Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38390/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 December 2015	**On 18 January 2016**

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
Mr H J E LATTER (DEPUTY UPPER TRIBUNAL JUDGE)

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Kandola, Home Office Presenting Officer
For the Respondent: Ms R Akther, instructed by Taj, Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Chamberlain) allowing an appeal by the applicant (the respondent to this appeal) against a decision made on 28 August 2014 refusing to vary his leave to remain on private life grounds. In this decision I will refer to the parties as they were before the First-tier Tribunal the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Bangladesh born on 5 January 1984. He claims that he arrived in the UK in 1998 making an unlawful entry with the assistance of an agent. He remained without leave until 31 August 2011 when he applied for leave outside the rules, which was granted from 13 October 2011 until 13 April 2012. On 4 April 2012 he applied for leave to remain on the basis of exercising access rights to his child. His application was refused on 9 September 2013 but following the appellant lodging an appeal, on 9 June 2014 the respondent withdrew the decision and made a further decision on 27 August 2014 refusing the application. The respondent was not satisfied that the appellant was able to meet the requirements of Appendix FM for leave to remain as a parent or that he could bring himself within the provisions of paragraph 276ADE in respect of his private life.

The Findings of the First-tier Tribunal Judge

3. At the hearing before the First-tier Tribunal the appellant gave oral evidence and produced documentary evidence in support of his appeal. The respondent was not represented and there was therefore no cross-examination of the appellant. The judge noted this when assessing credibility [10] but she found the appellant to be an honest witness who had been open in his answers and not evasive. She found that his evidence was consistent with the documentary evidence and could be relied on. She made the following findings of fact. The appellant had come to the United Kingdom in 1998 when he was 14 and had been supported by his relatives. She noted that there was no other evidence to show the date of his arrival but there was a letter from a health centre confirming that he had been registered with the practice since 2000. At the date of hearing the appellant was 31 years of age and had lived in the UK for seventeen years. She found that it was not his decision to come to the UK when he was a minor but his parents had sent him here. The appellant said that he now realised that his parents did this so that he could work and send money back to them. However, he had not sent money back to his family in Bangladesh.

4. The judge accepted that the appellant had had a child following a relatively short relationship with a partner. There had been a number of problems, which led to care proceedings and to a full care order and placement order with the local authority. In his witness statement the appellant explained that he had fought hard to have direct access to his child but at present had only been granted indirect contact twice a year.

5. The judge accepted the appellant's evidence that in consequence of him fathering a child outside marriage his family had disowned him as they were a very religious Sunni Muslim family. She found that the appellant last had contact with his mother some three years ago when he contacted her through desperation because of the proceedings in respect of his child. He sought help from his family but that was refused. The judge accepted the appellant's evidence that he did not have any contact with friends in

Bangladesh given the young age when he came to the United Kingdom and the amount of time he had been here. She considered the provisions of paragraph 276ADE(1)(vi) and found that the appellant would face very significant obstacles in reintegrating into Bangladesh and she accordingly allowed the appeal on private life grounds.

6. The judge went on to consider article 8 outside the rules. She accepted that the appellant had established family life sufficient to engage the operation of article 8 and that the respondent's decision would interfere with that life. She carried out a proportionality assessment taking into account s.117B of the Nationality, Immigration and Asylum Act 2002 as amended. She took into account that he did not have a genuine and subsisting parental relationship with his child but she accepted that he had indirect contact. She noted the comments of the district judge in the family court that the appellant "loves his son very much and does want to do everything he can to be with his son and to care for him". The judge found that it was not in the best interests of the appellant's child to have his father removed so far away as to extinguish all hope of contact in the future. She found that removal would be disproportionate to a legitimate aim and accordingly the appeal was also allowed on article 8 grounds.

The Grounds of Appeal and Submissions

7. In the respondent's grounds of appeal it is argued that the judge's finding that the appellant would face "very significant obstacles in reintegrating into Bangladesh" proceeded on a legally erroneous interpretation of that phrase. The appellant was a young and healthy male brought up in the UK by relatives of Bangladeshi origin in an area densely populated by people from Bangladesh. He had not turned his back on his religion, his culture, his wider family or national identity and continued to speak Bengali. His relatives could continue to provide him with financial support as they had done for the previous sixteen years. The grounds argue that the judge either misdirected herself in law or came to an irrational finding.

8. In so far as article 8 was concerned, as his child had been adopted and he only had indirect contact, any presumption of family life had been rebutted. The judge had also erred, so it was argued, by factoring into the proportionality exercise the appellant's claim that he wanted to fight for custody of his son and had no hope of doing that outside the UK. Indirect contact could continue from Bangladesh or the appellant could visit for any court appointed direct contact which in any event would not be very frequent. Further, apart from being able to speak English the whole of S117B was against the appellant.

9. Mr Kandola adopted these grounds in his submissions. He accepted that the factual matrix was not in dispute. He pointed out that in [16] the judge had referred to the fact that the appellant "would face significant obstacles" on return rather than "very significant obstacles" as required by the rules. This, he argued, indicated that the judge may not have applied the proper test under the rules. He submitted that there was no evidence that the appellant had relinquished any ties to Bangladeshi

culture and that the judge's findings on the issue of private life were irrational. So far as article 8 was concerned, he argued that the judge had wrongly proceeded on the basis that it would be open to the appellant at some point in the future to fight for custody when there was no realistic prospect of any such application succeeding.

10. Ms Akther submitted that the judge had reached a decision properly open to her. In substance, the respondent's grounds indicated a disagreement with the judge's assessment of the facts. She had correctly set out the relevant legal tests and had given more than adequate reasons for her decision. She had accepted that this was an unusual case and given clear reasons for her decision. It was not arguable that her findings were not properly open to her.

Assessment of Whether there is an Error of Law

11. The issue for us is whether the judge erred in law such that her decision should be set aside. We are not satisfied that she made any such error. When dealing with the application based on the appellant's private life she had to consider whether he met the requirements of paragraph 276ADE(1)(vi), which provide as follows:

> "(vi) ... [The applicant] is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

12. The judge found the appellant to be an honest witness. She accepted that he had arrived in the UK in 1998, that his family had disowned him owing to his relationship with his former partner and the fact that he had had a child outside marriage. She also accepted that his father had died and that his mother in Bangladesh now had no contact with him. She recorded in [14] that the appellant described his family as "non-existent to me." She set out in [16] that the appellant would face significant obstacles on return to Bangladesh. We are not satisfied that this indicated that the judge was applying the wrong test. She had referred to "very significant obstacles" in [7], [11] and when setting out her decision in [18]. The respondent does not satisfy us that the judge either applied the wrong test or that she reached an irrational decision. She took into account all the appellant's circumstances. She noted that he spoke "a bit of Bengali" [17] but said that this alone was not enough to enable him to reintegrate into a country which he had left seventeen years previously.

13. In summary, we are satisfied that the judge reached a conclusion which was properly open to her on the evidence in the light of her findings of primary fact. She was entitled to find that in the appellant's circumstances there would be very significant obstacles to him reintegrating into Bangladesh.

14. As we have found that the judge did not err in law in her assessment of the application made within the rules, we need only deal briefly with the challenge to the decision made outside the rules. In substance the challenge is that the judge failed to take adequate account of the provisions of s.117B and proceeded on a misapprehension that the appellant would be able to make an application either for custody or further contact to his child. Firstly, we are not satisfied there is any substance in the point relating to s.117B. The judge at [22]-[25] took these factors into account. She noted that little weight should be given to private life but was equally entitled to note that the appellant had had leave following his application in 2011. She was entitled to take into account the fact that the appellant had been a minor when he came to the UK and could not be held responsible for the manner in which he arrived. Secondly, the judge recorded the fact that the appellant said he wanted to fight for custody of his son but her comments in [26] were primarily based her finding that it would not be in the best interests of the appellant's son to have his father removed so far away so as to extinguish all hope of contact in the future. We are not satisfied that the criticisms made of the way the judge carried out the proportionality exercise indicate that she erred in law or proceeded on a mistaken view of the facts.

Decision

15. We are not satisfied that the judge erred in law and it follows that the decision of the First-tier Tribunal stands. There has been no application to vary or discharge the anonymity order made by the First-tier Tribunal and this remains in force.

Signed H J E Latter

H J E Latter
Deputy Upper Tribunal Judge Latter

Date: 12 January 2016