IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002260

First-tier Tribunal Nos: HU/56089/2023
LH/01449/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 October 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Ferdous Alam Khan
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Zane Malik K.C, Counsel, instructed by Zyba Law
For the Respondent: Mr Tony Melvin, Senior Presenting Officer

Heard at Field House on 9 September 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Peer ("the judge") promulgated on 5 March 2024, dismissing the appellant's human rights appeal against the respondent's decision dated 26 April 2023, refusing his human rights claim.

Background

2. The appellant is a national of Bangladesh who entered the United Kingdom on 5 July 2009 with a Tier 4 Student visa. He remained lawfully in the United Kingdom until 25 September 2015 (for a period of six years) at which point his student leave was curtailed. Various subsequent applications were made and refused with no right of appeal. The appellant met his spouse, an Indian national, online in June 2019. The appellant's spouse entered the United Kingdom on a student visa on 8 November 2020 and at that time was aware that the appellant was in the UK unlawfully. The couple married by way of an Islamic ceremony

shortly after her arrival on 11 December 2020 and were legally married on 14 August 2021. On 30 March 2022, the appellant made an application for indefinite leave to remain which led to the decision under appeal.

The Appellant's Case

3. The appellant asserts that there are very significant obstacles to his integration in Bangladesh because of the length of time he has been absent from Bangladesh, his lack of family ties there and his poor mental health. Further, it would be a disproportionate breach of Article 8 ECHR in respect of his family and private life to remove him from the United Kingdom because it is not possible for he and his wife to pursue family life together in either India or Bangladesh.

The respondent's case

4. The respondent's case is that there are no very significant obstacles to the appellant forming private life in Bangladesh. He lived in Bangladesh until he was aged 17. He is familiar with the language and culture. Although there would be a period of adjustment, the appellant has gained skills whilst living and studying in the United Kingdom, which would enable him to reintegrate back into society in Bangladesh. He would be able to seek employment. He would also be able to obtain medical treatment in Bangladesh.

5. The respondent further submits that there are no unjustifiably harsh consequences for the appellant to return to Bangladesh. The appellant and his wife can pursue their family life either in India or Bangladesh. The appellant's private life was established either when his immigration status was precarious or he was unlawfully present in the United Kingdom and his wife was aware of his unlawful immigration status when she married him. Further she is on a temporary visa herself and has no expectation that she can remain in the United Kingdom. The removal of the appellant from the UK would not amount to a disproportionate breach of his right to respect for family and private life pursuant to Article 8 ECHR.

The Decision

6. The judge found that the appellant does not face very significant obstacles to integration in Bangladesh. He speaks Bengali and English. Although he has spent approximately half his life in the United Kingdom, he spent his formative years in Bangladesh, he visited Bangladesh when he was in the UK lawfully and last visited Bangladesh in 2016. The judge found that he could use his skills and qualifications to seek employment and that he is in contact with a sister and a neighbour in the area in which he grew up, from whom he could access support. The judge was not satisfied that the appellant was suffering from severe depression. The judge found that the appellant was suffering from mixed anxiety and a depressive disorder, had received counselling and was on medication, but found that he could seek medical treatment for these conditions in Bangladesh. The judge found that the appellant did not need assistance with his activities of daily living. The judge found that the appellant did not meet the requirements of 276ADE(1)(vi) of the immigration rules.

7. The judge went on to carry out the Article 8 ECHR balancing exercise and found that the public interest in maintaining immigration control outweighed the appellant's right to respect for private and family life. In particular the judge gave little weight to the appellant's private and family life pursuant to Section 117B(4) and 117B(5). The judge noted that Article 8 ECHR does not require a state to respect a couple's choice of residence. The judge found

that although there would be some difficulties, the appellant's spouse would be able to relocate with her husband to Bangladesh or that he would be able to relocate with her to India. The judge found that it would not be unjustifiably harsh for the appellant to leave the United Kingdom and reapply for entry clearance to join his wife in the UK or wait for his wife's visa to expire at which point she could join him wherever they chose to live together. The judge dismissed the appeal pursuant to Article 8 ECHR.

The Grounds

8. The grounds were succinctly pleaded by Mr Malik KC as follows:

   (i) The FtT erred in law in failing to follow the Joint Presidential Guidance Note No. 2 of 2010, Child, Vulnerable Adult and Sensitive Appellant Guidance ("the Joint Presidential Guidance Note") and making due allowances as to the appellant's vulnerability.

   (ii) The FtT's approach to the evidence of Dr Costa and Dr Sultana was legally flawed.

   (iii) The FtT applied the wrong standard in its consideration of the issue of very significant obstacles.

   (iv) The FtT assessed the issue of proportionality on the false premise that the appellant could return to the United Kingdom after seeking entry clearance from Bangladesh.

Permission to appeal

9. Permission to appeal was granted by Deputy Upper Tribunal Judge Saini on 20 June 2024.

Rule 24 response

10. The respondent produced a rule 24 response opposing the grounds of appeal.

Submissions

11. The representatives made legal submissions which were recorded in the Record of Proceedings and to which I will refer below.

Ground 1 - vulnerability.

12. The judge made findings that the appellant has mental health issues and that he is on medication. At [31] the judge said:

> "31. The appellant gave oral evidence that he currently takes mirtazapine. This is corroborated by the documentary evidence available including GP records printed 24 July 2023 and a GP letter dated 15 February 2024 which records the repeat prescription for mirtazapine 45mg and mixed anxiety and depressive disorder entry dated 19 August 2021 [sic]. I accept that the appellant has also received individual counselling. A letter dated 9 February 2024 records a referral for 'bereavement of close family member, feelings of guilt, severe anxiety and depression' and completion of counselling offered with the appellant being referred back to GP care."

13. At [43] the judge made the following finding:

> "43. The appellant has mental health difficulties and I accept that he has anxiety and depression. The appellant receives medication for his condition and has also received some individual counselling."

14. I am satisfied as submitted by Mr Malik KC that the appellant fell within the definition of a "vulnerable" witness and, as is conceded by the respondent, that there was no reference in the decision to the Joint Presidential Guidance Note and no finding that the appellant was a "vulnerable witness". I turn to consider whether this would render the decision unsafe and unlawful.

15. Firstly, Part 5 of the Joint Presidential Guidance makes it clear that it is for the parties to alert the Tribunal to an appellant's vulnerability, although manifestly this does not obviate the judge from having any responsibility to ensure that a hearing is fair, which will, by implication, include considering whether any reasonable adjustments need to be made for a vulnerable witness. As headnote (2) states in SB (vulnerable adult: credibility) Ghana [2019] UKUT 398 (IAC):

> "*(2) By applying the Joint Presidential Guidance Note No 2 of 2010, two aims are achieved. First, the judicial fact-finder will ensure the best practicable conditions for the person concerned to give their evidence. Secondly, the vulnerability will also be taken into account when assessing the credibility of that evidence.*
>
> *(3) The Guidance makes it plain that it is for the judicial fact-finder to determine the relationship between the vulnerability and the evidence that is adduced."*

16. Mr Malik KC pointed to paragraph 30 of AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123, where it is held that the failure to follow the Joint Presidential Guidance Note and to make allowance for an individual's vulnerability "will most likely be a material error of law".

17. It is therefore trite that the responsibility was on the judge to make sure that the appellant gave his evidence in the best practical conditions and needed to determine the relationship between the vulnerability and the evidence that was adduced. I am also satisfied from AM (Afghanistan) that, although it will most likely be a material error of law not to make a specific note that an appellant is a vulnerable witness and apply the guidance, that this is not always the case.

18. In this appeal, the grounds do not identify which reasonable adjustments should have been put in place to allow the appellant to give his best evidence. Certainly none appear to have been requested by the very experienced counsel M Gill KC at the hearing. Nor there was there any mention of the appellant being a vulnerable witness or any request for reasonable adjustments made in the skeleton argument.

19. There is no specific pleading in the grounds identifying how the appeal was conducted unfairly apart from a general assertion that the guidance was not followed. Secondly, it is not recorded which finding the judge made which was materially impacted by the judge's failure to take into account the appellant's vulnerability. Mr Malik KC referred in submissions to the appellant's evidence that he was in contact with his sister and in contact with a neighbour in Bangladesh, but there was no reference to any error in these findings in the grounds; there does not to be any dispute that this was the appellant's evidence in the appeal and in event in the appellant's bundle, in the GP medical notes there is reference to the appellant's sister being a pharmacist and being able to assist him with checking his medication.

20. In these circumstances, I am not satisfied that the failure of the judge to specifically refer to the Presidential Guidance rendered the appeal procedurally unfair nor infected the judge's view of the evidence.

21. I am also further satisfied, as stated in the Rules 24 response, that the judge clearly had the appellant's vulnerability at the forefront of her mind throughout the hearing. It is clear from reading the decision as a whole that the judge was abundantly aware of the appellant's mental health problems, made findings on the extent of his problems and these findings form part of her consideration when making his decision. Although of course, the Joint Presidential Note and Guidance applies as much to human rights appeals as to protection appeals, this appeal was a human rights appeal and the credibility of the appellant was not the central issue. For these reasons, I am not satisfied that this ground is made out.

Ground 2 – expert evidence

22. It is asserted that the judge's approach to the expert medical evidence of Dr Costa and Dr Sultana was legally flawed.

23. The judge had before her the appellant's GP notes which were extensive as well as an expert report prepared by Dr Costa dated 13 August 2023 and a letter from Dr Sultana. The judge dealt with the medical evidence at [31] to [35] of the decision.

24. Mr Malik KC's submission is that the judge discounted the expert evidence on the basis that the experts' opinions were based on the information provided to them by the appellant and that this approach is fundamentally flawed. The medical experts were not merely recording what the appellant had told him, they were qualified to form a professional judgment on the basis of the information given as to the extent of the appellant's mental health issues, in accordance with Balakoohi v Secretary of State for the Home Department [2012] EWHC 1439 (Admin), at [94]. He submitted that it is quite clear that the appellant's GP records were considered by both experts. Further, there is no suggestion in the judge's decision that the standard identified by the UT's Presidential Panel in HA (expert evidence, mental health) Sri Lanka [2022] UKUT 111 (IAC) was not met by the expert evidence.

25. Mr Melvin relied on the Rule 24 response.

26. The judge relied on the GP evidence before her at [31] to make her primary findings that the appellant was taking mirtazapine 45 milligrams and suffered from mixed anxiety and depressive order and had received counselling as a result of bereavement, guilt etc. The judge manifestly found the GP evidence to be reliable and placed weight on it.

27. The appellant additionally relied on a report by Dr Costa, who prepared a report specifically for the appeal. Dr Costa's report was dated 13 August 2023. Dr Costa saw the appellant on 28 July 2023 for an unknown period and had sight of the appellant's GP records, letters from talking therapies and a psychiatric report dated 16 March 2022 by Dr Sultana. The expert took a history from the appellant in which the appellant described being depressed and having impulsive thoughts. He also recorded that he had a supportive network of friends as well as his wife. He ruminates. He has sleep difficulties and has put on weight. He was taking medication and waiting for more talking therapy.

28. The expert assessed the appellant on the Diagnostic and Statistical Manual of Mental Disorders as having a depressive illness. This was said to be as a result of the hopeless situation the appellant has found himself in over the course of several years and not being able to see his mother when she was ill. Thus far, the report goes no further than the GP records and Talking therapy letters and the judge's findings are in line with this.

29. The expert also assessed the appellant using psychometric tests. The appellant scored 36 out of 63 on the Beck Depression Inventory which indicated severe depression. The expert commented that the Beck Depression Inventory is not used as a diagnostic tool, but as a measure. Ranges 19–29 indicate moderate depression and 30 to 63 indicates severe depression. He also scored 34 in respect of anxiety indicating severe anxiety (the range was from 26 to 63).

30. Dr Costa's opinion was that it was important that the appellant continued "to have the support of his social network in addition to psychological intervention in the form of long-term group or individual psychotherapy". She then commented on the difficulties obtaining this kind of treatment under the NHS.

31. Dr Costa then concluded "

> "if [the appellant] and his wife are not allowed to remain in the United Kingdom…. "I do not think that he would be able emotionally equipped to cope with it. I have no doubt that it would have devastating effect on his mental health as it would be an additional stressor. The risk of him having a mental health crisis and becoming a danger to himself would significantly increase.
>
> His suicidality would increase and he may attempt to take his own life as an impulsive, desperate measure."

32. It is important to note at this juncture that the appellant did not submit that it would be a breach of Article 3 ECHR on medical grounds for him to be removed to Bangladesh. It was not his case that he would actively commit suicide if returned. The relevance of his poor mental health was that it was a factor which would amount to a very significant obstacle to integration and was relevant to the proportionality assessment in the Article 8 ECHR balancing exercise.

33. The judge decided that she could place <u>little weight</u> on the psychologist's report in line with the respondent's submissions. These were that the expert was a psychologist rather than a psychiatrist; the findings were made on a single assessment on 28 July 2023 of unknown duration; the report is written in very general terms; it refers to assessment using DSM-IV but provides no real details or explanation of this methodology or how it was applied; the Beck Depression and Anxiety Inventory are not diagnostic tools and are questionnaires or psychometric tests. The diagnosis of severe depression is as a result of this test.

34. It is clear that these are the reasons that the judge gave for giving little weight to the psychologist's report. I do not agree with Mr Malik KC that the reasons that the judge gives for placing little weight on the conclusions of Dr Costa are flawed. The judge gave various reasons, which did not only include the fact that the appellant was assessed over only one session and Dr Costa relied on what he was told, but that the diagnosis of severe depression is "unreasoned and in very general terms" and there was reliance on an assessment by the psychiatrist Dr Sultana which in turn was flawed. (see below).

35. I am satisfied that the judge's approach to the report and the reasons that she gave for giving little weight to the report are clearly adequately reasoned and in accordance with the guidance on medical reports.

36. Similarly, I am satisfied that the judge was entitled to give limited weight to Dr Sultana's letter. Dr Sultana is a psychiatric consultant at Evercare Hospital in Dhaka. Her letter is undated. She states that she has been through the appellant's medical records and

conducted three telephone conversations with him. She notes that the appellant has received support from his wife and close friends in the United Kingdom and that his current stable environment continues to assist with his recovery. She also opines that it was in his medical interests to remain in the United Kingdom as moving to Bangladesh would disrupt his treatment. She stated that:

> "Bangladesh is still in the early stages of treatment of mental health such as depression and government funding for this remains very low and does not really offer many services for anyone suffering from mental health. There are not many medical professionals who work in this area of medicine and not many places that offer treatment for depression. Although there are some private institutes that are specialist places for mental health, their ability and resources are at early stages and I do not believe that they are equipped to provide the support that Mr Khan requires, especially as he is not a simple case. Also, it is highly unlikely that Mr Khan would be able to get a place in any of these places are there are only a few and it is notoriously hard to get treatment because of the limited patients that they are able to treat and usually places are secured through pre-existing relationships with relevant people".

37. The judge's approach to the report of Dr Sultana is as follows:

> "34. The respondent submitted that limited weight be placed on Dr Sultana's letter in circumstances where there was no evidence what medical records were assessed and the assessment was based on 3 telephone consultations. The respondent submitted that the appellant had given evasive oral evidence as to when the letter was received and there was no evidence about payment made for the consultation and when the letter was sent. The appellant submitted that the respondent had not raised concerns as to the reliability of Dr Sultana's letter in either the refusal decision or the review and was raising spurious points but that in any event there was consensus as 'everyone speaks with one voice a person who is depressed'.
>
> 35. I accept that the medical evidence supports that the appellant has depression. I note that the psychologist and the psychiatrist do not directly or explicitly set out any diagnosis but concur with the underlying GP records and the GP assessment of anxiety and depression arrived at mid-2021. In all the circumstances, I cannot conclude that the evidence reliably supports any clear diagnosis of severe depression. The consensus and it is what the appellant refers to in his own written statement is that his mental health circumstances relate to grief further to the bereavement of his mother in 2018."

38. I can see no error in the judge's approach to the report from Dr Sultana, which clearly did not comply with any of the guidance on expert reports. She did not explain her expertise and does not provide any detailed evidence about what medical records she had viewed or how she came to be instructed. In any event her conclusion was that the appellant suffers from depression which is consistent with the finding made by the judge based on the GP reports. Dr Sultana goes no further than those reports so it is difficult to understand the materiality of the asserted error in this respect.

39. The expert's view was also that it would be difficult for the appellant to get the treatment he requires in the UK.

40. The judge also made a finding that the appellant would be able to access his medication in Bangladesh. This finding has not been challenged in the grounds and was based on the respondent's CPIN from which the judge found that the appellant's medication was available in Bangladesh. The judge was entitled to take into account that the appellant is not receiving specialist interventions in the United Kingdom, that he has had some counselling in the past, is on the waiting list for further counselling and he is being treated by his local GP.

41. At [44] the judge states:

> "there is treatment available in Bangladesh although I accept the provision is different from that available in the UK. For completeness and notwithstanding the possibility of some stigma, the background evidence indicates that there is treatment and medication available in India also".

42. At [45] the judge went on to state:

> "The appellant relies on having been able to source and make contact with a psychiatrist in Bangladesh, which indicates that engaging psychiatric treatment and support is clearly possible".

43. This finding was manifestly open to the judge and has not been challenged.

44. Standing back it is clear that the judge found that the appellant would be able to access medication and treatment in Bangladesh. The fact that he had been able to make contact with a psychiatrist in Bangladesh and have three sessions with her from the UK indicated that he would be able to do this in Bangladesh. This conclusion was manifestly open to her. She went on to say at [45]:

> "I accept that Dr Sultana's letter concurs with the Bangladesh CPIN as to the different provision in Bangladesh. I also note that her opinion is that it is in the appellant's interest to remain in the United Kingdom because relocating to Bangladesh will "'disrupt his treatment" and that the "current stable environment continues to assist with his recovery". I fully accept that having a network of support around him and stability supports recovery and that adjustment to a different environment will introduce some disruption. I do not accept that the appellant is not capable of taking steps to access support in Bangladesh."

45. In summary, the judge was satisfied from all of the evidence before her that the appellant has depression, that a stable environment will assist his recovery but that he can obtain treatment and medication in Bangladesh albeit not to the same level as in the UK. These findings are manifestly sustainable on the evidence before the judge and it was not argued that they were not.

46. To the extent that there was an error in the judge's assessment of these reports in terms of diagnosis, the difference was between the appellant having depression and anxiety and severe depression and severe anxiety. There does not seem to be any divergence over what treatment the appellant needs. The judge accepted that the appellant has depression. It is difficult to see how a diagnosis of severe depression would be material to the outcome of the appeal in circumstances where there is an unchallenged finding that the appellant could access treatment, would have family support from his sister and that his wife could choose to relocate to Bangladesh with him is she wished.

47. I can find no error in the judge's approach to the medical evidence. This ground is not made out.

Ground 3 - the standard of proof in relation to "very significant obstacles".

48. Mr Malik KC submitted that the judge erred at [42] when she said:

> "There is no cogent evidence available to me to suggest that it would be <u>impossible</u> for a person with the skills, education and qualifications that the appellant has to find employment in Bangladesh."

49. According to Mr Malik KC, the judge applied the standard of "impossibility", which he submits is a plain and obvious error of law. He submitted that the real question was whether the appellant's long period of absence from Bangladesh in combination with his mental health issues, would entail serious hardship in him finding employment. He submitted that when carrying out this evaluation, the judge was required to apply the standard of a balance of probabilities. Likewise, he submitted, the standard of "cogent evidence" used by the judge is ambiguous and flawed in line with Secretary of State for the Home Department v Starkey [2021] EWCA Civ 421 [2021] as it could be a loose way of saying that there was no evidence at all or it could mean that there was evidence but the Tribunal did not consider that it was sufficient.

50. Despite these submissions, I am in agreement with the respondent that the judge has in fact applied the correct standard of proof when considering the issue of "very significant obstacles" under 276ADE(1)(vi) of Appendix FM to the Immigration Rules. At [20] the judge expressly directs herself to the correct standard of proof. She refers to the appellant having to demonstrate on the balance of probabilities that he meets the requirements of the Immigration Rules and the facts on which he relies (my emphasis). It was clear that the judge had this standard in mind throughout the decision.

51. The relevant Immigration Rules are set out in full at [23]. At [24] the judge directs herself appropriately to the case law which includes Parveen v Secretary of State for the Home Department [2018] EWCA Civ 932. In this authority there was reference to Sales LJ's guidance on Kamara, where he says:

> "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported … 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. … 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."

52. At [25], the judge then went onto properly direct herself to Sanambar v Secretary of State for the Home Department [2021] UKSC 30.

53. The judge then turns to the obstacles that the appellant says he faces at [26] which include his lack of ties to Bangladesh, his estrangement from his family in Bangladesh, difficulties securing employment and his mental health problems. The judge took into account the appellant's length of residence in the UK; that the appellant spent his youth and formative years in Bangladesh, visited Bangladesh when he resided lawfully in the UK and last visited Bangladesh in 2016; that he speaks Bengali and English and that he is in contact with his sister and a neighbour. Shee took into account that the appellant's father and brother have sold the family home and relocated. The judge made findings on the appellant's mental health problems and found that the appellant is able access medication and look after his day-to-day needs in Bangladesh.

54. At [41] the judge noted that there was "no documentary evidence to support the appellant's assertion that persons could not be employed in the public sector in Bangladesh after the age of 30, or as to the labour market in Bangladesh in general, which will include private sector employment". At [42], the judge noted that the appellant has achieved a number of qualifications, speaks Bengali and English, which is widely spoken in Bangladesh. The wording which is said to amount to an error is found at the end of [42] and appears to me to

relate to the suggestion that the appellant would not be able to find employment in Bangladesh because he is over 30. The judge's clear finding is that it would not be impossible for the appellant to find employment in Bangladesh for this reason. The inference is that there is some possibility of the appellant finding employment. This is a factual finding which is feeding into her overall assessment as whether the appellant would have the capacity to integrate and form a private life in Bangladesh. The judge at [45] goes on to find that the appellant has been able to make contact with a psychiatrist in Bangladesh and has contact with a sister and a neighbour. He is still familiar with the customs and culture. He is able to build up relationships and support with family and individuals in Bangladesh.

55. At [47], the judge finds the appellant has not demonstrated to the relevant standard of proof that he could not operate in Bangladesh on a day-to-day basis and build a meaningful network of relationships in time. This clearly relates back to his reference to the balance of probabilities at [20]. I am satisfied that although the wording at [42] is unfortunate, it relates only to the possibility of the appellant finding employment. The judge manifestly properly understood that the relevant standard was the balance of probabilities and has applied this standard when considering 276ADE(1)(vi) of the Immigration Rules as a whole.

56. At [48], the judge said:

> "There was no evidence of any real detail or cogency available to me, to support the assertions that the appellant and his spouse could live together, neither in India nor Bangladesh".

57. I am not satisfied that the judge's reference to "cogent" evidence is unlawful. From reading the decision it is clear that the appellant and his wife in their statements and oral evidence have both said they cannot live in each other's countries as a couple. The judge acknowledges this, but his meaning at [48] is clear. There was a lack of detail and a lack of background evidence to support this assertion. The judge manifestly took into account the difficulties that they said they would face at [39]. The appellant's wife did not feel she should have to choose between her career and her family life, there are visa issues for the appellant in India, there is anti-Muslim sentiment and there are issues with his wife's family. The judge understood that the wife's position was that she could not go to Bangladesh because she could not be expected to abandon her work, would suffer discrimination and not be able to understand the language. At [40] the judge recorded the wife's oral evidence that her family did not accept the appellant because of his mental health difficulties. I note here that the judge was perfectly entitled to find that this evidence and her evidence of issues with the family was inconsistent with the appellant's wife's oral evidence that she had not in fact told her parents about the marriage despite being in regular contact with them.

58. At [48] the judge acknowledges that there is some level of anti-Muslim sentiment in India which can plausibly said to be increasing in the current context. The judge also takes into account that there may be degrees of hostility towards in Indians in Bangladesh.

59. The judge concluded that:

> "the appellant is presenting the Tribunal with highly generalised assertions and there is simply no evidence before the Tribunal on which to securely base any findings or conclusions that the environment in either India or Bangladesh is such that the couple could not establish family life in either of these locations, even if they faced some difficulty and inconvenience in relocating and establishing that family life. There are sizeable populations of Muslims living in India and if the appellant and his spouse chose to base themselves in Bangladesh, they would be a couple

> married in accordance with Islamic tradition and she would have his support in readjusting to life there".

60. I cannot find any legal error in the judge's findings on this issue. The appellant does not set out what evidence the judge has not taken into account. I am satisfied that the judge has taken into account the evidence before her and that the judge has given adequate and tolerably clear reasons for rejecting the appellant's evidence that neither he nor his wife can live together in Bangladesh or India. This was a finding that was open to the judge on the evidence before her. I am not satisfied that this ground is made out.

Ground 4 – ability of the appellant to return to Bangladesh to apply for entry clearance

61. Mr Malik KC submitted that the judge erred in assessing the issue of proportionality on the false premise that the appellant might be able to return to the United Kingdom having sought entry clearance from Bangladesh. He submits that the judge erred by failing to take into account that having overstayed his visa in the United Kingdom, the appellant would be subject to a five year re-entry ban and would not be able to apply to re-enter the United Kingdom as the spouse of the holder of a graduate visa.

62. In my view this ground is misconceived. The skeleton argument before the First-tier Tribunal was prepared by very experienced Counsel, Mr Manjit Gill KC, who could be expected to be fully appraised of the law. When addressing proportionality, he argued that it was not proportionate to expect either the appellant or his wife to live in Bangladesh or India. He submitted that the Immigration Rules permit the dependent of a person with a graduate visa to obtain leave to remain in the UK and that it would be disproportionate to require the appellant to leave the United Kingdom and reapply from abroad, in view of the financial burden, the huge and prolonged disruption to their family and private lives, the lack of contacts, accommodation and employment opportunities in Bangladesh or in India, as well as discrimination in each country, the inability to obtain access to appropriate mental healthcare, the risk of deterioration in the appellant's mental health and the delay from the respondent in making a decision. In fact it was submitted that in a situation where the appellant could go abroad and come back as a dependant of his wife and the immigration requirements could easily be satisfied, such return was merely a procedural formality and it would therefore be disproportionate to remove the appellant. The judge refers to this submission at [59]. This is at odds with the grounds as pleaded.

63. I cannot see any reference in the skeleton argument before the First-tier Tribunal to a submission that the appellant would not be able to apply to re-enter the United Kingdom because of a re-entry ban.

64. At [58] the judge commented that no detailed evidence or submissions were presented to her to demonstrate that the appellant would meet the requirements for either a student or graduate dependant and that the issues for determination, which had been agreed by both parties, did not include whether or not the appellant satisfied the graduate dependant rules on the basis that the appellant's spouse has a graduate visa. In this paragraph the judge noted that the appellant could not meet the requirements of this rule if he made an application from within the United Kingdom because of his immigration status as an overstayer in breach of the immigration laws.

65. I am satisfied that the judge has not erred in this respect because the submission posited by Mr Malik KC was not advanced before the First-tier Tribunal. A judge cannot be expected to take into account a material factor or make findings on an issue if that factor or issue has not

been raised in the hearing, in accordance with Lata (FtT: principal controversial Issues) India [2023] UKUT 163 (IAC).

66. I am also satisfied that the judge's approach to proportionality was entirely lawful. The judge gave appropriate weight to different and conflicting factors that were before her and directed herself properly in accordance with the law. In this appeal, the starting point for the judge was that the appellant was an overstayer who had built up his private life in the United Kingdom at a time when his immigration status was precarious. He then remained here unlawfully and has never explained why. The appellant's relationship with his wife was formed at a time when he was living in the UK unlawfully and she was living in India before she had even arrived in the United Kingdom. She entered the UK intending to marry the appellant in the full knowledge that her future husband's immigration status was illegal and that she was coming here for a temporary purpose. The judge rightly pointed out that she could have had no expectation in these circumstances that she would be able to remain with him in the United Kingdom. Little weight must be given to a family life which was entered into when the appellant was unlawfully in the United Kingdom and little weight must be given to private life which was formed when an individual remains in the UK with precarious immigration status or unlawfully.

67. I agree with Mr Melvin that the fact that the appellant cannot meet the requirements of the immigration rules for leave to remain as a dependent of a graduate visa and could not meet them on return to Bangladesh is in fact a public interest factor weighing on the Secretary of State's side of the balance. It was open to the judge to find that it was proportionate for the appellant to return to Bangladesh and reapply for entry clearance because his spouse could accompany him, she could cope with living in the UK without him, she could provide him financial support and they could maintain their relationship remotely.

68. The judge was manifestly entitled to find that Article 8 does not respect the choice of residence of a couple as to where they exercise their family life. Although the judge acknowledged that there would be difficulties for either individual going to live in the other's country, the judge was manifestly entitled to find that the couple could choose to live together either in India or in Bangladesh. Those findings have not been challenged by the appellant as irrational or inadequately reasoned. Simply put, the judge found that the sponsor in the UK is on a temporary visa and the couple can if they so wish, choose to relocate together elsewhere. The judge was entitled to find that the public interest in maintaining immigration control in this appeal outweighed the appellant's right to respect for private and family life in the UK.

69. Since I have found that none of the grounds are made out, I dismiss the appeal and uphold the judge's decision dismissing the appeal on human rights grounds.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 October 2024