Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-005467
HU/54283/2021; IA/10948/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th March 2023	**On 2nd May 2023**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR EMRAN MIAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Allison, Counsel, instructed by Londinium Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh, born on the 22 September 1974. He appeals against the decision of the First Tier Tribunal ('FTT') dismissing his appeal on Article 8 grounds. Permission to appeal was granted by Upper Tribunal Judge Stephen Smith on 25 November 2022.

Case history

2. The appellant entered the UK for the first time in 2004 as a student. Whilst he was here he met his wife and they underwent an Islamic marriage on 11 March 2012. At the time the appellant was an overstayer and had no lawful basis to be in the UK. After they married the couple returned to Bangladesh to register their marriage. They made an application for entry clearance on 8 July 2012. In this application the appellant relied on a an ETS English test certificate which he had previously obtained in the UK.

3. The application was refused, however he successfully appealed and was granted entry clearance valid to 11 May 2016. On 15 March 2016 he applied for settlement. This was refused on the basis that he obtained his English language certificate by deception. The appellant appealed and his appeal was heard by FTTJ Hanbury on 17 January 2018, Judge Hanbury dismissed the appeal in a decision dated 2 February 2018.

4. The appellant applied for leave to remain on human rights grounds as the spouse of a British National on 13 November 2018. This was refused on 23 July 2021, and it was against this decision that he appealed generating the appeal which has ultimately come before us.

The First Tier Tribunal decision

5. The appeal was heard by a panel comprised of First Tier Tribunal Judge Seelhoff and First Tier Tribunal Judge Bennett at Hatton Cross on 14 September 2022. They dismissed the appeal for the following key reasons:

   (i) Applying the principles of Devaseelan [2003] Imm AR 1, the FTT concluded that they were obliged to adopt the findings of Judge Hanbury that the appellant had used deception in an earlier application.

   (ii) The FTT found that the respondent had erred in treating the suitability provisions as grounds for a mandatory refusal without recognising that the grounds were discretionary rather than mandatory. The FTT were satisfied that whilst deception had been used, it had not been appropriate to refuse the application on suitability grounds alone.

   (iii) Moving on to Appendix FM, the FTT found that the language requirement could not be satisfied. The appellant had passed a B1 English test over 2 years before the latest application. The appellant also accepted that he cannot meet the financial requirements of the rules either. As a result, the FTT went on to consider Ex.1

   (iv) The principles of Devaseelan also applied to the EX.1 analysis as Judge Hanbury had previously found that there were no insurmountable obstacles to family life continuing outside the UK.

   (v) The panel found that there were no insurmountable obstacles for the appellant's integration on return for the same reasons identified in paragraphs 36 and 37.

(vi) The FTT turned to consider matters outside of the rules and found that they were required to attach minimal weight to the family and private life developed at a time when an individual's immigration status is precarious. The panel considered that they were obliged to attach less weight to the Article 8 rights developed over the last 4 ½ years, and noted that the minimum income requirements were not met.

6. The panel dismissed the appeal.

The appeal

7. The appellant appealed against the FTTs decision and advanced 3 grounds:

(i) The FTT materially erred in failing to consider the appellant's financial independence for the purpose of s117B(3) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). In particular the FTT failed to consider the appellant's "earning potential" and that he was likely to make a positive contribution to the British economy.

(ii) The FTT materially erred at paragraph 40 by taking as their starting point that little weight should be given to the family life as it had been formed when the appellant's immigration status was precarious. This is said to be an error because s117B(5) of the 2002 Act applies only to private life and not family life, the appellant had entered lawfully, albeit with use of a document obtained through the use of deception, and it could not be said he was here unlawfully. The FTT materially erred by using little weight as their starting point, the FTT's subsequent findings were unlawful.

(iii) The Article 8 balancing exercise was inadequate because the FTT failed to give any consideration to the appellant's English speaking ability, which ought to have counted in his favour. This failure to consider it in the balancing exercise "goes to the core" of the proportionality assessment.

8. Permission to appeal was granted by Upper Tribunal Judge Stephen Smith who gave permission on all grounds, albeit the focus of the grant of permission was entirely on ground 2.

Findings and reasons

9. We take the grounds in the order in which they appeared in the grounds of appeal which is the order in which Mr Allison addressed them in his oral submissions.

10. We do not consider that ground one establishes a material error of law. The appellant seeks to advance an argument that the FTT ought to have considered the appellant's potential financial contribution to the British economy for the purposes of s117B(3). We reject this submission. Mr Allison could provide no authority for this proposition, indeed it is contrary

to the decision of this tribunal in AM (S.117B) [2015] UKUT 260 (IAC) (emphasis added):

> *14. Whilst we heard extensive argument upon the purpose and effect of s117B(2) and s117B(3), we are satisfied that ultimately the matter is quite straightforward. Upon their proper construction neither s117B(2), nor s117B(3), grants any form of immigration status to an individual who does not otherwise qualify for that status, because they have failed to meet the requirements set out in the Immigration Rules for the grant of that status. If it was the intention of Parliament that the requirements of the Immigration Rules should be over-ridden, merely because an individual could establish that they were able to speak English, or were financially independent, to some degree, then we are satisfied that Parliament would have said so in the clearest terms. In addition we consider that Parliament would have considered it necessary to set out what degree of fluency, or, level of financial independence was required of the individual, and the immigration status that the individual would be entitled to once it had been demonstrated. Plainly these statutory provisions do no such thing. One must continue to look to the Immigration Rules to discern what Parliament considers are the requirements to be met by a claimant, and the length of the period of leave to be granted to them if those requirements are met.*
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> *15. What then is their purpose? We are satisfied that s117B(2), and s117B(3), were intended by Parliament to meet, and to finally dispose of, the arguments that have from time to time been advanced to the effect that the language and/or the financial requirements of the Immigration Rules should either be ignored altogether, or, should carry little weight, when the Tribunal is weighing the proportionality of a decision to remove in the context of the consideration of an individual's Article 8 rights; Bibi [2013] EWCA Civ 322, and MM (Lebanon) [2013] EWCA Civ 985. That view is strengthened by the Human Rights Memorandum that was published by the Respondent as an accompaniment to the 2014 Act [71-73]. In short we are satisfied that s117B(2) and s117B(3) can only properly be read as reinforcing the statement of principle that is set out in s117B(1), as indeed the Appellant accepts both s117(4) and s117(5) should be read.*
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> *16. Read in that way, the arguments sometimes advanced that depend upon the inferior status of the Immigration Rules to primary legislation, and the lack of full democratic legitimacy, are rendered sterile; R (on the application of Onkar Singh Nagre) v SSHD [2013] EWHC 720 (Admin) at [25].*

> *"There was some debate at the hearing about the status of the new rules. For general discussion about the status of the Immigration Rules, which is also relevant to the new rules, see Odelola v Secretary of State for the Home Department [2009] UKHL 25; [2009] 1 WLR 1230. They do not have the status of primary legislation, or the full democratic legitimacy which goes with that status: Huang v Secretary of State for the Home Department [2007] UKHL 1; [2007] 2 AC 167, [17]. That is the position even though the new rules were subject to debate in Parliament going beyond what is usual when such rules are made and laid before Parliament. However, the Immigration Rules do have some degree of democratic endorsement, in that they represent the policy of the Secretary of State (who is politically accountable to Parliament and, ultimately, the electorate) and they are laid before Parliament and so are amenable to being called up for a negative resolution in Parliament (a measure of parliamentary control which is greater than would be the case if, for example, the Secretary of State simply had power to make the rules without them being subject to such a procedure; although it also clearly less than would be the case if they were actually made as subordinate legislation, in particular if made pursuant to the affirmative resolution procedure, or as full primary legislation)."*

17. It follows that we would respectfully disagree with the concluding remark of Upper Tribunal Judge Lane in R (on the application of Luma Sh Khairdin) v Secretary of State for the Home Department (NIA 2002: Part 5A) IJR [2014] UKUT 566 (IAC) at [59];

> *"The most that section does is to offer some mild support for the applicant, rather than the respondent, in that the evidence makes plain that the applicant is not and will not be "a burden on taxpayers" (subsection (3)(a)), with the result that the respondent cannot rely upon that as a public interest factor weighing against the applicant."*

18. The mere fact that the evidence in a particular case establishes fluency or financial independence to some degree, does not prevent the Respondent from relying upon these matters as public interest factors weighing against the claimant. The Respondent would only be prevented from doing so if a claimant could demonstrate fluency, or financial independence, to the level of the requirements set out in the Immigration Rules. There was therefore no error of law in the Judge's approach to the issues of fluency and financial independence in the context of her consideration of s117B. The Appellant could 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.*

11. We find that the FTT did not materially err by failing to consider the appellant's claimed financial independence. As the UT outlined in AM (Malawi) there are no positive rights that the appellant can draw from his asserted financial independence. The purpose of the statutory underpinning in relation to financial independence is related to the minimum income requirement. In this case the appellant fails under the rules on that basis due to his wife's income. That an appellant is able to work may, in some cases on specific facts, positively go towards someone's stated case of remaining on private life grounds, in this case the FTT did not materially err by failing to give him credit for potentially being financially active for the purpose of s117B(3). AM (Malawi) expressly prohibits it.

12. Turning to ground 2 we agree that the FTT erred in so far as taking as a starting point that little weight should be afforded to the appellant's' family life established here whilst his immigration status was precarious. The question for us, and alluded to by UTJ Stephen Smith when granting permission, is whether the error is material.

13. We are satisfied that the error is not material. The FTT's finding at paragraphs 37 and 40 are:

> *37. The Appellant and his wife are both fit and capable of working as evidenced by the fact that his wife continues to work at current time and the fact that the Appellant has worked until recently and only stopped on legal advice. No evidence was served in support of the contention that it would be difficult for them to find work in Bangladesh. This is not something that we feel able to accept as a bare assertion. The Appellant also has family remaining in Bangladesh who could assist in reintegration. In terms of the Appellant's medical needs he accepted in his evidence that medical provision is available in Bangladesh but simply asserted that it was not affordable. We have not been provided with evidence to support the contention that he could not afford the treatment, and in any event affordability would not normally be a consideration for this tribunal in any event. It is the availability of treatment which is the key.*
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> *...*
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> *40. We have considered article 8 outside the rules as we were invited to do by counsel. We accept that there is private and family life in the UK but note that pursuant to section 117B of the Nationality Immigration and Asylum Act 2002 and the case of Rajendran (s117B – family life) [2016] UKUT 00138 (IAC) we are required to attach minimal weight to family and private life rights developed at a time when an individual's immigration status is*

> *precarious. Whilst we acknowledge that the Appellant's relationship began at a time when he had status, we are obliged to attach less weight to the developments over the last 4½ years since the last adverse decision. We also must find that it is in the financial interests of the UK to refuse the application as the Sponsor could not meet the financial requirements of the rules at the current time.*

14. The FTT were clearly correct to identify that private life was established in the UK whilst enjoying precarious status. We cannot identify the error of taking as a starting point that little weight be afforded to the appellant's family life resulted in any material difference to the outcome of this appeal. This is an appellant who, along with his wife, retains significant links with Bangladesh both in terms of family and cultural ties. Noting Judge's Hanbury's conclusion in relation to whether there were insurmountable obstacles to family life continuing outside the UK and observing the FTT's conclusion at paragraph 37 of their decision, the appellant cannot satisfy the relevant immigration rules. The failure under the immigration rules is a powerful factor in the proportionality assessment. This assessment incorporated not only the inability to satisfy the minimum income requirement but also that there are neither insurmountable obstacles to family life continuing outside the UK or very significant obstacles to integration for the appellant.

15. During the course of his submissions Mr Allison also accepted that whilst family life had been established in fact when the appellant was unlawfully in the UK, he left and re-entered on a valid visa. From that lawful re-entry the family life developed whilst the status was precarious. This factual backdrop is important in our assessment as to the materiality of the error of the FTT. Whilst the appellant re-entered the UK, he did so using documents obtained by fraud. We note that the FTT did not consider this factor in their assessment,

16. In our judgment the error of the FTT is not material for the reasons set out, had it have taken as a starting point a neutral position in relation to the family life, it would not have come to a different conclusion. The stark reality of this case is that on the findings of both the FTT and previously Judge Hanbury, family life can continue together in Bangladesh. In those circumstances the assessment outside of the rules on the factual matrix advanced was likely to result in an assessment that the decision is proportionate. There are neither insurmountable obstacles to family life continuing, nor very significant obstacles to integration, in Bangladesh.

17. Turning to ground 3. For the same reasons identified above in relation to ground 1, there is no merit in the submission that the FTT erred by failing to factor in the appellant's English language ability. Indeed, we note that the FTT specifically highlighted in its consideration under the rules his inability to meet the evidential requirements for the English language requirement.

18. Whilst ground 3 is headed “Failure to give adequate reasons for overall proportionality assessment outside the Rules”, in reality the complaint in the body of the grounds is no more than the FTT failed to consider the appellant’s English language ability.

19. We are satisfied for the above reasons that there is no error in the FTTs approach in failing to factor in his English language ability.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

T.S. Wilding

Date 3rd April 2023

Deputy Upper Tribunal Judge Wilding