Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11672/2019

THE IMMIGRATION ACTS

Heard remotely at Field House On 21 January 2021 *via Skype for Business*	**Decision & Reasons Promulgated On 24 February 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

BAKSHU AHMED RASHED ADNAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Fazli, Counsel, instructed by Barclay Solicitors
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to are in the appellant's bundle from the first-tier Tribunal, the grounds of appeal, and written submissions from the appellant and respondent, the contents of which I have recorded.
The order made is described at the end of these reasons.

The parties said this about the process: they were content the proceedings had been conducted fairly in their remote form.

1. This is an appeal against a decision of First-tier Tribunal Judge Cameron dated 17 January 2020 dismissing an appeal by the appellant, a citizen of Bangladesh born on 5 May 1992, against a decision of the respondent dated 24 June 2019 to refuse his human rights claim.

2. The essential issues are whether the judge erred in finding that the appellant's removal would be proportionate for the purposes of Article 8 of the European Convention on Human Rights, and whether the judge erred in relation to his analysis of the appellant's claimed family life with a non-blood relative.

Factual background

3. In 2008, the appellant's parents brought him to this country on a visit visa. They left him under the care of a friend of the family, Mr Ali, and returned to Bangladesh shortly thereafter. The appellant was aged 13 at the time. He has lived here ever since, with no leave to remain. Between 2012 and 2017, he made a number of attempts to regularise the status, each of which was unsuccessful. On 28 January 2019, the appellant made further submissions in support of his human rights claim which were treated as a fresh claim, the refusal of which gave rise to the proceedings before the judge below.

4. The appellant's human rights claim, and his case before the First-tier Tribunal, was based on the private and family life links he claimed to have established during his residence here. He also claimed to have lost all contact with his family in Bangladesh, as he was angry with them at having been abandoned by them here.

5. The judge heard evidence from the appellant and a friend of his, Foyzul Islam. Mr Ali, it was said, was unable to attend as he had been called to Bangladesh due to a family emergency. The judge rejected the appellant's evidence that he no longer had any contact with his family [60], and also rejected the appellant's evidence that he had not seen his father during two return visits his father made to this country in 2010 [61]. The judge rejected Mr Ali's written evidence that, as the appellant's guardian, he had not been aware of the need to regularise the appellant's immigration status [63].

6. The judge accepted that the appellant had lived in this country for over half his life. The judge did not accept that during that time he had established "family life" with Mr Ali for the purposes of Article 8(1) of the ECHR. That was because he was "not satisfied that the [appellant's] family would have simply ceased contact with him when they brought him over here for specific reasons…" See [64]. The judge, did however, accept that the appellant would have "established very close ties to Mr Ali and his

family which would be a very significant element of his private life." Earlier in the decision, the judge had expressed concern that, although Mr Ali was overseas, had attended to speak to the appellant's relationship with the family as a whole [57].

7. The judge found the appellant would be able to speak Bengali upon his return, and would be able to learn to read and write in the language within a relatively short period [69]. The appellant would return to Bangladesh with the benefit of having studied in this country, and would be able to use his qualifications to assist with finding employment in Bangladesh [70]. Both Mr Ali and Mr Islam had family in Bangladesh, and would be able to assist the appellant, at least initially [71]. Although the judge did not say so expressly, it appears his analysis from [59] to [72] seeks to address the "very significant obstacles" test that features in paragraph 276ADE(1)(vi) of the Immigration Rules; the judge cited Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, which is often cited as authority on the concept of "integration" for the purposes of paragraph 276ADE.

8. The judge found that the appellant's immigration status was relevant to the weight his private life attracted. His "position was precarious", found the judge [76]. The judge accepted that the appellant had formed a "substantial private life" both with Mr Ali and his family, and also with friends such as Mr Islam. Those factors attracted weight, but the appellant's position "has always been precarious although I accept that he was not responsible for being left here as a child and I also accept that he has attempted since 2012 to regularise his status" [78].

9. At [79], the judge said:

> "The fact however is that the appellant came to this country as a visitor and overstayed. He has not had leave to remain since his visit visa expired in 2006. I am not satisfied that he has lost all contact with his family or that even if he has not had recent contact that he could not re-establish contact on return to Bangladesh. He has friends in this country[,] Mr Ali and Mr Islam[,] who have ties in Bangladesh and who could assist in providing him with at least initially some support on his return."

10. Then at [81]:

> "After taking into account all of the evidence available before me I am not satisfied that the appellant has shown that there are compelling circumstances which would warrant a grant of leave outside the rules."

11. The judge dismissed the appeal.

Permission to appeal

12. The grounds of appeal contend that, first, the judge erred in his assessment of the public interest and the factors that weighed against the

appellant in the proportionality assessment, and secondly, that the judge erred in relation to whether the appellant enjoyed family life with Mr Ali.

13. Permission to appeal was granted by Upper Tribunal Judge Kekić.

14. In granting permission to appeal, Judge Kekić directed that the parties make written submissions on the issue of whether an oral hearing would be required, and gave directions for an exchange of submissions concerning the substantive grounds of appeal. The appellant, through different counsel, Adeel Malik, made written submissions on 27 August 2020. The respondent served written submissions in response on for September 2020.

15. On 20 October 2020, Upper Tribunal Judge Rintoul directed that a remote oral hearing should take place.

Submissions

16. Mr Fazli submitted that the judge treated the appellant's initially precarious, and later unlawful, immigration status as a "straitjacket", and failed to address the flexibility inherent to section 117B of the Nationality, Immigration and Asylum Act 2002. The appellant's situation was unique; having arrived age 13, he was forced into being an overstayer by his parents and could not (as the judge accepted at [78]) be held responsible for his immigration status when he was a child. By the time he reached the age of majority, he had established a significant private and family life in this country, and by the time of the hearing, had been resident for over half of his life. The judge's assessment of "precariousness" featured too heavily in his analysis, Mr Fazli submits, without any recognition of the flexibility inherent to section 117B, nor the difference of approach in relation to the analysis of "family life" under that same provision.

17. Secondly, Mr Fazli submitted that the judge fell into error when finding that "family life" did not exist between Mr Ali and the appellant for the purposes of Article 8 of the ECHR. The judge based his analysis, submits Mr Fazli, on the erroneous premise that family life could either exist between the appellant and his family in Bangladesh, or between Mr Ali and his family in this country, but not both. Although the judge had expressed some reservations about the fact that neither Mr Ali nor any members of his family had attended to give evidence, the judge accepted that there were "very close ties" (see [65]) between the appellant and Mr Ali and his family, and accepted that there was a "substantial private life… with Mr Ali and his family" (see [77]). The judge appeared to ascribe significance to the fact that Mr Ali was not a member of the appellant's "blood family" when finding that "family life" did not exist, which was incompatible with the jurisprudence on Article 8: see Uddin v Secretary of State for the Home Department [2020] EWCA Civ 338 at 34, per the Senior President of Tribunals. Mr Fazli also submitted that the judge's findings concerning the appellant's claimed loss of contact with his family in Bangladesh were not open to him.

18. For the respondent, Ms Isherwood contends that the judge reached a decision open to him on the facts of the case. The judge was entitled to find the appellant had lost contact with his family, and to observe that, as an adult with ties to Bangladesh, he would be able to integrate upon his return. The judge accepted at [65] that the appellant had "very close" ties with Mr Ali and his family, and so was aware of the nature of the links being claimed. Ms Isherwood urged me to uphold the decision of the First-tier Tribunal.

Legal framework

19. Sections 117A – D of the Nationality, Immigration and Asylum Act 2002 contain statutory public interest considerations to which a court or tribunal must have regard when determining whether a decision under the Immigration Acts breaches a person's right to private and family life under Article 8 of the European Convention on Human Rights. The operative duty is contained in section 117A(2)(a):

> "(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B…"

20. Where relevant, section 117B provides:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,

> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

21. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, the Supreme Court held that section 117A(2)(a) features an inherent degree of flexibility. Lord Wilson put it this way, at [49]:

> "…the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of 'little weight' itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above… [S]ection 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:
>
> > '53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …'"

Discussion

22. In relation to the judge's findings of fact, it is necessary to recall that an appeal to this tribunal may only be brought on the basis of an error of law, not of fact. Certain findings of fact are capable of being infected by an error of law, as notably summarised in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]. There are many judgments of the higher courts which underline the distinction between errors of fact and law. I can do no better than rely on the oft-quoted judgment of Lewison LJ in Age UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so… The reasons for this approach are many. They include
>
> > i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> >
> > ii. The trial is not a dress rehearsal. It is the first and last night of the show.

> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see Customs and Excise Commissioners v A [2002] EWCA Civ 1039; [2003] 2 WLR 210; Bekoe v Broomes [2005] UKPC 39; Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] UKCLR 1135"

23. The judgment in Fage UK Ltd. v Chobani UK Ltd is seven years old, but it continues to represent a useful summary of the law on the approach to findings of fact, and the deference owed by appellate tribunals and courts to first instance judges. See the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5 at [52], and most recently in the Court of Appeal in Lowe v Secretary of State for the Home Department [2021] EWCA Civ 62 at [29].

24. Mr Fazli's submissions concerning the judge's findings of fact do not demonstrate that the judge reached findings that no reasonable judge could have reached. The judge gave adequate reasons for the appellant's evidence that he had not enjoyed contact with his family in the last ten years [60]. The judge noted that the appellant had been brought to this country in order to obtain a better education and employment, in order to support his family in Bangladesh in the future. Against that background, the judge was entitled to reject the appellant's evidence of having lost all contact with his family in Bangladesh. Similarly, at [61] the judge accepted evidence from the respondent that the appellant's father had applied for a visa to visit this country twice in 2010. Those applications, noted the judge, had been made in order for the appellant's father to visit family in this country. The appellant had not, highlighted the judge, referred to any

other family members in this country. The judge noted at [62] that there was nothing in Mr Ali's statement detailing levels of contact with the family of the appellant at home, observing that he was not satisfied with that evidence, as the appellant's case was that Mr Ali had been a close friend of his parents, and had been willing to accept the appellant into his care in 2006.

25. These were all factors the judge was entitled to take into account. There is nothing in the analysis of the judge which was not open to him on the evidence before him. The appellant may well disagree with those findings, but they were not findings which no reasonable judge could have reached, and I declined to interfere with them.

Article 8 analysis

26. Against that factual background, I turn to the judge's Article 8 analysis.

27. Mr Fazli relies the judge's reference to the appellant not being a member of Mr Ali's "blood family" at [64], submitting that that demonstrates the judge impermissibly imposed a requirement of blood relations, inconsistent with the Article 8 jurisprudence, which recognises that family life may exist between non-blood relations. He also submits that the judge impermissibly treated the question of whether Article 8 family life exists as being the binary question of whether the appellant enjoyed family life with his family in Bangladesh, on the one hand, or whether he enjoyed family life with Mr Ali and his family in this country, on the other. Article 8 features no such requirement for exclusivity, he submits.

28. I reject these submissions. The judge did not find that, simply because Mr Ali and the appellant were not blood relations, they could not enjoy Article 8 family life with each other. Rather, the judge was correctly addressing the fact that family life cannot be presumed between non-blood relations, meaning something more would have been required for family life to exist between Mr Ali and his family and the appellant. Mr Ali, of course, had not attended the hearing to give evidence, and nor had any members of his family. The judge was entitled to find, as he did at [65], that there were "very close ties" to Mr Ali and his family on the part of the appellant, and that that would form a "very significant element" of his private life, but in the absence of further evidence, was entitled to conclude that that fell short of the threshold for family life under Article 8.

29. Nor do I accept the submission that the judge impermissibly concluded that the appellant's continued relations with his family in Bangladesh precluded the possibility of family life existing with Mr Ali and his family. At [64] when the judge said, "given my findings *at least initially*", he was plainly referring to the initial period of the appellant's residence in this country, which had been specifically at the behest of his family to further his education and later employment prospects. His father had visited the country twice in 2010, and on the judge's findings, contact had been retained. At those initial stages of the appellant's residence in this country,

family life with his Bangladeshi family would undoubtedly have continued, on the judge's findings. In turn, that was a relevant factor which the judge was entitled to take into account when considering whether the (unsubstantiated, written only) evidence in relation to the claimed family life links with Mr Ali and family were sufficient to reach the Article 8 family life threshold.

30. In concluding that family life did not exist between the appellant and Mr Ali and his family, the judge reached a finding that was open to him on the evidence, having considered all relevant factors, in light of the correct legal framework. It was not an irrational decision and there is no basis for this tribunal to interfere with it.

31. The remaining submission of Mr Fazli contends that the judge impermissibly treated the public interest considerations contained in section 117B as a "legal straitjacket". The appellant's unique circumstances, he submits, called for a more flexible approach. I reject this submission. The judge's decision was careful and balanced. It did not treat section 117B as a rigid framework, within which there was no room for judicial manoeuvre. At [74], the judge correctly directed himself concerning the approach to proportionality assessments under Article 8 pursuant to Agyarko v Secretary of State for the Home Department [2017] UKSC 11, noting that the essential question is whether a "fair balance" had been struck. At [76] he noted that "in normal circumstances" those who remain here without leave would be expected to remain, indicating that there may be some cases in which an other than normal approach was required or justified. It was in that context that he addressed the appellant's arrival here as a child, in circumstances when he was not responsible for his immigration status: [78]. The judge's operative reasoning rightly did not completely disregard the appellant's status as an overstayer, approaching the significance of that fact alongside his findings that the appellant still had family and ties in Bangladesh, as well as the potential support of Mr Ali and Mr Islam who had links to Bangladesh. Those were rational considerations. See [80]. And then finally, the judge's overall proportionality analysis was anchored to "the appellant's specific circumstances", concluding that it would be proportionate to remove the appellant. In the final analysis, there was no impermissible – or any – rigidity in the judge's assessment. This is not a case, for example in contrast to the factual matrix in Rhuppiah, where the judge felt bound by section 117B to dismiss an appeal that he may otherwise have been minded to allow. Rather, this was a decision which considered all relevant factors, demonstrated flexibility in its approach to the unique situation of the of the appellant, and reached a decision which was rationally open to the judge on the facts as he legitimately found them to be.

Conclusion

32. The decision of Judge Cameron did not involve the making of an error of law. The appeal is dismissed.

Notice of Decision

The decision of Judge Cameron did not involve the making of an error of law.

This appeal is dismissed.

No anonymity direction is made.

Signed *Stephen H Smith* Date 10 February 2021

Upper Tribunal Judge Stephen Smith