Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37457/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 16 July 2014	**On: 8 August 2014**

Before

THE HONOURABLE MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE KEBEDE

Between

MOTIUR RAHMAN LATIF

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahluwalia instructed by Zahra & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 23 February 1992. He has been given permission to appeal against the determination of First-tier Tribunal Judge Herlihy, dismissing his appeal against the respondent's decision to refuse to vary his leave to remain.

2. The appellant entered the United Kingdom on 31 January 2007 with leave to enter as a visitor until 30 July 2007. He applied for leave outside the immigration rules on 12 July 2007 but his application was refused on 14 September 2007. On 7 November 2007 he applied for asylum. His application was refused on 17 January 2008 but he was granted discretionary leave to remain to 23 August 2009, following a successful appeal. He applied again on 29 June 2009 for leave to remain outside the rules and again his application was refused, on 6 May 2010. Following another successful appeal he was granted three years' discretionary leave to remain until 27 July 2013.

3. On 12 June 2013 the appellant applied for a further period of leave outside the immigration rules, on the basis of his private life in the United Kingdom. His application was refused on 2 September 2013 under paragraph 322(1) of the rules on the basis that a variation of leave was being sought for a purpose not covered by the rules. Consideration was also given to his family and private life under Appendix FM and paragraph 276ADE but it was concluded that he could not meet the criteria in either.

4. The appellant appealed against that decision.

5. The basis of his claim, as set out in a witness statement produced for his appeal and his statement for a previous appeal in 2010, is as follows. He came to the United Kingdom with his father at the age of 14 years, entering as a visitor, but his father abandoned him and left him with his uncle whilst he returned to Bangladesh. His mother had died in 2000 in Bangladesh and his father had re-married. His step-mother had ill-treated him. His uncle, Abdul Gafur, brought him up as his own child, together with his own four children, and it was on the basis of his family life with his uncle and aunt that he was previously granted discretionary leave to remain in the United Kingdom. On 11 May 2012 he got married and moved out of his uncle's home and it was on the basis of his marriage that he instructed solicitors to make an application on his behalf for further leave to remain. When he met his wife in September 2011 they kept their relationship a secret from their respective families but her family found out and were angry and so she went to live with his sister until they went through an Islamic marriage and she came to live with him at his uncle's house before they moved out to their own place. In August 2013 his wife left him and returned to live with her parents and so a week later he returned to his uncle's house. In October 2013 his wife told him that she would not be coming back and he had been badly affected by the breakdown of his marriage to the extent that he had to seek medical treatment for depression and counselling. He had no life outside the United Kingdom. He had no family in Bangladesh other than a married sister who lived with her own family. He did know the whereabouts of his older brother who had left home prior to his departure due to ill-treatment at the hands of their step-mother. His other two sisters lived in the United Kingdom and he was very close to them and their children.

6. The appellant's appeal was heard on 28 March 2014 by First-tier Tribunal Judge Herlihy. The judge heard oral evidence from the appellant and his uncle and sister. She did not accept that he had lost all ties to Bangladesh. She found that he had lived independently from his uncle following his marriage. She did not find the evidence of the witnesses credible in their claims as to their lack of contact with family in Bangladesh and she considered it very likely that they knew of the whereabouts of the appellant's father and that it had been entirely planned that he would come to the United Kingdom and live with his uncle. She considered that the support that he received from his family in the United Kingdom would continue if he were to return to Bangladesh. Having found that the appellant did not meet the requirements of the immigration rules relating to family and private life, she went on to consider Article 8 in a wider context. She did not accept that the appellant had established a family life in the United Kingdom. She found it likely that there were family members in Bangladesh with whom the United Kingdom family members were in contact. She did not accept that the appellant's removal would breach Article 8 and she dismissed the appeal under the immigration rules and on human rights grounds.

7. Permission to appeal that decision was sought on the grounds that the judge's finding, that there was no established family life in the United Kingdom, failed to take account of relevant factors such as the appellant's treatment for depression, his history of losing his mother, being ill-treated by his step-mother and being abandoned by his father and his consequential reliance upon his family for care and support. The grounds asserted further that the judge had failed to consider family life in the context of the appellant's relationship with his minor nephews, nieces and cousins; failed to follow the guidance in Devaseelan v SSHD [2002] UKIAT 000702 with respect to the findings of the judge in his previous appeal in regard to his abandonment and loss of ties to Bangladesh; and had failed to take account of further relevant matters.

8. Permission to appeal was granted on 30 May 2014.

Appeal hearing and submissions

9. Mr Ahluwalia expanded upon the grounds of appeal, relying in particular on the ground related to Devaseelan v SSHD [2002] UKIAT 000702. He referred us to the findings of Judge Balmain in his determination of the appeal in 2010, whereby the appellant's account of being abandoned by his father and of lack of ties to Bangladesh were accepted, and submitted that Judge Herlihy had failed to follow the guidance in Devaseelan in regard to those positive findings. Her failure to do so was a material error, since her adverse findings infected her conclusions as to the relationship between the appellant and his uncle. She failed to consider the medical evidence relating to the appellant's emotional state following the breakdown of his marriage and the protective factors consisting of the support from his uncle's family as referred to in the medical evidence, in concluding that there was no element of dependency over and above the normal emotional ties between adult family members. The judge had erred by finding that family life was not established.

10. Mr Avery submitted that the question of the findings as to the appellant's abandonment by his father was irrelevant. The judge had had regard to the findings in the determinations of the previous appeals but gave proper reasons for finding that the appellant had significant links to Bangladesh. Her conclusion, that there was no family life with his uncle, was a sustainable one.

11. In response, Mr Ahluwalia submitted that the question of abandonment was relevant, as Judge Herlihy's adverse credibility finding infected her findings on family life. There was no realistic support system for the appellant in Bangladesh.

12. We decided to reserve our decision with respect to the error of law and heard further submissions in the event that we were to set aside Judge Herlihy's decision. There is no need to set out those submissions since we have found that the judge's decision should not be set aside for error of law.

Consideration and findings

13. We consider Judge Herlihy's decision to be a detailed and careful one and it is clear that she took into account all relevant matters when considering the appellant's case.

14. The main thrust of the grounds of appeal, as reiterated by Mr Ahluwalia in his submissions, is that the judge failed to follow the principles in Devaseelan and failed to give reasons for departing from the findings of a previous judge who had made positive credibility findings and had allowed the appellant's appeal, leading to a grant of discretionary leave to remain. However, whilst Judge Herlihy did not specifically cite Devaseelan, we have no doubt that she had the relevant principles in mind and followed those principles when making her own findings, taking the decisions of the previous Tribunals as a starting point. That much is abundantly clear from her findings at paragraphs 5.5 and 5.6 of her determination, where she expressly referred to the decisions of the Tribunals allowing the appellant's previous two appeals. As she said at paragraph 5.5, the first determination, in 2008, allowed the appeal only on the basis that the Secretary of State had failed to have regard to her policy on unaccompanied minors, the appellant being only 16 years of age at the time. The merits of the appellant's case were not considered by that Tribunal and no findings of fact were made. To that extent, the determination is of no relevance to the current appeal.

15. With regard to the 2010 determination of Judge Balmain, that was considered by Judge Herlihy at paragraph 5.5, where she noted the basis for the appeal being allowed, namely that the appellant had only just turned 18 years of age, he had never lived independently of his family and he was entirely emotionally and financially dependent upon his uncle. She went on, at paragraph 5.6, to set out the change in the appellant's circumstances such that she had decided that the reasons for the previous appeal succeeding no longer applied. Whilst we accept that the judge did not specifically refer to, or give specific reasons for departing from, Judge Balmain's findings on the evidence

that the appellant had been abandoned by his father and had lost contact with his brother in Bangladesh, we do not consider such an omission to be material. That is for several reasons.

16. Firstly, whilst Judge Balmain accepted the evidence of the witnesses, ie the appellant, his uncle and his sister, as credible, that evidence was not subjected to any cross-examination as it was before Judge Herlihy since the Secretary of State was not represented before him. Judge Herlihy therefore had the benefit of the witness's evidence being tested under cross-examination and accordingly reached a different view on credibility. Secondly, and more importantly, Judge Herlihy's adverse credibility findings arose as a result of events that had occurred subsequent to Judge Balmain's decision and from evidence given in that regard, namely the appellant's uncle's visit to Bangladesh in 2012 and the medical evidence contained in the notes of a counselling session on 11 February 2014. It was as a result of the evidence set out at paragraph 5.8 of her determination that she found the accounts of the witnesses about the family circumstances in Bangladesh and surrounding the appellant's arrival in the United Kingdom to be lacking in credibility. Having had regard to that evidence and having viewed the counselling notes at page 177 of the appeal bundle in which, as the judge observed, no reference was made to abandonment, we consider that the judge was entitled to make such adverse findings for the reasons given and we consider that there was nothing inconsistent in the judge's approach to that set out in Devaseelan.

17. We find further that even if the judge had erred by making her own, adverse findings about the appellant's claim to have been abandoned by his father (which we find that she did not), that did not have any material effect on her overall conclusions on family life, particularly as the appellant could not in any event meet the immigration rules. Mr Ahluwalia sought to make his arguments on the basis of a wider Article 8 consideration and submitted that there were compelling reasons justifying leave outside the rules on the basis of the family life in any event established by the appellant. He submitted that the judge's contrary and adverse findings in regard to the appellant's family history would have infected her conclusions on family life to the extent that the findings at paragraphs 5.6, 5.7 and 5.15 could not be relied upon. However it seems to us that, on the contrary, the judge gave full and proper reasons for concluding that family life had not been established. The appellant was, by that time, 22 years of age and had been married and moved out of his uncle's house to live independently with his wife, albeit moving back after the breakdown of the marriage. Mr Ahluwalia accepted, furthermore, that the appellant and his wife had been in receipt of public funds whilst living away from his uncle's home and, as such, it is clear it us that they were not dependent financially upon his uncle at that time.

18. The grounds of appeal further challenge the judge's findings under Article 8 on the basis that when considering the question of dependency for the purposes of family life established as an adult, she did not take into account the appellant's mental health problems and consequential emotional dependency upon his uncle's family nor the fact that his history as an

abandoned child led him to stronger emotional ties to his uncle. However the judge was fully aware of the appellant's mental health condition arising as a result of the breakdown of his marriage. Having had regard to that evidence ourselves, whilst we have noted the reference to the comfort received by the appellant from his uncle's family following the marriage breakdown, we find nothing in that evidence to suggest that the judge's findings on the question of dependency upon his uncle's family in terms of the principles in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 were not sustainable ones that were properly open to her on the evidence. Neither do we find that an acceptance of the appellant's account of his family history would have led her to any other decision than the one she reached.

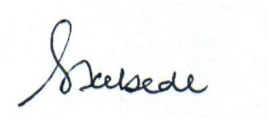
19. Likewise, we find the judge's finding in regard to the absence of established family life with his sisters to be a sustainable one. Whilst the grounds assert that the judge erred by failing to consider family life between the appellant and his cousins, nieces and nephews, we find nothing in the evidence before the judge to suggest that the best interests of the children lay anywhere other than in remaining with their respective parents. We note that the judge considered the maintenance of those family ties at paragraph 5.17 of her determination and we consider that the findings that she made in that regard were perfectly sustainable ones.

20. With regard to private life, we consider that the judge gave full and careful consideration to all relevant matters, both within and outside the rules. She was entitled to find that the appellant could not meet the requirements of the rules, having failed to demonstrate that he had lost ties to Bangladesh. As already discussed, she gave full and proper reasons, based on more recent evidence, for departing from the conclusions of the judge in the previous appeal in regard to the issue of ties to Bangladesh and in any event was entitled to rely on the accepted facts that the appellant's uncle maintained a house in Bangladesh and that the appellant had a married sister remaining in Bangladesh. The judge was perfectly entitled to find that a 22 year old man who had previously separated from his family members and lived independently as a married man for a period of more than one year, who had spent the first 15 years of his life in Bangladesh and who had, at the very least one sister in Bangladesh, whether or not she was married with her own family, could reasonably be expected to re-establish himself in that country.

21. Accordingly, we find no errors of law in the judge's findings on Article 8 and consider that the grounds in essence amount to little more than a disagreement with her decision.

DECISION

22. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision. The decision to dismiss the appeal stands.

Signed 

Upper Tribunal Judge Kebede Dated: 21 July 2014