Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01641/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
17 December 2015	**31 March 2016**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[M C]

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer.
For the Respondent: Mr T Chowdhury, of Kingdom Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal. The respondent, whom we shall call "the claimant", is a national of Bangladesh now aged 18, having been born on 13 April 1997. Following a successful appeal he arrived in the United Kingdom on a visitor's

visa valid for six months on 28 March 2010 and upon its expiry remained without leave. He applied for further leave to remain on 31 October 2011, 28 December 2011 and 6 July 2012: all those applications were refused. On 10 February 2014 he applied for asylum. That claim was refused on 6 January 2015 and the claimant was served with a decision to remove him under s 10 of the 1999 Act, and with a notice under s 120 requiring him to state any other reasons that he might have for remaining in the United Kingdom. The claimant responded to that notice under cover of a letter from his solicitors dated 21 February 2014, repeating the asylum grounds in summary and relying in addition on grounds under article 8 on the basis that the claimant was well settled with his family in the United Kingdom and doing well at school. In a ceremony divided between 8 April 2015 and 8 June 2015 the claimant married a British citizen. On 23 June 2015 his appeal was heard by Judge Eames in the First-tier Tribunal.

2. At the beginning of the hearing Mr Chowdhury of Kingdom Solicitors, who has represented the claimant throughout, wholly withdrew the asylum claim and indicated that, under the section 120 procedure, he now asserted solely that the claimant was entitled under the Immigration Rules (in particular Appendix FM) to leave to remain in the United Kingdom. The presenting officer objected, saying that the claimant was attempting to evade the application fee and the checks that the Home Office would normally run on the settlement application under the Rules. She did, however, indicate that if the appeal were to proceed on this basis she would be able to deal with it. The judge allowed the amendment of the grounds, apparently on the basis that "human rights arguments in general can be assumed to be in play in almost any appeal", and because the respondent now had notice of the issue. There was an adjournment to enable the presenting officer to peruse any new documents. It is not said that the procedure adopted by the judge was unfair to the Secretary of State.

3. Further, it is clear that the claimant was entitled to act as he did. It was the Secretary of State's decision to serve a Section 120 Notice, which permitted the claimant to raise issues entirely different from his asylum and (by virtue of s 85(2) and (3) and 86(2)(b) required the judge to consider and determine those issues. Thus, despite the Presenting Officer's expressed disquiet, no procedural issue arises in this appeal at either level.

4. The judge heard evidence and submissions from both parties. He directed his attention to the Immigration Rules, on which alone the claimant now relied. The judge concluded that the claimant met the requirements of the relevant rules, and so allowed the appeal.

5. In this appeal to the Upper Tribunal, the Secretary of State challenges the judge's conclusions. In the course of his submissions Mr Richards described the judge's conclusion as irrational. Eight specific points are taken in the grounds of appeal; but in fact there are other difficulties in the judge's analysis of the relevant rules and his conclusions on them.

6. The relevant rules are in Appendix FM to the Statement of Changes in Immigration Rules, HC 395 (as amended) and are as follows:

> "R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are –
> (a) the applicant and their partner must be in the UK;
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
> (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
> (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
> (d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
> (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and
> (iii) paragraph EX.1. applies."
>
> "GEN.1.9. In this Appendix:
> (a) the requirement to make a valid application will not apply when the Article 8 claim is raised:
> (i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;
> (ii) where a migrant is in immigration detention… or;
> (iii) in an appeal (subject to the consent of the Secretary of State where applicable); and
> (b) where an application or claim raising Article 8 is made in any of the circumstances specified in paragraph GEN.1.9.(a)… the requirements of paragraphs R-LTRP.1.1.(c) and R-LTRPT.1.1.(c) are not met. "

7. In this appeal it is not said that the claimant fell for refusal under the suitability requirements in Section S-LTR. The relationship and status requirements mentioned in paragraph R-LTRP.1.1(d)(ii) are as follows:

> "ELTRP.1.2. The applicant's partner must be –
> (a) a British Citizen in the UK;
> (b) present and settle in the UK; or
> (c) in the UK with refugee leave or as a person with humanitarian protection.
> E-LTRP.1.3. The applicant must be aged 18 or over at the date of application.
> E-LTRP.1.4. The partner must be aged 18 or over at the date of application.
> E-LTRP.1.5. The applicant and their partner must not be within the prohibited degree of relationship.
> E-LTRP.1.6. The applicant and their partner must have met in person.
> E-LTRP.1.7. The relationship between the applicant and their partner must be genuine and subsisting.
> E-LTRP.1.8. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-LTRP.1.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.
E-LTRP.1.10. The applicant and their partner must intend to live together permanently in the UK and, in any application for further leave to remain as a partner (except where the applicant is in the UK as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so.
E-LTRP.1.11. If the applicant is in the UK with leave as a fiancé(e) or proposed civil partner and the marriage or civil partnership did not take place during that period of leave, there must be good reason why and evidence that it will take place within the next 6 months.
E-LTRP.1.12. The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner.

E-LTRP.2.1. The applicant must not be in the UK –
(a) as a visitor; or
(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner …."

8. Section EX, so far as relevant is as follows:

"EX.1. This paragraph applies if
(a) … 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."

9. The judge's conclusion was that the claimant met the relevant requirements of R-LTRP.1.1(a) and (b); that he met the requirements of those paragraphs of E-LTRP.1.2-1.12 and E-LTRP.2.1, as required by R-LTRP.1.1(d)(ii), and that paragraph EX.1. applied to him. In these circumstances the judge concluded that the claimant was entitled to leave to remain under Section R-LTRP of Appendix FM. The Secretary of State's grounds of appeal are directed to the conclusions in relation to paragraph EX.1., but before we get there we should draw attention to our concerns in relation to the other requirements of the Rules. We work through them in the order in which they appear in the Rules. So far as concerns R-LTRP.1.1(a) there is no problem: the claimant and his wife are in the United Kingdom. So far as concerns the requirement

in sub-paragraph (b) that the claimant "must have made a valid application", the judge said this at [34]:

> "I find they have made a valid application. Noting the terms of paragraph GEN.1.9, I deem the amendment of their present grounds of appeal to have that effect. So R-LTRP.1.1(a) and (b) are satisfied."

10. We do not think that is quite right: because of the terms of GEN.1.9, the position was that, as the article 8 claim was raised "in an appeal", the requirement to have made an application did not apply. The judge was right in finding that sub-paragraph (b) was not an obstacle to the claimant, but for the wrong reason. This difficulty has a legacy, however, in the judge's treatment of E-L-TRP1.3 and 1.4. In relation to E-LTRP.1.3 and 1.4, the judge said this at [36]:

> "E-LTRP.1.3: I note that the appellant made his original asylum claim whilst under 18. His present claim, as now amended, is effectively a human rights claim as of the date on which the s120 amendment application is allowed - that is, the date of the hearing, which is when I allow the application. At the date of hearing, the appellant is aged 18.
>
> E-LTRP.1.4: his wife is over 18."

11. That reasoning poses some difficulties. As we have pointed out, the article 8 claim was made in the s 120 notice, that is to say on 21 February 2014. At that date the claimant was under 18. As we have also pointed out, the judge did not have a role in allowing that claim to be made: the human rights claim (including one governed by the Rules) having been made in the course of the s 120 procedure, the judge was obliged to determine it. We do not think that it can be right to say that in the present case the article 8 claim was made at a time when the claimant was over 18. What is far from clear is whether paragraphs E-LTRP.1.3 and E-LTRP.1.4 apply where paragraph GEN.1.9 applies. On the one hand it is clear from the latter provision that, in a case such as the present, no application is necessary; on the other hand it is a general provision of Appendix FM that applicants for entry clearance or leave to remain as partners must be, and their partners must be, over the age of 18. Where a formal application is made it will clearly fail if either the applicant or the applicant's partner is under the age of 18; and their attaining the age or ages of 18 between application and decision (or decision on appeal) would not help them, because of the wording of the Rule ("at the date of the application"). That being the general principle for ordinary applications, we think it is extremely unlikely that it is intended not to apply to cases where no application is necessary. Having not heard full argument on the issue we approach it with caution, but it appears to us that where paragraph GEN.1.9 applies, the references to "the date of the application" must be taken to be references to the date of the claim. If that is right, the claimant did not meet the requirements of paragraph E-LTRP.1.3. The applicant's wife is aged 27, and so was aged 18 or over at all material times.

12. No issue arises on the judge's treatment of the other parts of E-LTRP.1.2-1.12. He regarded them all as having been met and having reached that conclusion he wrote at

[37] that "R-LTRP.1.1(d)(ii) is therefore met". But the last-mentioned provision requires also that the provisions of E-LTRP.2.1 be met. The judge does not deal with this at all. This raises another point of interpretation which is not at all easy. Is (or was) the claimant in the UK "as a visitor"? He was last admitted as a visitor, but his leave has expired. He has no "valid leave" of any period, so sub-paragraph (b) does not apply to him. E-LTRP.2.2(b) requires an applicant not to be in the Untied Kingdom in breach of immigration laws, but by its own terms and those of R-LTR.1.1(d)(ii), that is not a provision which applies when paragraph EX.1 does. This is another issue on which we heard no argument, because it is not raised by the Secretary of State as a ground of appeal; because of the view which we have reached overall on the appeal, we do not need to make a decision on it. We do not, however, think it was open to the judge simply to ignore this provision of the Rules, as he did.

13. In particular for the reasons we have given in relation to paragraph E-LTRP.1.3, we doubt whether the judge was right in thinking that only paragraph EX.1 was in issue. It was, however, only his conclusions on the latter paragraph that were specifically challenged by the Secretary of State. We need to set them out in full. We have replaced the judge's bullet points with numbers, to make reference easier:

> "38. In order to succeed the appellant must show that paragraph EX.1 is met therefore. I have had regard to the arguments about the degree of difficulty that the appellant and his wife might face if they went to Bangladesh to try to continue their family life there together. Factors which tend to suggest difficulty are these:
>
> (i) [A] is British born and raised. She has not had experience of living in Bangladesh. She describes it as a "3rd world country".
>
> (ii) She has no family at all in Bangladesh. Her only family members and relatives are in the UK.
>
> (iii) Moving there would uproot her from her family, social life and successful career. That would, I find, be a significant difficulty. It could not readily be overcome.
>
> (iv) Her employment prospects there are unknown.
>
> (v) Bengali is only her second language; she is not fluent.
>
> (vi) The appellant is part-way through an education which, if completed, would result in genuinely useful qualifications and a likely boost to his employability; if interrupted only partly completed, these studies may prove to be no use.
>
> (vii) All the appellant's siblings are in the UK.
>
> (viii) The appellant fears for his life because of his brother's politics; there have been threats, he says. Without necessarily finding that he has proven this part of his case adequately to fully ground – on its own – an asylum or

humanitarian protection claim, I do nevertheless find that there is sufficient factual merit in this claim for it to count as a credible factor in the assessment of significant difficulty on return. It does constitute an obstacle that could not be overcome or would entail very serious hardship for the appellant, in my view.

(ix) The appellant's wife's father's property in Bangladesh (see below) whilst ostensibly available would not be available in a way that would be acceptable to the family traditions subscribed to by the appellant's wife and her family.

(x) It is not known whether the appellant's wife would gain leave to remain in Bangladesh.

39. Militating against a conclusion that there are insurmountable obstacles are the following factors:

(i) The appellant's mother is in Bangladesh.

(ii) His wife's father owns a house which, even if not ideal, sounds as if it is habitable.

(iii) The appellant has lived through all his childhood in Bangladesh. He is fluent in Bengali.

(iv) The appellant's wife is from a Bangladeshi background in the UK. She may not have lived there but she has visited; and she may have some understanding of the culture there.

(v) The appellant's wife is free to enter Bangladesh with her open visa.

40. Assessing those factors in the round, and noting in particular the requirement of "very serious hardship" in EX.2, I find on balance that the overall matrix of obstacles to family life in Bangladesh are indeed insurmountable. They are principally so in respect of the appellant's wife. It is she who would face the gravest difficulties, amongst which the loss of her family including her parents, her social milieu and her valued job count highly in my view. In reaching that conclusion I stress that the risk the appellant alleges is not central to my analysis; it is a factor which contributes to an overall hardship but is not the linchpin of his case."

14. We heard submissions from Mr Richards on these issues. Mr Chowdhury did not provide any substantive reply to any of the challenges, save to submit that the judge's overall conclusion was open to him on the evidence. It appears to us that the Secretary of State's challenges are, for the most part, well-founded. It is convenient to begin with [38](iv) and (x). At [31], the judge had reminded himself that it was for the claimant to establish, on the balance of probabilities, that he met the requirements of the Rules. The conclusions in the two sub-paragraphs mentioned, however, are based purely on speculation. Mr Chowdhury confirmed to us at the hearing that there was no evidence in relation to either of them. In these circumstances it cannot

be right for the judge to take them into account. They simply fall out of the equation. The same applies to the second part of [38](vi); and, so far as the claimant's being "part-way through an education" is concerned, there is no evidence that he cannot complete his education in Bangladesh. We do not know why the judge took into account [38](vii). There was no evidence that there is any dependence between the claimant and his siblings, or that he would lose touch with them entirely if he lived in Bangladesh. It is certainly difficult to see how the fact that one's siblings are in another country mean that family life with one's spouse suffers difficulties.

15. So far as concerns [38](viii), the position is that the claimant withdrew his asylum claim. That had both a substantive and a procedural consequence. The first is that the Secretary of State's refusal of the asylum claim is the last determination of it. The procedural consequence is that, as the grounds of appeal point out, the Secretary of State did not cross-examine the claimant or any of the other witnesses about it. The Secretary of State's conclusion on the asylum claim was that it was not made out, even to the applicable lower standard, and the claimant did not challenge that conclusion before the judge. Substantively, therefore, it is extremely difficult to see how the judge could conclude that there was "sufficient factual merit in the claim for it to count as a credible factor in the assessment of significant difficulty on return", and as constituting "an obstacle that could not be overcome or would entail very serious hardship for the appellant". The judge was taking into account matters which the claimant has not only failed to prove to the lower standard but has not sought to prove. In our judgement, [38](viii) is therefore also purely speculative.

16. Turning then to the factors relating specifically to the claimant's spouse, it is right to say that she is "British born and raised", but she has visited Bangladesh. Her description of it noted in [38](i) does not appear to have any impact on whether there would be any serious hardship in her living with her husband there. It is right to say, as noted in [38](ii) that her family is all in the United Kingdom; but she is an educated woman, aged 27 and in employment; if she lives in Bangladesh she will still be able to be in contact with her family and will no doubt be able to visit them in the United Kingdom from time to time; again it is difficult to see that having family members only in another country would entail very serious hardship in living with the claimant in Bangladesh. Moving to Bangladesh would indeed "uproot her"; but as a wife she has already left her own family to join her husband's; and there were no particular features in the evidence suggesting that her social life was one a disruption of which would cause her "very significant difficulties". So far as her employment is concerned, we have already made our comments on [38](iv). The judge says at [38](iii) that (apparently) the combination of the loss of family, social life and career would be "a significant difficulty" which "could not readily be overcome". That is a substantially more relaxed test than imposed by paragraph EX.2. So far as concerns language, the statement at [38](v) is correct according to the evidence; but she speaks Bengali and so far as her life in Bangladesh with her husband is concerned, the position is that they have both English and Bengali in common and there is no reason for supposing that her linguistic skills would prevent her from conducting ordinary life in Bangladesh.

17. The evidence in relation to the house was set out by the judge at [16]:

> "Her father had a house there in Sylhet but she did not know the address. She did not know whether this was close to where her husband had lived. The only people living in the house were some maids and servants looking after the building and the crops there. It was not a house that she and her husband would be able to live in, not least because in their culture a daughter would not live in her father's house. "

18. If the cultural assertion be accepted, the conclusion to be drawn is that the claimant's wife's father has unused residential property and agricultural land, and sufficient funds to maintain servants to look after them. There is no evidence that that resource would not be available to the claimant and his wife, if necessary in another form.

19. Thus, each one of the factors taken into account as meeting the requirements of paragraph EX.2 is either a factor which, for lack of evidence, should not have been taken into account, or a factor which cannot properly establish the requirements of that paragraph, or a factor which tends to point in the opposite direction. Our conclusion is that the judge's decision was not properly based on the evidence before him, and was one which he was not entitled to come to.

20. As we see it, the relevant facts are as follows. The claimant is a man over 18, educated to a certain level in this country, but brought up in Bangladesh, where his mother still is. The appellant's wife is 27 and well educated; she has no ties to family in this country which go further than ordinary family affection. She has chosen to throw in her lot with the claimant. Her father is a man of substance who owns property in Bangladesh and it is not said that the claimant and his wife will not have anywhere to live. There is no evidence that either of them will not be able to obtain employment; they both speak both English and Bengali, the latter to a more limited extent in her case. They are both free to enter Bangladesh. If they do go to Bangladesh together, the social life of both of them will no doubt suffer interruption and they will be further from their UK relatives than they have been recently. Taking these factors as a whole, it does not appear to us that they come anywhere near establishing "very significant difficulties" which will be faced by either of them continuing their family life outside the UK and "which could not be overcome or would entail very serious hardship" for either of them. On the evidence, as it appears to us, this is an assessment which, on the evidence before the judge, could only properly go one way.

21. As indicated earlier in this determination, we have some concern whether in any event the applicant met the requirements of paragraph R-LTRP.1.1(d)(ii); but, in our judgment, the requirements of paragraph R-LTRP1.1(d)(iii) did not apply to him in any event. For completeness we should add that the alternative of paragraph R-LTRP.1.1(c) cannot avail the claimant. It is ruled out by GEN.1.9(b): the claimant relies on GEN.1.9(iii) and in those circumstances GEN.1.9(b) provides that the requirements of R-LTRP.1.1.(c) "are not met". In any event, the claimant's partner's

income is below (albeit only just below) that required by paragraph E-ECP.3.1(a). The claimant failed to show that he met the requirements of the Immigration Rules.

22. No separate claim is raised outside the Rules, but the facts which we have set out demonstrate that there is no possible basis upon which the Secretary of State or the judge ought to have reached the view that the situation of the claimant and his partner was such that they have an article 8 right to remain in the United Kingdom despite failing to meet the requirements of the Rules.

23. For the foregoing reasons we find that Judge Eames' decision erred in law. We set it aside, and we substitute a determination dismissing the claimant's appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 7 March 2016