Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/04789/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly **Decision Promulgated**
On 6 May 2015 **On 10 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between
MUSAMMAT RABEYA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Hussain of Maya Solicitors
For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge

Kempton promulgated on 27 January 2015 which allowed the Appellant's appeal under the Immigration Rules.

Background

3. The Appellant was born on 26 February 1995 and is a national of Bangladesh.

4. The Appellant applied for entry clearance to join her husband Mohamed Runu Miah.

5. On 13 March 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:

   (a) The letter conceded that the sponsor was exempted from meeting the requirements of Paragraph E-ECP.3.1 as they are in receipt of DLA but they must however meet the requirements of E-ECP.3.3 and show that the Sponsor is able to maintain and accommodate them adequately in the United Kingdom without recourse to public funds.

   (b) The sponsor is in receipt of DLA of £74 per week which is less that the £112.55 that a couple require after accommodation costs per week

   (c) The bank statement from the sponsor's mother does not demonstrate that she is genuinely in a position to meet the costs of having the Appellant and his spouse living there.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Kempton ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :

   (a) Given that the sponsor was in receipt of DLA the financial requirements of Appendix FM did not apply.

   (b) The sponsor lives in a house wholly owned by his mother which has no mortgage.

   (c) The sponsor receives £76.00 DLA per week and a couple on income support would receive £111.45.

   (d) The sponsor has no costs arising out of living with his mother and can do as he pleases with his DLA.

   (e) The arrival of the Appellant would make little financial difference to the costs of running the home.

   (f) The Appellant can be adequately accommodated and maintained although the sponsor's income is below the income support threshold.

7. Grounds of appeal were lodged on the basis that it was not open to the Judge to find that the Appellant and his wife could adequately maintain and accommodate themselves without recourse to public funds when their income was below income support level as this failed to take into account the case of KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065.

8. On 16 March 2015 First-tier Tribunal Judge Astle gave permission to appeal stating that the Judge fell into error in failing to follow KA.

9. At the hearing I heard submissions from Ms Johnstone on behalf of the Respondent that :

   (a) She relied on the grounds of appeal.

   (b) The Judge was not entitled to take into account the availability of third part support under Appendix FM.

   (c) The Judge was in error failing to take into account: the level of income support available to a couple was the minimum level of income.

   (d) There was no housing report.

10. On behalf of the Appellant Mrs Hussain submitted that :

   (a) There had been no issue raised in the hearing in relation to the adequacy of the accommodation.

   (b) There were no costs arising out of the accommodation as the house was owned outright.

   (c) She conceded that the Judge was in error in stating that a level below income support level was sufficient but it was not material because the shortfall could be met by a job offer made to the Appellant: she would be able to work for 14 hours a week at the national minimum wage.

11. In reply Ms Johnstone on behalf of the submitted that:

   (a) The evidence of the job offer for the Appellant was not before the ECO.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

13. This was an application for entry clearance as a spouse under Appendix FM. It was accepted by the Respondent in the refusal letter that the Appellant's sponsor was in receipt of Disability Living Allowance and as a result was not required to meet the minimum income threshold set out in E-ECP.3.1. The Appellant was however required to demonstrate by reference to paragraph E-ECP.3.3 that their sponsor their partner was able to maintain and accommodate themselves, the applicant and any dependants **adequately** in the UK without recourse to public funds.

14. It is argued that the Judge erred in her assessment of adequacy because she found that the sponsor was in receipt of a sum that was less than that which a couple would receive income support. It is suggested that the Judge erred in failing to take into account the guidance given in KA as to adequacy. I am satisfied that the Judge erred however what was said in KA has now been incorporated into the Rules in that there is a definition of adequacy in the Interpretation section of the rules at paragraph 6:

> "'adequate' and 'adequately' in relation to a maintenance and accommodation requirement shall mean that, after income tax, national insurance contributions and

> housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support."

15. I am satisfied that the acceptance by the Judge that a sum less than the level of income support for a couple was a material error of law. Mrs Hussain suggests that the shortfall could be made up by the job offer available to the Appellant's spouse. This evidence however was not before the decision maker and the Judge was required to consider the circumstances at the date of the decsion

16. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set to be remade.

17. I had invited Mrs Hussain and Ms Johhnstone to make any additional submissions they wished in relation either to the Rules or Article 8 and I would take them into account.

Remaking the Decision.

18. The Appellant is a national of Bangladesh who made an application for entry clearance to the United Kingdom to join her husband who is in receipt of DLA.

19. The Appellant is required to show that in relation to a maintenance and that, after income tax, national insurance contributions and housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support. The Appellant and his wife would have no housing costs arising from living with his parents but I am satisfied that the total he receives in DLA payments per week is £76.00 which is less than the relevant income support of £111.45 per week. This does not meet the definition in the Rules of adequacy and therefore the Appellant cannot succeed under the Rules.

20. In relation to claims under Article 8 these are addressed by Appendix FM and paragraph 276ADE of the Rules and the Secretary of State's Guidance. If an applicant does not meet the criteria set out in the Rules then guidance issued by the Secretary of State in the form of instructions provides in effect, that leave to remain outside the rules could be granted in the exercise of residual discretion in 'exceptional circumstances' which are defined in the guidance and 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.

21. It is now generally accepted that the new IRs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

> "30. … if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

22. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

> "64. … 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."

23. More recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragragh 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. "

24. I am obliged if making a 'free standing' Article 8 assessment to take into account Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) which sets out the public interest considerations that I must have regard to in determining proportionality.

25. I have considered whether in the circumstances of this case all of the issues have been addressed in the consideration under the Rules or whether compelling circumstances exist to justify consideration of the case outside the Rules under Article 8.

26. Mrs Hussain argued that the Appellant's sponsor is a United Kingdom citizen who has significant health problems that have impacted on his ability to work and resulted in him being awarded DLA as a result of hearing and speech loss. He said the only available work for him would have been with his brother but he had thought it was better for his wife to work. She conceded that he would be able to work for his brother and thereby meet the requirements of the Rules but this was an unnecessary additional burden to impose on him and his wife in terms of delay and costs.

27. The fact that the Appellant's sponsor is a United Kingdom citizen is a requirement of the Rules not a compelling circumstance that automatically entitles him to bring a spouse to the United Kingdom regardless of whether he meets the requirements of the Rules. While at the time of this application Mrs Hussain concedes that the Appellant was not working and was in receipt of DLA it is clear that this was a matter of choice and she conceded that he could in fact work and supplement his state benefits to meet the requirement of adequacy under the Rules. The fact that the Appellant could meet the Rules but would prefer not to have to is not, in my view a compelling reason to consider this appeal under Article 8 outside the Rules. The financial requirements of the Rules have been upheld by the higher courts .

28. If I were wrong about this and the circumstances justified looking at the case outside the Rules I am satisfied that if I applied the questions set out in **Razgar [2004] UKHL**

27 and accepted that the Appellant and his spouse had a right to respect for their family life and the refusal of entry clearance interfered with that right; the decision would be in accordance with the law; the decision would be necessary in the interests of the economic well being of the through the maintenance of the requirements of a policy of immigration control.

29. The provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 require me to take into account in assessing the public interest that the maintenance of effective immigration controls is in the public interest: thus if the Appellant can meet the Rules she should be required to do so. In relation to requiring that they are adequately maintained it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent.

30. The issue would come down to one of proportionality. I have considered whether in fact the Appellant and her husband could reasonably enjoy family life in Bangladesh. Mrs Hussain suggests they could not as the sponsor could not find employment or family support there. I do not accept that these are persuasive arguments: he does not currently work in the United Kingdom and while he would lose the support of his immediate family he would have the support of his wife's family in Bangladesh. Nevertheless that fact is that is not what is going to happen because Mrs Hussain concedes that the sponsor could in fact find work in the United Kingdom with his brother and meet the requirements of the Rules. The Appellant and her spouse knew when they married that she could not come to the United Kingdom unless she met the requirements of the Rules. Paragraphs 37-40 in SS Congo reminds me that the family life was therefore established against this precarious background, 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.

31. In determining whether the refusal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellants life in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the Appellants removal.

Decision

32. **I set aside the decision of the First-tier Tribunal as containing a material error of law. I substitute the following decision:**

33. **The appeal is dismissed under the Immigration Rules.**

34. **This appeal is also dismissed on human rights grounds (Article 8)**

Signed Date 10.5.2015

Deputy Upper Tribunal Judge Birrell