Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04999/2020**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On the 18 January 2022	**On the 28 February 2022**

Before

UPPER TRIBUNAL JUDGE LANE

Between

SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Schwenk
For the Respondent: Ms Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who was born in 1984. He appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer dated 27 February 2020 refusing his application for entry clearance to join his wife, TB, in the United Kingdom. The First-tier Tribunal, in a decision promulgated on 2 March 2021, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. First, the appellant challenges the judge's findings concerning paragraph 320(11) of HC 395 (as amended), in particular whether the appellant had 'frustrated the intention of the Rules … by overstaying.' The respondent's summary of the appellant's immigration history in the United Kingdom (contained in the decision letter) records that the appellant had not reported at all during the period 2007-2013. The letter states that the appellant had 'overstayed and failed to report when required to do so.' The judge records [18] that the appellant conceded that he had 'contrived in a significant way to frustrate the intentions of the rules' and the judge then proceeded to determine whether 'there are aggravating circumstances'. Mr Schwenk, for the appellant, submitted that the appellant had not agreed the immigration history shown in the decision letter. He argued, relying on an unreported decision of the Upper Tribunal (*Fernando*; HU 090422019), that absconding and overstaying could not be distinguished, the one naturally preceding the other when an individual 'goes to ground'. Absconding, therefore, could not amount to aggravating circumstances.

3. First, I do not accept that the respondent is not entitled to rely on the immigration history contained in the decision letter. Not only has the appellant never disputed the history before this appeal in the Upper Tribunal (it does not appear to have been mentioned at all before the First-tier Tribunal) but in 2019 he expressly agreed in a witness statement before a previous Tribunal that the history was accurate.

4. Second, I do not agree with the unreported decision in *Fernando,* at least in so far as the observations of the Judge Bruce in that case may be applied to the facts of the present appeal. Overstaying, that is remaining in the United Kingdom without leave to remain, does not necessarily require an individual to 'go to ground'. Had he continued to report, the appellant would still have been an overstayer until such time as he applied for and acquired leave to remain. In the present appeal, the failure to report is, in my opinion and that of the First-tier Tribunal judge, a factor which aggravated the appellant's overstaying and the First-tier Tribunal judge did not err by treating it as such in deciding whether the paragraph 320 (11) applied.

5. Mr Schwenk also argued that the judge's Article 8 ECHR assessment was flawed by legal error. He submitted that the judge should not have found that the fact the couple had 'formed their relationship' in the United Kingdom was a mater 'in the respondent's favour' as the coupe had not cohabited until after their marriage which was solemnised in Bangladesh. Section 117B of the Nationality, Immigration and Asylum Act 2002 provides that:

> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

The appellant's wife, TB, is a qualifying partner (she is a British citizen). The appellant and TB commenced their relationship in the United Kingdom even though they did not cohabit until after they had married in Bangladesh. I reject Mr Schwenk's submission that the couple's relationship was not 'established' in the United Kingdom; it was indeed established in the sense that it was formed and commenced in the United Kingdom; section 117(4)(b) does not require that the establishment of a relationship must involve either marriage or cohabitation.

6. Even if the First-tier Tribunal was wrong in those parts of its analysis challenged on appeal, the finding at 21(iii) that the there exist no impediments to the couple continuing their relationship in Bangladesh was effectively determinative of the Article 8 ECHR appeal. I note that the judge's conclusion at 21(iii) has not been challenged on appeal before the Upper Tribunal.

7. For the reasons I have given, this appeal is dismissed.

Notice of Decision

This appeal is dismissed.

Signed
Date 1 February 2022
Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.