Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: HU/14694/2019 (P)

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THE IMMIGRATION ACTS

Decided under rule 34 (P)	**Decision & Reasons Promulgated**
On 23 September 2020	**On 28 September 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KUMAR [B]
MONJU [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)
For the appellant: Mr M West, of Counsel, instructed by City Heights Solicitors
For the respondent: No submissions received

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Foudy on 13 April 2020 against the determination of

First-tier Tribunal Judge Rae-Reeves, promulgated on 28 November 2019 following a hearing at Hatton Cross on 14 November 2019.

2. The appellants are a married couple born respectively on 1 January 1983 and 4 June 1989. The first appellant entered the UK as a student in October 2009 and the second appellant arrived in September 2012 with Tier 1 post study leave. They have a daughter born on 13 May 2019. They are Bangladeshi nationals. The appellants are preachers at a Hindu temple although the first appellant's application for leave under Tier 2 as a Minister of Religion was refused in 2016. Their last period of leave ended in October 2015. They appeal against the decision of the respondent dated 13 August 2019 to refuse their out of time application for indefinite leave to remain on long residency grounds and their article 8 claim.

3. The appellants claim that as Hindu preachers they would face discrimination in Bangladesh, that they would be destitute because the first appellant would be unable to work because the second appellant was unable to care for their child due to back problems. The applications were refused because the respondent considered that the appellants could not meet the requirements of paragraphs 276B or 276ADE and considered that there were no exceptional circumstances which would warrant a grant of leave outside the rules.

4. The appellants lodged appeals and these came before First-tier Tribunal Judge Rae-Reeves at Hatton Cross. He heard oral evidence from the first appellant and two friends. He found that due to long gaps in the first appellant's period of leave, he could not meet the long residence requirements. He concluded that although Muslims faced some discrimination in Bangladesh, there were areas with large Hindu communities and that the appellants could relocate there. He had regard to the second appellant's health issues and found that she would be able to access medical care in Bangladesh where she would also have help from her family with child care. He found that the first appellant would be able to find employment and that the child's best interests would be to remain with her parents. Accordingly, he dismissed the appeal.

5. The appellants sought permission to appeal on four grounds: (i) that the judge did not have regard to the appellants' subjective fear of returning to their home area and how that would impact upon their ability to relocate and that as this part of their evidence was unchallenged, the judge should have allowed the appeals; (ii) that the judge erred in finding that that the appellants could obtain help with childcare when their claim was that they had no one to help and that it was fanciful to expect their families would be able to help if the appellants had to relocate; (iii) that the first appellant would be unable to work because of his wife's condition as she could not physically look after the child for any length of time and that the judge had been pedantic in rejecting the assertion that the second appellant had had major spinal cord surgery because this was not mentioned in the hospital letters; (iv) that the appellants would be destitute because the first appellant would be unable to work given his wife's condition and this was a very significant obstacle; (v) that the findings were confused and unclear; and (vi) that the judge's finding that they could join

family who had relocated to India added to the confusion of the determination as this was not an issue before him.

6. Permission was granted by the First-tier Tribunal Judge on the basis that the judge had arguably erred when finding that there was no evidence of the claim of the second appellant undergoing spinal surgery because he had oral evidence to that effect.

Covid-19 crisis

7. Normally, the matter would have been listed for hearing after the grant of permission, but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen. Instead, directions were sent to the parties by Upper Tribunal Judge Kamara on 26 May 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

8. Mr West's submissions for the appellant were received on 9 June 2020 but no reply has been forthcoming from the respondent. I note that the directions were properly served on the respondent and that the appellant's submissions were also forwarded to the respondent by email. In the absence of any reply, I proceed to consider the matter.

9. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

10. The appellants have not raised any objections to the matter being determined on the papers and I am satisfied that they would not be disadvantaged by the Tribunal dealing with the matter in that way. The arguments for the appellants are clearly made by way of the grounds for permission and in the submissions made in compliance with the Upper Tribunal's directions. I am satisfied that I am able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

11. The appellants' submissions confirm that the grounds for permission are relied upon in full and these are amplified by Mr West. With respect to the first ground, he submits that the evidence that the appellants would be destitute on return to Bangladesh was unchallenged. Reliance is placed on MS (Sri Lanka) [2012] EWCA Civ 1548 where it was held that "*the Upper Tribunal's judgment is fundamentally flawed because it does not address the appellant's evidence on the airport issue and it ignores the fact that the Secretary of State elected not to challenge that evidence*" (at 19). The unchallenged factors are said to be that the appellant would not be able to obtain work because of his wife's condition, that many Hindus had to leave the appellants' village because they were targeted by extremists, that the appellant's uncle was attacked with a hammer and that the appellants as preachers would be at greater risk. It is submitted that greater weight should have been attached to this evidence when assessing the issue of very significant obstacles. It is submitted that the judge failed to give adequate sufficient reasons for not doing so.

12. With respect to ground two, it is argued that the determination was perverse and that findings were made which were not within the reasonable range of responses open to the judge. It is submitted that having found that there may well be intimidation and violence from the extreme elements of the Muslim majority towards Hindus in Muslim dominated areas, the judge then found that the appellants could return to a more Hindu dominated part of the country. It is submitted that this however, conflicts with the judge's finding (at 25) that the appellants could rely upon their family in Bangladesh in order to help them with childcare. It is submitted that it is perverse to state that the appellants could relocate yet continue to obtain childcare from their families. It is submitted that the appellants' case was that they would not be able to look after their child due to the second appellant's physical issues and that without help they would be destitute.

13. The third ground argues that the judge erred in respect of the evidence of the second appellant's medical issues. It is submitted that the judge accepted that the she suffered from a prolapsed disc, causing back pain and sciatica and that she had a follow-up appointment in April 2020. It is submitted that the judge erred in not accepting that she had had spinal cord surgery as claimed in the first appellant's witness statement because he had not been provided with any evidence of it. It is submitted that, as pointed out in the appellant's grounds, an appointment letter (AB:164) for a trauma and orthopaedic operation supported the appellant's oral evidence on this issue. It is submitted that it was, therefore, not open to the judge to reject that evidence. It is submitted that the issue was highly relevant to the assessment of very significant obstacles on return under paragraph 276 ADE.

14. The fourth ground argues that the second appellant's condition was not properly considered when assessing whether the family would be destitute on return. It is submitted that the judge erred in considering this issue by reference to article 3 and article 8 which was not pleaded by the appellants and that he, therefore, erred by applying the wrong tests. It is submitted that the judge's reasoning is difficult to follow and that he conflates consideration of paragraph 276 ADE with articles 3 and 8. The findings are said to lack

coherence. It is considered that the appellants' standing in the community in this country was not considered with reference to a private life within the rules.

15. With respect to ground five, issue is taken with the judge's finding that the appellants could return to their village. It is submitted that this is perverse given the earlier finding that there were some risks to Hindus on return. It is submitted that there was no finding as to the effect that the appellants' position as preachers would have on them.

16. With respect to ground six, it is submitted that the judge's finding that the appellants could go to India (where the first appellant has parents and siblings) was a misdirection. It is submitted that it was not open to the judge to make such a suggestion as it was not suggested as a possibility by the respondent. Further, the issue was not put to the appellants.

17. It is submitted that if errors of law were to be found, the appeal could be re-decided within the Upper Tribunal.

Discussion and conclusions

18. It is not disputed that the appellants cannot meet the requirements of paragraph 276B. As set out in the decision letter, neither appellant has not completed ten years of continuous lawful residence in the UK and the point was not pursued at the hearing (at 22).

19. Nor can the appellants succeed under the family life provisions of Appendix FM because neither has settled status. Although their daughter was born prior to the date of the decision, they do not appear to have notified the respondent of her birth but in any event she is not a qualifying child.

20. The two grounds on which the application and appeal were put were that there would be very significant obstacles to the appellants' return to Bangladesh and that there were exceptional circumstances which warranted the grant of leave outside the rules.

21. As now put, the appellants' case is essentially that they would face discrimination from Muslims and be destitute on return to Bangladesh because they would be unable to have family support and because the first appellant would be unable to work because the second appellant cannot care for their child due to issues with her back. The complaint against the judge is that he did not take these factors into account even though some were unchallenged by way of cross examination and that he perversely found that the appellants would be able to seek family support whilst simultaneously finding that they would be able to relocate to an area with a large Hindu community. The grounds for permission overlap when setting out the appellants' objections.

22. The heavy reliance on a fear of discrimination/harm in Bangladesh is a matter which was not put to the respondent as part of the application nor did it even feature in the lengthy grounds of appeal that were submitted (reproduced in the AB:3-17). It is noteworthy that no asylum claim has been made and the issue of discrimination and threats from Muslim extremists is raised as an

obstacle to re-integration on return rather than as a claim that serious harm would befall the family on return.

23. Various appointment letters of the second appellant's problems as a result of a prolapsed disc were submitted with the application and the respondent considered this as part of her assessment of exceptional/compassionate circumstances, noting that there was no evidence the second appellant continued to require treatment or that treatment would be unavailable in Bangladesh.

24. The first complaint is that the judge did not take account of the appellants' subjective fears of return when assessing the very significant obstacles to re-integration on return and whether they had an internal flight option. Of course, as this is not an asylum claim, the judge was not required to consider the issue of internal relocation as a separate matter and the grounds do not clarify how a subjective fear could translate into a very significant obstacle on the ground when the appellants return. The judge took account of the documentary evidence and the appellant's testimony and concluded, as it was open to him to do, that intimidation from extreme elements did not amount to such an obstacle (at 23-24). He had regard to the sizeable Hindu minority of some 10%, the presence of Hindu belts in some areas and the fact that despite some land grabs and targeted attacks, there was generally peaceful co-existence between Muslims and Hindus. His finding that the appellants had the option to relocate to an area with a larger Hindu population was made after he found that the religious difference would not be a very significant obstacles and so there was no contradiction in his subsequent finding that the second appellant could seek help with childcare from her family.

25. It is also argued that because the appellants' evidence was unchallenged as to their subjective fear, the appeals should have been allowed. Reliance is placed on MS (Sri Lanka) [2012] EWCA Civ 1548 in which the Upper Tribunal's determination was found to be "*fundamentally flawed because it does not address the appellant's evidence on the airport issue and it ignores the fact that the Secretary of State elected not to challenge that evidence*" (at 16). In the present case, the judge did not, however, fail to address the issues raised by the appellants. Moreover, he was clearly aware of the contention that as preachers they would be at a higher risk (at 12 and 20) although there was no country information adduced to support this assertion. The issue of returning to their home area was addressed and the cases are thus distinguishable.

26. Much is made over the issue of childcare. This covers the second, third and fourth grounds. It is argued that the second appellant is so badly affected by back pain and sciatica that she cannot look after her child for more than half an hour and that, therefore, the first appellant will be needed for childcare and so will be unable to work and support the family which would result in them being destitute. It is of note that there is no reference in the appellant's lengthy grounds of appeal of any issue with the second appellant's health and the need for child care. Nevertheless, this was a matter the judge had regard to. As the judge had already found that the issue of religious discrimination did not constitute a very significant obstacle to return (see above), it was open to him

to find that the appellants could turn to the second appellant's family for help with childcare. The possibility of relocation was just an option he found that would be available to them and it was entirely sensible for him to consider the situation were they to remain in their home village.

27. The reasons given in the grounds of appeal for the first appellant not being able to find work were that he was too old at 36 to find public sector employment and because he would be able to find work in the UK (AB:9). There is no independent evidence to support the contention that the appellant was too old to find work and given his UK educational qualification, experience of employment here and alleged ability to easily find work in the UK, it is difficult to see why he would be unable to find employment in Bangladesh; indeed his evidence to the judge was that he probably would be able to find a job but that he would be unable to take it due to his wife's condition. The appellants have not addressed the option of obtaining paid child care if the second appellant is indisposed. That is an option open to them. The claim that the family would be destitute is not made out.

28. The judge is also criticized for "*pedantically*" rejecting the appellant's claim in his witness statement that his wife has had major spinal surgery. It is maintained that the appellant's assertion amounted to evidence and that this was discounted. The judge's findings have to be read as a whole. It is plain that he considered all the evidence, including witness statements and oral evidence (at 10, 11 and 26) when making his findings. He refers to the documentary evidence, the oral testimony and to witness statements in his determination and it must therefore be accepted that he had regard to all the evidence. The judge did take account of what the appellant said in his witness statement about surgery. As that was the same as his oral evidence, there has been no error in the judge's failure to specifically refer to the oral testimony. He was not satisfied that such surgery had taken place as there was no reference to it in any of the hospital letters. Given that various appointment letters and a discharge summary (showing no procedures had been undertaken) were adduced, it was open to the judge to expect documentary evidence of a major procedure such as spinal surgery. Reference is made in the grounds to an appointment letter at AB:164 which it is said confirms the surgery. This letter refers to an appointment for a procedure/surgery; it is not confirmed which applies to the second appellant (and a procedure would cover the injection the judge accepted that she had received). Moreover, the appointment of that date was cancelled as can be seen by a further hospital letter. The judge accepted the appellant's evidence that the second appellant had received a nerve root injection but properly noted that there was no evidence of a diagnosis or prognosis and no evidence that treatment (such as the injection she has received) would not be available in Bangladesh. Even if the judge erred in not accepting the appellant's oral evidence on the issue of surgery in February 2018, there is no evidence that some two years on she requires any further major treatment or that if she did it would be unavailable in Bangladesh. As found in GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 there is a requirement for proper evidence and an assertion by an appellant as to his personal circumstances and as to the evidence will not

necessarily be adequate. The evidence could easily have been adduced and no reason has been offered even at this stage as to why it was not forthcoming.

29. There is also a complaint that the judge had no right to consider whether the appellants could join the first appellant's family in India because this was not an issue they had ever raised themselves and it had not been suggested as a possibility by the respondent. The appellants' grounds of appeal do, however, refer to India but argue that they have no "meaningful ties" there. It was, therefore, open to the judge to consider whether this would be an option for the future.

30. It is argued that the judge made findings on the medical issues under articles 3 and 8 which had not been part of the appellants' case but failed to make findings on the argument that was made. Whilst the latter is not identified, it would appear to be the issue of whether the second appellant's ill health amounted to a very significant obstacle. To maintain that the judge did not make a finding on that is misleading as the judge did address this issue (at 27). As the appellants argued article 8 applied to them, the judge was also required to consider that matter as part of a proportionality exercise. An additional consideration of whether article 3 would be breached, does not infect the findings on the issues of paragraph 296ADE or article 8.

31. The argument about private life argued at paragraph 41 of the written submissions is not a point that was put forward in the grounds for permission and in the absence of any application to amend the grounds, I decline to take it into account.

32. For all these reasons, therefore, I conclude that the judge's decision making did not contain any errors of law and his decision to dismiss the appellants' appeals is upheld.

Decision

33. The decision of the First-tier Tribunal did not contain errors of law. The appellants' appeals are dismissed.

Anonymity

34. No request for an anonymity order has been made at any stage and I see no reason to make one.

Signed

R. Kekić
Upper Tribunal Judge

Date: 23 September 2020