IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003753

First-tier Tribunal No: HU/54691/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th of Mach 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HARUN ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Choudry of Counsel.
For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 4 March 2024

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hands ('the Judge'), promulgated following a hearing at Newcastle on 30 June 2023, in which she dismissed the appellant's appeal on human rights grounds.
2. The appellant is a citizen of Bangladesh born on 10 June 1983 who sought leave to remain in the United Kingdom outside the Immigration Rules pursuant to Article 8 ECHR. The appellant stated he is the partner of Nargis Begum and at the date of the hearing the father of an 11 month old child, and claims he provides essential emotional support to them by both listening and his involvement in their day-to-day lives. The child, Arham, was born in June 2022.
3. The Judge's findings are set out [16] of the decision under challenge.
4. The Judge notes that the appellant and Ms Begum did not live together, as he lives in London and she lives in Huddersfield, that the child has the surname of her ex-husband, and that her address had been used by her ex-husband in his application for naturalisation.
5. The Judge found that on the basis of the material before the decision-maker it was a well reasoned and sustainable decision to refuse the application. The Judge notes, however, that the situation as it was before her at the date of the hearing was very different. [20].

6. The Judge was satisfied in relation to the evidence regarding the appellant's relationship for the reasons set out from [23]. The Judge was not satisfied, however, that either the appellant or his partner have been telling the truth in relation to their evidence as a whole.
7. At [34] the Judge writes:

> 34. Looking at all the evidence in the round, given the disregard and lack of respect both the Appellant and the Sponsor have shown for the laws and the authorities in the United Kingdom, I find I cannot rely on them as being witnesses of the truth. I have not had sight of or heard sufficiently reliable evidence that would indicate that this couple have a genuine and subsisting relationship, whilst I acknowledge there is a child born to them, many parents live apart or people decide to have children whether they are in a relationship or not. I am satisfied that the Appellant has lived in the same home as the Sponsor and her child for a period approaching three months and that he has had photographs taken of him with the child but this does not form a sufficiently reliable base for me to find, on a balance of probabilities, that their relationship is either genuine or subsisting or that he takes responsibility for caring for the child on a daily basis.

8. The Judge accepts the appellant has formed a private life in United Kingdom as the father of the British citizen child. The Judge finds the appellant cannot meet the requirements of the Immigration Rules in terms of the partner or parent route, meaning he would need to establish there are exceptional circumstances that would merit a grant of leave to remain in order to continue with his private life in the United Kingdom [35]. The Judge was not, however, satisfied the appellant had provided sufficient evidence to establish that he meets the requirements of Appendix FM EX.1 and so cannot meet the Immigration Rules [36].
9. The Judge analyses the situation outside the Rules from [37] including whether there are exceptional circumstances that would enable the scales of proportionality to be weighed in favour of the appellant remaining in the United Kingdom [41].
10. The Judge considers the best interests of the child before concluding that the decision does not adversely interfere with the Article 8 rights of the appellant, his partner, or the child, leading to the dismissal of the appeal at [57].
11. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 5 September 2023, the operative part of the grant being in the following terms:

> 2. The grounds assert that the Judge erred in failing to consider the appellant's difficulties in return due to his Bihari ethnicity.
> 3. On the face of the decision, the Judge appears to have failed to consider the appellant's Bihari ethnicity in the context of return to Bangladesh. This is a point taken by the appellant and considered in the respondent's review §15-16.
> 4. It is not clear whether this point in isolation will make a material difference in the context of the other findings. However, it is capable of making a material difference, and so is an arguable error.

Discussion and analysis

12. The approach to be adopted to litigation within the Tribunals is now substantially different from that which developed in the mid-2000's where, following the approach recommended in the Leggatt Report of a less formalised more 'user-friendly' judicial body, representatives and parties adopted a very low-key approach to the need to comply with directions and procedural rigour.
13. That has now changed as the workload of the Immigration Tribunals becomes greater and more complex, requiring a far more disciplined approach to the conduct of litigation similar to that to be found in the CPR, to maximise the limited resources available.

14. The recent decision of the Upper Tribunal in TC (PS compliance – "issue-based" reasoning) Zimbabwe [2023] UKUT 164 (IAC), an appeal heard by both the President of the Upper Tribunal and of the First-tier Tribunal sitting at Field House, demonstrates this. The head note of which reads:.

> *1. Practice Statement No 1 of 2022 ('the PS') emphasises the requirement on the part of both parties in the FTT to identify the issues in dispute and to focus on addressing the evidence and law relevant to those issues in a particularised yet concise manner. This is consistent with one of the main objectives of reform and a modern application of the overriding objective pursuant to rule 2 of the Tribunal Procedure (FTT)(Immigration and Asylum Chamber) Rules 2014. It ensures that there is an efficient and effective hearing, proportionate to the real issues in dispute.*
>
> *2. A PS-compliant and focussed appeal skeleton argument ('ASA') often leads to a more focussed review, and in turn to a focussed and structured FTT decision on the issues in dispute. Reviews are pivotal to reform in the FTT. The PS makes it clear that they must be meaningful and pro-forma or standardised responses will be rejected. They provide the respondent with an important opportunity to review the relevant up to date evidence associated with the principal important controversial issues. It is to be expected that the FTT will be astute to ensure that the parties comply with the mandatory requirements of the PS, including the substantive contents of ASAs and reviews.*
>
> *3. The identification of 'the principal important controversial issues' will lead to the kind of focussed and effective FTT decision required, addressing those matters, and only those matters, which need to be decided and concentrating on the material bearing upon those issues. The procedural architecture in the FTT, including the PS under the reformed process, is specifically designed to enable these principal important controversial issues to be identified and for the parties' preparation, as well as the hearing to focus upon them.*
>
> *4. FTT decisions should begin by setting out the issues in dispute. This is clearly the proper approach to appeals under the online reform procedure where at each major stage there is a requirement to condense the parties' positions in a clear, coherent and concise 'issues-based' manner.*
>
> *5. The need for procedural rigour at every stage of the proceedings applies with equal force when permission to appeal to the UT is sought and in the UT, including a focus on the principal important controversial issues in the appeal and compliance with directions. The requisite clear, coherent and concise 'issues-based' approach continues when a judge considers whether to grant permission to appeal. This means that the judge should consider whether a point relied upon within the grounds of appeal was raised for consideration as an issue in the appeal.*
>
> *6. The reasons for the permission to appeal decision need to focus upon, in a laser-like fashion, those grounds which are arguable and those which are not. To secure procedural rigour in the UT and the efficient and effective use of Tribunal and party time in resolving the issues that are raised, it is necessary for the grant of permission to clearly set the agenda for the litigation for the future.*

15. The starting point is to consider the appellant's immigration history. This shows the appellant claimed to have entered the United Kingdom illegally by lorry in August 2006. On 28 June 2007 he applied for leave to remain on the basis of his human rights, Articles 3 and 8, which was refused on 3 February 2011. On 5 September 2007 the appellant was served with form IS151A as an illegal entrant. The appellant appealed the decision of 3 February 2011 which was dismissed and on 31 October 2011 his application for permission to appeal to the Upper Tribunal was refused. On 16 May 2013 the appellant applied for leave claiming he was stateless. That application was refused on 17 January 2014 with no right of appeal in relation to which there is no evidence of a successful challenge. On 19 June 2015 the appellant made further submissions which were refused under

paragraph 353 of the Immigration Rules with no right of appeal on 16 February 2016 and, on 21 June 2021, he submitted an application for leave to remain on the basis of family and private life, the refusal of which is the decision under appeal.

16. The application of 21 June 2021 was made on the private life route. The appellant specifically states in the application he is not applying as a family member, only on the basis of his private life in the UK. Within the application, where he was asked for his nationality details and specifically country of nationality, the appellant has written “officially stateless” but confirmed he was born in Dhaka in Bangladesh on 10 June 1983.

17. The appellant claimed he was unable to provide a valid form of identification because it is a Bihari from Bangladesh and that they had never been issued with any form of identification as they were never considered citizens of Bangladesh.

18. The Reasons for Refusal letter dated 28 March 2023 refers to the application of 21 June 2021 as an application as a Family Member (Partner) which was refused. It was not found the appellant could satisfy any requirements of Appendix FM the Immigration Rules nor had it been shown he was entitled to an exemption for meeting the eligibility requirements as provided for by paragraph EX.1. on the basis of the information known to the decision-maker.

19. The decision-maker went on to consider the appellant’s private life claim before concluding the appellant had not established that he qualified for permission to stay under Appendix FM or otherwise.

20. Under the heading ‘Exceptional Circumstances and Compassionate Factors’, taking into account the evidence to ascertain whether there was anything that would warrant a grant of leave on the basis refusal will breach Article 8 ECHR, the decision-maker considers the appellant’s claim to face a real risk as a result of his being of Bihari ethnicity but concludes that based on the information provided there were no such exceptional circumstances sufficient to warrant a grant of leave to remain on that basis.

21. The refusal letter makes specific reference to the decision in which the appellant’s claim to be stateless was rejected. From that the following is extracted:

> *20. It is believed that your alleged details of your life in Bangladesh have been fabricated in order to make it appear that you are a Bihari. It is believed that you have done this in an attempt to obtain some legal status in the UK. It is also believed that you have come to the UK purely for economic betterment, this belief is confirmed by the fact that you were caught working illegally in a restaurant by Immigration Officers (RFRL dated 03-Feb-2011)*
>
> *21. Although it is not believed that you are a Bihari, even if it were later to be proven that you were, as stated above Bihari’s are citizens of Bangladesh and can return there.”*
>
> The fact that it is not believed you are Bihari, and you were unable to speak Urdu significantly undermines your claim to be at genuine risk of persecution or serious harm on return to your this home country.

22. It is not disputed the appellant’s bundle provided for the purposes of the hearing before the First-tier Tribunal contains a number of documents relating to the Bihari.

23. The appellant’s appeal against the decision was considered by the Secretary of State’s representative in accordance with the established review procedure on 24 May 2023. That identified the three issues in the appeal as being:

    (a) Is the appellant in a genuine and subsisting relationship with a qualifying partner and child?

(b) Whether there are insurmountable obstacles to the Appellant and his partner continuing their family life outside the UK.
(c) Whether the removal of the appellant would have unjustifiably harsh consequences such that paragraph 3.2 of Appendix FM of the Immigration Rules is satisfied.

24. In relation to the appellant's claim of risk arising from his ethnicity it is written:

> 15. The Appellant relies on his claimed connection to the Bihari community, that has previously been considered by the Respondent (156RB). As found in GA Bangladesh 2002 UKIAT 05810 a large proportion of the Bihari community have moved away from the camps and are living and working alongside local people [14].
> 16. There is no evidence to suggest that the Appellant would need to reside in a camp or has previously been subjected to any mistreatment by the Bangladesh authorities.
> 17. The Appellant claims to have no relations or friends in Bangladesh but has failed to provide evidence of what family were residing in Bangladesh and why contact could not be re-established. In any event it is well recognised that a lack of a supporting network would not normally amount to a very significant obstacle.

25. As the Secretary of State upheld the decision on review the matter proceeded to the appeal being listed and directions being given by the First-tier Tribunal. Those directions will have included a direction that the appellant provided all the evidence he was seeking to rely upon by a specified time. The appellant did so by the provision of the written evidence before the Judge, which I find the Judge clearly considered with the required degree of anxious scrutiny.

26. The grounds of appeal to the First-tier Tribunal relied upon by the appellant are in the following terms:

> Grounds of Appeal
>
> Relationship Not Genuine
>
> **Not resident together:**
>
> My partner and I were not residing together and the reasons for which were given in my partner's supporting letters which were submitted after the submission of my application.
>
> **My partner's ex husband:**
>
> It is stated that my partner sponsored her ex-husband's application for naturalisation on 15 November 2021 for which a decision was dispatched on 3 December 2021. My partner has stated in her letter of 2 May 2023 that she was not aware of his application for naturalisation and did not support any such application. Furthermore she is NOT aware of any correspondence coming to her address for this matter.
>
> My partner has provided the document from Dewsbury Sharia Office titled 'Certificate of Legal Dissolution of Marriage Under Islamic Sharia Law' dated 21 June 2021.
>
> This demonstrates that her marriage with her ex-husband has completely broken down and she intends to take steps to apply for a divorce.
>
> **Involved in the our child's upbringing.**
>
> I am involved in our child's life and upbringing. I was regularly travelling to see my partner and our son at their residence which is her parents address. I am now living at the house permanently with my wife and child.
>
> Our child's name is nothing to do with her ex husband and is the name of our mutual choosing.
>
> For the avoidance of doubt, I have undergone a DNA test and the results demonstrate that I am the biological father of our son.
>
> My partner explained in her letters the reasons why we were living separately which was intended for only a short time and never on a permanent basis.

I would ask the Home Office to reconsider my application in light of the supporting letter from my partner and her parents. Also take into account the Sharia Certificate and of course the DNA Test results.

27. There is nothing in the grounds of appeal challenging the Secretary of State's conclusion that the appellant is not of Bahari ethnicity or that, even if he was, he would face no real risk on account of the same on return sufficient to entitle him to a grant of international protection.
28. This lack of any reference to a risk arising from his alleged ethnicity is also present in the witness statements of both the appellant and his partner.
29. The appellant's witness statement dated 26 June 2023 sets out his case in relation to whether there exists a genuine and subsisting relationship with his partner, whether there are insurmountable obstacles for his family life to continue outside the UK, and whether his removal would have any unjustifiably harsh consequences on his family. The partner's witness statement dated 26 June 2023 follows a similar format with similar arguments being put forward in support of the appellant's claim. That was the state of the claim that came before the Judge.
30. At [5] the Judge sets out the issues under appeal and in the proceedings as follows:

> 5. The Appellant has appealed a decision by the Respondent to refuse to grant him leave to remain in the United Kingdom on the grounds that it breaches his, his partner's and his child's rights under Article 8 of the ECHR. The Appellant says the decision is a disproportionate interference in his family and private life and would have a detrimental effect on his mental health, the mental health and moral well-being of his partner and the moral well-being of his son. The Appellant also says there would be significant obstacles to his reintegration into the Bangladeshi culture because of his lack of citizenship of that country, the lack of family support and the lack of employment opportunities he would have there. He would be left destitute, as he would have no income and that there would be unjustifiably harsh consequences for him.

31. Insofar as the appellant claimed that his lack of citizenship and lack of resultant opportunities arises as a result of his alleged ethnicity, this was clearly an issue that was considered by the Judge, although the case as it was advanced before the Judge is more fully set out at [13 – 15] of the determination and did not include this issue. What is of importance is the Judge summarising the submissions made by Miss Choudry in support of the argument there are exceptional circumstances to warrant the appeal being allowed outside the Immigration Rules which are said to be in the following terms:

> a. The relationship is genuine and subsisting and this is supported by the child being born to it and therefore, the insurmountable obstacles to it continuing outside of the United Kingdom should be considered. The reason given in the refusal letter for not believing it is genuine and subsisting, is the fact the sponsor supported her ex-husband's naturalisation rather than any issue with the relationship between the sponsor and the Appellant.
> b. There was no real inconsistency in the evidence of the Appellant and the sponsor. They both recalled he moved into the sponsor's parents' home to live with her in April 2023, some three or four months ago.
> c. The fact they share a room does not mean there was always room for him there. It may well be the house would have been overcrowded had he moved in earlier and this is why they were not living together at the time of their Islamic marriage.
> d. There is evidence the child is their's and also evidence from photographs, the midwife and the doctor of the Appellant's involvement in the child's life.
> e. The Appellant has lived in the United Kingdom for 17 years and the sponsor arrived here when she was ten years old. She has visited Bangladesh on two occasions, but this is not the same as living there. There would be significant difficulties for the family as the Appellant does not work and has been unemployed for seventeen

years, he has no qualifications to enable him to get a good job. Therefore, there are unjustifiably harsh consequences if the family had to go to Bangladesh.

f. The rights of the Appellant's son, a British citizen child, have been disregarded.

g. In terms of s117B (vi), there is no public interest in removing the Appellant and the child could not live in Bangladesh. The term 'reasonable to leave' is defined in the case of JG (Turkey) and it has been revisited in AB and then in KO (Nigeria). Little weight should be given to the life the Appellant has formed in this country, but his history is irrelevant when the paramount consideration is the British child. The best interests of the child are to be with both his parents.

h. The child is eleven months old and quite attached to his father, so it is not in his best interests for his father to leave him.

32. Again, there is no reference to the ethnicity issue or challenge to the related conclusion set out in the Refusal Letter, or that the appellant had not established he is Bihari.

33. At [17] the Judge finds there is no skeleton argument and therefore no specific issues had been identified in the appeal from the appellant's side.

34. The Judges assessment of the evidence and submissions provided concludes at [23] in relation to the appellant's relationship with sponsor for the reasons set out in the following paragraphs. At [34] the Judge finds she cannot rely upon either the appellant or sponsor as being witnesses of truth.

35. At [36] the Judge finds the appellant had not provided sufficient satisfactory reliable evidence to establish he met the requirements of Appendix FM, pursuant to paragraph EX.1 or otherwise, and he did not meet the Immigration Rules. That is a sustainable finding.

36. Having analysed the evidence the Judge finds at [41] that there were no exceptional circumstances that would enable the scales of proportionality to be weighed in favour of the appellant. That is a sustainable finding.

37. Miss Chaudry submitted that the failure of the Judge to consider the evidence relating to the Bihari was material as it may warrant a different finding being made by the Judge in relation to the question of whether the appellant would suffer undue hardship should he be returned to Bangladesh, and the proportionality of the decisions in relation to Article 8 ECHR.

38. At [47] the Judge writes:

> "The Appellant has not established that he would suffer undue hardship should he be returned to Bangladesh. There is insufficient evidence to establish that he has no family and friends there or that he could not establish himself their on return. You will be able to seek appropriate employment. His skills as an odd job man would be available to him."

39. I do not find it has been made out on the material available to me and that was available to the Judge that the issue of the appellant's ethnicity was raised as a live issue on which the Judge was being asked to make a specific finding. The grounds of appeal clearly do not challenge the decision of the Secretary of State that the appellant is not Bihari.

40. In relation to the material provided in the appellant's bundle, in addition to domestic documents, copy passports, and character references, there are letters from the Stranded Pakistanis General Repatriation Committee one of which claims the appellant is stateless, but this was considered and it has been specifically found he is not stateless. I accept the country material referring to stateless Biharis of Bangladesh contains reference to some living in slum -like conditions and facing regular discrimination, including after the authorities in Bangladesh stated they should have voter and ID registration, and in a letter from the High Commission for Pakistan dated 18 May 2007 explaining the general situation with regard to the repatriations of Biharis to Pakistan, but that will not apply to a person who is not Bihari and has not been shown to apply to this appellant in any event.

41. It is not disputed that in the past this group have experienced hardship and discrimination within Bangladesh. There have been numerous meetings involving officials from Pakistan who decreed that the Urdu speaking Bahari should be assisted in being able to return to move and settle in Pakistan, although there are articles indicating that some promised flights did not materialise.
42. The appellant is a Bengali speaker, as evidenced by his request for a Bengali interpreter at the hearing who he clearly understood, which is the national language of Bangladesh, not Urdu which most of the Bihari speak.
43. In relation to the key challenge of the failure of the Judge to deal with this issue, I find no legal error made out on the basis the Judge was not asked to consider this issue as a specific issue requiring determination in the appeal, a fact clearly evidenced by a reading of the documentation as a whole.
44. I do not find the fact there were documents within the appellant's bundle relating to the situation for the Bahari should have alerted the Judge to the fact this was an issue requiring determination, as it is evidence that could have been easily included historical reference in light of the fact this was a matter that had been raised previously in relation to which the appellant's claim had been rejected. It is not a 'Robinson obvious' point on the facts and nor could it be argued that it inferred there was an additional ground when there was no specific reference to it in the witness statements.
45. I asked Ms Chaudry for her submissions in the event the Judge was found not to have erred in not dealing with this matter and whether the failure was material. I refer to the submissions made in response above. The difficulty for the appellant is there is not sufficient material to establish that all of Bahari ethnicity face a real risk of harm if returned to Bangladesh or that the discrimination that may be faced by some will have an impact upon all, such as to entitle them to a grant of international protection. The evidence so far as it relates to this appellant is neither compassionate nor compelling, especially in light of the finding of a lack of credibility in his and his partner's evidence.
46. My primary finding is that there is no legal error in the decision of the Judge. If I had found in the alternative, as a result of the Judge not making a finding on the issue, I would have found such error not to be material. Discrimination has to reach a certain level to qualify an individual for a grant of international protection or to make return untenable as a result of insurmountable obstacles or otherwise. On the evidence it is not made out this appellant is an individual who is entitle him to be recognised as at risk of such on the basis of the evidence that he has provided specific to his own personal circumstances.
47. As my primary finding is that the Judge has not been shown to have erred in law I dismiss the appeal.

Notice of Decision

48. There is no material error of law in the decision of the First-tier Tribunal. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber
5 March 2024