



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

Appeal Number: HU/16905/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 10 January 2018**

**Decision & Reasons Promulgated
On 30 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**ASHUK [K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Shah of Taj Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Hillis of the First-tier Tribunal (the FTT) promulgated on 14th August 2017. The FTT dismissed the Appellant's appeal against the Respondent's decision dated 27th June 2016 to refuse his application for leave to remain in the UK based upon his private and family life.
2. The Appellant's immigration history is not in dispute. He entered the UK illegally in June 2003 having previously claimed asylum in France. In May

2006 the Appellant applied for indefinite leave to remain in the UK, and this application was refused on 31st October 2009.

3. On 3rd July 2012 the Appellant applied for leave to remain on the basis that he had married a British citizen who was pregnant with their child. This application was granted from 14th October 2013 until 27th February 2016.
4. The Appellant and his partner separated at the end of 2015 and he had doubts as to whether he is the biological father of their daughter who was born on [] 2012.
5. Prior to expiry of his leave, the Appellant on 25th February 2016 made an application for further leave to remain using form FLR(FP). The application was made on the basis that the Appellant had family life with a British child, and he also wished to rely upon paragraph 276ADE(1) in relation to his private life, and Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The application was refused on 27th June 2016. The Respondent noted the Appellant's relationship with his partner had broken down and that he did not live with her or the child. There was no evidence that he had direct access to the child or that he was involved in the child's life and upbringing. It was not accepted that the Appellant had proved that he had a genuine and subsisting parental relationship with the child. It was therefore not accepted that he was entitled to leave to remain under the ten year parent route.
7. The Respondent considered paragraph 276ADE(1) stating that the Appellant had not lived continuously in the UK for at least twenty years. It was not accepted that there would be very significant obstacles to his integration into Bangladesh therefore his application was refused with reference to paragraph 276ADE(1).
8. The Respondent considered whether there were any exceptional circumstances outside the Immigration rules and concluded that there were not.
9. The Appellant appealed to the FTT. At the hearing the Appellant's representative confirmed that the Appellant had not initiated any contact proceedings in the Family Courts regarding his daughter, and no DNA test had been conducted to establish paternity. It was made clear to the FTT that the appeal proceeded on the basis of paragraph 276ADE(1)(vi) and Article 8 outside the Immigration rules only.
10. The FTT found that the Appellant had failed to prove that he had family life with his daughter and therefore Article 8 was not engaged on the basis of family life. With reference to the Appellant's private life it was noted that the Appellant suffered from depression, but the FTT found at paragraph 29 this would not "cause insurmountable obstacles in his integration into Bangladeshi society on his return." The FTT noted that the Appellant was

currently working in the UK as a chef and had done so consistently over the last fourteen years. The FTT dismissed the appeal with reference to Article 8 of the 1950 Convention.

11. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds are summarised below. It was contended the appeal before the FTT was concerned with only one issue, that being whether the Appellant should be granted leave based upon his private life, and his long residency in the UK. It had been agreed at the commencement of the FTT hearing, the appeal was not pursued with reference to Appendix FM, and family life with the Appellant's daughter.
12. It was contended that the FTT had failed to carry out an assessment under paragraph 276ADE(1)(vi). It was further contended the FTT had failed to give adequate consideration to the Appellant's private life in the UK, and failed to carry out any balancing exercise in relation to proportionality.
13. Permission to appeal was granted by Judge Bird of the FTT in the following terms;
 - "2. The Appellant seeks permission to appeal against this decision on the grounds that the judge made arguable errors of law in the assessment of the Appellant's private life under paragraph 276ADE(vi) and the significant obstacles and undue hardship that would be faced by the Appellant on his return to Bangladesh after fourteen years.
 3. The judge considered the evidence that was presented at the hearing which he refers to in the body of his decision. It is arguable that the reasons he gives for finding that there were no insurmountable obstacles to the Appellant's integration into Bangladeshi society are brief, but these have to be read with his findings overall about the Appellant's immigration history. No arguable error of law arises on this ground.
 4. The grounds further allege that the judge failed to carry out a balancing exercise under Razgar in light of the private life that the Appellant had established here.
 5. It is arguable that the judge has failed to carry out a proper proportionality assessment in accordance with the guidance given by the House of Lords in Razgar in dismissing the appeal under Article 8 ECHR."
14. Following the grant of permission the Respondent did not lodge a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.
15. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

Error of Law

16. At the commencement of the hearing Mr Tarlow accepted that the FTT had materially erred in law by failing to adequately consider the Appellant's private life under Article 8 of the 1950 Convention.
17. I found that concession to be rightly made. Mr Shah accepted that the grant of permission related only to Article 8, not paragraph 276ADE(1)(vi). There had been no challenge to the findings made by the FTT in relation to family life. I therefore set aside the decision of the FTT having found a material error of law because of the failure to adequately consider the Appellant's private life under Article 8 of the 1950 Convention.
18. The representatives agreed it would be appropriate for the decision to be re-made by the Upper Tribunal.

Re-making the Decision

19. Mr Shah confirmed that no further evidence was to be called. The decision was to be remade based upon the evidence given to the FTT.
20. I ascertained that I had received all the documentation to be relied upon. This amounted to the Respondent's bundle with Annexes A-E, and the Appellant's bundle comprising 44 pages. No further documents were submitted.
21. I heard submissions from Mr Tarlow who submitted that there were no exceptional circumstances. It was submitted that the Appellant still has links with Bangladesh, and has been working in the UK as a chef, and could reintegrate into Bangladesh and carry on employment there. Mr Tarlow submitted the appeal should be dismissed.
22. I then heard submissions from Mr Shah who relied upon the written submissions contained at pages 1-8 of the Appellant's bundle. It was accepted that the Appellant's relationship with his wife had broken down, and that she had left him at the end of 2015. The Appellant had made a financial contribution towards his daughter. The Appellant is in full-time employment, and I was asked to take into account his length of residence since 2003. The Appellant has some working knowledge of English, and I was asked to find that this was an exceptional case, on the basis that the Appellant had been granted leave to remain in the UK between 14th October 2013 and 27th February 2016, so it was not the case that he had been here unlawfully ever since arrival in June 2003.
23. I was asked to allow the appeal with reference to Article 8 outside the Immigration rules.
24. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

25. I firstly set out my reasons for finding a material error of law. The FTT erred materially in law by not considering adequately the Appellant's

private life. I accept that the Appellant's representative stated at the outset of the appeal before the FTT, that the appeal was based upon the Appellant's private life. The FTT went on to consider whether or not there was family life, finding that there was not, in relation to the Appellant and his daughter. That finding has not been challenged. There was no adequate consideration of the Appellant's private life. There was a brief reference at paragraph 29 to insurmountable obstacles to integration into Bangladesh, which is not in fact the correct test. The test under paragraph 276ADE(1)(vi) is whether there are very significant obstacles to integration.

26. I now make my findings to re-make the decision.
27. I must take into account that only one ground of appeal is available, and that is whether the decision made by the Respondent is contrary to section 6 of the Human Rights Act 1998. The Appellant relies upon Article 8. In deciding this appeal I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali v SSHD [2016] UKSC 60, and in so doing, have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.
28. The burden of proof lies on the Appellant to establish his personal circumstances in the UK and why the decision to refuse his human rights claim interferes disproportionately in his private life in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.
29. Permission to appeal was not granted in relation to paragraph 276ADE(1)(vi) and that decision was not challenged on behalf of the Appellant. I note that the Appellant has in fact travelled to Bangladesh, and then returned to the UK.
30. It was disclosed in his application form at page 37, and in the covering letter from his solicitors dated 25 February 2016, that the Appellant returned to Bangladesh and remained there between 2 December 2013 and 2 February 2014. His reason for returning was that his father was unwell and sadly his father subsequently passed away. At the time of that visit, the Appellant's mother was described as elderly. This I find supports the finding made by the FTT, that there would be no very significant obstacles to the Appellant's reintegration into Bangladesh. He would have no language or cultural difficulties, and no adequate reason has been given to indicate that the Appellant would not be able to find employment in Bangladesh. The FTT found as fact that he has been working as a chef in this country.
31. With reference to Article 8, I accept that the Appellant has formed a private life in this country so that Article 8 is engaged. I accept that he has studied English, receiving an entry level certificate in ESOL, Skills for Life (Speaking and Listening) (Entry 1), the certificate being awarded on

10th March 2015. In addition to employment, I accept that the Appellant will have made friends, although there is no comprehensive evidence of his private life. There are no letters or statements from any friends or family in the UK, and no witnesses gave evidence before the FTT in relation to the Appellant's private life.

32. I take into account that the Appellant arrived in the UK illegally and that he remained without leave, until he was granted limited leave to remain as the partner of a British citizen on 14th October 2013, which leave was valid until 27th February 2016.
33. I accept that the relationship with his partner broke down when she left him at the end of 2015, and he has had no meaningful contact with her since then, and no contact with his daughter since the beginning of 2016. I accept that he has doubts as to whether he is the biological father of his daughter.
34. I take into account that the Appellant wishes to remain in the UK.
35. I must also however consider the public interest, and have regard to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002.
36. Sub-section (1) confirms that the maintenance of effective immigration controls is in the public interest.
37. Sub-section (2) confirms that it is in the public interest that a person seeking to remain in the UK can speak English. I accept the Appellant has a basic grasp of English as evidenced by the ESOL qualification he has achieved.
38. Sub-section (3) confirms that it is in the public interest that a person seeking leave to remain is financially independent. I accept that the Appellant has employment and is financially independent. However, the fact that the Appellant can speak English and is financially independent are neutral factors when considering the public interest.
39. Sub-section (4) states that little weight should be given to a private life or a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully. Therefore I must attach little weight to the Appellant's private life established when he was in this country without leave, which was between 2003 and October 2013.
40. Sub-section (5) states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. The Appellant has had precarious immigration status since October 2013 as he has only had limited leave to remain. I therefore must attach little weight to the private life that he has established since October 2013.

41. Sub-section (6) states that in a case of a person not liable to deportation the public interest does not require the person's removal if he has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the UK. The FTT has found, and this finding was not challenged, that the Appellant does not have a genuine and subsisting parental relationship with a qualifying child. Therefore he cannot rely upon sub-section (6) of section 117B of the 2002 Act.
42. I must therefore balance the Appellant's wish to remain in the UK, and his length of residence, with the considerations set out in section 117B. It is significant, that I must, by virtue of section 117B attach little weight to the private life that the Appellant has established. This does not mean that I attach no weight, but it does mean that I find the weight that must be attached to the public interest in maintaining effective immigration control, outweighs the weight to be placed upon the Appellant's private life and the wishes of the Appellant to remain in the UK.
43. I conclude the Respondent's decision to refuse the Appellant's application for leave to remain in the UK, does not breach Article 8, and is not contrary to section 6 of the Human Rights Act 1998. The appeal must therefore be dismissed.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside.

I re-make the decision. The appeal is dismissed.

Anonymity

The FTT made no anonymity direction. There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date 12th January 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 12th January 2018

Deputy Upper Tribunal Judge M A Hall