IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38421/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 March 2015
Prepared on 26 March 2015

Decision & Reasons Promulgated
On 17 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR FORHAD AHAMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T. Shah, Solicitor
For the Respondent: Mr P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Bangladesh, born on 4 May 1972. He appeals against the decision of First-tier Tribunal Judge Whalan sitting at Taylor House on 6 November 2014 who dismissed the Appellant's appeal against a decision of the Respondent dated 2 September 2013. That decision was to remove the Appellant and to refuse to

grant leave to remain outside the Immigration Rules under Article 8 of the European Convention on Human Rights.

2. The Appellant entered the United Kingdom on or about 13 August 2002 on a visit visa valid until 21 January 2003. On 17 December 2002 he lodged an application for further leave to remain on medical grounds which was granted on 6 March 2003 until 6 June 2003. Thereafter the Appellant overstayed his leave. Some six years later on 24 November 2009 he applied for leave to remain under Article 8 which was refused on 7 January 2010 with no right of appeal. On 24 June 2011 he lodged an application for leave to remain in the United Kingdom on the grounds of his marriage to Ms Fatema Begum, a British citizen ("the Sponsor"). His application was refused on 22 August 2011 again with no right of appeal. On 25 January 2013 he was encountered during a street stop and arrested by immigration officials and on 27 June 2013 he was served with papers as an overstayer. The following day he lodged an application for leave under Article 8. This was refused on 2 September 2013 and has given rise to the present proceedings.

Documentation considered

3. On the file was the Respondent's bundle which comprised: removal decision and reasons for refusal letter dated 2 September 2013 together with notice of appeal against them; immigration information on form PF1; application details; application for leave on form FLR(O) dated 17 November 2009; a letter of representations by the Appellant's solicitors 24 June 2011 and enclosing a form FLR(M) together with the Respondent's letter refusing that application dated 22 August 2011; letter of representation from the Appellant's solicitors 28 June 2013 together with refusal letter dated 2 September 2013.

4. The Appellant submitted a bundle for the First-tier proceedings which was also relied upon before me which comprised statements of the Appellant, Sponsor, Appellant's sister and brother-in-law; DNA report confirming the Appellant is the father of three children by the Sponsor; children's health record books; Sponsor's decree absolute; documents regarding one of the Sponsor's children by her previous marriage; school and other documentation regarding the children and evidence of the Appellant and Sponsor's relationship.

Explanation for refusal

5. On 2 September 2013 the Respondent wrote a letter refusing the Appellant's application for leave to remain under Article 8. The letter noted that the Appellant was said to be in a genuine and subsisting relationship with the Sponsor and had been since January 2004. They underwent an Islamic marriage ceremony on 2 March 2004 and had been living together as a married couple ever since. They underwent a civil marriage on 13 June 2011. The Appellant was living with five children, three were his by the Sponsor and two were by her previous marriage. All the children were born in the United Kingdom and were British citizens. The Appellant had experience as a chef but was unable to work due to his immigration status. The Appellant met the criteria set out in Section S-LTR: Suitability for leave to remain under the Immigration Rules.

6. Although the Appellant had submitted his marriage certificate as evidence he was married to the Sponsor there was no evidence to suggest that he had a genuine and subsisting relationship with her and her children. There was no evidence to suggest that he resided at her address or saw her regularly. There was no evidence to support the relationship claimed to be in existence since January 2004. There was no Islamic marriage certificate for the Islamic marriage on 2 March 2004. His application could not succeed therefore under E-LTRP.1.7 - eligibility for limited leave to remain as a partner because "the relationship between the applicant and their partner must be genuine and subsisting".

7. The Appellant could return to Bangladesh to obtain correct entry clearance to enter the UK as the spouse of a British national and his wife could support that application. He was not currently working, provided no financial support to his wife or children and there were no insurmountable obstacles to him leaving the United Kingdom to make the application. The Appellant had remained in the country in breach of immigration laws as an overstayer since 6 June 2003 when his visa expired. He had failed to mention his relationship with the Sponsor when he had applied for leave to remain in November 2009 even though he had solicitors acting for him at that time. If he had been in a relationship with the Sponsor since 2 March 2004 it was reasonable to have expected him to rely on that relationship. Section EX.1.1 did not apply as the Respondent did not consider the Appellant had established a family life with his alleged partner. It was not accepted that the Appellant was taking an active role in the children's upbringing. The name Hafiz Ali appeared on the birth certificates of two of the children which was not the Appellant's name. The information that Hafiz Ali was the Appellant's nickname was not accepted as a credible reason for this discrepancy.

8. The Appellant could not succeed under paragraph 276ADE of the Immigration Rules as he had not lived continuously in the United Kingdom for at least twenty years and he still had social, cultural and/or family ties with Bangladesh. He spent 32 years of his life in Bangladesh and he would have no language or communication problems on return. He had significant experience and exposure to Bangladeshi culture and would encounter no problems re-adapting to society there. He would be expected to have family in Bangladesh including his parents to whom he had made previous reference. He had skills and experience as a chef and it was reasonable to suggest he could use his skills to secure a job in this field in Bangladesh. There were no exceptional circumstances to justify granting leave outside the Rules. Not only had the Appellant remained in the United Kingdom illegally after the expiration of his visit visa but he had also been working illegally. No explanation had been made for the delay in seeking to regularise his stay.

The Proceedings at First Instance

9. At first instance the Appellant told the Judge that when he had lodged his Article 8 application in 2009 he had made no mention of his wife or children but rather referred to his relationship with his sister because he was badly advised by a friend. There was no documentary evidence confirming his marriage to the Sponsor because it was illegal and he had lived at various locations, sometimes with his sister,

sometimes with his cousin. His family relationships back in Bangladesh had broken down a long time ago. He had told the Sponsor early on that he had no status in the United Kingdom.

10. The Sponsor described how she had come to the United Kingdom in November 2002 as she had married a Mr Azmal Ali, a British citizen. The couple had two children born January 2001 and April 2002. The marriage broke down and they separated in 2003. The Sponsor's marriage to the Appellant was arranged by family and friends. In contrast to the evidence of the Appellant the Sponsor said she did not know the Appellant had no immigration status until five or six months after their Islamic marriage in 2004. She was educated in Bangladesh until the age of 19. Her parents were now dead. She had a brother and sister living there. She had visited Bangladesh since coming to the United Kingdom but not since 2004. She maintained contact with her remaining family members in Bangladesh by telephone.

11. The Judge noted the written statements of the Appellant's sister and brother-in-law and the DNA evidence which confirmed paternity. The Judge found the Appellant and Sponsor to be straightforward and candid witnesses of fact and that they had a genuine marriage to each other. The Appellant and Sponsor were completely dependent upon state benefits. Both spoke some English but both needed the assistance of a Bengali Sylheti interpreter during the hearing. Aside from the diabetes of the Sponsor's oldest daughter no real information was provided about the children. The Appellant and Sponsor could not meet the financial requirements under Section E-LTRP3.3 as they were on a very limited income. The Judge considered whether the Appellant could succeed under Section EX-1 which provides an exception where there are insurmountable obstacles to family life with a qualifying partner continuing outside the United Kingdom. However as the Sponsor was born, raised and educated to college level in Bangladesh and had lived more than half her life there and had family there the Judge did not consider that there were such insurmountable obstacles.

12. At paragraph 38 the Judge dealt with the position regarding the children and wrote:

> "The Appellant's three children with Ms Begum are all British citizens but none had lived in the United Kingdom continuously for at least seven years immediately preceding the date of application (in June 2013). Nor did the Appellant have sole parental responsibility for any of the five children; indeed his responsibility for [the Sponsor's] two children with Mr Ali is comparatively limited. He cannot satisfy the relationship requirements of E-LTRPT2."

The Judge rejected the claim for private life under paragraph 276ADE accepting that the Appellant's only real integration to British society was to marry the Sponsor just over two years after she herself entered the United Kingdom from Bangladesh and live on her and her children's state benefits.

13. The Judge proceeded to consider the appeal under Article 8 outside the Immigration Rules stating at paragraph 40: "my conclusion is that the Immigration Rules do provide a complete code applicable to the Appellant's family and private life claims. If conversely I am wrong in this conclusion I will consider Article 8 for the sake of completeness under the principles outlined in **Huang** and **Razgar**". The Judge found

that there was a relevant family and/or private life and that interference with it would engage Article 8. The family unit had been established in its entirety against the background of the Appellant's overstaying. Any application for entry clearance was likely to be unsuccessful because of the inability to satisfy the financial requirements. The Judge considered Section 55 of the Borders, Citizenship and Immigration Act 2009 and noted that there was no requirement or proposal to remove the Sponsor or the British children. The children would retain their ability to re-start their lives in Bangladesh with their two parents should the Sponsor choose to relocate back to Bangladesh with the Appellant. Finally the Judge considered Section 117B of the Nationality, Immigration and Asylum Act 2002 stating at paragraph 45 that although the Appellant had a genuine and subsisting parental relationship with his children "they were not qualifying children at the date of application and in any event there is no requirement or expectation for them to leave the United Kingdom". He dismissed the appeal.

The Onward Appeal

14. The Appellant applied for permission to appeal arguing that the applicable Rule was EX.1. The Sponsor could not accompany the Appellant back to Bangladesh as she had five children to take with her. The seven year Rule quoted by the Judge did not apply as the children were British. The Judge had failed to follow the case of **Ahmed [2013] UKUT 84**, that any benefits received by the settled spouse and children should not affect the appeal. The children could not re-start their life in Bangladesh as they had no working knowledge of Bengali, the language in state-run schools. The Appellant would not be able to earn a living there after an absence of twelve years, one of the Sponsor's daughters had certain medical conditions and the Appellant would be unable to obtain entry clearance upon return as the Sponsor would not be able to earn the £18,600 required given the ages of the children she had to look after. The Judge had failed to consider the Upper Tribunal decision in **Omotunde** where British children were affected by the decision their interest and welfare was the primary consideration. The Judge had not considered the factors set out in **E v Philippines [2014]**. The assessment made under Section 55 was not in accordance with **JO (Nigeria) [2014]**.

15. The application for permission to appeal came on the papers before Judge De Haney on 26 January 2015. In granting permission to appeal he found the grounds to be arguable, noting that "the Judge has misstated the law [at paragraph 38] in respect of paragraph EX; whilst finding the children are British citizens he finds the Appellant does not satisfy the relationship requirement because they have not lived in the UK for seven years".

16. The Respondent replied to the grant of permission on 3 February 2015 stating that the Judge in a comprehensive determination had considered all the facts, applied the relevant case law and it was open to him to dismiss the appeal by giving adequate reasons. The purported errors [such as the finding at paragraph 38 that the Appellant did not satisfy the relationship requirements because the Sponsor and children had not lived in the UK for seven years] could have no material impact on the final outcome of the appeal.

The Error of Law stage

17. The matter came before me to decide whether there was a material error of law in the determination such that it fell to be set aside. At the outset the Presenting Officer indicated he was troubled by the determination as the Judge appeared to have misunderstood the relevant law. All the children were British citizens and therefore they were all qualifying children. Although the error of law was conceded the appeal was not as the Respondent's position remained that it was not unreasonable to expect the children to relocate with the Appellant and Sponsor. It was an error for the Judge to find in this case that they were not qualifying children. The break in the family life caused by relocation would be proportionate given the Appellant's bad immigration history and other factors in this case.

18. I considered whether there was an error of law and indicated to the parties that I found that there was. This was an application outside the Immigration Rules under Article 8 but the Judge nevertheless had to apply the statutory provisions contained in the 2002 Act. Given that the Sponsor and all five children, the three of the Appellant's and the two of the Sponsor's, were all British citizens they were all qualifying children and whether they had or had not lived in the United Kingdom for seven years immediately preceding the date of application during 2013 made no difference to their status as qualifying persons. The Judge needed to assess the appeal in the light of the status of the Sponsor and the children. The Judge repeated the error at paragraph 45. As this error appeared to have significantly affected his conclusions under Article 8 I considered that those conclusions were rendered unsafe and therefore the determination fell to be set aside and the decision re-made.

19. The Judge had also dismissed the Appellant's claim that removal would breach the Appellant's private life. I cannot see that the Judge was in error in concluding that there would be no disproportionate interference with the Appellant's private life since it was established at a time when his status here was unlawful. Little weight would be given to his private life in the balancing act determining the proportionality of interference. At the hearing before me the case concentrated on whether the Judge was wrong in his findings in respect of family life and it was the appeal in relation to the claim to family life that needed to be re-heard.

The Substantive Re-hearing

20. I indicated to the parties that I would proceed to re-hear the matter. I enquired whether there was any further oral evidence that needed to be given but I was informed that there was not. I indicated that the positive findings of fact made by the Judge at first instance would be preserved even though the determination itself was set aside. I heard further submissions from the parties before reserving my decision on the re-making of the appeal.

21. It was acknowledged the Appellant had a poor immigration history but the Respondent had not accepted the relationship between the Appellant and Sponsor and the Appellant had had to obtain DNA evidence to prove that he was the father of his three children. Where there were children involved the assessment of the proportionality of interference should be made by reference to the qualifying partner having to accompany the Appellant where four of the children were still in school.

The test was whether there were insurmountable obstacles but there were no guidelines as to what that phrase meant.

22. The Judge had placed too much emphasis on the fact that the wife and children were dependent on public funds. The issue was whether the Appellant would cause additional recourse to public funds. The Appellant had given evidence that he had not worked because he had no permission to do so but if granted permission he would find work and assist the family and then they would be able to come off benefits. There would be adequate payments at or above income support level. The Appellant and Sponsor had been in a longstanding relationship since 2004 and if one applied the **Razgar** test the Appellant satisfied the requirements. The Sponsor had come to the United Kingdom as the wife of a UK citizen but had found herself the victim of domestic violence. It would disproportionately affect the education of the children to return them to Bangladesh. They had no working knowledge of Bengali, they might be able to speak Bengali in the home but if they attended school they would have no written skills in that language and they had never been to Bangladesh.

Findings

23. The Appellant and Sponsor have a genuine and subsisting relationship. Together they have five children, three are the biological children of the Appellant himself and the other two are the children of the Sponsor by her previous marriage although the Appellant has a parental role for them. The children's ages are Zaria born 23 April 2002 now 13 years, Zaima born 22 May 2007 now 7 years, Mohamed Hamza born 23 January 2001 now 14 years, Mohamed Hamim born 23 September 2008 now 6 years old and Mohamed Hammad born 12 November 2011 now 3 years old. The best interests of these five children are a primary consideration of the Tribunal in assessing the claim under Article 8 and this accords with the duty under Section 55. This means that their best interests must be considered first but although a primary concern they are not necessarily paramount.

24. The best interests of the children are undoubtedly to be looked after by both parents together in one family unit. Given that they are already in the educational system and indeed are British citizens their best interests would be for them to remain in the United Kingdom to be able to continue their education.

25. The Respondent has made a removal decision against the Appellant and if enforced this would interfere with the family life of the Appellant, Sponsor and the children. Given that the Appellant has a bad immigration history of overstaying and working unlawfully the interference would be in accordance with the legitimate aim of immigration control. The decision comes down to the issue of proportionality. What the Tribunal must do is to balance the competing arguments to assess whether the removal of the Appellant is proportionate to the legitimate aim pursued. On the one hand the Appellant has a bad immigration record and he would have no difficulty, I find, in readjusting to life in Bangladesh. He has only been out of the country for some twelve years, he still speaks the language of Bangladesh, has family there, I have no doubt would be able to find work and re-establish himself.

26. Although he has formed a genuine and subsisting relationship with a qualifying partner that relationship was established at a time when the Appellant's status in this country was unlawful and by Section 117B(4) little weight should be given to that relationship in the proportionality exercise.

27. Importantly Section 117B(6) provides that where as in this case an Appellant is not liable to deportation the public interest does not require that person's removal where they have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom.

28. As indicated all five children in this case are qualifying children and it was found as a fact by the Judge at first instance that the Appellant had a genuine and subsisting parental relationship with them. The question is whether it is reasonable to expect the children to leave the United Kingdom. If it is not then the public interest does not require the Appellant's removal. It would be hard to say that the Sponsor's children by her previous marriage should reasonably be expected to leave the United Kingdom and travel to Bangladesh given their ages and the length of time they have been in education in this country. Similarly it would be hard to say that the family should be separated, for example some of the children should be expected to leave the United Kingdom but not others. If one is talking about the reasonableness of expecting children to leave the United Kingdom in my view it is all or nothing, either all of the children would be expected to leave with the Appellant and Sponsor or none would.

29. I do not consider that it would be unduly harsh to expect the Sponsor to return to Bangladesh with the Appellant (leaving aside the issue of the children) since she like the Appellant has spent the majority of her life in Bangladesh, speaks the language, has family members there and could re-adapt to life in that country. Indeed it would be reasonable to expect her to relocate with her husband given that she has known for a considerable time that he had no status and no right to be in this country and there is no right under Article 8 for a married couple to choose where to exercise their rights under Article 8.

30. It would be in the best interests of the children to continue to remain in this country and I do not consider that it would be reasonable to expect them to leave the United Kingdom. The children have a range of ages. It might be possible to say in relation to the youngest child that their formative experiences and life is likely to be focused on their parents and the child could return to Bangladesh with them, notwithstanding the British citizenship but that argument loses its force as the children's ages are greater. The result is that the public interest does not require the Appellant's removal as I do not consider it would be reasonable to expect the children to leave the United Kingdom with him.

31. The next question is whether the Appellant should nevertheless leave the United Kingdom in order to return to Bangladesh to apply for entry clearance from there. It may seem at present that there is little likelihood that such an application would be successful given the Sponsor's reliance on public funds but that is beside the point. In effect what is happening here is that the Appellant is seeking to use Article 8 to re-write the Immigration Rules and that this is in reality an exercise in queue jumping.

The question is whether the effects on this family of the Appellant being forced to return to Bangladesh to make such application for entry clearance as he could would be a proportionate or disproportionate interference with the family life of the Appellant, his wife and children the latter remaining in this country.

32. The case cited by the Appellant's solicitor of **Ahmed** has little if any relevance to the facts of this case. Firstly, that was a case on the calculation of state benefits in order to assess adequacy of maintenance. It was based on an application which had been made for entry clearance before the July 2012 amendments to the Immigration Rules (which set a higher threshold to be crossed). That is a quite different situation to the one which I have before me in the instant case.

33. In the case of **Azimi-Moayed [2013] UKUT 00197** the Upper Tribunal gave guidance on the principles to be applied in determining appeals where children were affected by the appealed decisions. As a starting point it was in the best interests of children to be with both their parents. If both parents were being removed from the United Kingdom the starting point suggested that so should dependent children who formed part of their household. It was generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country could lead to development of social, cultural and educational ties that it would be inappropriate to disrupt. Very young children are focused on their parents rather than their peers and are adaptable.

34. Undoubtedly there would be interference in this case with family life by the Appellant returning to Bangladesh. It might be some considerable time before he was able to return given the financial position of the Sponsor. However, to say that that means that the appeal must be allowed is in effect to re-write the financial requirements of Appendix FM, an argument that was comprehensively rejected by the Court of Appeal in the decision of **MM**. The Appellant has a poor immigration record, the Sponsor and children would continue to be supported by public funds as they are supported at the present time. There would be an effect on the children but they would continue with their education and continue to enjoy the rights and privileges of being a British citizen in the United Kingdom. Whilst therefore I would not consider it reasonable to expect the Appellant's Sponsor and all five children to relocate back to Bangladesh, I would consider that it was proportionate to the legitimate aim being pursued that the Appellant should have to return to Bangladesh and at some appropriate time in the future make such application as he can if he wishes to return to the United Kingdom to re-join his wife and children. He could continue to maintain contact with his family through modern means of communication.

35. There would be some interference with the children's best interests to the extent that they would not be brought up by their father/step father for the period that he was away seeking lawful entry but that consideration is outweighed by the other factors in this case, including the Appellant's poor immigration record, the reliance on state funds (including as was pointed out that the absence of the Appellant means that the low income of the Sponsor is not further sub divided). I find therefore that the Respondent's decision to refuse leave to remain under Article 8 and to remove the

Appellant would not breach this country's obligations under Article 8 of the Human Rights Convention. I therefore dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have re-made the decision in this case by dismissing the Appellant's appeal against the Respondent's decision to remove and to refuse to grant leave.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 13th day of April 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed this 13th day of April 2015

…….
Deputy Upper Tribunal Judge Woodcraft