



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/12773/2013

**THE IMMIGRATION ACTS**

Heard at Sheldon Court, Birmingham  
On 14 July 2014

Determination Promulgated  
On 4 August 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ROBERTSON

Between

MD MUHITUL ISLAM  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A K Chowdhury, Legal Representative, from AK solicitors.  
For the Respondent: Mr Mills, Senior Presenting Officer

**DETERMINATION AND REASONS**

**Immigration History**

1. The Appellant is a male citizen of Bangladesh, whose date of birth is 7 July 1988. His appeal against the decision of the Respondent to issue a decision to remove him pursuant to the provisions of s 10 of the Immigration and Asylum Act 1999 was dismissed on all grounds by First-tier tribunal Judge Talbot in a determination promulgated on 10 February 2014.

2. The Appellant appealed on the basis that the Judge erred:
  - a. In attaching weight to the written record of the Appellant's interview with the Immigration Officer when he and his three witnesses stated that his understanding of English was poor;
  - b. At [18], in failing to give adequate reasons for finding that the Appellant was working at Asia Restaurant pursuant to **MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)**;
  - c. Failing to state what weight he attached to the evidence of the Appellant and the consistent evidence of the witnesses, who confirmed that the Appellant was not wearing the same uniform as the other waiters;
  - d. Failing to give adequate reasons for his finding that the Respondent had discharged the burden of proof to establish that he was working at Asia Restaurant. Even if it was established that he was not a domestic worker, this did not mean that he had breached the conditions of his leave by working at the Asia Restaurant because the two are not inextricably linked.
  - e. At [23] in placing the burden of proof on the Appellant to establish that removal was disproportionate, when the burden is on the Respondent to establish that removal is proportionate, and in failing to follow the step by step approach set out in **Razgar** for the determination of the Appellant's Article 8 claim.
3. Permission to appeal was refused by the First-tier Tribunal and was granted on renewal to the Upper Tribunal. In granting permission, Upper Tribunal Judge Allen stated, "On balance it is in my view arguable that the judge erred in not making clear findings on the weight he attached to the consistency of the evidence of the witnesses, even bearing in mind the adverse points noted at paragraph 18, and also with regard to the fact that the appellant was differently dressed from the other waiters in the restaurant. There is also an arguable issue as to the placing of the burden in respect of proportionality on the appellant, although in the end that may not be material."
4. A Rule 24 response was submitted by the Respondent, in which it is stated that the Judge, in a comprehensive determination, had considered all the evidence and given sufficient reasons for finding that the Respondent had discharged the burden of proof under the Immigration Rules and, in relation to Article 8, the Judge had given reasons as to why no the Appellant's appeal did not warrant consideration outside the Rules.

### **Submissions on behalf of the Appellant**

5. Mr Chowdhury essentially relied on the grounds of application, stating further that additional follow-up questions had not been asked of the Appellant during the course of the interview with the Immigration Officer at the restaurant. He stated that, for example, when the Appellant was asked 'Who asked you to work here?' and the Appellant responded 'My friend,' the Immigration Officer should have asked 'Which

friend?' and then, 'Is he the employer?' Similarly, in response to the third and fourth question recorded by the Judge in his determination at [17] if the Immigration Officer had asked follow up questions, he would have known that the Appellant had gone to see his cousin and had then gone to the restaurant. Mr Choudhury submitted that it was clear from the interview record that the Appellant did not understand the question and this was confirmed by the consistent answers of the Appellant and his three witnesses.

6. When asked if he was saying that the responses of the Appellant to questions were not appropriate, Mr Chowdhury stated that when there were concerns regarding the Appellant's ability to understand English, there should be follow up questions. For example in response to the first question recorded by the Judge at [17] the Appellant was not asked if the friend he was referring to was his employer. Also, he continued, when he was asked, 'How long are you going to be working here?' and the Appellant responded, 'Until tomorrow probably,' this would have raised doubts as to whether the Appellant understood the question.
7. Mr Chowdhury continued, when asked what he was going to be paid, the Appellant said it was 'bed and board' and, if he had been asked by the Immigration Officer, he would have said that he was staying with his cousin and his cousin's husband. Furthermore, it was illogical for him to go to Wales to work; he would have been out of pocket if he had driven all the way to Wales to work but was only receiving bed and board. As to the dress of the Appellant when the Immigration Officer came to the restaurant, it was acknowledged that he was dressed differently to the other waiters. Mr Chowdhury submitted that the evidence at [17] was circumstantial.
8. As to the Judge's comment that the failure to mention in the written contract of employment as a domestic worker that free board was provided by his employer was surprising, there was nothing surprising in it because an employer is entitled to provide whatever he wished to provide. He stated that an employer may decide that he wanted to pay an employee £6 an hour but would also give him substantial tips of £50. The lack of reference to the latter in a contract would not matter. The Appellant stayed with his employer for five days a week. At weekends, he lived in his accommodation in Birmingham.
9. As to the failure to provide a bank statement, payslips or HMRC records, there was no need to provide these when an application was made for a visa as a domestic worker as provided in the visa application form; only two documents were required, the passport of the employer and the contract of employment. In the circumstances, it was highly unreasonable for the Judge to ask for more evidence than the Appellant needed to provide when he applied for leave.

### **Submissions on behalf of the Respondent**

10. Mr Mills relied on the Rule 24 response. He submitted that whilst the Appellant and his witnesses gave consistent evidence, the question of the weight attached to the consistency of evidence as between the Appellant and his witnesses was a matter for the Judge. The corroborative evidence of witnesses is not due any particular weight per se where evidence can only be weighed when considering the evidence in the round. They could all have been telling a lie; when they have an inherent interest in

the outcome, there is a motivation to lie. The Appellant had admitted in interview that he was working; it was only afterwards that it dawned on him that he was in trouble and the only way out for him was to say that he did not understand. If the owner of the restaurant had not supported the Appellant's account, he could be liable to a fine and prevented from sponsoring others. If his domestic worker employer had not supported his account, he would have lost his domestic worker leave. They all had an interest in the outcome of the appeal and their consistent evidence may not be due much weight.

11. As to the Judge's treatment of their evidence, Mr Mills submitted that the Judge had factored in the weight of their evidence at [17] and [19] and decided that it was due some weight but that other factors outweighed it. He gave weight to the lack of documentary evidence and he was entitled to put what weight he wanted to on it. There can only be an error of law if his decision is irrational.
12. As to the interview record, Mr Mills submitted that the Judge made findings of fact on the interview record. It was not obvious from the interview record, when it was looked at in the context of the rest of the interview as a whole, that additional questions should have been put. When the Appellant was asked, 'Who asked you to work here?' and the Appellant stated 'My friend', the Appellant had previously referred, at p 171 of the interview record, to his friend 'Shahan'. This may have been one of the other individuals whose details had been omitted at p169 of the interview record or another friend. There was nothing obviously illogical about the questions; on the contrary, the Appellant had supplied direct responses to direct questions.
13. Mr Chowdhury had submitted that it was illogical for the Appellant to travel to Wales to work at the weekends. However, there was no lack of logic to someone working as a domestic worker from Monday to Friday and travelling to Wales at the weekend to work; his cousin was married to the owner of the restaurant. There was nothing illogical about his cousin being short of staff at the weekend and asking the Appellant to help out. The fact that the Appellant was to be provided with bed and board was payment in lieu and that was sufficient to establish employment.
14. As to the dress of the Appellant being different to the other waiters, the Judge had noted that he was wearing formal attire even if he was dressed differently and this had been considered by him in the overall balance.
15. In relation to the Article 8 assessment, Mr Mills submitted that the Judge did not formally recognise the burden of proof in the assessment of proportionality. However, he had followed the correct approach. He had considered the application under the Immigration Rules. The Appellant could not succeed under the Rules and he had considered the circumstances and decided that compelling circumstances were not established for a consideration of the Article 8 appeal outside the Rules. If the failure to correctly express the burden of proof in relation to the proportionality exercise was an error of law, it was not material as it could not be seriously argued that someone who had only been in the UK for a period of 4 or 5 years as a domestic worker and had no family in the UK and who worked in breach of the terms of his visa would be entitled to succeed under Article 8. His appeal would have no reasonable prospect of success.

16. In reply, Mr Chowdhury submitted that it is not possible to assume that the witnesses were self-interested; it cannot be said that they were lying and it was unreasonable to make that inference. There was a lengthy cross-examination. By way of example, he said that the Appellant was asked the question at p 171 of the interview record, 'How did you get here?' He responded, 'In my car. It is outside.' He had explained during the hearing that he had gone to see his cousin and had gone to the restaurant. He was not going to earn money and the cost of the journey to Wales would not be worth it for bed and board. The Immigration Officer should have asked if he understood the questions. The Appellant was a low skilled domestic worker and it was unreasonable to have expected him to understand the questions.
17. Following submissions, I reserved my decision. Both Mr Mills and Mr Chowdhury agreed that if I were to find that there was an error of law, because the various factors were balanced together, it would be necessary for there to be a rehearing of all the issues and it should be remitted to the First-tier Tribunal.

### Decision and reasons

18. Mr Chowdhury's submissions hang on the inability of the Appellant to understand the questions put to him when he was interviewed by an Immigration Officer following an enforcement visit to the Asia Restaurant in North Wales. He submits firstly that an examination of the interview record confirms that the Appellant could not understand the questions put to him. Secondly, that his witnesses confirmed that he could not understand English, and thirdly that he was a low skilled worker and is unlikely to have understood English.
19. I do not accept that the Appellant did not understand the questions put to him at interview; the questions were direct and the Appellant provided direct answers. The questions put to him were not complicated or difficult to understand; there is nothing within the record reproduced by the Judge at [17] which would result in a finding that the Appellant could not understand English. Mr Chowdhury explained during the course of the hearing that the Appellant's cousin had said the Appellant could not understand English and had offered to interpret. The Immigration Officer was therefore alert to the possibility that he would need to assess whether the Appellant understood the questions put to him. However, when the Appellant was in fact questioned, the answers he gave were appropriate. If the response he provided did not answer the question, the Immigration Officer would have then asked the Appellant if he could understand what was being said to him.
20. In the interview record, the Appellant confirmed that he was working at the restaurant. I appreciate that the Judge did not state in terms what weight he placed on the consistent evidence of the witnesses, an approach that is encouraged in MK. However, a full reading of MK establishes that the purpose of providing reasons is that the parties to the appeal understand the reasons for the decisions and that this may be directly or by inference [7]. It is clear from the determination read as a whole that the Judge did not accept the evidence of the witnesses that the Appellant did not understand English.
21. It is also stated in MK that:

“[11] The depth and extent of the duty to give reasons will inevitably vary from one case to another. The duty is contextually sensitive. Thus, as the Upper Tribunal observed in **Shizad** [2013] UKUT 35 (IAC), a tribunal’s reasons need not be extensive if its decision makes sense. See also **R (Iran) v SSHD** [2005] EWCA Civ 982.”

22. The Judge analysed the interview record, and confirmed that on the face of the record it would “indicate that the questions put to him were understood” and that it amounted to an admission of employment [17]. There is nothing within Mr Chowdhury’s submissions which would lead me to conclude otherwise. His submissions on this point are simply a disagreement with the findings of the Judge. The Judge then noted that the Appellant, though not in the same uniform as the other waiters, was in formal attire, both of which would lead to the reasonable conclusion that he was employed in breach of the terms of his visa.
23. As to his domestic worker employment, the Judge noted that the contract did not fully record the agreement between the Appellant and his employer as to his conditions of employment. If the Appellant were only required to reside with his employer on a one off basis because of particular circumstances, one would not necessarily expect it to be written into his contract of employment. However, accommodation from Monday to Friday is not in the nature of one off tips to supplement income; it is a regular commitment which one would expect to see reflected in the contract. However, this was not the only point that was raised by the Judge; he also noted the lack of payslips and HMRC documentations. It is not unreasonable for a Judge to expect, when one claims to have been employed in the UK for a period of some four to five years, to have some evidence adduced of contact with HMRC for the purposes of NI and income tax contributions.
24. These are the factors that the Judge balanced against the consistent evidence of the witnesses and he decided on balance, that the other factors outweighed the consistent evidence of the witnesses and concluded “...that the Respondent has discharged the burden of proof upon him that the Appellant was in breach of the conditions of his leave as a domestic worker and that the cancellation of his leave was in accordance with the Immigration Rules” [19]. The matter of what weight is to be attached to evidence is for the Judge (**FK (Kenya)** [2010] EWCA Civ 1302 at para 23). The findings of the Judge were open to him on the evidence before him; his findings are not irrational or perverse and no arguable errors of law are disclosed.
25. In relation to Article 8, it is submitted that the Judge applied the wrong burden of proof at [23] in stating that the Appellant had not established that his removal would be disproportionate.
26. I note that the Judge has directed himself properly at [21], and confirmed that the Appellant does not meet the Immigration Rules for a grant of leave under paragraph 276ADE [22]. He has then gone onto consider his rights outside the Immigration Rules and concluded that the Appellant “...May have acquired a private life in the UK, having lived and worked here for over four years. However, he has given little evidence to show why his removal would constitute an interference with his Article 8 rights of sufficient gravity to engage his convention rights” [23], which are responses to the first and second questions in the five step approach in **Razgar** [2004] UKHL 27.

It is therefore clear that the Judge has followed the structured approach in **Razgar** and there is no need for him to specifically refer to it as long as it is clear that he has applied the principles set out therein. His conclusion then is that Article 8 rights are not engaged because the Appellant had not provided sufficient evidence to confirm that an interference would be of sufficient gravity to engage such rights on the basis that he had no family, social and cultural ties there in Bangladesh [23]. This conclusion is consistent with **Nasim and others (Article 8) [2014] UKUT 00025 (IAC)**. Therefore, whilst it is an error of law to place the burden of proof to establish that removal is not disproportionate on the Appellant, in the circumstances of this case, it would have made no material difference to the outcome of the case.

### **Decision**

27. The decision of Judge Talbot contains no material errors of law and his decision must therefore stand.

### **Anonymity**

28. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No request has been made for an anonymity order and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I find no reason to make an order.

Signed

Date

M Robertson  
Sitting as Deputy Judge of the Upper Tribunal

### **TO THE RESPONDENT**

#### **FEE AWARD**

In light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the appeal has been dismissed, no fee award is made.

Signed

Date

M Robertson  
Sitting as Deputy Judge of the Upper Tribunal