Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12760/2017**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 27 November 2018	**On 20 December 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

DEBASHIS SAHA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Symes instructed by JS Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Bangladesh who was born on 1 December 1982. On 7 April 2017, the appellant made an application for indefinite leave to remain ("ILR") based upon ten years' continuous lawful residence under para 276B of the Immigration Rules (HC 395 as amended). On 5 October 2017, the Secretary of State refused the appellant's application for leave under para 276B and also under Art 8 of the ECHR.

2. The appellant's appeal to the First-tier Tribunal was dismissed by Judge C J Woolley in a decision promulgated on 3 May 2018.

3. The appellant now appeals to the Upper Tribunal with permission granted by the First-tier Tribunal (Judge Blundell) on 15 August 2018.

The Immigration History

4. The appellant had entered the UK on 26 March 2007 with leave as a student valid until 30 April 2010. That leave was extended until 27 September 2011 when the appellant made a further application for leave as a Tier 4 Student. This was refused on 12 December 2011. The appellant tried to appeal out of time on 9 January 2012 but his notice of appeal was rejected as being out of time on 2 February 2012. As was accepted before Judge Woolley, the appellant's leave, therefore, expired on 4 January 2012 when time for lodging any appeal had expired.

5. The appellant then made an out of time application for further leave as a Tier 4 (General) Student on 9 March 2012. Leave to remain was granted on 21 June 2012 until 28 October 2013.

6. Prior to his leave expiring, on 28 October 2013 the appellant made an application for further leave as a Tier 4 (General) Student which was granted until 31 December 2014.

7. On 31 December 2014, the appellant applied for further leave as a Tier 4 (General) Student and that application was refused on 12 June 2015. Following an administrative review on 29 June 2015, that decision was maintained and the appellant's leave, thereafter, expired on 6 July 2015.

8. The appellant unsuccessfully sought judicial review of the decision to refuse his application for further leave as a Tier 4 (General) Student (see Saha and Anor v SSHD [2017] UKUT 17 (IAC)).

9. The present application for ILR based upon 12 years' continuous lawful residence was made on 7 April 2017 and was refused on 5 October 2017. It is against that latter decision that the appellant appeals in these proceedings.

The Judge's Decision

10. Before Judge Woolley it was accepted by the appellant's (then) counsel that he could not establish ten years' continuous lawful residence in the UK for the purposes of para 276B. The appellant did not have valid leave from 4 January 2012 until 21 June 2012, a period of 168 days and the appellant's leave finally expired on 6 July 2015. Judge Woolley found that the appellant could not establish a period of ten years' lawful residence between 26 March 2007 (when he first entered the UK) and 6 July 2015 (when his last period of leave expired). Neither the grounds, nor Mr Symes in his submissions, sought to challenge the judge's finding in respect of para 276B.

11. Before Judge Woolley the appellant relied upon para 276ADE but Judge Woolley found that there were not "very significant obstacles" to his reintegration into Bangladesh and so he could not succeed under para 276ADE(1)(vi). That finding

was not challenged in the grounds and was again not challenged by Mr Symes in his submissions.

12. Before Judge Woolley, it was also accepted that the appellant could not succeed as a 'partner' or 'parent' under Appendix FM. The appellant's wife is a Bangladeshi national who is not settled in the UK and their daughter, then aged 2½ years, is neither a British citizen nor settled in the UK and had not been in the UK for at least seven years.

13. The thrust, therefore, of the appellant's claim before Judge Woolley was under Art 8 outside the Rules. In that regard, the appellant contended that the Secretary of State had been wrong to refuse his claim under the Rules, inter alia, under para 322(2) on the basis that the appellant had, in making his earlier applications on 9 March 2012 and 25 October 2013, submitted a fraudulently obtained TOEIC certificate from ETS. That conclusion had unsuccessfully been challenged in the judicial review proceedings.

14. Nevertheless, before Judge Woolley the appellant maintained that he had not used a proxy test taker but had taken the English language test himself and therefore had not fraudulently obtained and used the English language certificate. Judge Woolley accepted, on the evidence before him, that the Secretary of State had not established that the appellant had submitted a fraudulently obtained English language certificate in his earlier application and so had not established that para 322(2) applied.

15. Judge Woolley then went on to consider the appellant's claim under Art 8 outside the Rules. First, he found that it was in the best interests of the appellant's child, aged 2½, that she should return with her family to Bangladesh (see para 42). He also found that it would be reasonable to expect her to go to Bangladesh with her parents (see para 51). Then, at paras 52–54 of his determination the judge considered first, potential factors "acting against the appellant" (at paras 52(i)–(v)) and then potential factors in "favour of the appellant" (at paras 52(vi)–(viii); then, he reached an overall conclusion on proportionality and Article 8 (at para 52(ix) and 53–54). The judge said this:

> "**The wider proportionality assessment**
>
> 52. I have found that the appellant enjoys a private and family life in the UK and that his rights to a private life will be interfered with by the decision to refuse his human rights claim. The issue therefore remains as to whether this decision is proportionate to the legitimate aim identified. The Lord Chief Justice in **Hesham Ali** recommended a balance sheet approach to the exercise of assessment.
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> **Potential factors acting against the appellant**
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> i) The appellant's immigration history
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> I find that the appellant's immigration status has been precarious from the moment he arrived in the UK, and at times has been unlawful. He arrived as a Tier 4 student in 2007. This was always going to be a temporary status and he could not have anticipated that he would ever be granted permanent status. There was a gap in his lawful leave in 2012. His further grant of leave as a Tier 4 student again was always going to be a temporary status.

Since his leave expired on 31st December 2014 he has been in the UK awaiting a decision or appeal. His child was born while his leave was precarious. I must take this as a factor weighing against the appellant. **MA (Pakistan)** makes it plain however that considerations of 'precariousness' should not apply to the child and the actions of the parent cannot be taken against her.

ii) The precariousness of family life

The appellant has developed his family life in the UK at all times while his status was precarious. His wife is Bangladeshi and is not a British citizen or settled in the UK. Little weight must be given to any private life developed in this way. These considerations also apply to the development of any family life with a non-qualifying partner (see **Rajendran (s117B – family life) [2016] UKUT 00138 (IAC)**).

iii) Knowledge of English and financial independence

The appellant has now shown that he has a knowledge of English through the production of an English Language certificate and he was comfortable at the appeal in that language. This however is not a factor in his favour but a neutral factor. The appellant is not allowed to work and told me that he was supported by three friends from the village. He cannot be regarded as financially independent. This is a factor against him.

iv) Reasonableness of return

I have found that there are no significant obstacles to his integration in Bangladesh. In respect of his wife and child I have found that it is reasonable to expect them to return to Bangladesh and that it is in the child's best interests to do so. His wife is a Bangladeshi national who is not settled in the UK and no reason has been advanced as to why she could not return to her home country to live with her husband and child.

v) Economic burden on the country

The appellant is living in the UK entirely dependent on the charity of his friends. He cannot be regarded as self-sufficient. He represents a significant economic burden on the country just in terms of the provision of housing and healthcare.

Potential Factors in favour of the appellant

vi) I give significant weight to the child's position. She was born in the UK and has been in the UK for all of her life. Moreover she cannot be blamed for the failings of her parents over this (see **Zoumbas v SSHD [2013] 1 WLR 3690**). Applying the tests laid down in **EV (Philippines v SSHD [2014] EWCA Civ 874** I note she will have grown up close to her Bangladeshi parents and will have learnt Bangladeshi culture through them. Her return to Bangladesh will I find be facilitated through her connection by heritage with that country and her exposure to Bangladeshi culture in the UK. In terms of her future education I note the Supreme Court's decision in **Patel [2013] UKSC 72** where Lord Carnwath reminded the court that Article 8 was not a general dispensing power. In respect of education he commented 'such considerations do not by themselves provide grounds of appeal under Article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this

country, however desirable in general terms, is not in itself a right protected under Article 8". I do not accept that the position of the child can be distinguished from the appellant in **Patel**, and in any event Lord Carnwath was setting down a general principle. I find that the child could continue their development and education adequately in Bangladesh, even though this might not be to the same standard as in the UK.

vii) Contribution to the community

I accept that the appellant has made a contribution to his local community. He is a local leader of Bangladeshi organisations and has made a wider contribution to UK society through his cricket playing at a high level. Following **Lama (video recorded evidence – weight – Article 8 ECHR: Nepal) [2017] UKUT 16 (IAC)** I accept that a positive contribution to society can be given some weight.

viii) Private and family life in the UK

I have accepted that the appellant has a private and family life in the UK and accept that he would much prefer to remain in the UK rather than returning to Bangladesh. Article 8 however gives no one the right to choose once country of residence over another. I bear in mind that any private and family life has been built up while the appellant's immigration status has been precarious and he has had no guarantee of that private and family life in the UK continuing. There could have been no reasonable expectation that the appellant would be allowed to stay, even once he had married and had a child. I find that Sections 117B(4) and (5) are engaged and that little weight should be given to the private life he has developed while his immigration status has been precarious. Even though this is not a factor that can be taken against the child it is still relevant in the overall balancing exercise.

ix) **Overall conclusion on the proportionality exercise**

Answering the questions put in **Agyarko** and **Hesham Ali** I find that the objective of the measure (namely the refusal of further leave to the appellant in the interests of legitimate immigration control) is sufficiently important to justify the limitation of any private and family life rights of the appellant, and that the measure of refusing his application is rationally connected to the objective of legitimate immigration control in the economic interests of the UK. I find that a lesser measure could not have been employed. I find that the importance of legitimate immigration control outweighs the rights of the appellant and his family which I have summarised above. Applying the balance sheet approach it is clear that the countervailing factors do not outweigh the importance attached to the principle of legitimate immigration control. The appellant may face some difficulties on return to Bangladesh after being in the UK for so long, but the fact that this is so does not mean that his Article 8 rights are thereby being breached. The appellant has not produced a very compelling case so as to outweigh the public interest in removal.

53. I was referred in the skeleton argument to the comments of Lord Reed in **Agyarko** at para 51 (see page 4 of skeleton). The words highlighted read 'if, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal'. From the facts I have found, however, the appellant would not be certain to be granted leave to enter. He has no income of his own and no support apart from the charity of his

friends. He has not mentioned any resources he might have in Bangladesh. It is hard to see how he could ever meet any of the financial requirements for leave to enter, in whatever capacity he applied in. The Supreme Court in **Agyarko** also placed an important gloss on the **Chikwamba** principle in cases involving precarious family life, as this has always been. In precarious family life cases 'it would be necessary to establish that there were exceptional circumstances to warrant such a conclusion' (i.e. that **Chikwamba** might apply notwithstanding a finding that there were no significant difficulties to private life continuing outside the UK). I find that no exceptional circumstances have been raised in this appeal. There has been no undue delay in decision making on the part of the respondent (the application was made on 7th April 2017 and the decision made on 5th October 2017) and the appellant has been in no doubt since his leave expired in December 2015 that his continued stay was precarious.

Overall conclusion on Article 8

54. Putting all the factors into the balance, I find that the interests of the appellant and his family in the UK do not outweigh the interests of immigration control. I find that the balance does not come down in favour of those rights as against the principle of legitimate immigration control. I find that hardship consequent on refusal of leave to remain does not go far enough beyond the baseline to make removal a disproportionate use of lawful immigration controls. The appellant and his family can reasonably be expected to return to Bangladesh where they could continue their life. I have found it reasonable for the child to return with him and his wife. Any obstacles or difficulties in removal do not go beyond matters of choice or inconvenience. I find that the interference with the appellant's rights to a private and family life is not of such a level as to breach those rights and that the decision to refuse leave to remain is therefore proportionate under Article 8 of the European Convention. There would be no unjustifiably harsh consequences for the appellant, his wife and child returning to Bangladesh. GEN 3.2 does not therefore apply so as to create a general dispensation from the requirements of Appendix FM".

Discussion

16. Relying upon the grounds of appeal, Mr Symes made a number of submissions supporting the appellant's contention that the judge's Art 8 assessment is legally flawed.

17. First, Mr Symes submitted that the judge failed properly to take into account that the appellant had not, on the judge's findings, practised any deception or used a fraudulently obtained English language certificate. Consequently, the appellant had wrongly been refused an extension of his leave in 2015 on that basis. Mr Symes submitted that if the true position had been known in 2015, the appellant's immigration history would have been different. In any event, the judge gave no credit to the fact that the appellant had been on a "lawful residence route" and it was only the TOEIC issue that derailed him.

18. The difficulty with Mr Symes' submission is, as Mr Howells identified in his submissions, that the refusal of leave on 12 June 2015 was not based exclusively on the fact that the appellant had previously submitted a fraudulently obtained English language certificate. It was also refused because the appellant did not have a valid Confirmation of Acceptance for Studies (CAS) which meant that the appellant's application for further leave to remain as a Tier 4 Student was bound to fail in any

event. Mr Symes' submission that the appellant was, after 2015, in difficulties in obtaining a new sponsor because of the claimed deception is unsupported by any evidence.

19. In truth, the judge correctly approached the substance and nature of the appellant's residence in the UK over the relevant eleven year period he relied upon under Art 8. His circumstances were, and would remain, "precarious". Even if he had been granted leave in 2015 as a student, he would still not have been able to establish the ten years' continuous lawful residence because of the break of 168 days in his leave in 2012 and his private life was, at all times, established or formed whilst his immigration status was precarious and to which, therefore, s.117B(5) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") applied.

20. Secondly, Mr Symes relied on two matters not raised in the grounds.

21. First, he criticised the judge at para 52(ix) for requiring the appellant to produce a "very compelling case" to outweigh the public interest in removal. Mr Symes submitted that that was too high a test, reflecting that applicable in deportation cases where an individual has been sentenced to a term of imprisonment of at least four years.

22. It is unfortunate that the judge imposed the epithet "very" before "compelling" in para 52(ix) (see also para 49(iv)). However, overall, it is clear that the judge did not impermissibly carry out the balancing exercise required under Art 8.2. First, he set out the law in some detail at para 49(i)–(iv). As I have already indicated, he considered the best interests of the appellant's child and concluded that it was both reasonable to expect her to go to Bangladesh with her parents and in her best interests to do so. He then considered the competing factors "against" and "in favour" of the appellant at paras 52(i)–(vii). The judge clearly had in mind the approach favoured by the Supreme Court in R (Agyarko) and Anor v SSHD [2017] UKSC 11 that a claim outside the Rules under Art 8 would only succeed if there were "unjustifiably harsh consequences" such that the public interest would then be outweighed (see [48] and [57]–[60]). In cases where private and family life is "precarious", the Supreme Court stated that: "a very strong or compelling claim is required to outweigh the public interest in immigration control" (at [57]). Judge Woolley cited Agyarko (at paras 43, 49(iv), 52(ix) and 53). At para 54 the judge made a finding that: "[t]here would be no unjustifiably harsh consequences for the appellant, his wife and child returning to Bangladesh". That finding is not challenged on any ground such as irrationality. It is entirely consistent with the approach in Agyarko. For these reasons, I am not persuaded that the judge misdirected himself in carrying out the balancing exercise when concluding that the appellant's removal would be a proportionate interference with his private and family life.

23. Second, Mr Symes submitted that the judge had been wrong to find in para 52(iii) that the appellant was not "financially independent" because he was supported by third parties. Mr Symes submitted that, in the light of the Supreme Court's recent decision in Rhuppiah v SSHD [2018] UKSC 58, for the purposes of s.117B(3) of the

NIA Act 2002 the appellant was "financially independent" providing he was not dependent upon public funds even if that was as a result of third party support.

24. Whilst Mr Symes is undoubtedly correct as to the proper interpretation of s.117B(3) of the NIA Act 2002 as a result of the Supreme Court's decision in Rhuppiah, which post-dated the judge's decision in this appeal and overruled the Court of Appeal's interpretation of s.117B(3) which the judge applied, I am wholly unpersuaded that this error materially affected the judge's decision and ultimate finding that the appellant's circumstances did not outweigh the public interest. The public interest was, undoubtedly, engaged as the appellant could not succeed under the Immigration Rules and had no basis for remaining in the UK apart from any claim under Art 8 (see s.117B(1) of the NIA Act 2002). The judge found that the appellant, his wife and child could reasonably be expected to return to Bangladesh and that it was in the child's best interest to be with her parents if they returned. The appellant's private and family life in the UK had been established whilst he had, at best, limited leave to remain with no prospect of settling in the UK. Given these circumstances, and the judge's findings, there were no "compelling" circumstances (amounting to unjustifiably harsh consequences) to outweigh the public interest in effective immigration control. The judge's finding was entirely rational and, in truth, inevitable.

25. For these reasons, I reject the appellant's grounds of appeal as augmented by Mr Symes in his oral submissions.

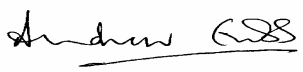
26. The judge did not materially err in law in dismissing the appellant's appeal under Art 8 of the ECHR.

Decision

27. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law. That decision stands.

28. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

13, December 2018

TO THE RESPONDENT
FEE AWARD

Judge Woolley, having dismissed the appeal, made no fee award. That decision also stands.

Signed

A Grubb
Judge of the Upper Tribunal