a fear of persecution.

16. Second, Ms Rushforth accepted that it was an error of law for the judge not to have considered para 276ADE(1)(vi) but, she submitted, that error was not material. She pointed out that the appellant had not made an independent claim under para 276ADE(1)(vi) in the written skeleton argument relied on before the First-tier Judge. The only basis upon which it was said that there were difficulties in the appellant and sponsor living in Bangladesh was on the basis of their family life and that was dealt with in relation to the issue under para EX.1. Ms Rushforth submitted that having reached a sustainable finding in relation to para EX.1. and, in the light of the fact that the appellant was no longer relying upon any fear of persecution on return, the appellant's claim under para 276ADE(1)(vi) could not succeed.

3. The Appellant's Reply

17. In reply, Mr Iqbal accepted that there was no reference to para 276ADE(1)(vi) in the appellant's skeleton argument and the only reference to integration was a reference to *the sponsor's* reintegration into Bangladesh society in para 26(b). Mr Iqbal accepted that para 276ADE(1)(vi) had not been raised before the judge at the oral hearing. Nevertheless, Mr Iqbal submitted that it was not open to the judge to reach the conclusions that he did including that there were not "unjustifiably harsh consequences" which was, he submitted, against the weight of evidence.

Discussion

(1) Paragraph EX.1

18. It is common ground between the parties that, in relation to the partner rules in Appendix FM, and also (largely) in respect of Art 8 outside the Rules, a central issue was the application of para EX.1. that: "there are insurmountable obstacles to family life with [the] partner continuing outside the UK". Paragraph EX.2., defines "insurmountable obstacles" as:

> "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

19. In Lal v SSHD [2019] EWCA Civ 1925 (Etherton MR; Asplin and Leggatt LJJ) provided guidance as to the proper approach to para EX.1. as follows at [36]:

> "In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both)."

20. In R (Agyarko) and another v SSHD [2017] UKSC 11, the Supreme Court recognised that the requirement in para EX.1. of "insurmountable obstacles" bore the same meaning as the phrase used in the jurisprudence of the Strasbourg Court under Art 8 (see [44] per Lord Reed). The Supreme Court indicated that it imposed a "stringent test" but one which should be understood in a "practical and realistic sense" (see [43] per Lord Reed). Applying that test, the Court of Appeal in Lal indicated that the decision maker must: "have regard to the particular characteristics and circumstances of the individual(s) concerned" (at [37]).

21. In this case, Judge Symes self-direction identified the applicable test under para EX.1. at para 20 of his decision. In relation to para EX.1., the judge made relevant findings of fact at paras [24] – [28] as follows:

> "24. Having identified the legal parameters of the appeal, I should make findings of fact. I have no doubt that the Appellant and Mrs Begum are in a genuine and subsisting relationship; the Respondent does not contest the fact. It is now of a significant duration given their relationship appears to have deepened quickly after they first met in

2018. I accept the evidence of Mrs Begum, who was a candid and direct witness, as to her health and UK ties, PA/53938/2021 and of her strong relationship with her siblings in Bangladesh, who visit her regularly in this country.

25. The Appellant's evidence is rather more difficult to analyse. He has advanced virtually no facts as to his personal history other than in the course of his asylum application. Yet his appeal against that application's refusal has been withdrawn. I pressed Mr Rahman on this issue at the hearing and he assured me he had given thorough advice to his client as to the consequences of withdrawing the asylum ground of appeal.....

26. However, Mr Rahman made it very clear that there was no intention to rely on a 'serious harm' case that might be cognisable within the human rights ground of appeal. In these circumstances I do not consider that I can accept any of the historical facts advanced as part of his 'asylum' narrative. He has given explanations for the Home Office criticisms of his account's credibility in his witness statement, and perhaps they would have sufficed had I been applying the lower standard of proof apt for international protection claims. But by abandoning his asylum claim he has effectively chosen not to maintain his challenge to the Respondent's reasoning. Facts advanced in the context of a family life application must be established on the civil standard, the balance of probabilities. Given the discrepancies to which the Secretary of State alluded in the refusal letter, I do not accept on balance of probabilities that any of the facts advanced by the Appellant are made out, save for those relating to his general family circumstances. It is apparent from the narrative above that he has family in Bangladesh. His asylum interview mentions he is from the Sylhet region of Bangladesh and that he has four brothers, two in Dubai and two remaining in Bangladesh. I can deduce no other facts relevant to his background than that.

27. The Appellant is thus a person who has family in Bangladesh who might support him on a return there. Mrs Begum clearly has strong ties there via her siblings who regularly visit her in the UK. She also has significant resources. It would be open to her to sell either of her UK properties; given that Bangladesh is a poor country it must be assumed that the capital released by so doing would go a long way there. She has clearly owned her own home for a significant period given the limited time remaining on the mortgage, and so PA/53938/2021 one can hardly be oblivious to the strong likelihood that she has accumulated significant equity. She could continue to benefit from rent from her commercial property or alternatively she could presumably lease out her own home. The assertion in her witness statement that she would face 'destitution' in Bangladesh simply defies reality, even without taking account of the possibility that the Appellant would himself be able to work in his own country of origin bearing in mind his qualifications.

28. Mrs Begum's witness statement places great weight on the Appellant's fear of persecution, but that of course has fallen by the wayside with the withdrawal of his international protection ground of appeal. She also points to her health problems. I have no doubt these are genuine, but there is virtually no medical evidence before me as to her ongoing prognosis and the health problems that her conditions bring with them; no doubt she has suffered from low moods and discomfort, but the tenor of the letters from her consultant are to the effect that those conditions are broadly under control. I have not been shown any evidence that the same medical treatment would not be available in Bangladesh given the

> availability of private funds to finance it, and the burden of proof is on the Appellant in an immigration appeal on an issue of this nature."

22. Mr Iqbal submitted, in particular, that the judge had not given adequate reasons in para 27. The judge had only said that there "might" be support for the appellant on return. Further, the judge had, in effect, speculated as to the value of Mrs Begum's properties in the UK, what equity she had and could realise by selling them, and how those resources would suffice in Bangladesh in the absence of objective evidence of the cost of living in Bangladesh.

23. We do not accept that submission. As the judge pointed out in a number of passages in his decision, including in the immediate preceding para 26, the burden of proof was upon the appellant to establish his case on a balance of probabilities. He had abandoned his appeal based upon risk on return to Bangladesh and the judge was undoubtedly entitled to find in para 26 that those circumstances, no longer pursued through the international protection claim, had not been established on the civil balance of probabilities. In fact, in para 26, the judge made a number of factual findings concerning the family which the appellant would have to provide potential support for him in Bangladesh. The use of the word "might" in para 27 is not inconsistent with a finding that the appellant had not established that his family would not provide support to him given that there was no evidence that he was in any way estranged from his family.

24. Further, as regards his partner's resources, the judge set out her evidence in relation to this at para 8 of his decision. There he noted her evidence that she owned her own home and a commercial property and that she worked part-time in a care home. She financially supported the appellant. He also noted her evidence that she claimed that she would not be able to support her family if she lost her property in the UK. In our judgment, it was a reasonable inference, which the judge was legally entitled to draw, that the appellant's partner could sell her UK properties and realise capital from them. There was clearly evidence before the judge that in relation to her own home she had owned it for a significant period and there was a limited time remaining on the mortgage. On the basis of that, it was reasonable for the judge to infer that she had "accumulated significant equity". It was, as an alternative, open to the judge to find that she could continue to rent out her commercial property and, in addition, could rent out her own home, thereby obtaining rental income. The Appellant's partner claimed that she would be "destitute" in Bangladesh. Given the evidence concerning her assets in the UK, the judge was entitled to reject that contention. Equally, it was open to the judge to take into account that the Appellant himself would be able to work, and of course had the option of support from his family in Bangladesh, on return.

25. Mr Iqbal submitted that the judge's reasons and findings in para 27 were not open to him. In response to questions from the bench, Mr Iqbal appeared to eschew any argument that the reasoning or findings was perverse or irrational. In truth, that is the only real basis upon which an error of law could be established. The judge's reasons were adequate and reasonable to sustain his findings leading to the conclusion that the appellant had not established that there were "insurmountable obstacles" to him and his partner living in Bangladesh.

26. Mr Iqbal did not specifically criticise the judge's reasons in para 28 when he found that the sponsor's health problems, though genuine, had not been shown

to be problems which could not be dealt with by medical treatment in Bangladesh. The evidence on this issue is summarised as paras 9(f) and (g) of the judge's decision. We see no basis upon which it could be said that the judge reached a Wednesbury unreasonable finding in relation to the claimed health problems, and any impact on them in Bangladesh, if the appellant and his partner returned there.

27. For these reasons, we do not accept Mr Iqbal's submissions challenging the judge's finding that para EX.1. was not met because the appellant had not established that there were "insurmountable obstacles" to his continuing family life in Bangladesh.

(2) Art 8 Outside the Rules

28. Turning now to the appellant's claim under Art 8 outside the Rules, the judge dealt with this in paras 29-31 which we set out above. At [30], the judge said this:

> "It is necessary to consider the s117B NIAA 2002 factors. The Appellant must speak some English given he has studied here. He is financially independent given his wife's resources. However his immigration status is precarious in the extreme. I take on board his advocate's submission that attempts have been made to regularise his immigration status: but those attempts notably do not include the making of any immigration application (let alone a tenable one) from the time he began to overstay until meeting Mrs Begum some eight years later. His campaign to regularise his status has in fact comprised only his attempts to document his identity with a view to marrying Mrs Begum, which for the reasons above would not have made any material difference to the fundamental difficulty he faces, ie establishing insurmountable obstacles (or other exceptional circumstances) to relocation to Bangladesh, and absent so doing he has, and had, no viable case under the Immigration Rules. His status as a long-term overstayer, his asylum claim having been abandoned, is at the highest end of the precariousness scale. In truth, having pursued an asylum claim which has consumed public resources to determine and given his presence a misrepresented veneer of legality pending its determination, he has distinctly abused the immigration control regime."

29. Then at [31], he concluded:

> "I cannot accept that the Sponsor's circumstances as a person of Bangladeshi origin who has made a life for herself in the UK as a British citizen for an extended period and suffers from relatively modest health problems amount to "*non-standard and particular features … of a compelling nature*". Accordingly I find the immigration decision proportionate and the appeal must be dismissed." (emphasis in original)

30. Mr Iqbal's submissions in relation to this issue mirrored those concerning para EX.1. with the ultimate submission that the judge's finding that there were not "unjustifiably harsh consequences" was against the weight of the evidence.

31. We do not agree. In carrying out the proportionality assessment under Art 8.2, the judge was required to strike a "fair balance" between the public interest, set out s.117B of the NIA Act 2002 (as amended)) and the personal circumstances of the appellant and sponsor. The appellant, in order to succeed, had to establish that there were "unjustifiably harsh consequences" in order to outweigh the public interest (see Agyarko at [60] per Lord Reed). In effect, the appellant raised

no issues beyond those considered by the judge in relation to para EX.1. in seeking to establish that his removal would be disproportionate on the basis that there would be unjustifiably harsh consequences" if he were removed. The judge concluded that there were not "insurmountable obstacles" to the appellant and his partner's family life continuing in Bangladesh. As we stated above, that finding is legally sustainable. In reaching that finding, the judge took fully into account their circumstances, personal and financial, on return to Bangladesh including the claimed impact upon the health of the appellant's partner (see [24]-[28]). There was, in truth, nothing further which could lead the judge to find that the public interest was outweighed, given the circumstances of the appellant and his partner as the judge found them to be, in concluding that the requirements of para EX.1. were not met. Having taken into account all the relevant factors, we see no conceivable basis upon which it can be concluded that the judge's finding in relation to Art 8 outside the Rules was Wednesbury unreasonable, perverse or irrational. Indeed, given his finding in relation to para EX.1. and the circumstances of this case, the judge's finding in relation to Art 8 outside the Rules was, in our view, inevitable.

32. For these reasons, we reject Mr Iqbal's submissions that the judge erred in law in dismissing the appellant's appeal under Art 8 of the ECHR.

(3) Paragraph 276ADE(1)(vi)

33. Turning now to the final issue in relation to para 276ADE(1)(vi), it was common ground before us that that was the only "private life" provision in Art 8 which had any potential application to the appellant as he had not been in the UK for at least twenty years.

34. Paragraph 276ADE(1)(vi) sets out the requirements to be met for an applicant to be granted leave to remain on the grounds of private life in the UK where at the date of application the applicant:

> "(vi) .... has lived continuously in the UK for less than 20 years (discounting any periods of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

35. Mr Iqbal accepted before us that para 276ADE(1)(vi) was not directly referred to in the appellant's skeleton argument relied on before the First-tier Tribunal Judge, nor were any submissions made in relation to it at the hearing.

36. The appellant's case, in substance, had previously been that he was at risk on return because of his political opinion. That issue was not pursued before the judge where the focus was upon the impact upon the appellant's family life with his partner if he were to return to Bangladesh. The appellant simply did not raise an independent case that his *private life* was such that he should not be removed because of para 276ADE(1)(vi) or outside the Rules under Art 8.

37. Given that these matters were not pursued before the judge, we have considerable doubt whether it can be properly characterised as an error of law for the judge not to deal with an issue which was not relied upon before him. Only if an issue was Robinson obvious - namely related to a matter which, if not considered, potentially would put the UK in breach of its treaty obligations (whether under the Refugee Convention or the ECHR) and there was a realistic

prospect of such a claim succeeding - can it be said that a judge erred in law by dealing with the case simply on the basis of the issues raised by the parties.

38. However, we note that in this appeal Ms Rushforth has conceded, on behalf of the respondent, that the judge's failure to deal with para 276ADE(1)(vi) was an error of law. If we proceed on the basis of that concession, we are, nevertheless, of the clear view that that error was not material to the outcome of the appeal.

39. As we have said, the judge made clear and sustainable findings in relation to the circumstances of the appellant and sponsor on return to Bangladesh. He found that there were no insurmountable obstacles to them living there together. He also found that the appellant had family who provide him support. The appellant's fear of persecution fell away as it was not pursued and the judge concluded that it was not established, in any event, on a balance of probabilities. The appellant had been in the UK since April 2010 and there was no evidence before the judge that he had lost ties, culturally or socially, with Bangladesh where he had lived for over 32 years before coming to the UK. The test of "very significant obstacles, embodies an "elevated" threshold (see Parveen v SSHD [2018] EWCA Civ 932 at [9]). The notion of "integration" is, as the Court of Appeal in Kamara v SSHD [2016] EWCA Civ 813 recognised at [14], a "broad one" which requires:

> "a 'broad evaluative judgment' to be made as to whether the individual will be enough of an insider in terms of understanding how life in society now the country has carried on and a capacity to participate in it so as to have a reasonable opportunity to be accepted there, 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."

40. In our judgment, the appellant's circumstances could not conceivably reach this "elevated" threshold applying Parveen and Kamara. Consequently, if (which we doubt) the judge's failure to consider para 276ADE(1)(vi) was an error of law, it was not material to the outcome of the appeal as the appellant would inevitably have failed to establish the requirements of para 276ADE(1)(vi).

(4) Conclusion

41. For these reasons, the judge did not materially err in law in dismissing the appellant's appeal under Art 8 of the ECHR.

Decision

42. The decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of a material error of law. That decision, therefore, stands.

43. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 January 2023