First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16368/2013
OA/16370/2013

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 5 December 2014 **On 16 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D G ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MRS LUBNA BEGUM
1st Respondent

MR MUSAYEL AHMED
2nd Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr R Singer, Counsel instructed by Hamlet Solicitors, London

DECISION AND REASONS

1. Mrs Lubna Begum and her son Mr Musayel Ahmed are citizens of Bangladesh whose dates of birth are recorded respectively as 10 February 1990 and 19 August 2010. On or about 3 April 2013 they applied for leave to enter the United Kingdom with a view to settlement as the Spouse and child

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respectively of Shamim Ahmed, a British citizen present and settled in the United Kingdom. On 4 July 2013 decisions were made to refuse the applications and so by notices of appeal dated 7 August 2013 they appealed to the First-tier Tribunal. On 9 September 2014 their appeals were heard by Judge of the First-tier Tribunal Chamberlain, who in a determination promulgated on 17 September 2014, dismissed the appeals under the Immigration Rules but allowed the appeals on human rights grounds (Article 8).

2. There was no dispute before Judge Chamberlain that the appeal could not succeed under the Immigration Rules as the Sponsor was paid in cash he was required to provide specified evidence as required by Appendix FM-SE, which he was unable to do.

3. In refusing the application the Secretary of State pointed to the Immigration Rules which required a gross income of not less than £22,400 per annum given that there was to be taken into consideration Musayel Ahmed. Quite separate from the failure of the then Applicants to provide the specified evidence, the Entry Clearance Officer who determined the application was not satisfied that the Sponsor's income was as claimed and took various points in respect of such evidence as was produced, casting doubt on the voracity of the documentation though without going so far as alleging fraud. Further it was said that Lubna Begum had not met the English language requirement since the documentation submitted was not reliable.

4. Judge Chamberlain looked to the available evidence and found that it was established, on balance of probabilities, that the Sponsor was earning in excess of the amount required by the Secretary of State to sponsor entry clearance for a Spouse and dependant child. As to the English language requirement, the Judge found insufficient evidence in support of the Entry Clearance Officer's contention that the documentation supplied was unreliable but found in the light of all the evidence that it was proved by the Appellant to be reliable, and, having regard to the totality of the evidence, found the documentation reliable so that the English language requirements were met by Mrs Lubna Begum.

5. What Judge Chamberlain then did was to examine the family life contended for between the Sponsor and Mrs Lubna Begum and Mr Musayel Ahmed. Judge Chamberlain found the consequence of refusal to be interference in the family life and then following the five stage approach in Razgar [2004] UKHL 27, found the decisions of the Entry Clearance Officer to be disproportionate. In coming to that view the Judge had regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 and found that the only reason that the application did not succeed was because the Sponsor was being paid in cash; not because the substantive requirements were not met in relation to finance.

6. Judge Chamberlain, guided further by the dicta in Patel v SSHD [2013] UKSC 72, found that the Article 8 claim had merit, taking into account, in particular, the fact that this was a family consisting of a mother, father and 4 year old child. To refuse permission because the Sponsor was paid in cash rather than because he was unable to support his wife and child did not meet, in the judge's view, the proportionality test and further, quite properly, the Judge had regard to the best interests of that 4 year old child which was, in the Judge's view, to be with both parents with the family being together. Indeed the Judge came to the view that the Sponsor had been working to ensure that he would be able to provide financially for his wife and child. The Judge went on to consider whether it was reasonable to expect the Sponsor to relocate to Bangladesh but found that it was not; the Sponsor was a British citizen who was employed in the United Kingdom with an extended family in the United Kingdom.

7. Not content with the decision of the First-tier Tribunal, by Notice dated 25 September 2014, the Secretary of State made application for permission to appeal to the Upper Tribunal. The grounds submit that only if there were arguably good grounds for granting leave to remain outside the Immigration Rules was it necessary for the Judge to proceed to consider whether there were compelling circumstances not sufficiently recognised under them. Reliance was placed on the guidance in R (On the application of Nagre) v Secretary of State for the Home Department [2013] EW HC 720 (Admin). It was submitted that there were no compelling circumstances identified by the judge sufficient to embark upon the course taken.

8. Further, relying on the dicta in Miah and others v Secretary of State for the Home Department [2012] EWCA Civ 261, and in particular to the judgment of Burnton LJ, it was submitted that the degree of compliance on the part of the Sponsor with the provisions of the Immigration Rules did not amount to something that needed to be "factored in" by the Tribunal or Secretary of State to the proportionality exercise under Article 8. The Secretary of State submits that essentially the judge allowed the appeal on the basis of "near miss" when such was not permissible; either the Immigration Rules were met or not.

9. On 4 November 2014 Judge of the First-tier Tribunal P J C White granted permission thus the matter comes before me.

Was there an error of Law?

10. For the Secretary of State, Mr Avery submits that there was no proper basis for the Judge to depart from the Immigration Rules and that there is no authority to suggest that Appendix FM-SE was not Article 8 compliant. The judge was not entitled to use Article 8 as a general dispensing power. I agree with the submission that the Judge was not entitled to use Article 8 as

a general dispensing power; the question in this case is whether that is what the judge did.

11. Mr Singer for the Respondents produced a lengthy and helpful Rule 24 response. Reference is made to numerous authorities.

12. There has been considerable consideration by the Upper Tribunal and the higher Courts with respect to the extent to which it is proper for a judge to look to the wider application of Article 8 when the Immigration Rules are not met. I do not propose to add to the considerable number of authorities which have attempted to set out, in the clearest possible terms, guidance in this regard. The three more recent authorities however, which assist me, in the date order in which they were heard, are: R (On the application of Esther Ebun Oludoyi and ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UK UT 000589 (IAC); Sultana and others (Rules: Waiver/Further enquiry; discretion) [2014] UK UT00540 (IAC); and R (On the application of Halimatu SA Adiya Damilola Aliyu and Fatima Oluwakemi Aliyu) [2014] EWHC 3919(Admin).

13. In the case of Oludoyi Upper Tribunal Judge Gill found that:-

> *"There is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new rules – correct approach) Pakistan [2013] UK UT640 (IAC) or Shahzad (Article 8: Legitimate aim) [2014] UK UT00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM and others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based rule. As is held in R (Ganesabalam) v SSHD [2014] EW HC2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations."*

14. In the case of Sultana, the President of the Upper Tribunal, sitting together with Upper Tribunal Judge Dawson held as follows:-

> *"(1) [D] of Appendix FM-SE is an example, within the context of the requirement to supply specified evidence, of the increasing influence of discretionary powers of waiver and further enquiry in the Immigration Rules.*
>
> *(2) Where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific*

provisions of the rules invoked and the grounds upon which the exercise of discretion is requested.

(3) Where any request of this kind is made and refused, a brief explanation should be provided by the decision maker.

(4) Where a refusal to exercise a discretionary power as described in (1) above may render an immigration decision not in accordance with the law, under Section 84(1)(e) of the Nationality, Immigration and Asylum Act 2002.

(5) Powers of waiver are dispensing provisions, designed to ensure that applications suffering from certain minor defects or omissions can be readily remedied.

(6) The hierarchical distinction between the Immigration Rules and Immigration Directorate instructions ("IDI's") must be observed at all times.

(7) Failure to recognise, or give effect to, an IDI may render an immigration decision not in accordance with the law."

15. Turning then finally to the case of Aliyu, Judge Grubb sitting as a Deputy High Court Judge said as follows:-

"59. In my judgment, the Secretary of State (apart from "Complete Code" situations) always has a discretion to grant leave outside the rules. That discretion must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2. There is, in principle, no "Threshold" criterion of "Arguability." I respectfully agree with what Aikens LJ said in this regard in MM (at [128]). However that factor, taken together with other facts such as the extent to which the rules have taken into account an individuals circumstances relevant to Article 8, will condition the nature and extent of the consideration required as a matter of law by the Secretary of State of an individuals claim under Article 8 outside the rules. If there is no arguable case, it will suffice for the Secretary of State simply briefly to say so giving adequate reasons for that conclusion. At the other extreme, where there are arguable good grounds that the rules do not adequately deal with an individuals circumstances relevant in assessing Article 8, the Secretary of State must consider those circumstances and identifiably carry out the balancing exercise required by proportionality in determining whether there are "Exceptional circumstances" requiring the grant of leave outside the rules under Article 8.

60. *In any event, as is made plain in <u>Ganesabalan</u>, a failure to consider whether to exercise discretion outside the rules will, in itself, by unlawful.*

61. *That said, a failure to consider the exercise of discretion or failing properly to consider the relevant factors outside the rules, though unlawful, will not result in the court granting any relief if the decision would "Inevitably" have been the same (see <u>Ganesabalan</u> at [37] and <u>Haleemudeen</u> at [61]".*

16. In making his submissions Mr Singer submitted that Appendix FM-SE (Family Members – Specified Evidence at D) provided a discretion and that since there was that discretion it could not be said that the rules were a complete code.

17. Under the heading "Evidence of Financial Requirements under Appendix FM" at (1)(m) it is provided that:

> *"Cash income on which the correct tax has been paid may be counted as income under this appendix, subject to the relevant evidential requirements of this appendix."*

18. That must be read together with (k) which provides:

> *"Where the gross (Pre tax) amount of any income cannot be properly evidenced, the net (Post tax) amount will be counted, including towards a gross income requirement."*

19. There then follows at (2) the evidential requirements in respect of salaried employment. I need not rehearse those requirements because it is not in issue that they were not met.

20. The case advanced in the First-tier Tribunal and accepted by the Judge was that the Sponsor was indeed paid in cash.

21. Turning to the grounds themselves, I remind myself that the authorities to which I have referred were each judicial review cases so that a rather different test to that to which I have to have regard was under consideration. However, the guidance is clear, namely that having regard to the totality of the evidence, it is open to a judge to look to the wider application of Article 8 if he or she concludes that there would be a disproportionate result, having regard to the legitimate aim being pursued by the Secretary of State.

22. The grounds as drafted submit that only where there are compelling circumstances, not sufficiently recognised under the Immigration Rules, can a judge depart from the Immigration Rules. It is clear from the more recent authorities that that submission is not one that has found support and I see no reason not to follow the learning in the guidance to which I have

referred. Each of those authorities has themselves considered the multiplicity of authorities dealing with the point. I agree with them.

23. As to the second ground, I do not find that the judge did approach this appeal as if it were "a near miss." The judge found that all of the requirements of the Immigration Rules had been met save for the form of the evidence. This was not a case, for example, there was a requirement that there should be income of £22,400 but that say only £22,000 were available; the judge found as a fact that the income of the Sponsor exceeded the minimum requirement though it is right to observe that in allowing the appeal under Article 8 the judge did dispense with the requirement at FM-SE 1(k), being a point which was taken by the Entry Clearance Manager on review.

24. That, however, is not the end of the matter. The "near miss" principle was considered at length by the Supreme Court in the case of Patel v SSHD [2012] EWCA Civ 742.

> *"55. Thus the balance drawn by the rules must be relevant to the consideration of proportionality. I said as much in Rudi. Although I rejected the concept of a "Near miss principle," I did not see this as inconsistent with Collins J's words in Lekstaka:*
>
> > *'Collins J's statement, on which the court relied in SB, seems unobjectionable. It is saying no more, as I read it, than the practical or compassionate considerations which underlie the policy are also likely to be relevant to the case of those who fall just outside it,* ***and to that extent may add weight to their argument for exceptional treatment****. He is not saying that there arises any presumption or expectation that the policy will be extended to embrace them." (Paragraph 31(ii)).'*
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> *(My reference to "Exceptional treatment" needs to be read now in the light of Huang Paragraph 20 in which Lord Bingham made clear that, contrary to previous Court of Appeal case law, there was no separate "Test for Exceptionality."*

25. In my judgment what the Judge did in this case was open to her. The appeal before me concentrated only on the financial requirements provisions. The English language point was not challenged. I observe that in the refusal, and indeed in the Entry Clearance Manager's further considerations, what appears really to have concerned the Secretary of State was the adequacy of the evidence. That evidence however has had the benefit of some considerable scrutiny by the Judge who made findings that were open to her namely that despite Rule (k), on proper examination, the mischief of the substantive rule that there should be sufficient monies available for the family to be maintained without recourse to public funds was met. In that sense this was not a near miss case at all but rather a total

miss in the sense that certain evidential requirement was not met. The Judge then looked at the totality of the evidence and asked herself whether the Appellants in the First-tier Tribunal should be denied entry when the real mischief which lay behind the rules had been met namely that which I have already said, the ability to maintain themselves.

26. Whilst the Immigration Rules have been drafted with Article 8 in mind, the rules and Article 8 are not an identical regime. The family members in this case asserted their right to family life and that right can only be interfered with, if, having regard to the legitimate aim (which in this case was the economic wellbeing of the United Kingdom) it was proportionate to deny entry.

27. Ultimately this case is about whether the Secretary of State has justified the interference in the right of the nuclear family including a 4 year old child to be together. In my judgment because was open to the Judge to look to proportionality within the wider application of article 8 ECHR means that the Secretary of State has failed to show that this is a decision that cannot stand. I remind myself that the findings of fact are not challenged. The Judge looked to various factors including the best interests of the 4 year old child. It is not in dispute that the Sponsor had the requisite earnings: the grounds are silent on the point. The Secretary of State might have argued, but did not, that because of the rules it was only open to the Judge to find that a figure net of tax had been proved. I say no more, the point was not taken in the grounds, nor argued before me. The point taken relates only to the failure to provide the evidence in a particular form. Whilst I accept that there may be other judges who might have taken a different view, that is not a matter with which I am concerned. I am concerned with whether the approach of this judge was one that was open to her having regard to the guiding principles in the case of R (Iran) [2005] EWCA Civ 982.

28. I find that the Secretary of State has not established any sufficient reason for me to interfere with the findings of the Judge of the First-tier Tribunal or that there is any material error of law. In the circumstances the appeal is dismissed.

Notice of Decision

The appeal is dismissed. The Decisions of the First tier Tribunal shall stand.

Signed **Date 15 December 2014**

D G Zucker
Deputy Judge of the Upper Tier