Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04329/2018 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 10th May 2021	**On 22nd June 2021**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MOHAMMAD ABDUL BACHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, instructed by Hubers Law
For the Respondent: Ms A Everett, Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the bundles on the court file, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 21 October 1985. He appeals against the decision of First-tier Tribunal Judge Pooler, promulgated on 12 October 2020, dismissing his appeal against the refusal of indefinite leave to remain on human rights grounds.

2. Permission to appeal was granted by the First-tier Tribunal on limited grounds, namely the judge's failure to consider Article 8. Permission to appeal was granted by the Upper Tribunal on the remaining two grounds on the basis that these grounds were put before the First-tier Tribunal and arguably required resolution.

3. The respondent conceded, in the Rule 24 response, that the appellant would be granted six months' leave to remain outside the Immigration Rules in accordance with Khan [2018] EWCA Civ 1684 and Home Office Policy. The judge having found that the Appellant did not obtain his English language certificate by deception. It was also conceded that the judge erred in law in failing to consider Article 8.

4. The issue before me is whether the judge erred in law in finding the appellant's application on 30 May 2015 was invalid and therefore, he did not have ten years' continuous lawful residence.

5. The judge made the following relevant findings:

> "27. On the evidence, I am satisfied that the respondent has discharged the burden on her. The documentary evidence includes a letter from the respondent dated 2 September 2015 in which the appellant was informed of the reasons for rejection; and in his written statement the appellant accepted that he had submitted a photocopy of his passport and not the original when he made his application on 30 May 2015. I find the application was invalid.
>
> 28. The effect of these findings is that the appellant has not had lawful leave in the UK since 30 May 2015. Mr Malik conceded in the hearing that the appellant was unable to demonstrate ten years' continuous lawful residence if his application of 30 May 2015 was invalid."

Submissions

6. Mr Malik relied on his grounds of appeal and submitted there was no basis in law for the judge's finding that the application of 30 May 2015 was invalid. This finding was wrong and inconsistent with paragraph 34BB of the Immigration Rules. The appellant had given a good reason for not submitting his original passport which was not challenged by the respondent and which the judge failed to take into account. The failure to engage with unchallenged evidence was an error of law.

7. Further, the appellant was given no notice and opportunity to submit his original passport. The appellant had received no correspondence from the respondent between 30 May 2015 and 2 September 2015 and there was no evidence from the

respondent to show that the letters of 26 June 2015 and 31 July 2015 had been served. These letters were not in the bundle before the First-tier Tribunal.

8. Mr Malik submitted the burden was on the respondent to show that the application was invalid. Although the appellant accepted he had not produced his original passport, he had given a good reason which had not been rejected by the respondent. The appellant's failure to challenge the invalidity of his application dated 30 May 2015 on judicial review was not relevant because the appellant was challenging the substance of the decision of 24 January 2018 refusing indefinite leave to remain. The application of 30 May 2015 was a valid application and the appellant satisfied paragraph 276B of the Immigration Rules and qualified for indefinite leave to remain.

9. Ms Everett relied on the Rule 24 response and submitted the respondent sent letters on 26 June 2015 and 31 July 2015, although she accepted there was no evidence from the respondent that they had been sent.

10. In summary, the Rule 24 response makes the following points. The appellant accepts that he did not provide his original passport and it was not clear if the argument made in the grounds of appeal was made to the First-tier Tribunal. The appellant had failed to engage with Ahmed & Others (valid application – burden of proof) [2018] UKUT 53 (IAC):

> "(2) The fact that an invalidity decision was not immediately challenged may be relevant in determining whether the legal burden, including an initial evidential burden requiring the Secretary of State to raise sufficient evidence to support her invalidity allegation, has been discharged.
>
> (3) Whether the Secretary of State ultimately discharges the legal burden of proof will depend on the nature and quality of the evidence she is able to provide , having regard to the timing of any request for payment details and the reasons for any delay, balanced against any rebuttal evidence produced by the appellant."

11. There was no good reason why the appellant did not challenge the invalidity notice by judicial review in 2015 and the respondent was not in fact required to provide detailed evidence as to why the application was invalid. There was no material error of law.

12. Further and alternatively, paragraphs 34BB(3)(iii) and (4) were discretionary and the respondent was not obliged to accept the appellant's explanation. The appellant's explanation, that his passport was with a college during the process of his exams and therefore could not be sent in, was not capable of amounting to a good reason as defined by the example in the Immigration Rules.

13. The appellant's reliance on 34C(b) was also misconceived. It was clear from the letter of 2 September 2015 that the respondent wrote to the applicant's then solicitors on 26 June 2015 giving him an opportunity to submit his original passport. The appellant failed to do so.

14. In response, Mr Malik submitted the respondent had not shown the letter of 26 June 2015 was served. He accepted the respondent was not obliged to accept the appellant's explanation but she was obliged to say why it was not a good reason. The appellant's failure to submit his passport was beyond his control. He needed his passport to attend his exam. The reason was a good one and the judge failed to consider it.

Conclusions and reasons.

15. The relevant Immigration Rules, as at 30 May 2015, are 34BB and 34C. The salient subsections are set out below. It is not in dispute that an application for indefinite leave to remain must be accompanied by an original valid passport unless sub-paragraph (3) applies.

    34B(3)(iii): This subsection applies where the Secretary of State considers that there is good reason beyond the control of the applicant, given in or with the application, why the original valid passport cannot be provided, e.g. where it has been permanently lost and there is no functioning national government to issue a replacement.

    34B(4): Where sub-paragraph 3(iii) applies, the Secretary of State may require the person to provide alternative satisfactory evidence of his or her identity and nationality.

    34C(b): The decision maker may contact the applicant or representative in writing and give the applicant a single opportunity to correct any omission or error which renders the application invalid.

16. The respondent's letter of 2 September 2015, addressed to the appellant's then representatives, stated: "We wrote to you on 26 June 2015 to notify you that the application was invalid. We told you the specific reason for this and gave you the opportunity to provide the required fee, additional information or documentation. You have failed to do so within the specified timescale and, for the reasons set out below your application is being rejected as invalid."

17. It is the appellant's case that he did not submit his original passport because he needed it as proof of identity to sit for his ACCA exam. In his witness statement which was before the First-tier Tribunal the appellant stated:

    "... informed the Home Office that I need to hold the passport for my ACCA exam and I will submit the passport as soon as my exam finished. I have sent a photocopy instead of the original passport."

18. The appellant accepted he failed to submit his original passport with his application. His application was prima facie invalid absent a good reason. The reason given in the application was not a good one nor was it beyond the applicant's control. On the facts, the appellant could not benefit from paragraph 34BB(3)(iii).

19. It is apparent from the decision letter of 2 September 2015 that the appellant was given an opportunity to produce evidence and he failed to do so. The applicant did not challenge the invalidity decision at the time.

20. The First-tier Tribunal judge considered the evidence before him and properly directed himself in law. His finding that the application was invalid was open to him on the evidence before him. I find there was no material error of law in the judge's finding that the appellant's leave ended on 30 May 2015 and the appellant had failed to establish ten years' continuous unlawful residence.

21. The respondent conceded the judge erred in law in failing to consider Article 8 and confirmed the appellant will be granted six months' leave to remain in accordance with Home Office policy following the decision in Khan. Accordingly, there is no public interest in removal.

22. The decision to dismiss the appeal on human right grounds dated 12 October 2020 is set aside. I remake it as follows. The appeal is allowed on human rights grounds.

Notice of Decision

Appeal allowed

J Frances

Signed Date: 16 June 2021
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I make no fee award. The appellant's appeal against the refusal of indefinite leave to remain was dismissed.

J Frances

Signed Date: 16 June 2021
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email