Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16248/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 July 2020 by Skype	**On 3 November 2020**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD ABDUR RASHID
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr S. Karim, Counsel instructed by Liberty Legal Solicitors

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, for convenience I refer to the parties as they were before the First-tier Tribunal ("FtT"). The respondent's decision which is the subject of this appeal is dated 20 September 2019, being a decision to refuse leave to remain on the basis of private life.

2. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Young-Harry ("the FtJ"), following an appeal heard on 3 February 2020.

3. The appellant is a citizen of Bangladesh, born in 1985. He arrived in the UK in November 2010 as a student. His leave was extended on various occasions until November 2015. An application made on 25 November 2015 for leave to remain on Article 8 grounds was refused in a decision dated 4 July 2016, with the human rights claim certified as clearly unfounded. This afforded the appellant an out-of-country appeal.

4. It appears from the narrative in the FtJ's decision that following the 4 July 2016 decision the appellant made another Article 8 application on 18 November 2016, which was also refused, in a decision dated 18 July 2018. Following a threatened judicial review, the respondent withdrew that decision.

5. On 1 April 2019, the respondent again refused the application "on ETS grounds" (FtJ [29]) but the appellant was afforded an in-country right of appeal. The appeal was listed to be heard on 30 July 2019 but two weeks prior to the hearing, by letter dated 12 July 2019 the respondent again withdrew the decision and invited the appellant to withdraw his appeal. The application for leave to remain which is the subject of this appeal is that which was made on 18 November 2016.

The appeal to the FtT

6. The FtJ referred to the various documents that were before her. Although the appellant had an asylum appeal outstanding, the parties confirmed that it was only Article 8 with which she was concerned. At that time, a Case Management Review was expected in the asylum appeal in February 2020.

7. The FtJ made a number of clear findings. She found that since his arrival in the UK in 2010 the appellant had been granted successive periods of leave and had, since the application for further leave was refused in July 2016, continued to make attempts to regularise his stay. She accepted that he had integrated well and established a private life which includes his relationships with his family members and friends in the UK.

8. She found that the appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules ("the Rules") in that he had failed to show that there would be very significant obstacles to his integration on return to Bangladesh. He was likely to have retained social, linguistic and cultural ties there.

9. She noted that the expectation was that he would return to Bangladesh at the end of his studies. She also noted that, on his own evidence, his parents remained in Bangladesh in the family home, and that he had visited them there as recently as April 2015. She found that the skills and qualifications that he had obtained in the UK could be used to aid his resettlement on return, and to secure employment. There was no reason that the financial support provided by his brother should not continue on return to Bangladesh.

10. The appellant's failure to meet the Rules was a matter that carried substantial weight on the respondent's side of the balance, she said.

11. The FtJ then referred to the need to have regard to any additional factors, outside the Rules, "compelling or otherwise", which would render the decision disproportionate. She found that although the appellant said that he suffered from anxiety and depression, he could continue to receive treatment for those conditions in Bangladesh, and any disparity of treatment between Bangladesh and the UK was not sufficient to render the decision disproportionate.

12. She found that his relationship with his niece was not one of parental responsibility and was not, therefore, significant in terms of s. 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

13. In considering the appellant's immigration history, she was not persuaded that the respondent's decision of 4 July 2016 was unlawful (having regard to *Ahsan v Secretary of State for the Home Department* [2017] EWCA civ 2009), or at least that was not a matter that was before her for consideration, her focus needing to be on the instant decision of 20 September 2019.

14. The FtJ quoted part of the respondent's letter of 12 July 2019 which was the means by which her decision of 1 April 2019 was reviewed prior to the hearing listed for 30 July 2019 and which meant that the decision of 1 April 2019 was withdrawn. The letter said, in summary, that the original refusal decision had been withdrawn and a recommendation made to issue "the relevant documentation". It also said that it would only be in rare circumstances that the withdrawal would not result in the issue of the documentation the appellant had applied for.

15. The FtJ found that that letter did not constitute a promise to grant leave, although it may have created that expectation in the appellant. She also said that based on the respondent's 12 July 2019 letter the appellant withdrew his appeal, and that "Beyond all reason" the respondent again refused the application in the instant decision subject to this appeal.

16. She noted that the appeal was listed for hearing on 22 November 2019 but was adjourned for the respondent to provide reasons for the "confusion and delay". Before her, the respondent had failed to provide reasons, as directed to do so in accordance with directions given on 22 November 2019.

17. At [34] the FtJ said that she found the respondent's handling of the case and inordinate delay unacceptable. The appellant had made an in-time application and had, since November 2016, been awaiting an outcome of his application and he had effectively had to put his life on hold. She said that this, "no doubt", had come at great expense and distress to the appellant. To date, the respondent had failed to provide any reason for her conduct in the case.

18. At [35] she said that whilst the respondent's letter dated 12 July 2019 did not constitute any promise or guarantee, it inevitably created an expectation in the appellant which had not been met. She found that the delay and poor handling of the appellant's case significantly reduced the weight of the public interest. She found that that carried substantial weight on the appellant's side of the balance such that the balance "just" tipped in his favour. Thus, she concluded that the appellant's private life considerations outweighed the public interest and there was a disproportionate interference with his Article 8 (private life) rights.

The grounds of appeal and submissions

19. The following is a summary of the grounds and submissions.

20. It is argued on behalf of the respondent that the FtJ failed to carry out a proportionality balancing exercise and had failed correctly to consider the public interest factors in s.117B of the 2002 Act. Thus, there had been a failure to apply the "little weight" provision in relation to his private life, she failed to determine the issue of whether the appellant was financially independent and had failed to consider the issue of his ability to speak English.

21. Furthermore, there had been a failure on the part of the FtJ to identify the "unjustifiably harsh" consequences in his removal that would outweigh the public interest. Therefore, the delay and poor handling of the case would not, in itself, lessen the public interest in the appellant's removal.

22. In his submissions, Mr Tufan relied on the grounds, reiterating that the FtJ had nowhere referred to the s.117B considerations. He referred to various aspects of the FtJ's decision in terms of the factors that weighed against him, for example, that he did not meet the Rules, that he could reintegrate on return, and that he would have been expected to return at the end of the period of his leave.

23. The "unjustifiably harsh consequences" had not been considered in the light of *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11. Furthermore, this was not a case of inordinate delay, as in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41. The delay here was only 20 months. She found that there was no clear promise made to the appellant. His immigration status was precarious.

24. In answer to my enquiry as to whether the respondent's poor handling of the appellant's case could be said to reduce the public interest in his removal, Mr Tufan denied that this was so, stating that the letter of 12 July 2019 was issued in error. He acknowledged, however, that there was nothing to support that contention and that he may have been thinking of a different case entirely.

25. Mr Karim relied on his 'rule 24' response. He also referred to various aspects of the FtJ's decision, arguing that she had adopted the appropriate

'balance sheet' approach (*Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60).

26. It was accepted that the FtJ did not refer to all aspects of s.117B but it was submitted that she clearly had those provisions in mind. The documents before her included English language certificates and the appellant had given evidence in English. There was evidence that he was financially supported by his brother, and he was entitled to rely on such support (see *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58).

27. He had made efforts to regularise his stay and the FtJ found that there was an expectation created by the respondent's letter of 12 July 2019. She found that no reasons or explanation had been given by the respondent for her conduct. An earlier hearing was adjourned to allow the respondent to provide an explanation which was not forthcoming. The delay went back to the original application of 2016; it was not a delay only from 2019.

28. Even if it could be said that the FtJ's decision was a generous one, that was not capable of establishing an error of law requiring the decision to be set aside, simply because the respondent disagreed with the decision.

29. Here there were exceptional and unique factors. There was delay and poor handling by the respondent. Although *Agyarko* spoke of unjustifiably harsh consequences, there was no explanation of why the respondent reneged on what was said in the letter of 12 July 2019.

Assessment and Conclusions

30. Although not of particular relevance to the circumstances of this appeal, it is as well to note that the appellant no longer has an asylum appeal outstanding, his appeal having been withdrawn on 13 March 2020. Mr Tufan confirmed that that accorded with his understanding. Mr Karim had no information on the matter.

31. As regards s.117B, there is some merit in the contention on behalf of the respondent in terms of the FtJ's failure expressly to refer to its provisions. She did expressly consider s.117B(6) in terms of the appellant's relationship with his niece, and found against him in that respect, but the other facets of s.117B were not expressly referred to.

32. However, it is plainly the case that the FtJ had regard to the public interest, which she expressly referred to at [13], [14], [35] and [36], and indirectly referred to in other places, for example when undertaking the necessary balancing exercise.

33. In addition, there is merit in Mr Karim's argument that in terms of the English language requirement there was evidence before the FtJ establishing that the appellant is able to speak English, and evidence that he is financially independent. As regards the latter, the FtJ referred to the financial support that he receives from his brother.

34. She also referred in detail to his immigration history noting, for example, at [16] that he came to the UK for temporary purposes on the understanding that he would return to Bangladesh, and referring at [12] to the refusal of leave in 2016 but his continued efforts to regularise his stay.

35. Whilst, therefore, I do consider that the FtJ ought to have made express reference to the terms of s.117B, I am not satisfied that she erred in law in not doing so, or that if she did, any error of law in that respect is material.

36. When considered the public interest, which at [14] the FtJ properly described as "weighty", she was entitled to express particular concern about the respondent's conduct. The respondent's letter of 12 July 2019 said this:

> "I am writing to inform you that the decision made on 1 April 2019 to refuse your client's application has now been reviewed.
>
> The original refusal decision has been withdrawn and a recommendation made to the team where your original application was decided to issue the relevant documentation.
>
> It will only be under rare circumstances that this withdrawal will not result in the issue of the documentation that you applied for. Such circumstances would be those that, even in the event of an allowed appeal, would cause the Secretary of State not to issue the documentation applied for.
>
> **Pursuant to Tribunal Procedure Rule 17(2), the respondent respectfully requests that this appeal be withdrawn.**
>
> The Post Decision Team will contact you in due course with further information about any next steps that you need to take.
>
> This letter is being copied to the Tribunal." [emphasis as in original]

37. In a decision dated 24 July 2019, a judge of the First-tier Tribunal caused a *pro forma* "Notice of Withdrawal" to be issued. In summary, it refers to the appellant having consented to the withdrawal of his appeal following the respondent having withdrawn the underlying decision. It states that the appellant's consent was freely given, with full knowledge of the consequences, because consent was properly given in the light of the reasons provided by the respondent for withdrawing the underlying decision and that, if represented, consent was given with the benefit of legal advice.

38. It is readily apparent that the appellant withdrew his appeal against the refusal of further leave to remain in the light of the respondent a) withdrawing the underlying decision, and b) stating that a recommendation would be made, in effect, for leave to be granted, and that it would only be rarely that that leave would not be granted. The FtJ referred to those circumstances at [32].

39. It follows that the appellant's decision to withdraw his appeal was made on the basis of a false premise, namely that he did not need to appeal because the respondent was going to grant him the leave that he had sought.

40. The FtJ rejected the contention that the letter of 12 July 2019 represented a promise or guarantee of a grant of leave, noting that it referred to a recommendation only. However, she did find that it created an "expectation" in the mind of the appellant which had not been met.

41. She was entitled to take into account that, despite having been given ample opportunity to do so, the respondent had not explained her conduct.

42. It is worth reiterating an aspect of the terms of the 12 July letter, namely that it would only be in rare circumstances that the withdrawal of the decision refusing leave to remain would not result in "the issue of the documentation you applied for". In other words, a grant of leave.

43. The respondent failed to explain to the FtJ whether she considered those "rare circumstances" existed, and if they did, what they were.

44. It is true that the FtJ did not expressly analyse the competing factors before her in terms of whether refusal of leave would result in unjustifiably harsh consequences (per *Agyarko)*, but it seems to me that that is the conclusion she reached. She undertook a careful balancing exercise and, as pointed out by Mr Karim, resolved a number of matters against the appellant, revealing a true balancing exercise. She was entitled to take into account the delay in the resolution of the application for leave made originally in 2016, that delay having been contributed to in a significant way by the respondent.

45. Although the FtJ did not express the matter in this way, when considering the public interest in this case it is legitimate to suggest that the respondent herself does not appear at all times to have been convinced of the public interest in a refusal of the application for leave. That is evident from her conduct in dealing with the application, and in particular in the letter of July 2019. It would appear that at that time it was not thought that the public interest did require a refusal of the application.

46. The respondent has not, even now, explained what "rare circumstances" exist such as to mean that what was not considered in the public interest in July 2019, is now in the public interest.

47. I am not satisfied that there is any error of law in the FtJ's decision. Her judgment as to the proportionality of the decision in the context of an assessment of the public interest was hers to make. It was a judgment made without legal error, based on her assessment of all relevant matters. She was entitled to conclude that the respondent's decision amounted to a disproportionate interference with the appellant's right to private life, when all the circumstances are considered.

Decision

48. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 3/11/2020