IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02351/2015

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 14th March 2016	**On 25 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR MOHAMMED ABU JAHED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, instructed by KC Solicitors
For the Respondent: Mr S Whitwell Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 22nd November 1996 and he challenges with permission a decision made by First-tier Tribunal Judge Gibbs on 12th August 2015 whereby she dismissed his appeal under the Immigration Rules and on human rights grounds against the decision of

the Secretary of State refusing him leave to remain under Appendix FM and paragraphs 276ADE of the Immigration Rules. The judge recorded that the appellant entered the UK on 2nd March 2008 accompanied by his father when he was 11 years old and did not return to Bangladesh prior to the expiry of his visit visa some six months later.

2. On 24th March 2010 the appellant applied for indefinite leave to remain in the UK and that application was refused but on 29th November 2010 he was granted leave to remain outside the Immigration Rules until 22nd November 2014. On 25th September 2014 he applied for further leave to remain in the UK. That application was refused on 23rd December 2014 on the basis the appellant did not meet the suitability requirements because he failed to declare that he was convicted of robbery on 7th September 2012 and the appellant was refused further to the suitability requirements that being S-LTR 1.6 and S-LTR 2.2. The respondent was not satisfied that there were any exceptional circumstances in the case. A decision was made to remove the appellant under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The permission to appeal asserted that the judge erred at paragraph 10 of the decision in concluding that S-LTR.2.2 is mandatory as the Rule states, whether or not to the applicant's knowledge, and submitted that this construction was erroneous in the light of **AA (Nigeria) v Secretary of State for the Home Department EWCA Civ 773** were the court held that intention was necessary and there had to be dishonesty for deception to apply. That Rule also applied to "whether or not to the applicant's knowledge" in relation to false representations and the judge erred in failing to recognise that the intention was necessary. Having found at paragraph 11 there was an innocent mistake on the part of the appellant the judge should have concluded S-LTR.2.2 did not apply and gone on to consider 276ADE specifically Section (iv) and (vi).

4. This was a minor child who was essentially abandoned by his father and the appellant was a vulnerable young man with learning disabilities and autism, such it would be unjust for the appellant to be penalised under Section 117B(3) of the 2002 Act because he was in receipt of disability living allowance. The judge's conclusions at paragraph 18 of the determination that public interest in removal was fortified was arguably erroneous and perverse. At paragraph 19 the judge gave little weight to the private or family life because the appellant was here unlawfully or with precarious leave but that leave had been established whilst he had discretionary leave and whilst he was a minor and it was arguable that Section 117B(5) of the Act would not apply the private life because he was under 18 and had been granted leave. Actions of adults which had an impact upon children should not be used to penalise them, see **Zoumbas v Secretary of State for the Home Department [2013] UKSC**.

5. Further the judge's findings of credibility were erroneous and she had failed to give adequate reasons to make proper findings in respect of the appellant's evidence.

6. The balancing exercise undertaken by the judge, it was asserted, was erroneous as it did not factor in the appellant's ties in the UK and the judge had not properly assessed the impact of removal both financially and emotional on the appellant and his UK relatives with whom the judge accepted he had family life.

7. At the hearing Mr Karim submitted that there was an identical wording in relation to the Rule paragraph 322(1A) and S-LTR.2.2.

8. Mr Whitwell by contrast submitted that it was a different Rule and there was not the same wording. The suggestion was that the appellant should not be penalised for deception by his family members but that was not consistent with the authority **AA**.

9. Mr Karim confirmed that the appellant did sign the application form but he just did not check it. At that point he was just shy of 18 and he was a minor and he should not be penalised for that mistake.

10. In terms of the other grounds the judge had made a mistake in assuming that his claiming DLA should penalise the appellant. It could not be parliament's intention to penalise and discriminate against those claiming disability benefits. The law should be sensibly read. It was not that he was submitting that the law was not legal. The benefits had been claimed through his uncle and aunt.

11. The judge also gave little weight to his private life and Mr Karim outlined the appellant's immigration history. The judge had once again not taken into account the fact that the appellant was a minor and I was referred to **ZH (Tanzania)** paragraphs 33 and 44. These were actions over which he **had no control**. Mr Karim also submitted that there was a lack of reasoning in respect of the appellant's evidence and in the assessment of proportionality the judge failed to assess the impact on the appellant and the impact on the members and relatives of his family. Those were material errors of law.

12. Mr Whitwell submitted that the ultimate question was whether the appellant was financially independent and the answer was no and this was clear from paragraph 18. Even if Section 117B(3) had not been found against the appellant, the remainder of the statutory considerations fell to be construed against the appellant and therefore Section 117B(3) did not assist him. Mr Whitwell referred me to the findings of the judge at paragraphs 21 and 23 and noted that the judge could not be certain of factual findings because of the actions of the family members and it was difficult to be certain exactly what was happening.

13. The fact was that the appellant was now an adult and the judge did not fall foul of **ZH (Tanzania)**. The judge had made findings on the autism and the ability of the appellant and found that he now had a driving

licence and was enrolled at college to become a mechanic. There was no error. In response to Mr Karim's contentions Mr Whitwell produced **Deelah and others (section 117B - ambit)** [2015] UKUT 00515 (IAC) and referred to the headnote at (iii).

Conclusions

14. In her findings and conclusions the judge found at paragraph 10 that the appellant was convicted of robbery on 7th September 2012 for which he received a fine and referral order. This conviction became spent on 9th October 2013 but nonetheless the application form states clearly that both spent and unspent convictions must be provided. The appellant claims that he relied on his aunt to fill out the form.

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"(1A) Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application,

…

the application must be refused."

S-LTR.2.1. 'The applicant *will normally be refused* on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.4. apply.

S-LTR.2.2. Whether or not to the applicant's knowledge –

(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or

(b) there has been a failure to disclose material facts in relation to the application.

It is correct to state that these are two different Rules and paragraph 322 is a mandatory refusal whereby S-LTR.2.2 is discretionary. Although the judge states clearly that she was satisfied that it was more probable than not that the appellant did not check the form before signing it, and therefore from his perspective the omission was an innocent mistake, she does not find the same for Mrs Begum. She found that Mrs Begum was an

articulate and intelligent woman and that it was more probable than not that she did not disclose the conviction because she believed it would adversely affect the appellant's application.

15. The judge rejected the finding under S-LTR.1.6 which is the mandatory refusal and although there was no challenge to the judge's finding on the basis that there was established a conviction, I am not persuaded that there was a discretionary element here such that the judge was entitled without more to do so. The fact is that the appellant had a conviction and it was the Secretary of State that made the assessment that his conduct (including convictions) made it undesirable to allow him to remain. However that was in favour of the appellant and no challenge was made to that by the Secretary of State.

16. That said, the judge was satisfied with regards to S-LTR.2.2(a) and (b) that:

> *"False information was given (the concealment of the appellant's criminal conviction) or alternatively that the appellant/his aunt failed to disclose a material fact (the criminal conviction)."*

On this basis the judge found that there were no factors such that could lead her to "conclude that the respondent should have exercised her discretion differently, particularly because I consider that the actions were deliberate".

17. The Rule under S-LTR.2.2 is quite clear that it is to apply whether or not to the applicant's knowledge. There was no question that false information and false representations had been submitted as the form submitted in September 2014 made no reference to the appellant's conviction and a specific question is asked with that regard. The Rule does not import the necessity for a mens rea on behalf of the appellant. Mr Karim invited the application in the circumstances of **AA** which considered paragraph 322(1A). At paragraph 65 **AA** states:

> *"The essential question is whether 'false' in either paragraph 320(7A) or paragraph 322(1A) is used in the meaning of 'incorrect' or in the meaning of 'dishonest'."*

The preferable meaning given to the term "false" was "dishonest".

18. **AA** draws a sharp contrast between a matter of innocent mistake, and a dishonest representation. An error short of dishonesty was not to be construed as a false representation. However at paragraph 67 the following was said:

> *"First, 'false representation' is aligned in the rule with 'false document'. It is plain that a false document is one that tells a lie about itself. Of course it is possible for a person to make use of a false document (for instance a counterfeit currency note, but that example, used for its clarity, is rather distant from the context of this*

discussion) in total ignorance of its falsity and in perfect honesty. But the document itself is dishonest. It is highly likely therefore that where an applicant uses in all innocence a false document for the purpose of obtaining entry clearance, or leave to enter or to remain, it is because some other party, it might be a parent, or sponsor, or agent, has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation. The mere fact that a dishonest document has been used for such an important application is understandably a sufficient reason for a mandatory refusal. That is why the rule expressly emphasises that it applies 'whether or not to the applicant's knowledge'."

19. This makes it clear that

> *"it might be a parent or sponsor or agent has dishonestly promoted the use of that document. The response of a requirement of mandatory refusal is entirely understandable in such a situation".*

Lord Justice Rix in **AA** clearly canvassed the possibility that a parent might submit a document which was a false document and that a child could be fixed with the dishonesty of the parent in such an instance. If that were not sufficient I move to paragraph 68 of **AA** and this refers to the grounds under paragraphs 320 and 322 where the entry clearance or leave to enter or leave to remain should "normally be refused". The judgment here states:

> *"If on the other hand a dishonest representation has been promoted by another party, as happened with the sponsor's husband in **Akhtar**, then it is entirely understandable that the Rules should require mandatory refusal irrespective of the personal innocence of the applicant herself. Therefore the reason of the thing, as well as the natural inference that 'false' in relation to 'representations' should have the same connotation as 'false' in relation to 'documents', together argue for a conclusion that 'false' requires dishonesty although not necessarily that of the applicant himself."*

20. As stated above it is quite clear that the non-disclosure of information is also referred to in **AA** at paragraph 69

> *"if dishonest, the dishonesty may again happen without the knowledge of the applicant, or the applicant may be personally dishonest. The facts of **Akhtar** again come to mind".*

21. In this instance the judge was clear [13] that Mrs Begum, the appellant's aunt, who is an articulate intelligent woman, did not disclose a conviction and the judge was satisfied that the appellant fell to be refused under these grounds. The judge considered the fact that these grounds were not mandatory but nonetheless did not conclude that the respondent should have exercised her discretion differently.

22. Mr Karim is submitting that because the appellant was underage the error was short of dishonesty, does not stand easily with an interpretation which can be derived from **AA** and I find that the judge directed herself appropriately between paragraphs 10 to 13 and found the relevant facts and that the appellant could not succeed under paragraph 276ADE because he fell foul of paragraph 276ADE(1), that is the suitability requirements.

23. The criticism therefore that the judge should have proceeded to consider the matter under 276ADE(4) and (6) is misconceived.

24. Indeed I note from the witness statement of the appellant that far from being 'abandoned' by his father and unable to make decisions as a minor or having no control over his future the appellant was in fact 'adamant to stay in the UK' and did not give in to his father's request to return to Bangladesh. He appeared to prefer the schooling here. He also added that he did well at school [w/s 9].

25. The next challenge was that it could not have been parliament's intention for the appellant to be penalised under Section 117B(3) because he was in receipt of disability living allowance.

26. Section 117B(3) reads

> '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.

27. A proportionality assessment was relevant as the judge found that she needed to consider the matter under Article 8 and bearing in mind the appellant was a child when he came to the UK, and of which the judge was clearly aware, of and addressed this issue. The case of **Miah (Section 117B NIAA 2002 – children) [2016] UKUT 00131** makes it clear that Sections 117(1) to (5) makes no distinction between adult and child immigrants and the factors set out apply to all regardless of age although other factors should be weighed in the balance. Even if the judge was incorrect in taking into account the fact of the disability living allowance the actual fact is that the appellant is ***not*** financially independent and that is the issue that needed to be looked at. The judge was not making a criticism that the appellant was receiving disability living allowance but merely observing through the source of finance that the appellant received that he was not financially independent. Indeed there are indeed restrictions on those able to claim benefits within the United Kingdom social security system specifically regarding residency. It might also be relevant to point out that the appellant is enrolled on a four year college course to become a mechanic and attended school in the United Kingdom. There was no indication that the appellant was self-supporting.

28. In respect of the ground that the judge gave little weight to the private or family life because the appellant was here unlawfully with precarious leave under Section 117B, Mr Whitwell cited the case of **Deelah** and indeed this states at headnote (iii):

> *"A private life established in the wording and in the context of Section 117B(4) and (5) of the 2002 Act is not to be construed and confined to the initiation or creation of the private life in question and not its continuation or development."*

It is clear that the appellant came to the UK and in respect of the private life at least the judge correctly considered that he had developed his private life whilst it was precarious. The appellant has had discretionary leave but this does not render his status anything other than precarious. As stated above the Section 117 factors apply equally to children and adults and thus the judge directed herself appropriately at paragraph 19. She gave little weight to his private life but in this instance in relation to his private life as opposed to his family life she considered that the public interest was served by the appellant's removal which was "a factor that weighs heavily against the appellant in my proportionality assessment". The judge was clear at paragraph 20 that "in this assessment I have considered all of the factors put before me on the appellant's behalf which were emphasised by Mr Chowdhury in his submissions".

29. Section 117 does not necessarily affect the weight to be attributed to family life but the appellant's immediate family is in Bangladesh and the judge also found that she was not persuaded that

"any of the witnesses before me are reliable and I find that they have sought to either exaggerate the situation that the appellant will face on return to Bangladesh or to obfuscate the facts".

This would include a finding in relation to the appellant himself. She did take into account his evidence at paragraph 25 of the decision by stating that

"the fact that the appellant does not want to return home or rely on his parents is not, in my mind, a persuasive factor".

30. Overall there is no doubt that the judge was fully aware that the appellant came into the UK as a minor but rejected the notion that the appellant had been abandoned by his family stating

"I find that the appellant, his aunt and uncle have sought to portray him as a victim of abandonment in order to bolster his immigration applications when the fact is that the family made the joint decision that he remain here".

The judge found that the appellant had "chosen not to contact" his family since his application was refused and was not persuaded that the contact had been severed in any meaningful way.

31. The judge has given a series of adequate findings in respect of the appellant's evidence and made an assessment of the proportionality of the respondent's decision. The judge found that the appellant had spent the majority of his life in Bangladesh and that he was now an adult. The judge carefully considered the weight to be attached to the issue of his mental health problems but noted that he had been discharged from the Coborn Centre [26] and that he had stopped taking medication in 2013. The judge was aware that the appellant had been in the UK for seven years but found that he was ultimately returning "to his home country, to his family" and that she was satisfied that this would mitigate any negative impact on him.

32. It is clear from a reading of the determination as a whole that the judge was fully aware of when the appellant entered the UK, the circumstances in which he entered the UK and remained in the UK and was to return. On an overall reading of the decision she gave due weight to his family life. She recorded at [25] that *'he has his immediate, financially stable, family to return to, as well as other relatives'*. I was referred to **ZH (Tanzania)** [2011] UKSC 4, that children were not to be blamed for the sins of the adult. I have made observations about the appellant's own statements regarding his abandonment or otherwise above and the judge found that the family made a joint decision in this regard. A careful consideration of paragraph 33 of **ZH (Tanzania)** demonstrates that this is in relation to an assessment of the best interests of the child as a primary consideration and that the children were not to be blamed for the actions of the adult. The fact is that the appellant is now an adult and the judge was aware of this and she took into account that most of his life had been spent in Bangladesh. The appellant is now an adult and it is not the task of the judge to consider the best interests of the appellant. In his witness statement the appellant states very clearly 'Now that I am 18 years old I am very keen to get involved in paid employment and live independently'. The judge pointed out at [26] that the appellant had attended a mainstream school, was not significantly impaired in his ability to function.

33. The challenge is merely a disagreement with the findings. I find that there is no legal error in the decision and the decision of the First-tier Tribunal Judge shall stand.

No anonymity direction is made.

Signed Date 21st April 2016

Deputy Upper Tribunal Judge Rimington