Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/30307/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2017	**On 7 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

FAHMID KHAN MILKY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid, of Counsel instructed by PGA Solicitors LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Davey who in a determination promulgated on 29 November 2016 dismissed the appeal of the appellant against a decision of the Secretary of State to refuse him leave to remain on human rights grounds.

2. The appellant is a citizen of Bangladesh born on 29 October 1989. He came to Britain in January 2009 with entry clearance as a student valid until 31 May 2011. His leave was extended but then curtailed and his appeal against the decision to curtail was dismissed on 14 November 2014. On 27 November 2014 he applied for leave to

remain on the basis of private and family life. That was refused without a right of appeal. After a judicial review application he was again refused but this time was granted a right of appeal.

4. The appellant met the sponsor, his wife, in September 2011 and they were married in July 2014. The judge noted that at the hearing the sponsor was fourteen weeks pregnant and expecting their first child towards the end of 2016. The judge noted that the sponsor and her parents, although of Bangladeshi origin, were British nationals and that she had been born and brought up in the United Kingdom. The appellant's wife had made one unsuccessful visit to Bangladesh which she had found "thoroughly objectionable". She had gone through the British education system, obtaining a degree and was in full-time employment, subject to maternity leave. He noted that it was asserted that her family had no direct ties either by family or property with Bangladesh.

5. The appellant stated that he had no property or family ties in Bangladesh which would provide him with support or assistance there. The sponsor had, the judge found, a well-paid job in the United Kingdom and "no prospects of being in work and having to care for a child in due course *(sic)* ". He noted that she had said that she needed the family support that she has in the United Kingdom with the arrival of her first child but he went on to say that "it is not accepted by the Secretary of State that the appellant and sponsor could not make a life for themselves in Bangladesh".

6. In paragraph 9 the judge said that the appellant could return to Bangladesh but added :-

> "I do however regard, in the light of the submissions and the evidence that it would be unreasonable to expect the sponsor to move to Bangladesh. In the light of her current pregnancy, and the uncertainties for accommodation, hospital arrangements, management of her pregnancy and those steps necessary to set up a home in Bangladesh she may chose to remain in the United Kingdom at present. She cannot be removed, as a British national. It is the sponsor's choice that it is undesirable for her to make a life with her partner in Bangladesh. I accept that she has a significant income working in the United Kingdom, whatever arrangements may be made during maternity, and that is likely to continue in her work. In the circumstances I do not find there are, on the evidence, any insurmountable obstacles for the appellant returning to Bangladesh."

7. In the following paragraph he wrote:-

> "10. I note it is accepted by the respondent that the appellant meets the suitability requirements of paragraph R-LTRP.1.1.(d)(i), and it is accepted that he meets the eligibility requirements of paragraph R-LTRP.1.1.(d)(ii). I find that as a fact by reference to qualifications under leave to remain, that EX.1. needs to be considered. I find that there is a genuine and subsisting relationship between the appellant and his wife who is in the United Kingdom, a British citizen settled in the United Kingdom, and there are no insurmountable obstacles to family life continuing outside the United Kingdom. I consider the circumstances in which she currently is a pregnant lady, without family support or social network in

> Bangladesh for her to move, her circumstances could or would entail serious hardship for her in Bangladesh. On the evidence before me, which was not substantially challenged by the Presenting Officer, I do not find the appellant has family members in Bangladesh to whom he could turn for funding, employment or support."

8. The judge went on to say that the effect of the Immigration Rules would make it very difficult for the appellant, married or not to a British national, to remain in the United Kingdom. He said that it might seem harsh that a person of British origin who has known nothing, effectively, other than life in the United Kingdom, should be expected to relocate when they do not want to but that marriage and family life were their choice. He concluded that:-

> "Accordingly, I find that the appellant meets the provisions of paragraph D-LTRP.1.3 with reference to paragraph R-LTRP.1.1.(d), but not under paragraphs EX.1. or EX.2. of Appendix FM."

9. He also found that the appellant could not succeed under the private life provisions of the Rules. He therefore dismissed the appeal.

10. The grounds of appeal referred to the fact that the judge, when he had stated that the circumstances in which the sponsor lived - that she was pregnant and without family support and a social network in Bangladesh had found that her circumstances could or would entail serious hardship for her in Bangladesh. They argued that that showed that the judge found that it would not be reasonable to expect the appellant to go to Bangladesh and it was stated the judge, in the light of those findings, had failed to give sufficient reasons for concluding that there were no insurmountable obstacles to the relationship continuing outside the United Kingdom. The grounds stated that in light of the earlier findings the conclusion of the judge was perverse.

11. It was also argued that the judge had failed to make a proper Article 8 consideration or whether or not it would be a disproportionate interference with the appellant's family and private life to require him to be separated from his wife in the period of time that it would take to make an application for entry clearance.

12. Permission was granted by Judge of the First-tier Tribunal Ford who focused on the finding of the First-tier Judge that he did not find that there was any evidence of any insurmountable obstacles for the appellant returning to Bangladesh and stated that that was a wrong test under Appendix FM, EX.1.(b) of the Rules.

13. At the hearing before me Ms Reid argued that the judge had not given reasons for concluding that there were no insurmountable obstacles to the sponsor living with the appellant in Bangladesh given his other findings including that she would face serious hardship there. That she argued is a material error of law. Moreover she argued that clearly there would be a disproportionate interference in the appellant's Article 8 rights if the appellant were required to return to Bangladesh. She stated that the judge had not considered the arguments in the skeleton argument before him where reference had been made to the determination of the Tribunal in **Chen**

[2015] UKUT 189 (IAC) which referred to the formal requirement of obtaining entry clearance being reduced if there would be a significant interference with family life by temporary removal and distinguishing between situations where children were not involved and those where the rights of children were involved. Where children were involved the determination in **Chen** stated:

> "It would be easier to show that the individual circumstances fall within a minority envisaged by the House of Lords in **Huang** or the exceptions referred to in the judgments of the ECtHR rather than in the latter case."

14. She emphasised that this was not a case where the appellant had been considered to have used deception. She referred to the Reasons for Refusal Letter, at paragraph 10, where it was stated that "it is accepted that the appellant met the suitability requirements of paragraph R-LTRP.1.1.(d)(i)" and in paragraph 11 of the letter where it was accepted he met the eligibility requirements of R-LTRP.1.1.(d)(ii).

15. In reply Mr Tufan emphasised that the appellant's situation in Britain was precarious and referred to the judgment in **Agyarko [2017] WLR(D) 126 [2017] UKSC 11** where at paragraphs 33 the Supreme Court has endorsed the comment that in a situation where one party was reluctant to relocate to continue family life that would not constitute insurmountable obstacles. He stated that it was clear that the sponsor was used to Bangladeshi culture. In any event the child was not born at the time of the hearing. He accepted that there was some evidence that the financial requirements of the Rules for marriage were met but stated that the appellant could not succeed in a marriage application because of the status requirements. He relied on the Rule 24 statement which said that there was merely a typing error when the judge said that the circumstances in which the sponsor was living would mean that her circumstances could, or would "entail serious hardship for her in Bangladesh".

16. I have considered the determination of the judge. I consider that there is a material error of law therein. I do not accept the argument in the Rule 24 statement that there is merely a typographical error in paragraph 9 of the determination. I reach that conclusion on the basis that the judge has given in the determination a number of reasons why he finds that the sponsor would have difficulties living in Bangladesh. I therefore consider that his conclusion is illogical as I take the view that serious hardships and "insurmountable obstacles" have distinct overlap in meaning and it is therefore not clear why the judge should find that the requirements of paragraph EX.1. were not met. I therefore set aside his decision.

17. In remaking the decision I take into account the clear findings of the judge regarding the difficulties which the sponsor would face if forced to go to Bangladesh with her child as I consider it is relevant to consider, on human rights grounds the situation as it is now. Not only do I consider there would be insurmountable obstacles for the sponsor to go to Bangladesh for the reasons given by the First-tier Judge but I also bear in mind the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 where at 117B(6) it is stated:-

"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

18. It is clearly the case here the appellant has a British child with whom it appears he has a parental relationship – there is nothing to suggest that he, the sponsor and the child are not living together in a family unit. Secondly the child is British and cannot be expected to be removed. I would also add that it is clear that the appellant's leave was originally curtailed because of difficulties with his college and not because he had used deception, that he had Section 3C leave until 14 November 2014 and that he made the application for leave to remain on human rights grounds on 27 November that year.

19. Taking all these factors into account I consider that it is appropriate that, having set aside the decision of the Immigration Judge I should allow this appeal on human rights grounds.

Notice of Decision

This appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed  Date 29 November 2017

Deputy Upper Tribunal Judge McGeachy