Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19896/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre (remote)	**Decision & Reasons Promulgated**
On: 17th September 2020	**On: 21st September 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Mohammed Naeem Alikhel
(aka Sabawoon Alikhel)
(no anonymity direction made)

Respondent

For the Appellant:	**Mrs Aboni, Senior Home Office Presenting Officer**
For the Respondent:	**Mr Jacobs, Counsel instructed by J McCarthy Solicitors**

DECISION AND REASONS

1. The Respondent is a national of Afghanistan born on the 1st January 1975. On the 1st April 2020 the First-tier Tribunal (Judges Easterman and Robinson) allowed his appeal on human rights grounds. The Secretary of State now has permission to appeal against that decision.

2. The Respondent has lived in the United Kingdom since at least February 2003 when he first came to the attention of the immigration authorities by claiming asylum. He was then 28 and he used the name Sabawoon Alikhel. He was

refused asylum but remained here. No effort having been made to remove him the Secretary of State finally recognised that for pragmatic reasons he should be permitted to stay. He was granted Indefinite Leave to Remain (ILR) under what became known as the 'legacy' scheme in 2010. He settled in London and found work as a butcher. He paid taxes and has never claimed any state benefits.

3. In February 2015 the Respondent applied for what is described as a 'No Time Limit' endorsement on his passport. When he did so, he gave the name Mohammad Naeem Alikhel. The Home Office responded by revoking his ILR on the grounds that he had used deception when he obtained that leave in the name Sabawoon Alikhel. The Respondent attempted to regularise his position – apparently at the suggestion of the Home Office - by making an application for leave to remain on human rights grounds, but this too was refused, and certified with reference to s94(1) Nationality, Immigration and Asylum Act 2002. The effect of that certificate is that the Respondent was deprived of a right of appeal. He sought judicial review, proceedings which were settled by consent.

4. That was how this matter came before the panel of the First-tier Tribunal in March of this year. The Judges heard the evidence of the Respondent and four additional witnesses before hearing submissions from the parties. Having done so they reached the following factual conclusions:

    i) That the Respondent was telling the truth when he described Sabawoon as a nickname that he is commonly known by.

    ii) He had gained nothing from the use of the name, which he is known by to this day.

    iii) There is nothing in law which prevents the Respondent from using the name Sabawoon.

    iv) Nor was there any lawful impediment to him using both names if he wished to do so.

    v) The only reason that the Respondent disclosed the name Mohammad Naeem Alikhel in 2015 was because he wanted his official documents in this country to be brought in line with his official documents in Afghanistan, viz an identity card that he had been issued with as a child.

    vi) In light of the above it has not been shown that the Respondent ever used deception.

5. From these findings of fact the Tribunal proceeded to consider the case within the legal framework permitted to it in the context of a human rights appeal. It

first considered whether the Respondent qualified for leave under paragraph 276ADE(1). He didn't. Then the Tribunal considered Appendix FM. He didn't qualify for leave under those provisions either. Turning to Article 8 'outside of the rules' the Tribunal noted that the Respondent's case appears to fall into a lacuna not envisaged by the drafters of the rules. Having had ILR he was wrongly deprived of it, exposing him to the risk of prosecution, fines and imprisonment for remaining here with no status; he is unable to work, rent a home, claim benefits or receive NHS treatment. He is not even permitted to drive or have a bank account. Absent any finding of deception there was nothing on the Secretary of State's side of the scales to say that refusing leave would be proportionate. The appeal was therefore allowed.

6. The Secretary of State appeals on the ground that the Tribunal failed to articulate where the breach of Article 8 would arise if the Respondent is refused leave, or indeed removed to Afghanistan. The Secretary of State further submits that since the Respondent failed to meet the requirements of the rules it was incumbent upon the Tribunal to consider the public interest as articulated in s117B Nationality, Immigration and Asylum Act 2002.

Discussion and Findings

7. Permission to appeal should never have been sought, or granted, in this case.

8. The legal framework for the determination of Article 8 appeals in this jurisdiction may appear to be complex but in fact it is quite simple. Decision makers must first assess whether the claimant can meet the requirements of any immigration rule. That is the first port of call because the rules, or at least those rules expressly framed as such, have been approved by parliament as being reflective of where, in the vast majority of cases, the balance between the Article 8(1) rights of the individual and the Article 8(2) rights of the state are to be struck. If the claimant cannot meet the relevant requirement, that is not the end of the matter. The drafters of the rules cannot be expected to have legislated for each and every permutation of human life and its interaction with authority. There will always be cases where there is a good reason to conclude that a refusal of leave would be contrary to the United Kingdom's obligations under the European Convention.

9. In this case the Respondent could not hope to meet any of the relevant rules. The Tribunal quite correctly identified, however, that on the peculiar facts of his case, the rules were largely irrelevant because they simply did not address his situation. The Tribunal were therefore required to assess the proportionality of the situation in light of that lacuna.

10. This was a man who had held ILR in the United Kingdom for many years. He had here an established private life and the legitimate expectation that he would – absent some unforeseen event like serious criminality or a dramatic

change in the law – be permitted to remain here for the rest of his life. All of that was taken away from him in 2018 when the Secretary of State unilaterally revoked his ILR on the grounds that he had exercised deception. But for that decision, the Respondent would still be working as a butcher, would still be entitled to the various legal advantages that settled status brings, and would still have his ILR. This was why the parties before the First-tier Tribunal agreed that the only matter in issue was whether the Respondent had in fact exercised deception. If he had then the public interest in refusing him leave would have been so substantial that it is difficult to see how, on the facts, it could have been overcome. If on the other hand he had not, there was nothing at all weighing on the Secretary of State's side of the scales.

11. The first ground of appeal is that the First-tier Tribunal failed to identify how the decision to refuse leave might have interfered with the Respondent's private life. This ground is without any foundation. The Tribunal sets out at its §57 why this decision manifestly interfered with multiple facets of the life that the Respondent has established here for himself (see my §5 above).

12. The second ground is that the First-tier Tribunal failed to have regard to the public interest as codified in s117B Nationality, Immigration and Asylum Act 2002. It is true that the Tribunal does not expressly make findings on all of these matters. Section 117B is however set out in its entirety earlier in the decision, and I have no reason to believe that the Tribunal excluded those matters from its consideration. Furthermore the fact is that a comprehensive evaluation of each of the public interest factors at s117B(1)-(5) could not have added anything to the Secretary of State's case. It is in the public interest that immigration control is maintained: the Respondent was fully compliant with the terms of his grant of leave. It is in the public interest that claimants are financially independent: before being stripped of his status and being unable to work, he was. It is in the public interest that claimants can speak English: he can. Finally little weight is to be attached to a private life established when the Appellant was here unlawfully or when status is precarious: the Respondent places reliance on the private life established in this country since he was granted indefinite leave to remain, leave that applying Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 [at §44] cannot be described as "precarious". As Mrs Aboni rightly accepted, in those circumstances the First-tier Tribunal could have done nothing but allow this appeal.

13. I therefore dismiss the Secretary of State's appeal. The only unsatisfactory thing about the First-tier Tribunal decision is the fact that its effect, insofar as the Respondent is concerned, is that he is now entitled to 30 months' leave to remain. He will thereafter will be placed on a '10 year route' back to settlement which will involve a number of applications and many thousands of pounds in application fees. In light of the history of this matter, and the unchallenged findings of the First-tier Tribunal, the Secretary of State will no doubt give anxious consideration at a high level to whether the Respondent should simply

have his indefinite leave to remain reinstated, and any of the usual fees waived. The question of an apology, and any financial restitution for the losses suffered by the Respondent, is a matter to be resolved between the parties.

Decisions

14. The decision of the First-tier Tribunal contains no error of law and it is upheld. The Secretary of State's appeal is dismissed.

15. There is no order for anonymity.

Upper Tribunal Judge Bruce
17th September 2020