Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13317/2019

THE IMMIGRATION ACTS

Heard at Bradford via Skype
On 20 August 2020

Decision & Reason Promulgated
6 October 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MD HASNAT AZADI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greg Ó Ceallaigh instructed by Waterstones Solicitors
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

ERROR Of LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Aujla ('the Judge') promulgated on 19 December 2019 in which the Judge dismissed the appellants appeal on human rights grounds.
2. Permission to appeal was granted by another judge of the First tier Tribunal; the operative part of the grant being in the following terms:

© CROWN COPYRIGHT 2020

> "In his decision, the Judge observed that there were aspects of the evidence which would be better suited to a protection/Article 3 claim. Arguably, he erred by excluding them from his consideration of very significant obstacles under paragraph 276 ADE. He was clearly not assisted by the fact that there were no grounds of appeal. The Judge's case management powers under Rule 4 of the Procedure Rules entitled him to limit the number of live witnesses to be called, especially as the Respondent was not represented and so there would be no cross examination. Apart from identifying the names of the witnesses, it is arguable that the Judge failed to consider their evidence given that he makes no further reference to it. It is also arguable, from paragraph 29 of the decision, that the Judge considered that the appeal was being advanced solely on private life grounds. It was obvious from the Appellant's statement that he considered that he had a family life in the UK and, regardless of the strength or weakness of such an argument, the Judge was duty bound to consider it.
>
> In the circumstances, I grant permission to appeal. All grounds are arguable, as they are clearly interlinked."

Background

3. The appellant is a citizen of Bangladesh born on 1 January 1988. He had lived in the United Kingdom for 11 years at the date of the hearing.
4. The Judge records the appellants immigration history before noting the appeal came before him for hearing as a float case, after he had finished his appointed list, and that Counsel who had represented the respondent earlier in the other appeals had left the building by the time this appeal was allocated to the Judge; meaning there was no representative available for the respondent.
5. At [15] the Judge writes:

> "I had preliminary discussions with Mr Ó Ceallaigh at the beginning of the hearing. I noted from the Appellant's bundle AB1 that, in addition to the witness statement of the Appellant, there were 14 other witness statements and the courtroom was full of people who had accompanied the Appellant. In view of the fact that the issue before me was very narrow, whether there were very significant obstacles to the Appellant's integration into Bangladesh on his return, I asked Mr Ó Ceallaigh about the number of witnesses. He stated that he would be calling 10 witnesses in addition to the Appellant. He was not able to draw my attention to any correspondence from those instructing him informing the tribunal said there would be 11 witnesses so that extra time could be allowed, if considered appropriate. In view of the narrowness of the issue, I indicated to him that I would allow him to call two witnesses in addition to the Appellant and he could decide who he wanted to call. He agreed and then decided on the names of his the two witnesses he would be calling."

6. In relation to procedural issues one can have sympathy for a judge who having completed the list allocated to them is willing to assist the Tribunal by taking on additional work, including cases allocated to the float list. Any judge so doing is not required to deal with such a case "come what may" and must still have in mind the overriding objectives and the principles of justice; including the primary

question of whether a party appearing before that tribunal will receive a fair hearing. Even if the appellant's representatives did not contact the tribunal administration to advise them of the substantial number of witnesses to be called, it may be argued that the blame for what occurred lays with them and not the appellant. Even with a substantial number of witnesses, as in this case, if witness statements had been filed and cross examination (if any) brief it may still have been possible to hear the case within the allocated time of two or three hours.

7. The grounds on which permission to appeal was granted are threefold namely (1) the Judge failed to consider the appellants case that there were very significant obstacles to his returning to Bangladesh, (2) in failing to consider the Appellants family life and (3) in failing to consider the appellants case that his removal will be a breach of Article 8 ECHR outside the Immigration Rules.
8. It is necessary when examining the grounds to go back to the nature of the application made by the appellant.
9. The appellant's immigration history shows that on 13 June 2017 he applied out of time for leave to remain outside the Immigration Rules. That application was varied on 29 September 2017 for leave to remain outside the Rules which was further varied on 5 February 2018 to leave to remain outside the Rules on the basis of an application for indefinite leave to remain. The application form SET(O) completed and submitted is the prescribed form seeking settlement, ILR, for reasons not specifically provided for elsewhere. The application form at Section 3 provides several categories in which an application can be made, one of which is stated to be "other purposes or reasons not covered by other application forms". It is this category that the appellant ticked as being applicable. In the section on the following page it is written "if you have ticked the other purposes or reasons category, please explain briefly why you are applying for indefinite leave to remain in the UK. You will also need to provide a letter explaining in more detail why you are applying, and the category of your last grant of leave" to which the appellant wrote "please see my attached cover letter".
10. That letter written by the appellant, dated 2 February 2018, sets out the appellants case seeking leave to remain outside the Rules referring to length of residence in the United Kingdom, lack of ties to Bangladesh , strong family life in the United Kingdom, education and professional qualifications in the United Kingdom as a barrister, a request to grant indefinite leave to remain so the appellant can pursue his career in the United Kingdom, a claim it will be impossible for the appellant to return to Bangladesh and work in legal practise as a result of the existing violence and oppression in that country, the fact his father was a prominent leader of an opposition political party, as more particularly set out and expanded upon in that document.
11. The respondents refusal dated 12 July 2019 states the appellant had not raised any compelling enough reasons for him to be considered for indefinite leave to remain claiming he had no spouse or children in the UK and that he would not be issued indefinite leave to remain under compelling circumstances in regard to his family life. It was acknowledging the appellant claimed to face persecution in Bangladesh which the decision maker stated amounted to a protection claim that would only be addressed under compassionate factors with the appellant able to claim asylum

if protection issues are raised; but that on the facts there was nothing compelling enough to consider whether that warranted a grant of leave outside the Immigration Rules. In relation to the rules themselves the decision maker did consider family life stating that as the appellant had not told him about a partner or dependent children his claim had not considered in relation to family life under Appendix FM but in relation to private life pursuant to paragraph 276 ADE only. It was found the application did not fall for refusal on grounds of suitability but fell for refused on the grounds of eligibility as the appellant did not have at least 20 years in the United Kingdom. In relation to whether there were very significant obstacles to integration into Bangladesh the decision maker rejected the appellants assertion such very significant obstacles existed, for the reasons set out in the refusal letter. In relation to exceptional circumstances, the decision maker concluded no such circumstances existed but noted the appellant had made representations in relation to family ties with the sister and nephew and close emotional ties with such family members. It was not, however, accepted that such exceptional circumstances did exist.

12. What does not appear to have been considered in detail in the decision letter is whether the appellant's claim his family life engaged article 8 was accepted as there does not appear to be a specific finding for or against this proposition in the letter. Nor does it appear that notwithstanding the author of the decision letter stating that the claim the appellant will face persecution in Bangladesh which amounted to a protection claim will be addressed under compassionate circumstances, that any such consideration was properly given to such matters based upon the information provided when assessing if there were compassionate factors in the case sufficient to warrant a grant of leave to remain outside the Rules.
13. The Judge was not at all assisted in this appeal by the fact the appellant's representative failed to include any grounds of appeal with the application.
14. Mr Ó Ceallaigh in his application for permission to appeal to the Upper Tribunal, Ground 2, writes:

> "10 The FTT complained [13] separately appellant had not submitted grounds of appeal. That criticism must be accepted and certainly grounds should have been lodged.
>
> 11 However, when counsel at the hearing asked if the skeleton argument could stand his grounds of appeal the FTTJ Refused on the basis that this would "*not be appropriate*". In the determination, the FTTJ then asserted at [13] "*I have assumed that the appellant claimed that he satisfied the requirements of the Immigration Rules in respect to private life and the respondent's decision was in breach of his Article 8 rights*". There was no need for the FTT to 'assume' what the appellants case was; it was set out in writing in front of him.
>
> 12 In fact, the Appellant had relied not only on his private life but also on his family life [appellants statement at [8] [21], and family members' statements; skeleton argument at [45]; [30-36]. The Appellant had been living in the same household for a decade, and was extremely close to his eight year old nephew as a result, being more akin to a second father than an uncle. Their separation would have a major impact on the child

[and the Appellant]. An Independent Social Workers report was submitted in support of this case. Several witnesses attested to this also.

13 The FTT however decided that the sole issue "*was very narrow, whether they were very significant obstacles to the Appellant's integration into Bangladesh*" [15]. The FTT did not consider the appellants family life, or his relationship with his nephew, at all.

14 It was also because of the 'narrowness' of the issues in the appeal that the FTT refused outright to hear from several of the witnesses. Although the FTT asserts that the intention was to call 10 witnesses, there were in fact 6 who had come to give evidence of the Appellants unusually strong connexions to the United Kingdom, his closeness to his family in this country, and his character. The FTTJ asserted that he would permit no more than 2 to adopt their statements, even though there was no presenting officer and so there would be no cross examination. Nothing in the determination suggests that any of the content of those statements was considered, save for the FTT's listing the evidence.

15 The FTT did not consider the Appellants case that he had family life in the United Kingdom. None of the submissions or evidence in respect of the Appellant's exceptional closeness to his family were referred to, whether from the Appellant himself, in the witness statements or in the ISW report.

16 The appellant submits that in failing to consider his family life the FTT urging law."

15. There is merit in the submission made to the Upper Tribunal that if the Judge had considered the family life claim but ruled that article 8(1) was not engaged on the evidence in relation to family life such evidence would still have been material to the appellants private life and relevant to the proportionality of any interference with the same pursuant to Article 8 (2).
16. Mr Ó Ceallaigh's application for permission to appeal also contains an additional footnote which was relied upon in his oral submissions in the following terms "*It is striking that the FTTJ gives concerns about time as the basis for this decision. The matter came on just before 13.30. The FTTJ interrupted counsel's closing submissions to announce that the decision was reserved and the hearing was concluded at 13.51. The Appellant, who had himself appeared in the FTT as a lawyer before, and the witnesses who were also immigration lawyers and had come to give evidence, were somewhat taken aback. The FTTJ also asserts that counsel "agreed" that only 2 witnesses should be called - that is simply not true.*
17. A further issue of potential unfairness is said to have arisen in relation to the Judges consideration of whether there were very significant obstacles to the appellant returning to Bangladesh. It is said that the material before the Judge contains an assertion that it will be very difficult for the appellant to integrate into life in Bangladesh, including the fact that because the appellant is a qualified barrister this will give him a political profile, that his father had a political profile that will place him at risk, that he himself is opposed to the current regime, and will be unwilling and unable to keep silent about his opposition if returned. It is asserted in the grounds:

> "6 The FTT refused outright to consider these factors [32]. That was an error of law. The reason the FTT asserted that these matters were to be ignored was because the Appellant had not made a protection claim [32]. The Appellant submits that the FTT was not entitled to take this approach, which is not justified in statute or under the Procedure Rules, and moreover that this is a procedural issue upon which it would be helpful for the Upper Tribunal to give guidance."

18. It is not clear why there is a need for guidance to be given as an individual is entitled to have all matters they raise in relation to an appeal considered by the judicial body responsible. It was acknowledged in the refusal letter that the matters raised by the appellant could form part of a protection claim which the appellant as a qualified barrister who has practised in the field of immigration law would have been fully aware. The fact he chose not to pursue that avenue is a matter for him, but it is not made out that prevents him from relying upon such evidence if it is relevant to another matter upon which a court or tribunal had to decide, which in this case was whether there were very significant obstacles preventing his integration to Bangladesh on return. Any person adopting such an approach will be aware that the lower standard of proof would be applicable to a protection claim whereas the civil standard, the balance of probabilities, will be applicable to a human rights claim. It is not the case, as it may be in a judicial review claim, of finding that the remedy sought must be the 'remedy of last resort' to be refused if an alternative avenue is open to the party bringing the matter before the court.
19. The approach of the Judge in not properly considering such issues is also highlighted by the finding at [33] that the appellant could easily reintegrate because he was a qualified barrister who would be operating in professional circles as a professional man and a lawyer; when it was the appellants case that the very fact of his being a barrister placed him at risk, that the idea of practising was impossible, and that a key part of his private life is that he spent a number of years achieving his qualifications and could be a practising lawyer in the United Kingdom which would be too dangerous for him in Bangladesh.
20. There is merit in the submission that the cumulative effect of the concerns raised in the grounds seeking permission to appeal, as acknowledged in the grant of permission to appeal, is that the appellant has not received a proper fair hearing of his appeal in this matter. In particular it appears the Judge, having decided that he could proceed even though there were no grounds of appeal, then rejected the submission that the skeleton argument could have stood as the grounds of appeal and then made an unfair assumption as to what the case was actually about, which was clearly not the case set out in the skeleton argument or any evidence relied upon by the appellant.
21. It is clear that the Judges assumption that the appeal was only to be decided on a very narrow issue of 'very significant obstacles' denied the appellant the opportunity to have the full range of issues relied upon properly considered by the Tribunal. It is also clear that in assessing 'very significant obstacles' the Judge improperly excluded from consideration, or failed to make adequate findings in respect of, a major aspect of the appellants case on the basis the Judge considered

such matters should form part of a protection claim. Whilst that may be the case, it did not excuse the Judge from factoring such matters into consideration of the 'very significant obstacles to integration' aspect of the case. It is also clearly the case the appellant has not had proper consideration of his assertion his removal from the United Kingdom will breach his protected human rights which he pleads on the basis of private and family life; in relation to which there has been no proper or adequate analysis.

22. I find in light of the above the determination must be set aside with there being no preserved findings. The failure to consider relevant aspects of this case properly had denied the appellant the opportunity to have his case fully properly and fairly considered by a judge of the First-tier Tribunal. Accordingly I consider, in accordance with the Presidential guidance and the overriding objectives that the only option available in relation to this appeal (in which the Judge failed to deal with issues raised, failed to properly consider the basis of the appeal, and committed procedural unfairness in limiting the grounds of appeal to be considered and witness evidence the appellant was seeking to rely upon in his support of his case in light of the mistaken belief that the issues were "narrow") is that the appeal be remitted to the First tier Tribunal sitting at Taylor House to be considered by a judge other than Judge Aujla.
23. In light of the issues and evidence to be relied upon it does not appear appropriate that the case should be assigned to the float list. It is also a case that should be allocated a time estimate of at least three hours and in which the appellant must file a clear stamen of the grounds of appeal he is seeking to rely upon in support of his appeal.

Decision

24. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal sitting at Taylor House to be heard afresh by a judge of that tribunal other than Judge Aujla. There shall be no preserved findings.**

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 29 September 2020