Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/10613/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 5 July 2021 **On 22 July 2021**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MOHAMMED JAHANGIR ALAM

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr C Timson of Counsel, instructed by

For the Respondent: Mr A McVeety, Senior 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. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Bangladesh with date of birth given as 10.4.83, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 18.3.20 (Judge Mark Davies), dismissing his human rights appeal against the decision of the Secretary of State, dated 28.5.19, to refuse his application made on 20.2.19 for entry clearance to the UK.

2. Permission was refused by the First-tier Tribunal on 9.6.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Rintoul granted permission on all grounds 1.3.21, considering it arguable that the First-tier Tribunal Judge ought to have first considered the Immigration Rules and arguable that the judge misapplied section 117B(6) of the 2002 Act. Judge Rintoul also noted from [16] of the grounds that points were not put to the appellant's wife, and that the judge was inconsistent as to whether article 8 was engaged or not.

3. The respondent's Rule 24 Reply, dated 23.3.21, rejects the suggestion that the judge failed to address the Immigration Rules. It is submitted that as the application was refused under the discretionary ground of paragraph 320(11), it was proper for the judge to consider the matter in the "wider context". It is submitted that given the appellant's very poor immigration history neither he nor his wife could have had any realistic expectation of being granted entry clearance.

4. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

5. 320(11) provides a discretionary ground of refusal ("should normally be refused") where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by one (or more) of the four behaviours there set out, with other aggravating factors. The refusal decision relied on the appellant's previous overstaying, aggravated by working illegally using an assumed identity, failing to report resulting in being reported as an absconder, previously using deception in applications, and being removed at public expense.

6. As the appellant submits, in order to determine whether refusal of entry clearance was proportionate, the Tribunal should have first considered whether continued reliance on paragraph 320(11) was appropriate. The extent to which the Rules are met or not is highly relevant to any article 8 ECHR proportionality balancing exercise. Although at [28] the judge noted Mr Karnik's submission that

the Tribunal should consider whether the respondent was justified in refusing the appellant's application on conduct going back to 2012, no such assessment was made. I am satisfied that this was an error of law.

7. In relation to the second ground, it is submitted that the judge erred in considering whether it was reasonable to expect the appellant's son to relocate to Bangladesh. At [30] the judge recognised the submission that there was a qualifying child. At [32] he noted the best interests considerations. However, at [38] the judge considered it "entirely reasonable" that the appellant's child should join him in Bangladesh. Further reasons were given at [45] and [46]. It follows that s117B(6) was addressed, even though this is an entry clearance case. However, I agree that the judge appeared to link the appellant's immigration history to the issue of reasonableness in relation to the qualifying child, so as to be an error of law. I am also satisfied that the reasoning provided for considering it reasonable for the child to join the appellant was inadequate. For example, there was no consideration of the rights of citizenship of the British child, his educational needs, and other matters. The findings were, therefore, in error of law.

8. Considering what was said by the appellant's wife at [19] to the effect that she could not join the appellant in Bangladesh as he shared a room with his brother, the judge's rejection of that at [39] of the decision is challenged as without evidential foundation. However, this is a minor point and not material to the outcome of the appeal. I am also not satisfied that the judge was inconsistent as to whether article 8 ECHR was engaged. Clearly what was intended at [48] was to find that article 8 was not infringed, in other words, that refusal of entry clearance was not disproportionate.

9. It follows that the decision cannot stand and must be set aside to be remade. Where the facts and findings are unclear and need to be remade entirely, the appropriate course is to remit this matter to the First-tier Tribunal to be remade, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made makes it appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside to be remade.

The making of the decision in the appeal is remitted to the First-tier Tribunal at Manchester.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 5 July 2021