



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

Appeal Number: IA/00071/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 January 2018**

**Decision & Reasons Promulgated  
On 26 February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR INAYETH HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr J Rendle instructed by Novells Legal Practice, London

**DECISION AND REASONS**

1. Mr Hussain is a citizen of Bangladesh whose date of birth is recorded as 11 February 1972. On 13 December 2015 his application made to the Secretary of State on human rights grounds for leave to remain in the United Kingdom was refused. He appealed that decision. His appeal was heard on 24 April 2017 by Judge of the First-tier Tribunal Ripley sitting at Hatton Cross. She allowed his appeal. She gave significant weight to delay on the part of the Secretary of State in considering the application made by him as long ago as May 2008. He had made a further submission in response to a request from the Secretary of State in November 2009. In 2011 he received a letter telling him that his case was in a backlog of

older asylum applications being considered by the Case Resolution Directorate. In the same month he submitted further evidence. In May 2015 the Secretary of State wrote to Mr Hussain requesting that he complete an SET(O) form and provide supporting evidence. Mr Hussain did as he was told. He responded within a month.

2. Not content with the decision of Judge Ripley to allow the appeal, the Secretary of State sought permission to appeal on various grounds, all of which were refused save for one. Judge Brunnen in the grant of permission, dated 24 November 2017, limited the Secretary of State to arguing that the judge arguably had applied the wrong test in making reference to “strong countervailing factors” against the refusal of leave to remain.
3. Mr Clarke submitted that in giving considerable weight, as she did, to the delay, and making reference, as she did, to the Secretary of State’s guidance in particular at paragraphs 41 and 42 the judge had erred. The guidance in Chapter 23 of Enforcement Instructions and Guidance relates to the policy of the Secretary of State in removing illegal immigrants from the United Kingdom unless it would be a breach of the Refugee Convention or the European Convention of Human Rights or that there are exceptional circumstances for not doing so in an individual case. The guidance concerns further exceptional circumstances where it is claimed that removal would be inappropriate. The relevant factors are:-
  - (i) Character, conduct and associations including any previous criminal record and the nature of any offence of which the applicant has been convicted.
  - (ii) Compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable.
  - (iii) Length of time in the United Kingdom accrued for reasons beyond the migrant’s control after their human rights or asylum claim has been submitted.

The focus in this case was upon (ii) and (iii). Under (ii) caseworkers are told that they should assess whether there was evidence that the individual had sought to delay or frustrate the decision-making process, frustrate removal or otherwise not comply with any requirement imposed upon them and account was to be take of:

- Evidence of deception practised at any stage in the immigration process, including submitting a false identity to the Home Office.
- Any other type of fraud or deception, such as benefit fraud or NHS debt.
- Failure to attend interviews as requested.
- Failure to supply information as requested e.g. for documentation.

- Whether they have lodged spurious application or further submissions to frustrate removal.
- Failure to comply with the reporting conditions.
- Failure to demonstrate genuine efforts to leave the UK voluntarily.
- When they have worked illegally.
- Any individual's lawful employment history and how they have supported themselves and/or their family, and
- A sustained history of compliance with every requirement the Home Office has made of them, including providing full information in their application, attending interviews, compliance with the reporting requirements.

Caseworkers must assess all evidence of compliance and non-compliance in the round, but repeated non-compliance and/or lengthy periods of absconding will generally mean that an individual cannot benefit from the grant of leave on account of exceptional circumstances, unless there are strong countervailing reasons in their favour.

The third consideration being length of time in the United Kingdom due to reasons beyond the migrant's control ... goes on to invite caseworkers to have regard to the length of residence in the United Kingdom which is a factor to be considered where residence has been accrued by an unreasonable delay not attributable to the migrant. But the second paragraph under that heading reads as follows: -

*"Provided that the factors outlined in "character" or "compliance" do not mean that the claimant cannot benefit from the exceptional circumstances guidance, then caseworkers must also consider whether there has been significant delay by the Home Office, not attributable to the migrant, in deciding a valid application for leave to remain on asylum or human rights grounds or whether there are reasons beyond the individual's control why they could not leave the UK voluntarily after their application was refused ... ."*

4. One of the issues addressed by the judge was whether Mr Hussain in the First-tier could benefit from the exceptional circumstances guidance. Mr Clarke invited me to find that it was not appropriate for the judge to go on to consider delay.
5. With all due respect to Mr Clarke I have some difficulty with that submission. There are instances in which there may not have been compliance with conditions attached to any previous grant of leave and the like but if strong countervailing reasons are found then in my judgement the delay is a factor to be taken into account. In other words, the condition precedent which Mr Clarke said did not exist will exist if there are strong countervailing factors found. This judge found strong countervailing reasons. I refer to paragraphs 47 and 48 and the approach taken by the judge at paragraphs 40 and 41 in which she explains her

reasoning in what I find to be an impeccable decision in that there is a clear logic with adequate reasons given leading to the conclusion open to the judge in my judgement.

6. In any event, even if Mr Clarke were right, the judge was still entitled when applying the guidance in **Huang** to make her own proportionality assessment which she did and she was entitled to give weight, having regard to other factors to the delay. The judge recognised that there had been non-compliance by Mr Hussain in the First-tier Tribunal; she noted that it was lengthy; that it preceded the making of the 2008 application; and as she said at paragraph 42 that did not extend or otherwise affect the Secretary of State's delay in considering the application. As to the eventual test which appears to have been applied by the judge of strong countervailing factors, as Mr Rendle rightly submitted, that was not a test any stronger than the test which was properly to have been applied given the guidance in the case **Agyarko [2017] UKSC 11** at paragraph 60. That reads:-

*"It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The rules and instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate."*

So understood, the provision in the instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with Article 8. That conclusion is fortified by the express statement in the instructions that "exceptional" does not mean "unusual" or "unique".

7. It follows in my view that even if there was an error it was not material because the judge was required to carry out a proportionality assessment. It was not necessary to look for strong countervailing factors but on the facts of this case the judge found them.
8. Inevitably therefore on the findings of fact which she made and ultimately this case was fact-sensitive and the reasoning being open to her being entirely rational the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal will stand.

## **Addendum**

9. The grounds were as I have already said severely restricted. It may be had Mr Clarke been given the opportunity to develop his argument more widely, I would have come to a different view. I simply do not know. Mr Clarke did not seek to expand on the grounds or renew any application before me to argue the case more widely. It should not be inferred from the observation that I make that I was of the view that had they been argued there would have been a different result, but I raise this for completeness.

### **Notice of Decision**

The appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed

Date: 21 February 2018

Deputy Upper Tribunal Judge Zucker