Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46496/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014 **Delivered Orally**	**On 21 July 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ALEYA BEGUM

Respondent

Representation:

For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent: Miss N Forster, Counsel instructed by M-R Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Appellant (hereinafter called the Secretary of State) against the decision of the First-tier Tribunal, who in a determination promulgated on 9 April 2014 allowed the appeal of the Respondent (hereinafter called "the Claimant"), a citizen of Bangladesh born on 7 March 1982, against the decision of the Secretary of State dated

23 October 2013 to refuse to grant to the Claimant further leave to remain in the United Kingdom.

2. The Claimant's immigration history is that she first came to the United Kingdom on 24 July 2001 with leave to enter as an EEA family member valid until 30 March 2006. On 17 September 2002 she applied for a residence document as the spouse of a British settler but was refused on 24 June 2003 because she failed to provide evidence to show that her spouse was exercising treaty rights in the UK.

3. On 18 May 2005 her application for leave to remain as the spouse of a settled person was rejected and a renewed application on the same basis on 22 June 2005 was refused with no right of appeal on 8 September 2008. On 24 October 2008 the Claimant applied for leave to remain on Article 8 ECHR grounds and was granted an extension of stay in the UK until 17 December 2012 on the basis of her family life. On 15 November 2004 the Claimant's application for an extension of stay in the United Kingdom was refused by the Secretary of State.

4. Reference was made to paragraph 322(9) of the Rules in relation to which it was pointed out that the Claimant had failed to produce further information and documents within a reasonable time to substantiate that claim despite it having been requested on 18 September 2014. Therefore a further grant of discretionary leave had been refused. Her application to be considered under Article 8 being since 9 July 2012 fell to be considered under Appendix FM and paragraph 276ADE of the Immigration Rules.

5. So far as is relevant to the present case, the requirements of E-LTRPT.2.3. were in the view of the Secretary of State not met, in that the Claimant had failed to demonstrate that she had sole parental responsibility for her child. The grounds contend that the First-tier Judge simply failed to make any findings as to whether the Claimant was able to demonstrate to the requisite standard of proof that she was solely responsible for her children in accordance with the Rules. Further that the Judge failed to consider paragraph R-LTRPT.(d)(ii) that relates to the requirements to be met for limited or indefinite leave to remain as a parent or partner, that requires the Claimant to meet the requirements of inter alia E-LTRPT.2.3., that, in turn, makes clear that the applicant must have sole responsibility for the child.

6. The Secretary of State pointed out in her grounds that this was a mandatory eligibility criterion for the purposes of EX.1(a). Further that, as held by the Tribunal in Sabir (Appendix FM – EX.1 *not free standing*) [2014] UKUT 63 (IAC), the requirements of EX.1 could not be considered in isolation and was not freestanding.

7. It is right to remind myself that the Claimant made a successful application on 24 October 2008 for leave to remain on Article 8 grounds

when she was granted an extension of stay in the United Kingdom until December 2012 on the basis of her family life.

8. I pause there because it would be as well to recite the head note to Sabir as follows:

> "It is plain from the architecture of the Rules as regards partners that EX.1 is 'parasitic' on the relevant Rule within Appendix FM that otherwise granted leave to remain. If EX.1 was intended to be a free-standing element some mechanism of identification would have been used. The structure of the Rules as presently drafted requires it to be a component part of the leave-granting Rules. This is now made plain by the [Secretary of State's] guidance dated October 2013."

9. The Secretary of State further contends that given that the First-tier Judge found at paragraph 5 of his determination that the Claimant and her husband had always resided together in Dagenham, it followed that this material finding would be inconsistent in any event with the requirements of E-LTRPT.2.3. (above). It followed that the First-tier Tribunal Judge had not correctly applied the provisions of EX.1(a).

10. It would be as well to set out below the Judge's findings so far as they are relevant to the issues in this appeal. These were more particularly set out at paragraph 5 of his determination but, I observe, were contained in one lengthy paragraph over two pages, and I would make the general observation that shorter paragraphs in a determination wherever possible result in better presentation and ease of reading in more readily seeking to identify and understand the basis of the Judge's reasoning and findings. The Judge had this to say:

> "The second basis of the refusal under E-LTRPT.1.1. is there was no evidence of a genuine and subsisting relationship with her husband. … But the evidence provided with the letter of 1 October 2012 [that should have been 2013] surely establish a relationship centring upon the family home address. … There were council tax bills/payslips/letters … from … schools/bank statements/letters from HMRC/medical cards/bills. The oral evidence of the couple also establishes the same. The Appellant detailed how they had always lived in Dagenham; initially in Dagenham Docks; her husband living in Hemel Hempstead one hour away by car; where he was a restaurant chef Thursday to Tuesday night; and being at home Tuesday to Thursday afternoon. She described the family life together with her husband taking the children to school when he was at home and I found her to be a credible and honest witness as also was her husband. The third basis of refusal under E-LTRPT.2.3. is that the Appellant could not show that she had sole responsibility for the children but she surely gets home on their father being a British citizen, and under EX.1(a) because the two eldest have been living in the UK continuously for seven years, and it would not be reasonable to expect them not to leave the UK. The latter finding is surely reinforced by the best interests of the three children, including the toddler … who had both parents residing legally in the UK at the time of the application. The Appellant fails as to private life under 276ADE for not living in the UK twenty years but she succeeds under Appendix FM particularly

> because under EX.1 it would not be reasonable to expect her British husband to disrupt the life he has built for himself, his wife and his British children in the UK so as to continue enjoying a semblance of it in Bangladesh. Even is she had not succeeded under the family provisions of the Rules, she would be bound to do so under the separate Article 8 jurisprudence because the family having established their life in the UK since 2001 any disruption would be bound to be disproportionate under the Razgar questions, taken into account in particular the best interests of the three British children of the family."

11. In granting permission to appeal, First-tier Tribunal Judge Levin (having observed that the Judge allowed the appeal under EX.1 of Appendix FM on the grounds that the Appellant had established a family life in the UK with her husband and her three children and also Article 8 outside the Immigration Rules) had this to say:

> "The grounds maintain that the Judge erred in law by allowing the appeal under Section EX which is not a freestanding provision, but the Judge failed to have regard to the requirements of Section E-LTRPT.2.3. of Appendix FM in reaching his findings and that the Judge's finding that the Appellant and her husband had always lived together in Dagenham made his allowing the appeal inconsistent with Section E-LTRPT.2.3.
>
> Having regard to the Judge's findings at paragraph 5 of his determination all the grounds arguably have merit.
>
> It follows therefore that both the grounds and the determination disclose arguable errors of law."

12. Thus the appeal came before me on 10 July 2014 when my first task was to determine whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

13. At the outset of the hearing Mr Deller most typically and helpfully clarified the Secretary of State's position. He described the Letter of Refusal as "going into some strange directions" for reasons which were intrinsically illogical and which fell apart on one vital fact. The critical point was that the Secretary of State made enquiries and asked for a reply by 2 October 2013 and then proceeded on the basis that no such response was received.

14. Mr Deller acknowledged that, as the Judge rightly observed, this was a mistake on the part of the Secretary of State because a letter had been sent dated 1 October 2013.

15. In consequence of that oversight Mr Deller explained that there flowed the basis upon which the Claimant's application was refused and he explained it in this way:

> "We were not satisfied that there was such a relationship and therefore that the application had to fail under the 'partner' route under Appendix FM and because we were refusing on failure to provide evidence, that focused on suitability which meant that the Claimant has no access to paragraph EX.1 because as the Tribunal explained in Sabir you have to reach EX.1, it does not exist on its own.
>
> It has also meant that the relationship with the children failed under the 'parent' route under Appendix FM because there was no satisfactory evidence that Mrs Begum had sole responsibility for them."

16. Mr Deller continued that the above had two effects on the Secretary of State's decision and he explained it as follows:

> "It has swept away the suitability requirement refusal because there had not been a failure to provide evidence within a reasonable time. That evidence that the First-tier Judge found, easily established a genuine and subsisting relationship with a British citizen and suddenly the reliance on the parent route thus disappeared because it was clearly in reliance on the partner route and a bridge to EX.1 was open, because the suitability qualification was not there anymore and there was no other obstacle under Appendix FM to EX.1 being considered in this case.
>
> That sweeps away nearly everything about our challenge."

17. Upon further thought, Mr Deller concluded his submissions on the basis that given that the Secretary of State had now accepted the evidence of a relationship and that it was sent in before the time requested, and mindful of the fact that there were British children and a British father, he no longer intended to place reliance on the grounds and would concede the appeal.

18. In those circumstances I did not trouble Miss Forster to address me.

19. The Tribunal much appreciates Mr Deller's realistic reflection on this case. It is right that I can rely upon the factual conclusions of the First-tier Tribunal Judge. Firstly he found as a fact that the Claimant and her husband and her children had a longstanding, genuine and subsisting family life. It was clear that he found the Claimant to be "a credible and honest witness as was also her husband". Secondly, the Judge also found as a fact, that the Claimant, having established her family life in the United Kingdom since 2001, would face disruption that would be bound to be disproportionate, not least because, as found by the Judge, it would not be reasonable, to expect the Claimant's British husband "to disrupt the life he has built himself and for his wife and his British children in the UK, so as to continue enjoying a semblance of it in Bangladesh."

20. Thirdly, the fact that the husband and children had British citizenship was also relevant. The position of the children was important, albeit not a decisive consideration (see the analysis of the Supreme Court in ZH (Tanzania)).

21. Fourthly, this is not a case where the family life was at all times precarious because indeed, when the Claimant made her application, it was recognised by the Judge in terms of the best interests of the three children, that the Claimant and her husband were residing legally in the UK at that time. Indeed in this case I do not consider that the Claimant's private life was precarious on the facts as they have already been found, they were long-standing and not generated for the purposes of application. On the contrary, they predated the application by a number of years. See for example the Claimant's successful application on 24 October 2008 for leave to remain on Article 8 grounds when she was granted an extension of stay until December 2012 on the basis of her family life.

Conclusions

22. For the above reasons, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law material to its outcome and I order that it shall stand.

Signed Date 18 July 2014

Upper Tribunal Judge Goldstein