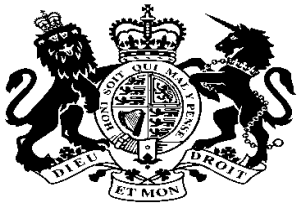

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/02510/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision & Reasons Promulgated**
On 1 February 2016	**On 12 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

RASNA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Timson counsel instructed by 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 Simpson promulgated on 10 March 2015 which allowed the Appellant's appeal under Article 8 against the decision of the Respondent to refuse her application for entry clearance as a family visitor for 8 weeks

Background

3. The Appellant was born on 10 June 1979 and is a national of Bangladesh.
4. On 27 March 2014 the Appellant applied for entry clearance to visit her husband, the Sponsor Muhammad Ajmat Ullah and their son who both live in the UK and are British citizens.
5. On 9 April 2014 an Entry Clearance Officer refused the Appellant's application. The refusal letter gave a number of reasons:
   (a) There was no evidence of the Appellants financial circumstances in Bangladesh.
   (b) The Appellant claimed to be financially reliant on her sponsor but there was no evidence of any property or assets in Bangladesh.
   (c) The Appellant's spouse claimed he would pay for the visit but his bank account at the Halifax showed a balance of 41 pence and at the TSB £810.94 which would not be sufficient to maintain the Appellant for 8 weeks.
   (d) The refusal was therefore under paragraph 41 (i) (ii) (vi) and (vii) of the Rules.
   (e) The letter set out that there was a limited right of appeal.

6. There was a review dated 26 August 2014 by the Entry Clearance Manager after an appeal was lodged.

   (a)The ECM did not accept that there was an interference with the Appellant's right to family life.

   (b) He notes that the Sponsor and their child having lived with her in Bangladesh made a choice to go and live in the UK and separate the family.

   (c) There was no evidence that the Sponsor and his child could not visit her in Bangladesh.

   (d) While it was asserted that the Sponsor's claim for Disability Living Allowance would be resolved by June 2014 and the Appellant could then apply for settlement there was no evidence that such an application had been made.

(e)The decision to refuse the application was proportionate to the legitimate aim of immigration control.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Simpson ("the Judge") allowed the appeal against the Respondent's decision under Article 8. The Judge:
   (a) She found that the Sponsor was 82 years old and in extremely poor health.
   (b) The sponsor was the primary carer for the couple's 11 year old child.
   (c) She found in the light of the claim for DLA by the sponsor the Appellants claim for entry clearance under the partner and parent route was likely to be successful as all matters appeared to be in place.
   (d) The Appellant's child had not seen his mother for some years and was being cared for by an elderly parent.
   (e) She found that the Appellant would not remain in the UK illegally but would return to make a spouse application and therefore refusal of entry clearance in all the circumstances was disproportionate.
   (f) The Judge found that in this case there were strong compassionate circumstances why she would allow the appeal under Article 8.
8. Grounds of appeal were lodged arguing that the Judge had failed to give adequate reasons for finding that the decision was disproportionate; she did not address section 117B of the Nationality Immigration and Asylum Act 2002; that on the evidence before her it was not open to the Judge to find that the Appellants settlement application would succeed given, for example, there was no evidence as to her English language ability; there was insufficient reasons given as to why it was in the child's best interests for her to come to the UK.
9. On 7 May 2015 First-tier Tribunal Judge Fisher gave permission to appeal.

Submissions

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

    (a) There was no restriction on the grounds.

    (b) There had to be an assessment of whether family life exists at all.

(c) She relied the cases of Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) and Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC)

(d) The caselaw was clear had to be an assessment of whether the Appellant would meet the requirements of the Rules as that was relevant to the assessment of proportionality. It was not clear that the Appellant would meet the language requirements or the financial requirements.

(e) There was no consideration of section 117B.

(f) If the intention was to make an application for settlement in the proper way why had there been no application by 9 April 2014. The remedy was to make a settlement application.

11. On behalf of the Appellant Mr Timson submitted that:

(a) The grounds were limited in that the Judge had made clear that family life existed and in granting permission Judge Fisher only granted permission in relation to section 117B and proportionality.

(b) He submitted that the failure to refer to section 117B made no material difference: the fact that she did or did not speak English was irrelevant as she was a visitor and the Judge specifically dealt with the issue of return.

12. In reply Ms Johnstone on behalf of the Respondent submitted:

(a) There was no assessment of maintenance at the time of the decision

Legal Framework

13. In Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC) it was held that (i) The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow.

14. In Kaur (visit appeals; Article 8) [2015] UKUT 487 (IAC) it was stated that in visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of paragraph 41 of the immigration rules. The restriction in visitor cases of grounds of appeal to human rights does not mean that judges are relieved of their ordinary duties of fact-finding or that they must approach these in a qualitatively different way. Where relevant to the Article 8 assessment, disputes as to the facts must be resolved by taking into account the evidence on both sides: see Adjei at [10] bearing in mind that the burden of proof rests on the appellant. Unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of LTE [Leave to Enter] outside the rules": (see SS (Congo) [2015] EWCA Civ 387 at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.
15. While the right of appeal is therefore in this case limited to human rights it is clear that the provisions of paragraph 41 of the Rules are to be considered and in this case those are:
16. The requirements of Paragraph 41 that are put in issue by the Respondent are as follows:

"*The requirements to be met by a person seeking leave to enter the United Kingdom as a general visitor are that he:*

(i) is genuinely seeking entry as a general visitor for a limited period as stated by him, not exceeding 6 months; and

(ii) intends to leave the United Kingdom at the end of the period of the visit as stated by him; and

(vi) will maintain and accommodate himself and any dependants adequately out of resources available to him without recourse to public funds or taking employment; or

will, with any dependants, be maintained and accommodated adequately by relatives or friends; and

(vii) can meet the cost of the return or onward journey;"

17. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

Finding on Material Error

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

19. This was an appeal against a refusal of entry clearance made by the Appellant on 27 March 2014 and refused in a notice dated 9 April 2014 and that decision was upheld by the ECO in a review dated 26 August 2014.

20. Section 52 of the Crime and Courts Act 2013 amended s88A of the 2002 Act so as to remove the right of appeal for persons visiting specified family members. Although they are still able to bring an appeal on the residual grounds in s 84(1) (b) and (c) of the 2002 Act, namely on human rights and race relations grounds. This limited right of appeal was recognised by the Judge.

21. The first challenge set out in the grounds of appeal is that the Judge failed to make a clear finding that family life existed at all and therefore that Article 8 was engaged. The permission is equivocal as to whether the appeal was limited in its grant. However I am satisfied that even were I to proceed on the basis that permission had been granted I am satisfied that the Judge has accepted that family life exists because the Appellant is married to the sponsor and they have a child together. The Judge set out in paragraph 5 that the parties all lived together in Bangladesh until the sponsor and their child moved to the UK.

22. The cases cited at paragraph 13 and 14 above make clear that the starting point in a visit visa case must be whether the Appellant can meet the requirements of paragraph 41 of the Rules as this is relevant to the issue of proportionality. This application was refused under paragraph 41 (i) (ii) (vi) and (vii). The background against which the application was made was that the Appellant intended to make a settlement application but it was accepted that as the sponsor had not resolved an application made for DLA the financial requirements of Appendix FM could not be met.

23. I am satisfied that in assessing whether the Appellant would return at the end of her visit the Judge found that the Appellant would return in order to make the spouse application because 'she is almost certain to be successful.' In reaching this conclusion the Judge had no evidence before her as to whether the Appellant could meet the language requirements and also failed to adequately explain why she accepted that the sponsor's DLA application was likely to be successful when it had not been resolved by the time of the decision or indeed by the hearing date of 6 March 2015. Had the Judge not accepted that the spousal application was so sure to succeed she may not have accepted the Appellants willingness to return at the end of her trip. This failure to adequately resolve disputed issues I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

24. I also note that the Judge failed to address the other grounds for refusal under paragraph 41 (v) and (vi). Clearly the extent to which the Appellant cannot meet the Rules is a relevant factor to the proportionality assessment and failure to resolve these issues are therefore material errors of law.

25. The Judge has failed to consider the statutory public interest considerations as set out in section 117B of the Nationality Immigration and Asylum Act 2002 indeed there is no reference to the public interest at all and thus the decision is not a balancing exercise but only an enumeration of factors in the Appellants favour.

26. The Judge's finding that it is in the best interest of the Appellant's child for her to visit the UK is challenged in that it is inadequately reasoned. I am satisfied that the Judge has given no reasons for this conclusion particularly given that living in

separate countries was a choice made by the parties and there was no evidence that the sponsor and child could not continue to visit the Appellant in Bangladesh

27. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. Both parties indicated that they were content for me to remake the decision in those circumstances without a further hearing.

Remaking the Decision

28. I have looked at all of the evidence in the round whether I specifically refer to it or not.

29. The Appellant appeals the decision of the Respondent on the basis that the decision is unlawful under section 6 of the Human Rights Act 1998.

30. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

31. The undisputed background against which the Appellant applied for entry clearance to the UK was that the Appellant married the Sponsor Ajmot Ullah in Bangladesh on 26 September 2001. At that time Mr Ullah had a wife in the UK and therefore he could not have brought the Appellant to the UK as his spouse until 2007 at the earliest when his first wife died. On 22 October 2003 the Appellant and Mr Ullah had a child in Bangladesh. While the sponsor was therefore apparently living in Bangladesh in 2003 with his wife and child it is unclear from the evidence before me when he returned to the UK with his son but is accepted that they are both now living in the UK now. Nevertheless, I accept that the Sponsor and their child have enjoyed family life together in Bangladesh and are entitled to have respect shown for their enjoyment of family life in the future.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

32. It is arguable that there is no interference in refusing entry clearance given that there was no evidence before me that the sponsor and child could not visit the

Appellant in Bangladesh: while the sponsor is 82 and in poor health there is no medical evidence to suggest that he is unable to travel. However even if I were wrong I have considered the position on the basis that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

33. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate her conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

34. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy her private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

35. In making the assessment I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *"in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

36. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".* Lady Hale stated that *"any decision which is taken without having*

regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)". Although she noted that national authorities were expected to treat the best interests of a child as "*a primary consideration",* she added *"Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".*

37. In relation to the Appellant's child I find that in determining whether it would be in the best interests of the him to have the Appellant visit the United Kingdom I of course accept that the starting point is that children should live with both parents. That does not however mean that a decision to refuse entry clearance is disproportionate. It is a factor that we have taken into account and of course placed considerable weight upon.

38. There is no evidence from either the child himself or the mother to suggest that his needs are not being properly met by living with his father. There was no evidence from any source to suggest that he is not being properly cared for by his father for while the father does not enjoy good health the child is now 13 years old and needs less 'hands on 'parenting and has lived for many years apart from his mother.

39. The decision taken by these parents as to what was in the child's best interest was that he should come to the United Kingdom with his father, separated from his mother. There has been no satisfactory evidence before me that circumstances have changed and no satisfactory evidence before me why their view that it was in the best interest of the child to be brought up in this manner had changed. While it may well be that the child misses his mother there is in fact no evidence to that effect. Indeed there was no evidence to suggest that he could not visit his mother in Bangladesh either with his father or alone.

40. Therefore I am satisfied that there were no reasons to believe that the present arrangements were not taken in the best interests of the child and nothing has changed other than the passage of time.

41. I now turn to the wider proportionality assessment and I take into accounts those factors which I am obliged to consider under section 117B of the 2002 Act:

42. I take into account that the maintenance of effective immigration controls is in the public interest. I note in this context that while this is not an appeal against the refusal under the Immigration Rules that the Appellant did not meet the requirements of the Immigration Rules which underpin immigration control in the UK.

43. In relation to the concern that the Appellant will not return this case has been argued by the Appellant on the basis that this was a short visit and then she would return to Bangladesh to make a spouse application that was bound to succeed. If I were satisfied of this I would accept that this was a powerful incentive as otherwise, given that the Appellant accepts that her closest family, the sponsor and child, both live in the UK and she is financially completely dependent on the Sponsor and has not produced any evidence of other family, assets or property in Bangladesh and clearly wants to join her husband she would appear to have no incentive to return to Bangladesh.

44. I am not satisfied however that there is evidence that the spousal application will succeed indeed on the basis of the evidence before me it would fail. Appendix FM has a language requirement and the Appellant is not exempt from this. There is no evidence that she has passed the language requirement. It was asserted with the application that the sponsors claim for DLA would be resolved by June 2014 and this would meet the requirements of Appendix FM: however, it was not resolved by June 2014, nor was it resolved by March 2015 when the case was before the first tier tribunal and the resolution was described as ‘imminent’. There was no additional evidence placed before me to suggest that it has subsequently been resolved and a spousal application made. Therefore, I am not satisfied that it is open to me to conclude that the inevitability of a successful spousal application would encourage the Appellant to return at the end of her trip as is suggested. Indeed it seems to me that there is little in Bangladesh for her to return to, her family and her funds are in the UK.

45. The refusal letter also challenged whether there was adequate accommodation. The sponsor had an address and there was a tenancy agreement at the time of the application and I accept that this issue was addressed. I am not satisfied that the Appellant has addressed the issue of paying for return flights and maintenance. While the sponsor produced an account which at one point in February had a balance of £810.94 for all of January the balance was under

£240. I do not accept that this demonstrates that the sponsor can, as the Appellant asserts, pay for return airfares and the additional cost of maintaining her together with him and his son.

46. While I accept that the ability to speak English is not as relevant to a visitor as to someone who seeks to settle there is no evidence whether the Appellant speaks English or not.

47. On the basis of the financial evidence produced before me I am not satisfied that the sponsor could adequately maintain the Appellant if she were to visit the UK. The Appellant is not financially independent in that she relies on funds from the Appellant.

48. I also find that there has been no evidence placed before me to suggest that the sponsor and child could not visit the Appellant in Bangladesh as they certainly lived there with her for a number of years. The medical evidence lists a number of issues that the sponsor has with his health and while accept they are not trivial and he is 82 years old but there is no suggestion he cannot travel and his age alone does not evidence an inability to travel.

49. It has also been suggested that a spousal application would be made when the sponsors DLA application was resolved: while there may have been no evidence of this before me that does not mean that it may not be resolved soon and such an application could be made. Moreover I have reminded myself on R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC).. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. There was no evidence before me that such a separation would be disproportionate.

50. I have considered whether I have been provided with evidence of any compelling circumstances in this case which would warrant a grant of leave outside the Rules. I am satisfied that no such evidence has been identified to me: the Appellant does not meet the requirements of the Rules as a visitor and indeed although not the subject of this appeal but nevertheless relevant to it she does

not yet appear to be able to meet the requirements for settlement under Appendix FM. There is no reason why the Rules should not apply to her as they do to every other applicant.

51. In determining whether the refusal would be proportionate to the legitimate aim of immigration control I find that none of the facts underpinning the Appellant's relationship with her family in the United Kingdom taken either singularly or cumulatively outweigh the legitimate purpose of the refusal decision.

Conclusion

52. **Given all of my findings set out above and taking fully into account the best interests of the child I am satisfied that the refusal of entry clearance in this case was proportionate.**

Decision

53. **There was an error on a point of law in the decision of the First-tier Tribunal with regard to Article 8 such that the decision is set aside**

54. **I remake the appeal.**

55. **I dismiss the appeal on human rights grounds**

Signed Date 9.2.2016