Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21429/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2015	**On 4 December 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RIADUL ISLAM

Respondent

Representation:
For the Appellant: Mr N. Bramble, Home Office Presenting Officer
For the Respondent: Mr S. Bellara, Counsel instructed by S & S Immigration Law

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant entered the UK on 31 January 2011 with leave to enter as a student that was valid until 31 May 2014. On 13 March 2014 he applied to vary and extend his

leave to remain on the ground that he was married to a British citizen. The respondent refused the application in a decision dated 01 May 2014 on the sole ground that the English language certificate he produced (EMDQ) was not one recognised by the Secretary of State and therefore didn't meet the requirements of paragraph E-LTRP.4.1 of Appendix FM of the immigration rules. In the alternative, the respondent refused the application under paragraph EX.1 of Appendix FM on the ground that there were no insurmountable obstacles preventing the couple from continuing their family life in Bangladesh.

3. First-tier Tribunal Judge Eldridge allowed the appeal in a decision promulgated on 20 May 2015. The First-tier Tribunal Judge ("the judge") noted that it was not disputed that the couple were in a genuine relationship [8 & 13]. He outlined the evidence he heard from the witnesses as to their family and private lives in the UK [13-15]. While he accepted that the appellant's wife had never been to Bangladesh and may face "considerable difficulties" there he concluded that the circumstances were not sufficiently compelling to amount to "insurmountable obstacles" for the purpose of paragraph EX.1 of Appendix FM of the immigration rules [18]. He concluded that the appellant did not meet the requirements of paragraph 276ADE(1)(vi) because there was no evidence to show that he would face "very significant obstacles" to return.

4. The judge went on to consider whether there were any circumstances that might engage the operation of Article 8 outside the immigration rules. He took into account the decision in *R (on the application of Chen v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 in which the Tribunal found that even if there were no insurmountable obstacles to a couple continuing their family life outside the UK there may occasionally be circumstances where removal would still be disproportionate [21]. In considering the "public interest question" the judge referred himself to the factors outlined in section 117B of the Nationality, Immigration and Asylum Act 2002. He gave weight to the fact that it is in the public interest to maintain an effective system of immigration control. Although the applicant did not submit an English language certificate issued by a recognised provider he took judicial notice of the fact that the appellant "had an excellent command of English". The judge also took into account the fact that the couple were financially independent and had a combined income of £24,000 a year. He also considered the fact that their relationship was formed at a time when the appellant was in the UK lawfully [22].

5. The judge then stepped back to consider the circumstances as a whole. He noted that the only reason for refusal was the fact that the appellant did not submit an English language certificate from an approved provider. However, he took into account the fact that the appellant clearly did speak good English (having heard and assessed his evidence). He noted the difficulties that his wife would have in earning the full financial requirement alone if the appellant had to return to Bangladesh and apply for entry clearance from abroad [23]. He took into account the guidance given by the Court of Appeal in *SSHD v SS (Congo)* [2015] EWCA Civ 387 and reminded himself that there needed to be compelling circumstances to show that removal would be

unjustifiably harsh [25]. He concluded that this was one of the small minority of cases where the consequences of removal would be unjustifiably harsh. He weighed all the circumstances as a whole and concluded that removal in consequence of the decision would be disproportionate in all the circumstances of this particular case [27].

6. The respondent seeks to challenge the decision on the following grounds:

> "2. The Judge found [paragraph 18] that there were no insurmountable obstacles to family life continuing in Bangladesh, but went on to find that the Appellant's removal would be disproportionate [27]. In reaching this conclusion, the Judge finds [20] that the Appellant cannot succeed under the rules. He goes on to find, however, [23] that 'the Appellant did not provide evidence of his ability in English the approved form but he has good English. He and his wife currently meet the financial requirements of a gross income of at least £18,600"
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> 3. The Upper Tribunal found in the case of *AM (S.117B) Malawi* [2015] UKUT 0260 (IAC) that 'If it was the intention of Parliament that the requirements of the immigration rules should be over-ridden, merely because an individual could establish that they were able to speak English, or were financially independent, to some degree, then we are satisfied that Parliament would have said so in the clearest terms' [14].
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> 4. In allowing the appeal, the Judge has placed undue weight to the matters referred to above in overcoming the strong interests of the State in maintaining effective immigration control. In so doing, he has erred in law."

Decision and reasons

7. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision did not involve the making of an error on a point of law.

8. The First-tier Tribunal Judge concluded that the appellant did not meet the strict requirements of the immigration rules. In accordance with the two stage test outlined in cases such as *SSHD v SS (Congo)* [2015] EWCA Civ 387 and *MF (Nigeria) v SSHD* [2014] 2 All ER 543 the judge turned to consider Article 8 outside the rules. The judge accepted that the appellant and his wife were in a genuine and subsisting relationship. He was required by operation of the statutory provisions contained in section 117B of the NIAA 2002 to consider a list of factors (where relevant) when assessing what weight to place on "the public interest question" under Article 8(2). Those factors include the question of whether the appellant speaks English (section 117B(2)) and is financially self-sufficient (section 117B(3)). The fact that the judge considered those matters was entirely in accordance with the statute and cannot be criticised.

9. The main thrust of the respondent's argument is that little weight should have been placed on those matters in light of the decision in *AM (S.117B) Malawi* [2015] UKUT 0260. It is correct to say that the Tribunal concluded that the issue of whether someone speaks English or is financially self-sufficient would not be given positive weight in the balancing exercise but those factors do have some significance to the question of what weight should be placed on "the public interest question" otherwise

they would not have been included in the list of factors that a court or tribunal must consider.

10. In this case the judge gave adequate reasons to explain why he did not consider the fairly stringent test contained in paragraph EX.1 was met in relation to ”insurmountable obstacles” but nevertheless concluded that the appellant’s wife would face “considerable difficulties” if she had to live with him in Bangladesh. The respondent argues that in light of that finding there would be no interference with family life. However, the judge directed himself to case law to support the proposition that there may be a small minority of cases where the threshold for “insurmountable obstacles” is not met but removal would nevertheless be disproportionate. He made clear that the test of “compelling circumstances” outlined by the Court of Appeal in *SS (Congo)* was at the forefront of his mind in coming to his decision.

11. I find that the judge was entitled to take into account the nature of the very narrow reasons for refusal in assessing what weight to place on the public interest. The respondent accepted that the appellant met all the other requirements of the rules for leave to remain as a spouse save for the fact that the English language certificate that he produced was not issued by an approved provider. The requirement to speak English is a public interest factor that underpins that part of the rules. It is also included in the list of factors contained in section 117B when assessing Article 8 outside the rules. The fact that a person does not speak English is likely to act as a negative factor because, as section 117B(2) suggests, the person is more likely to be a burden on taxpayers and would be less able to integrate into society.

12. The fact that a person speaks English is not a matter that would be given positive weight in the case of an applicant whose private or family life was established at a time when he was remaining in the UK without leave or whose immigration status was precarious. Section 117B(4) states that little weight should be placed on a relationship if formed at a time when the person is in the UK unlawfully and section 117B(5) states that little weight should be given to a private life established at a time when the person’s immigration status is precarious. Neither of those sections applied in this case. The appellant met his wife and established their relationship at a time when he had lawful leave to remain. Nothing in section 117B would suggest that appropriate weight should not be given to the family life that they have established in the UK. In these circumstances I find that in assessing what weight should be placed on the public interest in maintaining an effective system of immigration control the judge was entitled to take into account, as a matter of fact, that the appellant speaks good English and that the public interest question that underpins the requirement contained in paragraph E-LTRP.4.1 had nevertheless been satisfactorily addressed.

13. I find that the judge conducted a careful and thorough assessment of the facts of the case and directed himself properly to the relevant rules, statutory framework and case law. He considered the particular circumstances of the case as a whole and came to the conclusion that there were sufficiently compelling circumstances to render

removal in consequence of the decision disproportionate. While another judge may have come to a different conclusion on the same facts and evidence I find that the judge's proportionality assessment was not outside the range of reasonable responses. The decision could not be described as irrational and does not otherwise disclose a material error of law.

14. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 26 November 2015

Upper Tribunal Judge Canavan