Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15711/2019 (V)
HU/15712/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 October 2020	**On 5 November 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR MD IBRAHIM JAHAN
MRS SABINA YEASMIN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Slatter, Counsel instructed by Saint Martin Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties and neither party expressed any concern with the process.

DECISION AND REASONS

1. The appellants are citizens of Bangladesh. They are a married couple with two children who were born in the UK in September 2015 and June 2017. The first appellant came to the UK on 9 October 2009 as a student. He was joined by the second appellant, whose appeal is dependent on his, in June 2014.

2. On 14 February 2019 the appellants applied for leave to remain in the UK on the basis of their private lives. The application was refused on 9 October 2019. They appealed to the First-tier Tribunal, where their appeal was heard by Judge of the First-tier Tribunal Widdup. In a decision promulgated on 27 November 2019 Judge Widdup dismissed their appeal. The appellants are now appealing against that decision.

3. At around the same time as appealing against the decision of Judge Widdup, the first appellant made separate submissions to the respondent maintaining that the conditions of Paragraph 276B of the Immigration Rules were satisfied as he had accrued ten years' continuous lawful residence in the UK. The respondent refused that application. The ensuing appeal was heard – and dismissed - by Judge of the First-tier Tribunal James on 20 February 2020. Permission to appeal against the decision of Judge James was refused and the first appellant is now appeals right exhausted in respect of that appeal.

The Decision of Judge James

4. The first appellant conceded in the appeal before Judge James that he had not accrued ten years lawful continuous residence and therefore did not meet the requirements of Paragraph 276B. Before me, Mr Slatter did not seek to go behind this concession. I pause to note that after the hearing (on 22 October 2020) *Hoque & Ors v The Secretary of State for the Home Department* [2020] EWCA Civ 1357 was promulgated. This Court of Appeal judgment clarifies the interpretation and construction of Paragraph 276B. Applying this judgment, it is clear that the conditions of Paragraph 276B were not met by the first appellant. I am satisfied, therefore, that the concession was properly made.

5. Judge James found that it would not be disproportionate under Article 8(2) for the first appellant and his family to be removed from the UK. The decision contains a detailed assessment of the first appellant's (and his family's) circumstances, including the best interests of his children. Judge James found at paragraphs 32 – 33 that:

> "32. The wife and the appellant retain their family networks, social, religious and linguistic ties to Bangladesh, with their immediate and extended family members on an ongoing basis, further bolstered by their links to the Bangladesh Diaspora in UK.
>
> 33. Both children's best interests are met by remaining with their parents their mother being their primary carer at the ages of 2 and 4 years of age. The eldest may have commenced attending nursery school recently in 2019 however the child is not at a critical juncture in her educational pathway. It is not claimed either child has healthcare or other issues and their private life is minimal at this

> age being centred around their primary carer and their life being within the home and domestic sphere. That the majority of their peer group tend to be from the Bangladesh Diaspora and that it is not claimed they do not speak their mother tongue, the children have retained a sense of their heritage, as well as their linguistic and cultural background. To be reunited with their extended family members in Bangladesh is a positive, and they will have the support of their parents to integrate into their home country where they will have all the rights and benefits as citizens of that country including access to healthcare and education."

The Decision of Judge Widdup

6. Judge Widdup did not consider Paragraph 276B, as the respondent did not consent to the issue (it being a "new matter") being considered.

7. Judge Widdup assessed whether there were very significant obstacles under paragraph 276ADE(I)(vi) to appellants' integration into Bangladesh and concluded that there were not.

8. Judge Widdup did not assess the best interests of the appellants' children or whether removal would be disproportionate under article 8(2) ECHR. At paragraph 50 he stated:

> "I do not find that Article 8 is engaged. No removal directions have been issued and there is therefore no interference or imminent risk of interference with the appellants' family life. The dismissal of this appeal will also not bring to an end the lawfulness of the appellants' right to reside in the UK by reason of the application which has been made under 276B in respect of which a decision is pending."

Analysis

9. The grounds of appeal argue that Judge Widdup erred by not carrying out a sufficiently detailed assessment of obstacles to integration in Bangladesh and by failing to consider Article 8 outside the Rules.

10. Permission to appeal was granted only in respect of the latter: that is, that Judge Widdup arguably erred in not assessing proportionality outside the Immigration Rules.

11. On 21 August 2020 the respondent submitted a Rule 24 response stating that whilst the assessment of very significant obstacles was sound it was accepted that it was an error of law to fail to consider Article 8. The respondent also gave consent to consideration of the appellants' claim under Rule 276B.

12. I heard submissions from Mr Slatter on behalf of the appellant and Mr Whitwell on behalf of the respondent.

13. At the outset of the hearing, I raised with the parties that in the light of the Rule 24 response there had been a concession that the judge materially erred and it was now

appropriate for me to hear submissions in respect of the remaking of the appeal. Mr Whitwell agreed. Mr Slatter proposed that the appeal should be remitted to the First-tier Tribunal. The directions dated 6 August 2020 state that there is a presumption that in the event of the Upper Tribunal deciding that the decision of the First-tier Tribunal is to be set aside as erroneous in law the remaking of the decision will take place at the same hearing. No reason has been given as to why this presumption should not apply. I therefore proceed to remake the decision of the First-tier Tribunal.

14. Mr Slatter accepted that the decision of Judge James must be a starting point for my decision, in accordance with the principles in *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702. He acknowledged that he was in difficulty because no further evidence had been filed or served since the decision of Judge James. I asked Mr Slatter if, given the absence of any new evidence, there was a basis upon which I could reach a decision contrary to that of Judge James. He accepted that there was not. This is clearly correct because it is made plain in *Devaseelan* at [39] that a previous decision (in this case, the decision of Judge James) stands as an authoritative assessment of the appellant's status at the time it was made. Therefore, in order for me to depart from the conclusion of Judge James there must be at least some evidence that was not before, or was not considered by, Judge James. However, there is no such evidence before me. Accordingly, reaching a different conclusion than Judge James would be inconsistent with *Devaseelan*. It follows therefore that the appellants' appeal must be dismissed.

15. In any event, even if (which it is not) it were open to me to ignore the decision of Judge James and reach my own conclusion, I would have reached the same conclusion as Judge James for the reasons he gave in paragraphs 32 and 33 of his decision (see paragraph 5 above).

Notice of Decision

16. The decision of the First-tier Tribunal contains an error of law and is set aside. I remake the decision and dismiss the appeal.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan 29 October 2020