Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26188/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 9th October 2017	**On 24th October 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ABDUL HASNAT
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Carol Simpson, Counsel instructed by Pillai & Jones, solicitors
For the Respondent: Mr Tony Melvin, a senior home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who appeals with permission against the decision of the First-tier Tribunal refusing him leave to remain in the United Kingdom on private and family life grounds.

2. The appellant came to the United Kingdom as Tier 4 a student on 25 October 2009 and was in the United Kingdom with leave on that basis until 28 June 2014. During that time he met and married his wife. Thereafter, he had no leave and was here unlawfully.

Refusal letter

3. In her refusal letter, the respondent considered the appellant's circumstances under the partner and private life routes, concluding that he could not meet the requirements of the Rules in either case. The appellant had been in the United Kingdom precariously (i.e. with leave) from October 2009 to 28 June 2014, but thereafter had been unsuccessful in obtaining further leave. All of the time spent in the United Kingdom was either precarious or unlawful, and in total, at the date of decision, the appellant had been in the United Kingdom for less than 6 years.

4. When considering the partner route, the respondent noted that the appellant and his British citizen wife have no children. Paragraph EX.1 does not apply and the respondent considered that EX.2 was not met because no insurmountable obstacles had been shown for the appellant and his wife to relocate to Bangladesh, where they both were born, and he still had a large extended family.

5. When considering private life, the respondent noted that at the date of application, the appellant had been in the United Kingdom for less than 6 years, not the 20 years which the Rules require, and did not accept that he had lost his social and cultural ties to Bangladesh, or that there were very significant obstacles to his integration into Bangladesh if he returned there.

6. The respondent also considered whether there were any exceptional circumstances for the grant of leave to remain outside the Rules, and in particular, his family life with his partner, but noted that when entering the United Kingdom to study, the appellant would have been aware that his leave to remain was temporary and not a route to settlement.

First-tier Tribunal decision

7. The First-tier Judge found that although the appellant's wife was pregnant at the date of the hearing and asserted that she had diabetes, there being no medical evidence to support that, the parties could not bring themselves within the family life provisions of the Rules. The judge accepted at [22] that the relationship was genuine and subsisting and that paragraph EX.1 should be applied, but he found that the parties could not bring themselves within EX.1 because there were no insurmountable obstacles to their return to Bangladesh, both of them being Bangladesh born and the appellant still having his mother and seven sisters in Bangladesh, whom his wife had met during a two-week visit in November 2015.

8. As regards compassionate circumstances, the First-tier Tribunal Judge found that there were no exceptional compassionate circumstances for which leave to remain should be given outside the Rules.

Permission to appeal

9. The appellant's challenge to the decision was on *Chikwamba* grounds, that the appellant would be returning to Bangladesh only in order to secure entry clearance; that the judge applied too high a standard of proof (which cannot be traced to any

observation in the determination at all); and by way of a disagreement with the findings on insurmountable obstacles, exceptional circumstances and proportionality.

10. The grounds concluded that the determination "is so perverse that no other Immigration Judge would have made the same finding and decision as it has been made in this case".

11. Permission to appeal was granted by First-tier Judge Osborne on the basis that she considered it arguable that the standard of proof adopted was too high and on the basis of various observations about 117B(5), which are not as it turns out relevant to the assessment of this decision and the materiality of the errors therein made.

Rule 24 Reply

12. There respondent filed a Rule 24 Reply on 24 August 2017, asserting that the judge's assessment under EX.1 was correct, that the correct test was applied to insurmountable obstacles, that applying *R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 00189*, return to Bangladesh to make the application for readmission would not be unreasonable and, finally, there is a submission about Section 117B with which I am not concerned for the purposes of this decision.

Discussion

13. The provisions of section 117B, so far as relevant, are as follows:

> "(4) Little weight should be given to—
> (a) a private life, or
> (b) 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.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

14. The First-tier Tribunal Judge directed himself correctly at [31] that the appellant had entered the United Kingdom on a precarious basis and that little weight could be given to his private life developed during that period. However, at the end of that paragraph, he erroneously directed himself that the appellant entered as a visitor. At the end of [33], he noted that 'the whole of the appellant's time spent in the United

Kingdom is in the knowledge that they have no right to settle here'. That latter statement is factually correct.

15. The statutory presumptions in section 117B(4)(b) applies to family life with a qualifying partner, if that family life is established when a person is unlawfully in the United Kingdom, which was not the factual situation here: the appellant met and married his wife during his Tier 4 (student) migrant leave period. Accordingly, the Judge was not required to give little weight to the appellant's family life, but of course, he was required to consider the Immigration Rules themselves, which the appellant could not meet, because he could not show insurmountable obstacles to return to the country of origin with his wife. Section 117B(5) relates only to private life and the Judge was therefore required to give little weight to the appellant's private life developed in the short period he has lived here. Section 117B(6) is not operative, as the appellant has no children here.

16. The First-tier Tribunal decision could have been better written. It contains two misstatements of fact: at [31], the Judge began by stating that the appellant entered the United Kingdom as a student, but ended the paragraph by saying that the appellant came to the United Kingdom as a visitor; but in either case, he entered the United Kingdom precariously and it is not disputed that he remained without leave when his student visas expired in 2014, following his marriage.

17. At [12], the Judge suggested that he had heard 4 witnesses, whereas he heard evidence from the appellant and his wife, and no other witnesses. However, in the body of the determination those are the only two witnesses whose evidence is recited or relied upon. There are no phantom witnesses, and again, this seems to be a question of carelessness rather than misdirection of fact. I am satisfied that neither of these factual errors was operative in the decision made by the Tribunal and that they are immaterial to the outcome of the appeal (see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 and *AS (Iran) v The Secretary of State for the Home Department* [2017] EWCA Civ 1539 at [26]).

18. The *Chikwamba* argument cannot succeed on the facts of this appeal: the sponsor's income at £1400-£1500 per month (£16,800-£18000 per annum) was below the £18600 level required for entry clearance of the appellant as her spouse, assuming he met the other requirements of the Rules. Further, I was told at the hearing that the appellant's wife has now given up work because of her pregnancy. Whether considered at the date of hearing or the date of the Upper Tribunal hearing (or any earlier relevant date) it is not the case that the appellant would be leaving the United Kingdom with the certainty of a successful application for readmission as his wife's spouse and *Chikwamba* does not apply.

19. Nor is there any sign within the decision that the Judge applied a standard of proof higher than balance of probabilities in reaching his conclusions: indeed, save for the factual errors identified above, the Judge's conclusions of fact are undisputed. On the evidence before him, which consisted of the oral evidence of the husband and his wife, no supporting medical evidence regarding the wife's diabetes or the availability of medical treatment and so forth in Bangladesh, and the exceptional circumstances

advanced being just the wife's diabetes and her pregnancy, neither of which is particularly exceptional, the judge was unarguably entitled to reach the conclusion that he did that removal of this appellant to Bangladesh would be lawful and proportionate.

DECISION

20. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law. I do not set aside the decision but order that it shall stand.

Signed: *Judith A J C Gleeson* Dated: 20 October 2017

Upper Tribunal Judge Gleeson