Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14577/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 January 2017	**On 27 June 2017**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD MUSTAFA HASAN

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr Z Simret, instructed by Simon Nobel Solicitors.

DETERMINATION AND REASONS

1. The respondent, whom we shall call "the claimant", is a national of Bangladesh. He entered the United Kingdom on 2 February 2011 with a

student visa, which was subsequently extended and was due to expire on 20 September 2015. Because of difficulties with the college his visa was curtailed to 18 February 2015. Two days before that he applied for further leave to remain, using the form FLR(O). His application was refused by the Secretary of State on 26 March 2015. He appealed against the refusal.

2. Because of the dates of the Secretary of State's decision in this case, the claimants' appeals were and are governed by the appeals' provisions of the Nationality, Immigration and Asylum Act 2002, before amendment by the Immigration Act 2014. The relevant provisions are as follows. Section 82 allows a person to appeal against a decision for such as that in the present case. Section 84 sets out permissible grounds of appeal, including the following:

> "(1)....
>
> (a) that the decision is not in accordance with immigration rules;
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> ...
>
> (e) that the decision is otherwise not in accordance with the law;
>
> ...
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention...."

Section 86(2) requires the Tribunal to determine "any matter raised as a ground of appeal".

3. The basis upon which the claimant made his application, and on which he put his case to the First-tier Tribunal by way of appeal, was that as a homosexual he would be subject in Bangladesh to restrictions on his activities, which would amount to an infringement of his rights under article 8 of the European Convention on Human Rights and meant that he could not be expected to live in Bangladesh. The Secretary of State was aware of those submissions but rejected them. She added that if he wanted to make an asylum claim, he should do so. The claimant repeated his submissions in a letter attached to his notice of appeal to the First-tier Tribunal. He elected to have his appeal determined without a hearing. It was allocated to Judge Dennis, who gave his decision on 12 August 2015. After setting out the facts, Judge Dennis wrote as follows:

> "9. The Respondent has rejected the application in terms of a letter of 26 March 2015. The application was considered only with reference to Appendix FM and paragraph 276ADE(1) of the Immigration Rules. The applicant and Appellant of course, has made no claim of family life as might engage Appendix FM. Instead, the focus was solely on the provisions of Rule 276ADE(1). Unsurprisingly the Respondent concluded the Appellant did not meet the requirements of twenty

years of residence, etc., under the Rule. The focus was, rather, on Subsection (vi) which provides that where a person is over the age of eighteen and has lived in the UK for less than twenty years leave to remain might be granted where "there would be very significant obstacles to the applicant's integration into the country into which he would have to go if required to leave the United Kingdom". Despite the very explicit and lengthy setting out of his situation and his fears on return, supported by objective information, the Respondent has somewhat surprisingly simply stated: "It is not accepted that there would be very significant obstacles to your integration into Bangladesh, if you were required to leave the UK because you have spend the vast majority of your life in Bangladesh and you will be fully accustomed to the custom and traditions there".

10. I find this wholly inadequate. It in no way addresses any of the specific concerns of the Appellant, concerns which, if made out, most certainly would engage Subsection (vi) as constituting "very significant obstacles" to the Appellant's re-integration into Bangladesh. It is not sufficient for the Respondent simply, categorically and without explanation or justification, to state that it is "not accepted" such circumstances exist as would engage Subsection (vi) – notwithstanding the very clear indication such could be the case.

11. On this basis, alone, the decision must be seen as not in accordance with the law. I note, however, further that although the Appellant is clearly setting out a potential claim to be recognised as a refugee the Respondent has disingenuously stated his representations "would constitute an asylum application under ECHR Article 3 and also under the terms of paragraph 327 (b) of the Immigration Rules" [*sic*]. The applicant is then informed he should make a claim at an ASU, and no further consideration of these patent issues is undertaken by the Respondent. In this, too, I find that the decision is inadequate on its face.

12. For these reasons, therefore, I have elected to allow the appeal only insofar as to remit it to the Respondent or a full and complete consideration both under Paragraph 276ADE (1) (vi) and, necessarily, as a fully stateable claim for recognition as a refugee under the 1951 UN Convention and also that the persecution alleged may engage Articles 2 & 3 of the ECHR."

4. In the closing paragraphs of his determination, the judge indicated that the appellant might need to do more than he already has done in order to substantiate his claim. The notice of his decision reads as follows:

> "The appeal is allowed under the Immigration Rules insofar as to remit it to the Respondent for a sufficiently comprehensive review and determination."

5. The Secretary of State sought and obtained permission to appeal on the ground that the judge had failed to give adequate reasons for his conclusion that the Secretary of State's consideration of the case was unlawful. Mr Wilding expanded briefly on those grounds at the hearing. Mr Simret sought to defend the judge's determination, essentially on the grounds that the Secretary of State ought to have either granted leave under the Rules or done so on the basis of article 8 outside the Rules.
6. The problem in this case, as it appears to us, is that the judge did not consider the substantive matters before him. He clearly classified the issues that the applicant raised as, first, an issue as to whether the immigration rules had been correctly applied to him and, secondly, a question as to whether his removal would breach the Refugee Convention. If that was the case (and we do not say that the judge's classification was incorrect) the judge was obliged to determine those matters. If he thought that, as a result, the appeal was not suitable for determination without a hearing, he should have adjourned it to a hearing. It does not appear to us that he was entitled to do what he did do. A judge's function is to decide cases, not to refer them to somebody else to decide; and s 86(2) makes that clear. It follows that in dealing with the appeal in the way he did, the judge erred in law.

7. The claimant's appeal needs to be determined. We direct that it be determined at a hearing, and that the matters that he has raised be considered substantively at that hearing. The Secretary of State now has had a full opportunity to consider the matters raised, under paragraph 276ADE at least, and no doubt by the time of the further hearing before the First-tier Tribunal, will have reached a clear and informed view on that particular aspect of the case.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 23 June 2017