Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12903/2019
HU/12905/2019

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Tuesday 10 August 2021	**On Friday 24 August 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR B M SAIFUZZAMAN
MS AFSANA ISLAM

Appellants

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Reynolds, Counsel instructed by Lexwin solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against the decision of First-tier Tribunal Judge J S Burns promulgated on 17 February 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellants' appeals against the Respondent's decision dated 29 January 2019, refusing their human rights claim founded on Article 8 ECHR based on the Appellants' length of residence in the UK and their family and private lives. The Respondent's decision was supplemented by a decision dated 5 March 2020 dealing specifically with the First Appellant's long residence claim.

2. The Appellants are both citizens of Bangladesh. The First Appellant came to the UK on 15 April 2009 with leave which was extended to 4 October 2016. The Second Appellant came to the UK with leave as the First Appellant's partner on 20 April 2012. She has since sought to remain as his dependent. The couple have a child born in the UK in April 2017.

3. The Appellants applied for a residence card under the European Economic Area Regulations 2016 ("the EEA Regulations") on 4 October 2016. That application was refused on 21 February 2017. On 25 November 2016, the Appellants applied to remain based on their family and private lives. That application was rejected as void on 2 May 2018 (probably based on the intervening refusal of a later application). On 16 March 2017, the Appellants sought to remain outside the Immigration Rules ("the Rules") on compassionate grounds. That application was refused on 14 November 2017. The Appellants were given a right of appeal. They exercised that right of appeal, but their appeals were dismissed on 21 August 2018 and onward applications for permission to appeal were also rejected. The Appellants were appeal rights exhausted on 16 January 2019.

4. Judge Burns found as fact that the Appellants had not completed ten years' lawful residence in the UK. They could not therefore meet paragraph 276B of the Rules ("Paragraph 276B"). The Judge went on to consider their case under paragraph 276ADE(1)(vi) of the Rules but rejected it on the basis that there would not be very significant obstacles to the Appellants' integration in Bangladesh. He considered the claims also outside the Rules but concluded that the Respondent's decision to refuse the claim was not disproportionate and therefore not in breach of section 6 Human Rights Act 1998. He therefore dismissed the appeals.

5. The Appellants appeal on two grounds as follows:

   Ground (1): The Judge has reached an irrational conclusion in relation to Article 8 ECHR and/or has failed properly to consider material factors. The focus of this ground is that the Judge has failed to take into account that the Second Appellant "is a skilled worker whose role as a health and care worker falls within the shortage occupation list".

   Ground (2): The Judge has reached an irrational conclusion under Paragraph 276B. It is asserted that the Judge failed properly to apply the Home Office Long Residence guidance version 16.0 regarding time spent in the UK under the EEA Regulations.

6. Permission to appeal was refused by First-tier Tribunal Judge Fisher on 1 April 2021 in the following terms so far as relevant:

   > "... 3. I am not satisfied that there is any merit in this application. The Judge's assessment of the Paragraph 276B argument was not flawed. There was a break in the Appellant's leave from 4 October 2016 onwards and their EEA application was not an application to extend leave. Consequently, subsequent applications could not benefit from Section 3C leave. There was no procedural unfairness as the Judge accepted that Paragraph 276B had been considered by the Respondent and that it was not a new matter. In terms of the proportionality of the decisions, the Judge made findings which were open to him and his reasoning is adequate.

> He considered the best interests of the Appellants' child as a primary consideration. The fact that the second Appellant may be a senior care worker was but one consideration, and there were many others in favour of the decision.
>
> 4. Permission to appeal is refused."

7. On renewal of the application for permission to appeal to this Tribunal, permission was granted by Upper Tribunal Judge Lindsley on 17 May 2021 in the following terms so far as relevant:

> "... 3. The grounds of appeal contend, in summary, as follows. It is argued that firstly that the First-tier Tribunal erred in making an irrational decision that the removal of the appellants was proportionate when the second appellant has been a skilled health and care worker, as defined within the shortage occupation list, working in the UK since 2012 at a time when the UK is trying to attract such people as migrants from abroad. It is argued that the First-tier Tribunal errs at paragraph 55 of the decision in failing to consider the impact of the second appellant's contributions to society in the UK through the lens of public interest, applying what is said by McCloskey J in Forman (ss 117A-C considerations) [2015] UKUT 412, as a factor which ought to have been taken into account as it properly bears on the public interest question.
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> 4. Secondly, it is argued, that the conclusions regarding paragraph 276B of the Immigration Rules at paragraphs 30 and 42 of the decision are irrational in finding that the EEA application did not provide the appellants with a lawful basis to remain as this fails to properly apply the guidance in Home Office Long Residence Version 16.
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> 5. The first ground is arguable. The second ground does not appear to be arguable due to the findings at paragraph 39 of the decision but both grounds may be argued."

8. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

9. The hearing was conducted on a face-to-face basis. There was some confusion at the outset as it appeared that the Appellants' bundle held by this Tribunal was not the most up-to-date one. The bundle which Mr Reynolds had ran to significantly more pages and included witness statements dated it seems on the day of the hearing (which was finally agreed to have been on 15 February 2021 and not 15 December 2021 as stated in the Decision). The Tribunal arranged to have copied the relevant documents from the Appellants' updated bundle to which the parties wished to refer. However, due to the confusion caused, I have referred to documents hereafter by summary of content rather than page number.

DISCUSSION

Ground (2) – Paragraph 276B

10. I begin with the second ground. Although Mr Reynolds did not formally concede this ground, he relied only on what was said in the pleaded grounds. I concur with Judge Lindsley's view of this ground as not even arguable for the following reasons.

11. The Appellants rely on what is said in the Home Office Long Residence Version 16.0 guidance ("the Guidance") concerning "[t]ime spent in the UK with a right to reside under EEA regulations". Although the Appellants made an application for a residence card under the EEA Regulations in 2016 which was subsequently refused a few months later, there appears to be no factual basis for a claim that they had any right to reside under the EEA Regulations. Mr Reynolds frankly admitted that he had not asked the Appellants about the basis of that application.

12. It appears from [35] of the Decision based on the First Appellant's evidence before Judge Burns that the reason for the application was "to cover the position until such time that he was able to make a further application for a work visa, at which point the EEA application would be withdrawn". As Judge Burns there remarked "the EEA application was not submitted for the proper purpose of obtaining a residence card to which the Appellants had any entitlement …but simply for an ulterior purpose."

13. The First Appellant's very frank admission fundamentally undermines the Appellants' second ground. It is not suggested (nor could it be) that either Appellant was an EEA national or the family member of an EEA national. The grounds state that the application made by the Appellants was under regulation 8 of the EEA Regulations ("Regulation 8") (therefore as extended family members) and not regulation 7.

14. Whilst the Guidance instructs caseworkers to consider exercising discretion in respect of EEA nationals or their family members in relation to the treatment of a period of residence under EU law as lawful leave, that does not apply to those who had no lawful basis to stay in the UK under the EEA Regulations. As the Appellants' grounds appear to accept at [15], Regulation 8 does not confer a right to reside. and it is therefore difficult to understand how the application under the EEA Regulations or any entitlement to stay under EU law is said to benefit the Appellants. In any event, based on the First Appellant's admission in evidence, the Appellants did not have any basis to claim to stay in the UK as extended family members either.

15. If and insofar as the grounds seek to suggest that an application under the EEA Regulations extends leave on a statutory basis under section 3C Immigration Act 1971, that is without any conceivable merit. Section 3C is expressly limited to an application to vary leave made whilst a person has extant leave to remain. An application under the EEA Regulations is not such an application. An EEA national or family member relying on an EU law right to remain is (or was at the time of the Appellants' application) expressly exempt from the requirement of leave to remain under the Immigration Act 1971.

16. Judge Burns dealt with the Appellants' case in relation to the period of lawful residence at [12] to [42] of the Decision. His reasoning and conclusion are unimpeachable. His conclusion that the Appellants had no leave to remain after 4 October 2016 is plainly correct. There is no error of law disclosed by the grounds.

Ground (1) – Article 8 ECHR

17. The Appellants assert that the Judge "has erred in his assessment of the public interest and/or proportionality in the Appellants' removal from the United Kingdom". The foundation for that assertion is that the Second Appellant is a health and care worker whose role falls within the shortage occupation list. The relevant Secretary of State (for Health) is seeking to attract migrants from abroad to fill the gaps in that sector. It is said that the Second Appellant "has worked for the same employer since 2012" and that she "works on the front line and provides care services in the midst of a deadly and unforgiving disease" (presumably intending to refer to Covid-19). As the drafter of the grounds must be aware and as I will come to, that latter assertion is factually inaccurate since the Second Appellant has not had permission to work and therefore has not worked as a care worker since 2016.

18. The grounds assert that the Judge "has failed to properly and/or rationally consider the impact of the public interest on the Appellants' removal in light of the fact she works as a care worker at a time of global and labour shortage". Reliance is placed on the guidance given by this Tribunal in Forman (ss117A-C considerations) [2015] UKUT 412 ("Forman") as follows:

> "(i) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.
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> (ii) The list of considerations contained in section 117B and section 117C of the Nationality, Immigration and Asylum Act 2002 (the '2002 Act') is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question.
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> (iii) In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect."

19. The Appellant submits that the Judge failed to consider the impact of the Second Appellant's contribution and societal benefit through the lens of the public interest and whether that contribution "diluted the public interest in their removal from the United Kingdom as a family".

20. I turn next to the evidence which was before the Judge about the Second Appellant's work. In her witness statement dated 10 February 2021 she sets out at [11] to [16] her background. She worked as a carer for Hopscotch Homecare ("Hopscotch") from 2012. She became a "qualified carer and a healthcare assistant". She later became a "senior care worker". Hopscotch is described as a "specialist and multi-lingual care provider". In the 2015-16 tax year, the Second Appellant was earning over £21,000 per annum. Documents in the bundle attest to the Second Appellant's qualifications, employment history and salary. I accept that the Second Appellant is said to have been a valued employee for Hopscotch and, although it is not in evidence, I accept

Mr Reynolds' submission that they would welcome her back were she permitted to work in the UK.

21. The Second Appellant goes on to say that she had recently become aware that the UK Government was seeking to recruit those with her qualifications from abroad. She says that those coming from overseas would not have her qualifications and experience gained whilst in the UK. She also makes reference to the role as being one contained in the shortage occupation list. I was taken to that list in the bundle which confirms that to be the case and indicates that the salary which the Second Appellant was earning is commensurate with that in the list.

22. The Second Appellant asserts in her statement that "it would be contrary to the public interest and contrary to the economic interest and effective immigration control as the job I would be able to undertake would [in] any event have to be replaced by hiring a migrant worker with possibly no previous UK qualification or work experience."

23. I observe that, whilst the Second Appellant's assertion about the economic interest might be understandable, it is difficult to see why effective immigration control is benefitted by permitting someone in her position (as an overstayer) to remain in the UK merely because she happens to have skills which are in short supply here.

24. That brings me on to the way in which the Judge approached this part of the Appellants' case. As Mr Lindsay correctly submits, the Decision has to be read as a whole.

25. The Judge considered the Appellants' case on this aspect as part of his balancing assessment within the Article 8 claim outside the Rules. He was obviously right to consider it at this juncture. Although Mr Reynolds referred to this aspect as always having formed part of the Appellants' application, that application was to remain based on their family and private lives. It was not suggested that the Second Appellant had made an application to remain to work as a healthcare worker within the Rules. As I understand the position, she could not have done so because she had no right to remain in the UK and would have had to return to her home country to obtain entry clearance if she wished to come to the UK as, for example, a Tier 2 migrant (assuming of course that Hopscotch was in a position to sponsor such an application).

26. The way in which the Appellants' case was put to Judge Burns appears at [50] of the Decision as follows:

> "I have taken into account the following submissions made by Mr Biggs in this regard which he put in the following way: "*The first appellant has been in the UK for over 10-years, at all times with leave or while seeking to regularise his stay. He would have accrued around 9 years 9 months' lawful continuous residence had it not been for the 'legal technicality' that his 4 October 2016 application did not extend his leave to remain. As argued above, this 'technicality' was arguably unlawful and leads to an historical injustice. This very substantially reduces the public interest in the appellants' removal. Further, that the appellant made the 4 October 2016 application mistakenly thinking that it would trigger an extension of leave under s.3C of the Immigration Act*

> *1971 may significantly undermine the public interest in the decision appealed in this case. The second appellant is an experienced health care worker, a role which is particularly valuable to the UK currently. Although the evidence in the bundles is limited, it may also be that the second appellant would be eligible for a grant of entry clearance in the light of the forgoing if required to leave the UK. The appellants child's best interests lie in remaining in the UK, all else being equal. She [sic] is relatively young but attends pre-school in the UK, and has medical needs resulting in regular monitoring, medical treatment and supervision."*

27. That then is the case which the Judge had to consider when balancing interference with the Appellants' private and family lives against the public interest. In relation to the first part of the case regarding the length of the Appellants' residence in the UK, contrary to what is asserted on the Appellants' behalf, the First Appellant had not been here lawfully for "9 years 9 months". The First Appellant entered in April 2009 (there is a typographical error in the immigration history at [12] of the Decision). Judge Burns determined that the Appellants did not have lawful residence after October 2016. That is a period of less than eight years. I have explained already why Judge Burns made no error in reaching that finding.

28. No complaint is made about the Decision in relation to the position of the Appellants' child. I can therefore ignore the final two sentences of the case as set out at [50] of the Decision.

29. The Appellants' case therefore was that the Second Appellant plays (or more accurately played) a role which was particularly valuable at the time to the UK and might be eligible for entry clearance to come back to the UK to perform that role if she were back in her home country. That begs the very obvious question which I put to Mr Reynolds why the Second Appellant should not do just that. He was unable to offer any satisfactory response.

30. The availability of that option was also the focus of Mr Lindsay's submissions. As he submitted and I accept, the height of the Appellants' case was that the Second Appellant might be able to return to the UK with appropriate entry clearance as a healthcare worker. Even if her qualifications and experience gained in the UK might mark her out from other applicants for that role, there is no reason given why she could not take that course.

31. I am of course concerned here with how the Judge approached this issue. He dealt with the balancing assessment at [51] to [57] taking account of the extent of the Appellants' private and family lives as determined in their previous appeal making allowances for changes from that time (see [49] of the Decision). As I have already noted, he also took into account the way in which the Appellants put their case as set out at [50] of the Decision.

32. The Judge had regard as he was bound to do to Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). That included specifically the need to maintain effective immigration control in favour of the public interest ([51]). The Judge found the Appellants' English language ability and financial self-sufficiency to be neutral factors ([52]). That is clearly the correct approach. The

Judge gave little weight to the couple's private and family life applying Section 117B ([53]). It is not disputed that this was the correct approach. The Judge also found that the Appellants could continue their private and family lives in Bangladesh ([54]). That is not disputed.

33. At [55] of the Decision, the Judge said this about the Second Appellant's employment:

> "I accept that the Second Appellant is a care worker and that she may be playing a helpful role as such in the current circumstances. I am sure the same would apply in Bangladesh. I take her skills and care role in the UK into account but do not regard it as a determining consideration."

34. The guidance given in the case of Forman on which the Appellants rely merely entitles a Judge to take into account additional factors which might favour the public interest. It does not mandate a Judge to take them into account still less instruct a Judge to give any particular weight to any such factors. The Judge followed that guidance by taking the potential public interest into account but discounting that as not determinative. In the end, the Appellants' challenge is really one as to the weight which was given to that factor. That was a matter for the Judge carrying out the assessment.

35. As Mr Lindsay submitted and I accept, although there is only one public interest, the issue is which part of that public interest is relevant in this case. As I have already observed, whilst it might be argued as it was that allowing someone who performs a role which is of value to the UK to remain is in the interest of the UK, it is equally the case that there is a public interest in not permitting those without a lawful basis of stay to remain and also in ensuring that those who seek to come to and remain in the UK do so in accordance with the Rules which apply. That brings me back to the point made earlier that there is no reason provided by the Appellants why they could not return to Bangladesh so that the Second Appellant could apply if she so wished and if she was able to satisfy the Rules to return in the capacity of a healthcare worker.

36. The Judge was entitled to find as he did that the value which the Second Appellant could bring to the UK in her role as a healthcare worker was not a determinative factor. Having weighed interference against the public interest, particularly that relevant to this case of maintaining effective immigration control, the Judge was entitled to reach the conclusion he did that interference did not outweigh that public interest. There is no error of law disclosed by the Appellants' first ground.

CONCLUSION

37. As Mr Lindsay pointed out, the Appellants' grounds make allegations that the Judge has reached perverse conclusions. That is a high threshold. It is clearly not met in this case. The Judge was correct in his analysis in relation to the Appellants' length of residence. He was entitled to reach the conclusion he did about the public interest having regard to the overall public interest and the factors which he was bound by Section 117B to consider.

38. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellants' appeals remain dismissed.

DECISION

The Decision of First-tier Tribunal Judge J S Burns promulgated on 17 February 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 18 August 2021