Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32714/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 June 2015	**On 12 June 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

MD Saifur Rahman Razu
[No anonymity direction made]

Respondent

Representation:
For the claimant: Mr B Ali, instructed by Kuddus Kamal Solicitors
For the appellant: Ms A Holmes, 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 Coleman promulgated 15.1.15, allowing on both immigration and article 8 ECHR grounds the claimant's appeal against the decision of the Secretary of State to refuse him leave to enter the United Kingdom and to curtail his leave. The Judge heard the appeal on 6.1.15.

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

3. The relevant background to the appeal can be summarised as follows. The claimant first came to the UK in 2009 with leave as a student. His leave was subsequently extended. In an extension application submitted in 2012 he submitted an English language test certificate allegedly taken at the London School of Technology on 7.4.12. On that basis he was granted further leave to remain until 30.7.13. However, in May 2013 he submitted an application for leave to remain as the spouse of Anwara Khatun, a British citizen, tendering the same English language test certificate. On that basis he was granted further leave to remain as a spouse until November 2015. In July 2014 he and his wife went to Bangladesh together. On their return on 16.8.14 he was questioned by immigration officers about his 2012 English language certificate. He eventually admitted that he had not taken the test but paid someone £500 to take it for him. In consequence, the Secretary of State refused leave to enter and cancelled his leave to remain.

4. At the First-tier Tribunal hearing, the claimant's representative admitted that the decision to curtail leave was lawful under the Immigration Rules and the Immigration Act 1971, reliance being placed on paragraph 322(1A) of the Rules, and section 2A of Schedule 2 to the Act. The hearing proceeded on the basis of article 8 private family life only.

5. Judge Coleman found that the claimant could not meet paragraph 276ADE, first because he had made no such application, and in any event he failed under the suitability requirement because of the previous submission of false documents in order to fraudulently gain leave to remain. The judge also found that there were no very significant obstacles to his integration into Bangladesh.

6. In relation to family life, Judge Coleman considered EX1 and EX2 and the issue as to whether there were insurmountable obstacles to family life continuing in Bangladesh, notwithstanding that the claimant's wife is a British citizen. At §19 the judge concluded that the claimant had discharged EX1 and thus allowed the appeal under paragraph FM.

7. The judge then went on to consider article 8 outside the Rules, to conclude at §27 and §28 that the impact of the decision to refuse leave to enter and to cancel leave to remain was disproportionate to the legitimate aim of maintaining immigration control, and thus additionally allowed the appeal on article 8 grounds.

8. In granting permission to appeal, Judge Davies found it arguable that the First-tier Tribunal Judge's findings that the effect on the claimant's wife of the decision to refuse leave to enter the UK would be so devastating that it would be disproportionate are not in fact borne out by the evidence. Further, it is arguable that the judge failed to identify what unjustifiable hardship would be caused by the claimant's wife continuing her family life with him in Bangladesh.

9. Thus the matter came before me on 17.4.15 as an appeal in the Upper Tribunal. In my error of law decision I found that the decision to allow the appeal under the Immigration Rules was misconceived and in error of law. The judge found that he

claimant did not meet the suitability requirements under Appendix FM. In those circumstances, the appellant cannot advance to consideration of EX1 and insurmountable obstacles. As held in Sabir (Appendix FM- EX1 not free standing) [2014] UKUT 00063 (IAC), EX1 is not a free-standing consideration and is parasitic on the relevant rules for leave to remain. That the claimant could not meet the requirements of the Rules, either paragraph 276ADE or Appendix FM, was a matter that should have been brought into account in the article 8 ECHR proportionality assessment outside the Rules.

10. I also agreed with the submissions that in effect the judge had applied a 'near miss' principle, and failed to have proper regard for the public interest considerations under section 117B of the 2002 Act, a view now reinforced by the recent decision in AM (S 117B) Malawi [2015] UKUT 0260 (IAC). The appellant's continued immigration status in the UK was always precarious, dependent as it was on obtaining further leave to remain and thus little weight should be accorded to any private life developed in the UK. Further, little weight is to be accorded in the proportionality balancing exercise to a relationship with a partner developed when he was unlawfully present in the UK, having obtained leave to remain first as a student and then as a spouse by the fraudulent use of an English language test certificate. In error, at §28 the judge stated that the appellant did not fall foul of any of the 117B "requirements."

11. A further error is disclosed in §28 by the judge's reliance to the claimant's credit in the proportionality balancing exercise that he is able to speak English and is financially independent. As AM made clear, a claimant's human rights are not improved and cannot accrue 'credit' for such matters: "An appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources." Neither does the claimant acquire any positive benefit by reason of his immigration history, as held in Nasim & Ors (Article 8) [2014] UKUT 00025 (IAC): "A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning proposed or hypothetical removal from the UK is to preclude the Secretary of State from pointing to any public interest justifying removal, over and above the basic importance of maintain a firm and coherent system of immigration control." That immigration control is in the public interest is now enshrined in section 117B, which Judge Coleman acknowledged at §28 of the decision.

12. Although the claimant had served a small additional bundle of documentary evidence for the resumed hearing, Mr Ali elected to proceed by way of submissions only, on the basis that there was no need to disturb the findings of fact made by Judge Coleman. To clarify, I asked Mr Ali to specify those findings upon which he relied. His reply was to read out a substantial portion of the decision of Judge Coleman and to state that he relied on all the findings of fact.

13. Although I made no direction in my error of law decision and consequent directions as to whether any findings of fact should be preserved, I accept that the primary

findings of fact can stand as made. As judge Coleman pointed out, at §2, the basic facts are not in dispute. However, when I invited Mr Ali to identify those findings on which he relied, it became clear that he not only relied on the findings of Judge Coleman but her conclusions therefrom, including, for example, the statement of the judge at §17 that "I had the distinct impression that if the appellant could not remain in the United Kingdom this is a relationship which would fail." With respect to Mr Ali and Judge Coleman, that is not a finding of fact, and I made it clear to Mr Ali that I did not consider the Tribunal bound by this or similar remarks of the First-tier Tribunal Judge, which are not findings but, at the highest, conclusions based on primary facts. I do not accept that I am bound to accept that the relationship would fail if the claimant were removed from the UK. Indeed, as Ms Holmes pointed out in her submissions, there is insufficient evidence to suggest that it would be unjustifiably harsh to expect the wife to follow her husband and for them to continue family life outside the UK. This was the submission of the representative of the Secretary of State at the First-tier Tribunal appeal hearing. Whilst the wife is a British citizen, she is of Bangladeshi origin and speaks Bengali. Although she has not remaining family of her own in Bangladesh, she would have the assistance and protection of the claimant in making a new life in Bangladesh. I take into account that she has stated that she would not return to Bangladesh and never considered that might be the consequence of her marriage. Of course, as a British citizen she cannot be required to leave the UK, but it will be a matter for her to choose whether to accompany him or not.

14. However, I do accept the finding that the claimant's wife knew nothing of his fraud in submitting a certificate for a test he did not take himself, and that she was shocked to discover that. The relevance, as relied by Mr Ali, and as acknowledged by the judge at §23 of her decision, is the rights of the wife must also be taken into account when considering the impact of the decision of the Secretary of State. In her submissions and reply, Ms Holmes pointed out that if the claimant must succeed because his wife knew nothing of his fraud, he would be doubly benefiting from his fraud, having deceived both the Secretary of State and his wife. Nevertheless, it is right that I must and do take into the likely effect of the decision on both the appellant and his wife.

15. Mr Ali accepted in his submissions that other conclusions of the judge are not findings of fact but are in fact for me to decide, such as the conclusion at §19 that the effect on the wife because of the decision and her husband's behaviour of which she was not a part, constituted insurmountable obstacles to continuing family life in Bangladesh.

16. Mr Ali indicated at the outset of his submissions that he did not concede the issue of the Immigration Rules and the application of EX1, but he did not pursue it and declined my invitation at the conclusion of his submissions to explain how the claimant could succeed under the Rules. In the circumstances and for the reasons set out in the decision of Judge Coleman, I find that the claimant cannot meet the requirements of the Immigration Rules for leave to remain. That is a highly relevant

factor to be brought into account in the article 8 ECHR proportionality exercise outside the Rules.

17. Mr Ali stated that the thrust of his submissions was that whilst on his own circumstances the claimant would be unlikely to be able to demonstrate that the removal decision is disproportionate, when combined with the circumstances of his wife, he should succeed on the basis of family life under article 8 ECHR and I refer to his submissions, including those set out above.

18. For the reasons set out herein, I find that the appeal must fail and that the decision is entirely proportionate and not disproportionate to the private and/or family life rights of the claimant and his wife.

19. In applying the Razgar stepped approach, I accept the finding of the First-tier Tribunal that there is family life between the claimant and his wife and that the decision to remove him would constitute such grave interference with that family life so as to engage article 8 ECHR. The crucial question, as acknowledged by Mr Ali, is the proportionality balancing exercise between on the one hand the rights of the appellant and his wife, and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK through the application of immigration control. This public interest consideration has now been enshrined in section 117B of the 2002 Act and I am required to have regard to it and in particular to the principles set out by the Vice President in AM. Mr Ali submitted that AM is wrongly decided and wished to preserve his position in respect of the application of section 117B.

20. In his skeleton argument, Mr Ali seeks to rely on in the claimant's favour that he has now provided an English language certificate and was interviewed in English, and that he is not in receipt of public funds. However, as AM held, the claimant can obtain no positive right to a grant of leave to remain because of his fluency in English or the strength of his financial resources. Further, again as stated above, at all times the claimant's immigration status was precarious and thus little weight should be accorded to any private life he has developed in the UK. Neither did his status as a student entitle him to either an expectation of leave to remain on the basis of private life. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."

21. On the facts of this case, the claimant's true status in the UK was effectively unlawful. As stated above, he obtained leave to remain first as a student and later as a spouse on the basis of an English language certificate to which he was not entitled. In the circumstances, little weight should be given to the relationship formed with his wife, established at a time when he was effectively in the UK unlawfully.

22. The claimant's dishonest and deliberately fraudulent conduct in seeking to remain in the UK when he was not entitled to do so is highly relevant to the public interest in applying immigration control and removing him from the UK, and to the proportionality balancing exercise. It is not in the public interest that he should benefit from such disreputable conduct by being permitted to remain in the UK.

23. Those matters in the claimant's favour essentially relate to the establishment of family life with a British citizen, who was unaware that he had obtained leave to remain as her spouse by dishonest and fraudulent means. I fully take into account the devastating effect this potentially has on the relationship and her declaration that she will not go to Bangladesh. I also take into account all that has been urged upon me from the findings of fact of the First-tier Tribunal as to her private and family circumstances in the UK; these matters should not be underestimated and weigh significantly in the claimant's favour. I have carefully considered his wife's rights to family life. However, the proportionality balancing exercise is just that, a balancing exercise between the rights of both the claimant and his wife and the public interest in securing his removal from the UK. As stated, in that balancing exercise the scales are heavily weighted against the claimant by the relevant public interest factors of section 117B, and his disreputable and fraudulent conduct in relation to immigration control. In the final analysis I find that the decision is proportionate, even if it means that the claimant and his wife separate. It is not necessarily the case that this will be the consequence, as it is a matter for her to choose whether to accompany him, but her rights to family life do not, in my view, outweigh the very significant public interest in removing a person such as this claimant from the UK. The Rules as amended are the Secretary of State's response to article 8 private and family life rights claims and are designed to be article 8 compliant. Article 8 is not a shortcut to compliance with the Rules, which he cannot meet, primarily because of his own dishonest conduct. The claimant is not entitled to settle in the UK just because that is and evidently has always been his intention. Neither does the fact that being unlawfully present, or having engineered his continued presence by fraud on the Secretary of State, entitle him to remain just because he concealed that fraud from his wife.

Decision

24. The appeal is dismissed on immigration grounds and on human rights grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated **27 August 2015**

Anonymity

I 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, I make no anonymity order.

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

In the light of my decision, I 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).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I 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 **27 August 2015**