**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: AA/09380/2014**

**THE IMMIGRATION ACTS**

**Heard at: Field House** **Decision and Reasons Promulgated**
**On: 27 September 2018** **On: 11 October 2018**

**Before**

**THE HONOURABLE LADY RAE**
**(SITTING AS JUDGE OF THE UPPER TRIBUNAL)**
**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**JUNED MIAH**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

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

**DECISION AND REASONS**

1. The appellant is a citizen of Bangladesh born on 11 January 1995. He arrived in the UK on 16 October 2008 at the age of 13 years. On 27 October 2008 he made an asylum claim. On 12 February 2009 his claim was refused but he was granted discretionary leave until 11 February 2012 as an unaccompanied minor. That leave was subsequently extended until 11 July 2012, but an application made on 4 July 2012 for further leave was refused on 29 October 2014. The appellant appealed against that decision, on asylum and human rights grounds.

**© CROWN COPYRIGHT 2018**

2. The basis of the appellant's claim is as follows. At the age of eight years, his parents took him to the house of a man named Salam in Dhaka and left him there. He was made to work for Salam and his wife, cooking and cleaning, and he was slapped and thumped when his duties were not to an acceptable level. His parents visited him four or five times but then stopped and that was the last time he saw them. One day Salam told him they were leaving the house and they boarded an aeroplane to the UK. Salam abandoned him after they arrived in the UK and he was taken in by a man named Mr Alim who took him to the Home Office on 27 October 2008 when he claimed asylum. He feared returning to Bangladesh as he would not be able to survive there.

3. The respondent, in refusing the appellant's claim in February 2009, accepted his account of his domestic servitude in Bangladesh but did not accept his account of events leading to, and following his arrival in the UK. The respondent did not consider that the appellant was at risk on return in terms of Article 2 and 3 of the ECHR, but granted him discretionary leave as an unaccompanied child on the basis that it had not been possible to make contact with his family members in Bangladesh. In refusing his application for further leave on 29 October 2014 the respondent considered that the appellant was at no risk on return and that he no longer qualified for discretionary leave under the Home Office policy. The respondent did not accept the appellant's account of having lost touch with his family and concluded that his removal to Bangladesh would not breach his human rights. When considering Article 8 the respondent concluded that the suitability exclusion in S-LTR.1.6 of Appendix FM applied on the basis that the appellant's presence in the UK was undesirable owing to his failure to disclose, in his further leave application, a previous official reprimand by the police in March 2010, his arrest for shoplifting in February 2010 and his conviction on 19 March 2014 for breach of a non-molestation order. The respondent concluded that the appellant's removal would not breach his Article 8 rights either within or outside the immigration rules.

4. The appellant's appeal against that decision was heard in the First-tier Tribunal on 21 January 2015 by First-tier Tribunal Judge Chamberlain and was pursued only on long residence/ private life grounds under Article 8. The appeal was dismissed on 9 February 2015. At an error of law hearing on 21 May 2015 following a grant of permission to appeal that decision, the Upper Tribunal, sitting as a panel, found an error of law in Judge Chamberlain's decision and set it aside with directions made for skeleton arguments addressing the matter of whether section 117B(5) of the Nationality, Immigration and Asylum Act 2002 was intended to apply to children.

5. The appeal was adjourned to a resumed hearing on 29 September 2015 before a different panel, of the President, The Hon. Mr Justice McCloskey and Upper Tribunal Judge Bruce. The panel accepted the appellant's account of his experience in Bangladesh of being hired out to a master, of his ill-treatment by the master, of being abandoned by his master upon arrival in the UK and of having no ties to Bangladesh, family or otherwise, since arriving in the UK. The panel found, however, that the appellant had linguistic, cultural and social attachments to Bangladesh and that, whilst the exercise of reintegrating in his country of nationality would be challenging and difficult, it would not give rise

to very significant obstacles for the purposes of paragraph 276ADE(1)(vi) of the immigration rules. The panel did not consider the refusal under the suitability provisions to be sustainable in law. As for Article 8 outside the rules, the panel considered that Part 5A of the 2002 Act made no distinction between adult migrants and child migrants so that little weight was to be accorded to the appellant's private life in the UK. Having considered the appellant's circumstances the panel concluded that this was a case where the public interest prevailed and therefore dismissed the appeal on Article 8 grounds within and outside the immigration rules.

6. Permission to appeal to the Court of Appeal was sought by the appellant on three grounds: that the Upper Tribunal had erred by applying section 117B(5) of the NIAA 2002 to the private life established by the appellant when he was a minor, which fell outside that provision; that the Upper Tribunal had erred in concluding that the appellant continued to have linguistic, social and cultural ties to Bangladesh; and that the Upper Tribunal had erred in concluding that the appellant would not face very significant obstacles to reintegration on return under paragraph 276ADE(1)(vi). The Upper Tribunal granted permission itself, in order for there to be authoritative guidance given on the important issues in relation to the applicability of Part 5A of the 2002 Act to children.

7. The Upper Tribunal's decision was set aside by the Court Appeal, without a hearing, upon consent by the parties in relation to the first ground of challenge. It was noted that since the Upper Tribunal's decision the Court of Appeal had given judgment in MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705, in which it was concluded, reflecting the principles in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, that it would be inappropriate to treat a child as having precarious status merely because that was true of the parents. It was accordingly agreed that the Upper Tribunal had erred by treating the appellant as having held precarious immigration status as a child and so giving little weight to the private life he had established in the UK. The Court of Appeal remitted the matter to the Upper Tribunal to reconsider its decision having directed itself correctly in relation to s.117B(5).

8. The matter then came before us. It was agreed, further to directions issued by the Upper Tribunal on 24 May 2018, that the scope of re-making was limited to a consideration of Article 8 including a consideration of the relevant immigration rules.

## Appeal hearing and submissions

9. The appellant gave oral evidence before us, adopting his statement at pages A1 to A3 of the appeal bundle, and claiming that he knew nothing of Bangladesh having had a rough life there and that he had a very different life in the UK. When cross-examined by Mr Wilding he said that after doing a motor mechanics course he had helped out a friend at his garage. He had been taken on full-time as an estate agent and had previously worked as a waiter in a restaurant.

10. Both parties made submissions. Mr Wilding submitted that the appellant could not demonstrate very significant obstacles to integration in Bangladesh. He relied on the findings of the Upper Tribunal in 2015 and submitted that there was nothing in the evidence today which was capable of establishing that the Tribunal was wrong then or that the situation had changed. The appellant's work experience demonstrated his resourcefulness and capability of integrating into society wherever he went. His skills were transferrable to Bangladesh. The requirements of the immigration rules were therefore not met and there was a strong public interest against the appellant. Outside the rules, the appellant could not benefit from the Home Office policy on discretionary leave as the circumstances under which such leave had been granted, namely as an unaccompanied minor, had changed. He had not accumulated six years of discretionary leave by the time he turned 18 and therefore could not qualify for settlement under the policy. As for section 117B(5), whilst that did not apply to a child, it applied once the appellant became an adult and little weight ought to be attached to his private life as an adult. At the time of the appellant's recent employment his leave was precarious. In any event, even if section 117B(5) did not apply, there was nothing preventing the appellant from continuing his private life in Bangladesh. The decision to remove him was proportionate and did not breach his Article 8 rights.

11. Mr Karim submitted that the Upper Tribunal's acceptance of the appellant's claim to have been enslaved as a minor was crucial and was an unusual circumstance. He had spent his teenage years and his adult life in the UK and had never lived independently in Bangladesh. He did not know where his family was. He had no employment or accommodation readily available to him in Bangladesh and in the past three years his ties to Bangladesh had diminished whilst his ties to the UK had strengthened. There were therefore very significant obstacles to his integration in Bangladesh and the appeal should be allowed on the basis that he could meet the requirements of the immigration rules in paragraph 276ADE(1)(vi). Mr Karim relied on the Home Office Asylum Policy Instruction for Discretionary Leave at section 10.1 and submitted that the appellant had accrued six years of discretionary leave and therefore was entitled to settlement under the policy. The fact that the requirements of the rules and the policy were met was sufficient for the appeal to be allowed under Article 8. In any event, if consideration had to be given to Article 8 outside the rules and policy, the appellant was able to establish more pros than cons in the balance sheet approach set out in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60. There was very little against the appellant and a lot in his favour. With regard to section 117B(5), his private life was not established at a time when his leave was precarious and that continued to be the case. His private life was established whilst he was in the UK lawfully. His removal would be disproportionate.

**Statutory Framework and Immigration Rules**

12. In so far as it is material, paragraph 276ADE(1) of the immigration rules provides as follows:

"276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

13. Section 117 of the NIAA 2002 provides, so far as is material:

***"117A Application of this Part***

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a)breaches a person's right to respect for private and family life under Article 8, and

(b)as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a)in all cases, to the considerations listed in section 117B, and

(b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

***"117BArticle 8: public interest considerations applicable in all cases***

(1) The maintenance of effective immigration controls is in the public interest.

(2) 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 able to speak English, because persons who can speak English—

(a)are less of a burden on taxpayers, and

(b)are better able to integrate into society.

(3) 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.

(4) Little weight should be given to—

(a)a private life, or

(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

**Consideration and findings**

14. In its decision of 23 November 2015 the panel of the Upper Tribunal gave full and detailed consideration to the appellant's circumstances in the UK at that time and to the circumstances to which he would be returning in Bangladesh. Having accepted his account of how he came to the UK and his claim that he had had no ties with Bangladesh since coming to the UK at the age of 13, the panel found that he nevertheless continued to have linguistic, cultural and social attachments to that country and that he was unable to meet the requirement in paragraph 276ADE(1)(vi) to show very significant obstacles to integration in Bangladesh. The Court of Appeal did not interfere with the Upper Tribunal's findings in that respect, remitting the appeal only in regard to the application of section 117B(5) of NIAA 2002.

15. We have given careful consideration to the evidence produced by the appellant since the Upper Tribunal made its decision in November 2015 in order to assess whether it impacts upon the panel's findings or whether it demonstrates that there has been a material change in the appellant's circumstances such that he is now able to demonstrate very significant obstacles to integration in Bangladesh. However we can find nothing in the evidence before us to lead us to reach any different conclusion. Whilst the appellant asserts a strong private life in the UK, the evidence is very limited. He has undertaken some employment in the UK, assisting a friend in his motor garage, working part-time as a waiter in an Indian restaurant and most recently working in an estate agency. There is no suggestion or evidence of any family ties in the UK and no relationships of note. The only recent evidence produced before us consists of a brief letter of support from a local councillor, a letter from the estate agents and an unsigned letter from a friend. Whilst the appellant claims that he could not integrate into Bangladesh, he was unable to give any reason why he could not work in a restaurant in Bangladesh or find work in a car body shop, using the experience and skills he has achieved in the UK. His skills in both respects are plainly transferrable skills. There is, in effect, no evidence of any significant aspects of a private life which could not be replicated in Bangladesh. We find nothing in the appellant's evidence that changes the findings of the panel at [17] in regard to the level and nature of any obstacles and difficulties he may face in establishing himself in Bangladesh, despite the passage of time. Accordingly we find that the appellant cannot meet the requirements of the immigration rules on the basis of his private life.

16. It was Mr Karim's submission that the appellant benefitted from the Home Office policy on discretionary leave for applicants granted such leave before 9 July 2012, but we do not agree. Plainly the appellant no longer qualified for further leave on the same basis as previously, as that leave was granted on the grounds of being an unaccompanied minor whereas he is now an adult of 23

years of age. We do not agree with Mr Karim's submission that the appellant is entitled to settlement on the basis of having accrued six years of continuous discretionary leave including 3C leave extending until the present day. We agree with Mr Wilding that the calculation of leave would be from the initial grant in February 2009 until the appellant ceased to be a minor, in 2013, which clearly falls short of six years. We accordingly reject Mr Karim's submission that the appellant succeeds under Article 8 on the basis of an ability to meet the requirements of the rules and the Home Office policy. We find he meets the requirements of neither.

17. Moving on, therefore, to the wider consideration of Article 8 outside the immigration rules, we follow the "balance sheet" approach to such an assessment established in Hesham Ali. Plainly the appellant's inability to meet the requirements of the immigration rules means that the public interest lies in favour of his removal, subject to his ability to demonstrate compelling circumstances or sufficient countervailing factors. That is made clear in section 117B(1) of the NIAA 2002. We take account of the appellant's ability to speak English and to the fact that he is now working and therefore presumably financially independent, for the purposes of section 117B(2) and (3), but note that these are neutral factors. Section 117B(4) does not apply to the appellant as he has been in the UK lawfully since his initial asylum claim.

18. As for section 117B(5) we are fully cognisant of the fact that that was the basis upon which the previous Upper Tribunal's decision was set aside and why the appeal was remitted by the Court of Appeal. We accept that the appellant's immigration status whilst he was a child cannot be considered as precarious, as is made clear in the cases of MA (Pakistan) and Zoumbas, given that he cannot be considered to have been responsible for his entry to the UK or his immigration status thereafter as a child. We therefore give weight to the appellant's private life in the UK as a child. We have particular regard to his terrible experiences in Bangladesh and in being brought to, and abandoned in, the UK in the manner claimed, to his studies undertaken in this country and the friendships and ties that have evolved during his teenage years.

19. Where the parties diverged in their views was the impact of section 117B(5) on the adult appellant, beyond his minority. As we indicated to the parties, we were somewhat surprised that this had not been the subject of discussion previously during the lengthy appeal process and before the Court of Appeal. Mr Karim's submission was that the word "established" in section 117B(5) should be given its ordinary meaning and that the concept of precariousness could never be applied when private life had been established as a minor. Mr Wilding's submission was to the contrary and that an assessment of Article 8 was fact sensitive and was ongoing and moveable. We have to say that we find ourselves in agreement with Mr Wilding. There is nothing in the judgment in MA (Pakistan) which supports Mr Karim's case and we find of particular significance the Court of Appeal's emphasis in brackets at the end of [14] of the Statement of Reasons, on the appellant's precarious immigration status *while he remained a minor*. Accordingly we consider that little weight is to be given to the appellant's private life once he became an adult.

20. However, if we are wrong about that, and the appellant's lack of choice as a child as to his entry to, and stay in the UK has led to a situation where he cannot now be blamed for his immigration status, and consequently that we accord weight to the private life he has established not only as a child but also as an adult, we are still unable to find in his favour in the proportionality assessment. It remains the case that, despite the unfortunate experiences he had as a child in Bangladesh and the circumstances in which he found himself abandoned in the UK, and despite the lack of contact with his family since coming to the UK, he is now a healthy 23 year old male with the advantage of UK qualifications and skills which can assist him in re-establishing himself in the country where he spent 13 years of his life and to which he retains linguistic, cultural and social attachments. He has no significant links to the UK and there is no reason why he cannot establish himself into life in Bangladesh. We do not agree with Mr Karim that the "pros" far outweigh the "cons", in terms of the balance sheet approach. We find that there are no compelling or countervailing factors outweighing the public interest in maintaining immigration control in this case and we conclude that the appellant's removal to Bangladesh would not be disproportionate and would not breach his Article 8 rights.

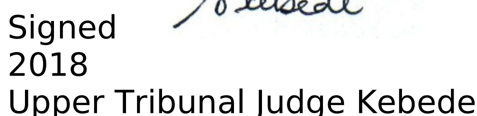
21. Accordingly we dismiss the appeal under the immigration rules and on wider Article 8 grounds outside the rules.

**DECISION**

22. We re-make the decision by dismissing the appellant's appeal on Article 8 human rights grounds.

Anonymity

We note that the decision made by the President was not anonymised although the previous decisions were, presumably because the appellant was a minor at that point. We formally discharge any anonymity orders that were made previously by the First-tier Tribunal or Upper Tribunal.



Signed Dated: 28 September 2018
Upper Tribunal Judge Kebede