



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12217/2017

THE IMMIGRATION ACTS

Heard at Field House  
On November 9, 2018

Decision & Reasons Promulgated  
On November 19, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MAHMUDUR RAHMAN KHAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moriarty, Counsel instructed by D J Webb & Co Solicitors  
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant entered the United Kingdom as a student on June 9, 2007 and his leave was subsequently extended in the Tier 4 (General) Student category until October 30, 2015. On December 6, 2014 the appellant was served with notice that his leave was being curtailed on February 8, 2015 due to the fact his college had had its licence revoked.
2. An application for leave to remain was then submitted in the Tier 4 category but this was rejected on June 24, 2015 as the appellant had failed to enrol his biometrics on request.
3. On October 13, 2015 the appellant lodged an application for leave to remain on family/private life grounds but he failed to complete mandatory sections on the form

and this application was rejected and returned to his representatives on December 15, 2015. Although this decision was subsequently challenged by way of judicial review the court rejected the application on September 1, 2016.

4. On April 3, 2017 the appellant made an application for indefinite leave to remain under paragraph 276B HC 395. This application was refused by the respondent on October 2, 2017 on the basis the appellant could not satisfy the requirements of paragraph 276B HC 395.
5. The appellant appealed this decision on October 13, 2017 under section 82 of the Nationality, Immigration and Asylum Act 2002 and the appeal came before Judge of the First-tier Tribunal Geraint Jones QC on July 9, 2018 and in a decision promulgated on July 13, 2018 he dismissed the appellant's appeal on Article 8 grounds. The appellant appealed that decision on July 27, 2018 and permission to appeal was granted by Judge of the First-tier Tribunal Kelly on August 8, 2018.
6. The matter came before me on October 8, 2018 and after hearing submissions from both representatives I concluded there was an error in law. I made the following findings:
  - (a) The appellant could not have succeeded under paragraph 276B HC 395 because the appellant had made his application before he had accrued ten years' continuous residence.
  - (b) The finding at paragraph 9 of the decision that the appellant had chosen to be an illegal overstayer was factually incorrect.
  - (c) Whether society and/or family would express concerns about his relationship remained a possible finding.
  - (d) The Tribunal had to consider whether there was a part of Bangladesh the appellant and his wife could reasonably relocate to.
7. I adjourned the hearing and directed that the appellant file and serve a further statement by November 2, 2018.

### **PRELIMINARY ISSUES**

8. It was agreed that further oral evidence would only be needed from the appellant himself although two other witnesses had attended.
9. Mr Jarvis served evidence (Form IS126) of what happened when the appellant had been detained by immigration officers. Mr Moriarty objected to this document being served on the basis (a) it was served late; (b) it was not relied on in the decision letter and (c) no refusal had been issued under paragraph 322(2) HC 395.
10. Having heard submissions, I allowed the document into evidence because the encounter was not disputed and the appellant could address the contents in his oral evidence. Mr Moriarty asked for time to see whether he would be seeking an adjournment to ascertain if the respondent had any further evidence but after a short

adjournment, he confirmed the appellant was content to proceed without any further delays.

### **EVIDENCE FROM RESUMED HEARING**

11. The appellant adopted his further statement and gave oral evidence.
12. The appellant accepted he had been encountered whilst working at Lidl. He explained that a friend had secured the employment for him and he had handed over to him a copy of his passport as this was required by his employer. At the time he had submitted an application for leave to remain and believed he was able to work. It therefore came as a surprise to him to find that the documentation contained on the Lidl file was not what he had submitted. The passport number was different and he could not explain why there was a false “indefinite leave to remain vignette” with the copy document. He had not been able to speak to his friend at the time because the authorities detained him. He did try and contact him after he had been released but he had been unable to (until this day).

### **SUBMISSIONS**

13. Mr Jarvis adopted the decision letter dated October 2, 2017 and submitted that when considering the appellant’s claim under article 8 ECHR the Tribunal should have regard to the fact that the appellant had been found to have been working using false documents.
14. The appellant had not disputed the confrontation between himself and the immigration officer or the fact he had been detained. Despite the serious nature of the allegation the appellant had taken no steps to clarify the position with his former employer and his claim that his friend had provided the false documents lacked credibility especially in circumstances when he had been unable to trace him since his arrest.
15. Whilst the decision letter placed no reliance on this document and there had been no criminal investigation he submitted that Tribunal could be satisfied that false documents had been used and in such circumstances he would never satisfy the suitability requirements either for a long-term residence application or an application under paragraph 276ADE HC 395.
16. With regard to his concern about returning to Bangladesh he submitted the appellant had made no refugee claim or an article 3 ECHR claim and he submitted it would be wrong to make a finding on that claim in these proceedings.
17. Mr Jarvis submitted there were no “very significant” problems preventing them continuing family life in Bangladesh because he has experience of life in that country, he has demonstrated an ability to support both himself and his wife, he has been educated, he speaks the language and there is the option of the voluntary return package available to him and his wife and young child. He submitted the fact he had been in this country for over 10 years was not sufficient reason to allow his appeal. The appellant continued to invite the Tribunal to exercise of discretion in allowing

his appeal on long residence grounds but he submitted that this discretion was only open to the respondent and if the appellant felt that discretion had been applied incorrectly then a judicial review against that decision should have been brought.

18. Mr Moriarty submitted that in considering the appellant's article 8 claim the Tribunal should take into account the fact the appellant had been let down and misled by his previous representatives. He had been incorrectly advised both in 2015 and 2017 and the Tribunal had already accepted that he had not chosen to overstay but it had been through the fault of his previous representatives. His former representatives had erroneously applied on long residence grounds in April 2017 when instead the application should have been made in June 2017. He referred the Tribunal to the decision of Mansur (immigration advisor's failing: article 8) Bangladesh [2018] UKUT 00274 and submitted that the fact he had been deprived of lawful residence was a factor to take into account when considering his claim on article 8 grounds.
19. Mr Moriarty invited me to attach no weight to form IS126 which had been handed in on the morning of the hearing. The appellant had given clear evidence that he was unaware his employer had false documents and his own evidence was that he had applied for leave to remain and believed he was able to work. He had no reason to lie or use a false document in such circumstances as any leave he had would have been extended. Requiring the appellant and his family to travel to Bangladesh would be both unreasonable and unduly harsh given the fact that the appellant and his wife came from different religions and the country evidence supported the appellant's fear that he would face problems in Bangladesh regardless of where he was living. He invited the Tribunal to have regard to the period of time that he had been living here and that the best interests of the young child would be to remain in this country. He submitted there were no criminal charges or "very poor" immigration history that would count against the appellant and he invited me to allow the appeal.

### **FINDINGS**

20. The appellant's immigration history is well documented and set out above. The First-tier Tribunal accepted that he entered the United Kingdom on June 9, 2007 and whilst his immigration status had always been precarious he had lived here lawfully until July 27, 2015.
21. The First-tier Tribunal had been provided with evidence that the former solicitors had failed to follow his instructions and there was therefore a delay in submitting his family/private life application until October 2015 despite the instructions being provided in-time in July 2015.
22. The problem for the appellant was that when he erroneously submitted his application for indefinite leave to remain there had been a gap in his immigration history regardless of the fact he had not accumulated 10 years lawful leave. The decision letter made it clear that he had to have made his application by July 27, 2015 but did not make the application until October 13, 2015 which was 106 days later.
23. At a previous hearing on October 8, 2018 the respondent's representative, Mr Tarlow, accepted that the appellant had not chosen to be an overstayer and the

correspondence in the bundle clearly lay the blame for this delay in submitting his application on the former solicitors.

24. In Mansur the Tribunal considered what effect an immigration advisor's failings had on an article 8 claim. The Tribunal concluded that a previous advisor's misfeasance was capable of affecting the weight that would otherwise be given to the importance of maintaining the respondent's policy of immigration control in circumstances where the advisor had failed to follow the applicant's specific instructions as this was the sole reason why the appellant's application for leave failed.
25. Turning to the facts of this current case I have been provided with evidence from the solicitors original file. It is clear from the evidence and in particular the document contained at page 60 that contrary to what the appellant had been led to believe his application had not in fact been submitted until October 12, 2015 even though the appellant's representatives had suggested that it had been submitted, in-time, on July 21, 2015. The solicitors stated in their letter dated April 16, 2018
 

"I have now had the opportunity of considering your complaint and have investigated my file. I have concluded that there was a delay in submitting your application following your instructions in July 2015. The FLR (FP) application was not submitted until October 2015 as acknowledged by the Home Office. It does appear that Mr Cheng, rather than submitting the application at the time advised, chose for whatever reason, not to do so. Please accept my apologies on behalf of the firm for the delay."
26. There is also a letter from the legal ombudsman dated May 21, 2015 confirming that the previous advisors had offered £500 by way of compensation albeit that offer had only been made verbally and until such time as it was in writing it could not be passed on to the appellant.
27. Mr Moriarty did not seek to argue the appellant was entitled to leave under paragraph 276B HC 395 but did argue that the negligence of the previous advisor was a significant factor the Tribunal should take into account when considering the article 8 claim and this approach appears to mirror the conclusions of the Tribunal in Mansur.
28. In Mansur the Tribunal acknowledged that the private life was a "significant one built over the last 10 years involving academic achievement and prolonged lawful work. The appellant has at all times strived to maintain adherence to immigration law". This affected the weight to be given to the maintenance of immigration controls to the point where the appellant's protected private life outweighs what is on the respondent side of the balance.
29. I am satisfied that the facts of his case are similar to those in Mansur and unless there are further factors which should be taken into account when considering the public interest in maintaining immigration control it would seem that this appellant should succeed on private life grounds under article 8 ECHR.
30. One such factor was raised in evidence before me and this centred around the immigration authorities' attendance at Lidl Limehouse at 306 Burdett Rd, London.

There appears to be no dispute that the appellant was encountered during an enforcement visit that took place on May 10, 2016. The appellant was working and was spoken to. He provided his correct details and told the authorities that he had an application for further leave to remain pending at the Home Office. What he told the immigration authorities was correct because documents show that he did lodge an application on October 12, 2015 although he believed this had been lodged in July 2015.

31. Lidl provided a photocopy of his passport and the photocopy of an indefinite leave to remain vignette. The respondent states the vignette was counterfeit but made no observations regarding the passport. During cross examination the appellant stated that he told the immigration officer that the passport number was different to his and that he had no knowledge of the counterfeit document. He had explained that he had obtained this employment through a friend and had passed a copy of his passport to the friend to pass on to his employer. If anything illegal had been done he invited me to find it had not been done with his knowledge or instruction.
32. I was not provided with any further information about this documentation by the respondent but I am satisfied that the documentation recovered from Lidl contained a counterfeit vignette because this fact does not appear to be challenged by the appellant. The respondent would appear to satisfy the burden of proof placed on him in cases such as RP (proof of forgery) Nigeria [2006] UKAIT 00086.
33. However, the appellant takes issue with the suggestion that he knew a counterfeit vignette had been submitted.
34. In Shehzad and Chowdhury [2016] EWCA Civ 615 the Court of Appeal held that a decision under paragraph 322(1A) of the Rules required material justifying a conclusion that the individual under consideration had lied or submitted false documents. The initial evidential burden of furnishing proof of deception was on the Secretary of State. Where the Secretary of State provided prima facie evidence of deception, the burden shifted onto the individual to provide a plausible innocent explanation, and if the individual did so the burden shifted back to the Secretary of State.
35. I have to consider whether the appellant's explanation is a plausible innocent explanation and in doing so I take into account the following:
  - (a) Lidl handed over a copy of the passport and vignette that was contained on the appellant's work file.
  - (b) The appellant claimed to have told the immigration officers that the passport number on the document he had been shown was different to the passport that he had submitted with his application.
  - (c) The applicant denied any knowledge of the vignette stating that he had made an application for leave to remain which was recorded in the immigration officer's record of attendance.

- (d) The appellant was unable to provide any evidence from his friend about how and why he provided the appellant's passport or how a counterfeit vignette came to be on the appellant's file.
  - (e) No reliance was placed on this document by the respondent in the decision letter.
36. Whilst I note the appellant's explanation, I do not find his account of how the counterfeit passport came to be on his personnel file credible. The appellant has also claimed that the passport number on the copy passport was different to that on his own but did not dispute it was his picture on the passport. His claim that he was unable to contact this friend after he was released or whilst he was detained for five days also lacks credibility.
  37. Whilst I accept he had had a pending application this does not mean the "indefinite visa" endorsed on his copy passport.
  38. An employer is required to take a copy of the passport to ensure it is genuine and I found the appellant's whole account of how this document was passed to Lidl by his friend to lack credibility.
  39. The appellant had been given an opportunity to adjourn the hearing to obtain further evidence, but he had instructed his counsel that he wished to proceed and I must therefore consider this issue on the evidence currently before me.
  40. Taking into account all the above I do not accept the appellant has put forward a plausible innocent explanation and based on the evidence before me I am satisfied the respondent has discharged his burden of proving that the appellant had either lied or had personally submitted false documents.
  41. I therefore find that there are adverse factors that would differentiate this appeal from the facts considered in Mansur.
  42. In deciding whether removal would breach the appellant's rights under article 8 ECHR I have taken into account all of the above matters and placed significant weight on the length of time the appellant has been here and the fact that but for the errors of his former advisors he would have qualified for leave to remain. The issue of future IVF treatment is not a factor that has persuaded me to grant leave. However, the use of a fraudulent document would have meant that this appellant would never satisfy the "suitability" requirements of the Immigration Rules and I find that the maintenance of immigration control outweighs any private life the appellant has built up in this country.
  43. When making a claim under article 8 ECHR I also have to consider the family life element of his claim. The appellant and his wife married in July 2009. At the time, the appellant and his wife were both in this country lawfully although their respective statuses would have been precarious as they both were in this country with limited leave to remain. The appellant is a Muslim whereas his wife is a Hindu.

44. In his witness statement dated October 31, 2018, the appellant described how there was conflict between Hindus and Muslims where his family lived and the appellant claims that his brother believed his marriage would ruin his reputation. The appellant described in paragraph 4 of this statement that he would be at risk if his brother knew of his marriage and located them. The appellant goes on to describe the problems both he and his wife would experience from their respective families.
45. Mr Jarvis submitted that the appellant was attempting to bring what amounted to a claim under either the Refugee Convention or article 3 ECHR under the umbrella of article 8 ECHR. Mr Moriarty submitted that there would be significant obstacles to them continuing their lives in Bangladesh. There is no evidence that either the appellant's or his wife's families had any influence outside their home area and Bangladesh is a country of over 164 million people.
46. The appellant's wife has converted to Islam and there is nothing in law preventing the appellant's wife converting to Islam and there is nothing preventing the appellant and his wife being married. There is some evidence that people who convert can be ostracised by their people but this relationship centres around a Muslim male marrying a female who has converted to Islam. I find nothing in the evidence that would support Mr Moriarty's submission there would be any risk especially in circumstances when no such claim was made to the respondent by way of formal application.
47. It is argued that were they to be returned they would struggle to pay rent or feed themselves and their two-month-old daughter. The appellant and his wife have demonstrated an ability to work and support themselves in the United Kingdom. There is nothing in the country evidence that suggests a young child cannot be brought up in Bangladesh. The appellant fears he would be unable to obtain work in the civil service but there are of course other job opportunities.
48. Whilst I must have regard to section 55 of the Borders, Citizenship and Immigration Act 2009 I note the child is very young and both parents come from Bangladesh where they have spent most of their lives. Their daughter is entitled to grow up in her country of nationality. Neither parent satisfies the Immigration Rules and therefore neither parent has any basis to remain here unless removal would breach their rights under article 8 ECHR.
49. I have considered Section 117B of the 2002 Act and whilst the appellant does speak English this is at best a neutral factor. They are not financially independent and their respective statuses were precarious at all times. There is also my finding over the appellant's employment. Section 117B(6) of the 2002 Act has no application in this appeal. The fact the appellant and his wife want to pursue IVF treatment is not a reason to allow them to remain especially as such treatment is available in Bangladesh. At paragraph 15 of his recent statement the appellant spoke of not having access to state funded treatment. That again is not a reason to allow this appeal.
50. Having considered all the evidence I am satisfied that return to Bangladesh would not be disproportionate.

**DECISION**

- 51. I have previously set aside the decision.
- 52. I remake the decision and dismiss the appeal on human rights grounds.

No anonymity direction is made.

Signed

Date 12/11/2018



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**  
**FEE AWARD**

I do not make a fee award as I have dismissed the appeal.

Signed

Date 12/11/2018



Deputy Upper Tribunal Judge Alis