



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11448/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 9 March 2022**

**Decision & Reasons Promulgated
On the 31st March 2022**

Before

**UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE HALL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ZIAL HOQUE CHOUDHURY
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, Counsel instructed by Hamlet
Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of First-tier Tribunal Judge Maka (“the judge”) promulgated on 23 October 2019 following a hearing on 21 October 2019.
2. Mr Choudhury is an Indian citizen born in January 1982. He arrived in the UK in September 2006 having been granted a work permit valid between

10 September 2006 and 10 September 2007. He then overstayed and made an application in February 2010 seeking leave to remain relying upon article 8 of the 1950 European Convention.

3. That application was refused without a right of appeal on 6 May 2010. On 20 May 2010 Mr Choudhury applied for the refusal decision to be reconsidered. He did not receive a response from the Secretary of State until 2019 when he received a letter in April 2019 inviting him to submit further representations as to why he should be allowed to remain in the UK.
4. The further representations were prepared by solicitors acting on behalf of Mr Choudhury and contained in a letter dated 14 May 2019. It was pointed out that Mr Choudhury comes from a Muslim family who are a minority group in India and Hindu extremists regularly attack minority groups throughout India and he feared he may be targeted on his return to his home area.
5. Mr Choudhury also stated that he suffers with back pain resulting from a road traffic accident and that he is taking medication and has been referred to a physiotherapist with his first appointment being in May 2019. He also suffers from rheumatoid arthritis for which he is taking medication. He did not believe that he would be able to receive this kind of treatment in India due to the expense. In addition, it was pointed out that he had lived in the UK for over 12 years and developed a very strong relationship with friends, associates and relatives. Mr Choudhury contended that he would be at risk from Hindu extremists if he returned to India and reference was made to articles 2 and 3 of the 1950 European Convention. Reference was also made to article 5 and it was submitted that his right to liberty and security would be breached.
6. Reliance was placed upon article 8 of the 1950 Convention and it was claimed that Mr Choudhury continued to build a family and private life in the UK and he has tried to regularise his stay in this country. He considers himself to be part of British society and his removal would be unnecessary and disproportionate.
7. It was pointed out that there had been a very considerable delay in the Secretary of State dealing with Mr Chowdhury's request for reconsideration which had been submitted in May 2010 and the delay had in fact strengthened the private life that he had established in the UK. It was contended that the delay had caused Mr Choudhury undue hardship and stress and he had been prejudiced by the failure to resolve his outstanding claim in a timely manner. It was contended that he now had a legitimate expectation that he be allowed to remain in the UK.

The Decision of the Secretary of State

8. The decision is dated 21 June 2019 and is briefly summarised below. It was noted that Mr Choudhury is single, not in a relationship, and does not have children.
9. It was not accepted that Mr Choudhury could successfully rely upon any of the provisions in paragraph 276 ADE (1) of the Immigration Rules. Mr Choudhury had not lived in the UK continuously for 20 years, and he had not demonstrated that there would be very significant obstacles to his integration in India if he had to leave the UK.
10. It was not accepted that the application demonstrated that there were any exceptional circumstances which would result in unjustifiably harsh consequences for Mr Choudhury or any family member, if he was not granted leave to remain in the UK. It was not accepted that Mr Choudhury would be unable to avail himself of medical treatment in India should that be required. With reference to fear on return Mr Choudhury was advised that he should make a claim to attend the Asylum Screening Unit in person if he wished to make a claim for asylum or humanitarian protection.

The Decision of the First-tier Tribunal

11. The judge noted at paragraph 18 that the parties, both of whom were represented, agreed that the main focus of the appeal was on Mr Choudhury's private life. It was accepted by Mr Choudhury's representative that Mr Choudhury could not succeed under paragraph 276ADE(1)(vi) of the Immigration Rules. It was agreed that the issue to be decided was whether the appeal could succeed with reference to the wider article 8 ECHR proportionality exercise. .
12. The findings of fact commence at paragraph 26. Mr Choudhury's immigration history was not in dispute. The judge found that he had established a private life in the UK. It was not found that he had family life although the judge noted that the appellant had cousins resident in the UK but they had not attended the hearing to give evidence.
13. Having found that article 8 was engaged on the basis of private life, the judge recorded that Mr Choudhury did not satisfy the Immigration Rules and at paragraph 34 attached due weight to this, and acknowledged that Mr Choudhury had overstayed between 2007 and 2010 when he made his next application for leave to remain.
14. The judge found that Mr Choudhury had suffered injuries in a road traffic accident and suffered with rheumatoid arthritis for which he needed to take medication. The judge accepted that Mr Choudhury had paid for his medication prescriptions.
15. At paragraph 35 the judge found that the removal of Mr Choudhury would be a disproportionate interference in his private life. At paragraph 36 the judge acknowledged the public interest in maintaining firm and fair immigration control but found that the Secretary of State had delayed

making a decision in Mr Choudhury's case from 2010 until 21 June 2019 and found that the delay had meant that Mr Choudhury had established 'deeper, closer, personal and social ties in his community, with his wider family and in the UK.' The judge found that the long period of delay had not been explained or justified and had strengthened Mr Choudhury's article 8 claim.

16. At paragraph 37 the judge found with reference to EB Kosovo [2008] UKHL 41 that the delay in this case reduced the weight otherwise to be accorded to the requirements of firm and fair immigration control, as the delay was the result of a dysfunctional system, yielding unpredictable, inconsistent and unfair outcomes.
17. At paragraph 39 the judge found that the public interest in this case was diminished by virtue of the private life established by Mr Choudhury over a period of time, and the fact that he had lawfully remained in the UK for approximately nine years awaiting a decision from the Secretary of State.
18. At paragraph 41 the judge found that there are 'insurmountable obstacles or major impediments' to the continuation of private life in India. It was accepted that Mr Choudhury had raised what amounted to asylum concerns and the judge commented that there was some evidence in the bundle of documents relied upon by Mr Choudhury, to indicate 'a lot of ethnic Bangladeshi from Assam and other surrounding areas are being deprived of nationality on the basis that they cannot prove they are Indian.' The appellant claimed in his further representations that he is ethnically Bengali and is from Assam.
19. At paragraphs 43-44 the judge found when considering a 'fair balance' between the private life interests of Mr Choudhury and the interests of the wider community that there are compelling and exceptional circumstances which mean that it would be unjustifiably harsh for the appellant to be removed from the UK, particularly given the diminished weight that the judge attached to the public interest because of the delay of the Secretary of State in making a decision upon Mr Choudhury's claim. The appeal was allowed with reference to article 8 ECHR.

The Application for Permission to Appeal

20. The Secretary of State applied for permission to appeal, and the grounds are summarised below. In general, we noted that the grounds were not easy to understand and needed to be unpicked and expanded upon.
21. It was contended that the judge had materially erred in law for failing to give reasons or adequate reasons for findings on material matters. The judge had failed to provide adequate reasons why he considered Mr Choudhury had established a private life of sufficient strength to overcome the public interest in maintaining a fair and just system of immigration.

22. Mr Choudhury had provided no evidence of any private life other than a statement that his cousins had supported him financially although the cousins had failed to attend the hearing and it was submitted that little weight should have been attached to their written evidence when the balancing exercise was carried out. It was submitted that Mr Choudhury had failed to prove that article 8 was engaged and the judge had erred in finding otherwise.
23. With reference to paragraph 41 in which the judge had found insurmountable obstacles or major impediments to the continuation of private life in India, it was submitted that the judge had provided no cogent reasons for reaching this conclusion. In relation to the reference by the judge that some ethnic Bangladeshi from Assam are being deprived of nationality on the basis they cannot prove they are Indian, the judge had ignored the fact that Mr Choudhury's family still reside in India without issue, and that Mr Choudhury entered the UK using his own Indian passport. It was claimed that the judge had failed to give reasons as to why he found the appellant would face insurmountable obstacles or major impediments to continuation of private life in India.
24. It was further claimed that the judge had erred by failing to identify any obstacles to Mr Choudhury's reintegration in India, having noted that Mr Choudhury has three brothers and three sisters living in India. It was submitted that the judge had not adequately considered proportionality, and his resulting conclusion was therefore unsound.
25. Finally, it was submitted that the judge had sought to punish the Secretary of State for the delay in decision-making despite denying this to be the case at paragraph 38. It was submitted that the delay was the only reason relied upon by the judge to diminish the public interest in maintaining effective immigration control. It was submitted that the judge had not identified any compelling circumstances and had not had regard to the fact that during his stay in the UK Mr Choudhury's immigration status had been precarious or illegal. It was submitted that in allowing the appeal the judge had utilised article 8 as a general dispensing power and erred in law.

Permission to Appeal

26. Permission to appeal was granted by Designated Judge of the First-tier Tribunal McClure on 24 February 2020. In granting permission, it was noted that Mr Choudhury did not have any family life in the UK and was dependent upon his private life. He had entered the UK in 2006 with leave valid for one year and overstayed and had not had leave thereafter.
27. When Mr Choudhury made an application for leave to remain in 2010, he did not have leave. It was acknowledged that thereafter there was a delay by the Secretary of State in making a decision, but it was clearly arguable that Mr Choudhury had not established such a quality of private life as to satisfy the requirements of article 8 within or outside the Immigration

Rules. Therefore, permission to appeal was granted as the grounds seeking permission were arguable.

The Upper Tribunal Hearing

28. On behalf of the Secretary of State reliance was placed upon the grounds upon which permission to appeal had been granted. In summary it was submitted that the length of time spent in the UK by an individual is not determinative. It was open to the judge to consider delay is relevant, but not as determinative.
29. It was submitted that the judge should have considered Mr Choudhury's immigration status in accordance with section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) in the balancing exercise. It was contended that the judge had not adequately considered proportionality and the necessary balancing exercise as he had attached determinative weight to delay.
30. On behalf of Mr Choudhury Mr Coleman submitted that while the judge had made what may be regarded as a generous decision, he had not materially erred in law. It was submitted that the judge's decision indicated that he had not regarded delay as determinative and had taken into account all the relevant evidence. Mr Coleman submitted that having considered all relevant evidence, the judge gave adequate reasons for the conclusion reached, and the appeal of the Secretary of State should be dismissed.
31. At the conclusion of submissions, we reserved our decision.

Our Analysis and Conclusions

32. Our initial finding is that the judge did not err in law in finding that article 8 was engaged on the basis of the private life established by Mr Choudhury since his arrival in the UK in 2006. It was established in AG (Eritrea) [2007] EWCA Civ 801 that the threshold of engagement is not a specially high one.
33. We next turn to consider the contention that the judge erred in failing to provide adequate reasons for finding that Mr Choudhury established a private life of sufficient strength to overcome the public interest in effective immigration control, and that the judge did not have regard to the fact that Mr Choudhury initially had a precarious immigration status when he had limited leave to remain, and thereafter remained without any leave.
34. Guidance on providing reasons can be found in Budathoki (reasons for decisions) [2014] UKUT 00341 (IAC). The head note to that decision states, 'It is generally unnecessary and unhelpful for First-tier Tribunal judgements to rehearse every detail or issue raised in a case. This leads to judgements becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve

key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.'

35. The judge's reasons for finding that the weight to be attached to Mr Choudhury's private life outweighs the weight to be attached to the public interest in maintaining effective immigration control centre on the delay in the Secretary of State making a decision in relation to Mr Choudhury's claim. The judge acknowledges at paragraph 14 that he should adopt a balance sheet approach and 'must also consider any applicable statutory requirements as introduced in the 2002 Act by section 19 of the Immigration Act 2014.'
36. This is a reference to Part 5A of the Nationality, Immigration and Asylum Act 2002 which comprises sections 117A-117D. Section 117A (2) (a) provides, that in considering the public interest question the court or tribunal must (in particular) have regard in all cases to the considerations listed in section 117B. (Our emphasis)
37. The judge has omitted to have regard when considering the balancing exercise to section 117B (4) which provides that little weight should be given to a private life that is established by a person at a time when the person is in the UK unlawfully, and section 117B (5) which provides that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
38. Mr Choudhury initially had a precarious immigration status when he entered the UK because he had limited leave to remain until 10 September 2007. He then remained in the UK unlawfully for a period of 14 years. At [41] the judge appears to find that Mr Choudhury's overstaying was between 2007 to 2010 when he submitted his application. This is not the case. Because the judge does not have regard to section 117B (4) and (5) he does not attach little weight to Mr Choudhury's private life which has been formed when he has been in the UK with a precarious immigration status or unlawfully, and the judge does not explain why he has decided not to attach little weight to that private life. The judge therefore has failed to give adequate reasons for his finding that Mr Choudhury's private life should be accorded greater weight than the public interest in maintaining effective immigration control, and this has been caused in part by the judge's failure to have regard to section 117B (4) and (5). This is a material error of law.
39. The judge also materially erred in law at paragraph 41 by failing to give adequate reasons for finding insurmountable obstacles or major impediments to the continuation of private life in India. It had been conceded on behalf of Mr Choudhury and the judge found that Mr Choudhury could not satisfy the requirements of the Immigration Rules. This includes paragraph 276ADE (1)(vi) which requires an individual to prove on a balance of probabilities that there would be very significant obstacles to his integration into the country to which he would have to go if required to leave the UK.

40. The judge does not explain how, when it was previously accepted that Mr Chowdhury would not face very significant obstacles to integration in India, the finding is made that he would find insurmountable obstacles or major impediments to the continuation of private life in India. These findings appear to directly contradict each other.
41. The judge at paragraph 41 makes reference to ethnic Bangladeshi from Assam, which is the appellant's home area, being deprived of nationality on the basis that they cannot prove they are Indian. However, the judge fails to adequately explain how this is relevant to Mr Choudhury's case, as it is accepted that he held an Indian passport when he arrived in the UK, and it is recorded that he has six siblings living in Assam, and the judge does not refer to any evidence which indicates that the siblings have had any difficulty in being deprived of nationality. The reasoning at 41 is deficient.
42. The judge was fully entitled to find the Secretary of State's delay in making the decision to be relevant when considering the balancing exercise taking into account Mr Choudhury's private life and the public interest in maintaining effective immigration control. However the delay was only one aspect of the balancing exercise, and the judge did not have regard to other aspects, referred to above, which caused the judge to fall into error and fail to give adequate reasons for his finding that Mr Choudhury's private life be accorded greater weight than the public interest in maintaining effective immigration control.
43. Because the decision of the First-tier Tribunal contains material errors of law the decision must be set aside. Both representatives indicated that if a material error of law was found, the appropriate course would be to remit to the First-tier Tribunal for the decision to be made afresh.
44. Remaking in the Upper Tribunal would constitute the usual approach to determining appeals where an error of law is found unless the effect of the error has deprived a party of a fair hearing before the First-tier Tribunal, or the nature or extent of any judicial fact-finding which is necessary for the decision in the appeal to be remade, is such that it is appropriate to remit the case to the First-tier Tribunal.
45. In this case there is substantial fact-finding to be undertaken and it is appropriate to remit the appeal to be heard afresh by the First-tier Tribunal. No findings are preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law.

The decision is set aside in its entirety.

The appeal is remitted to the First-tier Tribunal to be heard de novo in front of a judge other than Judge Maka.

There has been no application for anonymity and no anonymity direction is made.

A handwritten signature in grey ink, appearing to be 'M A Hall', written in a cursive style.

Signed

Date 24 March 2022

Deputy Upper Tribunal Judge M A Hall