IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001167
First-tier Tribunal No:
HU/56908/2021
IA/16030/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 June 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAHFUZUR RAHMAN

Respondent

(NO ANONYMITY ORDER MADE)

Representation:
For the Appellant: Ms R. Head on behalf of Qore Legal
For the Respondent: Ms H. Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 07 June 2023

DECISION AND REASONS

1. For the sake of continuity we shall continue to refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant (Mr Rahman) applied for Indefinite Leave to Remain (ILR) on 29 June 2021. The cover letter to the application dated 14 July 2021 made representations on the issue of long residence under paragraph 276B of the immigration rules. The submissions relating to human rights were unparticularised and amounted to nothing more than a bare assertion that the appellant had established a family and private life in the UK.

3. The respondent refused the application in a decision dated 21 October 2021. She noted that the appellant entered the UK on 23 October 2010 with entry

clearance as a student. His leave to remain as a student was extended until 29 February 2016. The appellant submitted an in-time application for an EEA residence card requesting facilitation of entry or residence as an 'other family member' (aka 'extended family member') of an EEA national. The residence card application was refused on 28 July 2016 and an appeal under The Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations 2006') was dismissed on 21 August 2017. Subsequent applications for a residence card were refused and a second appeal was dismissed by First-tier Tribunal Judge Hoffman in a decision sent on 19 January 2021.

4. The respondent refused the application for ILR on the ground that the appellant's lawful leave to remain ended when his appeal rights were exhausted on 05 September 2017. He was unable to show a continuous period of 10 years lawful residence. The decision letter incorrectly assumed that section 3C Immigration Act 1971 ('IA 1971') operated to extend the appellant's leave to remain. However, section 3C only applies to applications to vary leave to remain under domestic law. An application for an EEA residence card was not an application to vary leave to remain. Section 3C did not apply to appeals brought under the EEA Regulations 2006: see paragraph 1 Schedule 2 EEA Regulations 2006, *AS (Ghana) v SSHD* [2016] EWCA Civ 133, and *Ali & Ors (EU Law Equivalence; para 276B; s.3C)* [2022] UKUT 00278 (IAC). In fact, the appellant's lawful leave came to an end upon the expiry of his student visa on 29 February 2016. Nothing turns on this for the purpose of the appeal before the Upper Tribunal.

5. The respondent noted that the appellant had not raised any issues relating to a family life with a partner or child in the UK. She concluded that there were no 'very significant obstacles' to integration in Bangladesh for the purpose of paragraph 276ADE(1)(vi) of the immigration rules. No other exceptional circumstances were raised to justify a grant of leave to remain outside the immigration rules.

6. First-tier Tribunal Judge Suffield-Thompson ('the judge') allowed the appeal in a decision sent on 24 February 2023. The appellant's family life with his cousin in the UK appears to have been argued for the first time in the appellant's skeleton argument. The judge heard evidence from the appellant and his cousin. She found them to be credible witnesses [24].

7. The judge noted that there was a history of previous applications made under the EEA Regulations, which had all been refused. Whilst acknowledging that this was not an appeal under the EEA Regulations 2016, she observed that there were previous decisions of the First-tier Tribunal on the issue of dependency as an extended family member. The judge referred to the guidance given in *Devaseelan v SSHD* [2002] UKIAT 702 and found that 'if I have new evidence then I can and should consider this' [29]-[30]. Despite having directed herself to the correct starting point, she made no reference to the findings made by earlier judges. Instead, the judge went on to consider the appellant's explanation as to why those appeals might have failed. She accepted that he might have been poorly represented in the past [31]-[33].

8. The judge considered the further evidence before her relating to dependency, which included money transfer receipts dating back to 2008. The judge accepted that the appellant had been financially dependent upon his cousin for many years and that he had lived in his household in the UK since 2013 [37]. She considered Home Office guidance relating to the application of the long residence rule, which

formed part of the legal arguments relied on by the appellant's representative [41]. The guidance stated that during time spent in the UK under the provisions of the EEA Regulations a person is not subject to immigration control and was not required to have leave to remain. The guidance stated that the respondent would apply discretion and count residence under EU law as lawful residence. At [42] the judge concluded that: 'the Appellant is to be treated as a person who had LTR from 26 February 2016 until now so is eligible to apply for ILR.'

9. The judge concluded that the appellant did not meet the private life requirements of the immigration rules. The evidence did not disclose 'very significant obstacles' to integration in Bangladesh [48]-[51].

10. Having concluded that the appellant did not meet the requirements of the immigration rules the judge went on to consider whether removal in consequence of the decision would be unlawful with reference to a broader assessment of Article 8. She began this section of her findings by stating that 'I bring forward all of the findings that I have made above' [53]. The judge referred to the decisions in *Ghising (family life – adults – Ghurkha policy)* [2012] UKUT 00160 (IAC) and *Kugathas v SSHD* [2003] EWCA Civ 31, which were relevant to the assessment of family life between adult relatives. The judge accepted that the appellant had lived with his cousin for 'the majority of his adult life' [55]. She concluded that 'this is clearly a family unit and a relationship that goes over and above normal emotional ties' [57].

11. The judge then turned to consider whether the decision to refuse leave to remain was justified and proportionate. She accepted that 'meeting the Rules is a weighty factor in the Article 8 proportionality assessment' but found that it was not essential [61]. The judge went on to consider the fact that the decision would impact on the EEA sponsor's three children who had lived with the appellant for most of their lives. She found that he acted as 'a second father figure' [64]. The judge concluded that it would not be reasonable to expect family life to continue elsewhere and that it was not in the best interests of the children to remove the appellant. The judge found that contact through modern means of communication would not be the same as living as a family unit and that the appellant's cousin did not earn enough to visit Bangladesh on a regular basis.

12. When she turned to consider what weight to place on the appellant's private life in the UK in the balancing exercise the judge said: 'When he came here, he had legal leave. …He still has friends here that the made when he was entitled to be here and I take these relationships into account.' [72]. The judge went on to consider some of the statutory public interest considerations under section 117B of The Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'). She noted that the appellant speaks English and can work in the UK He has no convictions and is not a burden on the state. The only other public interest consideration identified by the judge was the public interest in maintaining an effective system of immigration control (section 117B(1)). She went on to say that 'this can be the only objection from the Respondent in this case.' [74]. The judge did not consider whether little weight should be given to private life established at a time when a person's immigration status is precarious or unlawful (sections 117B(4)-(5)).

13. The Secretary of State applied for permission to appeal to the Upper Tribunal on the following grounds:

    (i) Despite a self-direction to *Devaseelan*, the First-tier Tribunal failed to consider the previous First-tier Tribunal decision as the starting point for

the assessment of whether the appellant was dependent upon an EEA national and failed to explain why she was departing from those previous findings.

(ii) The First-tier Tribunal erred in treating the appellant's residence as lawful when he was not lawfully resident under EU law.

(iii) The First-tier Tribunal's finding that the appellant was a 'second father figure' was irrational and contrary to the guidance given in *Ortega (remittal; bias; parental relationship)* [2018] UKUT 00298 (IAC), where it was said that it was unlikely that a person will be able to establish that they have taken on the role of a parent when the biological parents continue to be involved in the child's life.

(iv) The errors of law identified undermined the First-tier Tribunal's assessment of the proportionality of the decision. The First-tier Tribunal failed to have regard to relevant public interest factors contained in section 117B NIAA 2002.

14. We have considered the First-tier Tribunal decision, the evidence that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our findings.

Decision and reasons

15. At first glance, the first ground of appeal had some initial attraction. Although the judge made a correct self-direction to the principles in *Devaseelan*, on the face of it, she did not outline what findings were made by First-tier Tribunal Judge Hoffman or provide sufficiently clear reasons to explain why she had decided to depart from those findings. When this section of the decision is read with Judge Hoffman's decision it is tolerably clear that the judge accepted that there might have been good reason why the appellant's case might not have been prepared properly on a previous occasion i.e. poor representation. Having failed to produce sufficiently reliable evidence in support of the previous appeal, we conclude that it was open to the judge to go on to consider the up to date evidence before her.

16. However, when one steps back from the detail, it makes no material difference to the outcome of the appeal whether the judge applied *Devaseelan* correctly or not. As she pointed out, this was not an appeal under the EEA Regulations 2016 which was capable of determining whether the appellant should have been issued with an EEA residence card. She was only considering the previous First-tier Tribunal decision with reference to an argument relating to 10 years lawful residence and in the context of an appeal brought on human rights grounds.

17. We find that the crux of the problem lies in the second ground of appeal. The judge did not purport to make any clear finding as to whether the appellant would, if he made an application at the date of the hearing, succeed in an application for ILR on grounds of 10 years lawful residence. It reasonable to infer that the judge might have qualified her finding at [42] because the preceding reference to the respondent's guidance made clear that time spent lawfully in the UK under EU law was considered towards the 10 year period at the respondent's discretion.

18. Nevertheless, the judge made a clear finding that the appellant should be 'treated as a person who had LTR from 26 February 2016 [42]. This finding was based on a mistaken and erroneous understanding of the relevant principles of EU and domestic law.

19. First, the appellant made an application for an EEA residence card on 26 February 2016. As the EEA sponsor's cousin he was not a 'family member' for the purpose of Article 2(2) of the Citizens' Directive (2004/38/EC). He did not have an automatic right of residence under EU law. Any 'other family member' needed to meet the requirements of Article 3(2). A person was required to apply for entry or residence to be 'facilitated' by the host Member State in accordance with national legislation: see *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) and *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC). The host Member State would undertake an extensive examination of the person's personal circumstances and had to justify any denial of entry or residence. An 'other family member' only becomes lawfully resident under EU law when their residence has been facilitated by the issuing of a residence card.

20. With a proper understanding of the operation of EU law it becomes clear that a finding that the appellant was dependent upon the EEA sponsor was not sufficient to conclude that he remained in the UK lawfully under EU law after his leave to remain as a student expired on 29 February 2016. The evidence showed that the appellant had been repeatedly refused an EEA residence card in the period from 2016 to 2019 and that an appeal under the EEA Regulations 2016 had been dismissed as recently as 19 January 2021. The application that is the subject of the appeal post-dated the United Kingdom's exit from the European Union. This was not, nor could be, an appeal under the EEA Regulations 2016. As an 'other family member' the appellant had never been facilitated entry or residence under EU law.

21. Second, for the reasons already given at [4] above, the judge also erred in finding that the appellant had leave to remain ('LTR'). In fact, since 29 February 2016 he had no leave to remain under domestic law and had not been facilitated entry or residence under EU law. Ms Head appeared to accept that the judge had erred but argued that it would not have made any material difference given her other findings relating to family life in the UK.

22. We have considered whether this error of law was capable of making a material difference to the outcome of the appeal. We accept Ms Head's submission that the statement made at [61] of the decision is a generalised proposition. When read with the finding at [42], there is nothing in the decision to suggest that the judge made a specific finding that the appellant would meet the requirements of paragraph 276B of the immigration rules if he made an application at the date of the hearing.

23. The difficulty is on the opposite side of the proportionality assessment. Having erroneously found that the appellant had leave to remain from 26 February 2016, the judge failed to give appropriate weight to the fact that the appellant had remained in the UK without lawful leave for seven years at the date of the hearing. Far from having 10 years continuous lawful residence, most of the time that the appellant has spent in the UK has been unlawful. This was a matter that was relevant to a proper assessment of what weight should be placed on the appellant's private life established at a time when his leave was precarious or unlawful (sections 117B(4)-(5) NIAA 2002). It was also relevant to what weight should be placed on the general public interest in maintaining an effective system

of immigration control (section 117B(1)). Such a long period of unlawful residence should have been weighed against her findings relating to the strength of the appellant's family life in the UK. For these reasons we conclude that the legal error relating to the assessment of lawful residence impacted on a proper assessment of the balancing exercise under Article 8(2) of the European Convention.

24. We acknowledge that the judge heard evidence from the appellant and his cousin as to the strength of their relationship and found them to be credible witnesses. She also directed herself to relevant case law relating to the strength of family ties between adult relatives. Although the judge's finding relating to family life was generous on the facts of this case, and another judge might have come to a different conclusion, it is difficult for the respondent to show that it was an irrational finding. However, we find that there is some weakness because the judge failed to give adequate reasons to explain why the fact of co-habitation lifted the relationship beyond the normal emotional ties one might find between adult cousins [57]. This was not the focus of the third ground, but we take into account this observation when deciding on the appropriate disposal of this appeal.

25. For the reasons given above, we find that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside.

26. The usual course of action is for the Upper Tribunal to remake the decision even if it involves making further findings of fact. We have considered the guidance given in the recent decision of *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). The error of law did not relate to any fairness issues arising in the First-tier Tribunal. Some of the findings were open to the judge to make but others disclosed material errors of law. Although we consider the third ground of appeal to be the weakest, and it is arguable that the finding relating to family life could be preserved, both parties considered that it would be appropriate for the decision to be made afresh in the First-tier Tribunal. Given that we have identified some concern about inadequate reasons relating to the engagement of 'family life', and that a decision requires a holistic assessment of all factors relevant to Article 8, we conclude that it is not appropriate to preserve the finding. In view of the fact that there will need to be a full assessment of the case, we find that it is just appropriate, on this occasion, to remit the matter to the First-tier Tribunal for a fresh hearing.

Notice of Decision

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 June 2023