Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19361/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7 November 2014	**On 4 December 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DR SHAFQUAT MOHAMMED RAFIQ

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Mr R Toal, Counsel, instructed by Gherson

DECISION AND REASONS

1. The respondent is a citizen of Bangladesh, born on 12 December 1972. On 9 May 2013 the Secretary of State made a decision to refuse him leave to remain in the United Kingdom and to remove him from the United Kingdom. The respondent appealed on the basis that returning him to Bangladesh would render the UK government to be in breach of Article 8 of the ECHR. In a determination promulgated on 15 July 2014, the respondent's appeal was allowed by First-tier

Tribunal Judge K W Brown. (The respondent will henceforth be referred to as the claimant).

2. On 9 September 2014 the Secretary of State was granted permission to appeal the judge's decision on grounds that argued that the judge erred in excusing the claimant's use of a false vignette to obtain work and finding his action to be "out of character" and also failing to take into account the public interest in discouraging such practices. The grounds also asserted that the judge erred in failing to consider that the time when the claimant had been in a relationship was when his immigration status was precarious and also in finding that the claimant's desire to continue working in the UK was a factor weighing against removal.

3. On 1 October 2014 the claimant was granted permission to appeal on the basis that the judge failed to determine the argument that the Secretary of State was under a duty to consider paragraph 395C of the Immigration Rules under which discretion has to be exercised by her. The grounds further submitted that there had been no application for leave to remain and that the provisions of Appendix FM should be read so as to require an applicant to demonstrate living together in a relationship akin to marriage for two years prior to "the appeal".

4. The claimant first entered the UK on 8 June 1999. He subsequently passed examinations that enabled him to work n the UK. He was last granted leave to remain and work as a postgraduate doctor until 9 March 2007. He failed to apply for his leave to be extended at that time. In January 2008 when he became aware that he had failed to apply in time, the claimant claimed that he panicked. Through a friend and a third party the claimant falsified his passport to include a false vignette. His employers were satisfied of the authenticity of the documents and the claimant continued to work, albeit illegally, within the UK without valid leave.

5. On 14 June 2011 the claimant was stopped by police in Scotland whilst driving. It was discovered that he had remained illegally within the UK. He was subsequently charged and convicted of immigration offences. A decision was made that the claimant should be removed from the UK on 15 June 2011. The appeal against that decision came before Immigration Judge Russell on 4 August 2011.

6. Immigration Judge Russell decided that claimant did have an in-country right of appeal against the decision that he is a person liable to removal under Section 10 of the 1999 Act by virtue of having made a human rights claim. He decided in light of the agreement between the parties at the hearing that the appeal should be allowed as not being in accordance with the law to the limited extent that it would be referred back to the Secretary of State to consider the claimant's matter in relation to paragraph 395C of the Immigration Rules.

7. In response to Immigration Judge Russell's decision the Secretary of State issued a notice of Immigration Decision dated 9 May 2013 to remove the claimant under Section 10 of the Immigration and Asylum Act 1999 and to refuse his human rights claim. The notice of Immigration Decision was accompanied by a refusal letter also dated 9 May 2013 setting out the reasons for the Secretary of State's decision.

8. In considering the appeal the judge took into account that the claimant might have expected to have been granted indefinite leave to remain had he not committed an offence relating to the provisions of false documentation. The claimant was taken before the Stranraer Sherriff Court and was fined £400 for being in the UK without valid immigration status. The judge noted that the offence for which the claimant had been convicted did not lead to a deportation order being made. The judge also noted that the General Medical Council, in proceedings concluded in late August 2013, suspended the claimant from the Medical Register for twelve months. The suspension would be reviewed before the end of the suspension but his Counsel who appeared for him before the GMC seemed optimistic that provided the claimant's immigration issues were rectified, and that he kept his legal knowledge up-to-date and showed insight in relation to his offence, there were good prospects that he would be reinstated to the General Medical Register. At the date of the hearing before me on 7 November 2014, I was shown documentation which indicated that the claimant had been reinstated to the Medical Register.

9. The judge heard oral evidence from the claimant about his personal circumstances. He was divorced from his wife, Ossilatul Karim. It was an arranged marriage which did not last very long. A decision was made that they should divorce which is uncommon in Bangladesh. The claimant felt he had brought shame on his family as expressed to him by his father. A rift developed between him and another member of the family in Bangladesh as a result for the divorce. He claimed that after his return to work in the UK he became depressed and anxious over the following months. He spoke to his GP about his mental condition and was referred to a mental health professions but he did not attend the appointment because he felt a sense of embarrassment.

10. The judge heard evidence from the claimant's partner, Miss Louise Tiernan. She is a Senior Nurse in Epsom and St Helier Hospital A&E Department. They had met in 2007 and started dating in 2009. She explained that the claimant had not been introduced to her two daughters because of his lack of immigration status.

11. The judge heard oral evidence from Beverly Daines, a friend of Louise Tiernan, who said she had known about their relationship since 2009. The judge also heard oral evidence of Asam Chowdhury. He said the claimant had helped him in the past as a friend since 2001 and during hardship the claimant had provided him with financial support. When the claimant needed help, he also offered him a place to live from November 2011 until November 2013. He was supportive of the appeal and hoped that his immigration status would be resolved soon.

12. In his findings the judge said he was impressed by both the claimant and Miss Tiernan who seemed to have been open and honest about their relationship and the circumstances leading up to the appeal. He found that the relationship is genuine and although living some distance apart, he concluded that they wished to see as much as possible of each other without causing difficulties amongst other family members, particularly Miss Tiernan's daughters.

13. In considering the claimant's behaviour, the judge said that the use of false documentation was a foolhardy mistake in an otherwise unblemished career and background. The judge said it seemed to him to have been out for character. He accepted that the claimant had clearly forgotten the importance of keeping his leave to remain up-to-date. He accepted also that the claimant panicked and that at the time he was under stress because of his previously failed marriage and of developing his medical career within the UK. He noted that the conviction and sentence imposed on him did not lead to the making of a deportation order and was not one that would breach the suitability requirements set out in the reviewed Immigration Rules (S-LTR).

14. The judge then considered the relationship between the claimant and Miss Tiernan. He found at paragraph 44 that even though there was doubt about whether the relationship between the claimant and Miss Tiernan comes within the published Immigration Rules, he found that at the date of the hearing they were committed to each other and that they intended in the future to live in a relationship "akin to marriage". The judge therefore found that they have demonstrated that they have a family life together at the present time. He found their evidence was mutually supportive and supported by others. He took into account that they do not cohabit on a day-to-day basis at the present time but there is a clear desire by both parties to spend as much time together under the same roof that they can. The couple's desires have been frustrated because of the claimant's involvement with using false visa documentation and Miss Tiernan's understandable reluctance to inform her daughters and her parents of the relationship until his immigration status is regularised.

15. The judge also found that claimant has established a private life in the UK based upon his professional life as a doctor until June 2011. Additionally he has formed many friendships through his professional work and private relationships though social development. Miss Tiernan has also been involved in many of the claimant's social activities. His private life in the UK has developed over a relatively long period since 1999.

16. Taking the evidence together the judge found that the claimant has a family and private life within the UK that may attract the protection of Article 8. He found that the removal of the claimant back to Bangladesh would have consequences of such gravity for him as would potentially engage Article 8. His relationship with Miss Tiernan would most likely be severed and his professional life that includes his ongoing ability to practice medicine in the UK would be shattered. He accepted that any interference with the claimant's private and family life would be in accordance with the law and the UK's stated aim of maintaining immigration control.

17. The judge then considered whether removal would be proportionate in all the circumstances. He considered the ongoing and deep relationship between the claimant and Miss Tiernan. Their intention to live in a relationship akin to marriage has been frustrated for the reasons set out in their respective evidence. If he were to be removed to Bangladesh that relationship would be ended. Miss Tiernan has two daughters in the UK to whom she is committed and she has so far protected them

from the difficulties surrounding the claimant's precarious immigration history. Miss Tiernan also has two elderly parents in the UK. Her life in the UK which includes her work as a senior nurse within the NHS could not continue if she were required to relocate to Bangladesh. It would be too much to expect her to relocate to Bangladesh with the claimant.

18. The judge considered that there are consequences for the claimant and to some extent the Secretary of State in relation to his professional life. The judge said that the claimant may be able to practice medicine straightaway if he is removed to Bangladesh but he has put considerable time and effort in going through the various stages as a junior doctor in the UK with the overall expectation that he will remain in the UK. His foolish and criminal actions have caused that career to come to an end (perhaps temporarily) by the supervisory role of the GMC. By all accounts the claimant is a good doctor. The UK government has to some extent invested in the claimant's continuing professional development within the NHS. That development and the claimant's potential to once again be an asset as a skilled medical practitioner within the UK wiill be lost if he is removed.

19. The judge then considered that there is another strand of argument in this appeal in the claimant's favour but does not go directly to the issue of proportionality and that is the fact that the Immigration Rules changed between the letter of 23 January 2013 which responded to the 2011 Tribunal decision and the refusal letter dated 9 May 2013. The judge considered paragraph 395C and found that whilst not going directly to the issue of proportionality, the claimant's circumstances allowed him to look favourably upon his provision of substantial evidence of his private and in particular family life which appears to have been largely ignored by the respondent and in the later letter.

20. Taking into account decisions in **Nagre [2013] EWHC 720 (Admin)** and **Gulshan**, the judge concluded that the claimant's case is an exceptional one. He considered that there are compelling circumstances that are not sufficiently recognised under the revised Immigration Rules. He found in the claimant's favour that his removal back to Bangladesh would be a disproportionate response and therefore unlawful interference with his private and family life that he has developed in the UK.

21. Mr Toal submitted that there would be no need to look at the claimant's cross-appeal for the moment. However, if the Upper Tribunal finds that the judge made an error of law then he would ask me to consider the two grounds which constituted the claimant's cross-appeal.

22. Mr Avery submitted that this was not a deportation case because the sentence was not sufficient although the criminal matter was an attempt to undermine immigration control.

23. Mr Avery's main argument was that there was a fundamental lack of engagement with the public interest by the judge. The claimant had committed a criminal offence and the judge sought to minimise that offence by describing it as foolhardy.

Secondly, the judge's finding that the claimant had an interest in maintaining family life in the UK does not outweigh the public interest and proportionality of his removal. There were significant aggravating factors which the judge failed to consider. The judge's finding that the claimant had established family life in the UK is contradicted by his finding that the claimant and his partner are in a relationship akin to marriage. The judge failed to factor into the equation that the family life was established at a time when the claimant's immigration status was precarious.

24. Mr Toal took me through the grounds lodged on behalf of the Secretary of State. The first ground identified three aggravating features of the claimant's conduct which the judge rehearsed at paragraph 8 of the determination. The first was that the use of false documents encourages the supply of documents and enables criminals to profit from the abuse of the UK's system of immigration control. The second was that the claimant involved others, the friend and the third party in his offending. The third was that the claimant used the false documents to obtain employment in a highly responsible and sensitive environment.

25. Mr Toal submitted that the third aggravating feature was misleading. He argued that the claimant did not use false documents to "obtain" employment. He was already was in employment and needed to produce evidence of his status in order to be retained in that employment.

26. As regards the argument that the claimant involved others, a friend and a third party in his offending, Mr Toal argued that that submission did not reflect the evidence before the Tribunal. It was the friend and the third party that engaged the claimant to be involved in criminal offending. Mr Toal submitted that whilst the claimant continued to suffer mental illness and a state of panic, he turned to friends and unwisely followed their suggested form of conduct. He submitted that the appellant was relying on the judge's own findings at paragraph 8 to identify what the appellant considered to be aggravating features.

27. I accept Mr Toal's submission that the appellant's argument that the claimant used false documents to "obtain" employment was factually misleading. Nevertheless the fact is that the claimant used a false vignette to maintain his employment knowing very well that the false vignette was not a true reflection of his immigration status at the time.

28. I was not persuaded by Mr. Toal's argument that the claimant did not involve his friend and a third party in his offending, rather they that involved him in the criminal offending. The fact is that the claimant was the one with the problem. He went to his friend and a third party with the problem and they told him how they were going to resolve it and he went along with their scheme. As far as I am concerned, he was just as culpable as they were.

29. I do not agree with Mr Avery that the judge failed to consider the aggravating circumstances and sought to minimise the claimant's behaviour. The judge at paragraph 8 identified the aggravating features of the offence committed by the claimant. At paragraph 38 he found that his use of the false document was foolhardy

in an otherwise unblemished career and background. It appeared to the judge that this had been out of character. He accepted the claimant's explanation that he had clearly forgotten the importance of keeping his leave to remain up-to-date. The judge also accepted the claimant's explanation that he panicked and that at the time he was under stress of his previously failed marriage and of developing his medical career within the UK. The judge also noted that the conviction and sentence imposed on the claimant did not lead to the making of a deportation order.

30. Looking at the judge's findings, I did not know what else the judge was supposed to have said in order to show that he had given proper consideration to the nature of the offence.

31. I accept Mr Toal's submission that whilst Mr Avery placed great emphasis on the nature and gravity of the offending behaviour of the claimant, the Secretary of State's letter of 9 May 2013 adopted a rather lenient approach. In that letter the Secretary of State said on two occasions that Dr Rafiq's conviction was not such as to disqualify him from consideration under the suitability requirements. However, the couple could not fulfil the requirements of E-LTRP1.7 on the strength of the evidence provided by the claimant. As Dr Rafiq had not been resident in the UK for twenty years he is unable to satisfy the requirements of paragraph 276ADE(iii). On this evidence I find that the Secretary of State did not appear to take the hard line approach being taken by Mr. Avery.

32. Mr Avery submitted that the judge failed to have regard to the establishment of the relationship whilst the claimant's immigration status was precarious. Mr Toal relied on the decision in **Jones [2013] UKSC 19** where Lord Hope said that it is well established, as an aspect of Tribunal law and practice, that judicial restraint should be exercised when the reasons that a Tribunal gives for its decision are being examined. The Appellate Court should not assume too readily that the Tribunal misdirected itself just because not every step in its reasoning is fully set out in it. Mr. Toal also relied on **Piglowska [1999] UKHL** where Lord Hoffman said that the Appellate Court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It also applies to the judge's evaluation of those facts.

33. In this case the judge considered the claimant's immigration history, his failure to apply for an extension of leave to remain and considered that the claimant and his partner had met after his leave had expired. The judge was impressed with the evidence given by the claimant and his partner. He found them to be open and honest. He also accepted the evidence that the partner was protecting her two daughters. The judge took into account the decision in **Nagre** which deals with a relationship was established at a time when the applicant's immigration status was precarious. The judge also relied on I agree on **Gulshan**. He concluded that the appellant's case is an exceptional case. I find no error of law in this decision.

34. I also find that the Secretary of State's letters of 23 January 2013 and 9 May 2012 indicated that had the claimant and his partner submitted better evidence of their

relationship she may have come to a different conclusion. The judge heard evidence from the claimant and his partner, found that they have established a family and private life. That finding was not challenged by the respondent. The judge accepted that their relationship was akin to marriage. He accepted that they were in a committed and genuine relationship. I do not find that these findings are contradictory. It was because of his finding that they are in a relationship akin to marriage that the judge decided that they have established a family life.

35. I find that in light of **UE (Nigeria) and Others [2010] EWCA Civ 957** the judge was entitled to take the claimant's wish to practice in the UK and his employment as a doctor in the UK as relevant factors. At paragraph 35 of **UE** the Court of Appeal concluded that it is open to the court to find that the loss of such public benefit is capable of being a relevant consideration when assessing the public interest side of proportionality under Article 8 as a matter of principle. The court also held at paragraph 24 that as a matter of principle there is no reason why the fact that the community in this country or part of it would lose something of value were an applicant to be removed should be seen as irrelevant to an assessment of the extent of the public interest in removal.

36. I find on this authority that the judge did not err in law in finding that the UK to some extent has invested in the claimant's continuing professional development within the NHS and that his development and potential to once again be an asset as a skilled medical doctor within the UK which will be lost if he is removed.

37. The judge's decision allowing the claimant's appeal under Article 8 of the ECHR shall stand.

Signed Date

Upper Tribunal Judge Eshun