Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00269/2019
HU/16350/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2020	**On 27 February 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD NAZIR [A]
LIZA [A]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Ms Jones, Senior Home Office Presenting Officer
For the Respondents: Ms Gill QC, instructed by City Heights Solicitors

DECISION AND REASONS

1. By my decision promulgated on 31 December 2019 ("the error of law decision"), I set aside the decision of the First-tier Tribunal. I now remake that decision.

2. In the error of law decision I referred to the first respondent as the claimant. I will continue to do so.

Preliminary Issue

3. At the commencement of the hearing, Mr Gill sought leave for the claimant's solicitor, Mr Faysul, to give evidence even though he had not prepared a witness statement and there had been a failure to comply with the Directions concerning witness evidence given in the error of law decision. He explained that the purpose of this evidence was to support the claimant's argument that the Secretary of State's decision of 10 May 2016 (refusing an application made by the claimant on 15 March 2016 for further leave as a Tier 1 Entrepreneur) was unlawful. I agreed to allow Mr Faysul to give evidence as this is a narrow point which could be addressed by Ms Jones in submissions. I directed Mr Faysul to prepare a written statement by hand, which was duly done.

Preserved Findings and Findings of Fact (Apart from the Claimant's Immigration History)

4. Apart from the claimant's immigration history (which is discussed below) the factual matrix is not in dispute. In summary:

   (a) The claimant is a citizen of Bangladesh born on 1 May 1982 who entered the UK on 20 January 2008 as a student.

   (b) The claimant's wife is also a citizen of Bangladesh. She was born on 18 March 1988. She entered the UK on 14 February 2015 as the claimant's spouse.

   (c) The claimant and his wife have a son, who was born in the UK on 25 December 2015.

   (d) The claimant and his wife both have family living in Bangladesh.

   (e) The claimant is well-educated and experienced in business, having established two businesses in the UK.

   (f) The claimant's businesses have contributed positively to the local economy and community.

   (g) The claimant and his wife have developed a social circle and life in the UK.

   (h) The claimant suffers from depression.

   (i) The claimant's wife suffers from hepatitis B and asthma.

   (j) The claimant and his wife are very concerned that they will not be able to access adequate medical treatment for their conditions in Bangladesh.

(k) The claimant is very concerned that he will not be able to find employment in Bangladesh due to the high level of corruption and unemployment in the country; and that the conditions of the country are such that he will not be able to start a viable business of his own.

(l) The claimant's wife is pregnant.

(m) The claimant's son does not have any current medical or developmental problems but a psychological report dated 28 January 2020 by Georgia Costa indicates that returning to Bangladesh is likely to have a negative impact on his mental health. She stated:

> He seemed like a confident child and his father confirmed that when he is with other children he is confident and plays with them. The teachers are very fond of him…
>
> … I have no doubt that [the claimant's son's] mental health will be adversely affected by his parents' mental health and as distress and anxiety increases in them it will have an impact on him …
>
> ... I am concerned that moving to unfamiliar surroundings, away from their support networks would inevitably impact on [the claimant's son's] emotional stability.

Immigration History

5. Having entered the UK as a student on 20 January 2008, the claimant extended his leave, first as a student, then as a post-study migrant, and then as a Tier 1 Entrepreneur. Prior to the expiry of his leave as a Tier 1 Entrepreneur on 18 March 2016, the claimant applied (on 15 March 2016) for further leave as a Tier 1 Entrepreneur. The application was refused on 10 May 2016 (and maintained following Administrative Review on 21 June 2016). For the reasons set out in the error of law decision, the claimant (and his family) ceased to have a basis to remain in the UK following the Administrative Review decision. Therefore, since 21 June 2016 the claimant and his family have been living in the UK without leave.

6. Mr Gill submitted that the Secretary of State's decision to refuse the claimant's Tier 1 Entrepreneur application on 10 May 2016 (and the Administrative Review decision that followed on 21 June 2016) were unlawful and flawed. He argued that had the Secretary of State acted lawfully, the application would have been granted.

7. The claimant's Tier 1 Entrepreneur application was refused on 10 May 2016 for two reasons. The first was that the Secretary of State did not accept that the bank statements submitted by the claimant showed that £50,000 had been invested into his business in the UK. The refusal letter of 10 May 2016 stated that the bank statements only showed a total of £37,000. The second reason the application was refused was that the "full payment submissions" that the claimant provided did not confirm start dates for employees.

8. Mr Gill argued that the evidence that was before the Secretary of State showed that £50,000 was in fact invested into the claimant's business. He relied on Mr Faysul's witness statement as well as bank statements covering the period between November 2014 and February 2015. Mr Faysul's evidence was that these bank statements, which he stated were before the Secretary of State when the decision was made on 10 May 2016, show in excess of £50,000 was invested into the business. He stated that the Secretary of State erred by not calculating the figures in the bank statements correctly. He also relied on a schedule setting out investments that showed a total figure substantially above £50,000.

9. With respect to the omission of "start dates" on the full payment submissions, Mr Gill argued that this ought to have been brought to the claimant's attention in accordance the Evidential Flexibility Rules.

10. I do not accept that the Secretary of State miscalculated the amount invested. I have gone through the bank statements myself and am unable to discern from them that more than £37,000 was invested. The claimant relies on a schedule listing sums invested. However, some entries on the schedule do not correspond to figures in the bank statements. In addition, the schedule covers a wider time period than the bank statements and therefore the total figure is of no assistance.

11. I also do not accept that this is a case where the Secretary of State ought to, but did not, apply evidential flexibility in respect of the bank statements. Mr Gill handed up a copy of the evidential flexibility rules in force at the relevant time. This provides that if an applicant has submitted specified documents in which some of the documents in a sequence have been omitted (for example, if one bank statement from a series is missing) the Secretary of State may contact the applicant to request the correct documents. This, however, is not a case where a bank statement has been omitted from a sequence. Rather, it is a case where a complete set of statements for a period of time has been submitted which do not show what it is claimed they show; i.e. that the required amount of money was invested. It may be that the claimant could have provided the Secretary of State with documents from a wider time period that might have shown the required sum was invested, but that is not the equivalent of a document being omitted from a sequence and is not a basis under which evidential flexibility was applicable.

12. It is not necessary to consider Mr Gill's submissions about the omission of employee start dates from the full payment submissions as even if he is correct on this point the Secretary of State was entitled to refuse the March 2016 Tier 1 Entrepreneur application because the bank statements did not show £50,000 was invested.

Analysis

13. I will first consider whether the claimant and his family are entitled to a grant of leave under the Immigration Rules.

14. The claimant, his wife and his son are all citizens of Bangladesh. Therefore, there is no route to leave under Appendix FM of the Immigration Rules on the basis of a

family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection.

15. The only route open to the claimant and his family under the Immigration Rules is that set out at paragraph 276ADE(1)(vi) whereby the claimant must establish that there would be "very significant obstacles" to integration into Bangladesh. This was rejected by the First-tier Tribunal which found:

> "I am not satisfied, to the requisite standard, that they would [encounter very significant obstacles]. They have been away from Bangladesh for eleven years and three years respectively. They both speak Bangla and I have found their son must have some understanding of Bangla and, in any event, is at an age in which he could learn. They each have family living in Bangladesh and the [claimant] is well educated, experienced in business and clearly resourceful. While I have no doubt that a return to Bangladesh would be hard, and that it would involve a number of obstacles, is not the same as finding that he and his wife would encounter very significant obstacles."

16. I reach the same conclusion. The claimant and his wife have spent the vast majority of their lives, and have extensive family, in Bangladesh. They both speak the language, and are familiar with the cultural and societal norms. The claimant is well educated and has extensive business experience. The evidence points to them being insiders in Bangladesh in the sense that they understand how the society operates and will be able to establish (and re-establish) relationships. Accordingly, although the claimant and his wife are understandably concerned about the implications of moving to Bangladesh, and they may well face difficulties obtaining employment and accessing suitable medical treatment (and finding a school for their son that they consider adequate), the evidence does not show that they will face significant obstacles integrating.

17. I now turn to the question of whether refusing leave to remain would breach article 8 of the ECHR because it would result in unjustifiably harsh consequences for the claimant and his family.

18. It is clear – and was not in dispute – that the claimant has a private life in the UK that engages Article 8 ECHR. He has lived in the UK for over twelve years, during which time he has established relationships (both social and professional) and has integrated into British society.

19. The issue in contention is whether removal of the claimant and his family would be disproportionate.

20. I start my analysis of the proportionality of removal by considering the best interests of the claimant's son. His best interests are a primary, but not determinative, consideration. It is clearly in his best interests to remain with his parents, whether that is in Bangladesh or the UK. No current health or developmental concerns have been identified about him but the expert evidence indicates that his mental health may suffer as a result of the family being required to leave the UK. However, in Bangladesh he will be with parents who have the capability and commitment to

provide him with a stable and supportive home environment and there is no reason he will not be able to thrive in Bangladesh just as much as in the UK. He would also benefit from being in the country of his nationality. That said, I accept that his parents have significant anxiety and concern about moving to Bangladesh and that his father's mental health may deteriorate. His economic position and education opportunities may also be worse. In my view, this is not a case in which it could be said that it is strongly in the child's best interests to either remain in the UK with his family or move with his family to Bangladesh. However, on balance, I consider that it would be (just) in his best interests for the family as a whole to remain in the UK.

21. I am required to have regard to the factors enumerated in Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). I do so as follows:

(a) In accordance with Section 117B(1) of the 2002 Act, the maintenance of effective immigration controls is in the public interest. Although the claimant was lawfully in the UK for eight and a half years, his lawful leave ended in 2016. On 21 June 2016 the claimant was notified that his application was unsuccessful and was told that he was required to leave the UK. However, he did not do so. Mr Gill submitted that the claimant had only made a "technical" mistake and that he has been in the UK lawfully "in a broader sense". This is not the case. Following the claimant's unsuccessful application for leave to remain as a Tier 1 Entrepreneur his leave to remain in the UK was not extended by operation of Section 3C of the Immigration Act 1971 and he remained in the UK unlawfully. This is not to say that the claimant has a poor immigration history. He does not. He came to the UK lawfully and extended his leave on several occasions in a timely manner. However, his leave expired in 2016 and he remained in the UK in any event. Accordingly, the public interest in the maintenance of effective immigration controls weighs against the claimant and his family.

(b) The claimant speaks English and is likely, if granted leave, to be financially independent and not a burden on the tax payer. These factors, the consideration of which is required by s117B(2) and (3), do not weigh against him.

(c) The claimant established and developed his private life in the UK at a time when his immigration status was precarious. Section 117B(5) requires that little weight should be given to a private life established by a person at a time when his immigration status was precarious. There is some scope, as confirmed in *Rhuppiah v SSHD* [2018] UKSC 58, to override the "generalised normative guidance" to give little weight to a private life in a case where there are particularly strong features of the private life in question and where it is not appropriate in Article 8 terms to attach only little weight to a private life. However, there are no strong features of the type anticipated in *Rhuppiah* in this case. Mr Gill sought to overcome this issue by relying on the claimant's family life, as the "little weight" provision under Section 117B(5) only applies to a private life. The difficulty with this argument is that the claimant's removal

would not interfere with his family life, as he would be removed with his family as a family unit.

22. The following further factors are relevant to the proportionality assessment:

    (a) The claimant has lived for twelve years in the UK, which is a substantial length of time. Further, he has been in the UK lawfully for most of this time. These factors weigh in his favour.

    (b) The family will likely face obstacles in Bangladesh. Although there will not be significant obstacles to integration, the claimant will face challenges finding employment and establishing himself financially. This, too, weighs in his favour.

    (c) The claimant suffers from depression, for which he receives medication. The report of Ms Costa dated 7 June 2019 states that the depression the claimant has suffered is "reactive in nature and is a direct result of the refusal of his case and the subsequent loss of his business." She states that he "may need anti-depressant medication to help him to come to terms with his experiences and the disappointment he feels". She also states that he would benefit from long-term psychological intervention. The evidence before me is that the claimant has seen his GP and is waiting to commence this treatment. I accept that the claimant suffers from depression, as set out by Ms Costa; and that the depression is likely to worsen if he is removed from the UK. However, the evidence does not show that he would be unable to continue obtaining suitable medication, comparable to that which he currently receives, in Bangladesh.

    (d) The claimant's wife suffers from hepatitis B and asthma, and receives treatment for these conditions in the UK. The evidence does not show that she would be unable to receive treatment for these conditions in Bangladesh.

23. The considerations that weigh against the claimant in the proportionality assessment are:

    (a) It is in the public interest that effective immigration controls are maintained and not only do the claimant and his family not meet the requirements of the Immigration Rules, they have remained in the UK since 21 June 2016 despite the absence of leave to do so.

    (b) Removal will not interfere with the claimant's or his wife's family life, as the family will be removed as a unit.

    (c) The claimant's private life was established when his immigration status was precarious and there is no basis upon which to give more than little weight to that private life.

24. On the other side of the scale, weighing in the claimant's favour, is that:

(a) It is (just) in the best interests of the claimant's son that the family remains in the UK.

(b) The claimant and his family will face challenges and difficulties in Bangladesh, although these fall significantly short of very significant obstacles to integration.

(c) The claimant suffers from depression that is likely to worsen if he is removed from the UK.

(d) The claimant and his wife may face some difficulties, at least initially, accessing equivalent treatment for their medical conditions.

(e) The claimant and his wife are extremely anxious and concerned about leaving the UK.

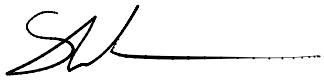
(f) The claimant has lived for over 12 years in the UK and has contributed (and, if granted leave to remain, likely will continue to contribute) to the UK economy.

25. Balancing these considerations, I reach the conclusion that removal would not be disproportionate. Although there are multiple factors weighing in the claimant's favour, I attach only little weight to them. This is because the best interests of his child only just favours remaining in the UK, the obstacles he will face in Bangladesh are a long way short of "very significant", there will be no interference with his family life (as the family will be removed together as a unit), and I give only little weight to the private life he and his wife have developed in the UK because it was established when their immigration status was precarious. Considered cumulatively these factors do not outweigh the public interest in effective immigration control.

Notice of Decision

The appeal is dismissed.

Signed



Upper Tribunal Judge Sheridan

Dated: 14 February 2020