IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44519/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th December 2015	**On 6th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

HAFIZ MD ABU SIDDIQUE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M Malhotra, Counsel, instructed by Chipatiso Associates LLP
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh whose date of birth is recorded as 22nd March 1963. He first arrived in the United Kingdom in 1998 on a visit visa in order to visit his wife and two sons who are British citizens. After five and a half months he then left but returned again in 2000 on a visit visa, returning again in 2001 when he and his wife separated. He made application to the courts in the United Kingdom for contact with his sons but whilst that was pending he left the United Kingdom, returning again in 2003 so that he might give evidence. Then in 2003 he was granted leave

until 30th September 2004 but later refused further leave to remain outside the Immigration Rules, and according to the Decision and Reasons under appeal, his appeal rights became exhausted in 2006 although it is submitted on behalf of the Appellant that it was 2008, but little turns on that in this case.

2. An application was made on human rights grounds to regularise his status but that was refused on 21st October 2010 with no right of appeal. Further representations were made with letters written on his behalf dated 22 July 2013 and 9 June 2014. They resulted in the decision dated 7 August 2014 in respect of which he appealed to the First-tier Tribunal; his appeal being heard on 28th April 2015 by Judge Clarke sitting at Taylor House.

3. It was a very significant part of the Appellant's case that he suffered and suffers from clinical depression and that in those circumstances he was dependent upon his sons for their support. The judge considered the evidence and found there to be no family life with the sons, although reading the decision as a whole it is clear that what was meant was no sufficient family life within the context of the claim that was being brought rather than saying none at all. Counsel for the Appellant agreed.

4. The appeal was dismissed but not content with that decision, by a Notice dated 22nd May 2015 application was made for permission to appeal to the Upper Tribunal. The grounds are lengthy, running to eleven paragraphs. It is submitted that there was a failure by the judge to consider paragraph 276ADE(6) and that in considering the issue of family life it should have been accepted that the rather rigid approach in **Kugathas v SSHD [2003] INLR 170** had been modified by the guidance in **Ghising [2012] UKUT 00160**. It is further submitted that greater weight should have been given by the judge to the clinical depression and that the judge made a factual error in concluding that the Appellant had been away from Bangladesh for the last eleven to twelve years when in fact it was nearer nineteen. I should add to that, that at paragraph 12 of the Decision and Reasons the judge had regard to family property in Bangladesh in which one of his brothers lived with his wife and children. It was suggested to me, as a preliminary matter, that that was an error of fact but that was not something that had been raised in the grounds and in those circumstances, absent sufficient evidence that there was an error of fact, is not a matter upon which I attach significant weight.

5. On 10th August 2015 Judge of the First-tier Tribunal Hollingworth granted permission in these terms:

> "An arguable error of law has arisen in relation to the construction to be placed upon the facts in respect of the conclusion that no family life existed. At paragraph 21 the judge has referred to the Appellant's clinical depression being managed by medication and the visits by his sons. It is arguable that the conclusion that it is proportionate for the Appellant to be removed in the light of this finding weighs against proportionality in respect of removal."

6. When determining whether or not there is an error of law I also have to have regard to whether or not it is material. There is no disagreement about that. Although my attention was drawn to the possible error of fact on the part of the judge, given when one reads paragraphs 11 and 12 together, this Appellant was more likely to have been out of Bangladesh for nineteen years rather than the eleven or twelve, the issue I have to determine is whether the findings and the eventual conclusion were open to the judge. It is trite law to make reference to **R (Iran) [2005] EWCA Civ 982 para 9** but it is apposite in a case such as this.

7. For the Appellants it was conceded, and quite properly, that the material findings of fact made by the judge were open to him. Those material facts are the extent to which there was family life, which I have already indicated is to be seen in the context of the claim, that is to say whether it is sufficient to engage Article 8 family life and whether it was open to the judge to find that the clinical depression relied upon was such that taken with other factors outweighed the public interest in removal. The judge quite properly made reference to Section 117B.

8. The point taken in the grounds that the judge did not have regard to 276ADE has to be seen in the context of the application being made outside of the Immigration Rules itself which was stated at paragraph 1 of the Decision and Reasons and not a fact which was challenged. And so it is to the wider application of Article 8 that I am to have regard and indeed that was also conceded at the outset when there were preliminary discussions as to what the issues were before me.

9. However, when one looks to an appeal which turns on the wider application of Article 8 the starting point has to be whether or not the Immigration Rules themselves adequately deal with the factual matrix being presented. If they do not, then there needs to be a sufficient "gap"; that was a matter that was discussed at some length in the case of **SS(Congo) and Others [2015] EWCA Civ 387**.

10. What is relied upon by the Appellant in asserting that there is sufficient "gap"? It is the clinical depression taken together with the period of absence from Bangladesh and the relationship that the Appellant has with his sons. But there is guidance as to how cases relying on medical conditions should be approached. The leading case is now **GS (India) [2015] EWCA Civ 40**. It was not suggested in this case nor has it ever been suggested that Article 3 is met. It is a high threshold and the guidance points to the fact that in nearly all cases it will be the same high threshold in Article 8 cases. There needs to be something over and above the Article 3 factors to engage Article 8. That is not to say that Article 8 cannot be engaged, it can be but there have to be other factors. When I invited submissions on what those additional factors were, it was not suggested that there were any.

11. The difficulty facing the Appellant in this appeal was quite properly recognised by Miss Malhotra. She did her very best to point some error of

law on the basis of a lack of consideration of all the material issues but I do not find that there is anything perverse or irrational in the way in which the judge, having made findings of fact, which it is conceded were open to him, then looked to the public interest which in this case involved a person who had, at least for a significant period of time, been in the United Kingdom unlawfully even though he sought eventually to regularise his status..

12. I observe that the medical evidence upon which reliance was placed did not go into considerable detail as to the nature of the clinical depression and the witness statements that I have seen speak much of the dependency of the sons on their father rather than the other way round. I quite accept the submission that there will be a symbiotic relationship but whether that was sufficient, was, I find, a matter that was open to the judge and the finding that he made was one that was open to him.

13. In these circumstances there is no material error of law.

Notice of Decision

14. The appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal is affirmed.

15. No anonymity direction is made.

Signed **Date**

Deputy Upper Tribunal Judge Zucker