IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33111/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th May 2015	**On 29th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ZAHANGIR ALAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, instructed by Haque & Hausman Solicitors (London)
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Bangladesh born on 1 December 1989 and on 13 June 2014 he applied, one day before the expiry of his student leave which was curtailed on 17 June 2014, for leave to remain as the spouse of Fahima Begum, a UK citizen. The appellant and the sponsor Ms Begum were married in the UK at Newham

Registry Office on 30 November 2013. It should be noted that the appellant's leave was curtailed with notice on 22 March 2014 to expire on 17 June 2014 and this decision was not appealed.

2. The Secretary of State refused the application on 5 August 2014 on the basis that the appellant had not fulfilled the financial requirements set out at paragraph E-LTRP.3.1:

> "E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of -
>
> (a) a specified gross annual income of at least -
>
> (i) £18,600; (ii) an additional £3,800 for the first child; and (iii) an additional £2,400 for each additional child; alone or in combination with
>
> (b) specified savings of -
>
> (i) £16,000; and (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-LTRP.3.2.(a)-(f) and the total amount required under paragraph E- LTRP.3.1.(a); or (c) the requirements in paragraph E-LTRP.3.3.being met, unless paragraph EX.1. applies.
>
> In this paragraph "child" means a dependent child of the applicant who is -
>
> (a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
>
> (b) applying for entry clearance or is in the UK as a dependant of the applicant;
>
> (c) not a British Citizen or settled in the UK; and
>
> (d) not an EEA national with a right to remain in the UK under the Immigration (EEA) Regulations 2006.
>
> E-LTRP.3.2. When determining whether the financial requirement in paragraph ELTRP.
>
> 3.1. is met only the following sources may be taken into account t-
>
> (a) income of the partner from specified employment or self-employment;
>
> (b) income of the applicant from specified employment or self-employment unless they are working illegally;
>
> (c) specified pension income of the applicant and partner;
>
> (d) any specified maternity allowance or bereavement benefit received by the applicant and partner in the UK or any specified payment relating to service in HM Forces received by the applicant or partner;
>
> (e) other specified income of the applicant and partner;

(f) income from the sources at (b), (d) or (e) of a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over; and

(g) specified savings of the applicant, partner and a dependent child of the applicant under paragraph E-LTRP.3.1. who is aged 18 years or over.

E-LTRP.3.3. The requirements to meet this paragraph are -

(a) the applicant's partner must be receiving one or more of the following –

(i) disability living allowance;

(ii) severe disablement allowance;

(iii) industrial injury disablement benefit;

(iv) attendance allowance;

(v) carer's allowance;

(vi) personal independence payment;

(vii) Armed Forces Independence Payment or Guaranteed Income Payment under the Armed Forces Compensation Scheme; or

(viii) Constant Attendance Allowance, Mobility Supplement or War Disablement Pension under the War Pensions Scheme; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds."

3. It was set out that the appellant did not meet the income threshold requirement of £18,600 under Appendix FM and he did not meet the related evidential requirements set out in Appendix FM-SE. He had demonstrated he had an annual income of £7,089.98 in the twelve months prior to the date of the application and claimed that his spouse had an annual income of £10,293.74. However his wife had not been in employment for six months prior to the date of the application and nor had she an annual income of £18,600 in the twelve months prior to the date of the application. Therefore the spouse's earnings could not be counted towards the £18,600 threshold.

4. The Secretary of State considered the application of exception EX.1 in conjunction with EX.2:

"EX.1. This paragraph applies if –

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who -

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

5. For the purposes of EX.1(b) insurmountable obstacles means 'very significant difficulties'.

6. The Secretary of State did not consider there were any exceptional circumstances, which, consistent with the right to respect for family life contained in Article 8 of the European Convention, might warrant a grant of leave outside the Immigration Rules.

7. The Secretary of State also considered paragraph 276ADE.

8. First Tier Tribunal Judge Taylor dismissed the appellant's appeal. The sole basis to refuse the application was that the parties had failed to show they earned £18,600.

9. The judge examined the payslips. The judge accepted that payslips were submitted for six months in relation to the appellant for the month of January to June 2014 and calculated his earnings as evidenced as £7,089. The judge set out the following in relation to the sponsor's income:

"12. The respondent did not accept the sponsor's income as she had not been in employment for six months. However paragraph 13(b) of Appendix FM-SE provides that where a person does not have six months of employment at the date of application, the gross annual salary will be calculated as at the date of the application. The sponsor submitted five months of payslips, as she stated that the first payslip covered two months. The total of the five months earnings was £4,289, which when annualised provides a salary of £10,293 which is the salary as claimed by the sponsor. The total of £10,293 and £7,089 is £17,392, which is insufficient to demonstrate earnings of £18,600. I am satisfied that as at the date of the application, insufficient evidence of earnings were submitted to meet the financial requirements.

13. As this is an in-country appeal, it was submitted on behalf of the appellant that the Tribunal could take post decision evidence into account, up to the date of the hearing. The appellant and sponsor submitted bank statements and payslips from January 2014 until November 2014, which indicated that their joint income was in excess of £18,600. However, Appendix FM-SE provides at paragraph D that a decision maker may only consider documents submitted at the time of the application. There is limited provision for consideration of post application documents, as set out in the Appendix and it was not submitted that any of the exceptions applied. I find that the post graduate diploma in business management decision evidence of earnings submitted at the appeal may not be considered as part of the appeal and only documents submitted with the application may be taken into account. On the basis of documents submitted with the application, the appellant does not meet the requirements of the Rules."

10. Application for permission to appeal was made by Mr Karim and he expanded his written application in his submission. He submitted that under Section 85(4) of the Nationality, Immigration and Asylum Act 2002 the judge could consider postdecision evidence and in error confined himself to the evidence submitted with the application. The appeal was an in-country appeal and the judge was obliged to consider the circumstances at the date of the hearing under Section 85(4) of the 2002 Act and this section trumped any evidential requirements of the Rules if there is such prohibition. This was not a points-based appeal and therefore Section 85A of the 2002 Act precluding post decision evidence would not have applied.

11. In his second ground Mr Karim argued that the judge was nonetheless obliged to consider under Article 8 the present circumstances including the fact that the requirements of the Rules were met. This was another error in the decision.

12. It was argued that in his reasoning the judge concluded there were no compelling circumstances (paragraph 14 of the determination) and there were material errors of law in this approach following **MM & Others v SSHD [2012]** EWCA civ 985. It was arguable that the compelling circumstances were not applicable.

13. In any event the appellant met the income threshold as at the date of the appeal hearing was in itself a compelling reason for consideration outside the Rules. The test for removal or relocation outside the Rules under the Strasbourg case law was more modest than the insurmountable obstacles test under EX.1. The judge erred in concluding that there were no insurmountable obstacles to relocation for the following reasons. The judge had not factored in the sponsor's employment, family ties and most importantly her status as a British citizen as well as her private life and the judge had not set out how he applied the insurmountable obstacles test and did not follow the guidance in **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA**. The judge also failed to consider Section 117B of the 2002 Act. The appellant was not in the UK unlawfully.

14. Permission to appeal was granted by First-tier Tribunal Judge Landes who did not find favour with the argument in relation to Section 85(4) but found it was arguable

that the judge should have taken into account the present circumstances when considering Article 8.

Conclusions

15. Paragraph 15 of Appendix FM-SE states that in respect of paragraph 13(b) and 13(d), the provisions in this paragraph also apply:

> "(a) In order to evidence the level of gross annual income required by Appendix FM, the person must meet the requirements in paragraph 13b or 13d(1); and
>
> (b) the person must also meet the level of gross annual income required by Appendix FM on the basis that their income is the total of: (1) the gross income from salaried employment in the UK or overseas and by the person in the twelve months **prior to the date of application**."

16. In this instance the appellant was relying on paragraph 13(b) because the sponsor had been employed by her current employer as at the date of application for less than six months. In accordance with paragraph 15 the appellant must show the gross income *prior* to the date of the application. I did not accept Mr Karim's argument that the date of the application ran up to the date of the hearing (5th January 2015). The date of the decision by the Secretary of State was 5 August 2014. Secondly, the date of an application in connection with immigration is set out at paragraph 34(g) of the Immigration Rules as follows: (1) where the application form is sent by post the date of posting and the Secretary of State recorded that this application was made on 13 June 2014. Even if the date of the application were extended to the date of the decision it was not argued that further information was submitted between the date of the application and the date of decision. There were only four payslips submitted to June 2014.

17. It is clear from paragraph 12 of the decision that the judge assessed income as at that date and found that the total of income was insufficient. I also note that the judge in error annualised the income of the sponsor. This is not in accordance with Paragraph 15 of Appendix FM-SE. This however was to the appellant's advantage.

18. The Rule is clear at paragraph 15 that income must be shown **prior to the date of the application**, that is in this case prior to the date of 13th June 2014 and Section 85(4) of the Nationality, Immigration and Asylum Act 2002 states that on an appeal under Section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision including a matter arising after the date of the decision but this does not mean that this can alter the substance of the Rule as it is set out. The question must be whether the appellant can meet the Immigration Rules. The evidence was not in existence even if it were considered at the date of the hearing that the appellant could meet the Immigration Rules at the date of the application.

19. At [13] the judge stated that Appendix FM-SE provides at paragraph D that a decision maker may only consider documents submitted at the time of the

application and that there was only limited provision for post application documents as set out in the Appendix and it was not submitted that any of the exceptions applied. Even if the judge was incorrect to apply paragraph D as I have indicated above the documents submitted subsequently did not assist the appellant in showing that she had fulfilled the Rules because the Rules are specific that the evidential requirements are needed prior to the date of the application.

20. I therefore find that this challenge to the decision cannot succeed.

21. Secondly, Mr Karim submitted that there was a finding by the judge at [13] in the following terms:

> "the appellant and sponsor submitted bank statements and payslips from January 2014 until November 2014 which indicated that their joint income was in excess of £18,600".

22. The question was then raised as to whether the judge having found that the *income threshold* was met as at the date of the hearing, he was right in considering that there were no compelling circumstances to consider the matter outside the rules.

23. The judge specifically recorded at [14] that it was submitted that the parties had a family life as they had a genuine and subsisting relationship but they had failed to meet the specific requirements with regards to financial matters. The judge went on to consider paragraph EX.1 of Appendix FM in that a person may exceptionally remain in the UK if that person is in a genuine and subsisting relationship with a UK citizen and there are insurmountable obstacles to family life with a partner outside the UK.

24. Insurmountable obstacles are defined at EX.2 of Appendix FM and mean

> "the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner".

25. The judge gave reasons as to why the appellant could not fulfil EX.1 finding that both parties were from Bangladesh and there was no immigration reason why they may not resume married life outside the UK. The judge acknowledged and considered [14] that the sponsor was a British citizen and had family in the UK but her spouse was her next-of-kin and although she may prefer to live near her family in the UK that was not an insurmountable obstacle.

26. The question is whether the judge should have gone on to consider Article 8 outside the Rules and was in error in concluding that there were no compelling circumstances in the light of the appellant's meeting the financial threshold.

27. The two-stage approach has been endorsed more recently by the Court of Appeal in **Singh and Khalid v Secretary of State for the Home Department** [2015] EWCA Civ 74 (at para 64). A proposition also endorsed by the Court of Appeal in **Singh and Khalid** at [64] is that

> "… there is no need to conduct a full separate examination of article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

28. The judge set out that the appellants could not meet the Immigration rules and in his view all the issues had been considered. That is a matter for the judge.

29. In **SS (Congo & Others) [2015] EWCA Civ 387** Lord Justice Richards had the following to say at [29]:

> "It is clear that it cannot be maintained as a general proposition that LTR or LTE outside the Immigration Rules should only be granted in exceptional circumstances. However, in certain specific context a proper application of Article 8 may itself make it clear that the legal test for grant of LTR or LTE outside the Rules should indeed be attested exceptionality. This has now been identified to be the case, on the basis of the constant jurisprudence of the ECtHR itself, in relation to applications for LTR outside the Rules on the basis of family life (where no children are involved) established in the United Kingdom at a time when the presence of one or other of the partners was known to be precarious – see **Nagre**, paragraphs 38 to 43 approved by this court in **MF (Nigeria)** at 41 and 42".

And at [33]

> "In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ".

30. The balancing factors here are on the one hand the appellant's immigration status was precarious when he formed his relationship and made his application to the Home Office but on the other hand, it was argued, as at the date of the hearing which is relevant for the purposes of Article 8, there was a finding made by the judge that the couple had in fact fulfilled the financial requirements. Should the appellant be required to return to Bangladesh he would be unable to return because he would not have the income? The point was made in this case that should the appellant be returned to his home country he would not be able to fulfil the requirements of the Immigration rules because the appellant and sponsor may not be able to demonstrate sufficient income and therefore the there was a need to conduct a full and separate examination of the Article 8 outside the rules. At the date of the hearing the sponsor and appellant could show that they met the required sum.

31. The test to my mind is set out clearly in **R (on the application of Chen v Secretary of State for the Home Department) Appendix FM Chikwamba – temporary separation proportionality) IJR [2015] UKUT 00189**.

32. At [39]

> "If it is shown by an individual (the burden of proof being upon him or her) that an application for entry clearance from abroad **would** (my emphasis) be granted and that there would be a significant interference with family life by temporary removal the weight to be accorded to the form requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his parents while entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was precarious. In other words, in the former case it would be easier to show the individual circumstances fall within the minority envisaged by the House of Lords in **Huang** or the exceptions referred to in judgments of the ECHR and in the latter case. However it all depends on the facts.
>
> [40] In Chikwamba, it was accepted that an application for entry clearance would succeed and that went in the claimant's favour".

33. Mr Karim submitted that at the date of the hearing it would appear that the appellant had not fallen foul of the suitability requirements, he has not remained in the UK unlawfully albeit his leave was curtailed.

34. For the reasons given below, I do not, however, accept that the judge was finding without more that at the date of the hearing the appellant could fulfil the financial requirements of the Immigration Rules. I take into account it was found that there were no insurmountable obstacles to the return of the appellant's partner and sponsor. The judge also factored in circumstances of this particular case that the appellant's sponsor has extensive family here.

35. This is not an entry clearance case as was the situation in **SS Congo v SSHD [2015] EWCA Civ 317** but nonetheless SS Congo identifies the approach taken to both LTE and LTR applications. **SS Congo** acknowledges that for the general run of cases the rules reflected a fair balance of interests under Article 8 and the rules provided significant evidence of the relevant public interest which needed to be taken into account.

> 'Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" ([47])'.

36. **SS Congo v SSHD [2015] EWCA Civ 317** refers to the safeguarding role and need for consistency within the rules and identifies that the Immigration Rules incorporate a difference between Leave to Enter and Leave to Remain applications through the use of EX.1 and EX.2, which in this case the judge addressed, and refers to the compelling circumstances outside the rules which the judge did not find. If the rules are not met then a further application should be made. The court sets out the approach as follows:

> 'In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons **with a (non-precarious)** family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave'[40]….
>
> 'In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with'[51]….
>
> 'Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8:' [53]…
>
> 'The Secretary of State remains entitled to enforce the Rules in the usual way, to say that the Rules have not been satisfied and that the applicant should apply again when the circumstances have indeed changed. This reflects a fair balance between the interests of the individual and the public interest. The Secretary of State is not required to take a speculative risk as to whether the requirements in the Rules will in fact be satisfied in the future when deciding what to do. Generally, it is fair that the applicant should wait until the circumstances have changed and the requirements in the Rules are satisfied and then apply, rather than attempting to jump the queue by asking for preferential treatment outside the Rules in advance'[57]

37. The judge stated that

> 'the appellant and sponsor submitted bank statements and payslips from January 2014 until November 2014 which indicted that their joint income was in excess of £18,600. There are specific evidential requirements to be assessed and the judge throughout the determination made it clear that he was concentrating on the documentation relevant at the date of application'.[13]

38. First, I am not persuaded that the judge specifically found that the financial requirements were met for the purposes of the immigration rules at the date of the hearing. He merely stated that the '*appellant and sponsor submitted bank statements and payslips from January 2014 until November 2014 which* ***indicated*** *that their joint income*

was in excess of the requirements'. Indeed at [14] the judge confirmed that '*the respondent has set out specific requirements with regard to financial matters and the parties have failed to meet them'*. Secondly even if it were, this effectively argues that the appellants do not need to meet the Immigration Rules at the date of the application and can merely wait and ensure that the rules are met by the date of the hearing. That would, in effect, circumvent the requirements of the rules. Emphasis has been placed in the authorities in relation to the financial requirements of the need for predictability and consistency. The approach taken by **SS Congo** is that the requirements of the Immigration Rules at Appendix FM are lawful and unless there is a pressing reason not taken into account that the Rules reflect a fair balance in relation to Article 8. If the appellant cannot meet the Rules then they need to make a further application. In substance, even without applying the test of a compelling circumstance, the judge applied EX.1 and found all the relevant factors had been taken into account.

39. Further reference was made to the failure of the judge to cite Section 117B Nationality, Immigration and Asylum Act 2002 and find that the appellant is not a burden on the UK taxpayer and would appear to be able to speak English further to Section 117B(3). Section 117B(4)(b) confirms that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. The appellant was not in the UK unlawfully. The fact that the appellant was here lawfully does not in this instance necessarily positively assist the appellant **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC).

40. **Sanade and others (British children - Zambrano - Dereci)** [2012] UKUT 00048(IAC) refers to the *Case C-34/09 Ruiz Zambrano* which '*makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so'*. However the judge was fully aware that the spouse was a British citizen and fully aware of her employment and set out the facts relating thereto. There is no *requirement* that the spouse must leave the United Kingdom. The parties were aware when they initiated the relationship that the leave of the first appellant was precarious. It is open to the appellant to make a further application for leave to return when circumstances change.

41. As **SS Congo** notes

> "The question of the right of the British citizen to live in the UK with non EEA partners who do not have the right of abode in the UK was considered in MM Lebanon. As per Abdulaziz Article 8 imposes no general obligation on a member state to facilitate the choice made by a married couple to reside in it and Article 8 is not an absolute right'[138]"

42. The First-tier Tribunal made no error of law and his decision is set aside. We remake the decision and dismiss the appeal.

43. No anonymity direction is made.

Signed Date 26th June 2015

Deputy Upper Tribunal Judge Rimington