Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33816/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 May 2015	**On 19 May 2015**

Before

The Hon. Mrs Justice McGowan
Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Md Muhibbur Rahman Shujon
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr A Hossain, instructed by London Law Associates
For the respondent: Mr A Clark, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Fowell promulgated 14.1.15, allowing the claimant's appeal against the decisions of the respondent, dated 13.8.14, to refuse to vary leave to remain in the UK and to remove him from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 5.1.15.

2. First-tier Tribunal Judge Davies granted permission to appeal on 24.2.15.

3. Thus the matter came before us on 7.5.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out herein we found errors of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Fowell should be set aside and remade.

5. The relevant background can be summarised briefly as follows. The claimant entered the UK in October 2009, aged 18, as a Tier 4 (General) Student with leave later extended until November 2013. On 2.10.13, before expiry of his student leave, the claimant applied for leave to remain as a partner pursuant to Appendix FM of the Immigration Rules. The application was initially refused on 13.10.13, on the basis that the evidence submitted did not meet the income threshold requirements of the Rules. However, the application was 'put on hold' pending a legal challenge to the judgement in MM & Others. Having succeeded in that challenge, the Court of Appeal upholding the lawfulness of the income threshold of Appendix FM, the Secretary of State revisited the claimant's application, refusing it in the decision of 13.8.14, on the basis of the failure of the claimant to meet the income threshold requirements. Whilst the claimant had provided further evidence of his partner's income, the refusal decision explained that only evidence relating to income as at the date of application could be considered. The partner's income was below the £18,600 threshold and thus the application was refused on that ground.

6. In the alternative, the Secretary of State considered the exception under R-LTRP and EX1(b) of Appendix FM, but concluded that the claimant failed to provide any evidence of 'insurmountable obstacles,' as defined by EX2, to continuing family life with his partner in Bangladesh. The claimant and his partner do not have any children and thus EX1(a) does not apply.

7. The Secretary of State also concluded that the claimant could not meet the private life requirements of paragraph 276ADE, as he could not demonstrate that there would be very significant obstacles to integration into Bangladesh if required to leave the UK.

8. Finally, the Secretary of State found no exceptional circumstances warranting consideration of private and/or family life rights outside the Immigration Rules on the basis of article 8 ECHR.

9. From §25 of the decision Judge Fowell proceeded on the 'common ground' between the parties that the claimant did not satisfy the income threshold requirements of Appendix FM, as specified under FM-SE. At §29 the judge provided cogent reasons for that conclusion, but noting that at any time after December 2013 the claimant could have made a fresh application relying on subsequent pay evidence that demonstrated that his partner's income now met the income threshold, such that the judge took the view that such an application was bound to succeed.

10. From §27 the judge explained why the late evidence did not assist the claimant as, although section 85(4) of the 2002 Act permitted the Tribunal to consider evidence

about any matter which it thinks is relevant to the substance of the decision including evidence which concerns a matter arising after the date of decision, the claimant could only succeed by showing that the application he made would have been successful. The Rules, in particular FM-SE paragraph D, require the income threshold evidence to be submitted with the application. At that date the partner's income was insufficient. There has been no appeal or cross-appeal against this part of the decision and it must therefore stand.

11. There is no appeal or cross-appeal against the subsequent finding of Judge Fowell at §30 of the decision that there were no insurmountable obstacles to continuing family life in Bangladesh. The claimant had relied on hostility towards him or Ms Nessa from her ex-husband, but the judge was not satisfied that there was any such risk of harm. The judge found that the claimant would likely return alone and make an application for entry clearance from Bangladesh.

12. Neither is there any appeal or cross-appeal against the finding at §32 that the claimant could not demonstrate very significant obstacles to his integration into Bangladesh pursuant to paragraph 276ADE of the Immigration Rules.

13. The difficulty with the decision is in the article 8 assessment outside the Rules, with the judge finding at §38 that the refusal decision was not in accordance with the law, not necessary for the protection of a legitimate aim, and not proportionate to the claimant's article 8 private and family life rights.

14. Mr Clark submitted that there were no compelling circumstances insufficiently recognised in the Immigration Rules to justify the judge going on to consider article 8 ECHR outside the Rules, since all the relevant private and family life considerations were incorporated and already considered by the judge under paragraph 276ADE in relation to private life and under Appendix FM in relation to family life. We would agree with that submission. It does not necessarily follow that it is a material error of law for the judge to have considered article 8 ECHR outside the Rules. However, we find, for the reasons set out herein, that the judge made material errors of law in that article 8 assessment.

15. The finding at §35 of the decision that there was a "potentially exceptional circumstance" in requiring the claimant to return to Bangladesh purely for the purpose of submitted a fresh application from outside the UK cannot in itself amount to exceptional circumstances, as it is the requirement of the Rules. However, in light of the recent decision of R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC), Mr Clark accepted that "there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate."

16. In the decision allowing the appeal the judge quoted extensively from Chikwamba v SSHD [2008] HL, a decision predating the incorporation of article 8 private and

family life into the Immigration Rules, and failed to take account of later case authority, including R (Kotecha and Das) v SSHD [2011] EWHC 2070 (Admin), explaining that Lord Brown was not in fact laying down a legal test that it would only comparatively rarely be proportionate in a case involving children to require an applicant to apply from abroad. In any event, there are no children to consider in this case.

17. At §39 of Chen, Upper Tribunal Judge Gill stated:

> "In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was 'precarious.'"

18. The facts of Chen are in fact rather similar to those of the claimant in the present appeal. The Chinese appellant in that case entered the UK as a student but later met and married a British citizen of Chinese parentage. The appellant had parents and siblings in China. It was accepted that there were no insurmountable obstacles to family life between her and her husband being enjoyed in China. They had no children and there was nothing to demonstrate any significant interference with family life. The Tribunal found the decisions of the Secretary of State refusing leave to remain outside the Immigration Rules were lawful and refused judicial review. In the present case not only are their no children, but the claimant failed to demonstrate that there would be any significant interference with family life by his removal and anticipate that he may make a further application from outside the UK, consistent with the requirements of the Immigration Rules.

19. Having considered the First-tier Tribunal Judge's article 8 assessment, we find that here is an insufficiency of cogent reasoning for reaching the article 8 ECHR conclusions, and a clear inconsistency between those conclusions and preceding findings, particularly at §31 and §37. At §31 the judge found that although the claimant's removal would involve some disruption to their family life, it does not involve any child. "The appellant is a young and capable individual who came to the UK as a student 5 years ago, has no real family here, and would not be subject to any undue hardship by having to return for a period to Bangladesh, let alone an unsurmountable (sic) obstacle." At §32 the judge found that his family connections in Bangladesh would enable him to integrate without undue difficulty. At §37 the judge noted that the claimant's return to Bangladesh would not affect any children and he would no doubt be able to manage the application process and the period of separation. The judge went on to describe his removal as "comparatively low level of disruption" to his family life. The judge then found that this had to be set against

"the overwhelming prospect of his application being approved." It was apparently conceded by the Home Office Presenting Officer at the First-tier Tribunal appeal hearing that on the evidence then available, a fresh application would succeed.

20. However, it is difficult to reconcile the above findings with the conclusion at §38 of the decision that the "proposed removal would be an interference with the appellant's right to respect for his private and family life of sufficient gravity as potentially to engage the operation of article 8." Not only is the conclusion devoid of cogent reasoning, it flies in the face of all the earlier findings suggesting a "comparatively low level of disruption" to family life. It is difficult to see how the decision can be said to be disproportionate. In the circumstances, it amounts to an error of law such that the decision in relation to article 8 ECHR is flawed and cannot stand.

21. Further, whilst the decision undoubtedly interferes with the family life of the claimant and his wife so as to engage article 8 following the Razgar stepped approach, the judge has given no reasons for finding that the decision is not in accordance with the law. We find that the removal would be entirely in accordance with the law, it being consistent with the Immigration Rules and the statutory basis for removal. In addition, the finding that the removal is not necessary to a legitimate aim is not justified, ignoring both case law and section 117B(1) of the 2002 Act to the effect that immigration control is in the public interest and necessary to protect the economic well-being of the UK, as held in Shahzad (Art 8: legitimate aim) [204] UKUT 85.

22. With reference to section 117B, we accept Mr Hossain's submissions that the claimant speaks English and that in reliance on his partner's income he is financially independent, that income exceeding the income support level. Further, whilst we find that the claimant's status in the UK as a student was precarious, section 117B in that regard relates only to private life and not a relationship developed with a partner. In the circumstances, the weight to be accorded to the public interest considerations of section 117B lie only in relation to immigration control being in the public interest.

23. Mr Hossain submitted that the claimant would not in fact be required to leave the UK in order to make a further application under Appendix FM, as he had leave at the time of his application, which continues during the appeal process by reason of section 3C, and he would also have 28 days following an unfavourable decision within which to make a fresh application. In those circumstances, it is difficult to understand how the refusal decision, effectively requiring the claimant to make a fresh application, could be disproportionate to his family and/or private life. However, according to Mr Hossain, the partner's income has reduced since the First-tier Tribunal appeal hearing and is now approximately £15,500, so that he would not now be able to meet the requirements if he were to make a fresh application, whether in country or from Bangladesh. That submission rather undermines the claimant's reliance on the Chikwamba premise. Nevertheless, it is not the function of the Tribunal or article 8 to protect the claimant against the potential negative outcome of

any future application not yet made and thus not yet considered by the Secretary of State. Article 8 is not a shortcut to compliance with the Immigration Rules and the claimant's case is not strengthened by the degree to which he does not meet the requirements of the Rules.

Conclusion & Decision:

24. For the reasons set out above, we find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside. Having indicated that decision to the representatives of the parties at the hearing before us, we invited submissions as to whether any further evidence or submissions were necessary before we proceeded to re-make the decision in the appeal. Both agreed that no further evidence was necessary and both relied on the submissions already made as to the error of law issue.

25. For the reasons set out above, it necessarily follows that the appeal must be dismissed. The claimant does not meet the requirements of the Rules for leave to remain. We were not satisfied that on the facts of this case there are any compelling or exceptional circumstances insufficiently recognised in the Rules so as to justify considering the private and family life claims outside the Rules on the basis of article 8 ECHR. All the relevant factors have already been considered within the discussion above as to the claimant's compliance or otherwise with the Immigration Rules. In any event, even on an article 8 ECHR assessment of private and family life rights, we find, for the clear reasons set out above, that in balancing the claimant's rights on the one hand against on the other the legitimate and necessary aim to protect the economic well-being of the UK by immigration control the balance comes down against the claimant and in favour of removal. In the circumstances, we find that the decision of the Secretary of State was entirely proportionate.

We set aside the decision of the First-tier Tribunal.

We re-make the decision in the appeal by dismissing it.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **21 July 2015**

Anonymity

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, we make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of our decision, we have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

We make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **21 July 2015**