Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01868/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Friday 19 March 2021	**On Wednesday 31 March 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR ROKAN UDDIN ARAFAT

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms L Simak, Counsel instructed by Chancery solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge G D Davison promulgated on 13 October 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 23 January 2020, refusing his human rights claim based on his private life in the UK. The claim was made in the context of an application for indefinite leave to remain ("ILR") based on ten years' continuous lawful residence in the UK.

2. The Appellant is a national of Bangladesh. Given his claim to have remained lawfully in the UK for ten years, it is necessary to set out his immigration history. He came to the UK as a student on 25 September 2009 with leave to 30 November 2012. It is common ground that his leave was extended in that category to 22 November 2016. On 18 November 2016, the Appellant applied for further leave to remain as a Tier 2 migrant. The sponsor in relation to that application did not at the time of application have a licence, but an application for a licence was, as I understand it, pending. As part of his Tier 2 application, the Appellant was told that he must enrol his biometrics. He says that he was unable to do so on the first occasion as the barcode did not work. He therefore asked for a new barcode. By the time that this was sorted out, the Appellant's intended sponsor had its licence application refused. The Tier 2 application was rejected as invalid on 1 March 2017 for failure to enrol biometrics.

3. It is the Appellant's case that, immediately prior to the rejection of the Tier 2 application, on 27 February 2017, he made an application to remain based on his private life. The Respondent says that this application was made on 1 March 2017. Either way, the Appellant repeated that application on 17 July 2017. The second was voided because the Appellant already had a pending application. There is no complaint made about that action. As I understand it, the two applications were in any event on the same basis, so nothing turns on the voiding of one. On 20 September 2018, the Respondent refused the application. She also certified the claim under section 94 Nationality, Immigration and Asylum Act 2002 ("Section 94"). There was no challenge brought to that decision. The effect of that decision, whatever the position in relation to the events in 2017, was that the Appellant's leave, statutorily extended by section 3C Immigration Act 1971 ("Section 3C") was brought to an end on that date at the latest. The Appellant was given a right of appeal exercisable only from outside the UK.

4. On 3 October 2018, therefore just within fourteen days from the September 2018 refusal, the Appellant applied for ILR on long residence grounds. On any view, he had not at that time completed ten years' continuous leave to remain. That application was refused on 10 February 2019 but this time the Appellant was given an in-country right of appeal. He appealed the decision, but that appeal was dismissed, and he became appeal rights exhausted on 25 October 2019. On 26 September 2019, the Appellant made a further application for ILR based on long residence which was refused by the decision under appeal.

5. I will come on to the way in which the above chronology was dealt with in the Decision. I mention now however two points made by Ms Simak in her submissions concerning the above chronology and length of lawful residence which were in my view thoroughly bad ones and fundamentally misunderstand the functioning of statutory leave and appeal rights.

6. First, Ms Simak suggested that had the Respondent understood that the rejection of the Tier 2 application and subsequent application prior to that rejection meant that the Appellant still had leave until the refusal of the February 2017 application (as Ms Everett accepted might be the position), she would have been bound to give an in-country right of appeal when refusing that application in September 2018. That might

have been the position under the previous appeal regime where the right of appeal was linked to the immigration decision being made (although certification under Section 94 was even then possible). However, since the coming into force of the Immigration Act 2014, the right of appeal is linked only to the refusal of the claim itself. There is no general presumption that a right of appeal will be permitted to be exercised in country depending on a person's status at the time of making of the application. Whether the right of appeal is exercisable from within or only outside the UK depends on the merits of the claim. Here, the Respondent certified that claim as clearly unfounded. That decision was unchallenged. On any view, therefore, leave to remain was brought to an end on 20 September 2018.

7. Second, Ms Simak submitted that the granting of an in-country right of appeal when refusing the subsequent claim in February 2019 had the effect of statutorily extending the Appellant's leave. That is in effect a submission that a refusal of leave operates to resurrect statutory leave which has previously expired. That cannot be correct. A person does not have to benefit from continuing leave to remain in order to exercise a right of appeal. That a significant number of appellants have no leave either because it has expired, or they never had leave reinforces that position.

8. Turning back to the Decision, the Judge found that the Appellant had leave only until 22 November 2016 ([22]). He found therefore that the Appellant had, at the date of hearing, been in the UK without lawful leave for four years. He considered the relevant evidence in relation to the Appellant's private life in the UK and whether there were "very significant obstacles" to the Appellant's integration in Bangladesh applying paragraph 276ADE(1)(vi) of the Immigration Rules ("the Rules") ("Paragraph 276ADE"). Thereafter, the Judge considered the claim balancing the interference with the Appellant's private life against the public interest, made a finding that removal would not be disproportionate, and dismissed the appeal on that basis.

9. The grounds of appeal in short summary are that the Judge "misdirected himself as both the facts and the law" when reaching his findings as to length of lawful residence. The grounds are however quite wide ranging in relation to the errors of fact and law said to have been made. For that reason, I deal with the detail when I come to consider the various arguments made.

10. Permission to appeal was granted by Resident First-tier Tribunal Judge Zucker on 25 November 2020 in the following terms so far as relevant:

> "... 2. It is arguable, as per paragraph 21 of the grounds, that the judge erred in the approach to resolving the issue of proportionality. The extent to which the judge arguably erred will be determined by the resolution of the other grounds all of which may be argued."

11. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was listed to be heard remotely. Neither party objected to that course. The hearing was attended by representatives for both

parties. The start of the hearing was disrupted by technical difficulties with Ms Everett's connection. However, once those were overcome, the hearing proceeded with no major technical difficulties.

12. I had before me the Appellant's bundle before Judge Davison, and the Respondent's bundle of core documents. The Appellant's solicitor also helpfully submitted a bundle of documents relevant to the arguments made to me to which I refer below as [AB/xx].

THE DECISION

13. In order to set the parties' submissions in context, it is necessary to set out certain parts of the Decision. I begin at [13] of the Decision where the following is set out as being the Appellant's position in relation to the period of lawful leave:

> "For the Appellant, having reviewed the immigration chronology and paragraph 39E it was accepted that 276B cannot be met. The Appellant does not have 10 years lawful residence. However, the reasons why he failed to get to 10 years, coupled with the other factors in this case, meant that the appeal stood to be allowed under either paragraph 276ADE or Article 8 outside the Rules as removal would not be proportionate."

That record of the concession made is repeated at [18] of the Decision where the Judge indicated that "the Appellant's representative quite correctly accepted that the Appellant had not established 10 years lawful residence". The Judge went on to record that "[o]n any lawful construction leave expired on 22 November 2016 and has not been extended". Ms Simak informed me that her submission had not gone that far if that is what the Judge intended to convey.

14. Following on from what is there said, the Judge considered the Appellant's arguments as follows:

> "19. The argument advanced was, in summary, as follows. It was not the Appellant's fault that the biometrics machine was not working. Discretion should therefore be exercised and the application of 1 March 2017 should be viewed as if it were made in time. If this had happened, upon refusal it would not have been refused with an out of country right of appeal. Then it is possible the Appellant would have got to the 10 year mark, in September 2019, with continuous leave. As these factors were outside his control it would be disproportionate to hold them against him.
> 20. Aside from this line of submission being based upon several contingencies, even if there had been no issue with the biometrics bar code it is clear from the Appellant's own witness statement that the Tier 2 application was doomed to fail (AB 43 paragraphs 4 and 5). When he made the Tier 2 application his employer did not hold the necessary licence. He did not therefore hold the relevant COS and the company was never awarded this licence. The Tier 2 application would have been refused and even if the Appellant had been granted a right of appeal he was 4 years away from reaching 10 years lawfully in the UK.
> 21. Further, the Appellant had an appeal dismissed on 10 October 2019, neither party to the proceedings has provided a copy of the determination (during the course of the

morning I had asked Mr Macrae for a copy of the same but none was forthcoming) and there is no mention of any previous factual findings in the refusal letter.

22. I find the Appellant had lawful leave until 22 November 2016 ie. a little over 7 years since his arrival in the UK. He has then made a succession of out of time applications which have either been refused or dismissed. Although it is to his credit that he has repeatedly sought to regularise his status the fact remains that he has held no leave/lawful status for approximately 4 years.

23. In the Appellant's witness statement AB44 the Appellant states he is of good character (paragraph 12), there is no suggestion to the contrary. He has played cricket at a high level and been heavily involved with his cricket club (paragraphs 16-17). He also refers to strong, family, social and cultural attachment to the UK (paragraphs 12, 18 and 21). At the hearing he explained that the family he has in the UK are cousins and they are like Brothers and Sisters to him. I accept that the Appellant has studied in the UK, he has played cricket and over the 10 years he has been here has built up a private life. He has some extended family in the UK whom he sees. But there was nothing in the evidence about those relationships that took them beyond normal family relationships. He is presently not allowed to work in the UK and so relies upon friends and family for support. I accept that his family will be disappointed that he has not been able to make a life for himself in the UK and establish a lawful right to remain in the UK. At the hearing he was asked by his representative how his parents would react if he was returned home, he replied; '*not happy, spent money for education and hoped I did something over here.*' His friend Mr Hasan set out the proposed business in IT networking that he and the Appellant had hoped to develop. I again accept this may have been a long-term dream for both of them. But matters have not worked out the way the Appellant hoped.

24. He claimed that despite his extensive education in the UK he would be unable to secure work in Bangladesh as it is a corrupt country and a job cannot be secured without political influence or payment of bribes. No evidence was provided to support these contentions and I do not accept that the Appellant would be unable to find work in the IT sector should he be returned.

25. The Appellant is a fit healthy 31 year old Bangladeshi male. He studied in the UK for several years obtaining the qualifications outlined in paragraph 3 of his witness statement (AB42-43). He has no partner or child in the UK. I find there would not be any very significant obstacles to his reintegration into Bangladeshi society. He has family to return to, parents and two sisters. The family have been remitting money to the Appellant and I find could assist him in the short term until he finds employment. Considering the definition of integration in Kamara [2016] EWCA Civ 813. At paragraph 14 it is explained that there must be a broad evaluative judgment. It must be considered whether an individual is enough of an insider in terms of understanding how life in the society in the country of return is carried on. The individual must have the capacity to participate in life in that country and have a reasonable opportunity to be accepted there and operate on a day-to-day basis. The individual must be able to build up within a reasonable time a variety of relationships to give substance to their private or family life. I find the Appellant would be in a position to do so.

26. For the same reason in considering Article 8 outside the Rules there is nothing disproportionate in removing the Appellant. Although over the period of 10 years I accept he will have established some private life in the UK as set out above his removal would be a lawful and proportionate response. There is nothing exceptional about this appeal that would merit a grant of leave outside the Rules.

27. The factors in section 117B do not assist appellant. His status has always been precarious, he speaks English, but this is a neutral factor. He has been financially self-

> reliant due to the assistance of friends and family. But this is again a neutral factor. There is no evidence he has been a drain on the public purse. But little weight attaches to his private life in this situation and I find on balance that the maintenance of a fair and effective immigration control demands his removal."

DISCUSSION AND CONCLUSIONS

15. The basis of the grant of permission to appeal is that the Judge may have erred when dealing with the proportionality balance but that the error may have been within the steps taken prior to the assessment when looking at the facts and the law. For that reason, I take those steps in order, based on the pleaded case and the oral submissions of the parties' representatives.

Length of lawful residence – [6] and [7] of the grounds

16. I accept that there is an error made by the Judge in the finding that the Appellant's leave came to an end on 22 November 2016 ([18] of the Decision). I understood Ms Everett to concede that this could not be correct. The Appellant made an application to remain prior to the expiry of his leave which would have extended that leave under Section 3C until such time as it was determined.

17. It is necessary however to look a little more carefully at what happened after 22 November 2016 in order to determine when the Appellant's leave came to an end.

18. It is common ground that the Appellant's Tier 2 application was rejected as invalid on 1 March 2017 ([AB/64-67]). In the decision under challenge, the Respondent says that the next application made was not made until 1 March 2017. The Appellant says that it was made on 27 February 2017. The evidence in that regard is at [AB/56-63]. That shows that the immigration health surcharge was paid online at 1608 on 27 February 2017 ([AB/56]). Since that proof of payment is one of the items included with the application (see [AB/63] – item (5)), it follows that the application could not itself have been sent until after that time on 27 February 2017. The application was sent by recorded delivery. There is no proof of posting in the bundle.

19. If the application was posted after hours on 27 February, it is realistic to expect that it would not have reached the Respondent until 1 March 2017. The Respondent's chronology shows that it was made on that date. As such, coincidentally, it appears that the making of the application crossed with the decision rejecting the application previously made as invalid.

20. I accept that if the application was received prior to the issuing of the rejection decision, it should have been treated as a variation of the previous application. That is what was requested by the 27 February 2017 application. I also accept that an application is deemed by paragraph 34 of the Immigration Rules currently in place to be made, if made by post, according to the date of posting if tracked or postmark if not tracked. What I am unable to ascertain from the evidence is whether the date given by the Respondent of 1 March 2017 has been reached by applying that rule (in other

words the application was not posted until then), whether it is the case that it could not be treated as a variation because a decision had already been taken or whether the two decisions crossed and the rule in relation to variation of application was not correctly applied.

21. For the purposes of the hearing, therefore, argument proceeded on the basis that the Appellant's leave continued and was statutorily extended following the application made on 27 February/ 1 March 2017. Ms Everett did not object to that course.

22. As I have already observed, there can however be no argument that the Appellant had completed ten years' continuous lawful residence. His leave, on any view, was brought to an end on 20 September 2018.

23. I will come on in due course to consider whether the Judge's error as to when the Appellant's leave came to an end could have had any impact on the outcome.

24. Ms Simak submitted that the Appellant's "mindset" in this regard was relevant. She accepted that, following the Court of Appeal's majority judgment in Hoque and others v Secretary of State for the Home Department [2020] EWCA Civ 1357 ("Hoque"), the Appellant could not succeed if the gap in his lawful leave is "open-ended" rather than "book-ended". In an effort to suggest that the gap in the Appellant's leave was "book-ended", she made the argument which I have rejected as an unmeritorious one at [7] above. I have there explained why that argument is misconceived.

25. Ms Simak suggested however that the Appellant was not to know that this is how the Respondent would treat his various applications as, in the past, the Respondent had dealt with applications made out of time but where the overstaying was to be disregarded in a different way from the way in which she argued the case in Hoque. There is no evidence before me about how those applications have been dealt with at different times by the Respondent. In any event, in this case, the argument does not withstand scrutiny. As Ms Simak accepted, the line of cases which culminated in Hoque, began some time before October 2020. The decision of Sweeney J in R (Juned Ahmed) v Secretary of State for the Home Department [2019] UKUT 10 (IAC) was given orally at a hearing on 7 March 2018 and the Court of Appeal's decision on permission to appeal in R (Masum Ahmed) v Secretary of State for the Home Department [2019] EWCA Civ 1070 was against a refusal of permission to apply for judicial review in a challenge against a decision of the Respondent in April 2018. By that time, if not before, the Appellant could have had no expectation that the period after his leave came to an end would be disregarded for the purposes of calculating ten years' continuous residence. At that time, he fell short of the period by over one year.

26. Further, and in any event, the Judge gave the Appellant credit for seeking to regularise his stay ([22] of the Decision).

Events in 2017 relevant to exercise of discretion – [8] to [13] of the grounds

27. The Appellant says that discretion ought to have been exercised in his favour in relation to events occurring in 2017 which led to the rejection as invalid of his Tier 2 application. It is asserted that the Appellant was unable to enrol his biometrics due to failure of the barcode.

28. Of course, working on the assumption set out above that the decision of 1 March 2017 did not in fact bring the Appellant's leave to an end and that the Judge erroneously concluded to the contrary, this point has no bearing.

29. If the point does have any relevance, however, it does not disclose any further legal error made by the Judge for the following reasons.

30. First, the Judge considered this argument at [19] and [20] of the Decision. It is asserted that the Judge's reasoning that the Tier 2 application was doomed to fail is perverse ([12] of the grounds). Perversity is a high threshold. In circumstances where the sponsor relied upon by the Appellant never had a licence to sponsor a worker (this is not a revocation of sponsor licence case), that finding was not merely open to the Judge but is one which I probably would have reached on these facts.

31. Second, in any event, the Appellant's case as to exercise of discretion is not made out on the facts. The documents at [AB/51-55] deal with this issue. The biometric letter was sent on 6 January 2017. On 25 January 2017, the Appellant's solicitors informed the Home Office that the barcode was not working. On the following day, the Home Office re-issued the letter and informed the solicitors that they had checked the barcode and it was scanning correctly. Although the solicitors subsequently emailed the Home Office on 6 February 2017 to say that they had not yet received the biometric letter, they took no further action until 27 February 2017, the day on which they say that they made the next application. The Home Office was therefore entitled to assume that the biometric letter had been received but not actioned and therefore to reject the Tier 2 application as invalid. In any event, for the reasons I have already indicated, the Judge's response to this point was a finding open to him. The Tier 2 application could not have succeeded in any event. The point is irrelevant in any event if it is assumed that the Appellant's leave continued beyond this point.

32. For reasons I have already explained, the Appellant's leave on any view came to an end on 20 September 2018. The point made at [12(2)] of the grounds therefore has no merit. The Appellant had no leave at the time of his appeal in October 2019.

The decision of 20 September 2018 – [14] to [19] of the grounds

33. In light of what I say at [6] above, I can deal with this point relatively shortly. Whether or not the Appellant had leave at the time of the 20 September 2018 decision is irrelevant to the outcome and in particular to the Section 94 certification of the claim. The Appellant's status had nothing to do with the relevant issue which is whether the claim was clearly unfounded. The Respondent concluded that it was. The Appellant

did not seek to judicially review that decision. Ms Simak submitted that this failure was not that of the Appellant but of his solicitors. However, I have no way of knowing that. For all I know, his solicitors may have advised him that such a challenge could not successfully be pursued.

34. In relation to [15] of the grounds, as I have already pointed out, the position taken by the Respondent in Hoque pre-dates that judgment by some margin. It was the position being taken certainly as long ago as September 2018 when the Section 94 certification decision was taken.

Paragraph 276ADE – [20] of the grounds

35. Ms Simak suggested that the Judge had erred when considering whether there were "very significant obstacles" to integration at [24] and [25] of the Decision. She submitted that the Judge's approach was wrong in law. The way in which the challenge is pleaded is as follows:

> "The assessment of the Appellant's eligibility for leave under paragraph 276ADE(vi) [sic] is wholly inadequate absent any proper engagement with the Appellant's circumstances and history, and in light of the guidance for assessment set out in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, [14] and Petition of MC for Judicial Review of the Decision of the Secretary of State for Home Department dated 1 September 2014 [2016] CSOH 7, which confirm the need to assess the Appellant's private life established in the UK against the background of the private and family life attachments to their country of origin."

36. At one point in her oral submissions, Ms Simak appeared to suggest that the Judge ought to have conducted a balance of the private life which the Appellant has in this country against the ties he would have in Bangladesh. As I think I subsequently understood her submission, however, it is rather more a question of attributing weight also to the Appellant's private life ties in the UK when assessing whether there are "very significant obstacles" to integration in Bangladesh.

37. I begin with Paragraph 276ADE(1). That sets out at sub-paragraphs (i) to (v) periods of residence which will, without more, entitle an applicant to succeed based on his or her private life (assuming of course that the application does not fail for other reasons such as suitability). It cannot be suggested that the Appellant in this case falls within any of those periods of residence – his claim to entitlement to ILR within the Rules based on lawful residence is confined to paragraph 276B of the Rules.

38. Paragraph 276ADE(1)(vi) reads as follows:

> "subject to sub-paragraph (2) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

39. In order to understand Ms Simak's submission, it is necessary to say more about the case of MC v Secretary of State for the Home Department [2016] CSOH 7 ("MC"), a

decision of the Outer House of the Court of Session on which Ms Simak relies. As I will come to, it cannot sensibly be suggested that the Court of Appeal's judgment in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 ("Kamara") supports her submission in relation to Paragraph 276ADE (1) (vi).

40. Ms Simak accepts that, as a decision of the Scottish Courts, the judgment in MC is not binding on me. She submitted that it is persuasive and should be followed in support of her submission. However, she also asserted that the respondent in that case (who I accept is also the Respondent here) had made a concession which should similarly be made and accepted in this appeal.

41. I begin by noting that MC was a judgment in a judicial review of a decision of the Secretary of State dated 1 September 2014 (although the judgment was not given until 13 January 2016). The judgment in Kamara was not handed down until August 2016. I will come back to that judgment later. The version of Paragraph 276ADE(1)(vi) which was in force at the date of the application which led to the decision under challenge in MC was a previous version. That version included the words "has no ties (including social, cultural or family) with the country…to which he would have to go if required to leave the UK."

42. I recognise that the version of Paragraph 276ADE(1)(vi) applied by the Respondent in that case is as now (as the Rules are those which apply at date of decision not application). It is not clear to me however whether the Court was influenced in its construction of Paragraph 276ADE(1)(vi) by the previous wording and the need to consider ties. The applicant in that case would of course have put forward her case based on the wording as it was when she made the application. It is no doubt on that basis that the argument put forward on her behalf was (as recorded at [4] of the judgment) that "the quality of the ties both in Malawi and in the UK were of relevance" (relying on the case of Ogundimu (article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) (("Ogundimu"). The argument as there summarised was that the reasons given by the respondent were inadequate when considering those ties. The ties referred to however at [5] of the judgment and relied upon by the applicant were those in the applicant's home country. The summary of Ogundimu at [7] of the judgment is uncontentious and similarly makes no reference to ties in the UK.

43. Having made that submission, the applicant's representative argued as recorded at [9] of the judgment that "there had been no proper assessment of private life accrued and enjoyed domestically in the United Kingdom". That was said to be "an essential part of any proportionality assessment that required to be done in a claim under article 8 of ECHR". That too is uncontroversial. The cases to which reference is made at [9] and [10] of the judgment are concerned with the consideration of private life in the UK within a wider proportionality assessment. It is far from clear to me that the applicant's representative was making any submission that the ties in the UK were relevant to the assessment to be made within Paragraph 276ADE(1)(vi) – his submission appears to be that ties in home country and UK were both relevant to the overall private life consideration. I do not disagree.

44. What is said to be a concession made on behalf of the respondent in that case has to be read in that context. Having set out the relevant factors, (again those in the home country), as recorded at [12] and [13] of the judgment, the respondent's representative "accepted that it was also necessary to have regard to the solidity of ties within the host country". As above, that is uncontroversial as part of the overall analysis. That does not however amount to a submission that those ties form part of the assessment under Paragraph 276ADE (1)(vi). Indeed, what is there said has to be read in the context of the submission recorded at [16] of the judgment that "the new rules were not concerned with whether or not there were no ties but whether there were very significant obstacles to the petitioner's integration in Malawi. The absence of ties are only one component of potential obstacles." That submission says nothing about the relevance of ties in the host country when making that assessment.

45. I do not disagree with the proposition at [18] of the judgment that what the respondent had to consider and therefore what the Court had to review was whether interference with private life caused by removal from the UK would breach the applicant's right to respect for private life. However, if and insofar as the Court understood the respondent's representative to have conceded that ties within the UK were relevant to the assessment within Paragraph 276ADE(1)(vi), I do not understand that to have been said, at least not clearly, in the record of the submissions made. The ties in the host country are relevant to the overall proportionality balance but not directly to the assessment under Paragraph 276ADE(1)(vi). As I will come to, a conclusion that ties in the host country forms part of the assessment under Paragraph 276ADE (1)(vi) or, put another way, that all elements of the private life claim are to be considered within the rule, is not consistent with other case-law and therefore, to the extent that this is what the Court decided, I respectfully decline to follow the judgment in MC.

46. I turn then to the case of Kamara. That judgment is binding on me. The test applied by the Court of Appeal is set out in clear terms at [14] of the judgment as follows:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

47. There is no suggestion that the consideration of the situation to be faced in home country includes an assessment of the ties to the host country. In Kamara, the appellant's integration in the UK was dealt with separately at [4] of the judgment. I readily accept that the context of the case of Kamara was deportation and section 117C

Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") ("Section 117C"). Section 117C in this regard reflects a broadly equivalent position in the Rules. Read as a whole, Section 117C and the Rules include considerations of time spent in the UK, degree of integration here and the obstacles to integration in home country. However, as I come to below, Paragraph 276ADE (1) similarly includes consideration of time spent in the UK. It does not however include any similar provision in relation to the degree of integration in the UK, perhaps understandably given that deportation cases often concern individuals previously settled in the UK.

48. It may be that the Scottish Court's analysis in MC was influenced by a perceived need to bring all factors of the Article 8 assessment within the Rules. The "new" Article 8 immigration rules were brought into force in July 2012. After that date, and until the Supreme Court judgments in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 ("Ali") and Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko"), it had been understood by the lower courts that the Rules in relation to Article 8 ECHR amounted to a "complete code". That view was articulated and dealt with by the Supreme Court at [51] to [53] of its judgment in Ali as follows:

> *"A complete code?*
> 51. In *MF (Nigeria)* [2014] 1 WLR 544 the Court of Appeal described the new rules set out in para 23 above as "a complete code" for article 8 claims (para 44). That expression reflected the view that the concluding words of rule 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the article 8 criteria and all other factors which were relevant to proportionality (para 39). On that basis, the court commented that the result should be the same whether the proportionality assessment was carried out within or outside the new rules it was a sterile question whether it was required by the rules or by the general law (para 45).
> 52. The idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules and the Rules alone, govern appellate decision-making. Dicta seemingly to that effect can be found, for example, in *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310; [2015] Imm AR 227, para 17, and *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636, para 39.
> 53. As explained at para 17 above, the Rules are not law (although they are treated as law for the purposes of section 86(3)(a) of the 2002 Act), and therefore do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules: see para 7 above. The policies adopted by the Secretary of Statae and given effect by the Rules are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case before them, as explained at paras 37-38, 46 and 50 above. It remains for them to judge whether, on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them,

> the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate."

49. A similar point is made by the Supreme Court in Agyarko at [48] as follows:

> "48. The Secretary of State's view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual's interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8. It is argued that the Secretary of State has treated "insurmountable obstacles" as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State's test is incompatible with article 8. As has been explained, the Rules are not a summary of the European court's case law, but a statement of the Secretary of State's policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the "insurmountable obstacles" test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances". In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8 that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

50. The Supreme Court's judgments in Ali and Agyarko were handed down in November 2016 and February 2017 respectively. It is therefore perhaps scarcely surprising that the Scottish Court in January 2016 considered itself to be applying a "complete code" when reviewing how the Respondent's decision in that case had been reached and seeking to incorporate all elements of the Article 8 claim within the confines of the Rules. However, that approach is now shown to be incorrect.

51. Turning back then to Paragraph 276ADE itself, the wording of Paragraph 276ADE(1)(vi) is clear in its terms. It is concerned with integration in the applicant's home country. That does not mean that ties and integration in the UK are in all cases irrelevant to obstacles to integration in an applicant's home country. Depending on the facts, I can see that the question of ties as it then was or obstacles to integration as it now is, may include consideration of the position in the UK. For example, if a person has been in the host country for many years and has, as a result, forgotten his or her mother tongue and adopted English as a main language, that may be relevant to the position on integration on return. Similarly, a person with mental health problems may be reliant for day-to-day functioning on a person settled in the UK – consideration

would then need to be given to whether the impact on functioning in the home country on return in the absence of that person would be so significant as to amount to a very significant obstacle. The country conditions may have changed dramatically in the time spent in the UK so that the passage of time is relevant. In that regard, however, it is also worth pointing out that Paragraph 276ADE(1)(vi) does not stand alone. The other sub-paragraphs of Paragraph 276ADE recognise that time spent in the host country is relevant to a person's private life. Paragraph 276ADE thus provides for leave to remain to be granted after specified periods of residence.

52. The question whether there are "very significant obstacles" to integration in the host country is, as I remarked to Ms Simak, a threshold test albeit one which is based on an evaluative assessment of all factors relevant to that integration. That is the approach taken by the Court of Appeal in Kamara. There is nothing to suggest that the position in the home country is to be determined by reference to a comparison with the position in the host country. The judgment in that case is of course binding on me.

53. I am here dealing with whether the Decision includes any error of law in this regard. The Judge dealt with the Paragraph 276ADE(1)(vi) issue at [24] and [25] of the Decision. It is not suggested that the Judge made any error there other than not taking into account the Appellant's integrative ties in the UK. For the reasons I have given, the Judge was not required to take the UK ties into account when assessing whether the Appellant meets the Paragraph 276ADE(1)(vi) test. The ground challenging the Judge's approach in this regard does not disclose any error of law.

Article 8 ECHR proportionality assessment – paragraphs [21] and [22] of the grounds

54. The ground of appeal in this regard is pleaded in the following terms:

> "21. For the same reasons, the Appellant's circumstances accumulatively would justify in all events the extension of leave outside the rules on an exceptional basis, as per the guidance provided by the Supreme Court in [Agyarko] where the Court identified exceptional circumstances as ones which in which the result would have unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate.
> 22. The FTTJ has not referred to the above established authority and failed to assess the Applicant's [sic] case through the prism of his ties to the UK and the diminished connections to his country of origin."

55. I accept that the Judge did not refer expressly to Agyarko. He had no reason to do so. Agyarko was concerned with impact of removal on family life and the test of "insurmountable obstacles" to that family life being continued outside the UK. The Appellant has no partner or child and does not rely on the Rules in relation to family life. Although there is some overlap in the way in which the Rules are to be applied (in the sense of consideration within the Rules followed by an assessment outside the Rules), there was no need to refer to the judgment in Agyarko in order to make that point.

56. Instead, the Judge referred at [6] of the Decision to the case of R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368 and the approach to be taken generally in Article 8 cases when assessing whether there is a breach. He also referred at [7] of the Decision to section 117B of the 2002 Act ("Section 117B"). In that context, he noted that Section 117B "applies in particular where the Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8". The Judge therefore recognised that his task was to assess whether the Respondent's decision breached the Appellant's Article 8 rights when considered as a whole. Indeed, the only ground of appeal before the Judge is whether the Respondent's decision breaches Article 8 ECHR.

57. The Judge considered the evidence about the Appellant's integrative ties to the UK at [22] and [23] of the Decision. I will return below to the error of fact which I have accepted the Judge made at [22] of the Decision as to the date when the Appellant's leave ended. Leaving that aside for the moment, however, there is no error made in the analysis of the evidence about the ties the Appellant has to the UK.

58. I have already considered and rejected the ground challenging the Judge's findings about the potential for the Appellant's integration in Bangladesh which are at [24] and [25] of the Decision.

59. Having reached findings which were open to him on the position in the UK and on return to Bangladesh, (those being the central issues) the Judge, at [26] and [27] of the Decision went on to balance the interference with the Appellant's rights against the public interest.

60. It is at this point that I return to the factual error which I have accepted that the Judge made at [22] of the Decision. The Judge accepted that the Appellant had seven years lawful residence in the UK but had been without leave for four years. The correct position is either that the Appellant had 7 ½ years lawful leave (if March 2017 is taken as the end date) or, on the assumption on which the hearing before me proceeded, that he had nine years lawful residence (to 20 September 2018) and two years without leave.

61. Ms Simak submitted that this made a difference because, as she put it, the Appellant was in a more proximate position to qualify for long residence. In my view, that comes perilously close to a submission that the Appellant is entitled to succeed based on a "near miss". She said though that this was not her position and referred me to the cases of Patel, Alam and Anwar v Secretary of State for the Home Department [2013] UKSC 72 ("Patel") albeit she did not refer me to the judgment or to any particular passage in that judgment.

62. The Supreme Court in Patel dealt with this issue at [41] to [57] in the speech of Lord Carnwath. What is said at [56] of the judgment is particularly relevant here:

> "Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised

> "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit."

In other words, an individual's Article 8 claim does not become better or worse for having failed to meet the Rules by a narrow margin. Whether a claim succeeds or fails depends on the substance of the claim.

63. As Ms Everett accepted, there might be cases where the passage of time alone could make a difference to outcome. An example of such a case can be seen in the case of Shala v Secretary of State for the Home Department [2003] EWCA Civ 233. In that case, during a period of delay by the Secretary of State in deciding his application, the appellant had entered into a relationship with a woman who had two children and who was a recognised refugee. Although the judgment concerned the impact of the Secretary of State's delay, as was explained in Strbac v Secretary of State for the Home Department [2005] EWCA Civ 848, the relevance of the delay in that case lay in the consequences of the delay for the appellant's family life (see [25] to [27] of the judgment in Strbac). Again, although also in the context of delay rather than passage of time, what is said in Strbac is also consistent with what is said at [14] of the judgment of the House of Lords in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 as follows:

> "It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it."

64. In this case, as Ms Everett pointed out, the Appellant's status, even prior to the ending of his leave, was precarious. As such, whether his status was unlawful or precarious made no difference. Either way, under Section 117B, his private life would be given little weight. I accept that this does not mean that the Appellant's private life is given no weight. I accept also that the weight to be given is a flexible consideration. However, the weight which the Appellant's private life fell to be given depended on the strength of that private life and therefore the degree of interference with it. It depended to some limited extent on the length of residence, but it did not depend on the Appellant's status during that residence unless his status during the period was sufficient to meet the Rules (which on any view it was not) or if his status was other than precarious (which it was not). In other words, the weight to be given in either event depended on the strength of the private life disclosed by the evidence.

65. The Judge took into account both the length of residence and the strength of private life formed during that time at [22] and [23] of the Decision. That the Appellant's lawful residence was six months or two years longer than the Judge thought to be the position made no difference to the strength of the Appellant's private life. There is nothing to suggest that the Appellant's private life became stronger during that period. If anything, it became weaker because he was no longer studying in the UK and was not allowed to work (as the Judge observed).

66. For those reasons, the Judge's error in relation to the finding concerning the Appellant's lawful leave makes no difference to the outcome. Based on the Judge's assessment of the factors making up the Appellant's private life, when those are balanced against the public interest as analysed by the Judge, the Appellant's appeal would still fail. For that reason, although there is an error of fact in the Judge's decision which, as a misunderstanding as to the effect of the evidence, amounts to an error of law, I decline to set aside the Decision. I therefore maintain the Decision.

CONCLUSION

67. For the foregoing reasons, although I accept that there is an error of law disclosed by the grounds, I am satisfied that it is not one which affects the outcome. Accordingly, I decline to set aside the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge G D Davison promulgated on 13 October 2020 involves the making of an error on a point of law but that error is not one which affects the outcome. I therefore uphold the Decision.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 23 March 2021