



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07397/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 15<sup>th</sup> May 2019

Decision & Reasons Promulgated  
On 21st May 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MR Md. SHAHINOR ALI  
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms S Iengar, Counsel, instructed by Evolent Law.

For the respondent: Ms S Jones, Senior Presenting Officer.

**DECISION AND REASONS**

Introduction

1. Both representatives are in agreement that there is a material error displayed in the decision of First-tier Tribunal Judge Brewer and suggested that I set the decision aside and remit the matter for a de novo hearing in the First-tier tribunal. Ms S Iengar confirmed that

the original application for an adjournment of today's hearing is not being pursued.

2. The appeal concerned the entry clearance officer's decision to refuse the appellant's application of 29 November 2017. He had applied for entry clearance under appendix FM for the purposes of settlement with his wife. They married in an Islamic ceremony on 8 February 2015 and then in accordance with UK law on 21 November 2016. It was accepted on appeal that the financial requirements were met. The decision was reviewed by the entry clearance manager on 20 November 2018 and was maintained.
3. His application was refused under paragraph 320(11) on the basis of suitability. In support of this the respondent relied upon his immigration history. He came to the United Kingdom under the then work permit scheme in 2004. He subsequently made a claim for protection indicating he was fearful of return to his home country, Bangladesh, because he had been sentenced to 4 years imprisonment. He was to attend at the Bangladesh High Commission to obtain documentation but did not attend. Finally, he was required to report but absconded on 27 August 2014. It is recorded that he voluntarily left on 10 September 2017.
4. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable the judge materially erred in that there was an absence of proof of the assertions made by the respondent.
5. Ms Jones said she had consulted the presenting officer's note from the First-tier Tribunal who indicated some concerns about the proofs. The reference to a period of imprisonment was made as part of an asylum claim. She also noted there was no evidence produced of any requirement to report. Ms Iengar added that there was no evidence provided from the Bangladesh High Commission to show the appointment letter had been sent or of a failure to attend. Furthermore, there was no documentation to confirm he had absconded. Overall, she said the bundle on behalf of the respondent in the First-tier Tribunal was very short and the refusal decision was absent.

### Consideration

6. At paragraph 8 of the decision the judge referred to the basic burden and standard of proof. At paragraphs 19 and 21 there is reference to the respondent needing to show a breach of rule 320(11). Consequently, the judge did demonstrate an awareness that the initial burden upon the respondent to establish the appellant engaged in deception or that there were aggravating circumstances. The requirement to do so is set out in the decision cited at paragraph 21 of the decision and at paragraph 10 of JC (Part

9 HC395 - burden of proof) China [2007] UKAIT 00027, which the appellant's representative has helpfully provided.

7. The judge made findings of fact to the effect that the appellant overstayed; work illegally; failed to attend for interview at the High Commission and absconded. At paragraph 23 the judge recorded the appellant claims not to have been notified of an appointment at the Bangladesh High Commission. There is no reference to the evidential basis for the respondent's assertion and the presenting officer today indicated in fact little evidence was presented.
8. In the interests of justice and bearing in mind the views of both representatives the decision is unsafe and is set aside. The matter is remitted for a de novo hearing in the First-tier Tribunal.

### Decision

The decision of First-tier Tribunal judge Brewer materially errs in law and is set aside. The appeal is to be relisted for a de novo hearing in the First-tier Tribunal

Deputy Upper Tribunal Judge Farrelly.

### Directions

1. Relist for a de novo hearing at Taylor house excluding First-tier Tribunal judge Brewer.
2. It was indicated there is no need for an interpreter.
3. It was indicated there may be around 3 witnesses attending. A hearing time of around 2 hours can be anticipated.
4. The appellant's representative should advise the respondent in writing what facts are in dispute. The respondent is to consider the necessary proofs and provide copies to the appellant. In particular, in the absence of any agreement, the respondent should address the following:
  - a) The evidence to establish the assertion that the appellant worked illegally in the United Kingdom
  - b) Evidence that the appellant failed to report as required
  - c) Evidence that the appellant was notified of and failed to attend an appointment at the Bangladeshi high commission.
  - d) Evidence that the appellant absconded.
5. If possible the respondent should seek to provide a form IS.96 in relation to the claimed failure to report. A copy of his asylum interview of July 2014 should be provided. The refusal letter should be provided. The party should also endeavour to see if there is evidence to confirm the fact he left the United Kingdom voluntarily.

Deputy Upper Tribunal Judge Farrelly.