Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04211/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 July 2013	**On 22 July 2013**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MR HOSSAIN ALI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Syed-Ali, Legal Representative, of Consilium Chambers LLP
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Bangladesh born on 13 July 1989, appeals, with permission, against a decision of Judge of the First-tier Tribunal A R Williams who in a determination promulgated on 3 May 2013 dismissed the appellant's appeal against a decision of the Secretary of State made on 24 September to refuse to grant leave to remain on the basis that the appellant's rights under the ECHR would be infringed by his removal.

2. The appellant had arrived in Britain with a work visa valid until 9 February 2005. He overstayed and in July 2007 submitted an application for leave to remain outside the

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Immigration Rules. That application was refused in December 2007. In October 2010 the Appellant's solicitors wrote to the Secretary of State stating that they had not received any information as to the outcome of the application made in July 2007. After further correspondence an application for judicial review was lodged on behalf of the appellant. In February 2012 the application for judicial review was refused by the High Court as having no merit.

3. The application for judicial review was renewed. On 19th June 2012 it was withdrawn by consent on the Secretary of State agreeing to consider the Appellant's further submissions under Article 8 of the ECHR. Having considered the representations made the application was refused on 24th September 2012.

4. The appellant had alleged in the application that he was in a stable relationship with a Ms Monwara Yasmin Uddin who had two children and that the relationship had endured since 2007.

5. The application was refused by the Secretary of State with reference to Appendix FM of the Immigration Rules which came into effect on 9 July 2012. It was stated that there was no credible, objective evidence to show a genuine relationship. It was not accepted that the relationship was genuine and subsisting and that it had been subsisting since 2007. It was stated that the ages of the children had not been provided and there was no evidence that the appellant had any parental relationship with them. The appellant's claimed partner had lived her formative years in Bangladesh and there was no evidence that she would suffer any hardship by having to return there. It was stated that the appellant did not qualify for leave to remain on the basis of his private life here because he had not lived in Britain for twenty years.

6. The judge heard evidence from the appellant who said that he was living with his cousin, Rohim Ahmed, and did not have to pay and rent and was provided with food. He accepted that he had remained as an overstayer but said that he had met his fiancée in November 2007. She was divorced although she had no divorce papers because her Islamic marriage was not registered in the United Kingdom. He has stated his fiancée's mother had accepted him as well as her two sons, the eldest of whom was 20 and a university student. The younger son was aged 13 and still missed his father and found it difficult to accept the absence of his father in his life.

7. The appellant stated that he wanted to avoid involving his fiancée in his immigration troubles as that would lead to her family finding out about the relationship. She had commitments in the United Kingdom. He said that he had lived with her for three months at the end of 2011 and the beginning of 2012 while her father was in Bangladesh.

8. The appellant said that he had worked in restaurants and grocery shops and was an Indian curry chef and a skilled butcher because he had worked in a butcher's shop as well. He said that he could not provide a lot of photographs because he was not in the habit of taking photographs at every opportunity. He claimed that he saw his

fiancée every day and that she stayed over at weekends. It was only her father that did not accept the relationship.

9. The appellant's partner gave evidence, saying that she had met the appellant in 2007 and there had come a time when she had wanted him to be a permanent part of her life. She said that she had taken time to make up her mind about the appellant as she was weary of any relationship because of her past experiences. She said that in the cultural and religious environment in which she lived and socialised there were difficulties that a single mother would face in having an affair with a man. She knew nothing about Bangladesh.

10. She stated that the appellant had told her that he had been "on a list for asylum when first met him and not legal in the country" and said that he had said that he had not heard about the asylum application.

11. The judge noted the evidence of the appellant's cousin Rohim Ahmed and letters of support claiming that the appellant was a law-abiding member of the community.

12. He further noted submissions made and photocopies of photographs which had been produced.

13. He found that the appellant could not qualify under the Rules relating to his rights under Article 8 of the ECHR. However, he went on to consider the appellant's appeal under the Convention in the appropriate structured way. He found that the appellant had a private life in Britain in which his removal to Bangladesh would constitute an interference, but found that that would be a proportionate interference with his rights.

14. He set out the relevant factors in paragraphs 30 onwards, placing weight on Section 55 of the UK Border Act 2009. In paragraph 36 of the determination he stated that it would always be open for the appellant to apply for entry clearance at a later date provided he could satisfy the relevant Immigration Rules. He went on to say, however, that he had considered the case of **Chikwamba [2008] UKHL 40** but that the appellant came no where near satisfying any Immigration Rule and he considered that any Article 8 argument was extremely weak. He made reference to having considered the judgment of the House of Lords in **Beoku-Betts [2008] UKHL 39**.

15. The appellant appealed. The grounds of appeal argued that the judge had not followed the judgment in **Beoku-Betts** and considered the rights of the other members of the appellant's family and argued that the judge had failed to treat "the partner of the appellant as a 'victim'" [para 43] **Beoku Betts**. It was stated that the judge had failed to address the test for the appellant's partner.

16. Judge of the First-tier Tribunal Sommerville granted permission to appeal, stating that the First-tier Judge had failed to make any adequate findings to the nature and

extent of the appellant's relationship with his fiancée and failed to assess the impact on her of his removal.

17. At the hearing of the appeal before me Mr Syed-Ali referred to the grounds of appeal and to a detailed skeleton argument which he had submitted. The skeleton argument contained submissions regarding the changes to the Immigration Rules and also to an argument that the appellant might have been entitled to leave to remain under legacy provisions. Mr Syed-Ali confirmed that he was not arguing that there was any error of law in relation to either of these matters. He also confirmed that he would make no submissions that the requirements of Section 55 of the UK Borders Act 2009 had been ignored.

18. Mr Syed-Ali emphasised, however, that he would argue that the Immigration Judge had erred in his consideration of the proportionality of the removal of the appellant. He pointed to the fact that the Immigration Judge had referred, in paragraph 28, that the interference with the appellant's rights to private and family life would have grave consequences if he were removed. He stated that the appellant's partner had give live evidence and referred to the fact that in paragraph 31 of the determination the Immigration Judge had referred to the issue of "insurmountable obstacles being in the way of a family living in the country of origin".

19. He submitted that the assessment of the Immigration Judge was insufficient and that he had not at all considered all the effected family members which was a duty placed upon him by the judgment of the House of Lords in **Beoku-Betts [2008] UKHL 39**.

20. Mr Nath argued that the Immigration Judge had properly considered all relevant matters and reached conclusions which were fully open to him on the evidence.

21. I have considered the determination in some detail. The reality is that the Immigration Judge dealt with the issue of the rights of the appellant under Article 8 of the ECHR both with reference to Appendix FM of the Rules – it is not contended that the appellant could have succeeded under the "new Rules" – but also under the Convention. In so doing he applied the relevant structured approach set out in the judgment of the Court of Appeal in **Razgar [2004] UKHL 27**. He had noted in some detail the evidence given to him by both the appellant and Ms Monwara Yasmin Uddin, the appellant's partner.

22. In paragraphs 11 onwards he referred to the appellant's evidence regarding his relationship with Ms Uddin, which included the fact that she had no divorce paper because her Islamic marriage was not registered, that her eldest son was aged 20 and a university student who kept his opinions to himself, and that there was a younger son of 13 who missed his father and found it difficult to accept the absence of his father in his life.

23. The appellant had stated that he had wanted to avoid involving Ms Uddin in his immigration troubles and that he had lived with her for three months at the end of 2011 and the beginning of 2012 when her father was in Bangladesh.

24. He noted the evidence from Ms Uddin which I have set out above, and in particular that although she saw the appellant every day, at the weekends she had told her parents that she was with a friend.

25. In paragraphs 24 onwards the judge assessed the evidence before him, noting that the appellant did not live with Ms Uddin because of "the distain relating to the relationship with Ms Uddin's father". He concluded that there seemed to be no immediate prospect, if any, that Ms Uddin and the appellant would live together as husband and wife. He did, however, accept that family life existed.

26. He pointed out that the mere existence of a family relationship was not sufficient for the applicability of Article 8, but did go on to conclude that the interference with the appellant's private and family life would have grave consequences if he were removed.

27. It was in those circumstances that he moved on to the issue of proportionality.

28. He properly analysed the relevant factors, including the length of time the appellant had been in Britain, but pointed out that that had been largely on an unlawful basis. He correctly directed himself that he must strike a fair balance between the competing interests of the individual and the community as a whole and that there was not a general obligation for any state to respect an immigrant's choice of country of residence. He stated that factors to be taken into account were the extent to which family life was effectively ruptured, the extent of the ties in the contracting state, whether there were insurmountable obstacles in the way of family living in the country of origin, and whether there were factors of immigration control such as history of breaches of immigration control or considerations of public policy weighing in favour of exclusion.

29. At this stage I would point out that although the Immigration Judge referred to the issue of "insurmountable obstacles", the reality was that he was only stating that that was one factor that should be taken into consideration when considering whether or not the rights of an appellant under Article 8 would be infringed by removal.

30. He went on to state that an important consideration would be whether family life had been created at the time when the persons involved were aware that the immigration status of one of them was such that the present of that family life without the home state would be precarious.

31. In paragraph 33 he stated that he had to bear in mind the appellant came nowhere near satisfying the Immigration Rules, and that the Rules were a relevant

consideration. I consider that he was correct to consider that that was a relevant factor.

32. He went on to say that even if family life were accepted there was no evidence of finance before the Tribunal and it was obvious that the appellant came nowhere near satisfying the English language requirement, and it was relevant that the appellant had been in breach of immigration law and control. He pointed out the appellant had ties with his home country.

33. He referred to the issue of the appellant's fiancée's children, pointing out that one was aged 20. He stated that it was quite obvious, looking at all the facts of the case, that it could never be said that it would be disproportionate for the appellant to be removed to his home country.

34. He did go on to say that it would be open to the appellant to apply for entry clearance at a later date if he satisfied the relevant Immigration Rules.

35. He concluded by saying that "any Article 8 argument is, so I find, extremely weak".

36. It is of note that the judge did not in his conclusions to the determination refer to the appellant's relationship with Ms Uddin but the reality is that when he reached his conclusion he must have taken into account the conclusions which he reached in paragraphs 25 and 26 of the determination where he had found that the appellant did not live with Ms Uddin and that it was said that they could not live together because of the disdain relating to the relationship from Ms Uddin's father, and that there appeared to be no immediate prospect that they would live together as husband and wife.

37. These are clearly relevant factors. I note of course that the judge in paragraph 25 stated that it was "for the purposes of this determination" that he was willing to accept that family life existed. The reality is that it was relevant for him to consider in some detail all aspects of the appellant's family and private life and he would be aware that relevant case law means that the threshold for finding that Article 8 is engaged is low, and that in most circumstances where the issue of Article 8 is argued it is appropriate to note that there is a low threshold for the engagement of that Article and to go on to the other **Razgar** questions and deal properly with the issue of the proportionality of removal.

38. In this case the Immigration Judge had found that the appellant and Ms Uddin were not living as husband and wife and there was no prospect of their doing so – Ms Uddin's father was not aware of the relationship. He also found that there was no evidence to suggest that the appellant had any relationship with the children of Ms Uddin.

39. Taking these factors into consideration I consider that although it might have been preferable for the Immigration Judge to have reiterated his conclusions regarding the

appellant's relationship with Ms Uddin at the end of the determination just before his conclusions, there was no material error of law in his not doing so, and that his conclusions were fully open to him. He clearly did take into account the effect of the separation on Ms Uddin when he stated at paragraph 28 that the interference would have grave consequences, but he was correct to place weight on other factors such as the appellant's immigration history and the fact that there was no prospect of Ms Uddin and the appellant living together as husband and wife before reaching his conclusions and indeed it is relevant that he refers to the case of **Beoku-Betts** before dismissing the appeal.

40. I therefore find that there is no material error of law in the determination of the Immigration Judge and that his decision dismissing this appeal both under the Immigration Rules and on human rights grounds shall stand.

Signed Date 22nd July 2013

Upper Tribunal Judge McGeachy