



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/07753/2017

**THE IMMIGRATION ACTS**

**Heard at FIELD HOUSE**

**Decision and Reasons  
Promulgated**

**On 1<sup>st</sup> March 2019**

**On 26 March 2019**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL  
G A BLACK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**Al-Zobayer [I]  
(anonymity direction not made)**

Claimant

**NO ANONYMITY ORDER MADE**

**Representation:**

For the Appellant: Mr S Walker (Home Office Presenting Officer)

For the Respondent: Ms F Allen (Counsel)

**DECISION AND REASONS**

1. This is a resumed hearing following my decision promulgated on 5<sup>th</sup> October 2018 that there was a material error in law in the decision of First Tier Tribunal (Judge I. F. Taylor) (FtT) which I set aside. I refer to my decision for the background to this matter.

## **Facts**

2. The Claimant is a citizen of Bangladesh and entered the UK in 2007. He applied for and was granted leave as a dependent on his mother from May 2007 - 2010. Once he was an adult he made an application for further leave in 2010 which was rejected as invalid application because he paid the incorrect fee. Then he made a second application in 2010 which was initially rejected as invalid by the SSHD because it was considered that he used the wrong form. It has since been admitted that the form used by the claimant was correct and the application was valid and the rejection of that application was incorrect. Subsequent periods of leave were granted to the claimant as a dependent on his mother until 14.6.2018. The Claimant applied for ILR on the grounds that he had lived lawfully in the UK for 10 years; a claim that was rejected on 4<sup>th</sup> July 2017 because there was a gap of 137 days. The Claimant moved to the UK at the age of 15 years and suffers from a hereditary medical condition Thalassaemia major for which he requires a blood transfusion monthly. Since coming to the UK and receiving treatment his health has improved. He was advised by doctors in the UK not to leave the UK for more than 4 weeks and not to receive blood transfusions outside the UK.
3. I now consider the appeal under Article 8. It is accepted that the Claimant cannot meet the long residence rules because of the gap in continuous residence. I consider paragraph 276ADE (1)(vi) and Article 8 outside of the Rules. I find that there are compelling circumstances which justify me in consideration of Article 8 outside of the Rules. Those circumstances are the dependence on his mother, the length of residence in the UK and the appellant's health issues.
4. I have regard to the case of **Patel** & ors v SSHD [2013] UKSC in which the SC concluded that any near miss under the immigration rules ought not be a matter for consideration under Article 8. However, in this instance the issue of long residence was not the only basis for arguing that Article 8 was engaged given the Claimant's family and private life (by reason of his length of residence in the UK and the impact of his illness) in the UK.

## **Submissions**

5. At the hearing before me Ms Allen submitted that taking into account all the factors the decision to remove the Claimant was not proportionate having regard to the length of lawful residence, the gap in leave, the procedural history as to invalid applications, the Claimant's age at the time of making the applications, his dependence on his mother, his serious medical illness and the poor treatment available in Bangladesh. There was no public interest in maintaining a policy that was since altered by the SSHD to allow for a period in which to rectify mistakes capable of invalidating an application.
6. Mr Walker representing the SSHD relied on a skeleton argument which focused on the calculation of the period of leave and the policy guidance.

No submissions were made under Article 8. Mr Walker accepted that the length of gap ought to have been recalculated having regard to the admitted error by the SSHD. Mr Jarvis had agreed to this at the error of law hearing but appeared to have reverted to the previous position in his skeleton argument. The SSHD had not provided any recalculation of the gap. For the SSHD it is submitted that the Claimant has a gap of 137 days in the period of lawful residence. For the Claimant it is submitted that the period is around 70 days.

### **Discussion and conclusion**

7. The errors made by the FTT are set out in my previous decision. The FTT allowed the appeal on human rights grounds having found that the Claimant ought to have been granted ILR and the SSHD's decision was unlawful. In terms of any gap in continuous residence I find that the gap is 70 days taking into account that for the second application made the Claimant did use the correct form. In general terms I agree with the SSHD as to the scope of the Article 8 claim were it to focus solely on the failure to meet the Rules. But as stated above there are significant aspects of the Claimant's family and private life to be considered and this is not simply a near miss case.
8. In addition, I am of the view that the FTT failed to give proper consideration to paragraph 276ADE(1)(vi) and what consideration there was appeared to equate the requirements with having to attain the high threshold for Article 3 medical cases. I am satisfied that there has been no challenge raised as to the Claimant's medical condition and nor as to the evidence produced as to the poor treatment available in Bangladesh and reduced life expectancy for sufferers of Thalassaemia in Bangladesh [16-19]. No challenge has been raised that the Claimant, although an adult remains financially dependent on his mother. The main issue raised by the SSHD was the gap in continuous residence and the lawfulness of the decision. The FTT concluded that Article 3 was not met [37], but did not go on to make any decision with regard to paragraph 276ADE (1)(vi), rather the FTT focussed on the facts that would previously have led to a decision that the SSHD was not in accordance with the law.
9. The evidence in my view shows that the Claimant would face very significant obstacles to his reintegration in Bangladesh because of his medical condition and the length of time he has lawfully lived in the UK and where he has reached a good and consistent level of health and wellbeing for a considerable period of time. All of the evidence must be considered in the round and I adopt the submission made by Ms Allen set out above at [5]. Whilst I fully accept that he has family ties in Bangladesh and has visited on a number of occasions over the years, he nevertheless remains dependent on his mother for financial support and receives medical treatment for his serious condition requiring blood transfusions on a monthly basis. He has received this treatment in the UK over the past 10 years and which I regard as an integral part of his private life. He has established a life in the UK and spent his formative years in the UK. I

accept that as found by the FTT it cannot be concluded that Article 3 is met as the Claimant is currently in good health, however the evidence shows that his health will deteriorate in the event that he had to return to Bangladesh and which his doctors have advised against. His return to Bangladesh would herald a likelihood of infections, hospitalisation and complications and where there is an uncertainty as to the availability of medication for Thalassaemia. As such these factors amount to very significant obstacles to his reintegration in Bangladesh and that paragraph 276ADE is met.

10. Alternatively, Article 8 outside of the Rules is engaged for the same reasons. The Claimant has established a private/family life in the UK based on all factors including his length of lawful residence and as a dependent on his mother who has ILR. His formative years have been established in the UK and he is now in his mid twenties having been educated in the UK. In addition he suffers a serious and enduring condition which requires ongoing treatment in the form of monthly blood transfusions. By reason of those factors he has a private and family life in the UK. The removal to Bangladesh would create an interference because he would be separated from his mother, the treatment available is to a much lower standard and would place him at risk of infection and hospitalisation and which would be a regression of his present good health. The interference is unlawful as paragraph 276ADE is met. The ultimate question is proportionality and I consider factors under section 117B. The appellant has the required level of English language. He is financially dependent on his mother. I fully accept that his medical treatment is arguably a reliance on public funds, but he has lived in the UK lawfully. Whilst his leave was precarious to the extent that he was dependent on his mother's applications as a student, given the length of residence he has now attained, over 10 years, I place little weight on that matter. The public interest lies in maintenance of the fair and consistent immigration controls. In this instance the exceptional factors are such that when taking all matters into account, the interests of this Claimant outweigh the public interest. This is not a case of a near miss in solely in terms of the failure to meet 10 year residence.

### **Re making**

11. I go on to remake the decision to allow the appeal on human rights grounds under the rules and outside of the rules.

### **Decision**

12. The appeal is allowed.

Signed

Date 15.3. 2019

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD