Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05102/2018**
HU/05106/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2019	**On 7 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

TAPASHI SAHA
TANNY SAHA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	Mr A Mustakim (counsel) instructed by Chambers of M M Hossain
For the Respondent:	Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

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. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Powell promulgated on 27 September 2018, which dismissed the Appellants' appeal on all grounds.

Background

3. The second Appellant is the first appellant's daughter. The first appellant was born on 2 January 1972. The second appellant was born on 25 September 1997. Both appellants are nationals of Bangladesh. On 4 July 2018 the Secretary of State refused the Appellants' applications for leave to remain in the UK.

The Judge's Decision

4. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Powell ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 30 October 2018 Judge Gibb granted permission to appeal stating inter alia

> 1. The appellant's, citizens of Bangladesh, were refused leave on 24/01/2018, and their appeals against removal were dismissed by the Judge of the First-tier Tribunal Powell (promulgated on 27.09.2018).
>
> 2. The grounds, which were in time, complaint that the Judge erred in: 1) failing to address additional grounds and evidence showing that the requirements of the rules were met; (2) not considering the situation at the date of hearing; (3) not giving adequate consideration to delay and the proportionality of the entry clearance option.
>
> 3. The grounds are arguable. The Judge arguably erred in framing the approach to article 8 on the basis of whether the appellants met the rules at the date of decision rather than at the date of hearing (see [26]). This arguably led to the exclusion from the article 8 proportionality assessment of a highly relevant factor, namely the ability of the appellants to meet the requirements of the rules at the date of hearing.

The Hearing

5. (a) For the appellants, Mr Mustakim moved the grounds of appeal. He said the Judge failed to address the additional grounds contain in a section 120 notice, that the Judge had not considered the situation at the date of hearing, but had restricted his consideration to the date of decision, and that the Judge had failed to take account of the delay in reaching a decision.

(b) Mr Mustakin took me to [26] of the decision, where, he says, the Judge restricted his consideration to the circumstances at the date of decision. He reminded me that in this case the application was submitted on 18 September 2015. The respondent issued a refusal decision 17 December 2015. Both appellants appealed against that decision. The appeal hearings were originally listed to be heard on 28 April 2017. On

27 April 2017 the respondent withdrew that decision, and it was not until 24 January 2018 that the respondent made the decision against which the appellant's appeal. He told me that the procedural history discloses a relevant consideration which the judge had not considered.

(c) Mr Mustakin told me that between the date of application and the decision made on 24 January 2018 there has been a material change in circumstances and the appellants establish that they meet all of the requirements of appendix FM. He reminded me that, notwithstanding the second appellant's date of birth, she was a minor the date of application, and argued that paragraph 301 of the immigration rules should have been considered. Mr Mustakin told me that inadequate consideration is given to the difficulties which would be faced by both appellants if they return to Bangladesh and make an entry for entry clearance from there.

(d) Mr Mustakin told me that the Judge's article 8 proportionality assessment is inadequate, and that the Judge placed undue emphasis on section 117B of the 2002 Act. He urged me to set the decision aside.

6. Mr Tarlow candidly accepted that the decision is tainted by material errors of law. He agreed that if an appellant meets the suitability and eligibility requirements of appendix FM there is no need to consider paragraph EX.1 of the immigration rules. He asked me to set the decision aside and substitute my own decision. He indicated that he would offer no resistance to a finding in favour of both appellants.

Analysis

7. At [13] the Judge takes correct guidance in law, reminding himself that he should consider both the date of decision and carry out an article 8 assessment at the date of hearing. The problem is that, having voiced a correct self-direction, the Judge does not follow it. At [26] the Judge clearly emphasises the date of decision. At [28] the Judge sets out a change in circumstances which indicates that at the date of hearing the appellants meet the requirements of the immigration rules. The Judge does not factor his findings at [28] into his article 8 assessment. That is an error of law. It is a material error because it is capable of affecting the outcome of the appeal.

8. Between [36] and [38] the Judge considers delay. He finds that the delay does not tip the balance of proportionality in the appellant's favour. What the Judge does not consider is the change in circumstances (which he identifies at [28]) between the date of the original decision and the date of the decision against which the appellants appeal.

9. The appellants appeal against a decision dated 24 January 2018. On the second page of that decision the respondent finds that the first appellant meets the suitability and eligibility requirements of appendix FM. Mr Tarlow candidly conceded that the respondent was wrong to refuse the first appellant's application

because the respondent quite clearly finds that the first appellant, at the date of decision, met the requirements of appendix FM.

10. The unambiguous wording of the respondent's decision does not form part of the Judge's article 8 proportionality assessment. The fact that the respondent accepts that the first appellant meets the requirements of appendix FM is a crucial part of the article 8 assessment.

11. The Judge's decision is tainted by material errors of law I set aside. There is sufficient material before me to enable me to substitute my own decision.

The Facts

12. The first appellant is the mother of the second appellant. The first appellant was born on 02/01/1992. The second appellant was born on 25/09/1997. Both appellants are nationals of Bangladesh.

13. The appellants entered the UK on 15 July 2015 with leave to enter as tier 1 dependents valid until 14 October 2015. The first appellant's husband was present in the UK as a tier 1 migrant. He is the father of the second appellant.

14. On 18 September 2015 both appellants submitted applications for leave to remain in the UK. Those applications were refused on 17 December 2015. The appellants appealed against those decisions and a hearing was fixed before the First-tier Tribunal to take place on 28 April 2017. The day before that hearing, the respondent withdrew the decision dated 17 December 2015. The respondent reconsidered his position but reached decisions on 24 January 2018 refusing the applications. It is against those decisions that the appellants appeal.

15. On 27 July 2015 the first appellant's husband (the second appellant's father) became a British citizen. The first and second appellants live with the first appellant's British citizen husband.

16. The first appellant and her husband work and have a combined income of £22,400 per annum. Both appellants have sat and passed ESOL entry-level A1.

17. The second appellant is now over 18 years of age, but she continues to live with her parents and is wholly dependent upon her parents. The second appellant has not established an independent life. Family life exists between both appellants and the first appellant's husband. The second appellant's role within the family has not changed since she was 17 years of age. The second appellant hopes to go to University to study nursing. During her studies she will remain dependent upon her parents.

18. The respondent accepts that the first appellant meets the suitability and eligibility requirements of appendix FM.

The Immigration Rules

19. The easiest way to consider this case is to look at the decision letter dated 24 January 2018. On the second page of that decision that the respondent finds that the first appellant meets the suitability and eligibility requirements of appendix FM. The respondent then unnecessarily goes on to consider paragraph EX.1. There is no need to do so. If the first appellant meets the eligibility requirements of appendix FM there is no need to consider whether she is exempt from those requirements.

20. The respondent's decision was that the first appellant meets the requirements of appendix FM at the date of decision.

Article 8 ECHR

21. Mr Tarlow conceded that there is no dispute about the facts in this case. On the facts as the Judge found them to be family life within the meaning of article 8 exists for both appellants and the British citizen who is the husband of the first appellant and father of the second appellant. On the facts as I find to be, the second appellant remains dependent upon her parents and establishes article 8 family life.

22. The second appellant's father is a British citizen who has no intention of leaving the UK. The first appellant meets the requirements of the immigration rules.

23. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…" In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

24. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8
(ii) If so, has the right to respect for this been interfered with
(iii) If so, was the interference in accordance with the law
(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

25. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an

appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

26. The fact that the first appellant can meet the requirements of the immigration rules indicates that the public in interest in immigration control does not carry greater weight than the first appellant's article 8 family life.

27. The respondent says that the immigration rules are a complete code governing the proportionality exercise. Applying the respondent's own code, the appellant meets the requirements, so that the public interest in immigration control is satisfied and the appellants exclusion is not necessary,

28. The respondent says that the appellants can return to Bangladesh and make an application for leave to enter from there. In Chikwamba (FC) v SSHD 2008 UKHL 40, the House of Lords said that in deciding whether a general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "*comparatively rarely, certainly in family cases involving children*" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

29. In R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. 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. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children**.** However, where a failure to comply in a particular capacity is the only issue so far as

the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

30. In Agyarko [2017] UKSC 10 Lord Reed said again that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal and that point was illustrated by Chikwamba.

31. In this case the respondent says that the second appellant could make a successful application to return to the UK to join her parents. Caselaw tells me that the refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life. The second appellant's father is a British Citizen. The second appellant's mother meets the requirements of the Immigration Rules. Family life exists between the second appellant and her parents. The decision must therefore be a breach of the right to respect for family life.

32. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

33. These appeals succeed on article 8 ECHR (family life) grounds.

Decision

34. The decision of the First-tier Tribunal promulgated on 27 September 2018 is tainted by material errors of law and is set aside.

35. I substitute my own decision

36. The appeals are allowed on article 8 ECHR grounds.

Signed Date 2 February 2019
Deputy Upper Tribunal Judge Doyle