Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29966/2014
IA/29969/2014
IA/29972/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21 July 2016

Decision & Reasons Promulgated
On 26 July 2016

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department
[No anonymity direction made]

Appellant

and

Rasedul Islam
Shirmin Jahan
[J A]

Claimants

Representation:

For the claimants: Mr S Archarjee, instructed by J Stifford Law Solicitors
For the respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Buckwell promulgated 26.10.15, dismissing on immigration grounds but allowing on human rights grounds the claimants' linked appeals the decision of the Secretary of

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State, dated 7.7.14, to refuse their applications for further leave to remain in the UK as a Tier 4 student (the first claimant) and dependent wife and son (second and third claimants), and to remove them from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 1.10.15.

2. Upper Tribunal Judge Martin, sitting as a judge of the First-tier Tribunal, granted permission to appeal on 21.4.16.

3. Thus the matter came before me for an error of law hearing on 3.6.16 as an appeal in the Upper Tribunal.

4. As set out in my error of law decision, promulgated 23.6.16, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Buckwell to be set aside and remade. I reserved the remaking of the decision to myself in the Upper Tribunal, giving leave for further evidence to be adduced as to the claimants' current circumstances in the UK.

5. The resumed hearing was listed before me at Field House on 21.7.16. Despite my directions that there should be a single consolidated and paginated bundle, Mr Archarjee relied on two separate bundles: the original bundle, unhelpfully marked as sections A to H, rather than simply paginated. Mr Archarjee also relied on a so-called supplementary bundle, marked in similar style, J to O.

6. Before making any of my findings of fact, I have carefully considered all documents placed before me, from both bundles, including in particular the adult claimants' unsigned witness statements of 26.5.16 in the first bundle, and those of 18.7.16 in the supplementary bundle.

7. After hearing further oral evidence from both adult claimants I reserved my decision, which I now give.

8. A typed note of the oral evidence of the two adult claimants and the submissions of the representatives is with the case papers.

9. I bear in mind that generally the burden of proof rests on the claimants, on the balance of probabilities. However, under any article 8 proportionality assessment the burden lies on the Secretary of State to demonstrate that removal is proportionate to the article 8 ECHR private and family life rights of the claimants.

The Background

10. The relevant background can be summarised as follows. The first claimant came to the UK with leave as a Tier 4 student. His wife and son are dependants on his claim, and their appeals stand or fall with his. In May 2014 the first claimant applied for further leave to remain as a Tier 4 student. His application was refused because he failed to meet the requirement under paragraph 245ZX(c) to show competence in English language at minimum CEFR level B2 and to prove this by production of an

original certificate from an approved English language test provider. He failed to submit the required original certificate. In consequence, he failed to qualify under Appendix A for the necessary 30 points for a Confirmation of Acceptance for Studies. The application was refused on 7.7.14.

11. The first claimant's case was that because of illness he was unable to sit all the English language components at Trinity College. The application was submitted without the necessary documentary evidence, as at that time not all the component English language certificates had not been obtained. However, the CAS was sent after the application, on 27.6.14, but the missing English language result was published online on 26.6.14 and then sent electronically to the Home Office. However, as no original certificate had been received the application was refused on 7.7.14.

The decision of the First-tier Tribunal

12. In the First-tier Tribunal appeal, Judge Buckwell concluded at §32 that the first claimant failed to satisfy the requirements of the Immigration Rules, as all original documents were not submitted with the application and were not received by the date the decision on the application was made by the Secretary of State.

13. However, Judge Buckwell, who evidently had considerable sympathy for the first claimant, went on to allow the appeal on human rights grounds on the basis that all requirements had in effect been met by the date of the decision of the Secretary of State. At §39 the judge concluded "I believe this to be a rare case where the interference with the private life rights enjoyed by the First (claimant) cannot be justified by the respondent being lawfully entitled to rely upon Article 8(2) ECHR." The judge allowed the appeal on the basis that the decision was disproportionate.

The Error of Law

14. In granting permission to appeal, Judge Martin found it arguable that the judge erred in failing to identify the circumstances justifying a consideration of article 8 outside the Rules, and secondly in misdirecting himself as to the wording of section 117B(5) at §35 of the decision.

15. Although allowing the appeal on human rights grounds under article 8 ECHR private and family life, the judge omitted to make any consideration of the family and private life Rules of Appendix FM and paragraph 276ADE, before going on to article 8 ECHR.

16. Further, before article 8 ECHR can be considered outside the Rules an appellant must demonstrate that there are compelling or exceptional circumstances insufficiently recognised in the Rules so as to justify granting leave to remain outside Rules under article 8 ECHR, on the basis that the decision is unjustifiably harsh. In SSHD v SS (Congo) & Ors [2015] EWCA Civ 387, the Court of Appeal re-stated the context and considered the role of public policy as expressed in the Rules in the proportionality assessment. The decision maker is entitled to decide that Article 8 considerations

have been fully addressed in the Rules when dealing with 'stage two'. If they have, it is enough to say so. This will necessarily involve deciding whether there is a 'gap' between the Rules and Article 8, and then whether there are circumstances in the case under consideration which take it outside the class of cases which the Rules properly provide for. Whether these circumstances are described as 'compelling' or 'exceptional' is not a matter of substance. They must be relevant, weighty, and not fully provided for within the Rules. In practice they are likely to be both compelling and exceptional, but this is not a legal requirement. The first stage, therefore, is to assess how completely the Rules reflect Article 8 considerations.

17. The First-tier Tribunal Judge failed to identify any compelling circumstances but went straight to a human rights assessment under article 8 ECHR. However, even in that assessment the decision was fatally flawed.

18. First, it appears that the judge allowed the appeal on the basis that the first claimant was a good student with adequate funds. Even though he did not provide the required documents with his application, not even before the decision was made, the judge considers that the Secretary of State should have delayed making the decision, should have made enquiries about his claimed illness (in respect of which no evidence was adduced), and because by the date of decision the Secretary of State knew that he met the English language and CAS requirements.

19. In effect, the First-tier Tribunal judge used article 8 as a general dispensing power to excuse compliance with the Immigration Rules. The judge failed to take account of Patel, referenced in the decision at §33, which reminded judges that article 8 is not a general dispensing power and that the opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8.

20. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

21. The panel considered at length article 8 in the context of work and studies. The respondent's case was that none of the appellants could demonstrate removal would have such grave consequences as to engage article 8. §57 of Patel stated, "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right… The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."

22. At §14 of Nasim [2014], the panel stated: "Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands

the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control."

23. The panel pointed out that at this point on the continuum, "the essential elements of the private life relied on will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country, (§15)" and (§20) recognised "its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

24. The decision of the First-tier Tribunal provided no sufficient justification in law for allowing the appeal on article 8 private life grounds. However, even the proportionality balancing exercise was flawed.

25. At §35 the First-tier Tribunal judge acknowledged section 117B of the 2002 Act and that immigration control is in the public interest. However, the judge in error of law failed to properly consider that the claimants' immigration status was at all times precarious so that little weight should be given to their private life in the UK, pursuant to AM Malawi [2015] UKUT 260 (IAC). The judge misdirected himself in law when he stated that this provision does not apply as the appellant was seeking to extend his leave for educational purposes. Neither does the claimant obtain any credit in the proportionality balancing exercise for being able to speak English or being a good student, or because he is financially independent of the state. This ground of appeal is made out.

26. Applying the above guidance and case authority, it is clear that the decision of the First-tier Tribunal was flawed for error of law and cannot stand.

The remaking of the decision in the appeal

27. First, it is clear that none of the claimants can meet the requirements of the Rules for leave to remain in the capacity sought.

28. I reject Mr Archarjee's submission that paragraph 245AA should have applied so as to require the Secretary of State to await the English language certificate and/or CAS before making the decision. 245AA provides that specified documents must be provided with the application and that the Secretary of State will only consider documents submitted after the application in certain defined circumstances set out under paragraph 245AA.

29. In this application the claimant failed to submit the original English language document with the application. 245AA makes clear that documents will not be requested where a specified document has not been submitted, with a missing English language certificate cited as an example. 245AA does not assist the claimants. Neither do I accept that the decision was procedurally unfair.

30. It is also clear that none of the claimants can meet the requirements of either Appendix FM or paragraph 276ADE of the Immigration Rules for leave to remain. None of them meet the Appendix FM eligibility requirements in relation to settled status in the UK. Even if EX1 was considered, there is nothing on the facts of this case that would amount to insurmountable obstacles, as defined by EX2, to continuing family life in Bangladesh, where they would return to as a family unit. Employment or accommodation concerns, or the lack of support from the wider family are factors that cannot possibly be construed as insurmountable to family life continuing in Bangladesh. The family life of this family in the UK was entirely precarious in the sense of any expectation of being able to enjoy the continuation of family life in the UK.

31. Further, none of the claimants can show sufficient length of residence in the UK to meet paragraph 276ADE, or that there are very significant obstacles to their integration into Bangladesh, where the adult claimants have lived most of their lives, speak the language, and have retained undoubted cultural ties and family ties, if not also social ties. I note that they claim that their relationship with family members has gradually decreased, but it is not suggested they are non-existent.

32. As as this is an in-country application in remaking the decision in the appeal I have to consider the circumstances prevailing at the date of the re-making, which I have done. I take into account that the first claimant came to the UK in 2007 and their child born in the UK is now 5 years of age. I have also taken account as a primary consideration under section 55 of the best interests of the claimants' child, who is doing well at school and who has never lived in Bangladesh. However, he does not meet the 7 years' threshold requirement of paragraph 276ADE. It is undoubtedly the case that the child's best interests are to remain with his parents and if the parents are to be removed the starting point in respect of the child is that he should be removed along with his parents. Other than the fact that he has started school and will have some associations with friends arising from that fact, and that he will probably speak English well, there are no factors that would suggest the best interests of the child are to remain in the UK. He has no right to live, settle or be educated in the UK. He is young enough and will have the support of his family to adapt and settle in Bangladesh and learn Bengali.

33. I take into account the claimants' degree of connection to the UK with associations with friends and others in the UK that has arisen since 2007, as well as the letters of reference and support. However, the adult claimants came to the UK with the intention of returning to Bangladesh on completion of studies. They had and have no legitimate right to expect to be able to settle in the UK. Their immigration status was always precarious and having a child born in the UK does not change that position.

34. Whilst the claimants assert they will find difficulties finding employment and have no property or assets to return to, that is not the test for leave to remain in the UK. It is not the responsibility of the UK to ensure that they have a lifestyle or can live comfortably in Bangladesh. They have skills and education that they can apply to providing for themselves.

35. I note from the latest witness statements that various matters are raised that appear to be an asylum claim. Reference is made to religious extremists, and rival political factions, and that the adult claimants do not feel safe in returning to Bangladesh. However, no asylum claim has been made and these references do not allow this Tribunal to assess risks on return unless there has been a proper application to the Secretary of State and decision in respect of any such application.

36. Frankly there is nothing particularly rare or even remarkable at all in the oral evidence or witness statements that is or would or could be properly described as compelling or exceptional circumstances. I can see no gap between the Rules in relation to private and family life and article 8 ECHR. In my view, there is no basis to find that leave to remain outside the Rules is justified because of compelling circumstances inadequately recognised under the Rules, so as to render the removal decision unjustifiably harsh. I find no reason to consider article 8 outside the Rules on the facts of this case.

37. In any event, even if I were to consider article 8 outside the Rules, under a Razgar staged approach, the appeal would be bound to fail.

38. First, I find that there is no interference with family life sufficiently serious as to engage article 8, as the claimants will be removed together and do not claim to have any other family connections in the UK, but they have family in Bangladesh, even if their contact with those family members has diminished over the years.

39. In respect of private life, section 117B of the 2002 Act provides that immigration control is in the public interest and that little weight should be given to any private life developed in the UK whilst the claimants' immigration status was precarious, as it was. In effect, residence in the UK as student and dependents does not, without more, accumulate private life rights enforceable under article 8, as their removal does not impinge on the moral and physical integrity of the claimants. They are free to develop their private life in Bangladesh and maintain contact with friends in the UK through modern means of communication and occasional visits. That the claimants speak English or are financially independent of state support is irrelevant to this consideration, as stated above.

40. Taking the evidence as a whole, I am not satisfied that any interference with their private life which will be occasioned by their removal is sufficiently serious to engage the protection of article 8 ECHR. However, in the proportionality balancing exercise between on the one hand the claimants' private (and family) life and on the other the legitimate and necessary aim to protect the economic well-being of the UK through immigration control, it is clear that the removal of the claimants would not be disproportionate, for the reasons stated above.

Decision

The appeal of each claimant is dismissed on both immigration and human rights grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **26 July 2016**

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **26 July 2016**