



IAC-FH-CK-V1

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

Appeal Number: IA/41095/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12th August 2015**

**Decision & Reasons Promulgated
On 27th August 2015**

Before

**UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE JACOBS**

Between

**MR SHEKH MOHAMMAD KABIRUL ALAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representative

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of Judge of the First-tier Tribunal N Bowes, who in a decision promulgated on 22nd April 2015, dismissed the appellant's appeal against a refusal by the Secretary of State to vary his leave to remain as a student on the basis of his private life in the United Kingdom and to exercise her discretion in her favour outside of the Immigration Rules.

Background

2. The appellant, whose date of birth is 31st December 1980, is a citizen of Bangladesh. He lawfully entered the United Kingdom in October 2009 as a student. He was granted further periods of leave to remain in the same category. His leave was however curtailed to 23rd March 2014 as a result of difficulties with his sponsoring educational institution. The appellant made an application on 20th July 2014 for leave to remain on the basis both of his private life and also exceptionally outside of the Immigration Rules. This application was treated as being made in time by the respondent who had given the appellant appropriate assurances and no issue has been raised in respect of the tribunal's jurisdiction to consider the appeal.
3. The application made to the Secretary of State indicated that the appellant's sight had deteriorated. His vision had become blurred and cloudy. He had been offered a corneal transplant but this did not go ahead because he was concerned that it would affect his studies. His eye condition however deteriorated to such an extent that he was unable to continue his studies. The appellant was suffering from rheumatoid arthritis and was, in this regard, undergoing trials at King's College Hospital.
4. On 18th September 2014 the appellant sent a further letter to the respondent. In this letter he indicated again that he was suffering from severe rheumatoid arthritis which was affecting his liver function. He indicated that he had granular dystrophy and dry ocular surface to his eyes that resulted in him being unable to see or read properly.
5. He indicated to the Secretary of State that he had been residing in the UK since October 2009 and, as a result, had built up a private and family life with the expectation that he would be able to finish his studies. He indicated that it would be a huge disgrace for him to return to Bangladesh if he did not complete his course and requested that the Secretary of State grant his application under the Immigration Rules. Alternatively, the Secretary of State was asked to consider his application under Article 8. In this regard the appellant maintained that he would be unable to find suitable shelter, medical or other lifesaving support and that were his basic needs as a human being would not be met.

The Reasons For Refusal Letter

6. The Secretary of State was not satisfied that the appellant had fulfilled the requirements of paragraph 276ADE of the Immigration Rules. The only subparagraph of relevance for the purposes of the error of law hearing is 276ADE(vi). This requires very significant obstacles to an individual's integration into their home country for leave to remain to be granted. The Secretary of State, satisfied that the appellant had lived in Bangladesh for 28 years and had his parents and siblings there, was not satisfied that very significant obstacles to integration existed.
7. Significantly, the Secretary of State then went on to consider the appellant's circumstances outside of the Immigration Rules. The Secretary of State noted the appellant's medical condition and his intention to complete his studies. She

identified a hospital in Bangladesh where corneal transplant surgery could occur. She identified faculties in Bangladesh offering treatment of rheumatoid arthritis and listed available relevant medication. The appellant had not produced any evidence that he had been, or would be, denied treatment or medication, and he had family support in Bangladesh. The Secretary of State was therefore not satisfied that the high threshold that he needed to overcome in respect of medical treatment cases under both Articles 3 and 8 was met, and she rejected the appellant's claim that he had a legitimate expectation that he would be able to complete his studies.

The decision of the First-tier Tribunal

8. At an appeal hearing on 12th May 2015 it was argued on behalf of the appellant that the respondent should have exercised her discretion differently, and that the decision was unfair according to common law fairness principles. It was also claimed that the refusal of the application for leave and the removal decision contravened the respondent's obligations under Article 8.
9. Paragraph 10 of the determination notes that, at the outset of the hearing, it was agreed between the parties that the issues for the judge's consideration were whether the appellant met paragraph 276ADE and, if not, whether he could resist his proposed removal on the basis of his Article 8 rights. We pause to note at this point that the appellant was represented by Mr Chelliah of Simon Noble Solicitors.
10. In his determination the judge recorded the evidence presented at the hearing. This included details of the appellant's medical conditions, his dreams of studying in the United Kingdom, his feelings of disgrace and hopelessness if he was unable to complete his studies, and details of his family in Bangladesh which consisted of his elderly parents, one brother and two sisters.
11. The judge found the appellant credible and his medical conditions were found to be as stated in the various medical documents. The judge indicated that the question for his consideration was whether the appellant met the Immigration Rules and/or a breach of Article 8. The judge went on to consider paragraph 276ADE(vi) and concluded that feelings of shame and the appellant's medical conditions did not amount to very significant obstacles in light of the available medical treatment in Bangladesh, as disclosed in the Reasons For Refusal Letter, the fact that he would be able to rely on family support, and in light of the fact that the appellant entered the United Kingdom in his 20s.
12. The judge then went on to consider the appellant's 'free-standing' Article 8 right. The judge indicated that there had to be compelling circumstances in order to allow an appeal outside the immigration rules, and adopted the five step **Razgar** approach. The judge was satisfied that the appellant had established a private life in the United Kingdom. The judge found the decision to remove the appellant was lawful and in pursuit of a legitimate aim. When assessing proportionality the judge took account of Part 5A of the Nationality, Immigration and Asylum Act 2002. The judge noted that the appellant was proficient in English and found the appellant to be financially independent, factors in his favour.

13. The judge then noted that the public interest in maintenance of effective immigration control was a relevant factor and noted that the appellant's position in the United Kingdom had always been precarious as he had never been granted indefinite leave to remain and was not in a category leading to settlement.
14. The judge concluded that the appellant's private life could continue in Bangladesh. The judge also concluded, with reference to the case of **GS (India) [2015] EWCA Civ 40**, that the appellant being 'mentally upset' was not sufficient to amount to truly exceptional circumstances.

The Grounds of Appeal to the Upper Tribunal

15. The appellant, aggrieved with this decision, sought permission to appeal to the Upper Tribunal. In a decision dated 23rd June 2015 Judge of the First-tier Tribunal Page granted permission. The judge, mindful of the fact that the appellant was not legally represented, indicated that the First-tier Tribunal had given great weight to the availability of treatment for the appellant's condition in Bangladesh but found that it arguable that this was not of such great weight. Judge Page stated:

"The appellant's application argues that he made his further leave to remain application on the basis of his exceptional compelling circumstances and therefore could not satisfy the English language requirements to obtain a CAS which is why he applied under the further leave to remain route outside of the Immigration Rules to obtain discretionary leave so that he could complete his education. The permission to appeal application argues that the judge did not consider the facts properly by not considering the exceptional circumstances in their context. The permission to appeal application complains that neither the respondent nor the judge considered whether discretion should be exercised. Further, the judge found that although the appellant was a credible witness his case was not truly exceptional. The application argues that the judge was in error here as the truly exceptional circumstances that should have been considered were the appellant's medical issues arising from his visual impairment."

The hearing before the Upper Tribunal

16. We heard from both the appellant and Mr Tufan, who represented the Secretary of State. The appellant initially requested an adjournment in order to obtain a lawyer to represent him. We refused to grant the adjournment. The appellant had been informed for approximately a month prior to the hearing date of the time and place of the Upper Tribunal hearing. We were satisfied that the appellant had sufficient opportunity to instruct a lawyer. We were mindful of the appellant's complaint of feeling sick and his mobility difficulties. We were not, however, persuaded that this would have prevented the appellant from using remote forms of communication to instruct a lawyer. We additionally note that the appellant was able to travel to the hearing centre and appear before the Upper Tribunal. Having regard to the overriding objective in the Tribunal Procedure (Upper Tribunal) Rules 2008 and the authority of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**, and bearing in mind the narrow issue before us, we were satisfied the Appellant was not deprived of a fair hearing by our refusal to grant the adjournment.

17. The appellant then made submissions. He indicated that he could not get his CAS letter because he had not obtained a suitable mark in his English exam, and this in turn was due to his inability to read properly. He indicated that he was in the United Kingdom to complete his education. We considered further letters from the appellant's medical practitioners in relation to his eye condition. The appellant indicated that he was worried that he would not be able to obtain sufficient treatment in Bangladesh.
18. Mr Tufan in reply invited us to find that the judge had not made any material error in law. He referred us to the case of **Patel v Secretary of State for the Home Department** [2012] EWCA Civ 741 in relation to the position of a student vis-à-vis Article 8.

Discussion

19. We have considerable sympathy for the appellant. We are however restricted in our consideration of the appeal before us to deciding whether the First-tier Tribunal Judge made a material error of law. At the hearing before the First-tier Tribunal it was agreed that the issues were: 1) whether the appellant met the requirements of paragraph 276ADE of the Immigration Rules; and 2) in the alternative, whether his removal would breach Article 8. It was not apparent from the manner in which the appeal was argued at first instance that the exercise of discretion, either by the Secretary of State or by the judge, was in issue.
20. In any event, we must have regard to Section 86(3)(b) of the Nationality, Immigration and Asylum Act 2002 as it was at the date of the decision. This enables the First-tier Tribunal to allow an appeal against an immigration decision insofar as it thinks that a discretion exercised in making a decision against which the appeal is brought, or is treated as being brought, should have been exercised differently. But Section 86(6) of the same Act indicates that a refusal to depart from, or to authorise departure from the Immigration Rules, is not the exercise of a discretion for the purposes of Section (3)(b). This is confirmed in the case of **Patel** at Section 57. This states, in material part:

"It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the Rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the Rules are not reviewable on appeal: Section 86(6)."
21. The First-tier Tribunal Judge was, as a result, simply not entitled to consider the merits of the Secretary of State's exercise of discretion outside of the Rules. We acknowledge that a First-tier Tribunal judge can consider whether the exercise of a discretion outside the immigration rules was lawful. It does not appear that this judge was invited to do so. However, even if we are wrong in this conclusion, we are satisfied, having regard to the content of the Reasons For Refusal Letter, that the Secretary of State did not act unlawfully in the exercise of her residual discretion outside of the Immigration Rules. The reasons for refusal letter specifically engaged with the factors identified by the appellant as being relevant to the exercise of discretion.

22. In her Reasons For Refusal Letter the Secretary of State noted the appellant's medical conditions and his intention to complete his studies. The Secretary of State investigated the availability of medical treatment in Bangladesh and concluded, on the basis of the evidence before her, that such treatment was available. The Secretary of State identified hospitals at which treatment for rheumatoid arthritis could be obtained and indicated that relevant medication was available. These were conclusions that the Secretary of State was lawfully entitled to reach on the basis of the evidence presented to her.
23. We are not satisfied either that the First-tier Judge materially erred in his approach to paragraph 276ADE of the immigration rules and in his approach to the Appellant's freestanding Article 8 right. At paragraphs 19 and 20 the judge gave proper reasons for concluding that there were no very significant obstacles to the appellant's return to Bangladesh. The judge fully considered the extent of the appellant's private life in the United Kingdom and the impact of removal applying the proper test (paragraphs 22 to 28 of the decision).
24. We additionally note the case of Patel which indicates, at paragraph 57, that the opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under Article 8.
25. Finally, the appellant maintained that the treatment that he requires is simply not available in Bangladesh. However, the authorities relating to the differences in medical treatment between countries, notably "D" v United Kingdom (UK) 0030240-96 and N v the United Kingdom (App no. 26565/05), indicate that an extremely high threshold needs to be overcome before either Article 3 or Article 8 is engaged. Further support comes from the authority already cited of GS (India).
26. In these circumstances, and in light of the nature of the appellant's medical condition as disclosed in the evidence both before the First-tier Tribunal and us, we are satisfied that the seriousness of the appellant's medical condition is not of a sufficient degree that would trigger the protection under both Articles 3 and 8 and in these circumstances we dismiss the appeal.

Notice of Decision

The First-tier Tribunal made no error of law. The appeal is consequently dismissed both on human rights grounds and under the immigration rules.

No anonymity direction is made.



Signed

Date

Upper Tribunal Judge Blum

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.



Signed

Date

Upper Tribunal Judge Blum